

No. 25-1037

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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JOHN AND JANE DOE,

Appellants,

v.

PHILIP WEISER,

in his official capacity as Attorney General of Colorado, *et al.*,

Appellees.

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On Appeal from the Order of the United States  
District Court for the District of Colorado

The Honorable Charlotte N. Sweeney

District Court Case Number: 1:24-cv-02185-CNS-SBP

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**APPELLANTS' REPLY BRIEF  
ORAL ARGUMENT REQUESTED**

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## INTRODUCTION

The Does have standing to seek prospective relief. The Policy requires District personnel to lie to and deceive parents, the Law and Policy give the Does' children the authority to undergo a social transition without the Does' consent, and the Does are required to alter their relationships with their children to combat the influence of the Law and Policy. Moreover, A.D. is still struggling with her gender identity, and the District is encouraging B.D. to consider whether she may have a transgender identity even though she is too immature to process what that means.

On the merits, socially transitioning the Does' children without their consent—or in the alternative, without notice—violates their parental rights. Social transitioning is a form of healthcare treatment, and even if it weren't, whether to socially transition a child is an important decision in the child's life, one that significantly impacts relationships that bind the family together. Parents can lose their rights, of course, but only when the state has made a proper showing under its *parens patriae* authority, which neither the Law nor Policy require.

The extensive record in this case contains no material factual disputes, and the parties have briefed the merits thoroughly. The Court should thus direct the district court to grant the Does the modest relief they seek: a preliminary injunction enjoining Appellees from (again) socially transitioning their children while this litigation is pending.

## ARGUMENT

### I. THE DOES' MOTION ISN'T SUBJECT TO A HEIGHTENED LEGAL STANDARD

The Attorney General argues that the Does' Motion for Preliminary Injunction is subject to a heightened legal standard. But the district court didn't hold the Does to a heightened standard, App. 4 at 887–88, and the Attorney General hasn't shown the district court erred.

First, the Attorney General argues that the Does' Motion seeks “all the relief [the Does] could recover” on the merits. Weiser Br. at 10. But a motion for preliminary injunction seeks the “same relief” as the merits only when the preliminary injunction, “once complied with, cannot be undone.” *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1247 (10th Cir. 2001). Here, if the Does' Motion were granted and Appellees prevailed on the merits, the district court would simply vacate the preliminary injunction. And if the Does prevailed on the merits, the district court would convert the preliminary injunction into a permanent one and award the Does nominal damages. App. 3 at 804–05. Thus, the Does' Motion doesn't seek the “same relief” they seek on the merits. *Id.*

Second, the Attorney General contends that the Does' Motion seeks to alter the “status quo.” Weiser Br. at 10. That's wrong too. In determining the status quo, courts should look to “the last peaceable uncontested status existing between the parties.” *Schrier v. Univ. of Co.*, 427 F.3d 1253, 1260 (10th Cir. 2005). When the

Does filed their Motion on August 7, 2024—before the District’s 2024–25 school year started—A.D. had begun the process of de-transitioning and B.D. wasn’t being socially transitioned. App. 1 at 27–28. The Does’ Motion seeks to preserve the status quo that was in effect at that time, not alter it. *Schrier*, 427 F.3d at 1260.

Third, the Attorney General claims that because the Does challenge the Law and Policy on their face, they have a “heavy burden” of demonstrating a likelihood of success. Weiser Br. at 10 (cleaned up). Not so. While the Does bring a facial (and as-applied) challenge on the merits, their Motion seeks preliminary relief as applied to their children only. In light of this limited request, the Does aren’t required to show the Law and Policy are facially invalid at this stage of the proceedings.

Even if the Does’ Motion were subject to a heightened standard, they satisfy it. They’ve made a “strong showing” that the “likelihood-of-success[] and the balance-of-harms factors . . . tilt in their favor.” *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019).

## **II. THE DOES ARE LIKELY TO SUCCEED ON THE MERITS**

### **A. The Does have Article III standing.**

Appellees contend that the district court didn’t abuse its “discretion” in concluding the Does lacked standing. Córdova Br. at 10, 15; District Br. at 3. But standing is a legal question this Court reviews de novo. *Does 1-11 v. Bd. of Regents*

of *Univ. of Colo.*, 100 F.4th 1251, 1261 (10th Cir. 2024). Under de novo review, the Does have made a strong showing that the district court erred.

1. The Does are suffering injury-in-fact.

*a. The Law and Policy are causing ongoing injury.*

i. Important Information

Appellees argue that the Does lack standing to challenge the Policy’s impairment of their ability to obtain important information about their children because they “never asked” District personnel whether their children were being socially transitioned. District Br. at 20; *see also* Córdova Br. at 18. But this argument conflates retrospective relief with prospective relief, as the district court did. Whether the Does previously asked for this information is not dispositive to whether they are presently being injured. *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003) (noting that “[p]laintiffs may have standing [to pursue prospective relief] even if they have never been” subjected to past injury); *Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees*, 680 F. Supp. 3d 1250, 1277 (D. Wyo. 2023) (granting preliminary injunction despite no evidence school “ever actively withheld information” from parents). Instead, the Does have standing to seek prospective relief because they presently have the intent to obtain this information on a regular basis. *Tandy v. City of Wichita*, 380 F.3d 1277, 1284 (10th Cir. 2004) (concluding

that plaintiff’s “intent to use buses ‘several times per year’” was sufficient to confer standing).

Contrary to Appellees’ suggestion, the Does aren’t required to ask the District for this information to have standing. If the Does were to ask, they would be unable to obtain the truth because the Policy requires District personnel to lie to and deceive them. Accordingly, asking would be futile, and “[t]he law does not require the doing of a futile act” to establish standing. *Cole v. Tansy*, 926 F.2d 955, 957 (10th Cir. 1991); *see also Mendoza v. Perez*, 754 F.3d 1002, 1014 n.6 (D.C. Cir. 2014).

The District also claims that the Policy doesn’t “require staff to lie to parents.” District Br. at 20. But even if that were correct (and it’s not), the Policy indisputably requires District personnel to *deceive* parents. App. 3 at 875 (precluding disclosing “a student’s transgender status to . . . parents”); App. 3 at 895 (requiring use of students’ “legal name and [corresponding] pronoun” in conversations with parents). The Policy doesn’t contain an exception when parents ask District personnel a direct question. Indeed, A.D.’s Gender Support Plan specifically provides that—in response to a direct question from her parents—District personnel must not tell them the truth. Sealed App. at 912. The Policy’s deception requirement injures the Does. *Willey*, 680 F. Supp. 3d at 1278 (concluding that providing “materially misleading . . . information” to parents in response to inquiry likely violated parental right); *see*

also *Foote v. Ludlow Sch. Comm.*, 128 F.4th 336, 353 (1st Cir. 2025) (same with respect to “deceptive communication”).

