No. 24-3278

United States Court of Appeals for the Third Circuit

CHRISTIN HEAPS,
PLAINTIFF-APPELLANT,

v.

DELAWARE VALLEY REGIONAL HIGH SCHOOL BOARD OF EDUCATION; SCOTT MCKINNEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF SCHOOLS; ASHLEY MIRANDA, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SCHOOL COUNSELOR; ANGELICA ALLEN-MCMILLAN, IN HER OFFICIAL CAPACITY AS ACTING COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF EDUCATION; JOHN ROES 1-10, SAID NAMES BEING FICTITIOUS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES; MATTHEW J. PLATKIN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NEW JERSEY,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, NO. 24-CV-107, HON. GEORGETTE CASTNER, PRESIDING

BRIEF OF DEFENDING EDUCATION AS *AMICUS CURIAE* SUPPORTING APPELLANT AND REVERSAL

CHRISTOPHER MILLS
Spero Law LLC
557 East Bay Street #22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

Counsel for *Amicus Curiae*

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Pursuant to Federal Rule of Appellate Procedure 26.1, Defending Education does not have a parent corporation, it is not a publicly traded company, and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

Defending Education is a national, nonprofit membership association. Its members include many parents with school-aged children. Launched in 2021, it uses advocacy, disclosure, and litigation to combat the increasing politicization and indoctrination of K-12 and postsecondary education. It has a substantial interest in this case. The Fourteenth Amendment protects the fundamental right of parents to direct the upbringing and education of their children. The logic of the district court's decision deprives parents, including members of Defending Education, of this fundamental right on intensely personal matters of gender identity.[1]

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the *amicus curiae*, its members, or its counsel—contributed money intended to fund preparing or submitting the brief. All parents consented to its filing.

INTRODUCTION

Facing parents of public school children is an explosion of policies that allow school personnel to socially transition their young children—giving children new names, pronouns, restrooms, and field trip bunks—in secret. Defending Education has found that nearly a quarter of the nation's students are subject to these policies. These "social transitions" are not neutral interventions. While the overwhelming majority of children with gender incongruity grow out of it, most children who are socially transitioned do *not*. Rather, they go on to increasingly invasive and irreversible interventions—puberty blockers, sterilizing cross-sex hormones, and experimental genital surgeries. Yet schools are refusing to even tell parents that they are setting their children on this dangerous pathway.

If the fundamental parental right to direct a child's upbringing protects anything, it protects against state-sanctioned transition of a child without parents' knowledge. But courts are leaving parents with no way to vindicate this right. When parents challenge a school's policy, they are often told that their concerns are too speculative so they lack standing. And when parents challenge a school's application of its policy to their child, some courts—like the one below—say that a school's concealment of its transition does "not rise to the level of active deception" that would interfere with parents' rights. To correct this deprivation of parents' rights, the Court should reverse.

ARGUMENT

I. Secretly transitioning children is a widespread problem in public schools.

The phenomenon of public schools secretly socially transitioning young children has exploded in recent years. Defending Education keeps track of school districts with policies stating that district personnel can or should keep a student's transgender status hidden from parents. At last count, 1,215 school districts nationwide were reported to have such policies—and the actual figure is likely higher. These districts cover over 12.3 million students, roughly a quarter of the public school student population.[2] These policies draw on ideological guidance from groups like the National Education Association, which instructs school personnel not to "disclose a student's actual or perceived sexual orientation, gender identity, or gender expression to" "parents" "unless required to do so by law."[3] The NEA urges schools "to have a plan in place to help avoid any mistakes or slip-ups" that might clue in "unsupportive parents" about what schools are doing to their children.[4] Likewise, New Jersey encourages its school districts to lie to parents: "There is no

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[2] *See* Defending Education, *List of School District Transgender–Gender Nonconforming Student Policies*, https://defendinged.org/investigations/list-of-school-district-transgender-gender-nonconforming-student-policies/ (last updated Apr. 21, 2025); National Center for Education Statistics, *Fast Facts*, https://perma.cc/RZ4B-MWU7.

[3] *Legal Guidance on Transgender Students' Rights* 6 (June 2016), https://perma.cc/26N8-23D5.

[4] *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* 16, https://perma.cc/US5J-6AZW.

affirmative duty for any school district personnel to notify a student's parent or guardian of the student's gender identity or expression," the State insists, and schools should protect against any "inadvertent[] disclos[ure]" to parents. JA85.

