

No. 24-3278

IN THE UNITED STATES COURT OF APPEALS
FOR THIRD CIRCUIT

CHRISTIN HEAPS,
Plaintiff-Appellant,
v.
DELAWARE VALLEY REGIONAL HIGH SCHOOL
BOARD OF EDUCATION, *et al.*,
Defendants-Respondents.

On Appeal from the United States District Court
for the District of New Jersey
Case No. 3:24-cv-00107

BRIEF *AMICI CURIAE* OF HAWAII FAMILY FORUM, ILLINOIS FAMILY
INSTITUTE, WISCONSIN FAMILY ACTION, ETHICS AND RELIGIOUS
LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION,
CONCERNED WOMEN FOR AMERICA, PACIFIC JUSTICE INSTITUTE, and
THE NATIONAL LEGAL FOUNDATION
in Support of the Appellant and Urging Reversal

Steven W. Fitschen
(Counsel of Record)
James A. Davids
National Legal Foundation
524 Johnstown Road
Chesapeake, Va 23322
(757) 463-6133
sfitschen@nationallegalfoundation.org
jdavids@nationallegalfoundation.org

Frederick W. Claybrook, Jr.
Claybrook LLC
13536 Montvale Dr.
Silver Springs, MD 20904
(301) 622-0360
rick@claybrooklaw.com

CORPORATE DISCLOSURE STATEMENT

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

Table of Contents

Table of Authorities.....ii

Statements of Interests 1

Summary of the Argument.....3

Argument.....4

 I. The Naming of Minor Children Is a Parental Responsibility4

 II. Public Schools Have a Duty to Tell Parents That Their Children Are Taking Other Names and Socially Transitioning.....8

 III. The School Has No Legitimate Interests in Hiding Information from Parents, Much Less a Compelling One 19

Conclusion24

Table of Authorities

Cases

Alfonso v. Fernandez,
 195 A.D.2d 46, 606 N.Y.S.2d 259
 (N.Y. App. Div. 1993).....14

Anspach v. Phila. Dept. of Pub. Health,
 503 F.3d 256 (3d Cir. 2007).....16-17

Arnold v. Bd. of Educ.,
 880 F.2d 305, 311-12 (11th Cir. 1989),
abrogated on other grounds in
Leatherman v. Tarrant Cnty. Narcotics Intel. & Coord. Unit,
 507 U.S. 163 (1993).....16, 18-19

Bellotti v. Baird, 443 U.S. 622 (1979).....22-23

Brokaw v. Mercer Cnty.,
 235 F.3d 1000 (7th Cir. 2000).....21

C.N. v Ridgewood Bd. of Educ.,
 430 F.3d 159 (3d Cir. 2005).....18

Croft v. Westmoreland Cnty. Children and Youth Servs.,
 103 F.3d 1123 (3d Cir. 1997).....21

DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.,
 489 U.S. 189 (1989)..... 12-13, 17

Dobbs v. Jackson Women’s Health Org.,
 597 U.S. 215 (2022).....18, 23

Doe v. v. Boyertown Area Sch. Dist.,
 897 F.3d 518 (3d Cir. 2018).....24

Doe v. Heck,
 327 F.3d 492 (7th Cir. 2003).....21

Doe v. Uthmeier,
2025 WL 1386707 (D. Ct. App. Fla., May 14, 2025).....23

Doe I v. Madison Metro. Sch. Dist.,
2022 WI 65, 976 N.W.2d 584 (2022)5

Edwards v. Aguillard,
482 U.S. 578 (1987).....14

Foote v. Ludlow Sch. Comm.,
128 F.4th 336 (1st Cir. 2025)12

Fowler v. R.I.,
345 U.S. 67 (1953).....8

Ginsberg v. N.Y.,
390 U.S. 629 (1968).....23

Gruenke v. Seip,
225 F.3d 290 (3d Cir. 2000).....16, 17-18, 22

Kennedy v. Bremerton Sch. Dist.,
597 U.S. 507 (2022).....9

Mahmoud v. Taylor,
No. 24-297 (U.S. Sup. Ct., June 27, 2025).....7-8, 10-14, 17, 19

Meyer v. Neb.,
262 U.S. 390 (1923).....14

Morse v. Frederick,
551 U.S. 393 (2007).....13

Parents I v. Montgomery Cnty. Bd. of Educ.,
78 F.4th 622 (4th Cir. 2023)..... 5, 20-21