The District contends that standing is lacking because one of the policies that comprises the Parental Exclusion Policy—Policy ACA—allows parental notification. Policy ACA, however, provides only that parents may be notified when “appropriate.” App. 2 at 497. Whether notification is “appropriate” is determined by a different part of the Parental Exclusion Policy—the LGBTQ+ Toolkit—which precludes parental notification to allegedly unsupportive parents unless the child consents. App. 3 at 875. Thus, read as a whole, the Parental Exclusion Policy impairs the Does’ right to obtain information. And even if Policy ACA were read in isolation, standing exists. If the Does asked, and the District denied that it was socially transitioning their children, the Does don’t have a way of knowing whether the denial was because their children weren’t being socially transitioned or because the District had concluded disclosure wasn’t “appropriate.”

Appellees also claim that the Does aren’t injured because they can request their children’s educational records under the Family Educational Rights and Privacy Act (“FERPA”). But a plaintiff doesn’t have to be *precluded* from obtaining information to have standing. Rather, standing exists when “the government erects a barrier that makes it more difficult” to obtain information. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666

(1993). Lying to and deceiving parents makes it more difficult for them to obtain information about their children. Moreover, the District doesn't always create written records of children's social transitions. In fact, the District didn't create a Gender Support Plan for A.D. for almost an entire school year. Sealed App. at 910 (dated May 5, 2023). Accordingly, FERPA doesn't provide parents an alternate means of learning whether their children are being socially transitioned at school.

Further, Appellees have chosen their words carefully. They don't concede that they interpret FERPA to require that parents must be provided documents revealing their children are being socially transitioned if the parents don't already know about the transition. Indeed, the Policy provides the opposite: it states that FERPA requires schools to conceal this information—even from parents—if their child hasn't already “come out” to them. App. 3 at 872 (“Outing a [transitioning] student to . . . families is a violation of the students FERPA rights.”); *see also* App 3 at 875 (similar). While this misinterprets FERPA,<sup>1</sup> it nevertheless defeats Appellees' argument that FERPA provides an alternate way for parents to learn about their children's social transition.

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<sup>1</sup> The U.S. Department of Education is beginning to investigate schools that withhold documents relating to children's social transitioning in response to their parents' FERPA requests. *See U.S. Department of Education Launches Investigation into Maine Department of Education for Alleged FERPA Violations* (March 28, 2025), available at <https://perma.cc/8TYH-M38L>; *U.S. Department of Education Launches Investigation into California Department of Education for Alleged FERPA Violations* (March 27, 2025), available at <https://perma.cc/2V7Q-RVFR>.



The new cases Appellees cite are easily distinguishable. In *Footte*, the parents didn't seek prospective relief, so forward-looking injury wasn't at issue. 128 F.4th at 348. Moreover, as the District acknowledges, *Footte* involved “nondisclosure,” District Br. at 21, not the lying and deception at issue here, *Footte*, 128 F.4th at 353 (noting that plaintiffs' complaint made only “general” and “contradict[ing]” allegations that the school deceived parents). And in *John & Jane Parents I v. Montgomery County Board of Education*, the parents expressly limited their claim to seek access to their children's “gender support plan.” 78 F.4th 622, 629 (4th Cir. 2023). But because the parents didn't allege their children actually had such a plan, the parents' injury was speculative. *Id.* at 631. Here, by contrast, the Does seek to ascertain whether their children are being socially transitioned, which is information that indisputably exists. Because the Policy requires the District to lie to and deceive parents—even in response to a direct question—the Does are suffering ongoing injury.

## ii. Decisional Framework

Appellees ignore most of the cases the Does cite in support of this theory of standing, and the one they do address—*Deanda v. Becerra*, 96 F.4th 750 (5th Cir. 2024)—they misinterpret. The District argues that *Deanda* doesn't apply because, unlike that case, “there is no state law requiring parental consent” here. District Br. at 23. This is a classic case of fighting the hypothetical. When evaluating standing,

the Court “must assume . . . that each claim is legally valid.” *Citizen Ctr. v. Gessler*, 770 F.3d 900, 910 (10th Cir. 2014). The Does contend that the constitution requires parental consent when schools socially transition children. Whether that’s right or wrong is a question for the merits, not standing. The same is true for the District’s argument that “the prevailing weight of authority” holds parental consent isn’t constitutionally required. District Br. at 23. That’s a merits inquiry, not standing.

The District also argues that the Does lack standing to challenge the Law because it’s “silent” as to parental consent. District Br. at 32.<sup>2</sup> To the extent the District is suggesting the Law *requires* parental consent, that’s wrong. The Law provides that schools “shall” address “student[s] by [their] chosen name.” C.R.S. § 22-1-145(2). Because the Law doesn’t mention parental consent, parental consent isn’t required.

The Commissioner contends that this theory of standing fails because “students (not parents) . . . have always had control” over their names. Córdova Br. at 18. But she cites no authority in support of this contention, and it’s obviously wrong: children don’t name themselves. Moreover, this case isn’t about a child who wants to go by Jimmy instead of James at school. Rather, it’s about taking authority away from parents to decide whether their children undergo a controversial form of psychological treatment that can have a significant impact on their life course.

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<sup>2</sup> Notably, the Attorney General and the Commissioner don’t join this argument.

Regardless of the source of law that authorizes children to make this decision on their own, the Does are injured by that allocation of authority.

The Commissioner also complains that this theory would confer standing on every parent in the District, but the fact that “an injury may be suffered by a large number of people does not make [the] injury a nonjusticiable generalized grievance.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 n.7 (2016). Rather, the question is whether “each individual suffers a particularized harm.” *Id.* Here, all parents in the District are suffering particularized injury under the Law and Policy because their decisional rights over their children are being impaired. *See Parents 1*, 78 F.4th at 644 (Niemeyer, J, dissenting) (concluding that parents have standing where school policy “invites minor children to develop and implement a gender transition plan without the knowledge, consent, or participation of their parents”).

### iii. Behavioral Modification

Appellees argue that the Does would have been required to take the same parenting actions even in the absence of the Law and Policy. But that’s not true. If the Law and Policy weren’t on the books, the Does would not, for example, be required to seek to convince their children not to undergo a social transition or monitor their children’s actions at school as closely as they do now. Instead, the Does would know that their children weren’t being socially transitioned. Because the Does are required to modify their behavior to counter the impact of the Law and

Policy on their children, the Does are injured. *Parents I*, 78 F.4th at 644 (Niemeyer, J, dissenting) (concluding that standing exists where policy alters “the dynamics and dialogue between parent and child”).