Thus, schools across the country are socially transitioning young students and concealing it from parents. The stories shared by parents like Mr. Heaps are heartbreaking. In Florida, Wendell and Maria Perez said that they found out that a school "employee had been counseling their 12-year-old about 'gender confusion' for months" "only after their child made two suicide attempts."[5] An Ohio school district apparently "encouraged young children to become transgender—then lied to parents about what was happening"—and one of those children also "attempted to commit suicide."[6] One mother in California "went two years without knowing her sixth grader had transitioned at school."[7]

What's more, no one can pretend that social transitions are some neutral intervention. As the United Kingdom's Cass Report—a seminal review of evidence about childhood gender transition—explained, "it is important to view [social transition] as an active intervention because it may have significant effects on the

[5] Katie J. M. Baker, *When Students Change Gender Identity, and Parents Don't Know*, N.Y. Times (Jan. 22, 2023), https://www.nytimes.com/2023/01/22/us/gender-identity-students-parents.html.
[6] Order 2, *Kaltenbach v. Hilliard City Schs.*, No. 24-3336, Dkt. 59 (6th Cir. Mar. 28, 2025) (Thapar, J., concurring).
[7] Donna St. George, *Gender Transitions at School Spur Debates*, Wash. Post (July 18, 2022), https://perma.cc/BVZ5-T3PK.

child or young person in terms of their psychological functioning and longer-term outcomes."[8] And "[t]he importance of what happens in school cannot be under-estimated."[9] Absent interventions like social transitioning, the vast majority of "children with gender dysphoria grow out of it." *Eknes-Tucker v. Governor of Alabama*, 114 F.4th 1241, 1268 (11th Cir. 2024) (Lagoa, J., concurring). But one "study found that 93% of those who socially transitioned between three and 12 years old continued to identify as transgender" five years later.[10] Another "study looking at transgender adults found that lifetime suicide attempts and suicidal ideation in the past year was higher among those who had socially transitioned as adolescents compared to those who had socially transitioned in adulthood."[11]

Social transition is the start of a conveyor belt that sends a child through the medical transition pathway. The U.S. Department of Health and Human Services recently explained that studies "suggest[] the majority of children who socially transition before puberty progress to medical interventions."[12] According to the Endocrine Society—a proponent of medically transitioning children—"[i]f children

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[8] Hilary Cass, *Independent Review of Gender Identity Services for Children and Young People* 158 (Apr. 2024), https://perma.cc/74EA-L76V.
[9] *Id.*
[10] *Id.* at 162.
[11] *Id.* (internal quotation marks omitted).
[12] U.S. Dep't of Health & Human Servs., *Treatment for Pediatric Gender Dysphoria: Review of Evidence and Best Practices* 71 (May 1, 2025), https://perma.cc/A322-8Z8L ("HHS Report").

have completely socially transitioned, they may have great difficulty in returning to the original gender role."[13] The Society even admitted that "there are currently no criteria to identify" when gender dysphoria could be reduced by early social transitions.[14] Social transitions are thus likely to usher children to dangerous, unproven, and sterilizing sex hormones and surgeries. *See Eknes-Tucker*, 114 F.4th at 1260–61, 1268–70 (Lagoa, J., concurring); *see also United States v. Skrmetti*, 145 S. Ct. 1816, 1836–37 (2025) (emphasizing that the Cass Review "characterized the evidence concerning the use of puberty blockers and hormones to treat transgender minors as 'remarkably weak,' concluding that there is 'no good evidence on the long-term outcomes of interventions to manage gender-related distress'"); *id.* at 1841–43 (Thomas, J., concurring) (detailing the risks).

Even state laws purporting to ban secret transitioning policies may not solve the problem. The ACLU has a threatening "open letter" to schools claiming that it is somehow unconstitutional "to disclose a student's sexual orientation or gender identity" "to a student's parents."[15] The Biden Administration took a similar position, suggesting that secret transitioning policies are required under Title IX and

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[13] Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102(11) J. Clinic. Endocrinology & Metabolism 3879 (Nov. 1, 2017).
[14] *Id.*
[15] ACLU, *Open Letter to Schools About LGBTQ Student Privacy* (Aug. 26, 2020), https://perma.cc/KM2H-2MT3.