Parham v. J.R.,
442 U.S. 584 (1979).....5, 6, 22

Pierce v. Soc’y of Sisters,
268 U.S. 510 (1925).....10

Prince v. Mass.,
321 U.S. 158 (1944).....9, 11, 22

Ricard v. USD 475 Geary Cnty. Sch. Bd.,
2022 WL 1471372 (D. Kan. May 9, 2022).....5, 11, 12, 24

Roe v. Wade,
410 U.S. 113 (1973).....18, 23

Stanley v. Ill.,
405 U.S. 645 (1972).....5

State v. Loe,
692 S.W.3d 215 (Tex. 2024)16

Tinker v. Des Moines Ind. Comm. Sch. Dist.,
393 U.S. 503 (1969).....9

Troxel v. Granvill,
530 U.S. 57 (2002).....5, 6, 23

United States v. Skrmetti,
145 S. Ct. 1816 (2025).....5, 6, 16

Winkelman v. Parma City Sch. Dist.,
550 U.S. 516 (2007).....11

W. Va. State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943).....15

Wis. v. Yoder,
406 U.S. 205 (1972).....11, 14

Wyatt v. Fletcher,
718 F.3d 496 (5th Cir. 2013).....20

Statutes

Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g.....20

Other Authorities

Eric A. DeGross, *Parental Rights and Pub. Sch. Curricula: Revisiting Mozart After 20 Years*, 38 J. of Law & Educ. 83 (2009).....16

Douglas Laycock, *High-value Speech and the Basic Educ. Mission of a Pub. Sch.: Some Prelim. Thoughts*, 12 Lewis & Clark L. Rev. 111 (2008).....15

Statements of Interests¹

Hawaii Family Forum (HFF) was established in 1998 to protect, preserve, and strengthen Hawaii's ohana (family). HFF is a non-profit, pro-family research and education organization that provides resources that equip citizens to make their voices heard on critical social policy issues involving the sanctity of human life, the preservation of religious liberties, and the well-being of the ohana as the building block of society.

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. Core values of IFI include upholding parental rights and championing religious freedom and conscience rights for all individuals and organizations.

Wisconsin Family Action (WFA) is a Wisconsin not-for-profit organization dedicated to strengthening, preserving, and promoting marriage, family, life and religious freedom. WFA has a unique and significant statewide presence with its educational and advocacy work in public policy and the culture. WFA's interest in

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.

this case stems directly from its core issues, in particular its long-sustained efforts to protect and promote the family.

The Ethics and Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with nearly 13 million members in more than 45,000 churches and congregations. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. The ERLC affirms that God has established the family as the first and most foundational institution of society and has an interest in ensuring that parents have the freedom to make decisions regarding the upbringing, education, and healthcare of their children.

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

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 New Jersey, are vitally concerned with the outcome of this case because of its effect on religion-based parental rights.

Summary of the Argument

The decision below allows the public schools to subvert parental rights. It should be reversed for multiple reasons.

Your *Amici* focus on three such reasons. First, the naming of children is not a scholastic matter, as the district court held, but a parental one. Second, contrary to the district court, schools have a duty to disclose to parents when their child decides to exhibit as transgender. And, third, the school's purported "interests" on

which the district court relied are really just a nullification of parental rights and so do not support even a rational basis for the school's policy, much less a compelling one.

Argument

I. The Naming of Minor Children Is a Parental Responsibility

The district court found that parental rights, while fundamental and protected by the Fourteenth Amendment, are not absolute and that schools may impose reasonable regulations. (JA25.) From there, the district court assumed, without supporting analysis, that the name a child is called at school, along with associated pronouns, is up to the child and the school to determine simply by virtue of the fact that the school published a policy that says so. This certainly comes as a surprise, as it is parents who name their children at birth, who register their children for attendance at school, who tell the school the sex of their child, and who instruct the school what name and nickname the school should use for their child. It is not "reasonable" for schools to subvert this parental responsibility, either by publishing a policy or otherwise.

