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

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Should this Court review a decision of the Seventh Circuit Court of Appeals where it applied the holding in *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S. Ct. 1138, 185 L.Ed.2d 264 (2013) and determined that an unincorporated organization of parents does not have standing to challenge a public school district policy that its members disagree with when the policy has not been and may never be applied to any of the members or their children?

CORPORATE DISCLOSURE STATEMENT

The Eau Claire Area School District, Wisconsin, is a municipal entity. The other co-respondents, listed here, are individuals: Tim Nordin, Lori Bica, Marquell Johnson, Phil Lyons, Joshua Clements, Stephanie Farrar, Erica Zerr, and Michael Johnson.

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STATEMENT OF THE CASE

Petitioner, PARENTS PROTECTING OUR CHILDREN, UA is an unincorporated association of parents whose children attend schools within the Respondent, EAU CLAIRE AREA SCHOOL DISTRICT (the "District").[1] App.40, ¶ 6. Petitioner objects to the District's internal, administrative guidance for staff that explains how to provide support to students who express concern about their gender identity (the "Administrative Guidance"). *See* App.64-77. As the Seventh Circuit observed, Petitioner "acknowledges that it brought this lawsuit not in response to an experience any member parent had with the School District's implementation of the Administrative Guidance, but instead as a facial pre-enforcement challenge to invalidate the entirety of the new policy." App.4.

Petitioner's Statement of the Case grossly mischaracterizes the Administrative Guidance, relying on its own speculative interpretation rather than what the document says, just as it did before the Court of Appeals. The Court of Appeals noted that with this approach, Petitioner "invites us to look beyond the language of the Administrative Guidance to risks that the association envisions and worries may accompany its implementation." App.7. Mischaracter-

[1] Petitioner also named Tim Nordin, Lori Bica, Marquell Johnson, Phil Lyons, Joshua Clements, Stephanie Farrar, and Erica Zerr, the current or former members of the school board for the District, and Michael Johnson, the superintendent of the District in their official capacities, as defendants in this case.

izing the Administrative Guidance does little to assist Petitioner.

The stated purpose of the Administrative Guidance is to "foster inclusive and welcoming environments that are free from discrimination, harassment and bullying regardless of [one's] sex, sexual orientation, gender identity or gender expression." App.64. The Administrative Guidance contemplates the development of a Gender Support Plan to meet students' "educational needs and ensuring that the student has access and opportunity to participate in the District's educational programs and activities." App.66. All Gender Support Plans are maintained in a student's permanent pupil records file. App.67. Even if a student does not want their parents to know about their gender identity issues or the existence of the Gender Support Plan, they are specifically advised that the Gender Support Plan is a pupil record that is always available to their parents and that it is "not a privileged document between the student and the school district." App.72.

Petitioner cannot dispute that its members and their children have not been affected by the Administrative Guidance or even had a Gender Support Plan developed. *See* App.7-8 ("[N]owhere does the complaint allege that even one of the association's members—any particular parent—has experienced an actual or imminent injury attributable to the Administrative Guidance or a Support Plan. Nor, for that matter, do we see an indication that any of Parents Protecting's members asked the School District about how it plans to implement the Guidance. All we have before us is a policy on paper without concrete facts about its implementation."). Petitioner's concerns are

even further removed from actual or threatened harm as not a single member's child has been diagnosed with gender dysphoria, has expressed that they are gender nonconforming, has expressed gender identity issues, or has contacted anyone in the District to address the need for gender support. App.7-8. As such, the Guidance has never been applied to any of Petitioner's members' children.

Despite this lack of injury, Petitioner based its lawsuit on a claim that at some unknown point in the future one of its members' children might identify as transgender, and if so, they might request gender support from the District, and then, further, they might also request that the District not immediately notify their parent of these facts. Petitioner's claim of possible future harm is completely dependent upon this highly attenuated chain of future possibilities that may never occur.

