STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 4

B.F., T.F., P.W. and S.W.,

Plaintiffs,

v. Case No. 21-CV-1650

KETTLE MORAINE SCHOOL DISTRICT,

Defendant.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs' response brief already addresses many of the arguments in the District's response brief, and their few additional arguments are all meritless. Both sides agree this case can be resolved on summary judgment. The District concedes that it disregarded B.F.'s and T.F.'s decision about whether a transition was in their daughter's best interest, and it argues that, going forward, it can continue to make this decision without parental consent. The District also offers nothing to rebut Plaintiffs' expert evidence about the seriousness of transitioning during childhood. The Court should grant summary judgment for Plaintiffs, not the District.

ARGUMENT

I. The "Shocks the Conscience" Test Does Not Apply Here.

In its response brief, the District leans even more heavily into its argument that Plaintiffs must meet a "shocks the conscience" requirement. Def. Resp. Br. 3–4, 7–8. As Plaintiffs already explained, the "shocks the conscience" test is an *alternative* test that does not apply when the claim is that government has infringed a well-established fundamental right, like interfering with parents' right to make decisions for their minor children. Pls. Resp. Br. 5–10. In their response brief, the District adds a twist, arguing that the "shocks the conscience" test applies to any challenge to executive, rather than legislative action.

While some lower federal courts have drawn this executive/legislative distinction for any type of claim under the Fourteenth Amendment (based on a misinterpretation of *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)), *see* Pls. Resp. Br. n.2, the Supreme Court itself has not understood *Lewis* that way, even in

subsequent cases involving executive action. In *Chavez v. Martinez*, 538 U.S. 760 (2003), for example, a challenge to a "coercive interrogation"—classic executive action—the plurality opinion (joined by Justices Thomas, O'Connor, and Scalia), treated the "shocks-the-conscience" test as an alternative theory of liability to a violation of a fundamental right. They first analyzed whether the conduct was "egregious" or "conscience shocking," *id.* at 774–75, and then *separately* analyzed whether it violated a fundamental right, *id.* at 775 (emphasizing that "the Due Process Clause *also* protects certain 'fundamental liberty interest[s]' from deprivation"). Justice Stevens, in his dissent, agreed that these are alternative theories of liability, stating so explicitly: "The Due Process Clause of the Fourteenth Amendment protects individuals against state action that *either* "shocks the conscience," *or* interferes with rights 'implicit in the concept of ordered liberty.'" *Id.* at 787. Notably, no Justice in *Chavez* disagreed with this framing—not even Justice Souter, who authored *Lewis*.

Indeed, *Lewis* itself favorably quoted *Salerno* for the proposition that "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.'" 523 U.S. at 847. *Lewis* only had in mind "cases dealing with abusive executive action" where the claim is that government conduct is so arbitrary or egregious as to be "arbitrary in the constitutional sense." *Id.* at 846. And, as the Seventh Circuit has noted, "the Court [in *Lewis*] made clear that its shocks-the-conscience analysis was not generally applicable to all substantive-due-process

claims." *Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999) (listing examples, and concluding that a "fundamental rights analysis," rather than a "shocks-the-conscience" test, would apply to a tortious-interference-with-contract claim involving executive action).

Many other lower federal courts have rejected the executive/legislative distinction the District argues for—and multiple have rejected it in the context of parents' rights claims involving executive action. *E.g.*, *Seegmiller v. LaVerkin City*, 528 F.3d 762, 768–69 (10th Cir. 2008) (rejecting defendants' argument for an executive/legislative distinction, explaining that "the 'shocks the conscience' and 'fundamental liberty' tests are but two separate approaches to analyzing governmental action under the Fourteenth Amendment," and giving, as an example, a parental rights claim, where the court reversed on that basis (discussing *Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir.2003)); *Crowe v. Cnty. of San Diego*, 608 F.3d 406, 441 n.23 (9th Cir. 2010) ("Defendants argue that the correct standard is whether defendants' conduct 'shocked the conscience.' There is no support in the relevant case law for this assertion. The standard for deprivation of familial companionship is 'unwarranted interference,' not conduct which 'shocks the conscience.'"); *Kolley v. Adult Protective Servs.*, 725 F.3d 581, 585 (6th Cir. 2013) ("There are two types of deprivations that support substantive due process claims: (1) deprivations of a particular constitutional guarantee; and (2) actions that 'shock the conscience.' [ ] This claim deals with the first type of deprivation—deprivation of a constitutional guarantee, particularly the right to the maintenance of a parent-child

relationship.") (citations omitted); *Lambert v. Bd. of Trustees*, 793 F. App'x 938, 943 (11th Cir. 2019) ("In the *absence of a fundamental right*, executive action constitutes an actionable violation of substantive due process only if it shocks the conscience."); *Waldman v. Conway*, 871 F.3d 1283, 1292 (11th Cir. 2017) ("Where a *fundamental liberty interest does not exist*, substantive due process nonetheless protects against the arbitrary and oppressive exercise of government power.").[1]