The District argues that this theory of standing fails because the Does’ injury is “self-inflicted.” District Br. at 26. But self-inflicted injuries defeat standing “only [when] the injury is so completely due to the plaintiff’s own fault as to break the causal chain.” *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1157 n.8 (10th Cir. 2005); *Fish v. Kobach*, 840 F.3d 710, 753 (10th Cir. 2016) (similar). In light of A.D.’s ongoing struggles with her gender identity and B.D.’s exposure to concepts she isn’t mature enough to process, App. 3 at 790, 794, the Does’ efforts to counter the impact of the Law and Policy on their children are attributable to the Law and Policy, not unreasonably overbearing parenting.

*b. The Does face a “realistic danger” of future injury.*

The District frames the Does’ theory of future injury as a “pre-enforcement” theory. District Br. at 27. That framing isn’t wrong, but there’s an important difference. In a typical pre-enforcement challenge, the plaintiff intends to perform some act the challenged law forbids, and the question is whether the plaintiff has established a “realistic danger” of arrest or prosecution. *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979). Here, the Law and Policy aren’t criminal statutes. Rather, they give the Does’ children a means to undergo a social transition at school in

violation of the Does' right to consent. Thus, the question is whether the Does have established a "realistic danger" that their children will (again) seek to be socially transitioned at school, thus implicating the Law and Policy.

The Does have made that showing. Appellees acknowledge, as they must, that A.D. is "likely to continue to struggle with her gender identity for the foreseeable future." District Br. at 27 (cleaned up). This alone is sufficient to establish standing. *Parents I*, 78 F.4th at 629 (noting that standing exists when children are "struggling with issues of gender identity"). The fact that A.D. currently feels like a girl again and regrets previously wanting to transition doesn't undermine this conclusion. Children's gender identity can be "fluid"; A.D. "has [not] desisted"; A.D. is "still suffering from the underlying psychological conditions" that triggered her transgender identity; A.D. "has gone through prior periods" where she stopped feeling like a boy; A.D. doesn't "feel comfortable in a female body"; and A.D. is "trying to . . . get back to her prior self," but she hasn't yet "figured out how to do that." App. 2 at 556; App. 3 at 768, 792. These allegations plainly establish a "realistic danger" A.D. will again seek to be socially transitioned at school. Courts have concluded parents had standing on much less. *See Doe v. Delaware Valley Reg. High Sch. Bd. of Educ.*, No. 24-00107, 2024 WL 5006711, at \*4, \*7 (D. Del. Nov. 27, 2024) (holding parent had standing where school previously socially transitioned

child who didn't "feel comfortable in her skin" even though she no longer wanted to transition (cleaned up)).

Appellees' argument otherwise appears to be based on a misunderstanding of Supreme Court cases stating that standing exists when future injury is "certainly impending." *Córdova Br.* at 16 (cleaned up). While that standard sounds demanding, the Supreme Court has clarified that plaintiffs aren't required "to demonstrate that it is literally certain that the harms they identify will come about." *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 414 n.5. (2013). Rather, standing exists if there is merely a "substantial risk," *id.*, or a "realistic danger," *Babbitt*, 442 U.S. at 298, of future injury. Moreover, even if the "certainly impending" standard were more demanding than the "substantial risk" or "realistic danger" standards—and it is doubtful that it is, *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (using "substantial risk" and "certainly impending" interchangeably); *Babbitt*, 442 U.S. at 298 (same with "realistic danger" and "certainly impending")—*Clapper* establishes that while injuries that are "certainly impending" are sufficient to give rise to standing, meeting a heightened "certainly impending" standard isn't necessary. 568 U.S. at 414 n.5.

The District focuses on the result in *Clapper*—a conclusion that standing was lacking—divorced from its unique factual setting, arguing that "the legal requirements" are the same in *Clapper* as here. *District Br.* at 31. But that's wrong.

In *Fish v. Schwab*, this Court held *Clapper* means that courts must “engage[] in an especially rigorous standing inquiry” in cases that “concern the actions of the political branches in the fields of intelligence gathering and foreign affairs.” 957 F.3d 1105, 1120 (10th Cir. 2020) (cleaned up). Because this case doesn’t arise in that setting, *Clapper*’s “especially rigorous standing inquiry” doesn’t apply here.

The District also claims that to demonstrate future injury the Does must establish that A.D. was previously socially transitioned “*because of*” the Law and not for some other reason. District Br. at 28 (emphasis in original). This argument is mystifying. By its nature, a pre-enforcement challenge occurs *before* the statute is applied to the plaintiff. *Babbitt*, 442 U.S. at 298. While prior application of the statute is “good evidence” it will be applied again, *Driehaus*, 573 U.S. at 164, prior application isn’t necessary to establish future injury, *Babbitt*, 442 U.S. at 298. Here, the District previously socially transitioned A.D. at school. Whether that prior transition occurred before or after the Law (or current version of the Policy) were in effect is immaterial. See *303 Creative LLC v. Elenis*, 600 U.S. 570, 583 (2023) (holding standing exists when the government “has a history of past enforcement against nearly identical conduct”).

Appellees argue that even if the Does have standing vis-à-vis A.D., they don’t have standing vis-à-vis B.D. While the Does’ argument with respect to A.D. is stronger, they have standing with respect to B.D. too. The District is “encouraging”

B.D. to “evaluate whether she feel[s] like [she] might [have a transgender identity]” and subjecting her to social pressures to transition despite the fact she is “too immature to process” that information. App. 3 at 794. On these facts, the District is laying the groundwork for B.D. to come to have a transgender identity, thus giving rise to injury. *Am. Humanist Ass’n, Inc. v. Douglas Cnty. Sch. Dist. RE-1*, 859 F.3d 1243, 1256 (10th Cir. 2017) (noting that parents have standing to challenge actions of their children’s school that “result[] in the exercise of pressure” on them).

Finally, the cases Appellees cite are distinguishable. In *Parents 1*, as discussed, the parents didn’t allege that their children were “struggling with gender identity issues or [were otherwise] at a heightened risk for questioning their . . . gender” identity. *Id.* 78 F.4th at 635–36. Here, the Does have introduced precisely this type of evidence. And in *Doe v. Pine-Richland School District*, the parent’s only allegation of future injury was that her daughter had watched videos related to transitioning and had transgender-identifying friends. No. 2:24-CV-51, 2024 WL 2058437, at \*3 (W.D. Pa. May 7, 2024). The Does’ allegations of future injury are far more compelling here.

2. Causation and redressability also exist.

Appellees also argue that causation and redressability are lacking. These arguments are uniquely bad. Indeed, not even the district court adopted them. This Court should reject them too.



As for ongoing injury, the Commissioner argues that the Law doesn't impair the Does' ability to obtain truthful information. But the Does don't assert this theory of standing against the Law. Rather, this theory applies to the Policy only. Op. Br. at 20–22.

