

No. 25-759

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IN THE  
**Supreme Court of the United States**

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AMBER LAVIGNE,  
*Petitioner,*

v.

GREAT SALT BAY COMMUNITY SCHOOL BOARD,  
*Respondent.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the First Circuit**

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**BRIEF IN OPPOSITION**

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
STATEMENT .....	1
A. Introduction .....	1
B. The Factual Allegations .....	3
C. Proceedings Below .....	6
REASONS FOR DENYING THE PETITION ...	9
I. Petitioner Does Not Provide a Proper Basis to Review the Ground for the Ruling Below .....	9
II. The First Circuit’s Application of this Court’s Pleading Standard Does Not Warrant Review .....	12
A. The First Circuit’s application of the pleading standard was consistent with this Court’s precedent.....	12
B. The First Circuit’s “context-specific” application of the pleading standard is not in conflict with other Courts of Appeals .....	15
C. This case is a poor vehicle for the pleading question presented .....	19
III. Whether Petitioner Has Identified a Fundamental Right Does Not Warrant Review .....	20
A. The fundamental right that Petitioner asks this Court to consider was not raised below, nor is it implicated in this case.....	21

TABLE OF CONTENTS—Continued

	Page
B. This case is a poor vehicle to address whether the right identified by Petitioner is among parents' fundamental rights.....	24
C. Petitioner does not articulate a circuit split that implicates her claim.....	26
CONCLUSION .....	30

## TABLE OF AUTHORITIES

CASES	Page(s)
<i>Adarand Constructors, Inc. v. Mineta</i> , 534 U.S. 103 (2001).....	11
<i>Anspach ex rel. Anspach v. City of Philadelphia, Dep't of Pub. Health</i> , 503 F.3d 256 (3d Cir. 2007) .....	28
<i>Arizona Christian Sch. Tuition Org. v. Winn</i> , 563 U.S. 125 (2011).....	26
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	2, 12-18
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	13, 16
<i>C.N. v. Ridgewood Bd. of Educ.</i> , 430 F.3d 159 (3d Cir. 2005) .....	28
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005).....	11
<i>Deom v. Walgreen Co.</i> , 591 Fed.Appx. 313 (6th Cir. 2014) .....	16
<i>DeShaney v. Winnebago Cnty Dep't of Soc. Servs.</i> , 489 U.S. 189 (1989).....	23
<i>Foisie v. Worcester Polytechnic Inst.</i> , 967 F.3d 27 (1st Cir. 2020) .....	11
<i>Foote v. Ludlow Sch. Comm.</i> , 128 F.4th 336 (1st Cir. 2025), <i>pet. for cert. filed</i> , No. 25-77 .....	20, 23, 27, 28
<i>Frith v. Whole Foods Market, Inc.</i> , 38 F.4th 263 (1st Cir. 2022).....	10, 16

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Gruenke v. Seip</i> , 225 F.3d 290 (3d Cir. 2000) .....	27, 28
<i>Hartzell v. Marana Unified Sch. Dist.</i> , 130 F.4th 722 (9th Cir. 2025), <i>cert.</i> <i>denied</i> , 146 S. Ct. 298 (2025) .....	27
<i>Hughes v. Northwestern Univ.</i> , 63 F.4th 615 (7th Cir. 2023) .....	16-17
<i>In re Century Aluminum Co. Securities</i> <i>Litigation</i> , 729 F.3d 1104 (9th Cir. 2013) .....	17, 18
<i>J.S. ex rel. Snyder v. Blue Mountain Sch.</i> <i>Dist.</i> , 650 F.3d 915 (3d Cir. 2011) .....	28
<i>John and Jane Parents 1 v. Montgomery</i> <i>Cnty. Bd. of Educ.</i> , 78 F.4th 622 (4th Cir. 2023), <i>cert. denied</i> 144 S. Ct. 2560 (2024) .....	21
<i>Johnson v. Arteaga-Martinez</i> , 596 U.S. 573 (2022) .....	2, 20
<i>Lee v. Poudre Sch. Dist. R-1</i> , 135 F.4th 924 (10th Cir. 2025), <i>cert.</i> <i>denied</i> , 146 S. Ct. 26 (2025) .....	21
<i>Leebaert v. Harrington</i> , 332 F.3d 134 (2d Cir. 2003) .....	27
<i>Littlefield v. Forney Ind. Sch. Dist.</i> , 268 F.3d 275 (5th Cir. 2001) .....	27
<i>Ho v. Garland</i> , 106 F.4th 47 (D.C. Cir. 2024) .....	18

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Lyng v. Nw Indian Cemetery Protective Ass’n</i> , 485 U.S. 439 (1988).....	20
<i>Mator v. Wesco Distribution, Inc.</i> , 102 F.4th 172 (3d Cir. 2024).....	16
<i>Monell v. Dep’t of Soc. Servs. of N.Y.</i> , 436 U.S. 658 (1978).....	1, 3
<i>Moore v. Harper</i> , 600 U.S. 1 (2023).....	24
<i>National Rifle Assn. v. Vullo</i> , 602 U.S. 175 (2024).....	18-19
<i>New York v. Ferber</i> , 458 U.S. 747 (1982).....	25
<i>Palin v. New York Times Co.</i> , 940 F.3d 804 (2d Cir. 2019) .....	17
<i>St. Pierre v. United States</i> , 319 U.S. 41 (1943).....	24
<i>Starr v. Baca</i> , 652 F.3d 1202 (9th Cir. 2011).....	17, 18
<i>Swanson ex rel. Swanson v. Guthrie Ind. Sch. Dist. No. I-L</i> , 135 F.3d 694 (10th Cir. 1998).....	27
<i>United States ex rel. Integra Med Analytics, L.L.C. v. Baylor Scott &amp; White Health</i> , 816 Fed.Appx. 892 (5th Cir. 2020) .....	15
<i>VoteVets Action Fund v. U.S. Dep’t of Veteran Affs.</i> , 992 F.3d 1097 (D.C. Cir. 2021).....	18