A child announcing to a school a desire to adopt a new, transgender name does not convert that renaming by the child into the act or instruction of the school. It is not something initiated by the school, and it is not a classroom course of study

or part of the curriculum. As Judge Niemeyer stated regarding a similar school “Parental Preclusion Policy,”

While the science and medicine related to gender identification, gender dysphoria, and gender transitioning are, these days, being actively debated, it is clear that developing and implementing a gender transition plan for minor children without their parents’ knowledge and consent do not simply implicate a school’s curricular decisions but go much further to implicate the very personal decisionmaking about children’s health, nurture, welfare, and upbringing, which are fundamental rights of the Parents. *See Troxel [v. Granville]*, 530 U.S. [57,] 65 [(2002)]; *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ricard v. USD 475 Geary Cnty. Sch. Bd.*, No. 5:22-cv-4015, 2022 WL 1471372, *8 (D. Kan. May 9, 2022).

Parents 1 v. Montgomery Cnty. Bd. of Educ., 78 F.4th 622, 646 (4th Cir. 2023)

(Niemeyer, J., dissenting);² *see also United States v. Skrmetti*, 145 S. Ct. 1816,

1836-37 (2025) (noting scientific debate); *id.* at 1841-45 (Thomas, J., concurring)

(reciting details of scientific debate).

²While Judge Niemeyer was writing in dissent, he was the only judge on the panel that reached the merits, as the majority held that the particular parents who sued in that case did not have standing. Nevertheless, the majority went to some pains to remark that “this does not mean [the parents’] objections are invalid,” *id.* at 626, and that the parents made “compelling arguments” that the “Parental Preclusion Policy” of hiding from parents that their child is changing names and exhibiting as transgender is unlawful. *Id.* at 636; *see also Doe 1 v. Madison Metro. Sch. Dist.*, 2022 WI 65, 976 N.W.2d 584, 599 (2022) (Roggensack, J., dissenting) (while the four-member majority avoided addressing the merits of a similar parental preclusion policy on procedural grounds, three justices would have reached the merits and ruled that it violated the parents’ federal constitutional rights).

It is unreasonable, if not foolish, to expect a child to make difficult and critically important decisions, especially ones that will have repercussions for the rest of the child's life, and social transitioning does not constitute any sort of an exception. It is well established that *parents* are to make such decisions for their minor children. As the Supreme Court explained in *Parham*, children lack the “maturity, experience, and capacity for judgment required for making life’s difficult decisions.” 442 U.S. at 602; *see also Skrmetti*, 145 S. Ct. at 1835-36 (finding reasonable a state’s determination that minors lack the maturity to understand the consequences of medically transitioning); *id.* at 1846-47 (Thomas, J., concurring) (same). And in *Troxel*, the Court repeated that parents have a “fundamental right to make decisions concerning the care” of their minor children. 530 U.S. at 72 (plurality op.).

The Supreme Court elucidated in *Parham* that, even if the decision of the parents “is not agreeable to a child or . . . involves risks,” it “does not diminish the parents’ authority to decide what is best for the child.” 442 U.S. at 603-04. The Court continued that a child’s disagreement with the parents does not “automatically transfer the power to make that decision from the parents to some agency or officer of the state.” *Id.* at 603. That is true even when the “agency or officer of the state” is a school district or its employee.

Properly understood, the curricular carve-out to parental control deals only with internal school choices that must be applied uniformly to allow a school to function, such as the substance of classroom instruction (*e.g.*, what textbooks to use) and hours of operation. Transgenderism, like other medical or psychological conditions, may need to be addressed while the child is in school. But treatment of a student’s medical or psychological condition is, at most, ancillary to the primary mission of public schools. Parents entrust their children to the public schools not to name them, feed them, clothe them, or diagnose and medically treat them, but to *educate* them. Within its proper sphere, the school has considerable discretion, particularly within the area of what, when, and how subjects are taught (commonly called the “curricular exception”). Outside its proper sphere, schools must defer to parents for the care, nurturing, and upbringing of children.

Of course, there is a limit to the curriculum exception, even as to matters directly affecting education. For example, grades are central to the educational function of the school, but a school certainly could not refuse to disclose an individual student’s grades to the parents because the student was afraid of the parents’ reaction or wanted to keep them secret. Much less can a school withhold information from parents about their child’s transgender behavior, which is not part of the school’s delegated education function. *See Mahmoud v. Taylor*, No. 24-297

(U.S. Sup. Ct., June 27, 2025) (finding opt-out for parents when school’s curriculum for their children violates their religious beliefs).