The Commissioner also argues that because A.D. first identified as transgender before the Law was passed, the Does would have been required to account for the possibility that A.D. might seek to undergo a social transition regardless of the Law. But this argument ignores B.D., who—so far—hasn't identified as transgender. Moreover, in the absence of the Law and Policy, the Does could take a less confrontational approach to parenting, safe in the knowledge that they would always retain the *authority* to say “no” to a social transition. With the passage of the Law and Policy, however, the Does must *convince* their daughters not to be socially transitioned. The Law and Policy has thus caused the Does to alter their relationships with their children, which can be redressed by an injunction.

As for future injury, causation and redressability also exist. Contrary to Appellees' suggestion, whether children may be socially transitioned under some other source of law is irrelevant. *Larson v. Valente*, 456 U.S. 228, 242 n.15 (1982) (rejecting argument that to establish standing the plaintiff must demonstrate “there is no other means by which the State can” bring about the same injury); *WildEarth Guardians v. USDA*, 795 F.3d 1148, 1157 (9th Cir. 2015) (noting that the “existence

of multiple causes of an injury does not defeat [standing]”). Under the Law and Policy, schools are authorized to socially transition children without parental consent, and an injunction precluding that practice would redress the Does’ injury.

Finally, the Commissioner argues that causation and redressability are lacking because the Law and Policy “merely require[] school personnel not to ‘deadname’ students.” Córdova Br. at 22. This argument is pure sophistry. The Law and Policy’s requirement that schools not “deadname” children is just another way of saying the Law and Policy require schools to socially transition children. The Court can—and should—redress that injury with an injunction.

**B. The Does are likely to succeed on their First Amendment and substantive due process claims.**

1. The Does allege straightforward constitutional violations.

Appellees don’t dispute that the parental right exists, that it is fundamental, or that the “fundamental-rights approach” applies here. Córdova Br. at 24; District Br. at 33–34. Instead, Appellees contend that the Does are asking the Court to extend the parental right in violation of *Washington v. Glucksberg*. This argument fails.

First, the right to family integrity is protected by both substantive due process and the First Amendment. *Keates v. Koile*, 883 F.3d 1228, 1236 (9th Cir. 2018); *Easterling v. Thurmer*, 880 F.3d 319, 323 (7th Cir. 2018). *Glucksberg* doesn’t apply to First Amendment claims. 521 U.S. 702, 720–21 (1997). Rather, the question for the Does’ First Amendment claim is whether the right they assert “falls within” the

protections of that amendment. *ACORN v. City of Tulsa*, 835 F.2d 735, 742 (10th Cir. 1987). *See also Soldal v. Cook Cnty.*, 506 U.S. 56, 70 (1992) (noting that courts must evaluate plaintiff's claim under the more "explicit textual source of constitutional protection" before evaluating plaintiff's "substantive due process" claim (cleaned up)). And for reasons already discussed, Op. Br. at 37–38, the right to family integrity "falls within" the First Amendment.

The District claims that the Does didn't seek injunctive relief on their First Amendment claim, but the Does plainly did. District Supp. App. 1 at 36–37 (arguing that the right to family integrity is "protected by . . . the First Amendment's concept of 'intimate association'" (citations omitted)).

The Does acknowledge that old Tenth Circuit authority houses the right to family integrity in substantive due process only. *Griffin v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993). But Supreme Court precedent says otherwise, *Bd. of Dir. of Rotary Intern. v. Rotary Club*, 481 U.S. 537, 545 (1987), and more recent Tenth Circuit authority acknowledges that the right also arises under the First Amendment, *Wirsching v. Colorado*, 360 F.3d 1191, 1198 (10th Cir. 2004) (evaluating First Amendment family integrity claim); *see also Reinhardt v. Kopcow*, 66 F. Supp. 3d 1348, 1359 (D. Colo. 2014) (noting that family integrity claim arises under "First and Fourteenth Amendment"). Moreover, the out-of-circuit precedent *Griffin* relied on has been abrogated. *See Keates*, 883 F.3d at 1236; *Easterling*, 880 F.3d at 323.

Second, as for the Does’ substantive due process claims, while *Glucksberg* sets forth a test designed to determine whether to recognize *new* substantive due process rights, the parental right isn’t *new*. See *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923); see also *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (noting that the parental right is “established beyond debate as an enduring American tradition”). And in *Parham v. J.R.*, the Supreme Court specifically noted that parents have the right to control their children’s “medical care [and] treatment.” 442 U.S. 584, 603 (1979); see also *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010) (similar); *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1203 (10th Cir. 2003) (similar).

Accordingly, parents aren’t required to satisfy the *Glucksberg* test for every new type of healthcare treatment the state seeks to perform on their children, be it a cochlear implant, the administration of ADHD medication, hypnotherapy, or any other new type of treatment that might arise in the future. Instead, the question is whether the state action at issue “fall[s] within” the logic of the previously recognized right. *Dubbs*, 336 F.3d at 1203; see also *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (noting that question wasn’t whether the Court should create a “new . . . right to same-sex marriage” but whether same-sex marriage falls within “the right to marry in its comprehensive sense” (emphases added)). *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality op.) (concluding that state statute impairing parental decision to determine child visitation infringed parental right without

conducting *Glucksberg* analysis); *id.* at 77–78 (same) (Souter, J., concurring); *id.* at 80 (same) (Thomas, J., concurring); *Footnote*, 128 F.4th at 348 (asking whether parents’ asserted right “fell within” scope of preexisting right).

Moreover, even if social transitioning weren’t psychological treatment, the analysis would be similar. In that situation, the question would be whether the right the Does assert is sufficiently important in the lives of their children that it goes to the “heart of parental decisionmaking,” *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005), or constitutes “unwarranted intrusion” in the family, *Thomas v. Kaven*, 765 F.3d 1183, 1196 (10th Cir. 2014), under the principles established by preexisting parental-rights case law.

Either way, the Does aren’t required to demonstrate anew that the parental right exists under *Glucksberg*. Indeed, requiring them to make such a showing would impermissibly “trap[ the constitution] in amber.” *United States v. Rahimi*, 602 U.S. 680, 691 (2024). Instead, the question is whether the rights the Does are advancing “fall within” the scope of the parental right. For reasons discussed elsewhere, they do. *See* Op. Br. 30–38; *infra* at 24–34.

Third, even if the Does were required to satisfy the *Glucksberg* test, they’ve done so. For time immemorial, parents—not children, and not the state—have had the power to name their children as a component of their general parental authority. Moreover, under the common law, parents had the right “to speak and act on . . .

behalf” of their minor children. *Hodgson v. Minnesota*, 497 U.S. 417, 483 (1990) (Kennedy, J., concurring in part and dissenting in part); *see also* Blackstone, 1 COMMENTARIES at 447 (noting parental right to “sett[le one’s children] properly in life, by preventing the ill consequence of too early and precipitate [decisions]”). And this concept of the “authority of parents in the lives of their children persisted in the decades leading up to the ratification of the Fourteenth Amendment.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 835 (2011) (Thomas, J., dissenting on other grounds).

