No. 24-3278

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CHRISTIN HEAPS,

Plaintiff-Appellant,

v.

DELAWARE VALLEY REGIONAL HIGH SCHOOL BOARD OF EDUCATION, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court for the
District of New Jersey, No. 3:24-cv-00107 (Castner, J.)

AMICUS BRIEF OF DO NO HARM IN SUPPORT OF APPELLANT

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July 3, 2025

CORPORATE DISCLOSURE STATEMENT

Do No Harm, Inc. has no parent corporation, and no corporation owns 10% or more if its stock.

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INTEREST OF *AMICUS CURIAE*[1]

Do No Harm, Inc., is a nonprofit organization with over 20,000 members, including physicians, nurses, medical students, patients, and policymakers. Do No Harm is committed to ensuring that the practice of medicine is driven by scientific evidence rather than ideology. In recent years, the practice of biology-denying interventions, euphemistically known as "gender affirming care," has become more common—despite the serious harm caused by those medical interventions and the complete lack of reliable evidence of any benefit for minors. Do No Harm recently released a database demonstrating that nearly 14,000 minors were subjected to biology-denying interventions in the United States between 2019 and 2023. *See Do No Harm Launches First National Database Exposing the Child Trans Industr*y, Do No Harm (Oct. 8, 2024), perma.cc/C5U3-7W94.

Part of Do No Harm's mission is to help parents vindicate their rights when schools help "gender transition" their children without their knowledge, participation, or consent. It thus has a direct interest in this important case.

[1] No party's counsel authored this brief in whole or in part; and no party, party's counsel, or person (other than amicus or its counsel) contributed money to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Whether public schools violate parental rights when they secretly transition children is "a question of great and growing national importance." *Parents Protecting Our Children v. Eau Claire ASD*, 145 S.Ct. 14 (2024) (Alito, J., dissental). In this case, the Delaware Valley Regional High School Board of Education applied an official policy to socially transition Christin Heaps's daughter without his knowledge, participation, or consent. The school treated Heaps's daughter as a boy for months, giving her a masculine name and using masculine pronouns. Pursuant to the policy, school officials actively hid these actions from Heaps.

These actions violate Heaps's fundamental parental rights, yet the district court's opinion makes those rights impossible to vindicate. Do No Harm agrees with Heaps that the district court incorrectly denied his motion for a preliminary injunction. Do No Harm writes separately to highlight why the "shocks-the-conscience" standard does not apply here. Though the district court did not evaluate Heaps's claims under this framework, other courts have invoked this test in deciding similar cases. Do No Harm thus seeks to provide this Court with insight into why this "comically vacuous" test should not apply. *Littlejohn v. Sch. Bd. of Leon Cnty.*, 132 F.4th 1232, 1280 (11th Cir. 2025) (Newsom, J., concurring).

Though courts sometimes ask whether government misconduct "shocks-the-conscience" when evaluating substantive-due-process claims, that standard does not apply here. The Supreme Court has articulated two alternative tests for substantive-due-

process claims. Under the first, a plaintiff can allege the infringement of a fundamental constitutional right—one that is "'deeply rooted in our history and tradition'" and "'essential to our Nation's scheme of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Once they do so, strict scrutiny applies, and "the Government can act only by narrowly tailored means that serve a compelling state interest." *Dep't of State v. Muñoz*, 602 U.S. 899, 910 (2024). Alternatively, if a plaintiff cannot allege the infringement of a fundamental right, the "shocks-the-conscience" test is an alternative path to liability. But it is not an *additional* requirement that plaintiffs who *have* a fundamental right must satisfy.

Even if the shocks-the-conscience test applies in fundamental-rights cases, it never applies when the plaintiff challenges legislative action, like the policy challenged here. Heaps alleges a violation of his substantive-due-process rights based on an official school policy, under which the school secretly socially transitioned his daughter, and its application to his child. His claims thus challenge legislative action, and the shocks-the-conscience test does not apply for that independent reason.

This Court should reverse the decision below.