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Warner Chappel Music, Inc. v. Nealy</i> , 601 U.S. 366 (2024).....	11, 12
 CONSTITUTION	
U.S. Const. amend. I .....	19
U.S. Const. amend. XIV .....	2, 6, 7, 23
 STATUTES	
22 Me. Rev. Stat. Ann. § 1502.....	5
20-A Me. Rev. Stat. Ann. § 4008.....	5
 RULES	
Fed. R. Civ. P. 12(b)(6) .....	3, 13
Sup. Ct. R. 10(a) .....	19
 COURT FILINGS	
Appellant’s Opening Brief, <i>Lavigne v. Great Salt Bay Comm. Sch. Bd.</i> , 146 F.4th 115 (1st Cir. 2025) (No. 24-1509) .....	8, 22
Appellant’s Reply Brief, <i>Lavigne v. Great Salt Bay Comm. Sch. Bd.</i> , 146 F.4th 115 (1st Cir. 2025) (No. 24-1509) .....	11

## STATEMENT

### A. Introduction

Petitioner Amber Lavigne does not claim that the source of her constitutional harm was the conduct of school personnel, whom she alleges gave her child a chest binder and referred to her child by the child's chosen pronouns. Rather, Petitioner challenges what she believes to be a secret, unwritten, de facto "withholding" policy of the Great Salt Bay Community School District ("GSB" or the "District"), pursuant to which she believes GSB withheld information about her child, and her only claim is municipal liability against the District on the basis of that alleged unwritten policy.

Far from presenting a compelling reason for review, the Complaint was dismissed for a common reason: Petitioner failed to plausibly plead the existence of a custom or practice sufficient to give rise to municipal liability under *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978). Petitioner now points to what she characterizes as a split among the Courts of Appeals and argues that the First Circuit applied the wrong pleading standard in assessing her claim when it considered obvious, alternative explanations. There is, however, no such split and, even more importantly, Petitioner did not develop that argument below and has therefore failed to preserve it for review by this Court.

Second, because both the District Court and the First Circuit decided this case on the issue of municipal liability, neither court addressed whether Lavigne plausibly alleged the deprivation of a constitutional right. *See* App. 15a, 53a. Consequently, neither court below considered whether the facts

alleged by Petitioner, if true, implicated a fundamental right under the Due Process Clause of the Constitution. This Court is not a court of first review and ordinarily declines to review issues not addressed by the Courts of Appeals. *See, e.g., Johnson v. Arteaga-Martinez*, 596 U.S. 573, 583 (2022). It should decline to do so here as well.

Third, the due process question Petitioner asks this Court to review—“[w]hether a parent’s fundamental constitutional rights include the right to be notified when public schools affirmatively recognize and facilitate a child’s gender transition”—is not properly before this Court, nor is review thereof justified in this case, because that is not the right Petitioner claimed was at issue below. In her Complaint and briefing to both the District Court and the First Circuit, Plaintiff based her claim only on an alleged policy of withholding or “concealing” information.

Contrary to Petitioner’s allegations, such an unwritten policy does not exist. In fact, Petitioner attached to her Complaint the GSB Community School Transgender Student Guidelines (“Guidelines”), which specifically require parental involvement when addressing the needs of transgender students. *See* App. 99a. Despite those Guidelines, which Petitioner does not challenge, she argued that a secret policy of concealment existed. The Court of Appeals determined, however, that the well-pleaded and non-conclusory facts in the Complaint did not plausibly allege such an unwritten policy. That assessment was correct under this Court’s well-settled precedent. *See Ashcroft v. Iqbal*, 556 U.S. 662, 681-82 (2009).

Because Petitioner failed to plausibly allege that the District had a custom or policy of “withholding” information from parents, the First Circuit agreed

with the District Court that GSB could not be held liable pursuant to *Monell*. Petitioner now offers no preserved argument from which this Court can review the basis for that ruling. For that reason, among others, the Petition should be denied.

### **B. The Factual Allegations**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Respondent accepted as true the well-pleaded facts in Petitioners' Complaint and its attachments thereto.

GSB, through its Transgender Guidelines, established a procedure by which the District will develop a plan for the individual needs of transgender students, and the Guidelines specifically require parental involvement in the development of that plan. App. 96a-104a.

The process begins with contact by the student and/or their parent(s)/guardian(s) to a building administrator or guidance counselor, followed by the scheduling of a meeting to discuss the student's circumstances and needs. App. 98a-99a. Although the Guidelines leave open the possibility that any number of people may attend this meeting, the Guidelines require the following participants: (1) a building administrator, (2) the student, and (3) the student's parent(s)/guardian(s). App. 99a. The Guidelines further provide for a plan that "should be developed by the school in consultation with the student, parent(s)/guardian(s) and others as appropriate." App. 99a.

Petitioner's minor child ("A.B.") attended the Great Salt Bay Community School, and Petitioner alleges that A.B. received counseling from a social worker at GSB. App. 59a, 62a at ¶¶ 6, 16. Petitioner alleges that, in December 2022, she found a chest binder while she was cleaning A.B.'s room and that A.B. told her that the school social worker had given it to A.B. App. 63a

at ¶ 20. Petitioner alleges, based on “information and belief,” that the social worker told A.B. that “he was not going to tell A.B.’s parents about the chest binder, and A.B. need not do so either.” App. 63a at ¶ 22.

Petitioner further alleges that it was around this same time that she learned that, at her child’s request, some School officials were referring to A.B. by a name other than A.B.’s birth name and with pronouns inconsistent with A.B.’s birth sex. App. 64a-65a at ¶¶ 26, 28.

Petitioner does not allege that she ever asked the School for any of this information that she alleges was intentionally withheld from her. There is also no allegation in the Complaint concerning how long the District knew about this information before Petitioner allegedly discovered it from her child at home.

After she learned the information from her child, Petitioner alleges that, on December 5, 2022, she met with the School Principal and Superintendent and that each of those school officials expressed sympathy and concern that Petitioner was unaware of the information that she discovered. App. 65a-66a at ¶¶ 32-33. Petitioner also alleges that the Superintendent thereafter informed her that there had been no policy violation. App. 66a at ¶ 34.