Based on these “deeply rooted” principles and traditions, *Glucksberg*, 521 U.S. at 721, it beggars belief to think the founding (or second founding) generation would have thought the state could socially transition children without parental consent. And in light of “Western civilization concepts of the family,” which acknowledge “broad parental authority” over their children, *Parham*, 442 U.S. at 602, parents’ right to consent when the state socially transitions their children is “implicit in the concept of ordered liberty,” *Glucksberg*, 521 U.S. at 721. “Neither liberty nor justice” is served by allowing schools to make this major decision in children’s lives to the exclusion of their parents. *Id.* (cleaned up).

2. Coercion isn’t a necessary element of a parental rights claim, and coercion exists here.

Appellees contend that the state violates parents’ rights only when it coerces their children. But this argument contradicts binding authority, most obviously in the healthcare setting. Parents have the right to control their children’s healthcare,

even if children voluntarily seek treatment from the state. *Parham*, 442 U.S. at 603; *see also Mario V. v. Armenta*, No. 18-CV-00041-BLF, 2021 WL 1907790 (N.D. Cal. May 12, 2021) (holding parents’ rights violated where teacher conducted blood-sugar tests on willing students). More generally, at its core, the parental right is the right to “*make decisions* concerning the care, custody, and control of their children,” *Troxel*, 530 U.S. at 66 (plurality op.) (emphasis added), not merely the right to have their children be free from governmental coercion.

In *Doe v. Irwin*—what appears to be the first case that concluded coercion was required to make out a parental rights claim—the parents alleged that they had the right to be notified when a state-run health clinic provided contraceptives to their children. 615 F.2d 1162, 1163 (6th Cir. 1980). The Sixth Circuit disagreed, concluding that parents didn’t have the right to be notified of their children’s “voluntary decisions” to obtain contraceptives. *Id.* at 1168; *see also Anspach v. City of Phila.*, 503 F.3d 256, 262 (3d Cir. 2007) (holding similar).

*Doe* and *Anspach* are distinguishable. First, unlike social transitioning, minors have a privacy right to obtain contraceptives. *Doe*, 615 F.2d at 1166 (discussing *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977) (plurality op.)); *Anspach*, 503 F.3d at 262 (same). No court has ever hinted—and Appellees don’t argue—that minors have a privacy right to undergo a social transition without parental consent. Second, unlike schools—where attendance is compulsory and

where the state has plenary control over the child, C.R.S. § 22-33-104—state-run health clinics “have no authority” over children seeking contraceptives. *Anspatch*, 503 F.3d at 265, 268; *see also Alfonso v. Fernandez*, 195 A.D.2d 46, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993) (holding school-based condom distribution program violated parental rights). Third, unlike schools, health clinics don’t have ongoing relationships with parents in which consent can be obtained. Indeed, the District already requires parental consent for a host of school-based activities for their children, like field trips, the distribution of medication, and organized sports. App. 3 at 710–19. And fourth, unlike District schools, health clinics are not active participants with the child in the concealment of the child’s activities from parents. *See Foote*, 128 F.4th at 353 (noting that school’s deception of parents regarding child’s social transition is an unlawfully “restraining act”).

Moreover, a holding that coercion is a necessary element of a parental rights claim would give schools far too much leeway to interfere with parental decision-making. Under such a holding, it would be constitutionally permissible for schools to employ doctors to provide medication to willing children. *But see Mario V.*, 2021 WL 1907790 (holding parental right violated by giving willing students blood-sugar tests). It would be constitutionally permissible for schools to hold a “Grandparent Visitation Day” for willing children. *But see Troxel*, 530 U.S. at 65–66 (plurality op.) (concluding parents have right to determine persons with whom the child



associates). And it would be constitutionally permissible for school personnel to retain custody of a child who ran away from home. *But see Gomes v. Wood*, 451 F.3d 1122, 1128 (10th Cir. 2006) (holding state may maintain temporary custody of child only “in an emergency” (cleaned up)).

Even if coercion were required, it exists here. True, the District doesn’t compel children to undergo a social transition. But once children make that decision, the District’s affirmation of their transgender identity has the psychological effect of causing the transgender identity to persist, a psychological effect A.D. herself experienced. App. 2 at 550–55; App. 3 at 79. The constitution guards against even “subtle coercive pressure in the elementary and secondary public schools.” *Lee v. Weisman*, 505 U.S. 577, 592 (1992). By creating an environment in which the child’s transgender identity is affirmed—including by teacher “role models,” *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987)—the District’s actions necessarily involve “coercion.” *Landerer v. Dover Area Sch. District*, No. 1:24-CV-00566, 2025 WL 492002, at \*10 (M.D. Pa. Feb. 13, 2025).

3. The Does are likely to succeed on all three of their theories.

*a. Social transitioning is healthcare treatment.*

Appellees assert that social transitioning isn’t healthcare treatment but that it merely “accords [children] the basic level of respect expected in a civilized society.” District Br. at 38 (cleaned up); *see also* Córdova Br. at 34 (similar). But this

argument simply ignores: (1) the consensus view that social transitioning constitutes treatment in the Eighth Amendment context; (2) Dr. Anderson’s declaration; (3) the *Final Cass Review*; (4) Dr. Zucker’s article; (5) various medical associations; and (6) the U.S. Department of Health and Human Services. Op. Br. at 31–34. The District also feigns ignorance about what social transitioning treats, but Dr. Anderson’s declaration couldn’t be clearer: the purpose of social transitioning “is to alleviate any psychological distress caused by the mismatch between one’s natal sex and gender identity.” App. 2 at 539; *see also* App. 3 at 776. That’s treatment.

Appellees rely heavily on *Foote*, but *Foote* is distinguishable. While the complaint there *asserted* that social transitioning was treatment, it did little more than “label[]” social transitioning as treatment with “conclusory allegations” not entitled to a presumption of truth. 128 F.4th at 349. Indeed, *Foote* specifically acknowledged that its conclusion was limited “[s]olely [to the facts] as pled” on the sparse record before it. *Id.* at 350. Here, by contrast, the extensive evidence establishes that social transitioning is treatment.

The Commissioner suggests that if social transitioning is treatment there is no limiting principle that would keep such a holding from applying to school-based counseling, gym class, or even healthy lunches. These are obvious strawmen. Ordinary school-based counseling, gym class, and healthy lunches are routine, beneficial activities for all children. *See Thomas v. Evansville-Vanderburgh Sch.*

*Corp.*, 258 F. Appx. 50, \*54 (7th Cir. 2007) (holding routine conversations between child and school counselor didn't violate parental right). Social transitioning, by contrast, is a "primary pillar" of a controversial treatment paradigm with serious and potentially life-long consequences that isn't appropriate for all children who seek it. App. 2 at 540, 555–62. The comparison is manifestly inapt.