FERPA.[16] School districts commonly make similar claims about FERPA—the district's policy here cites it, JA80—even though rights to educational records under FERPA are the *parents'* until the student turns 18. 20 U.S.C. § 1232g(d). Though the Department of Education is now investigating schools with secret transitioning policies for violating FERPA,[17] all this confirms the need for parents to be able to defend their fundamental right to direct their children's upbringing. Policies that let school officials transition children in secret undermine parents' ability to provide for their children's wellbeing and harm children.

II. The decision below leaves parents without meaningful recourse to vindicate their constitutional rights.

Judicial recourse was already elusive for the many parents seeking to vindicate their constitutional right to direct their children's upbringing against schools secretly trying to transition their children. Courts confronting similar cases have often denied standing to parents of children who have not yet been covertly transitioned by their schools. In effect, these courts have told parents to wait until their child is secretly socially transitioned—no matter if, by design, they will not

[16] *See* Kate Anderson et al., *The Biden Administration's Proposed Changes to Title IX Threaten Parental Rights*, Federalist Soc'y (Jan. 5, 2023), https://fedsoc.org/commentary/fedsoc-blog/the-biden-administration-s-proposed-changes-to-title-ix-threaten-parental-rights.

[17] U.S. Department of Education, *Press Release: U.S. Department of Education Directs Schools to Comply with Parental Rights Laws* (Mar. 28, 2025), https://perma.cc/K87Q-L96U.

know that. Yet parents are now told by the district court's decision that even once that happens, and they bring an appropriate lawsuit, they cannot prevail because mere concealment of the child's transition does "not rise to the level of active deception resulting in a constitutional violation." JA171 n.10. And even if school conduct rose to that level, the district court then held that the school's conduct would satisfy strict scrutiny. JA35–36. These understandings are wrong, and they would make it impossible for parents to vindicate their constitutional rights—depriving them of the fundamental ability to guide their children's upbringing and education.

A. Courts have denied standing to challenge secret transition policies.

Courts routinely—and wrongly—deny standing to parents who challenge similar secret transition policies before they are imposed on their child. Typical is one Fourth Circuit decision, which held that such parents lack a current injury because their children did not yet have "any discussions with school officials about gender-identity or gender-transition issues"—so "no information is being withheld." *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 78 F.4th 622, 629 (4th Cir. 2023). The Fourth Circuit also said that no impending injury existed because the parents had "not alleged that they suspect their children might be considering gender transition." *Id.* at 630. The obvious response is that the *point* of these policies is to deny parents that knowledge, but the Fourth Circuit swept that aside. The court held it irrelevant whether "the government hides information" that would let the

parents "determine whether they had been injured" enough for the court's liking. *Id.* at 631.

Other courts have come to the same conclusion. One held that parents' "worry and concern do not suffice to show that any parent has experienced actual injury." *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist.*, 95 F.4th 501, 506 (7th Cir. 2024). Another went further, holding that "[e]ven if the child" "identifies as transgender," "standing still does not exist unless [the] child has some interaction with the District pursuant to its gender policy." *Doe v. Pine-Richland Sch. Dist.*, 2024 WL 2058437, at *9 (W.D. Pa. May 7, 2024). Similar decisions abound. *See Kaltenbach v. Hilliard City Schs.*, 730 F. Supp. 3d 699, 703 (S.D. Ohio 2024) (holding that parents lack standing because they "offer no allegations that their children have told or will tell the school that they are (or may be) LGBTQ+"); *Lee v. Poudre Sch. Dist.*, 2023 WL 8780860, at *7 (D. Colo. Dec. 19, 2023) (parents of "disenrolled" student lack standing for prospective relief).

To be sure, denying standing to parents whose children are subject to secret transition policies is wrong. These policies "specifically encourage school personnel to keep parents in the dark about the 'identities' of their children, especially if the school believes that the parents would not support what the school thinks is appropriate." *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist.*, 145 S. Ct. 14, 14 (2024) (Alito, J., dissenting from denial of certiorari). Under these

policies, "parents' fear that the school district might make decisions for their children without their knowledge and consent is not 'speculative'"—parents "are merely taking the school district at its word." *Id.* But the reality is that many courts deny standing in these circumstances, perhaps "as a way of avoiding some particularly contentious constitutional questions." *Id.* at 14–15.

