No. 23-1280

In the Supreme Court of the United States

PARENTS PROTECTING OUR CHILDREN, UA,
Petitioner,

v.

EAU CLAIRE AREA SCHOOL DISTRICT, WISCONSIN, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PROFESSORS S. ERNIE WALTON AND ERIC A. DEGROFF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Professor DeGroff has taught courses in the Regent University Schools of Law, Government, and Education in education law, administrative law, and legal history. His scholarship has focused on parental rights, education policy, and religious liberty. He has lectured on topics related to the history and principles of American education and law and contemporary public-school issues.

Associate Dean Walton, who also serves as an assistant professor and as the director of the Regent Law Center for Global Justice, writes and speaks on the intersection of parental authority and public-schools policies.

Their publications include: Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting* Mozert *after 20 Years*, 38 J.L. & Educ. 83 (2009); and *Sex Education in the Public Schools and the Accommodation of Familial Rights*, 26 Child. Legal Rts. J. 21 (2006); S. Ernie Walton, In Loco Parentis*, The First Amendment, and Parental Rights–Can They Coexist in Public Schools?*, 55 Tex. Tech L. Rev. 461 (2023); and *Gender Identity Ideology: The Totalitarian, Unconstitutional Takeover of America's Public Schools*, 34 Regent U. L. Rev. 219 (2022), among other law review articles and frequent opinion/editorial pieces in a variety of outlets.[1]

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[1]Under Rule 37.2, *amici* provided timely notice of their intention to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

School policies that deprive parents of information about their children's mental and physical health undermine parents' fundamental right to direct the upbringing of their children. So too do policies that deprive parents of control and decision-making authority over how to address sensitive matters such as gender dysphoria and gender identity. The Court should grant the Petition in this case and make clear to courts across the nation that parents have standing to vindicate their fundamental right to guide the development of their children, without having to wait for those children to suffer irreparable physical and psychological harm.

For centuries before the Founding, parents directed and controlled their children's upbringing. Parents' legal authority included the right to direct their children's education, especially about subjects as sensitive as values, identity, and religious beliefs. This historical right continued from the Founding and has been consistently recognized by this Court. Although parents have long entrusted their children to others for the purposes of education, those third parties (whether public or private schools, or individual tutors) act *in loco parentis* within clear boundaries, exercising only the limited authority delegated to them by parents. At no time are schools, public or private, empowered to completely usurp parents' decision-making authority, especially regarding the child's moral development. Throughout the history of this nation, this Court has enforced limits on the authority of educators acting *in loco parentis* and protected the rights of parents to provide

for the maintenance, protection, and education of their children.

The Eau Claire Area School District's ("ECASD") Administrative Guidance for Gender Identity Support (the "Gender Identity Policy") usurps parents' primary role in directing their children's moral upbringing. The Gender Identity Policy allows students to "socially transition" to a new gender identity without their parents' knowledge. Yet Petitioners have not delegated authority to ECASD to facilitate the social transition of their children, nor should they be presumed to have done so. By withholding critical information about their children's mental wellbeing and fundamental life choices, ECASD, a delegee acting with limited authority *in loco parentis*, has usurped the parental role and denied parents their deeply rooted right to control their children's education and moral and religious upbringing.

Policies like this are harming students and parents nationwide. Unfortunately, efforts to vindicate parents' rights and protect children are being thwarted by a mistaken application of standing law. This Court should grant the Petition and recognize that parents have standing to reclaim their right to direct their children's moral upbringing and protect them from harm.