ARGUMENT

I. The "shocks-the-conscience" standard does not apply to Heaps's claims.

This Court recognizes the "primacy" of "parents' authority" to "raise and nurture their children" as a "fundamental right." *Gruenke v. Seip*, 225 F.3d 290, 305 (3rd Cir. 2000). This interest is protected by the Due Process Clause of the Fourteenth

Amendment. *See Mammaro v. N.J. Div. of Child Prot. & Permanency*, 814 F.3d 164, 170 (3rd Cir. 2016). That Clause substantively protects certain fundamental rights—*i.e.*, those rights which are "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs*, 597 U.S. at 231. Where fundamental rights or interests are involved, this Court applies strict scrutiny. *See Gruenke*, 225 F.3d at 305 ("the primacy of the parents' authority … should only yield where the school's action is tied to a compelling interest"); *Tatel v. Mt. Lebanon Sch. Dist.*, 752 F. Supp. 3d 512, 560 (W.D. Pa. 2024). And "[w]hen a fundamental right is at stake, the Government can act only by narrowly tailored means that serve a compelling state interest." *Muñoz*, 602 U.S. at 910.

The Fourteenth Amendment bars States from infringing parents' right to direct "the care, custody, and control of their children." *Troxel v. Granville,* 530 U.S. 57, 65-66 (2000) (collecting cases). That right is infringed when officials transition children without their parents' knowledge, participation, or consent. *Mirabelli v. Olson*, 2025 WL 42507, at *10 (S.D. Cal. Jan. 7). Though parents lack an affirmative right to "obtain" risky treatments for their children, *Eknes-Tucker v. Gov'r of Ala.*, 80 F.4th 1205, 1224 (11th Cir. 2023), they have a negative right to avoid the State imposing those treatments without their knowledge or consent, *L.W. v. Skrmetti*, 73 F.4th 408, 418 (6th Cir. 2023); *e.g.*, *Arnold v. BOE of Escambia Cnty.*, 880 F.2d 305, 313 (11th Cir. 1989) (school violated parents' constitutional rights by secretly helping their child get an abortion).

Though courts sometimes ask whether the misconduct "shocks-the-conscience," that standard does not apply here for two independent reasons. That test is inapplicable in a case, like this one, that alleges a violation of fundamental rights. And that test is inapplicable in a case, like this one, that challenges legislative conduct.

A. The "shocks-the-conscience" test does not apply when a plaintiff alleges a violation of a fundamental right.

While this Court has acknowledged that "executive action violates substantive due process only when it shocks the conscience," *UA Theatre Cir. v. Twp. of Warrington*, 316 F.3d 392, 399-400 (3rd Cir. 2003) (Alito, J.), that test does not apply when a plaintiff alleges the violation of a fundamental right. The shocks-the-conscience standard is an alternative way to prove a substantive-due-process violation. According to the Supreme Court, any state action that deprives someone of life, liberty, or property can violate due process if it's "arbitrary." *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992). The shocks-the-conscience test is a last resort: Plaintiffs who lack a fundamental right can still prevail by satisfying this demanding standard. *McKinney v. Pate*, 20 F.3d 1550, 1556 & n.7 (11th Cir. 1994) (en banc). But the shocks-the-conscience test is not an *additional* requirement that plaintiffs who *have* a fundamental right must satisfy.

Binding precedent explains that the shocks-the-conscience and fundamental-rights tests are alternatives ways for a plaintiff to prevail. As the Supreme Court has explained, "substantive due process prevents the government from engaging in 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) (cleaned up; emphasis added). This Court, too, has recognized the tests as alternatives. *See B&G Constr. Co. v. Dir, Off. of Worker's Comp.*, 662 F.3d 233, 255 (3rd Cir. 2011) (quoting *Salerno*). Other courts have too. *E.g.*, *Poe v. Leonard*, 282 F.3d 123, 138-39 (2d Cir. 2002) (tests are "independen[t]"); *D.B. v. Cardall*, 826 F.3d 721, 740 (4th Cir. 2016); *Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999); *Martinez v. Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003); *Pediatric Specialty Care v. Arkansas DHS*, 364 F.3d 925, 932 (8th Cir. 2004); *SO Apartments v. San Antonio*, 109 F.4th 343, 352 (5th Cir. 2024).