In any event, as Plaintiffs explained, Wisconsin Courts have always treated the "shocks-the-conscience" test as an alternative theory of liability under the Fourteenth Amendment, Pls. Resp. Br. 6 and n. 1, and the District cites no Wisconsin case to the contrary. The District invokes *In re Paternity of J.L.H.*, 149 Wis. 2d 349, 441 N.W.2d 273 (Ct. App. 1989), as an example of a Wisconsin court applying this test in the context of a parents' rights claim, but that decision clearly treated it as an alternative, *id*. at 359 ("Substantive due process prohibits [government] conduct that 'shocks the conscience,' *or* interferes with rights"), and only addressed the shocks-the-conscience test because *the plaintiff* invoked that alternative test, *id*. at 358–59 ("He contends that this proceeding shocks the conscience.").

In any event, even if the test did apply, disregarding parents on such a fundamental decision does shock the conscience, as Plaintiffs explained. Pls. Resp. Br. 9–10; *see supra* n. 1.

[1] Even the First Circuit, which admittedly does apply a shocks-the-conscience test to all claims against executive action, has attempted to fuse the two tests by explaining that a "significant interference with a protected relationship, such as the parent-child relationship," is the kind of thing that *does* shock the conscience. *McConkie v. Nichols*, 446 F.3d 258, 261 (1st Cir. 2006) (citing *Grendell v. Gillway*, 974 F.Supp. 46, 51 (D.Me.1997)).

II. The Lack of a *Written* Policy Is Irrelevant.

The District heavily emphasizes the lack of a *written* policy, but this is irrelevant to either set of Plaintiffs.

As to Plaintiffs T.F. and B.F., it does not matter at all, given that the District concedes that it disregarded their decision about what was best for their daughter. Pls. Opening Br. 13. That is sufficient for a complete violation of their constitutional rights. All that matters is that there was a "direct[ ] and substantial[ ] infringe[ment]" of their parental, decision-making role. *Matter of Visitation of A.A.L.*, 2019 WI 57, ¶ 18, 387 Wis. 2d 1, 927 N.W.2d 486; *accord Doe v. Heck*, 327 F.3d 492, 525 (7th Cir. 2003) (finding a parents' rights violation because the government did not have "a compelling reason" to "interfere with their familial relationships"); *Gruenke v. Seip*, 225 F.3d 290, 303–07 (3d Cir. 2000) (finding a sufficient "interference with familial relations"); *Crowe*, 608 F.3d at 441 n.23 (stating that the test is "unwarranted interference"). The District argues that the lack of a written policy triggers the "shocks-the-conscience" test, Def. Resp. Br. 3–7, but it does not, for the reasons explained above.

As to Plaintiffs P.W. and S.W., the District argues that the lack of a written policy affects their standing, Def. Resp. Br. 15–17, which Plaintiffs have already explained is wrong. Pls. Resp. Br. 14–18. The only new thing the District adds is to cite *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist., Wisconsin*, No. 22-CV-508-SLC, 2023 WL 2139501 (W.D. Wis. Feb. 21, 2023). That case is not persuasive because it considered standing under Article III in federal courts, which the Wisconsin Supreme has repeatedly explained is a much higher bar than in state

courts. Pls. Resp. Br. 15 (listing cases). Even setting that point aside, Plaintiffs submit that case was wrongly decided, and it was appealed yesterday.

But the District then goes beyond standing in their response brief, claiming Plaintiffs have "presented no evidence" of any unwritten policy, and suggesting as a result that there is nothing for Plaintiffs P.W. and S.W. to challenge. Def. Resp. Br. 4–7. That is simply not true.

First, as Plaintiffs explained, the District's discovery responses and arguments to this Court prove that the District's unwritten policy is that parental consent is not required before treating a minor child as the opposite sex. Pls. Opening Br. 17–18. Discovery responses are a sufficient basis for summary judgment. Wis. Stat. § 802.08(2) ("answers to interrogatories, and admissions on file"). Indeed, even in their response brief, the District claims that it can and does decide "on a case-by-case basis" whether to defer to parents about how a minor student is addressed at school. That policy to allow "case-by-case" discretion alone violates parents' rights.

