No. 23-1069

In the First Circuit Court of Appeals

STEPHEN FOOTE, individually and as Guardian and next friend of B.F. and G.F., minors and MARISSA SILVESTRI, individually and as Guardian and next friend of B.F. and G.F., minors,

***Plaintiffs–Appellants*,**

v.

LUDLOW SCHOOL COMMITTEE; TODD GAZDA, former Superintendent; LISA NEMETH, Interim Superintendent; STACY MONETTE, Principal, Baird Middle School; MARIE-CLAIRE FOLEY, school counselor, Baird Middle School; JORDAN FUNKE, former librarian, Baird Middle School; TOWN OF LUDLOW,

Defendants–Appellees.

On Appeal from the United States District Court
for the District of Massachusetts,
No. 22-cv-30041-MGM

BRIEF OF *AMICI CURIAE* THE FAMILY FOUNDATION, ILLINOIS FAMILY INSTITUTE, CONCERNED WOMEN FOR AMERICA, NATIONAL LEGAL FOUNDATION, AND PACIFIC JUSTICE INSTITUTE

in Support of Plaintiff–Appellants and urging reversal

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CORPORATE DISCLOSURE STATEMENT

None of the *Amici Curiae* have issued shares to the public, and none have a parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock of any *Amicus Curiae*.

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INTERESTS OF *AMICI CURIAE*[1]

The Family Foundation (TFF) is a Virginia non-partisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest pro-family advocacy organization in Virginia, and its interest in this case is derived directly from its members throughout Virginia who seek to advance a culture in which children are valued, religious liberty thrives, and marriage and families flourish.

The Illinois Family Institute (IFI) is a non-profit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. A core value of IFI is to uphold religious freedom and conscience rights for all individuals and organizations.

Concerned Women for America (CWA) is the largest public policy organization for women in the United States, with approximately half a million supports from all 50 States. Through its grassroots organization,

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare, including religious liberties. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite.

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties (including the freedoms of speech, assembly, and religion) and parental rights. The NLF and its donors and supporters, in particular those from Massachusetts, are vitally concerned with the outcome of this case because of its effect on religion-based parental rights.

The Pacific Justice Institute (PJI) is a non-profit legal organization established under section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. As such, PJI has a strong interest in the development of the law in this

area. PJI often represents teachers, parents, and their children to vindicate their constitutional rights in the public schools.

SUMMARY OF THE ARGUMENT

Stephen Foote and Marissa Silvestri ("Foote Parents") are parents of two children in the Ludlow School District, which is under the authority of the Ludlow School Committee. The Ludlow School Committee has established a policy under which school personnel would only share information about a student's expressed gender identity with the student's parents if the student consented to such communication ("Policy").

In dismissing the Foote Parents' case, the district court ruled that the Policy did not meet the "shock the conscience" standard, which it held applies to alleged substantive due process violations of fundamental rights. This was clear error. Under long established Supreme Court precedent, only *executive* actions are evaluated under the "shock the conscience" framework. Where, as in this case, *legislative* actions are evaluated, "level of scrutiny" analysis is employed. Given the fundamental right at issue here (the care and upbringing of one's child), strict scrutiny applies, and the district court's

own analysis makes clear that the Ludlow School Committee cannot meet this burden. On this basis, the district court's order should be reversed, and the Ludlow School Committee's motion to dismiss should be denied.

ARGUMENT

I. The "Shock the Conscience" Test Does Not Apply to Legislative Acts Such as Are Involved Here.

As outlined by the district court (Appx. 158), the Foote Parents allege that the Policy of the Ludlow School Committee violates three fundamental rights: (1) their parental right to direct the education and upbringing of their children; (2) their parental right to direct the medical and mental health decision-making of their children; and (3) their right to familial privacy. The district court required these claims to meet a "shock the contemporary conscience" standard. This was an incorrect application of the law.

The first step in evaluating a substantive due process claim is determining whether a plaintiff is alleging harm from an executive or legislative act. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *Martinez v. Cui,* 608 F.3d 56, 63-64 (1st Cir. 2010). An executive act is evaluated under the "shock the conscience" standard, *Cnty. of*

Sacramento, 523 U.S. at 846-47, while traditional levels of scrutiny (strict scrutiny, intermediate review, or rational basis) are used for legislative or quasi-legislative actions. *See Mass. Bd. of Retirement v. Murgia,* 427 U.S. 307, 312-14 (1976) (applying levels of scrutiny to legislative actions). In *County of Sacramento*, the Court explained that "only the most egregious" executive actions are subject to substantive due process review, in recognition that they apply to one state actor against few individuals (or only one). 523 U.S. at 846. Further, the Court reasoned that constitutional claims are not supposed to be a general replacement for common law tort claims, which are appropriate for most individual actions. *Id.* at 848-49. Thus, executive actions are reviewed under the high bar of the "shock the conscience" standard. *Id.* at 854-55 (applying "shock the conscience" standard to a case against an individual police officer who decided to undertake a high-speed chase of motorist). As this Court held in *DePoutot v. Raffaelly,* 424 F.3d 112 (1st Cir. 2005), "conscience-shocking conduct is an indispensable element of a substantive due process challenge to *executive* action." *Id.* at 118 n.4 (emphasis added).