The Ninth Circuit recently applied this framework correctly. The facts were identical: "Consistent with a [school] policy, the [school] began using [a] child's new preferred name and pronouns without informing [her parent]." *Regino v. Staley*, 133 F.4th 951, 956 (9th Cir. 2025). The parent argued that this "enforcement" of school policy violated "substantive" due process "as-applied." *Id.* And the district court "dismissed [the parent's] complaint." *Id.* Disagreeing, the Ninth Circuit faulted the district court for not applying the Supreme Court's framework on fundamental rights. *Id.* at 960. The court did not address whether the policy's enforcement "shocks the conscience," precisely because the plaintiff could alternatively prevail under the "different" standard that governs "fundamental rights." *Id.* n.5 (citing cases treating the tests as disjunctive).

Heaps alleges a violation of his fundamental rights. He alleges that the school—acting under an official policy—treated his daughter as a boy for months and hid it from him. Blue-Br. 2-4. Because those actions implicate Heaps's fundamental right to direct

"the care, custody, and control" of his child and thus trigger strict scrutiny, he is likely to succeed on the merits of his claim. *Troxel,* 530 U.S. at 65-66. Indeed, the school district secretly transitioned Heaps's daughter not only against his will but also without his knowledge. Those actions are "beyond troubling." *Kaltenbach v. Hilliard City Schs.*, 2025 WL 1147577, at *1 (6th Cir. Mar. 27) (Thapar, J., concurring). And they violate Heaps's fundamental rights.

B. The "shocks-the-conscience" test does not apply to legislative action.

Even in substantive-due-process cases involving no fundamental right, the Supreme Court distinguishes between "legislative" actions and "executive" actions. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (explaining that the "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue"). This Court has followed suit, explaining that a "different analysis is applicable depending on" whether an "executive or legislative action" is "implicated." *Evans v. Sec'y Pa. Dep't of Corr.*, 645 F.3d 650, 659-60 (3rd Cir. 2011); *see also Hancock v. Cnty. of Rensselear*, 882 F. 3d 58, 65 n.2 (2d Cir. 2018) (describing the distinction as "functional," meaning "[s]ome types of executive action, such as regulations," are still considered "legislative action").

Substantive-due-process challenges to legislative actions never trigger the "shocks-the-conscience" test. "[L]egislative conduct … need not be conscience-shocking." *Foote v. Ludlow Sch. Comm.*, 128 F.4th 336, 346 (1st Cir. 2025). Instead, this Court

simply asks whether fundamental rights are involved based on whether it is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." *Child.'s Health Def., Inc. v. Rutgers*, 93 F.4th 66, 78 (3rd Cir. 2024) (cleaned up). For fundamental rights, the Court applies strict scrutiny, and the government regulation must be "narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. 721.

Heaps challenges legislative action. As the First Circuit recently explained, "statutes and governmental policies are typically deemed legislative," while "individual acts of government officials" that are "untethered from any policy" are "executive." *Id.* at 345. Here, Heaps challenges an official school policy, under which the school socially transitioned his daughter in secret by treating her as a boy for months "while purposely keeping such information secret from her father," and insisted it will continue transitioning his daughter despite his objections. Compl. ¶¶1, 3, 39-41, 47. Earlier this year, the First Circuit treated the same conduct as "legislative" because the school's policy "applies broadly to all students" and was "administered by multiple governmental actors." *Foote*, 128 F.4th at 346-47. Though the parents in *Foote* "also challenged some individual actions" of school officials, the court concluded that "those discrete decisions by individual educators" still fell into the "legislative bucket" because they "were taken to actively implement and reinforce" the policy. *Id.* That is precisely the case here.

CONCLUSION

The Court should reverse the decision below and remand for further proceedings.

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7) because it contains 1,948 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word in 14-point Garamond font.

Dated: July 3, 2025 */s/ Cameron T. Norris*

CERTIFICATE OF SERVICE

I filed this brief on the Court's e-filing system, which will email everyone requiring notice.

Dated: July 3, 2025 */s/ Cameron T. Norris*