Defending Education experienced the use of standing to insulate these harmful policies from judicial review. On behalf of parent members, it sued the Linn-Mar Community School District in Iowa for a "parental exclusion policy" depriving parents of students in seventh grade and up the right to know their child's gender identity at school. The district court refused to find standing for this claim, reasoning that "no one has been denied information related to their child's gender identity or Gender Support Plan"—*yet*. *Parents Defending Educ. v. Linn-Mar Cmty. Sch. Dist.*, 629 F. Supp. 3d 891, 908 (N.D. Iowa 2022). The court also noted that one parent "has freely withdrawn their child from the school district," and held that "the harm of being 'forced' out of the school district is self-inflicted." *Id.* On appeal, the Eighth Circuit declined to reach the issue, holding that it was moot. *Parents Defending Educ. v. Linn-Mar Cmty. Sch. Dist.*, 83 F.4th 658, 665–66 (8th Cir. 2023).

Here, however, Mr. Heaps navigated Article III's waters, which can be uniquely treacherous for disfavored or controversial rights. The Defendants were caught hiding from Mr. Heaps that for *months* "the school was referring to Jane by

a male name and pronouns"—and Mr. Heaps found out only because "another parent called Jane by a male name in [his] presence." JA6. In other words, the school's conduct let another parent know deeply personal facts about Jane that her own father did not. And "[s]ince commencing this lawsuit," Mr. Heaps received a visit from "the Department of Children and Families, Division of Child Protection" "to conduct a wellness check," along with threats from the school to hold Jane back. JA154; JA230 ¶ 30. Yet even though Mr. Heaps overcame jurisdictional hurdles—because the school had started secretly transitioning his child—the district court held that he could not vindicate his parental rights because the school was not "requiring or prohibiting some activity," and would satisfy strict scrutiny regardless. JA27. As discussed next, those holdings were error, but the point here is that they would make it impossible for parents to challenge secret transition policies.

B. Secret transition policies burden parents' rights.

The district court's denial of relief hinged on a supposed distinction "between school officials who passively recognize[] students by their preferred gender identities, and officials who proactively interfere[] with the parent-child relationship." JA32. According to the court, parental rights to direct their children's upbringing only come into play when the government is "constraining or compelling an[] action by the parents." *Id.* And, the court reasoned, the school did not "coerce[] Jane into socially transitioning" or "prevent[] or discourage[] Jane from discussing

the issue with" her father. JA31. Thus, the court concluded, Mr. Heaps had not shown the requisite "proactive[] interfere[nce] with the parent-child relationship." JA32.

This holding was error, for at least two reasons. *First*, well-settled law recognizes that government action short of direct compulsion or prohibition can burden constitutional rights. The district court provided no justification for treating the parental right to direct a child's upbringing as second-class. *Second*, classifying secret transitioning as some passive activity short of deception blinks reality. By the school's belief, it was critical to change Jane's name and pronouns in all settings—so critical that its policy treats Jane's birth name as wholly "confidential," JA79, 80—*except* when discussing Jane with Mr. Heaps. If that is not "active deception," those words lack meaning.

1. Secret social transitions are a cognizable burden on a deeply-rooted constitutional right.

Secret transitioning implicates the deeply-rooted parental right to direct their child's upbringing, and burdening that right gives rise to strict scrutiny—regardless of whether the school can be said to have engaged in some direct compulsion.

A century ago, the Supreme Court recognized that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925). The Constitution confers a fundamental right "to direct the upbringing and education of children." *Id.* at 534.

Mandatory public schools are a recent development. The Supreme Court has characterized "school authorities [as] acting *in loco parentis*," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986), drawing on Blackstone's description:

> A parent "*may* . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, *as may be necessary to answer the purposes for which he is employed*."

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995) (emphases added) (quoting 1 William Blackstone, *Commentaries on the Laws of England* 441 (1769)).

In loco parentis does not mean "displace parents." *Gruenke v. Seip*, 225 F.3d 290, 307 (3d Cir. 2000). "It is not educators, but parents who have primary rights in the upbringing of children." *Id.* Rather, *in loco parentis* rests on a theory of delegation: parents delegate parental authority to the school while their children are not in their custody—but only partial delegation based on educational purpose. On this doctrine, teachers have incidental authority to teach and ensure order to the extent necessary to educate the child. But the parent, not the teacher, retains overall authority over the child's upbringing and education. "It is a dangerous fiction to pretend that parents simply delegate [all] their authority . . . to public school authorities." *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring).