Petitioner alleges that, on December 12, 2022—shortly after making her alleged discoveries—she withdrew A.B. from the Great Salt Bay Community School. App. 66a at ¶ 35. On December 14, 2022, Lavigne addressed the school board about what she claimed had happened. App. 67a at ¶ 38.

The School Board thereafter issued two separate statements. App. 88a-92a.

The first was issued on December 19, 2022 and did not at all reference the District's Guidelines. App. 88a-89a. Instead, it referenced the District's policies for making complaints and reaffirmed the District's commitment to including parents, saying "[t]he Board and administrators remain committed to working in partnership with parents, staff, and local law enforcement to ensure that all students and staff continue to have access to a safe educational and working environment." App. 88a-89a.

The second statement was issued on January 14, 2023 and said nothing at all about the alleged failure to inform Lavigne of information of any kind. App. 90a-92a. After first discussing bomb threats and rumors in the community, the Board wrote in that second statement:

Federal and state law both provide certain rights for parents and students with respect to education. While parents generally have a right to access the educational records of their children, the Board must balance this right with the right of students in Maine who, regardless of age, have the right to access mental health services without parental consent (*22 MRSA Section 1502 – Consent of Minors for Health Services*), and the right to establish their own confidential counseling relationship with a school based mental health services provider (*20-A MRSA § 4008 – Privileged Communications*). All of the Board's policies comply with Maine law, and neither the Board nor school administration are aware of any violation of policy or law which requires further action at this time.

Our Board is united in our support of students, families, staff, and administration and remains committed to upholding the laws of the State of Maine.

App. 90a-92a.

Third and finally, the School Principal wrote a letter to the GSB school community in which, among other things, she referenced Maine state law that provides confidentiality to school social workers for information received in the context of counseling, and the Principal outlined steps the school was taking to address ongoing hate speech and threats directed to the School and its staff. App. 93a-95a.

### **C. Proceedings Below**

1. Petitioner brought this lawsuit in the United States District Court for the District of Maine, originally naming as defendants the Great Salt Bay Community School Board (the “School Board”) alongside two social workers, the School Principal, and the Superintendent. Petitioner named all four individual defendants in their official capacity only, and she alleged violations of her rights to substantive and procedural due process under the Fourteenth Amendment of the United States Constitution.

Because Petitioner named the individual defendants in their official capacity only, the District Court, without objection from Petitioner, dismissed the individually named defendants from the lawsuit, and Petitioner thereafter did not appeal their dismissal. App. 55a-56a. Indeed, Petitioner was unequivocal before the District Court that she did not challenge the underlying conduct of the school officials as the source of her constitutional injury, nor did she challenge the GSB’s written guidelines that she attached to the

Complaint; rather, Petitioner challenged only the alleged unwritten policy of withholding information from parents. *See, e.g.*, App. 33a.

The District Court subsequently reviewed the allegations against the Board and, characterizing the policy or custom that Petitioner purported to challenge as “somewhat nebulous,” it painstakingly reviewed the allegations in her complaint, considering each alleged theory of municipal liability and determining that the Complaint failed to plausibly allege any one of those bases.<sup>1</sup> App. 37a-52a.

2. The First Circuit affirmed the District Court’s dismissal of the Complaint. App. 25a-26a. Agreeing that the Complaint failed to plausibly allege that GSB had a policy of “withholding” information from parents, the Court of Appeals did not reach whether Petitioner had plausibly alleged the deprivation of a right protected by the Due Process Clause. *See* App. 15a (citing the “bedrock principle of judicial restraint” that requires courts to avoid reaching constitutional questions in advance of the necessity of deciding them).

Before the First Circuit, Petitioner argued that her Complaint plausibly alleged a municipal policy of “active concealment” on the bases of an “unwritten policy, custom, practice, or pattern of withholding and concealing vital information” and Board ratification.

As for an alleged unwritten policy, custom, practice, or pattern, Petitioner argued that the Complaint warranted a reasonable inference of a policy of concealing or withholding information from parents on

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<sup>1</sup> Before the District Court, Petitioner argued that she had alleged a municipal policy of “withholding” information from parents on the basis of a widespread custom or policy, ratification by a final policymaker, and the failure to train.

the basis of (i) the Board’s January 14, 2023 statement, stating that the Board was not aware of any violation or policy of law, (ii) the School Principal’s February 26, 2023 statement, stating that a “misunderstanding of these laws pertaining to gender identity and privileged communication between school social workers and minor clients has resulted in the school and staff members becoming targets for hate speech and ongoing threats,” (iii) the School Board’s approval of a second-year probationary contract for the school social worker who Petitioner alleged gave her child a chest binder, and (iv) the written policies attached to her Complaint. *See* App. 17a-18a.

Despite challenging only the alleged “withholding” policy and not the underlying conduct of GSB employees, Petitioner argued that “if no policy was violated by [the social worker’s] actions or those of other GSB employees, the logical conclusion is that these actions were the policy.” Appellant’s Opening Brief at 14, *Lavigne v. Great Salt Bay Comm. Sch. Bd.*, 146 F.4th 115 (1st Cir. 2025) (No. 24-1509); *see also* App. 18a.

The First Circuit correctly concluded that “none of these allegations support the inference that the Board maintained an unwritten custom or policy of withholding information from parents,” explaining that Petitioner’s own argument “concede[d] that the Board maintained written policies that apply to the conduct in question,” and that “there need not have been some superseding unwritten custom of active concealment for the Board and school officials to conclude that the alleged misconduct did not run afoul of the Board’s existing written policies.” App. 18a-19a. The First Circuit noted that the Guidelines themselves explain that they are to be “interpreted in light of applicable federal and state law” and that the statements

themselves referenced state law protections provided to student and counselor relationships. App. 19a-20a. Moreover, the First Circuit noted that Petitioner herself alleged that the policies do not directly address the underlying conduct about which she expressed concern. App. 19a-20a.