ARGUMENT

The Gender Identity Policy violates the fundamental right of parents to direct and control the upbringing of their children recognized by this Court in *Troxel v. Granville*, 530 U.S. 57 (2000). Although schools play a role in the development of children, the

primary responsibility for, and authority over, the development of a "child's social and moral character" lies with parents. *Id.* at 78 (Souter, J., concurring). This right does not disappear when parents send their children to public school. Indeed, "[w]hether for good or ill, adults not only influence but may indoctrinate children." *Id.* Just as parents control their children's social companions, they also have a say in "the designation of the adults who will influence the child in school." *Id.*

This fundamental right is protected by the Fourteenth Amendment. "[A]n analysis focused on original meaning and history" is "the rule rather than some exception" when it comes to constitutional interpretation. *Kennedy v. Bremerton Sch. Dist.,* 142 S. Ct. 2407, 2428 (2022) (cleaned up) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)). "[T]o carry th[e] burden" of justifying a law or regulation that infringes on fundamental rights, "the government must generally point to *historical* evidence . . . ." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2130 (2022) (emphasis added). "[I]f earlier generations addressed [an analogous] societal problem, but did so through materially different means," that "could be evidence that a modern regulation is unconstitutional." *Id.* Or if they "attempted to enact analogous regulations," "but those proposals were rejected on constitutional grounds, that rejection surely would [also] provide some probative evidence of unconstitutionality." *Id.* at 2131. The government can make no such showing here. Parental rights in education—including at public schools—have long been recognized within the historically analogous legal framework.

This Court has long recognized the right of parents to "control the education of their own." *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). Its holdings are grounded in the historical tradition of the natural law right of parents to direct their children's upbringing and education. *See* S. Ernie Walton, *The Fundamental Right to Homeschool: A Historical Response to Professor Bartholet*, 25 Tex. Rev. L. & Pol. 377, 400–02 (2021). Essential to that right is the ability of parents to know about, and direct, fundamental life choices that their children are making.

I. Historically, Parents Controlled Their Children's Education.

Under English common law, parents had the right and responsibility to "guide their children's development." Eric A. DeGroff, *Parental Rights and Public School Curricula*, *Revisiting* Mozert *After 20 Years,* 38 J.L. & Educ. 83, 108 (2009) (citing 1 William Blackstone, *Commentaries on the Laws of England* 440–41 (1983)). In fact, Blackstone asserted that it was "the duty of parents to their children" to provide for their education. 1 Blackstone, *supra*, at 438–39. This duty, originally recognized as a moral duty, *see id.*, was quickly recognized by the Court of Chancery as a legal right. Thus, early English courts began to enforce "the right of parents to make educational choices for their children despite the wishes of the child or even the preferences of civil authorities." DeGroff, *supra*, at 110 (collecting English cases). By the nineteenth century, the right of a parent to make educational decisions for their child had become so ingrained in the common law that one scholar

described that right as "absolute against all the world." Robert Wolstenholme Holland, *The Law Relating to the Child: Its Protection, Education, and Employment* 60 (1914).

When a child's education involved *religious* matters, the English common law went even further to protect the decisions of parents. The right was so strong at common law that a father's right to determine the religion in which a child would be educated continued after the father's death. *See* Lee M. Friedman, *The Parental Right to Control the Religious Education of a Child*, 29 Harv. L. Rev. 485, 488 (1916). Even when the courts believed that the parents' decision to raise their children in a specific religion would jeopardize the child's eternal welfare, they respected the decision of the parents. DeGroff, *supra*, at 111.

The English common law built on even older canonical laws dating back to the ninth century. Under those laws, too, parents had a right to direct the education and upbringing of their children. For example, if a child decided to join a monastery before reaching legal age, "the parents ha[d] up to a year to demand that the child be returned to their custody." *Id.* at 119 (quoting Aviad M. Kleinberg, *A Thirteenth-Century Struggle Over Custody: The Case of Catherine of Par-aux-Dames*, 20 Bull. Medieval Canon L. 51, 58 (1990)). Even ecclesiastical courts supported parents' right to choose how to raise their children. Those courts, which often thought that keeping a child with his or her parents would lead to the child's "eternal damnation," still upheld the parents' rights to make those choices. *Id.* Thus, the right of parents to direct their children's education in both religious and secular environments is evident in both the common

law and the canonical law that heavily influenced American traditions. That right might be exercised either by educating their children themselves at home or by delegating a limited amount of authority to a third party.