"School officials have only a secondary responsibility and must respect [parents'] rights." *Gruenke*, 225 F.3d at 307.

The common law never envisioned that schools could override parental authority. When schools took actions that exceeded the bounds of parents' partial delegation, courts held the schools liable. *See, e.g.*, *Hailey v. Brooks*, 191 S.W. 781, 783 (Tex. Civ. App. 1916) (delegation is "limited" and school has only "reasonably necessary" powers); *Vanvactor v. State*, 15 N.E. 341, 342 (Ind. 1888) (teacher's delegation is "restricted to the limits of his jurisdiction and responsibility as a teacher"); *Guerrieri v. Tyson*, 24 A.2d 468, 469 (Pa. Super. 1942) (school could not dictate how to treat student's injury); *State v. Bd. of Educ. of City of Fond du Lac*, 23 N.W. 102, 104 (Wis. 1885) (school could not punish student for failing to collect firewood); *Hardy v. James*, 5 Ky. Op. 36, 1872 WL 10621, at *1 (1872) (school could not punish child for "trivial" playground disagreement); *State v. Ferguson*, 144 N.W. 1039, 1044 (Neb. 1914) (school could not force student to take a cooking class).

"If *in loco parentis* is transplanted from Blackstone's England to the 21st century United States, what it amounts to is simply a doctrine of inferred parental consent to a public school's exercise of a degree of authority that is commensurate with the task that the parents ask the school to perform." *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 200 (2021) (Alito, J., concurring). That task is education of

the student—not overriding parental choices about their child's upbringing. There is no reason to think that parents have delegated authority to schools to transition their own child's gender—and withhold the knowledge that is happening from the parents whose power the schools are purporting to exercise.

Parents "have a right to direct their minor child's education which cannot be accomplished unless they are accurately informed." *Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs.*, 680 F. Supp. 3d 1250, 1277 (D. Wyo. 2023). Even courts rejecting similar claims have recognized the obvious reality that "knowing that the Student had requested the use of an alternative name and pronouns in school might inform how the Parents respond to and direct their child's gender expressions outside of school." *Foote v. Ludlow Sch. Comm.*, 128 F.4th 336, 355 (1st Cir. 2025).

A burden on the parental right to direct their child's upbringing triggers strict scrutiny, no matter whether the school has engaged in some direct compulsion. The district court believed that the parental right extends no further than "constraint or compulsion" of the child or parent. JA164. This is an "alarmingly narrow" view of the constitutional "guarantee as nothing more than protection against compulsion or coercion." *Mahmoud v. Taylor*, No. 24-297, 2025 WL 1773627, at *19 (U.S. June 27, 2025). By deceiving parents about their children, the school district is *burdening* parents' rights. Forcing parents to try to work around or counteract that burden is a

constitutional injury, as confirmed by both relevant Supreme Court precedent and other areas of constitutional law.

The Supreme Court's foundational parental right cases reject the district court's logic. For instance, the Court in *Meyer v. Nebraska*, 262 U.S. 390 (1923), invalidated a state statute that restricted the teaching of a foreign language to children in school. It made no difference that the law was not an absolute constraint: parents remained free to "teach[] [a] [foreign] language on Saturday or Sunday," or outside school hours. *Nebraska Dist. of Evangelical Lutheran Synod of Missouri, Ohio, & Other States v. McKelvie*, 104 Neb. 93, 175 N.W. 531, 535 (1919). But the Court recognized "the power of parents to control the education of their own." *Meyer*, 262 U.S. at 401.

Likewise, other constitutional rights can be infringed by "indirect coercion or penalties," "not just outright prohibitions" or compulsion. *Carson v. Makin*, 596 U.S. 767, 778 (2022) (cleaned up) (Free Exercise Clause); *see Mahmoud*, 2025 WL 1773627, at *14 (noting that "the Free Exercise Clause protects against policies that impose more subtle forms of interference"). "[I]ndirect 'discouragements'" can "have the same coercive effect upon the exercise of [constitutional] rights as imprisonment, fines, injunctions or taxes." *Am. Commc'ns Ass'n, C.I.O., v. Douds*, 339 U.S. 382, 402 (1950) (Free Speech Clause); *see Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 190 (2024) (similar); *see also Anderson v. Celebrezze*, 460 U.S. 780,

793 (1983) (right to vote). There is no reason to treat parents' fundamental right to direct their children's upbringing differently.