The District moved to dismiss the Complaint on the basis that Petitioner lacked standing. App.2. The District Court reviewed the Complaint under the motion to dismiss standard and determined that the well-plead allegations in the Complaint and the exhibits attached thereto failed to show that Petitioner had standing. App.36. The Seventh Circuit affirmed, noting that "this lawsuit came as the ink was still drying on Eau Claire's Administrative Guidance" and that "sweeping pre-enforcement facial invalidation of law is highly disfavored." App.9-10.

In its petition for Supreme Court review, Petitioner continues its approach of focusing on the merits of its claims instead of whether this Court should grant

review.[2] The merits of a party's argument on the underlying claim, however, does not drive whether one has standing or whether this Court should review the Court of Appeals' decision on standing.

Petitioner also relies on an argument that this case and other cases across the country present important constitutional issues on parental rights, and yet lower courts across the country have not reached the merits because those challenging the issues do not have standing. But simply because the merits of an issue have not yet been addressed by this Court does not require or allow this Court to disregard the case or controversy requirement of standing. Creating a standard that "important constitutional issues" can be litigated by anyone, regardless of whether they have sustained harm, would eviscerate Article III's requirement of a case or controversy.

There is no case or controversy here. Petitioner's members have not suffered any actual harm and the remote possibility that they might suffer harm in the future is far too dependent upon a highly attenuated chain of possibilities that may never occur. The District Court properly dismissed Petitioner's Complaint for lack of standing and the Seventh Circuit properly affirmed, adhering to this Court's precedent. This Court should not accept the invitation to accept this case for review. What Petitioner requests is for this Court to disregard the case or controversy requirement

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[2] The amici briefs submitted in support of Petitioner all suffer from this same defect as well. Rather than addressing whether, and why, this Court should grant review on the issue of standing, they almost universally assert their position on the merits of the claims, not whether the Court should grant the petition for review, much less why.

of standing so that lower courts can issue advisory opinions on socially or politically charged issues.

REASONS FOR DENYING THE PETITION

The criteria for this Court's certiorari review are set forth in Supreme Court Rule 10. Petitioner does not explicitly identify which criteria it believes to be relevant to its petition. From its arguments, it appears that Petitioner relies upon the criterion that the Seventh Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. Nothing within the petition, however, shows this position to be accurate. Rather, this is one of those mundane petitions for a writ of certiorari that simply argues that the lower court misapplied a properly stated rule of law. Petitioner gives this Court no compelling reason to grant review.

Rather than addressing why this Court should grant review, Petitioner argues the merits of its underlying claim. Additionally, Petitioner seems to be requesting that the Court should create a new rule for standing that would allow groups like Petitioner to have standing to challenge governmental policies that they believe are socially or politically incorrect when they have not been harmed by the policy. But this Court cannot abandon Article III's case or controversy requirement because "[t]hough some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*

v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L.Ed.2d 351, 364 (1992). "The law of Art. III standing is built on a single basic idea—the idea of separation of powers." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203, 210 L.Ed.2d 568, 582 (2021).

Article III standing principles are particularly important in this case because what Petitioner wants is to allow federal courts to publicly opine on the legal questions that are important to its social and political beliefs while ignoring that its dispute is hypothetical and abstract, one which may never come to pass. At its core, Petitioner wants this Court to change the law to treat standing as a policy consideration and not a constitutional requirement. Standing to sue in some state courts, including in Wisconsin, "is not a matter of jurisdiction, but of sound judicial policy." *See McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d 1, 783 N.W.2d 855. Conversely, standing in federal courts is jurisdictional and the case or controversy requirement is a constitutional absolute. *See Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 662-63, 139 S. Ct. 1945, 204 L.Ed.2d 305 (2019) ("As a jurisdictional requirement, standing to litigate cannot be waived or forfeited.").

