UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 25-952

Caption [use short title]

Vitsaxaki v. Skaneateles Cent. Sch. Dist.

Motion for: Leave to File an Amicus Brief

Set forth below precise, complete statement of relief sought:

Do No Harm seeks this Court's leave to file an amicus brief in support of Appellant.

MOVING PARTY: Do No Harm **OPPOSING PARTY:** Defendants-Appellees

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Cameron T. Norris **OPPOSING ATTORNEY:** Jeremy M. Sher

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Court- Judge/ Agency appealed from: U.S. District Court for the Northern District of New York (Hurd, J.)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
■ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ■ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ■ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is the oral argument on motion requested? ☐ Yes ■ No (requests for oral argument will not necessarily be granted)

Has the appeal argument date been set? ☐ Yes ■ No If yes, enter date:

Signature of Moving Attorney:

/s/ Cameron T. Norris **Date:** 6/12/25 Service : ■ Electronic ☐ Other [Attach proof of service]

25-952

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JENNIFER VITSAXAKI,

Plaintiff-Appellant,

v.

SKANEATELES CENTRAL SCHOOL DISTRICT;
SKANEATELES CENTRAL SCHOOLS' BOARD OF EDUCATION,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of New York, No. 5:24-cv-00155 (Hurd, J.)

MOTION FOR LEAVE TO FILE AMICUS BRIEF OF DO NO HARM IN SUPPORT OF APPELLANT

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June 12, 2025

Do No Harm, Inc., requests this Court's leave to file the attached *amicus* brief in support of Appellant. Appellant has consented to its filing. Appellees have declined to consent.

Do No Harm, is a nonprofit organization with over 20,000 members, including physicians, nurses, medical students, patients, and policymakers. Do No Harm is committed to ensuring that the practice of medicine is driven by scientific evidence rather than ideology. In recent years, the practice of biology-denying interventions, euphemistically known as "gender affirming care," has become more common despite the serious harm caused by those medical interventions, and the complete lack of reliable evidence of any benefit for minors. Indeed, Do No Harm has recently released a database demonstrating that nearly 14,000 minors were subjected to biology-denying interventions in the United States between 2019 and 2023. *See Do No Harm Launches First National Database Exposing the Child Trans Industry*, Do No Harm (Oct. 8, 2024), perma.cc/C5U3-7W94. It regularly files amicus briefs that highlight these important issues. *See, e.g.*, *United States v. Skrmetti*, No. 23-477.

Whether public schools violate parental rights when they secretly transition children is "a question of great and growing national importance." *Parents Protecting Our Children v. Eau Claire ASD*, 145 S.Ct. 14 (2024) (Alito, J., dissental). Part of Do No Harm's mission is to help parents vindicate their rights when schools help "gender transition" their children without their knowledge, participation, or consent. It thus has an interest in this important case.

In this case, the Skaneateles Central School District applied an official policy to socially transition Appellant Jennifer Vitsaxaki's 12-year-old daughter behind her back. The school treated Vitsaxaki's daughter as a boy for months, giving her a masculine name and using third-person plural pronouns. Pursuant to the policy, school officials actively hid these actions from Vitsaxaki, even after she inquired about her daughter's wellness at school.

These actions violate Vitsaxaki's fundamental parental rights. This Court has "long recognized" that "parents have a constitutionally protected liberty interest in the care, custody and management of their children" and that the "deprivation of this interest is actionable on a substantive due process theory." *Southerland v. City of New York*, 680 F.3d 127, 152 (2d Cir. 2012) (cleaned up). Yet the district court's opinion makes that right impossible to vindicate.

Do No Harm agrees with Appellant that the district court incorrectly dismissed her complaint. Do No Harm writes separately to highlight why the "shocks-the-conscience" standard does not apply here. Other courts have invoked this test in deciding similar cases. Do No Harm thus seeks to provide this Court with insight into why this "comically vacuous" test does not apply here. *Littlejohn v. Sch. Bd. of Leon Cnty.*, 132 F.4th 1232, 1280 (11th Cir. 2025) (Newsom, J., concurring). Do No Harm believes its brief will assist the Court in deciding this case.

CONCLUSION

For these reasons, Do No Harm respectfully requests that the Court grant the motion for leave to file the attached *amicus* brief.

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June 12, 2025

CERTIFICATE OF SERVICE

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

Dated: June 12, 2025 */s/ Cameron T. Norris*

25-952

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JENNIFER VITSAXAKI,

Plaintiff-Appellant,

v.

SKANEATELES CENTRAL SCHOOL DISTRICT;
SKANEATELES CENTRAL SCHOOLS' BOARD OF EDUCATION,

Defendants-Appellees.

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AMICUS BRIEF OF DO NO HARM
IN SUPPORT OF APPELLANT

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June 12, 2025

CORPORATE DISCLOSURE STATEMENT

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

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INTEREST OF *AMICUS CURIAE*[1]

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

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

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

INTRODUCTION AND SUMMARY OF ARGUMENT

Whether public schools violate parental rights when they secretly transition children is "a question of great and growing national importance." *Parents Protecting Our Children v. Eau Claire ASD*, 145 S.Ct. 14 (2024) (Alito, J., dissental). In this case, the Skaneateles Central School District applied an official policy to socially transition Jennifer Vitsaxaki's 12-year-old daughter without Vitsaxaki's knowledge, participation, or consent. The school treated Vitsaxaki's daughter as a boy for months, giving her a masculine name and using third-person plural pronouns. Pursuant to the policy, school officials actively hid these actions from Vitsaxaki, even after she inquired about her daughter's wellness at school.

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

Though courts sometimes ask whether government misconduct "shocks-the-conscience" when evaluating substantive-due-process claims, that standard does not

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

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

This Court should reverse the decision below.