All of these “obvious, alternative explanations,” evident from Petitioner’s own Complaint and the documents attached thereto, made the inference that Petitioner asked the court to make an unreasonable one. And because Petitioner otherwise made no well-pleaded allegations pointing to a widespread policy, pattern, or practice of concealing information from parents, the First Circuit concluded that Petitioner had failed to plausibly allege a basis for municipal liability.<sup>2</sup>

## **REASONS FOR DENYING THE PETITION**

### **I. Petitioner Does Not Provide a Proper Basis to Review the Ground for the Ruling Below**

Petitioner has been unequivocal throughout this litigation that she only seeks municipal liability against the District on the basis of an alleged de facto “withholding policy.” Petitioner’s failure to plausibly allege municipal liability was the sole basis of the First Circuit’s holding, and yet Petitioner now challenges

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<sup>2</sup> The First Circuit also agreed that Petitioner had failed to plausibly allege ratification as a basis for municipal liability, and the Petition does not attempt to challenge that portion of the ruling below. The First Circuit did not address Petitioner’s “failure to train” theory for municipal liability because Petitioner abandoned that theory on appeal. *See* App. 16a at n.5.

that ruling by presenting an issue that was neither raised nor decided below.

Petitioner argues for the first time in her Petition for Certiorari that the First Circuit does not accord “appropriate weight” to “obvious alternative explanations” for a defendant’s conduct when considering a motion to dismiss. Pet. 17. Petitioner’s new argument is an attempt to challenge the First Circuit’s conclusion that she did not plausibly allege an unwritten “blanket policy, pattern, and practice of intentional withholding and concealment” of information from parents.<sup>3</sup> App. 21a.

Before the First Circuit, Lavigne argued, on the basis of the statements made by school officials and the renewal of the social worker’s probationary contract, that if there was no policy violated by the alleged actions of the GSB employees, the “logical conclusion” of those statements and the contract renewal is that those actions were the policy.

The School Board responded in its brief by pointing out that just because an employee engages in conduct that does not violate a school policy, that does not mean that such conduct is the policy or practice of the District, citing *Frith v. Whole Foods Market, Inc.*, 38 F.4th 263, 275-76 (1st Cir. 2022), in which the First Circuit looked to obvious, alternative explanations to conclude that the alleged inference of discrimination was not plausibly alleged in that case. The School Board argued that, instead of there being a de facto,

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<sup>3</sup> Petitioner’s new argument in her Petition would not change the outcome of the First Circuit’s conclusion that Petitioner failed to plausibly allege municipal liability on the basis of ratification because the First Circuit did not discuss “obvious alternative explanations” in so deciding.

secret policy of concealment, there were any number of “obvious, alternative explanations” for school officials to conclude that there was no policy violation.

In her reply to the First Circuit, Petitioner responded to the School Board’s argument, also citing First Circuit case law, to argue that, in order to rely on obvious, alternative explanations at the motion to dismiss stage, the School Board would need to show that Petitioner’s “allegations of misconduct are equally consistent with some innocent explanation.” Appellant’s Reply Brief at 16, *Lavigne*, 146 F.4th 115 (No. 24-1509) (citing *Foisie v. Worcester Polytechnic Inst.*, 967 F.3d 27, 52 (1st Cir. 2020)).

Significantly, however, Petitioner never made the distinct legal argument, as she does now, that reliance on obvious, alternative explanations requires implausibility of a plaintiff’s own alternative explanation. *See* Pet. 14. Nor did Petitioner make the legal argument that a court cannot rely, either in this case or in others, on obvious, alternative explanations. Instead, Petitioner relied solely on First Circuit case law, rather than the law of other Courts of Appeals that she cites in her Petition for the first time, and she made only factual arguments against the School Board’s proffered alternative explanations.

This Court is “a court of review, not of first review,” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and “ordinarily do[es] not decide in the first instance issues not decided below,” *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 108-09 (2001) (dismissing a writ that had been granted because the question at issue was not addressed below). Issues not raised below are likewise not properly presented for this Court’s review. *See, e.g., Warner Chappel Music, Inc. v. Nealy*, 601 U.S. 366, 371 (2024).

Here, Petitioner never challenged whether or how any assessment of “obvious alternative explanations” comports with or departs from this Court’s pleading standard, and the issue is therefore not properly before this Court. *See id.* (explaining that this Court would not consider whether the discovery rule governs the timeliness of copyright claims, even though many Courts of Appeals are divided on that issue, because the petitioner had never challenged the use of the discovery rule below).

Given that the only ground for the ruling below was Petitioner’s failure to plausibly allege a basis for municipal liability, certiorari is not warranted in this case because the only issue Petitioner raises to challenge that ruling is not properly presented for review.

## **II. The First Circuit’s Application of this Court’s Pleading Standard Does Not Warrant Review**

Even if the question of the proper weight to be accorded “alternative explanations” were properly before this Court, that issue does not warrant review in this case.

### **A. The First Circuit’s application of the pleading standard was consistent with this Court’s precedent.**

Petitioner’s argument seems to suggest that this Court in *Iqbal* discouraged or retreated from the assessment of “obvious alternative explanations” when considering the plausibility of a plaintiff’s claims. Pet. 15. To the contrary, this Court relied on an “obvious alternative explanation” when determining that the petitioners in *Iqbal* had not plausibly

alleged discrimination. *Ashcroft v. Iqbal*, 556 U.S. 662, 681-82 (2009) (“As between that ‘obvious alternative explanation’ for the arrests . . . and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.” (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007))).

While this Court’s pleading standard makes clear that a court can draw “reasonable inferences” of the misconduct alleged, such inferences must indeed be reasonable, and a complaint still falls short of plausibility when it “pleads facts that are merely consistent with a defendant’s liability.” *Iqbal*, 556 U.S. at 678. The possibility of misconduct is not enough; “[t]he plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully,” and this Court has explained that making that assessment is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. That is exactly what the Court of Appeals did here.

