No. 25-259

IN THE
SUPREME COURT OF THE UNITED STATES

JANUARY LITTLEJOHN, et vir,
Petitioners,

v.

SCHOOL BOARD OF LEON COUNTY, FLORIDA, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY

Now *four* Justices have recognized the need for certiorari in a case like this one. Justices Alito, Thomas, and Gorsuch just reiterated concerns that the lower courts are "avoid[ing]" the merits of the "'importan[t]'" question of constitutional law underlying this case: whether parents have a fundamental right not to have public schools secretly transition their children. *Lee v. Poudre Sch. Dist. R-1*, 2025 WL 2906469 (Oct. 14) (Alito, J., respecting denial of certiorari). Justice Kavanaugh likewise voted to grant certiorari in a case challenging one of these parental-exclusion policies, where another circuit again avoided the merits. *See Parents Protecting Our Child. v. Eau Claire ASD*, 145 S.Ct. 14 (2024). That underlying question of parental rights remains of "'great and growing national importance.'" *Poudre*, 2025 WL 2906469, at *1 (Alito, J.). So the lower courts' attempts to avoid it are important too, as they prevent the question from percolating and deny parents and schools a resolution of the constitutional rules.

This case again raises that important question of parental rights, and the lower courts again refused to reach it directly—this time, based on a "shocks the conscience" threshold that has persistently befuddled and split the circuits across many contexts. Whether the shocks-the-conscience test applies to deprivations of fundamental rights is a question that would need this Court's review no matter what unenumerated right the Littlejohns were asserting here. While the school respondents say there is no split and the courts aren't confused, the lower courts insist otherwise. Judge Tymkovich documented the circuit split in

2020. Then-Judge Gorsuch and others have called the legal standard "murky." And below, Judge Newsom surveyed the caselaw again and deemed it a "jurisprudential dumpster fire." *See* Pet.24-25, 29.

The school is right that parental-exclusion policies raise contentious, sensitive questions of constitutional law; but that is precisely why this Court needs to intervene. This Court should grant certiorari in *Foote*, which tees up the parental-rights question directly. If the Court grants *Foote*, it should also grant this companion case to ensure the shocks-the-conscience test is addressed, rejected, and not used to deprive parents like the Littlejohns of relief. Even if this Court were not inclined to resolve that important question of parental rights just yet, this case is a crucial first foray into the issue. As the Eleventh Circuit did below, this Court could assume that the Littlejohns have a fundamental right under *Glucksberg*. It could then resolve the circuit conflict by holding that the Eleventh Circuit was wrong to also make the Littlejohns satisfy the shocks-the-conscience test. And it could remand the underlying merits so this important question of parental rights can percolate—both nationwide and in the Eleventh Circuit (where one judge below already said the Littlejohns state a claim).

What this Court should not do is leave parents, children, schools, and courts with no guidance at all. The need for certiorari is underlined by the Littlejohns' amici, which span over 70 groups representing parents and children and nearly half of the States. As they explain, this Court should grant certiorari here—either alone or in conjunction with *Foote*.

I. Regardless of what this Court does in *Foote*, it should grant certiorari here because the question presented is independently certworthy.

The petition in *Foote*, where the plaintiffs bring similar claims against similar conduct, is pending before this Court. *See* No. 25-77. The respondent there opposes certiorari, mainly arguing that the lower courts are not yet split on whether parental-exclusion policies violate a right that's fundamental under *Glucksberg*. *See Foote*-BIO.17-29. The petitioners in *Foote* rightly disagree. Even if this Court wanted more courts to reach that underlying question before it grants certiorari, that desire for percolation would not be a reason to deny certiorari over the *different threshold* question presented here. A decision holding that violations of fundamental rights need not also shock the conscience would let the *Glucksberg* question percolate. And it would resolve a broader and persistent source of conflict in the lower courts.

A. Whether the shocks-the-conscience test applies to fundamental-rights claims warrants this Court's review.

Under this Court's precedent, the Fourteenth Amendment bars governmental conduct that "shocks the conscience *or* interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (emphasis added). Misreading this Court's decision in *Lewis*, many circuits have turned that "or" into an "and" when deprivations of fundamental rights are executive rather than legisla-

tive. Whether *Lewis* requires that "totally bizarre" result is a question this Court should resolve. App.118 (Newsom, J., concurring).