II. *In Loco Parentis* Is Limited In U.S. Law.

Blackstone recognized that while a parent had the primary right and duty to ensure their child was educated, some parental authority over that education could be delegated to a third party. 1 Blackstone, *supra*, at 453. In doing so, the parent authorized the third-party educator to stand *in loco parentis* or "in the place of the parent." *Id.* From the outset, this delegation of authority was limited. Tutors or schoolmasters exercised only "that portion of the power of the parent . . . as may be necessary to answer the purposes for which he is employed." *Id.* This limitation was echoed by American jurists such as Chancellor James Kent: "[T]he power allowed by law to the parent over . . . the child, may be delegated to a tutor or instructor, the better to accomplish the purposes of education." James Kent, *Commentaries On American Law,* Lecture 29 (1826–30).

In loco parentis—a third party's limited exercise of delegated parental authority—has long been recognized by American courts, both before and after the rise of public schools in American culture. *See* S. Ernie Walton, In Loco Parentis, *The First Amendment, and Parental Rights–Can They Coexist in Public Schools?*, 55 Tex. Tech L. Rev. 461, 469–76 (2023). Historically, the familial freedom to educate overrode "state-mandated education about civic values." Noa Ben-Asher, *The Lawmaking Family*, 90

Wash. U. L. Rev. 363, 377 (2012). The home was "considered as the keystone of the governmental structure," with parents ruling "supreme during the minority of their children." *Sch. Bd. Dist. No. 18 v. Thompson*, 103 P. 578, 581 (Okla. 1909).

In the nineteenth century, state courts applied *in loco parentis* to public schools primarily to justify corporal punishment. Walton, In Loco Parentis, *supra*, at 472. For example, in 1837 the North Carolina Supreme Court opined that "the authority of the teacher is regarded as a delegation of parental authority." *State v. Pendergrass*, 19 N.C. 365, 365–366 (1837). Vermont's Supreme Court issued a similar ruling in 1859, with the qualification that a schoolmaster's authority to inflict discipline is more limited than a parent's, given the absence of "natural affection." *Lander v. Seaver*, 32 Vt. 114, 122 (1859).

A. State courts routinely constrained school authority in favor of parents.

When public schools stand *in loco parentis*, the delegation of authority has its limits. This has been true throughout history, and early state court decisions recognized a right of parents to hold their children out of classwork that conflicted with their values. In *Morrow v. Wisconsin*, for instance, the Supreme Court of Wisconsin resolved a disagreement between a parent and a teacher regarding the child's course selection. 35 Wis. 59, 62–63 (1874). The parent wanted his child to focus on orthography, reading, writing, and arithmetic at the expense of geography. *Id.* His teacher disagreed. *Id.* The court ruled for the parent and held that the teacher "does not have an absolute right to prescribe and dictate what studies a

child shall pursue." *Id.* at 64. Instead, the court held that the father had "the right to direct what studies, included in the prescribed course, his child shall take." *Id.* "[I]n case of a difference of opinion between the parent and teacher upon the subject, [the court] see[s] no reason for holding that the views of the teacher must prevail." *Id.* at 66.

Several cases in the late nineteenth century and early twentieth century in Nebraska likewise affirmed the right of parents to direct the details of their children's education in public schools. Two cases involved parents' attempts to opt their children out of classes in the public-school curriculum. *State v. Sch. Dist.*, 48 N.W. 393, 394 (Neb. 1891) (attempting to remove the child from grammar class); *State v. Ferguson*, 144 N.W. 1039, 1042 (Neb. 1914) (attempting to remove the child from home economics). The Supreme Court of Nebraska resolved both cases with a basic maxim: "the right of the parent . . . is superior to that of the school officers and the teachers." *Ferguson*, 144 N.W. at 1042 (quoting *Sch. Dist.*, 48 N.W. at 394). To rule for the school, the court reasoned, would "destroy both the God-given and constitutional right of a parent to have some voice in the bringing up and education of his children." *Ferguson*, 144 N.W. at 1043. "In this age of agitation" surrounding World War I, the Supreme Court of Nebraska refused to allow "the doctrine of governmental paternalism [to go] too far, for, after all is said and done, the prime factor in our scheme of government is the American home." *Id.* at 1044.