II. Public Schools Have a Duty to Tell Parents That Their Children Are Taking Other Names and Socially Transitioning

The district court held that the school was excused from failing to report the child’s gender and name transition because the Constitution does not impose a notice requirement in these circumstances. (JA26-30.) This, too, was error. The passive/active distinction may work in some situations, but it doesn’t work in the public schools, either practically or legally. And it doesn’t work to suggest that parents should just be satisfied with being free at home to instruct their children as to their views about transgenderism and renaming, as long as there is no “proactive intrusion” by the school into familial affairs. (JA28-31.)

When the government infringes constitutional rights, it does not suffice to argue that the individuals wronged may still exercise their rights at a different time or in a different place.³ For example, when a city prohibits use of a public park by some denominations but not others, it is no defense to say that those foreclosed can still practice their religion elsewhere. *See Fowler v. R.I.*, 345 U.S. 67 (1953). Nor could the school district be excused for its sanctioning of Coach Kennedy for his praying on the field because he could have said the same prayer elsewhere. *See*

³ Of course, this case does not involve a time, place, or manner restriction.

Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022). Similarly, just because the parents may exercise their free exercise and parental rights when their children are not at school does not excuse this school district’s violation of parental rights while the children are at school. To paraphrase *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the parents’ rights to care for and make decisions for their minor children do not stop at the schoolhouse gate. *See id.* at 506 (noting that school actions may unconstitutionally interfere with parental rights).

The district court’s suggestion that parental rights only come into play when parents affirmatively request information from the school about whether their child is transitioning doesn’t hold water, either. (JA30.) *Any* infringement or hindrance of fundamental, parental rights violates them. *See Prince v. Mass.*, 321 U.S. 158, 166 (1944). In this connection, the district court could see no intrusion on parental rights as established by Supreme Court opinions and refused to “expand” them, professing adherence to Supreme Court admonitions that substantive rights protected under the Fourteenth Amendments should only be established with caution. (JA24.) The parents here need go no further than demand recognition of their parental rights to manage the care and upbringing of their children. But, far from asking for an expansion of parental rights in the

school context, this case brings into play two, well established features of parental rights.

First, for a century it has been recognized that parents have the right to decide whether their child should attend, or continue to attend, a public school. *See Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925); *see also Mahmoud*, slip op. at 18-19. Obviously, a key reason parents may wish to remove their child from public school, as the facts here demonstrate, is if the school is not cooperating with the parents on the issue of their child exhibiting as transgender. When a school keeps secret from parents that their child is transitioning, the school is preventing the parents from exercising their responsibilities. Thus, the school must provide *timely*, contemporaneous notification to them. *See id.*, slip op. at 41 (requiring school to provide parents notice when curriculum to be used with their children might violate parental religious beliefs).

Parents do not have the burden to keep asking the school if their child is exhibiting as transgender (which the school by policy is hiding from them in any event). *See id.*, slip op. at 32 (“it is not realistic to expect parents to rely on after-the-fact reports by their young children to determine whether the parents’ free exercise rights have been burdened”). The parents told the school what to call their child and what sex their child was when they registered their child. The school violates those parental instructions on this critically important, life-changing

decision when it starts honoring a child's desire to exhibit as transgender and to hide that decision from the parents. Parents cannot carry out their constitutional responsibilities to decide whether their child should continue to attend the school without this basic information. *See id.*; *Ricard*, 2022 WL 1471372 at *8.

Second, the rights of parents to direct their children's education does not end with a right to remove their child from the school. As the district court appears to recognize (JA31), parents also have a constitutional right to supplement their children's education by instruction of their own, especially about subject matters touching on sexuality, and they have a right to do so with specificity, knowing when and what their child is being taught and how their child is being counseled at school. *See Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 529 (2007) ("It is not a novel proposition to say that parents have a recognized legal interest in the education and upbringing of their child."); *Wis. v. Yoder*, 406 U.S. 205, 213-14 (1972); *Prince*, 321 U.S. at 166. They can only properly fulfill these fundamental responsibilities if they know what is happening at school in a timely manner. Of course, sufficient information on this score is unavailable from the children themselves. Any parent knows that most children are neither capable nor willing to provide a play-by-play of the school day to their parents. Family relations are also affected when parents have to probe their children repeatedly about sexual subjects. Plus, such probing is difficult on matters to which the parents do not yet

wish to expose their children or if it suggests that parents suspect their children may be disrespecting their wishes, whether they actually are or not.