Legislative actions, in contrast, represent the deliberative decisions of legislative bodies that apply to many people and situations. Judicial review of their constitutionality is the only method for individuals to vindicate their rights. Legislative actions are, therefore, reviewed under the level of scrutiny analysis. *See generally Lewis v. Brown*, 409 F. 3d 1271, 1273 (11th Cir. 2005) (comparing executive and legislative actions for substantive due process review purposes). Indeed, just last year, this Court affirmed that, in assessing a legislative enactment, strict scrutiny is the appropriate level of scrutiny when fundamental rights are at issue:

> The federal Constitution's guarantee of substantive due process protects individuals against [legislative] state action that transgresses "basic and fundamental principle[s]." *Amsden v. Moran*, 904 F.2d 748, 754 (1st Cir. 1990); *see also Pagan* [*v. Calderon*], 448 F.3d [16,] 32 [(1st Cir. 2006)]. Thus, generally speaking, under the federal Due Process Clause, a state action will be reviewed for strict scrutiny . . . where it interferes with a fundamental right . . . .

Kenyon v. Cedeno-Rivera, 47 F.4th 12, 24 (1st Cir. 2022) (second alteration in the original); *see also McConkie v. Nichols*, 446 F.3d 258, 260-61 (1st Cir. 2006) (applying "shock the conscience" test to executive action).

It has long been established that school board actions are deemed legislative in nature. For example, in *Harrah Independent School District v. Martin*, 440 U.S. 194 (1979), the Supreme Court, in addressing a substantive due process challenge to a school board's rule, stated that it was "endowed with a presumption of *legislative* validity" and decided which of the three levels of scrutiny to apply, rather than applying the "shock the conscience" standard for executive actions. *Id.* at 198-99 (emphasis added); *see, e.g.*, *Tatel v. Mt. Lebanon Sch. Dist.,* 2022 WL 15523185 (W.D. Pa. Oct. 27, 2022) (applying level of scrutiny analysis in challenge to school policy); *Citizens for Equal Educ. v. Lyons-Decatur Sch. Dist.*, 739 N.W.2d 742, 756 (Neb. 2007) (same); *see also Wis. v. Yoder*, 406 U.S. 205 (1972) (not applying the "shock the conscience" standard to parental challenge to state education law); *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1202-03 (10th Cir. 2003) (reversing district court's use of "shock the conscience" standard when parents challenged application of regulation).

The district court clearly acknowledged the legislative nature of the Ludlow School Committee's actions, terming the Policy one "sanctioned by the School Committee." (Appx. 153-54.) Yet, the district

court applied the "shock the conscience" decision-making framework reserved for executive actions. (Appx. 160-61.) This was plain error, requiring reversal.[2]

II. Under Strict Scrutiny Analysis, the Ludlow School Committee's Actions Violate the Parents' Fundamental Rights to Direct the Upbringing and Education of Their Children.

One of the longest established substantive due process rights under the Fourteenth Amendment is parents' rights to direct the upbringing and education—as well as to exercise care, custody, and control—of their children. *See Troxel v. Granville,* 530 U.S. 57, 65 (2000) (citing, *inter alia*, *Pierce v. Soc'y of Sisters,* 268 U.S. 510 (1925); *Meyer v. Neb.,* 262 U.S. 390 (1923)). Parents have "broad parental authority over minor children," and the Supreme Court has "rejected any notion that a child is the mere creature of the state." *Parham v. J.R.* 442 U.S. 584, 602 (1979) (internal quotes omitted). Furthermore,

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[2] While, in their opening brief, the Foote Parents generally argue why the district court's executive action/"shocks the conscience" analysis was flawed for numerous reasons, in their First Amended Complaint, Appellants state both a facial and an as applied challenge of, and seek relief from, the "Protocol and any associated policies, procedures, and practices" of the Committee. (*E.g.*, Appx. 93-95.) Thus, their complaint at bottom clearly is a challenge to legislative actions, not executive ones, that infringe their fundamental rights.

the Supreme Court presumes that "parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Id.* The fact that a child may disagree with his or her parent as to a certain course of action or that the decision involves risks "does not diminish the parents' authority to decide what is best for the child." *Id.* at 604.