Both of these Nebraska decisions expressed the longstanding tradition that parents can elect to opt their children out of specific classes and thereby direct their children's education. This right persisted

even after the proliferation of public schools in the middle of the nineteenth century.

State courts have been particularly sensitive to parental objections based on religious grounds. Courts in Colorado, Massachusetts, and California allowed plaintiff-parents to opt their children out of specific school activities because their children's participation violated their own and their children's religious beliefs. *See Vollmar v. Stanley,* 81 Colo. 276 (1927), *overruled on other grounds*; *Conrad v. City & Cnty. of Denver*, 656 P.2d 662, 670 (Colo. 1982); *Spiller v. Inhabitants of Woburn*, 94 Mass. 127, 128–29 (1866); *Hardwick v. Bd. of Sch. Trs.*, 205 P. 49, 50 (Cal. App. 1921).

In *Vollmar v. Stanley*, the Colorado Supreme Court upheld the right of a Catholic parent to have his child excused from daily readings from the King James version of the Bible. Emphasizing that the Colorado Constitution gave the parent "a right . . . to have his child attend the public schools," the court held that the school board could not force the parent to surrender that right as a condition of exercising his constitutional right to direct his child's education. 81 Colo. at 282–83.

Similarly, in *Spiller v. Inhabitants of Woburn*, Massachusetts instituted a practice that began each school day with a reading from the Bible and prayer. 94 Mass. at 128. The plaintiff-parents disagreed with the practice and wanted to opt their child out of this exercise. *Id.* at 129. Only because the practice allowed "a child to be excused from it" "if the parent requested" was the exercise allowed to continue. *Id.* at 130. In essence, the ability of parents to opt out of the practice was its saving grace. *Id.*

Last, in *Hardwick v. Bd. of Sch. Trs.*, the court determined that granting the school an "overreaching power" that would deny parents "their natural as well as their constitutional right to govern or control" their children was a step too far. 205 P. at 709. Thus, the court allowed the parents to opt their children out of portions of physical education classes that included dancing, which violated the family's religion. *Id.* at 714.

B. This Court also limits schools' authority to act *in loco parentis.*

Since the early twentieth century, this Court has likewise limited the authority of public schools in favor of the liberty of parents to direct both the education and moral upbringing of their children. Starting with *Meyer*, this Court grounded the power and duty to educate children in parents. 262 U.S. at 400. Recognizing that students are often educated at school rather than at home, this Court acknowledged that schools exercise power to educate children only to the extent that parents have delegated that power and declared that the right of parents to control the education of their children was protected by the Fourteenth Amendment. *Id.* at 400. Referencing the practice of Sparta whereby children were removed from their parents at an early age and educated solely by "guardians," this Court observed that any practice which empowers agents of the state above a child's parents in matters of character development rests upon ideas regarding "the relationship between individual and state" that would do "violence to both letter and spirit of the Constitution." *Id.* at 402. Just two years later, in *Pierce v. Society of Sisters*, this

Court affirmed the rights of parents to direct the education of their children and pointed out that a child "is not the mere creature of the State." 268 U.S. 510, 534–35 (1925).

Likewise, in *Wisconsin v. Yoder*, this Court held that although states have authority to impose "reasonable regulations for the control and duration of basic education," that authority was limited by "fundamental rights and interests" of parents, including Free Exercise rights. 406 U.S. 205, 213–14 (1972). This Court noted that Western civilization includes a "strong tradition of parental concern for the nurture and upbringing of their children" and that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232.