It is as simple as this: to be able to exercise their recognized, constitutional rights and responsibilities intelligently, parents need to know what is going on at school. “[I]t is illegitimate to conceal information from parents for the purpose of frustrating their ability to exercise a fundamental right.” *Ricard*, 2022 WL 1471372 at *8. The Supreme Court’s ruling in *Mahmoud* trumpets exactly the same message. A school hiding the ball by failing to disclose when it is violating the instructions parents have given about the name and gender of their child that the school is to use is an unconstitutional infringement of parental rights.

The First Circuit in *Foote v. Ludlow School Committee*, 128 F.4th 336, 354 (1st Cir. 2025), recently held, similarly to the district court, that the school had no affirmative obligation to inform parents that it was calling their child by another name. For support, the First Circuit cited *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). Properly analyzed, *DeShaney* supports the parent here, not the school.

In *DeShaney*, a county’s social service agency, despite indications that a child might be suffering abuse from his father, did not promptly intervene, and the father subsequently seriously harmed the child. The child claimed this was a substantive due process violation by the agency, but the Supreme Court rejected

that claim because “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.” *Id.* at 195. The Court distinguished the abuse situation before it from a setting in which the State had compelled attendance, noting that such a circumstance creates a special relationship between the State and the individuals involved. *Id.* at 199-200.

Here, the situation is very different from *DeShaney*, at several levels. First, the State has not been passive; it has acted to deprive parents of their fundamental rights. The school is not just leaving matters alone; if it did that, it would continue to let parents decide the naming of their child and whether the child should exhibit as transgender. Instead, the school is taking affirmative steps to shield the child from the parents’ authority and decision making. It plays it too cute by half to suggest, as the district court does (JA32), that the school was not lying to parents when it hid from them what name they were using with the child, including by reverting to the child’s given name when communicating with the parents.

Certainly, constitutional rights do not rest on such subterfuge and ethical sophistry.

Second, the State has acted in its compulsory education laws to require that the child attend school. While some parents have the wherewithal to put their children in private schools or to home school them, many do not. *See Mahmoud*, slip op. at 19; *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring).

As a result, their only alternative to comply with the compulsory education laws is to send them to public school, and that generates an affirmative obligation of the State to keep parents in the know about what is happening at school. The words of the Supreme Court in *Edwards v. Aguillard*, 482 U.S. 578 (1987), address the school situation and identify it as a special relationship:

Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Id. at 584; *see also Alfonso v. Fernandez*, 195 A.D.2d 46, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993) (noting compulsory nature of schooling and finding the school violated parental rights when it distributed condoms to students upon their request without giving parents notice).

Third, a public school's authority is best understood as a conditioned consent or delegation from parents. Parents are primarily responsible for their children's education, particularly when religious beliefs come into play. *See Mahmoud*, slip op. at 6-11; *Yoder*, 406 U.S. at 413-18; *Meyer v. Neb.*, 262 U.S. 390, 401 (1923). When they send their children to public school along with the children of other parents who may well have other philosophical and religious beliefs, they consent in the main to a generalized, common instruction for their children. But that does not give a public school *carte blanche* to treat their

children however the school wishes. It is also commonly understood that parental consent is conditioned on the school staying in its lane, teaching in accord with its central mission. *See generally* Douglas Laycock, *High-value Speech and the Basic Educ. Mission of a Pub. Sch.: Some Prelim. Thoughts*, 12 Lewis & Clark L. Rev. 111 (2008). Professor Laycock gives an “outside-its-lane” example of a public school teaching its students that they should all support the Democratic Party. *Id.* at 117. This would be improper even if the district’s populace is heavily Democratic. The stakes are even higher with topics that implicate appropriate sexual lifestyles and religious beliefs about them and when behavioral, rather than curricular, matters are involved.

While writing in the context of free speech rights, what Professor Laycock says resonates here:

Parents entrust the public schools with their children for important but particular purposes. Parents may expect the school to teach skills and values conducive to success in later life, and they may expect the schools to teach fundamental democratic values. But they do not expect the schools to indoctrinate their children on current political or religious questions that may be the subject of substantial disagreement among the parents themselves, either locally or nationally. Indoctrination on that sort of question is not part of the school’s basic educational mission

Id. at 119; *see W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)

(“Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction.”).