Petitioner argues that the Court of Appeals here “believed that the ‘alternative explanation’ of the facts as alleged was more probable than Plaintiff’s contention.” Pet. 16. This argument overlooks the fact that Petitioner’s argument before the First Circuit in support of a “blanket policy, pattern, or practice of withholding” required, by her own explanation in her briefing below, a “logical” leap; it required the assumption that the school officials’ statements to the effect of there being no policy violation equated to the existence of a policy of concealing information from parents. In support of a municipal policy, Petitioner was therefore not relying on well-pleaded facts that required belief—of course, Rule 12(b)(6) requires all

well-pleaded facts be taken as true—rather, Petitioner was relying on an assumption that, taken in context, did not meet the plausibility standard.

Among the facts that Petitioner alleged was that GSB actually has written Guidelines, which, as the Court of Appeals noted, Petitioner herself acknowledged did not directly speak to the alleged underlying conduct of the GSB employees. App. 20a. Thus, drawing on the specific context of Petitioner’s allegations and “common sense,” the Court of Appeals correctly applied this Court’s pleading standard when it concluded that Petitioner did not plausibly allege the existence of a policy of concealment because “there need not have been some superseding unwritten custom of active concealment for the Board and school officials to conclude that the alleged misconduct did not run afoul of the Board’s existing written policies.” App. 19a. Yet another obvious, alternative explanation was the state law, referenced in the statements themselves, that protects communications between students and school social workers. App. 19a (noting that GSB’s Guidelines state that they should be interpreted in light of applicable federal and state law).

Choosing between, at best, an inference of a secret municipal policy and multiple “obvious, alternative explanations,” the Court of Appeals’ analysis was entirely consistent with this Court’s precedent. *See Iqbal*, 556 U.S. at 682 (discrimination was not plausibly alleged when there was an “obvious, alternative explanation” for the alleged purposeful, invidious discrimination that the Court was asked to infer).

**B. The First Circuit’s “context-specific” application of the pleading standard is not in conflict with other Courts of Appeals.**

Petitioner argues that the First Circuit’s ruling below “deepens a persistent and disruptive split on the appropriate weight to be accorded ‘obvious alternative explanations’ at the motion to dismiss stage.” Pet. 17. Yet this Court never said that there is certain “weight” to be given to alternative explanations at the pleading stage; instead, it is a “context specific task” that requires “judicial common sense” when assessing whether the allegations and any *reasonable* inferences therefrom push beyond the realm of a mere possibility and into that of plausibility. *See Iqbal*, 556 U.S. at 678.

When viewed in light of this “context specific” inquiry that requires judicial common sense, the cases cited by Petitioner, which address wide-ranging types of claims, do not evince a conflict among the Courts of Appeals. *See* Pet. 17-25. Petitioner has failed to identify a meaningful circuit split. Rather, she merely illuminates varying outcomes when Courts of Appeals review a motion to dismiss.

In *United States ex rel. Integra Med Analytics, L.L.C. v. Baylor Scott & White Health*, one case cited by Petitioner, the Fifth Circuit considered an obvious alternative explanation when it was supported by the very data in plaintiff’s own complaint. 816 Fed.Appx. 892, 897 (5th Cir. 2020). So too here, the First Circuit looked at GSB’s Guidelines and alleged official statements, all of which were included in Petitioner’s own complaint, to glean that there were obvious, alternative explanations that undermined any reasonable inference of a secret, de facto policy.

In *Mator v. Wesco Distribution, Inc.*, which Petitioner also cites as evidence of division among the Courts of Appeals on this issue, the Third Circuit did not announce a Circuit-wide rule regarding alternative explanations at the pleading stage; to the contrary, it explained that “factual context is paramount” when “applying the pleading standard discussed in [*Iqbal* and *Twombly*] to ERISA fiduciary breach claims.” 102 F.4th 172, 184 (3d Cir. 2024).

In *Frith v. Whole Foods Market, Inc.*, the First Circuit did not, as Petitioners now suggest, require the plaintiffs to prove any version of events at the pleading stage. 38 F.4th 263 (1st Cir. 2022). Rather, key to the First Circuit’s reliance on “obvious, alternative explanations” in that case was the substantive law and theory of discrimination underlying the plaintiffs’ claim. *See id.* at 275-76 (timing inference relied upon by plaintiffs to allege pretext in support of racial discrimination claim did not plausibly allege discrimination where common sense pointed to an obvious, non-discriminatory alternative explanation for the timing of the company’s application of the policy.).

The Courts of Appeals that Petitioner contends are on the “other side of the [Circuit] split” equally demonstrate that courts consider obvious alternative explanations, if any, as one way to assess whether, in context, the reasonable inferences alleged are enough to meet the plausibility standard. *See Deom v. Walgreen Co.*, 591 Fed.Appx. 313, 319 (6th Cir. 2014) (“Although the existence of a more likely alternative explanation does not in itself entitle a defendant to dismissal, . . . the existence of obvious alternative explanations simply illustrates the unreasonableness of the inference sought and the implausibility of the claims made.” (internal quotations omitted)); *Hughes*

*v. Northwestern Univ.*, 63 F.4th 615, 629 (7th Cir. 2023) (“[W]hether a claim survives dismissal necessarily depends on the strength or obviousness of the alternative explanation that the defendant provides.”); *see also Palin v. New York Times Co.*, 940 F.3d 804, 811, 815-16 (2d Cir. 2019) (concluding that plaintiff had plausibly alleged actual malice for defamation claim when the district court had in that case made credibility determinations, rather than considering an “obvious, alternative explanation,” to assess whether actual malice was plausibly alleged).

For the same reason, the D.C. Circuit and Ninth Circuit Courts of Appeals have not, as Petitioner suggests, “equivocated” on this issue; rather, in the cases cited by Petitioner from those Circuits, the Courts of Appeals have likewise endeavored in the “fact specific” inquiry required by this Court’s precedent. *See* Pet. 24-25.