Petitioner's desire to expand the doctrine of standing is not a sound basis for requesting that this Court grant the petition for review. Regardless of the importance of the issues raised or the ideological appeal of those issues, this Court cannot ignore the constitutional requirements of standing. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39, 96 S. Ct. 1917, 1925, 48 L.Ed.2d 450, 461 (1976) ("A federal court cannot ignore this requirement without overstepping its assigned role in our system of adjudi-

cating only actual cases and controversies."). While the issues raised in Petitioner's lawsuit may well be important and meaningful to its members and the host of parties who have filed amicus briefs, the Court should decline Petitioner's invitation to do away with the case or controversy requirement of standing.

I. The fact that lower courts in other cases have also adhered to this Court's jurisprudence on standing, sometimes finding it to exist and other times finding it lacking, does not justify granting the petition for review

Petitioner identifies various cases where lower courts have found standing on issues related to challenges that implicate transgender students, and others where lower courts have rejected claims of standing. But this result does not support any of the criteria for this Court's review.

This Court's criteria for granting a writ of certiorari includes where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Petitioner's claim that lower courts have issued decisions reaching conclusions that vary from case to case and court to court does not meet this criterion. *See* Supreme Ct. R. 10. Petitioner does not identify any decision from one court of appeals that conflicts with the Seventh Circuit's decision in this matter. Instead of focusing on conflicting decisions about the doctrine of standing, Petitioner's argument is premised on its assertion that some courts have dismissed similar lawsuits on standing grounds and others have not. But the uniform application of well-settled law to the facts of

individual cases does not show that there is a decision from one court of appeals that conflicts with the Seventh Circuit's decision.

Contrary to Petitioner's claim, courts around the nation have not been using standing to evade the merits of the social and political issues that Petitioner seeks to litigate. Rather, courts are applying well-settled standing doctrine, as they must, to hold that those who are not actually harmed by school district policies cannot file suit to challenge those policies. There have been cases where courts have found standing, and others where they have not. Nevertheless, those cases have properly applied the doctrine of standing and there is nothing within the lower court cases that implicates any departure from the accepted principles of standing.

For example, lower courts have found standing and addressed the merits of claims where there was a clear injury in fact. The plaintiffs in *Mirabelli v. Olson* were teachers who were unquestionably subject to a school policy that could have violated their First Amendment rights. No. 3:23-cv-00768-BEN-WVG, 2023 U.S. Dist. LEXIS 163880, at *3 (S.D. Cal. Sep. 14, 2023). In *Ricard v. USD 475 Geary Cty.*, the court found standing to exist where a policy prohibited a teacher from using a student's preferred pronoun in parental communications. No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742, at *12 (D. Kan. May 9, 2022). The court found that the policy had a reasonable likelihood of infringing on the teacher's free exercise rights as she had alleged a religious belief that prohibited her from being dishonest, *i.e.*, an injury in fact. *Id.* Finally, the plaintiffs in *Willey v. Sweetwater Cty. Sch. Dist. No. 1 Bd. of Trs.*, were the

parents of a student who had gender identity issues and who alleged an injury in fact because the school had already applied its gender support policy to their child. 680 F. Supp. 3d 1250, 1264-65 (D. Wyo. 2023). None of these cases were extraordinary or sought to address the merits simply because someone disagreed with the schools' policies. They all addressed a claim where the plaintiff identified a concrete and particularized injury in fact.

The cases that Petitioner identifies as cases in which courts "evaded the merits" based upon a lack of standing were also not extraordinary. Those cases presented exactly like this one: plaintiffs challenging a policy that had never applied to them and which may never affect them. *See, e.g., John & Jane Parents 1 v. Montgomery Cty. Bd. of Educ.*, 78 F.4th 622, 626 (4th Cir. 2023) ("The parents have not alleged that their children have gender support plans, are transgender or are even struggling with issues of gender identity. As a result, they have not alleged facts that the Montgomery County public schools have any information about their children that is currently being withheld or that there is a substantial risk information will be withheld in the future. Thus, under the Constitution, they have not alleged the type of injury required to show standing."); *Kaltenbach v. Hilliard City Sch.*, No. 2:23-cv-187, 2024 U.S. Dist. LEXIS 77821, at *10 (S.D. Ohio Apr. 19, 2024) ("Plaintiffs offer no allegations that their children have told or will tell the school that they are (or may be) LGBTQ+ or that the children show any signs of mental illness . . . Because . . . Plaintiffs have not plausibly alleged that their children have reported or will report such issues to school officials, they have