Parental consent to having the public school set behavioral policies is not unconditional. Schools can go too far and exceed that consent (or delegation). The school district has done so here, wading into a debate that is roiling our country and encroaching on the fundamental rights of parents to make decisions for their minor children.⁴ Schools cannot leverage compulsory school attendance laws into permission to trample parental and religious rights at will. *See generally* Eric A. DeGroff, *Parental Rights and Pub. Sch. Curricula: Revisiting Mozart after 20 Years*, 38 J. of Law & Educ. 83 (2009) (arguing that parental rights are fundamental and require public schools to provide an opt-out when the curriculum violates religious beliefs).

Finally, the district court relied on this Court's remark in *Anspach v. Philadelphia Department of Public Health*, 503 F.3d 256 (3d Cir. 2007), that neither *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000), nor *Arnold v. Board of Education*, 880 F.2d 305, 311-12 (11th Cir. 1989), *abrogated on other grounds in Leatherman v. Tarrant Cnty. Narcotics Intel. & Coord. Unit*, 507 U.S. 163 (1993), "provide for a constitutional right to notice." 503 F.3d at 270. That remark does

⁴ Justice Blacklock of the Texas Supreme Court has described the two sides in the great national debate over the wisdom and propriety of minors exhibiting as transgender as those holding to either the "Transgender Vision" or the "Traditional Vision." He notes that, at their core, the differences reflect moral, religious, and political beliefs. *State v. Loe*, 692 S.W.3d 215, 239-40 (Tex. 2024) (Blacklock, J., concurring). Of course, the differences between the views also involve contested social science, as demonstrated by the Supreme Court's decision in *Skrmetti*.

not survive *Mahmoud*, which requires parental notification when a school is potentially violating parental rights. In any event, the remark does not apply to these facts, for several reasons.

One, *Anspach* itself did not present a school situation. Rather, it dealt with minors voluntarily visiting a public health clinic and there receiving contraceptives. Relying in part on *DeShaney*, this Court distinguished the school situation, where attendance is compulsory, and noted that there was only a “passive” failure by the clinics to inform the parents. *See id.* at 268-69. Here, by contrast, school is compulsory and school personnel are far from passive in their helping minors make determinations not to inform their parents, dissembling to hide that fact, and violating the parents’ instructions on what to call their minor child. *See Mahmoud*, slip op. at 31-32.

Two, in *Gruenke*, this Court held that a coach violated both the student’s and the parents’ fundamental rights in family relations by pressing the student about her pregnancy status, instead of contacting her parents about his suspicions. 225 F.3d at 303-07. In the passage that *Anspach* references, the *Gruenke* court was discussing the culpability of a counselor who was on notice of the situation and stayed mum. This Court disapproved, but it did not have to reach the issue. Nevertheless, this Court stated it had “considerable doubt about [counselors’] right to withhold information of this nature from the parents” and warned as follows:

School-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution. Public schools must not forget that “*in loco parentis*” does not mean “displace parents.”

225 F.3d at 307 (internal citations and quotations omitted).⁵

Three, in *Arnold*, the Eleventh Circuit held that school counselors violated the rights of parents by encouraging and assisting their daughter to have an abortion while actively discouraging her to discuss the situation with them. 880 F.2d at 312-14. The *Arnold* court declared it to be “common sense” that counselors should encourage a student to talk with her parents, but did not have to address whether that was a constitutional rule. *Id.* at 314. Admittedly, relying on *Roe v. Wade*, 410 U.S. 113 (1973), the *Arnold* court stated in *dicta* that it should be the minor’s decision whether to involve her parents in the abortion decision, 880 F.2d at 314, but whatever force that *dicta* may have had under *Roe* and its progeny has now been evaporated by *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022) (overruling *Roe* and noting the distortions to other legal principles

⁵ The district court also discussed *C.N. v Ridgewood Board of Education*, 430 F.3d 159, 185 (3d Cir. 2005). In *C.N.*, the parents were on notice of the school conduct they found objectionable and so, by definition, it did not deal with a parental preclusion policy like that involved here. *C.N.* also stated a broader test for parental rights than the district court articulated, finding it covers matters “at the heart” of parental decision making, *id.* at 184, not only “coercion” or “indoctrination.”

that *Roe* and its progeny worked in the abortion context). The *Arnold* court concluded, in words easily transferable to the decision of whether a child exhibits as transgender, “Parental consultation is particularly desirable regarding the abortion decision since for some the situation raises profound moral and religious concerns.” 880 F.2d at 314; *see Mahmoud*, slip op. at 40-41 (requiring parental notification when parents have moral and religious concerns about the school’s curriculum).