These cases and those from state courts show that parents retain their right to direct their children's moral upbringing and education at public schools. Walton, In Loco Parentis, *supra*, at 497. Accordingly, while public schools stand *in loco parentis*, they do so only with respect to traditional subjects and non-ideological matters. *Id.* at 499. "In other words, education in 'matters of public concern' should be deemed to fall outside the scope of the parental delegation of authority[.]" *Id.* This is particularly true given the changes in public education occurring over the last two centuries–changes including compulsory education, the inability of parents to sign employment contracts with the state, the coercive economic power of the state in public education, and state-mandated educational agendas. *Id.* at 489–92; *Mahanoy Area Sch. Dist. v. B. L.,* 141 S. Ct. 2048, 2051–52 (2021) (Alito, J., concurring). These changes mandate that courts

construe the delegation of authority from parents to public schools "much more narrowly than was done in the early days of the Republic." Walton, In Loco Parentis*, supra* at 492.

III. The Gender Identity Policy Exceeds The School's Delegated Authority.

Gender identity ideology is certainly a "matter of public concern." *See Janus v. Am. Fed. of State, Cnty., and Mun. Employees*, 138 S. Ct. 2448, 2476 (2018) (referring to sexual orientation and gender identity, among other things, as "sensitive political topics" and "matters of profound 'value and concern to the public'"). Courts should therefore not construe parents to have delegated their authority over their children's gender-related choices and beliefs to public schools. *See* S. Ernie Walton, *Gender Identity Ideology: The Totalitarian, Unconstitutional Takeover of America's Public Schools*, 34 Regent U. L. Rev. 219, 261 (2022). Gender ideology is rooted in a worldview called "expressive individualism," which holds that human identity is primarily sexual and is rooted in a person's own psychological and subjective view of oneself. S. Ernie Walton, *No Judge Hinkle, Gender Identity Is Not Real, Nor Legally Relevant*, The American Spectator, June 12, 2023, https://spectator.org/no-judge-hinkle-gender-identity-is-not-real-nor-legally-relevant/. Expressive Individualism "touches on the deepest moral, social, and religious questions, even going to the heart of what it means to be human." Walton, *Gender Identity Ideology*, *supra,* at 261.

Accordingly, decisions related to children's gender choices are reserved for parents, and "the state

has no right to facilitate a child's social gender transition or hide it" from them. *Id.* at 261–62. Just as courts have historically recognized parents' rights to control the religious development of their children in public school, the same rules must apply to the superiority of a parent's claims over that of educators when it comes to fundamental worldview issues and a child's moral formation regarding gender identity. Isolating parents from their children by not only enabling and encouraging the children to act contrary to their parents' wishes, but also actively concealing those actions from the parents, exceeds the authority delegated by parents to the state for the purpose of educating their children. *See id.* at 270–73.

The Seventh Circuit wrongly found that the Petitioners lacked standing because the harm to their rights was too speculative—that none of them suffered an actual or even imminent injury due to the Policy's enactment. The Policy plainly directs school personnel to "speak with the student first before discussing the student's . . . status with the student's parent/guardian," App. 66, and directs schools to use the name and gender preferred by the student to the extent allowed by law, without parental permission. App. 68. And the Policy's employee training program is remarkably forthcoming about it: "Parents are not entitled to know their kids' identities. That knowledge must be earned." App. 80. These two directives prove that the policy itself abrogates parents' rights to direct their children's upbringing.

Without knowledge regarding their children's gender choices—and the school's responses to those choices—parents are prevented from exercising their rights. The harm caused by this policy is at least as concrete as the harm noted in *Parents Involved in*

Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 718–20 (2007), where this Court found standing for parents challenging a racially discriminatory policy before the policy had been applied.

The Gender Identity Policy deliberately isolates parents from their children with respect to the development of core values and religious beliefs. This isolation usurps parental authority and invades parental rights by nature of the policy's existence. The parents need not wait until additional harm is done to their children before seeking redress. Such usurpation of parental authority cannot stand absent clear evidence of child abuse. *See Parham v. J.R.*, 442 U.S. 584, 603 (1979) ("The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition."). Granting the Petition and reversing the decision of the Seventh Circuit will realign the relationship between parents and schools with the longstanding history and tradition of this Nation respecting parents' ability to direct their children's upbringing, moral formation, and education.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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