The Ninth Circuit cases cited by Petitioner are consistent in considering “alternative explanations” within the broader, touchstone of plausibility. *See In re Century Aluminum Co. Securities Litigation*, 729 F.3d 1104, 1107-09 (9th Cir. 2013) (explaining that “the level of factual specificity needed to satisfy [the] pleading requirement will vary depending on the context” of the claim alleged under the Securities Act of 1933 and explaining why, based on “experience and common sense,” the alternative explanation provided by the plaintiff in that case was “merely possible rather than plausible”); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (explaining, in the context of evaluating alleged deliberate indifference, that, at the pleading stage, there was no “obvious alternative explanation within the meaning of *Iqbal*” for why a

sheriff took no action to stop his subordinates alleged constitutional violations).<sup>4</sup>

The D.C. Circuit cases cited by Petitioner are likewise consistent in assessing plausibility. *See Ho v. Garland*, 106 F.4th 47, 51-54 (D.C. Cir. 2024) (assessing that a pro se plaintiff had “narrowly” and plausibly alleged an inference of causation for his discrimination claim and explaining that a plaintiff “need not rule out every possible lawful explanation, but rather only dispel any obvious alternative explanations” (internal quotations and alterations omitted)); *VoteVets Action Fund v. U.S. Dep’t of Veteran Affs.*, 992 F.3d 1097, 1102, 1106 (D.C. Cir. 2021) (explaining that complaint plausibly alleged violations of the Federal Advisory Committee Act when, despite the government’s plausible alternative, the plaintiff had alleged other specific facts that “plausibly support” its theory pointing toward liability).

That there is no “fundamental disagreement” on this issue by virtue of different outcomes resulting from the context-specific assessment of “obvious alternative explanations” at the pleading stage is perhaps best demonstrated by this Court’s precedent. *Compare Iqbal*, 556 U.S. at 682 (alleged disparate impact of arrest policy had an “obvious alternative explanation” where the nondiscriminatory purpose of the policy would unsurprisingly produce a disparate, incidental impact); *with National Rifle Assn. v. Vullo*, 602 U.S.

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<sup>4</sup> Despite Petitioner’s contention that the Ninth Circuit’s application of the pleading standard was inconsistent in these two cases, the Ninth Circuit itself explained in *In re Century Aluminum Co.* why that decision was, in fact, consistent with its opinion in *Starr*. *See In re Century Aluminum Co.*, 729 F.3d at 1108 (explaining that, in *Starr v. Baca*, there were “two plausible explanations in contention” (emphasis in original)).

175, 181-85, 195 (2024) (state official’s argument that she was pursuing violations of the law was not an “obvious alternative explanation” that defeated the plausibility of well-pleaded allegations showing that her conduct constituted coercive threats in violation of the First Amendment).

Because the First Circuit’s ruling is not in conflict with other Courts of Appeals, Petitioner does not offer a compelling reason for this Court to grant a writ. *See* Sup. Ct. R. 10(a).

**C. This case is a poor vehicle for the pleading question presented.**

Even if this issue were properly before the Court, this is not the right case to reassess how courts consider, if at all, “obvious alternative explanations” when ruling on a motion to dismiss because the vagueness of Petitioner’s municipal liability theory and allegations make this case inapt for providing guidance to lower courts on the pleading standard, and Petitioner furthermore fails to set forth how review by this Court would result in a different outcome for her than the ruling below.

Petitioner’s allegations in furtherance of a municipal policy of concealment are vague and conclusory. As the Court of Appeals explained, the Complaint largely conforms to a “legal blueprint.” App. 21a; *see also* App. 37a (“The purported municipal ‘policy or custom’ that Lavigne challenges is somewhat nebulous.”). Such allegations are also contradicted by the Guidelines Petitioner attached to her Complaint, which actually provide for parental involvement.

Petitioner also offers no argument explaining how her complaint sufficiently alleges municipal liability under a pleading standard that would, she hopes,

accord some other weight to “alternative explanations.” Petitioner contends now that an obvious, alternative explanation for defendant’s conduct should only defeat the plaintiff’s explanation if the plaintiff’s explanation is “implausible;” however, she fails to consider that that is exactly what the Court of Appeals concluded when it pointed out that “there need not have been some superseding unwritten custom of active concealment” in order for school officials to conclude that the conduct Petitioner complained of did not violate a school policy.

### **III. Whether Petitioner Has Identified a Fundamental Right Does Not Warrant Review**

The due process question in the Petition does not warrant review because, as already described, Lavigne failed to plausibly allege a basis for municipal liability and now offers no preserved argument from which this Court can review that issue. Even if Lavigne had placed herself on adequate footing to seek review of the municipal liability issue, neither the Court of Appeals nor the District Court considered whether the facts alleged by Petitioner, if true, implicated a fundamental right.<sup>5</sup> *See Johnson*, 596 U.S. at 583 (declining to reach

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<sup>5</sup> Lavigne’s concern that the First Circuit “evaded” the constitutional question in this case does not find support in the law of the First Circuit, which recently addressed the constitutional implications of similar parent concerns. *See Foote v. Ludlow Sch. Comm.*, 128 F.4th 336 (1st Cir. 2025), *pet. for cert. filed*, No. 25-77. In declining to address Lavigne’s alleged constitutional injury in this case, the First Circuit’s reliance on principles of judicial restraint was consistent with this Court’s precedent. *See, e.g., Lyng v. Nw Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988) (“A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching

constitutional claims where they were not addressed below in the first instance).

Despite these hurdles to review, Petitioner nevertheless asks this Court to consider her framing of the fundamental right she now believes is at issue, absent any explanation in her Petition as to how that right is implicated, if at all, by the facts alleged in her complaint. Petitioner's arguments do not compel review by this Court.

**A. The fundamental right that Petitioner asks this Court to consider was not raised below, nor is it implicated in this case.**

Petitioner asks this Court to review “[w]hether a parent’s fundamental constitutional rights include the right to be notified when public schools affirmatively recognize and facilitate a child’s gender transition.” That question is not properly before this Court, nor is review thereof justified in this case because Petitioner’s claim against the School Board does not

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constitutional questions in advance of the necessity of deciding them.”).