In these circumstances, the school had an affirmative obligation to notify the parents that the school was assisting their minor child to exhibit as transgender. This is a matter at the heart of parental, not school, responsibilities, and the school violated the parents’ fundamental rights by violating their instructions as to what to call their child and arrogating to itself the decision of what was best for the child.

III. The School Has No Legitimate Interests in Hiding Information from Parents, Much Less a Compelling One

The district court applied (wrongly) a rational basis test and found that the stated purposes of protecting transgender students from discrimination at school and of fostering a diverse learning environment adequately justify the school’s policy to hide from the parents the fact that their children are socially transitioning. (JA35-36.) These purposes do not state legitimate state interests, but, rather, are a packaging of impermissible state action in nice-sounding phraseology.

Interests such as fostering a “safe learning environment” by keeping from parents that the school is facilitating their children exhibiting as another gender are illegitimate and, thus, cannot properly be accorded any weight.⁶ They all have at their base the assumption that the schools may override the judgment of fit parents about how best to raise their children and what is in their children’s best interests. As Judge Niemeyer observed, this does not advance a proper interest, but, instead, nullifies parents’ fundamental rights:

[T]he district court erred in its strict scrutiny analysis by relying on the students’ well-being and privacy interests to defeat the Parents’ fundamental substantive due process right. Just as it is no defense to an alleged infringement of a plaintiff’s First Amendment right to claim a compelling interest in not hearing disagreeable viewpoints, so also is it no defense to an alleged infringement of parental substantive due process rights to claim a compelling interest that is premised on a rejection of that right—in this case, the Board’s claimed interest in having matters central to the child’s well-being kept secret from and decided by a party other than the parents. In other words, the district court failed to recognize that its analysis was akin to holding there to be a *per se* interest in infringing on the Parents’ rights by granting students a superior right to privacy and granting the school the prerogative to decide what kinds of attitudes are not sufficiently supportive for parents to be permitted to have a say in a matter of central importance in their child's upbringing. But that is effectively a nullification of the constitutionally protected parental rights.

⁶ Nor can the school district claim, as other schools have done, that it is protecting the child’s “privacy” interests. A minor child has no such interest vis-à-vis the parents. See Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (requiring schools to make available to parents all records regarding their children); *Wyatt v. Fletcher*, 718 F.3d 496, 505 (5th Cir. 2013).

Parents I, 78 F.4th at 646 (Niemeyer, J., dissenting). Other circuits have also held in related contexts that the State’s second-guessing of the decision of fit parents about what is best for their children is illegitimate and entitled to no weight. See *Doe v. Heck*, 327 F.3d 492, 521 (7th Cir. 2003); *Croft v. Westmoreland Cnty. Children and Youth Servs.*, 103 F.3d 1123, 1126 (3d Cir. 1997); *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1019 (7th Cir. 2000).

It does not assist the school (or the district court) to pretend that the policy only affects what happens at school. It doesn’t. Just by asking a student at school the questions, “Do you want to tell your parents?” and “Are your parents supportive of your transition?,” as the policy requires, school personnel encourage children to distrust their parents. It is just as obvious that a child living a “double life,” exhibiting as transgender at school and not at home, creates an emotional distance from the parents and threatens alienation from them after the parents discover that this behavior has been kept secret from them. This is not just a “school matter,” and it never can be.

Nor can the school justify its abrogation of parental rights by claiming students will “feel better” and “do better” at school if the school takes over these judgment calls for parents at the child’s behest. That does not alter the basic point that *parents* are charged with making these decisions, not school employees or the children themselves. The law presumes that parents, not school boards, are

principally responsible for their children and are in the best position to know their children's unique temperaments, circumstances, and needs and can best assess their long-term interests. *See Parham*, 442 U.S. at 602-03. As this Court put it in *Gruenke*, "It is not educators, but parents[,] who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights." 225 F.3d at 307. If the child feels some discomfort at school due to the parents' decision, or even performs more poorly than the school thinks the child might otherwise, that is part and parcel of the parents' decision, one they are entrusted by law to make and that the school must honor. It does not justify the school overriding the parents' decision or collaborating with the student to counter the parents' instructions concerning the name and gender of their child.