To be sure, if a school counselor were to perform a sustained course of experimental hypnotherapy on a student, for example, that might constitute an as-applied constitutional violation. *Gruenke v. Seip*, 225 F.3d 290, 307 (3d Cir. 2000) (noting that "school-sponsored counseling" can violate parental right). But the line between routine, beneficial discussions with school counselors, on the one hand, and significant interventions like a social transition, on the other hand, is easy to apply. A school nurse may put a Band-Aid on a child's paper cut without offending the constitution, for example, but the nurse may not provide the child medication without obtaining parental consent. The District's policies already acknowledge this bright line. App. 3 at 714–16.

The Commissioner highlights that the Law and Policy don't require children to be diagnosed with gender dysphoria before they're socially transitioned. But Appellees can't claim plausible deniability simply by burying their heads in the sand. The Law and Policy don't exclude students who have gender dysphoria, so some subset of children who are being socially transitioned at school will have it.

Moreover, the very fact a child is asking to be socially transitioned indicates that he or she has some measure of psychological distress, and socially transitioning such a child is no less healthcare treatment than if the child has gender dysphoria. App. 2 at 543, 549. Appellants' argument is like saying giving a child Adderall loses its character as "treatment" if the child doesn't have ADHD. That's plainly wrong: Adderall has a physiological impact on the child's body regardless of whether the child has ADHD, just as social transitioning has a psychological impact on the child's mind regardless of whether the child has full-blown gender dysphoria. *Id.*

The Commissioner notes that District personnel aren't licensed mental health providers, but this makes the District's actions *worse*. Social transitioning is the creation of an environment in which a child's transgender identity is "affirm[ed]." Appx. 2 at 540. In this regard, social transitioning is like group therapy. In group therapy, the members of the group aren't providing healthcare treatment to one another; rather, it is the creation of the therapeutic environment that constitutes treatment. Here, Appellees are creating a putatively therapeutic environment for children without involving a mental health provider to guide the way. And contrary to the Commissioner's contention, *Chiles v. Salazar* is inapposite. *Chiles* involved a statutory prohibition on "conversion therapy." 116 F.4th 1178, 1191 (10th Cir. 2024), *cert. granted* 2025 WL 746313 (2025). Whether treatment is covered under

that statutory prohibition has no bearing on the types of treatment decisions the constitution protects.

The District also argues that social transitioning isn't treatment because District personnel don't have the subjective intent to render treatment. But the Policy itself notes that social transitioning "can play a critical role in alleviating . . . psychological distress." App. 3 at 874. Moreover, treatment is treatment regardless of school officials' subjective beliefs. A school official who gives children Adderall to help them focus is rendering treatment even if the official lacks an intent to treat. The question is the impact on the child, not the official's subjective intent.

The Commissioner protests that "it is the student, rather than the state, making the decision" to undergo a social transition, *Córdova Br.* at 31, but Appellees may not so easily duck responsibility for their own actions. Under the Law and Policy, *Appellees* are making the choice to honor children's wishes to be socially transitioned. And *Appellees* are requiring everyone in the school environment to participate in the transition by affirming the child's new identity. By this active participation in the child's choice, *Appellees* are impermissibly facilitating children in making a major life choice on their own.

Appellees' argument presupposes that children are capable of both understanding their own feelings regarding their gender identity and making one of the "most difficult psychological changes a person" can make. App. 2 at 555. Both

presuppositions are wrong. Even with matters as significant as life and death, minors are “vulnerable . . . to negative influences and outside pressures” and often make “impetuous and ill-considered . . . decisions.” *Roper v. Simmons*, 543 U.S. 551, 569 (2005). And “[m]ost children, even in adolescence, simply aren’t able to make sound judgments.” *Parham*, 442 U.S. at 602 (emphasis added). These insights are the foundational premise of the parental right—children are too immature to make significant decisions that can have lasting impact on their life course, so those decisions “reside first” in their parents. *Troxel*, 530 U.S. at 65 (plurality op.).

The District points out that the Policy “encourage[s]” children to involve their parents, District Br. at 41, but that’s not good enough. Children aren’t competent to decide whether to undergo a social transition; they also aren’t competent to decide whether their parents should be involved in that decision. Moreover, this argument is self-defeating. The District concedes that parental involvement is “preferred.” District Br. at 43 (cleaned up). This begs the question of why the Law and Policy don’t *require* parental involvement in the first instance.

Finally, the District complains that Dr. Anderson didn’t personally examine A.D. But Dr. Anderson’s ultimate opinion is that the Law and Policy “are inconsistent with . . . mental health principles and practice” insofar as they authorize schools to socially transition children “over the objection of parents (or possibly

worse, without their knowledge).” App. 3 at 567, 569. She didn’t need to examine A.D. to arrive at this conclusion.

*b. Social transitioning is an important life decision.*

Even if social transitioning weren’t healthcare treatment, it’s such a significant decision in children’s lives that parents have the right to consent when the state seeks to socially transition their children.

Appellees invoke the line of cases holding that schools have discretion to determine *what* schools teach, *Fields v. Palmdale Sch. District*, 427 F.3d 1197, 1207 (9th Cir. 2005) (“*Fields I*”), *opinion amended on denial of reh’g* 447 F.3d 1187 (9th Cir. 2006) (“*Fields II*”), and *how* schools teach, including things like school “dress codes,” “the hours of the school day, school discipline, the timing and content of examinations, [and] the individuals hired to teach,” *Blau v. Fort Thomas Pub. Sch. District*, 401 F.3d 381, 395–96 (6th Cir. 2005). But these cases aren’t analogous to social transitioning. Schools’ core purpose is to “educat[e]” students, Colo. Const. art. IX sec. 2, and schools have no special role—much less competence—in deciding whether children should be socially transitioned. Indeed, no “professional body . . . has endorsed school-facilitated social transitions without parental consent.” App. 2 at 568.

Moreover, the rationale underlying the *Fields* / *Blau* line of cases is that giving parents the right to dictate what or how schools educate students would create

intractable management problems because different sets of parents would want their children to be taught conflicting things or be subject to different rules. *Fields I*, 427 F.3d at 1205 (noting that “[i]f all parents had a . . . constitutional right to dictate . . . what the schools teach their children, the schools would be forced to cater a curriculum for each student” (cleaned up)). But social transitioning doesn’t present that concern. Schools can defer to parents’ wishes regarding the transition of their own children without impacting other parents’ rights, just like they do for field trips, the distribution of medication, and organized sports. App. 3 at 710–19.

The Commissioner argues that the state’s power to operate public schools goes “beyond” the power parents implicitly delegate to them under the *in loco parentis* doctrine. Córdova Br. at 28 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985)). But this argument misreads *T.L.O.*, which stands only for the proposition that because public schools are exercising *state power*—and not merely parents’ *private power*—public schools are state actors. 469 U.S. at 336. *T.L.O.* doesn’t mean that the state’s power to operate public schools supersedes parents’ rights over their children. Indeed, that would just be another of way of saying that parents’ rights evaporate behind the schoolhouse door, which is wrong. *C.N.*, 430 F.3d at 185 n.26; *Fields II*, 447 F.3d at 1190–91 (deleting language suggesting otherwise). Schools must always “comport[] with the transcendent imperatives” of the constitution. *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (plurality op.).