Like most respondents, the school respondents deny the existence of any circuit conflict; but the question presented is one of the rare issues where the cries of division, discord, and unease are coming from the lower courts themselves. Though he voted for the school below, Judge Newsom called the caselaw on the proper legal standard a "jurisprudential dumpster fire." App.117. Judge Tymkovich even wrote a law-review article about it, documenting how "[s]everal circuits disagree" on the question presented. *A Workable Substantive Due Process*, 95 Notre Dame L. Rev. 1961, 1993 (2020); *accord* Fournier-Br.4-7 (documenting the "inter- and intra-circuit conflict").

The circuits have not "settled" on an approach since Judge Tymkovich wrote his article in 2020. *Cf.* BIO.15. Even in the *same* circuit, panels continue to zig and zag between *Glucksberg* alone and *Glucksberg* plus the shocks-the-conscience test. *See* Pet.24-25. Judge Newsom complained in this very case—decided in 2025—that the Eleventh Circuit's "own precedent is a mess." App.110. Again, the question is whether courts must apply the shocks-the-conscience test to deprivations of unenumerated rights that *satisfy* the history-and-tradition test from *Glucksberg*—i.e., *fundamental* rights that are substantively protected under the Fourteenth Amendment's protection of "liberty." So the school cannot disprove the circuit conflict by citing cases that didn't involve fundamental liberty rights under *Glucksberg*. *Cf.* BIO.14

Nor can the school ignore cases where courts did not apply the shocks-the-conscience test to *Glucksberg*-qualifying rights by reimagining those cases as challenges to "legislative" conduct. *Cf.* BIO.13. Those courts *did not ask* whether the conduct was executive or legislative precisely because they understood that, when the right is fundamental, the shocks-the-conscience test never applies. The Ninth Circuit did so on the same claim, in the same posture, just weeks after the Eleventh Circuit's decision. *See* Pet.26-27. Far from "dicta," BIO.14 n.6, the Ninth Circuit's holding that *Glucksberg* and shocks-the-conscience are alternative tests led it to *vacate* the dismissal of those parents' complaint, while the Eleventh Circuit's opposite rule led it to affirm the dismissal of the Littlejohns' complaint. *See Regino v. Staley*, 133 F.4th 951, 960 n.5 (9th Cir. 2025).

Even assuming that the school is right, that the lower courts' perception of their own discord is wrong, and that the circuits are perfectly aligned, this Court *still* should grant certiorari. In that world, the circuits would be aligned on an indefensible reading of this Court's precedent. *See* S.Ct.R.10(c) (listing circuit splits and departures from this Court's precedent as independent grounds for certiorari). To be sure, Members of this Court often disagree about *whether* certain rights satisfy *Glucksberg*'s history-and-tradition test. But when the Court holds that they do, deprivations of those rights must satisfy some sort of heightened scrutiny. If a rogue executive actor denied a gay couple a marriage license (*Obergefell*) or arrested someone for sodomy (*Lawrence*), the Court wouldn't ask whether the conduct *also* shocked the conscience. In

cases involving fundamental rights, the shocks-the-conscience test isn't needed to distinguish between "'constitutional'" and "'tort'" claims. BIO.35. Violations of *Glucksberg*-qualifying rights *are* constitutional claims. (There is no tort that the Littlejohns could have brought here, as the school itself stresses. BIO.23 n.9.) And by making it harder to challenge rogue executive action than legislation, the Eleventh Circuit's approach gets things "exactly backwards." App.120 (Newsom, J., concurring).

Of course, this Court needn't decide who is right about the proper reading of *Lewis* at the certiorari stage. The lower courts are divided and confused. Contra the school, *see* BIO.14, "the very existence of such confusion" is a classic reason for granting certiorari, *Supreme Court Practice* §4.7 (11th ed. 2019). The lower courts thus need an answer from this Court—one way or the other. That the school vigorously defends the Eleventh Circuit's misreading of *Lewis*, *see* BIO.31-35, only strengthens the case for certiorari. It means this Court will benefit from rigorous adversarial briefing and argument on whether the shocks-the-conscience test applies to deprivations of fundamental rights.