Petitioner also incorrectly states that the ruling below “resembles” that of *John and Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 78 F.4th 622 (4th Cir. 2023), *cert. denied* 144 S. Ct. 2560 (2024), wherein the Fourth Circuit concluded that parents lacked standing to challenge a public school’s guidelines for gender identity support. Here, the First Circuit did reach the merits of Petitioner’s municipal liability claim, but it concluded that Petitioner had failed to plausibly allege such a claim. Further, Petitioner not only failed to plausibly allege that any “withholding policy” was the moving force behind her alleged constitutional injury, *see Lee v. Poudre Sch. Dist. R-1*, 135 F.4th 924, 935 (10th Cir. 2025), *cert. denied*, 146 S. Ct. 26 (2025), but she furthermore failed to plausibly allege a “withholding policy” at all.

implicate a parent's "right to be notified," whether fundamental or otherwise.

Petitioner did not contend below that she had a fundamental "right to be notified." Petitioner made this abundantly clear in her principal brief before the First Circuit:

Appellant does not claim a right to be informed about how her child is navigating matters related to gender identity. . . . Instead, she argues that her right to control and direct the education of her child has been violated by GSB's *policy of active concealment* regarding the decisions it made and the actions it took that directly affect her child's mental health and physical wellbeing. In other words, Appellant is not claiming that the school must surveil a child and make reports to parents about a child's actions or behavior; she is claiming that when the school takes affirmative actions that will affect the mental health or physical wellbeing of a child it may not actively conceal that information from the parent.

Appellant's Opening Brief at 25, *Lavigne*, 146 F.4th 115 (No. 24-1509) (emphasis in original); *see also* App. 33a ("Lavigne makes it clear that all counts in her Complaint center on her 'right not have information about decisions actively withheld by Defendants pursuant to the Withholding Policy.'").

Petitioner's new framing of her alleged fundamental right is not implicated by the *de facto* policy that she claims to be the basis of the Board's municipal liability. Petitioner remains unequivocal that the unwritten *de facto* policy that she challenges is a policy of *concealing*

information from parents.<sup>6</sup> To that end, and despite never alleging that she requested information from the school, it was the concealment of such information that she alleged and argued was the source of her constitutional injury. Had Petitioner alleged a municipal policy or practice of not *notifying* parents about the School's actions with respect to students' gender identity, the Guidelines attached to Petitioner's Complaint belie that theory of municipal liability: they require parental involvement when the School addresses the needs of transgender students.

Petitioner's pivot provides good reason for this Court to decline review of the due process question. This Court has recognized the distinction between passive and active conduct under the Due Process Clause, which is not intended to regulate government inaction. *See, e.g., DeShaney v. Winnebago Cnty Dep't of Soc. Servs.*, 489 U.S. 189, 195-201 (1989); *see also Foote*, 128 F.4th at 354 (public school's non-disclosure protocol did not violate parents' due process rights where the Due Process Clause limits a state's power to act). Particularly considering this distinction, Petitioner cannot now assert for the first time that she has a "right to be *notified*" rather than a right not to have information actively concealed from her.

So framed now for the first time, the right "to be notified" raises myriad questions that were not, nor

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<sup>6</sup> Petitioner maintains this view in her Petition. She argues that "parents cannot exercise their right . . . to oversee the education and upbringing of their children if school officials conceal information from them about what goes on in the public schools." Pet. 6; *see also, e.g.,* Pet. 10 (arguing that the School Board's statements and actions are consistent with "approving of the actions employees took in withholding . . . information from Lavigne").

could be, addressed below. Among those questions is how quickly a parent would need to be notified, if at all under the circumstances. In that regard, Plaintiff's Complaint is silent as to how long she went without information, the *concealment* of which she has always claimed as the source of her alleged constitutional injury.

Petitioner's underlying allegations in the Complaint do not implicate whether parents have a fundamental right to be "notified" when schools allegedly "recognize and facilitate a child's gender transition." Indeed, Petitioner has never alleged a policy of no notice; to the contrary, she attached the Guidelines to her Complaint. This Court should decline to review the due process issue because Petitioner asks this Court to advise on the fundamental nature of a right that was neither raised nor addressed below, nor is it implicated by Petitioner's theory of municipal liability. *See St. Pierre v. United States*, 319 U.S. 41, 42 (1943) (*per curiam*) (explaining that this Court "is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it"), *quoted in Moore v. Harper*, 600 U.S. 1, 40 (2023) (Thomas, Gorsuch, and Alito, JJ., dissenting).

**B. This case is a poor vehicle to address whether the right identified by Petitioner is among parents' fundamental rights.**

Petitioner contends that the due process question "will continue to be raised before this Court;" however, this is not the right case to decide whether and how a parent's fundamental rights are implicated by information that a school has about a student's gender identity. As explained, Petitioner has never before

claimed that she has a right to proactive notice from the school. Instead, she challenged only GSB's alleged active non-disclosure of such information, and yet all that she alleges in her Complaint is that, for some unspecified period of time, GSB did not affirmatively notify her of information she found out instead from her child.

This case is not apt for providing guidance to lower courts on this important due process issue. In addition to Petitioner's due process question having been neither raised nor addressed below, Petitioner does not ask this Court to review whether she has plausibly alleged a deprivation of substantive due process; instead, she asks this Court to answer whether the broad right to notice that she now identifies is among parents' fundamental rights. Review of that question in this case would be untethered to the remainder of the substantive due process analysis, leaving many questions for lower courts to sift through when applying constitutional scrutiny, including whether and how to balance the countervailing interests of the State, students, and other parents.<sup>7</sup>

Assuming Petitioner had sufficiently alleged her theory of municipal liability—that is, a *de facto*, unwritten policy of “withholding”—review of Petitioner's due process question would also be untethered to any concrete or comprehensible school policy, despite the fact that in this case GSB *has* adopted Guidelines that

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<sup>7</sup> These countervailing interests are significant. *See, e.g., New York v. Ferber*, 458 U.S. 747, 756 (1982) (stating that it is “evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling” (internal quotations omitted)).

provide for parental involvement with respect to its transgender students.