On top of all that, it is not obvious that the school's actions did not compel or constrain action. As discussed more next, withholding information from parents about their child's core identity constrains parents' understanding and decisions about upbringing. And giving the imprimatur of official approval to a child's chosen identity puts great pressure on the child to continue with that identity—and to go along with the school's approved measures to keep the identity secret from parents. "The State exerts great authority and coercive power through public schools because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Mahmoud*, 2025 WL 1773627, at *17 (cleaned up); *see id.* at *19 ("The government's operation of the public schools . . . implicates direct, coercive interactions between the State and its young residents.").

In short, in a world in which schools "routinely send notes home to parents about lesser matters," such as "playground tussles, missing homework, and social events,"[18] there is no justification for withholding information about the child's preferred name and identity from parents. That withholding burdens parents' fundamental rights.

[18] St. George, *supra* note 7.

2. The goal of secret social transitions is active deception.

The district court's merits analysis was premised on its view that the school's conduct did "not rise to the level of active deception resulting in a constitutional violation." JA171 n.10. But the whole point of using Jane's actual name *only* with Mr. Heaps was to actively deceive him. On the school's belief, it was critical to change Jane's name and pronouns for all school purposes, so all "[s]chool staff members" had to "refer to the student in accordance with the student's chosen name and pronoun." JA78. The school considered this so critical that Jane's birth name became "confidential." JA79, 80.

But the school still used this "confidential" birth name with one person: Jane's father. Indeed, the school embarked on a mission to deceive Doe, "including by not changing [Jane's] name in the school's system and not announcing [Jane's new name] over the school's PA system" so that "her sibling" would not "learn of her social transition" and "cause issues for her at home." JA122 ¶¶ 33–34. The school warned Jane's teachers that Mr. Heaps "was not aware of the social transition." *Id.* ¶ 32.

The point of these machinations is not hard to grasp. It was to deceive Mr. Heaps. Calling this anything short of "actual deception" is incredible: the school intentionally used a name it considered otherwise void solely with Jane's father so he would not know that it was secretly transitioning his daughter. This fits neatly

within the common definition of "deception": "The act of deliberately causing someone to believe that something is true when the actor knows it to be false." *Deception*, Black's Law Dictionary (12th ed. 2024).

The school and the district court found it meaningful to repeatedly emphasize that the school's policy "does not permit 'staff members [to] lie to parents or guardians if they inquire about their child's gender identity or expression.'" JA32; *see* JA122 ¶ 27 (school counselor claiming that "I never lied to Doe"). But deception extends beyond outright lies. And the existence of deception here could not turn on whether a parent happened to ask, "Are you lying to me right now about my child's name?" The only accurate answer to that question, by the way, would be "yes," which only underscores that the school is actively deceiving parents even before parents think to ask a magic question that will end the school's deceit.

This "manipulative" conduct by the school burdened Mr. Heaps's parental rights. *Anspach v. City of Philadelphia, Dep't of Pub. Health*, 503 F.3d 256, 266 (3d Cir. 2007). The district court's contrary conclusion was error.

C. Secret transitioning policies could not satisfy strict scrutiny.

The district court's alternative holding that the school district's actions here satisfy strict scrutiny was also wrong. "[T]he primacy of the parents' authority" over the upbringing of their children may "yield only where the school's action is tied to a compelling interest." *Gruenke*, 225 F.3d at 305. "[T]o survive strict scrutiny," the

school's actions "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 213 (3d Cir. 2004) (internal quotation marks omitted). This "is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). This "stringent standard is not watered down but really means what it says." *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 484 (2020) (cleaned up). Laws "will survive strict scrutiny only in rare cases." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). "[O]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (cleaned up). The school must demonstrate *specifically* that "application of the [legal] burden to [Mr. Heaps] represents the least restrictive means of advancing a compelling interest." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) (cleaned up). The school must also "specifically identify an actual problem" and show that its actions were "actually necessary to the solution." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011) (cleaned up). Even at the preliminary injunction stage, the government must shoulder these heavy burdens. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 669 (2004).