likewise not plausibly alleged that they will suffer any injury as a result of what the District might do in response to such a report."); *Doe v. Pine-Richland Sch. Dist.*, Civil Action No. 2:24-cv-51, 2024 U.S. Dist. LEXIS 83241, at *25 (W.D. Pa. May 7, 2024) ("The sum of Doe's allegations relating to standing are that she is a parent of a child in the District, that there are members of her child's friend group who may identify as transgender, and that she believes her child has visited websites addressing transgender issues. She has not alleged that her child identifies as transgender, that her child has approached the District with respect to gender, or that the District has interacted with her child in any way with respect to gender.").

In these decisions, the lower courts properly applied the case or controversy requirement, refusing to allow parents to preemptively challenge school district policies absent some indication that the plaintiffs would be harmed by the policy. Correctly applying this Court's requirement that a plaintiff show that a case or controversy exists is not an attempt to evade the merits. And the fact that lower courts have adhered to this Court's jurisprudence on standing is not a basis for asking this Court to change that standard.

Petitioner seeks review to change the standing requirement so that it can address social and political issues, including gender identity issues, even though its members have not been harmed by the school's policy. Petitioner asks this Court to relax the standing requirement so that legal issues related to its social and political agendas can be litigated in the abstract. To accept Petitioner's invitation that merely being a parent in a school district is sufficient to show

standing, would mean that every parent in a school district would have standing to preemptively challenge every school policy. Distilled to its essence, Petitioner claims that this Court should grant its petition and broaden the concept of standing because under well-settled jurisprudence it does not yet have standing. Article III's jurisdictional requirement of a case or controversy precludes this argument, and this Court should decline the request to accept review.

II. The Seventh Circuit's decision on standing did not rule on an important question of law that has not been addressed by this Court nor did it conflict with this Court's standing jurisprudence

Petitioner claims that the Seventh Circuit decided this case in a way that conflicts with this Court's standing decisions. The standard that Petitioner appears to address is that the Court of Appeals "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." *See* Supreme Ct. R. 10. However, Petitioner does nothing to develop this argument and instead does little more than argue that the Court of Appeals "got it wrong." But "getting it wrong" does not justify review by this Court. Petitioner merely re-hashes its arguments that under the well-established standing jurisprudence it was right, and the Court of Appeals got it wrong. Such an approach falls short of implicating this Court's certiorari review.[3]

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[3] Petitioner does not develop an argument that the Seventh Circuit "decided an important question of federal law that has

A. The Seventh Circuit correctly applied the principles set forth in *Clapper* in rejecting the claim that Petitioner would suffer an alleged future harm

The Seventh Circuit did not misapply standing jurisprudence. Petitioner failed to establish that any of its members sustained an injury in fact and admitted "that it brought this lawsuit not in response to an experience any member parent had with the School District's implementation of the Administrative Guidance, but instead as a facial pre-enforcement challenge to invalidate the entirety of the new policy." App.4. The Seventh Circuit correctly found that such a pre-enforcement challenge was subject to the framework set forth in *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S. Ct. 1138, 185 L.Ed.2d 264 (2013), where this Court explained that "[t]he law recognizes that an anticipated future injury may be sufficiently imminent to establish standing . . . But the alleged future injury must also be concrete: conjecture about speculative or possible harm is inadequate." App.6.