Finally, while the School Board takes seriously the concern that “schools are increasingly concealing vital information from parents,” Pet. 30, that concern remains only a hypothetical concern in this case, rather than a justiciable controversy, because Petitioner has failed to put forward a GSB policy, pattern, or practice of concealing information—of any kind—from parents. *See Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 132 (2011) (explaining that this Court resolves “not questions and issues but ‘Cases’ or ‘Controversies’”). Moreover, such a hypothetical concern is tempered by the fact that, in this case, the School Board has adopted Guidelines that provide for parental involvement when the school makes a plan to assist in the educational and social integration of transgender students at school.

**C. Petitioner does not articulate a circuit split that implicates her claim.**

Petitioner broadly frames the “circuit conflict” as one in which circuit courts either do or do not hold that parental rights cease at the schoolhouse gate. *See* Pet. 27. So framed, a circuit split would be implicated every time a parent asserts a right to anything in the public-school setting.

Petitioner contends that the First, Second, Fifth, Ninth, and Tenth Circuits primarily decline to recognize parental rights beyond the right to choose between public and private school, and that the Third Circuit employs a “parent-primacy” approach that considers parental rights in context of the subject at issue. *See* Pet. 28-29. Despite framing this as an “entrenched” conflict among circuit courts in the most

broad terms possible, Petitioner does not actually identify in her Petition an actual conflict among the Courts of Appeals that is implicated by her municipal liability claim against the School Board for its alleged de facto policy of “concealment.”

In the cases cited by Petitioner, parental rights did heed to some State interest in education; however, that does not put those Courts of Appeals in conflict with the Third Circuit, as Petitioner seems to suggest, nor does Petitioner explain whether and how any such conflict implicates the right she identifies for this Court to consider. *See Hartzell v. Marana Unified Sch. Dist.*, 130 F.4th 722, 744 (9th Cir. 2025) (parent’s procedural due process right was not implicated when parent was banned from accessing school property), *cert. denied*, 146 S. Ct. 298 (2025); *Foote*, 128 F.4th at 354 (assessing whether parents’ fundamental rights are impacted by a school’s “curricular and administrative decisions” separately from the school’s non-disclosure protocol); *Leebaert v. Harrington*, 332 F.3d 134, 142 (2d Cir. 2003) (school’s mandatory health curriculum did not implicate parent’s fundamental rights); *Littlefield v. Forney Ind. Sch. Dist.*, 268 F.3d 275, 288-89 (5th Cir. 2001) (public school Uniform Policy did not implicate parents’ fundamental rights); *Swanson ex rel. Swanson v. Guthrie Ind. Sch. Dist. No. I-L*, 135 F.3d 694, 700-01 (10th Cir. 1998) (public school’s rule against part-time-attendance did not implicate parents’ fundamental rights).

The Third Circuit cases cited by Petitioner are not in “conflict” with these decisions of other Circuits, particularly where the Third Circuit’s approach is fact-specific to the subject at issue. *See Gruenke v. Seip*, 225 F.3d 290, 303-06 (3d Cir. 2000) (parents of a public school student had stated a claim for violation

of the familial right to privacy when high school swim coach forced student to take a pregnancy test and discussed the student's pregnancy with others such that the student's parents could not take steps to privately resolve the matter); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 183-86 (3d Cir. 2005) (survey with questions on sexual activity administered to public school students without parental consent did not violate parental rights where parents "remain[] free to discuss these matters and to place them in the family's moral or religious context").<sup>8</sup>

Nor is it clear how the Third Circuit side of the purported "split" that Petitioner relies on would be helpful to the new right that she asserts to "notice." See *Anspach ex rel. Anspach v. City of Philadelphia, Dep't of Pub. Health*, 503 F.3d 256, 270-71 (3d Cir. 2007) (explaining that *Gruenke* "did not . . . recognize

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<sup>8</sup> The Third Circuit recognized in *C.N.* that its approach was consistent with other circuits, noting that "other Courts of Appeals," including the First Circuit, have recognized "a distinction between actions that strike at the heart of parental decision-making authority on matters of the greatest importance and other actions that, although perhaps unwise and offensive, are not of constitutional dimension." *C.N.*, 430 F.3d at 184; see also *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 933-34 (3d Cir. 2011). Moreover, the First Circuit looked to Third Circuit case law in a recent decision regarding similar parent concerns. See *Foote*, 128 F.4th at 354. Despite still pursuing a theory of municipal liability that is based on a policy of "concealment," Petitioner curiously does not look to this recent First Circuit opinion, which considered whether a school policy on this topic demonstrated active or passive non-disclosure of information to parents. See *id.* Perhaps this is because Petitioner now seeks guidance on whether she has the right to be "notified;" however, that issue was never presented below, nor is it implicated in this case given that GSB's guidelines do indeed provide for parental involvement.

a parent's constitutional right to notification by school officials with regard to a minor's reproductive health" (emphasis supplied)).

GSB disagrees with Petitioner's contention that there is a "theory" among Courts of Appeals, applicable here, wherein, according to Petitioner, "parents have little or no say in the operations of public schools—not just with respect to curricula, but also with respect to policies regarding children's mental health and physical well-being." Pet. 28. First, in this case, GSB's Guidelines do not presuppose such a "theory" because the Guidelines provide for parental involvement when making a plan for transgender students. Second, "children's mental health and physical well-being" touches on almost everything that a School does—indeed, students' well being is paramount to GSB's educational mission. Third, Petitioner's argument assumes that substantive due process is the only mechanism through which parents have a "say" regarding their children, and it also fails to account for the countervailing rights of the State, students, and other parents.

Although Petitioner requests "uniform guidance" from this Court, Pet. 30, her shifting theory for the right she identifies and the relationship such a theory has, or lacks, with regard to her theory of municipal liability, makes it difficult to assess exactly what guidance Petitioner seeks and whether and how any disagreement among the Courts of Appeals bears a relationship to her claim. Petitioner has therefore not identified a "compelling" reason for this Court to grant a writ, and such ambiguity serves to underscore the way in which review by this Court would benefit from such issues having been both raised and decided below.

**CONCLUSION**

For the foregoing reasons, the Great Salt Bay Community School Board respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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