Given the historically longstanding and critical nature of these responsibilities, it is not surprising that parental rights with respect to their children are clearly established as fundamental and, accordingly, subject to the highest level of review, strict scrutiny. *See Troxel,* 530 U.S. at 65-66; *id.* at 80 (Thomas, J. concurring). Indeed, in *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court, after identifying parental rights as among the most fundamental of liberty interests protected by the Fourteenth Amendment, noted that no infringement of them is permitted "*at all*" unless it "is narrowly tailored to serve a compelling state interest." *Id.* at 721 (emphasis in original; punctuation conformed) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). As the Supreme Court repeated recently in *Fulton v. Philadelphia,* a government policy can only survive strict scrutiny analysis "if it

advances interests of the highest order and is narrowly tailored to achieve those interests." 141 S. Ct. 1868, 1881 (2021) (internal quote marks and citation omitted). Further, "so long as the government can achieve its interests in a manner that does not burden" the fundamental right, it must do so. *Id.*

As is clear from the allegations pled by the Foote Parents (which the district court rightly assumed were true for purposes of a motion to dismiss under Rule 12(b)(6)), the Ludlow School Committee's decision to act in direct opposition to the Foote Parents' expressed desires fails the strict scrutiny test. The Ludlow School Committee's identified interest was in providing gender nonconforming students with a safe school environment. (Appx. 156.) Assuming *arguendo* that this interest is sufficiently "compelling" to meet the strict scrutiny standard,[3] the

[3] We dispute that this articulation by the school board states a compelling interest, because the true interest being proffered by the school district is to protect the students from their parents at home and to insulate the child's decision at school from the parents at home. This does not state a valid state interest, because parents are the ones with the responsibility to make decisions for their minor children and are assumed as a matter of law, unless adjudicated to be unfit, to act in their children's best interests. *See Troxel*, 530 U.S. at 65-66; *Parham*, 442 U.S. at 602-04; *Doe v. Heck*, 327 F.3d 492, 521 (7th Cir. 2003); *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, 2022 WL 1471372 at *8 (D. Kan. May 9, 2022).

district court itself outlines some of the many ways that the Ludlow School Committee could have met those goals while upholding the Foote Parents' fundamental rights, including by (1) notifying the Foote Parents of their children's questions about gender and transitioning and (2) involving the Foote Parents in discussions and decisions related to how best to assess and support their children. Either or both of these approaches would have been more narrowly tailored ways to address the interest advanced by the Ludlow School Committee without infringing on the Foote Parents' fundamental right to direct the care and upbringing of their children. (Appx. 164-65.)

Additionally, as the district court noted, the Ludlow School Committee, in adopting the Policy, ignored guidance from the State of Massachusetts that parents should be informed of a "young student's" gender nonconformity or transgender status. (Appx. 18.) Instead, the Ludlow School Committee decided, in direct contravention of this guidance and the Supreme Court's holding in *Parham*, to arrogate to itself the position of the chief caregiver and decision-maker with respect to the Foote Parents' children. It did so by:

- Explicitly and intentionally ignoring the Foote Parents' written instructions not to have "any private conversations" with their children with respect to gender identity issues (Appx. 28);
- Intentionally keeping the Foote Parents unaware of their children's expressed desire to identify as a different gender (which included, *inter alia*, allowing the children to use different names and pronouns as well as permitting at least one child to use a different bathroom) *(*Appx. 29); and
- Despite being explicitly questioned by the Foote Parents, refusing to discuss concerns that the school was acting improperly with respect to their children's expressions of gender and gender identity. (Appx. 29-30.)

In taking these actions, the Ludlow School Committee made the Foote Parents' children "creatures of the state" and directly undermined the Foote Parents' right to raise and care for their children—a result both repudiated and precluded by *Parham*. *See* 442 U.S. at 602-04.

In short, the Ludlow School Committee's Policy was intended to, and in fact does, exclude parents—a child's first, fundamental, and most

important support and advocate—from a critical and life-altering process that will have a significant impact on their child and the entire family. The Policy effectuated this monumental change without providing any explanation or process to the Foote Parents. Given that the Policy unequivocally violates the Foote Parents' fundamental right to direct their child's upbringing, education, and care; the Policy is clearly unconstitutional. *See id.*; *Troxel,* 530 U.S. at 65.

Conclusion

This Court should reverse and find that the Ludlow School Committee violated the Foot Parents' fundamental, parental rights.

Respectfully submitted,
this 20th day of March 2023

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of F.R.A.P. 32(a)7(B)(i) and F.R.A.P. 29(a)(5). Exclusive of the exempted portions, this brief contains 2,480 words, including footnotes, in 14-point Century Schoolbook font. This total was calculated with the Word Count function of Microsoft Office Word 365.

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2023, I served the foregoing Brief *Amici Curiae* of The Family Foundation, *et al.*, on all counsel of record through the CM/ECF system. I certify that all counsel of record in the case are registered CM/ECF users.

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