Similarly, citing Justice Thomas’s lone concurrence in *Morse v. Frederick*, the Commissioner argues that the *in loco parentis* doctrine means there are “almost no limits on the types of rules” a public school can enact. Córdova Br. at 28 (cleaned up). As with *T.L.O.*, the Commissioner also misreads Justice Thomas. *Morse* involved a *student*’s First Amendment claim against his school. 551 U.S. 393 (2007). Justice Thomas’s opinion was that “*students*” are generally precluded from claiming their school violated their First Amendment rights precisely because schools are exercising parents’ implied delegation of authority over their children. *Id.* at 419 (emphasis added) (Thomas, J., concurring). That view doesn’t remotely suggest that *parents* give up their rights when they send their children to school. Indeed, Justice Thomas recognized that the *in loco parentis* doctrine goes only as far as “the purposes” of the delegation. *Morse*, 551 U.S. at 413 (Thomas, J., concurring). Those purposes are to “educat[e]” children, *id.*, not socially transition them without their parents’ consent.

The Commissioner also claims that parents don’t have the right to “override a state’s nondiscrimination laws” in schools. Córdova Br. at 12. As the Does have explained, however, Op. Br. at 40–41, it is irrational for the state to rely solely on children’s self-attestation of their gender identity—without parental consent—in creating a new protected class. Accordingly, *Brown v. Board of Education* is inapposite. Race, like sex, national origin, *etc.*, is an “immutable characteristic

determined solely by the accident of birth.” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). In children, however, gender identity can be fluid, and having a transgender identity is typically a temporary identity state that is often influenced by a host of external factors, including social pressures. App. 2 at 545–47, 556. For this reason, a child’s assertion of a transgender identity should *begin* a process—involving his or her parents—designed to evaluate the benefits and risks of a social transition, not *resolve* the question of whether the child should be socially transitioned. App. 2 at 547–49.

To be sure, the state has the power to create anti-discrimination protections for children whose parents consent to their social transition. But absent specific evidence that non-consenting parents are subjecting their children to harm, socially transitioning children over their parents’ objection violates their parental rights.

*Runyon v. McCrary* is also inapposite. *Runyon* held that parents don’t have the right to send their children to racially segregated schools in violation of 42 U.S.C. § 1981. 427 U.S. 160, 178 (1976). But the Does don’t assert the right (nor do they want) to send their children to schools without transgender-identifying students. Rather, they assert only the right to parent their *own* children. The constitution guarantees them that right.

*c. Social transitioning is an unwarranted state interference in the family.*

The District argues that the Does’ family integrity claim fails because the Law and Policy don’t have the “goal” of interfering with the family. District Br. at 41. But Appellees acknowledge that the “fundamental rights approach” applies here. Under that approach, Appellees’ intent is immaterial. *Halley v. Huckaby*, 902 F.3d 1136, 1153 n.13 (10th Cir. 2018). Moreover, the intent to override parental authority is manifest on the face of the Law and Policy. By their text, these provisions allow schools to socially transition children without parental consent. This establishes an intent to interfere with the family “on [their] face.” *Washington v. Davis*, 426 U.S. 229, 241 (1976).

This case is easily distinguishable from *Stewart v. City of Oklahoma City*. There, the plaintiff claimed his employer’s investigation into his actions at a domestic disturbance violated his right to family integrity because it caused him to “voluntarily declin[e] to attend . . . family . . . events.” 47 F.4th 1125, 1139 (10th Cir. 2022). The Court concluded that the interference was “purely incidental” to the employer’s “reasonable efforts to promote internal discipline” at the workplace. *Id.* Here, by contrast, the Law and Policy constitute a “direct and substantial interference” with parents’ rights. *Id.* Indeed, this Court has held the right to family integrity is violated on much less. *Thomas*, 765 F.3d at 1192, 1196–98 (seven-day hold on child’s release from psychiatric facility).

4. The Law and Policy fail any standard of review.

Appellees attempt to justify the Law and Policy on the grounds that they (1) prevent “discrimination” against transgender-identifying children and (2) protect the “safe[ty]” of these children. Córdova Br. at 41, 23; District Br. at 42. The Does have already explained why the prevention of discrimination is irrational in the absence of parental consent. Op. Br. at 40–42; *see also supra* at 32–33.

As for safety, Appellees don’t even attempt to explain how parental consent makes children “unsafe” at school. To the extent Appellees mean that they want students to “feel . . . welcomed,” Córdova Br. at 38, that’s just another way of phrasing their anti-discrimination interest, which is insufficient. And to the extent Appellees are arguing that the Law and Policy are designed to protect children from parental abuse, this violates the presumptions of parental fitness and affection. The state “has no interest . . . in protecting children from their parents unless it has some reasonable evidence that the parent is unfit and the child is in imminent danger.” *Wallis v. Spencer*, 202 F.3d 1126, 1142 n.14 (9th Cir. 2000); *see also Gomes*, 451 F.3d at 1128 (noting that “the ‘mere possibility’ of danger is not enough to justify [a child’s removal from the home] without appropriate process”). Because the Law and Policy don’t require the state to make a showing that parents are likely to harm their children before schools socially transition them, student safety is both an unconstitutional purpose and insufficiently tailored.

The Commissioner argues that there is “no narrower means” of protecting transgender-identifying students than by socially transitioning them upon their request. *Córdova Br.* at 42. Nonsense. Plainly, not all parents of transgender-identifying children are child abusers. Accordingly, socially transitioning all such children is irrationally overbroad. Moreover, Colorado law already provides a way to protect children whose parents may be abusive. If District personnel have reason to believe a child is in danger of being subjected to abuse from their parents, they may—in fact, they must—report the parents to the Colorado Department of Human Services. C.R.S. § 26-5-111; C.R.S. § 19-3-304 (proving that school personnel are mandated reporters). That agency is empowered to take actions to protect children, including taking them into protective custody, if necessary, while giving their parents the due process rights to which they are entitled. C.R.S. § 19-3-401.

Finally, Appellees don’t even attempt to justify the Policy’s lying and deception requirement for allegedly “unsupportive” parents. That’s because they can’t. In the absence of specific findings of parental unfitness, keeping parents in the dark about their children’s social transition doesn’t protect children. Instead, it just isolates children from the people who love and care for them most—their parents. That, too, is irrational.

**C. The Does are likely to prevail on their procedural due process claim.**

Appellees contend that the Does’ procedural due process rights aren’t implicated because they haven’t identified a liberty interest. But the Law and Policy infringe the Does’ First Amendment and substantive due process rights. These rights constitute liberty interests, the infringement of which gives rise to a procedural due process claim. *J.B. v. Washington Cnty.*, 127 F.3d 919, 925 (10th Cir. 1997); *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997).