The district court said that "protecting transgender students from discrimination at school and of fostering a diverse learning environment are

compelling state interests." JA35. And, with no discussion, the court said that "there is no less restrictive alternative that would achieve the State's goal of ensuring safe and supporting learning environment for transgender students." JA36 (cleaned up). Both parts of this analysis are deficient.

1. Defendants failed to prove a compelling government interest.

On a compelling government interest, the first problem is that neither of the court's asserted interests are implicated here. The focus of Mr. Heaps's complaint is that the school transitioned Jane while affirmatively misrepresenting its actions to him. The school could have used the same name for Jane with Mr. Heaps that it believed was so critical to use with everyone else, but it refused to. If anything, the school's policy appears to *discriminate* on the basis of transgender status, as it does not appear that the school will deceive parents of other children about their school identities. Actively deceiving Mr. Heaps has nothing to do with preventing discrimination at school.

Likewise, a "diverse learning environment" is both devoid of meaning and has nothing to do with telling Mr. Heaps the truth. Even if such an environment is a "commendable goal[], [it is] not sufficiently coherent for purposes of strict scrutiny," and "it is unclear how courts are supposed to measure" it. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 214 (2023). This interest is "inescapably imponderable." *Id.* at 215. What's more, the school

"fail[s] to articulate a meaningful connection between" deceiving parents like Mr. Heaps and a "diverse learning environment." *Id.* If anything, the school's policy seems designed to maximally frustrate parents and result in the disenrollment of children from public school—as usually happens in similar cases. *See, e.g.*, *Lee*, 2023 WL 8780860, at *7; *Tatel v. Mt. Lebanon Sch. Dist.*, 637 F. Supp. 3d 295, 306 (W.D. Pa. 2022); *Parents Defending Educ.*, 629 F. Supp. 3d at 908.

Thus, "[t]he government's assertion of compelling interests is just that: a bare recital unmoored from the specific circumstances of this case." *United States v. Marcavage*, 609 F.3d 264, 288–89 (3d Cir. 2010). The Constitution "demands a more precise analysis." *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021).

Another compelling government interest problem is that the school's policy is underinclusive by its own terms. "A law does not advance an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Espinoza*, 591 U.S. at 486 (cleaned up). As the district court repeatedly emphasized, the policy does not permit the school district to continue lying *if* the parent happens to ask the right questions. According to the school counselor, "if [Mr. Heaps] had asked me or otherwise approached me to discuss Jane's gender identity, I would have advised him of the situation concerning her social transition." JA121 ¶ 25. But if deceiving parents is so critical to "protecting transgender students from discrimination at school" and "fostering a diverse learning

environment," how could the deception end simply because a parent asks? Whatever the reason for this divergence, "[t]he consequence is that [the school's] regulation is wildly underinclusive when judged against its asserted justification[s]." *Brown*, 564 U.S. at 802. That "is alone enough to defeat it." *Id.*

The policy is underinclusive in other ways, too. It is remarkably cagey on whether, absent a parent's direct question, school officials *should* deceive the parent. The district superintendent summarized the policy as "not affirmatively requir[ing] teachers and staff members to notify parents about a student's expressed gender identity." JA126 ¶ 7. That makes it a matter of school official discretion whether to tell parents the truth. But again, if deception were truly a matter of necessity, the policy could not leave this decision to the whims of individual school officials. These discretionary "exceptions undermine[]" the school's claim of a compelling government interest. *Fulton*, 593 U.S. at 542.

More fundamentally, the policy could not advance any interest in protecting transgender children because it harms those children. As the Cass Report explained, "[o]utcomes for children and adolescents are best if they are in a supportive relationship with their family."[19] "For this reason parents should be actively involved in decision making unless there are strong grounds to believe that this may put the

[19] Cass, *supra* note 8, at 164.

child or young person at risk."[20] A school that secretly transitions a child based only on the child's "concern about how their parents might react" "set[s] up an adversarial position between parent and child" and deprives the child of the chance for holistic support both in and out of the home.[21] Even the school counselor here testified that "I have always been in favor of working with parents who have transgender children." JA121 ¶ 21. Add to that the likelihood that a parent will eventually find out—at least if they know to ask the right question—and the inevitable negative consequences for the parent-child relationship, the parent-school relationship, and the child's schooling. *See supra* p. 22 (collecting cases in which the parent eventually finds out).