The District's treatment of B.F.'s and T.F.'s daughter—and defense of that in this Court—is also proof of the District's policy that parental consent is not required. Indeed, in the *Monell* line of cases (to which the District analogizes), the Supreme Court has recognized that an "official policy" can be established by "even a single decision" if made by an official with "final policymaking authority." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 477–84 (1986). As the District concedes, the superintendent "made the ultimate decision" to disregard B.F.'s and T.F.'s decision

about how their daughter should be addressed at school, and, again, the District continues to defend that it can repeat this decision going forward.

An *unwritten* policy can violate constitutional rights just as much as a written policy, and courts have and do allow facial challenges to unwritten policies when appropriate. *E.g.*, *Faustin v. City & Cnty. of Denver, Colo.*, 423 F.3d 1192, 1196 (10th Cir. 2005) ("Our precedent allows facial challenges to unwritten policies."); *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1197 (11th Cir. 1991). Such a challenge is especially appropriate when the claim is that "the very existence of the discretion lodged in the public official is constitutionally unacceptable," such that the "facts of the challenging party's case are irrelevant." *See Watts*, 936 F.2d at 1197. That is the posture of this case. The District claims the authority to decide on a "case-by-case basis" whether to defer to parents or not; and that ad hoc decision-making process is *itself* unconstitutional on its face, as Plaintiffs have explained. Pls. Opening Br. 16–18; 26–29; Pls. Resp. Br. 14, 17–18.

III. The District's Remaining Arguments are Meritless.

When it reaches the merits, the District makes the same flawed move as in their opening brief. They attempt to get to rational basis review by redefining the right to something Plaintiffs have never argued for, to "direct how this public school teaches their children." Def. Resp. Br. 10–11. Plaintiffs already explained that this is not their argument or the right at issue. The right at issue is parents' right to *make decisions* for their children, and whether a child struggling with gender identity should socially transition is a major and controversial decision with lifelong implications. Pls. Resp. Br. 2–5; Pls. Opening Br. 26–28; *Doe 1 v. Madison Metro. Sch.*

Dist., 2022 WI 65, ¶ 92, 403 Wis. 2d 369, 976 N.W.2d 584 (Roggensack, J., dissenting) ("[S]ocial transitioning is a healthcare choice for parents to make").

The District has no persuasive response. It concedes that parents "retain a fundamental right to make decisions" concerning their own children, Def. Resp. Br. 11, and does not even attempt to rebut Plaintiffs' expert evidence about the seriousness of the decision to treat a child as the opposite sex.

The District only briefly addresses strict scrutiny, relying entirely on *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, No. 8:20-3552-PWG, 2022 WL 3544256 (D. Md. Aug. 18, 2022). Plaintiffs have already explained that "safety" and "non-discrimination" do not provide compelling justifications for the District's unwritten policy to exclude parents. Pls. Resp. Br. 10–14. The District very briefly suggests, for the first time, that its policy is justified as "protecting student privacy," but the District does not explain, and, regardless, children do not have privacy rights *vis-à-vis* their parents. *Wyatt v. Fletcher*, 718 F.3d 496, 499 (5th Cir. 2013); *e.g.*, Wis. Stat. § 118.125(2)(a) (parents' access to all of their children's education records).

As to the Maryland case, Plaintiffs respectfully submit that it was wrongly decided. It is currently on appeal to the Fourth Circuit, was argued on March 9, and all three judges on the panel strongly signaled that the District's similar policy violates parents' constitutionally protected *decision-making* authority:[2]

[2] The audio of the oral arguments is available at https://www.ca4.uscourts.gov/OAarchive/mp3/22-2034-20230309.mp3.

- Judge Niemeyer: "You are usurping the care and custody of the children. It is not curricula. It is counseling and helping a child transition, without the parents' involvement. This is a family decision." *Supra* n.2 at 46:58–47:17.
- Judge Rushing: "[I]nforming is not the point. They're complaining about informing the parents because it's the parents' decision to make. And this policy says, the school will decide to transition the child." *Id.* at 37:25–37:42. "The fundamental right to make that decision for a minor belongs to the parent." *Id.* at 38:38–42.
- Judge Quattlebaum: "[T]h[is] keeps the most fundamental decisions out of the parents' hands and into the school. … This is as fundamental as it gets." *Id.* at 42:24–43.

CONCLUSION

The Court should grant summary judgment for Plaintiffs.

Dated: March 22, 2023.

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