The District cites the district court’s decision in *Lee v. Poudre School District*, but *Lee* isn’t pertinent. In *Lee*, the court dismissed the parents’ substantive due process claim because the parents failed to allege the existence of a policy or custom under *Monell*. No. 23-CV-01117-NYW-STV, 2024 WL 2212261, at \*8–11 (D. Colo. May 16, 2024), *appeal filed* (10th Cir.). Here, the Does’ challenge the Law and Policy themselves, so *Monell* isn’t at issue.

The District also asserts that the Does haven’t specified the process to which they are entitled. But as the Does previously explained, Op. Br. at 43, they have the right to notice and an opportunity to be heard on the fact determinations the District makes before socially transitioning children under the Law and Policy—*i.e.*, (1) that the child’s chosen name “reflect[s his or her] gender identity,” C.R.S. § 22-1-145(2), and (2) that the child’s parents are “unsupportive” of the transition, App. 3 at 782.

The Does are entitled to notice and an opportunity to be heard on whether these conditions are satisfied before their children are socially transitioned at school.

### III. THE DOES' HARM IS IMMINENT AND IRREPARABLE

The Commissioner argues that constitutional violations don't give rise to *per se* irreparable harm. But the case she cites—*Leachco, Inc. v. Consumer Product Safety Commission*—involved a claim that “being subjected to an administrative proceeding carried out by an unconstitutionally structured agency” violated the separation of powers. 103 F.4th 748, 753 (10th Cir. 2024). While separation of powers violations may not give rise to *per se* irreparable harm, “violations of individual constitutional rights” do. *Id.* at 753–54. Moreover, due to the unique nature of the parent-child relationship, damages for infringement of the parental right are both “inadequa[te]” and “difficult[ to] calculat[e].” *Free the Nipple*, 916 F.3d at 806. Accordingly, the Does' harm here is irreparable. *Id.*; *see also Willey*, 680 F. Supp. 3d at 1288 (holding that infringement of parental right is irreparable).

The Commissioner also argues that the Does' harm isn't sufficiently imminent to justify preliminary relief, but the Does' showings regarding standing satisfy this requirement. *Awad v. Ziriak*, 670 F.3d 1111, 1131 (10th Cir. 2012). Indeed, the Does are currently suffering ongoing injury. And as for the Does' future injury, because of A.D.'s precarious psychological state, now is an especially dangerous time for her. In addition, B.D. is at risk of being socially transitioned every day that passes.

On these facts, the Does have established a “clear and present need for equitable relief.” *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (cleaned up).

Moreover, while Appellees contend that the Does’ alleged delay undercuts their harm, Appellees don’t identify any prejudice. That failure is fatal to their argument. *Fish v. Kobach*, 840 F.3d 710, 753 (10th Cir. 2016) (holding that the “failure [to show prejudice] alone is sufficient . . . to reject” delay argument). Moreover, the Does didn’t delay. A.D. didn’t even begin going by “A.D.” at school again until the beginning of her junior year at school (August 9, 2024), and the Does filed suit before that school year began (August 7, 2024). On these facts, the Does did not “sit on their rights.” *Fish*, 840 F.3d at 753.

#### **IV. THE OTHER PRELIMINARY INJUNCTION FACTORS FAVOR THE DOES**

Appellees acknowledge that the Does seek preliminary relief as applied to their children only, but they argue that granting this modest relief would somehow be harmful to other students. This argument is meritless. Enjoining Appellees from infringing the Does’ right to raise their own children can’t possibly inflict harm on anyone else. And because the Does have the right to consent when the state attempts to socially transition their children, other children in the District don’t suffer any cognizable harm when the Does say “no.”



Moreover, to the extent granting the Does preliminary relief would encourage Appellees to enact new laws and policies that respect parental rights, that's a reason to *grant* relief, not deny it. Appellees can protect students through laws and policies that are individually tailored to ferret out parents' abusive behavior while honoring parents' prima facie right to be involved in their children's lives. If entering a preliminary injunction here encourages Appellees to enact laws and policies that don't run roughshod over parents' rights throughout the state, that's all for the better.

**V. THE FAC SHOULD BE CONSTRUED TO SEEK A REMEDY VIS-À-VIS CADA**

The Attorney General's Response Brief tilts at windmills. The Does don't argue that the district court erred in concluding he lacks sufficient enforcement power under the Law to bring him within *Ex Parte Young*. Instead, they argue that the district court erred in rejecting their request to construe the FAC to assert a remedy against the Attorney General vis-à-vis CADA. *Id.* at 49–54.

The Attorney General's only rejoinder to that argument is that the PI Order didn't "mention CADA." Weiser Br. at 20. So what? The district court's conclusion in the PI Order that the Does were unlikely to succeed on their claim against the Attorney General was erroneous because the district court should have construed the FAC to assert a remedy against the Attorney General vis-à-vis CADA. The Attorney General doesn't dispute that was error. Accordingly, the Court should construe the

FAC to assert a remedy against the Attorney General vis-à-vis CADA and preliminarily enjoin him from enforcing CADA with respect to the Does' children.

## **VI. AN EVIDENTIARY HEARING IS UNNECESSARY**

Finally, the Commissioner argues in the alternative that if the Court concludes the Does have standing, it should vacate and remand for an evidentiary hearing. But the other Appellees don't ask for such a hearing, and the District has acknowledged that "based on . . . the undisputed facts . . . there is no . . . need for an evidentiary hearing." District Supp. App. 1 at 49. Moreover, the parties' briefing is extensive, and the Commissioner only asks for an evidentiary hearing in the alternative to her argument on the merits. Further, Appellees chose not to sponsor an expert below, nor did they introduce any credible evidence disputing Dr. Anderson's conclusions. On the extensive record before the Court, which the district court characterized as having "very little factual dispute," App. 4 at 888, the Court can—and should—rule on the merits without remanding for an evidentiary hearing, *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1049 (10th Cir. 2007) (remanding for entry of preliminary injunction where "the record was sufficiently developed"), *rev'd on other grounds sub nom. Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009).

Indeed, an evidentiary hearing would be a waste of time, during which the Does would continue to suffer irreparable harm, and their children would be subject

to being secretly socially transitioned at school. Considering the narrow relief the Does seek, the Court shouldn't allow that harm to continue any longer.

### **CONCLUSION**

The Court should REVERSE and REMAND with instructions for the district court to grant the Does' Motion for Preliminary Injunction.

April 25, 2025

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## WORD COUNT CERTIFICATE

This brief complies with the type-volume limitation of the Court's Order granting the Does' Motion to File an Oversized Brief (Dkt. 53) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B), this brief contains 9,999 words.

April 25, 2025

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