The Seventh Circuit's decision addressed the "threatened injury" claim by applying the holding in *Clapper*. This Court explained that a "threatened injury must be *certainly impending* to constitute injury in fact." *Clapper*, 568 U.S. at 409. This Court also

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not been, but should be, settled by this Court." The Seventh Circuit applied this Court's well-settled doctrine on associational standing. Nothing within the Court of Appeals decision treads on unsettled law. What Petitioner wants is for this Court to abandon that well-settled jurisprudence and create a new standard that would favor Petitioner, creating standing in the absence of a case or controversy. This too is not a basis for this Court to grant the writ of certiorari.

explained that: "Allegations of *possible* future injury are not sufficient." *Id*. And, relevant here, an injury in fact cannot be based on "a highly attenuated chain of possibilities." *Id.* at 410. The *Clapper* court explained that an injury cannot be found to be "certainly impending" if it requires multiple contingencies to occur in the future. *See id.* (explaining that five events needed to occur in the way predicted by the plaintiffs for them to sustain their alleged injury from the government's application of the Foreign Intelligence Surveillance Act of 1978).

The Seventh Circuit's decision did not depart from *Clapper* in finding that Petitioner's entire standing argument was premised upon a speculative chain of future possibilities. Petitioner's argument has always been premised on its speculation about the future. Petitioner claims that the Administrative Guidance *might* interfere with one of its members' rights *if* it were ever applied to them. This claim, however, relies upon a highly attenuated chain of future possibilities. For one of Petitioner's members to actually sustain the injury it claims, one of its members' children must: (1) develop a belief that they have a gender identity that differs from their biological sex; (2) affirmatively approach a District employee and request gender support; (3) participate in the development of a Gender Support Plan; and (4) request that the District not advise their parents about the Gender Support Plan. Additionally, as part of that chain of possibilities, (5) the school must never discuss the Gender Support Plan with the parent and (6) the parent must never request to see the student's educational records. Thus, for Petitioner's members' claimed injury to occur, multiple future contingencies

must take place, including future choices made by individuals who have never indicated that they have gender identity issues. Those individuals cannot even be identified because they have not acted and may never act.

The Seventh Circuit specifically explained that it was applying the *Clapper* reasoning, not departing from it: "Applying *Clapper*'s reasoning here reveals that Parents Protecting's expressions of worry and concern do not suffice to show that any parent has experienced actual injury or faces any imminent harm attributable to the Administrative Guidance or a Gender Support Plan." App.8. The Seventh Circuit did not depart from any of this Court's relevant decisions in applying *Clapper* and holding that Petitioner's complaint "did not allege that even one of the association's members—any particular parent—has experienced an actual or imminent injury attributable to the . . . Guidance." App.7-8.[4]

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[4] The Seventh Circuit summarized:

> The district court concluded that the association failed to allege any injury or risk of injury sufficient to establish standing under Article III's Case or Controversy requirement. Neither the Administrative Guidance nor the template Support Plan, the district court determined, mandated the exclusion of parents or guardians from discussions or decisions regarding a student's gender expression at school. From there the district court emphasized that the complaint lacked any allegation that any member's child had questioned their gender identity or otherwise sought guidance or support under the School District's policy, leaving the association unable to plead any withholding of information from parents. In its final analysis, the district court viewed the alleged harm as

B. The petition extensively addresses the merits of Petitioner's standing argument but fails to address the criteria for whether the writ of certiorari should be granted

Rather than addressing the criteria for review, Petitioner argues why its position on standing is correct. But a petition for a writ of certiorari is not about whether the petitioner's arguments on the merits are correct. Rather, this petition should, but does not, address whether the review criteria can be met. The District has addressed that the criteria for review cannot be met. It will not address the merits of Petitioner's standing argument in this brief, but it certainly does not concede that Petitioner has standing. As explained in the District's briefs to the lower courts, Petitioner's claim of possible future harm is completely dependent upon a highly attenuated chain of future possibilities that may never occur. Under this Court's well-established standards, this precludes Petitioner from establishing that there is a case or controversy, and it precludes a finding that Petitioner has standing.

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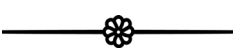
dependent on a 'chain of possibilities' too speculative to establish Article III standing.

App.5.



CONCLUSION

For the foregoing reasons, the District respectfully requests that this Court deny review. Petitioner has failed to demonstrate that any criteria for review has been met.

Respectfully submitted,

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