B. This case is an ideal vehicle to resolve the question presented.

The school concedes that this case presents a unique opportunity to resolve the question presented. As it notes, plaintiffs challenging executive deprivations of unenumerated rights must run a gauntlet that includes *Glucksberg*'s history-and-tradition test, *Monell*, and qualified immunity. BIO.22. Plaintiffs

shouldn't *also* have to satisfy a "goofy" and "subjectiv[e]" shocks-the-conscience threshold. App.117, 107 (Newsom, J., concurring); *accord* AAF-Br.5-11. When lower courts nevertheless make them, those opinions often have alternative holdings that prevent this Court from reaching that threshold question. Pet.37. Yet here, neither qualified immunity nor *Monell* defeats relief, as the Littlejohns explained and the school never denies. Pet.37. And the question presented was the *sole* basis for the Eleventh Circuit's decision below—generating four scholarly opinions from three respected jurists. So this Court might never see a cleaner vehicle for resolving whether deprivations of fundamental rights must also shock the conscience. And the answer to that question is vitally important for the most deserving plaintiffs—those who, like the Littlejohns, *can* run the gauntlet of qualified immunity, *Monell*, and *Glucksberg*.

While the school thinks the Littlejohns lose under *Glucksberg* too, BIO.23-29, that argument is irrelevant. The question presented asks what *legal standard* applies to executive deprivations of fundamental unenumerated rights—whether plaintiffs must satisfy *Glucksberg* alone, or *Glucksberg* plus the shocks-the-conscience test. The Eleventh Circuit "assum[ed]" that the Littlejohns satisfied *Glucksberg*, App.9, but ruled against them because they could not satisfy the shocks-the-conscience test. In reviewing that decision, this Court could make the same assumption, vacate the Eleventh Circuit's decision for incorrectly applying the shocks-the-conscience test, and then remand for that court to apply *Glucksberg* in the first instance. This Court takes that approach virtually every Term

when it grants certiorari to resolve the circuits' disagreement over the governing legal standard. *See, e.g.*, *Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303, 307-08 (2025); *A.J.T. ex rel. A.T. v. Osseo Area Schs.*, 605 U.S. 335, 344 (2025); *Counterman v. Colorado*, 600 U.S. 66, 69 (2023).

Even if relevant, the school's confidence that the Littlejohns failed to plead a *Glucksberg*-qualifying right is misplaced. Below, one judge agreed that the Littlejohns stated a claim under *Glucksberg*. App.122-24 (Tjoflat, J., dissenting). The other two did not address that question. App.9. And several courts have denied motions to dismiss in cases involving similar allegations. *See, e.g.*, *Regino*, 133 F.4th at 961-62; *Mead v. Rockford Pub. Sch. Dist.*, 2025 WL 2682125 (W.D. Mich. Sept. 18).

So while the school's attempts to brief the merits are premature, its pushback on the Littlejohns' claim is factually false and impermissibly fights the complaint. *See* BIO.23-29. Far from a "brief use" of their child's preferred name and pronouns, BIO.7-8, 25-26, the school ignored the Littlejohns' pleas for information for nearly six weeks while continuing to treat their child as "non-binary"; scheduled a private meeting with their daughter without their knowledge and after the Littlejohns forbade it; and then cancelled that meeting only because the Littlejohns discovered it and stopped it, *see* Compl. ¶¶117-21, ¶¶122-29. The damage that the school's experimentation on the Littlejohns' child is extensive and ongoing. *See* ¶¶159-63. The "abuse" inflicted on their daughter even became a

national example of the harm that these policies inflict on families. *E.g.*, *Remarks by President Trump in Joint Address to Congress* (Mar. 6, 2025). And sadly, many other families have experienced the same or worse. *See, e.g.*, Martinez-Br.1-5; Our-Duty-Br.14-25.

II. If this Court grants certiorari in *Foote*, it should grant certiorari here and set both cases for argument on the same day.