The Supreme Court in *Bellotti v. Baird*, 443 U.S. 622 (1979), in the context of a minor's desire to abort, repeated its admonition in *Prince* that it "is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations *the state can neither supply nor hinder*." 321 U.S. at 166 (emphasis added). The Court then observed that parents have a constitutional role in making critical life decisions of a sexual nature for their children:

Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood. While we do not pretend any special wisdom on this subject, we cannot ignore that

central to many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York, supra*, [390 U.S. 629], at 639 [(1968)].

433 U.S. at 637-39.⁷

The Supreme Court in *Troxel* held that, even after an evidentiary hearing, courts have no right to override the determination of fit parents about whether it would be in their children's best interests to see their grandparents; minor children do not get a "vote" on such matters. 530 U.S. at 64-70. If that is so, school boards certainly have no right to second-guess the determinations of parents about whether their children should "change genders," a decision with much greater complexity and risk for the children. *See id.* at 80 (Thomas, J., concurring) (stating that the State "lacks even a legitimate governmental interest—to say nothing of a

⁷ In *Bellotti*, the Supreme Court was operating under the regime of *Roe*, requiring it to balance against parental rights the "need to preserve the constitutional right and the unique nature of the abortion decision." 433 U.S. at 642. The Supreme Court upheld a parental notification law provided it had a judicial bypass. *Id.* at 643. Of course, the Supreme Court overruled *Roe* in *Dobbs*, and, post-*Dobbs*, the intermediate appellate court of Florida held a similar parental bypass law to be unconstitutional: "any deprivation of parents' due-process rights to notice and opportunity to be heard can no longer be justified by their children's asserted constitutional right to obtain an abortion (much less a secret abortion that cuts presumptively fit parents out of the decision)." *Doe v. Uthmeier*, 2025 WL 1386707 at *7 (D. Ct. App. Fla., May 14, 2025).

compelling one—in second-guessing a fit parent’s decision regarding visitation with third parties”). The district court in *Ricard* put it this way: “It is difficult to envision why a school would even claim—much less how a school could establish—a generalized interest in withholding or concealing from the parents of minor children[] information fundamental to a child’s identity, personhood, and mental and emotional well-being such as their preferred name and pronouns.” 2022 WL 1471372 at *8 (footnote omitted). The short answer is that a school can’t establish any such interest.⁸

Conclusion

The school district here has trampled on the fundamental rights of the parents of the minor child. Parental rights do not stop at the schoolhouse gate, and the naming and gender of a child are not educational matters, but familial ones. This Court should reverse the judgment below.

Respectfully submitted,
this 7th day of July, 2025,

/s/ Steven W. Fitschen
Steven W. Fitschen
(Counsel of Record)
James A. Davids

⁸ The district court’s reliance on *Doe v. v. Boyertown Area School District*, 897 F.3d 518 (3d Cir. 2018), is misplaced in part because *Doe* does not involve parental interests, but only competing interests of students. Bullying and discrimination, central to the Court’s decision in that case, are not considerations in this case.

National Legal Foundation
524 Johnstown Road
Chesapeake, Va. 23322
(757) 650-9210
sfitschen@nationallegalfoundation.org
jdavids@nationallegalfoundation.org

Frederick W. Claybrook, Jr.
Claybrook LLC
655 15th St., NW, Ste. 425
Washington, D.C. 20005
(301) 622-0360
Rick@claybrooklaw.com

COMBINED CERTIFICATIONS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 6,133 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman.

3. Steven W. Fitschen is a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

4. In accordance with L.A.R. 31.1(c), this brief has been scanned for viruses with version 25.6.10221a, which was last updated on July 7, 2025. and was found to be free of viruses.

5. In accordance with L.A.R. 31.1(c), the text of the electronic copy of this brief filed using this Court's CM/ECF system is identical to the text in the paper copies filed with the Clerk.

s/ Steven W. Fitschen
Steven W. Fitschen
July 7, 2025

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2025, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

s/ Steven W. Fitschen
Steven W. Fitschen
The National Legal Foundation
524 Johnstown Road
Chesapeake, Va 23322
(757) 463-6133
sfitschen@nationallegalfoundation.org