Further, as discussed above, secret social transitions are more likely to lead to dangerous medical interventions. Given that most children would desist from gender incongruence absent social transition, there is a real danger of locking children into an identity that they would have otherwise considered and then moved away from. In other words, affirmation is not some neutral (much less necessarily positive) intervention, but can change the child's natural developmental trajectory. The result is that the State will have imposed its own vision of how a child should develop in place of the child's—and the parent's—own.

[20] *Id.*
[21] *Id.* at 160.

According to the United States, "Every public health authority that has conducted a systematic review of the evidence has concluded that the benefit/risk profile of [pediatric medical transition] is either unknown or unfavorable."[22] That is why "health authorities in a number of European countries have raised significant concerns regarding the potential harms associated with using puberty blockers and hormones to treat transgender minors." *Skrmetti*, 145 S. Ct. at 1825. Some indeterminate number of children will thus be permanently harmed by early social transitions, as they will suffer "irreversible hormonal and/or surgical interventions [and] ultimately [will] not continue to identify as transgender."[23]

In short, as one court explained, a school "policy of confidentiality and non-disclosure to parents" "is not conducive to the health of their gender incongruent students." *Mirabelli v. Olson*, 691 F. Supp. 3d 1197, 1209 (S.D. Cal. 2023). The school's policy here does not promote any compelling government in protecting children—for many children, it will be harmful. The Defendants' evidence is grossly insufficient to prove a compelling government interest.

2. Defendants failed to show the least restrictive means.

The school's policy also flunks the least-restrictive-means test. The least-restrictive means test is "exceptionally demanding." *Burwell v. Hobby Lobby Stores,*

[22] HHS Report, *supra* note 12, at 77; *see generally id.* Chapter 5.
[23] *Id.* at 72–73.

Inc., 573 U.S. 682, 728 (2014). Under this test, if a less restrictive alternative would serve the government's purpose, the government "*must* use that alternative." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000) (emphasis added).

First, the school's "is substantially underinclusive for the reasons already set out," so it "cannot satisfy strict scrutiny." *Blackhawk*, 381 F.3d at 214. This "underinclusiveness leaves appreciable damage to the State's supposedly vital interest unprohibited and therefore belies the State's claim of narrow tailoring." *Catholic Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 145 S. Ct. 1583, 1594 (2025) (cleaned up).

Second, the Defendants failed to point to any "probative evidence in the record" that deceiving parents is necessary to further any compelling interest. *Marcavage*, 609 F.3d at 289. No study appears to examine whether deceiving parents somehow helps transgender children. The research presented by the State below (D. Ct. Dkt. 45 at 26–30 & nn. 7–15) does not examine this question, and the State's research must be "rejected" anyway because it "is based on correlation, not evidence of causation." *Brown*, 564 U.S. at 800; *see People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 111 F.3d 528, 537 (7th Cir. 1997) (Posner, J.) ("[A] statistical study that fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation.").

Third, the Defendants failed to point to any evidence that they tried any other policy that did not burden parents' constitutional rights before resorting to deception. While too many school districts across the nation use similar policies, many others do *not* permit deception of parents—and the Defendants point to no crises in discrimination or education in those places. That reality requires the school to "at a minimum, offer persuasive reasons why it believes that it must take a different course." *Holt v. Hobbs*, 574 U.S. 352, 369 (2015); *see Brown*, 564 U.S. at 799 (explaining that strict scrutiny requires that the government "specifically identify an actual problem" (cleaned up)). Plus, the Defendants failed to point to any evidence that this policy was necessary against Mr. Heaps specifically. *See O Centro*, 546 U.S. at 423.

"In the absence of proof, it is not for the [c]ourt to assume" that the Defendants are right. *Playboy*, 529 U.S. at 824. The least-restrictive means test requires far more than what they provided below.

CONCLUSION

For these reasons, the Court should reverse.

Respectfully submitted,

s/ Christopher Mills

CHRISTOPHER MILLS
Spero Law LLC
557 East Bay Street #22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

Counsel for *Amicus Curiae*

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Dated: July 7, 2025

/s Christopher Mills
Christopher Mills

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I, Christopher Mills, an attorney, certify that on this day the foregoing Brief was served electronically on all parties via the Court's CM/ECF system.

Dated: July 7, 2025

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