ARGUMENT

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

This Court has "long recognized" that "parents have a constitutionally protected liberty interest in the care, custody and management of their children" and that the

"deprivation of this interest is actionable on a substantive due process theory." *Southerland v. City of New York*, 680 F.3d 127, 152 (2d Cir. 2012) (cleaned up). Under such a theory, the Fourteenth Amendment's Due Process Clause substantively protects certain fundamental rights—*i.e.*, those rights which are "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs*, 597 U.S. at 231. "Where the right infringed is fundamental, strict scrutiny is applied." *Leebaert v. Harrington*, 332 F.3d 134, 140 (2d Cir. 2003). And "[w]hen a fundamental right is at stake, the Government can act only by narrowly tailored means that serve a compelling state interest." *Muñoz*, 602 U.S. at 910.

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

Though courts sometimes ask whether the misconduct "shocks-the-conscience," that standard does not apply here for two independent reasons. That test is inapplicable

in a case, like this one, that alleges a violation of fundamental rights. And that test is inapplicable in a case, like this one, that challenges legislative conduct.

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

While this Court will sometimes "use the shocks the conscience test" to "assess substantive due process challenges" to executive conduct, *Goe v. Zucker*, 43 F.4th 19, 30 (2d Cir. 2022), that test does not apply when a plaintiff alleges the violation of a fundamental right. The shocks-the-conscience standard is an alternative way to prove a substantive-due-process violation. According to the Supreme Court, any state action that deprives someone of life, liberty, or property can violate due process if it's "arbitrary." *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992). The shocks-the-conscience test is a last resort: Plaintiffs who lack a fundamental right can still prevail by satisfying this demanding standard. *McKinney v. Pate*, 20 F.3d 1550, 1556 & n.7 (11th Cir. 1994) (en banc). But the shocks-the-conscience test is not an *additional* requirement that plaintiffs who *have* a fundamental right must satisfy.

Binding precedent explains that the shocks-the-conscience and fundamental-rights tests are alternatives ways for a plaintiff to prevail. As the Supreme Court has explained, "substantive due process prevents the government from engaging in conduct that shocks the conscience *or* interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (cleaned up; emphasis added). This Court, too, has described the tests as alternatives. *See Poe v. Leonard*, 282 F.3d 123,

138-39 (2d Cir. 2002) (tests are "independen[t]"); *Mercer v. Brunt*, 272 F. Supp. 2d 181, 186 (D. Conn. 2002) ("two alternative tests"). Other courts have too. *E.g.*, *D.B. v. Cardall*, 826 F.3d 721, 740 (4th Cir. 2016); *Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999); *Martinez v. Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003); *Pediatric Specialty Care v. Arkansas DHS*, 364 F.3d 925, 932 (8th Cir. 2004); *SO Apartments v. San Antonio*, 109 F.4th 343, 352 (5th Cir. 2024).

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

Vitsaxaki alleges a violation of her fundamental rights. Her complaint claims the school—acting under an official policy—treated her daughter as a boy for months and hid it from her. Blue-Br.22; JA17-28. Those allegations state a claim that the school violated Vitsaxaki's fundamental right to direct "the care, custody, and control" of her child. *Troxel,* 530 U.S. at 65-66. Nor is her assertion of that right "overstated." *Goe,* 43

F.4th at 30-31. While this Court has held that fundamental rights were "not implicated" where the State was "not forcing any child" to undergo a healthcare procedure "against her parents' will," the opposite is true here. *Id.* The school district secretly transitioned Vitsaxaki's daughter not only against her will but also without her knowledge. Those actions are "beyond troubling." *Kaltenbach v. Hilliard City Schs.*, 2025 WL 1147577, at *1 (6th Cir. Mar. 27) (Thapar, J., concurring). And they state a claim that should be allowed to proceed.

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

Even in substantive-due-process cases involving no fundamental right, the Supreme Court distinguishes between "legislative" actions and "executive" actions. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (explaining that the "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue"). This Court has followed suit. *Hancock v. Cnty. of Rensselear*, 882 F. 3d 58, 65 (2d Cir. 2018). The distinction is "functional," meaning "[s]ome types of executive action, such as regulations," are still considered "legislative action." *Id.* at n.2.

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

in the concept of ordered liberty, or deeply rooted in this Nation's history and tradition." *Goe*, 43 F.4th at 30 (cleaned up). "When the right infringed is fundamental," the Court "appl[ies] strict scrutiny," and "the governmental regulation must be narrowly tailored to serve a compelling state interest." *Id.*

Vitsaxaki challenges legislative action. As the First Circuit recently explained, "statutes and governmental policies are typically deemed legislative," while "individual acts of government officials" that are "untethered from any policy" are "executive." *Id.* at 345. Here, Vitsaxaki challenges an official school policy, under which the school district socially transitioned her daughter in secret by treating her as a boy for months "without giving Mrs. Vitsaxaki notice, without obtaining her consent, and while actively concealing it from her." Blue-Br. ix, 7, 33-34. Earlier this year, the First Circuit treated the same conduct as "legislative" because the school's policy "applies broadly to all students" and was "administered by multiple governmental actors." *Foote*, 128 F.4th at 346-47. Though the parents in *Foote* "also challenged some individual actions" of school officials, the court concluded that "those discrete decisions by individual educators" still fell into the "legislative bucket" because they "were taken to actively implement and reinforce" the policy. *Id.* That is precisely the case here.

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7) because it contains 1,911 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word in 14-point Garamond font.

Dated: June 12, 2025 */s/ Cameron T. Norris*

CERTIFICATE OF SERVICE

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

Dated: June 12, 2025 */s/ Cameron T. Norris*