For all the reasons above, this Court should grant certiorari here regardless of whether it grants certiorari in *Foote*—the pending petition that directly tees up whether parental-exclusion policies violate a fundamental right under *Glucksberg*. As the school concedes, the threshold question here affects not just parental-exclusion cases, but "'*all* cases alleging fundamental unenumerated rights.'" BIO.31. And the question in *Foote* cannot percolate if the circuits keep avoiding it. Plaintiffs who sue pre-enforcement will keep getting dismissed for lack of standing, while plaintiffs who sue post-enforcement will get dismissed under the shocks-the-conscience test. Pet.35; *accord* Defending-Ed.-Br.11-15; Fournier-Br.17.

If this Court grants certiorari in *Foote*, it should grant certiorari here too—not just "h[o]ld" this petition for *Foote*, as the school suggests. *Cf.* BIO.37. In *Foote*, the First Circuit rightly held that the parents were challenging "legislative" conduct. 128 F.4th 336, 347 (1st Cir. 2025). The respondents in *Foote* do not appear to challenge that holding. *See Foote*-BIO.9, 13; Fournier-Br.21. So as the Littlejohns explained, this Court might receive no briefing and argument on—and thus not squarely reach—the legislative-versus-

executive issue or the shocks-the-conscience test in *Foote*, even though those doctrines continue to plague the lower courts. Pet.38. The school *agrees* that *Foote* need not resolve "the standard for substantive due process violations through executive action." BIO.37. But giving that question no clear answer should be unacceptable. It not only leaves the lower courts adrift on the contours of *Lewis*, but also risks artificially denying parents like the Littlejohns any meaningful relief. *Accord* Fournier-Br.20.

Ultimately, the best course is to grant certiorari in both this case and *Foote*. As several Justices, 95 amici, and others attest, the constitutionality of parental-exclusion policies is "a matter of profound constitutional significance." Howe, *Parental Rights*, SCOTUSBlog (Nov. 19, 2025), perma.cc/D8S6-5QXE. Though the school says parental rights are "better left to the political process," BIO.18-20, that argument is question begging and wrong. Fundamental rights, by definition, "'may not be submitted to a vote.'" *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015). Every school *could* honor the rights of parents and children; but when they fail, the courts should be open to redress the harm. *E.g.*, *Mahmoud v. Taylor*, 606 U.S. 522, 563 (2025). And the political process has failed. Parental-exclusion policies continue to spread. *See Poudre,* 2025 WL 2906469, at *1 (Alito, J.); Defending-Ed.-Br.3-10; Our-Duty-Br.14-25. State legislative fixes are hard to enforce and provide no retrospective relief. Pet.34-35 And those state laws are one bad school, court, or presidential administration away from being declared preempted by federal law. Pet.34-35. All this

explains why nearly two dozen States, including Florida itself, are here asking this Court for certiorari. *See* Florida-Br.3.

Even if this Court grants certiorari in *Foote* alone, it should at least hold this petition. *Cf.* BIO.37. If the parents win in *Foote*, this Court would likely GVR the Eleventh Circuit's decision here. The school's argument that the constitutional violation in *Foote* was worse, *see* BIO.37-38, is wrong. And it's a question for the Eleventh Circuit on remand, which did not reach whether the Littlejohns stated a claim under *Glucksberg*. *See* App.9 & n.5. Nor would any supposed "waiver" on the executive-versus-legislative question prevent the Eleventh Circuit from reversing the dismissal of the Littlejohns' complaint. *Cf.* BIO.37. Though the Littlejohns understandably "waived" their request for injunctive relief against the school's 2018 guide (because that policy had been repealed), they did not waive their claim for damages; and, as the Eleventh Circuit agreed, they could not waive the *facts* of what the school did to their child. Per the majority, "the Littlejohns challenge Defendants' application of the Guide to their child"—a formal school policy that was in place at the time, that was deployed against their daughter, and that caused the violations of their rights and the resulting harms. App.18. Though the Eleventh Circuit deemed that challenge "executive," it agreed that its decision "reach[ed] a different conclusion" than *Foote*, where the First Circuit found a "similar" challenge "legislative." App.19 n.8. Whether the Eleventh Circuit would stick with its analysis after *Foote* cannot be known until this Court writes an opinion in *Foote*. And even then, the best

course will likely be to GVR and let the Eleventh Circuit decide for itself what effect this Court's decision has on its analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

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