No. 23-1280

In the
Supreme Court of the United States

PARENTS PROTECTING OUR CHILDREN, UA,
Petitioner,

v.

EAU CLAIRE AREA SCHOOL DISTRICT, WISCONSIN; TIM NORDIN; LORI BICA; MARQUELL JOHNSON; PHIL LYONS; JOSHUA CLEMENTS; STEPHANIE FARRAR; ERICA ZERR; and MICHAEL JOHNSON,
Respondents.

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

BRIEF OF *AMICI CURIAE* ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, CONCERNED WOMEN FOR AMERICA, PACIFIC JUSTICE INSTITUTE, and NATIONAL LEGAL FOUNDATION
in Support of the Petitioner

Steven W. Fitschen
James A. Davids
National Legal Foundation
524 Johnston Road
Chesapeake, Va. 23322
(757) 463-6133
sfitschen@nationallegalfoundation.org

Frederick W. Claybrook, Jr.
(Counsel of Record)
Claybrook LLC
655 15th St., NW, Ste. 425
Washington, D.C. 20005
(301) 622-0360
rick@claybrooklaw.com

Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENTS OF INTEREST[1]

The **Ethics and Religious Liberty Commission** (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with approximately 13 million members in more than 45,000 churches and congregations. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. The SBC in its 2024 annual meeting passed a resolution regarding parental rights that encourages "the state to partner with, rather than act contrary to, the family unit, enacting legislation that protects and upholds parental rights, ensuring that parents have the freedom to make decisions regarding the upbringing, education, and healthcare of their children without undue interference, recognizing that parents are the primary arbiters of a child's moral and spiritual formation."

Concerned Women for America (CWA) is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that

[1] No counsel for any party authored this brief in whole or in part. No person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice was given to all parties.

strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday American women whose views are not represented by the powerful elite.

The **Pacific Justice Institute** (PJI) is a non-profit legal organization established under section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment and parental rights. PJI often represents teachers, parents, and their children to vindicate their constitutional rights in public schools. As such, PJI has a strong interest in the development of the law in this area.

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of fundamental parental rights and First Amendment liberties, including the freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from Wisconsin, are vitally concerned with the outcome of this case because of its effect on the fundamental rights of parents and their minor children.

SUMMARY OF ARGUMENT

The Seventh Circuit's decision deserves plenary consideration by this Court, if not summary reversal. That court's ruling that parents do not have standing to complain of a school policy that targets them for secrecy not only violates common sense and this Court's precedents but is in conflict with the Fifth Circuit's recent decision finding that a father has standing to complain of a policy that keeps what the government may do to his minor children secret from him. The one decision on which the Seventh Circuit relied, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), is so different on its facts as to prove, rather than disprove, that the Plaintiff-Parents here have standing.

ARGUMENT

The petition amply shows the importance of this case and why it is critical that this Court resolve the standing issue before more children and their parents are affected. This brief in support touches on three complementary issues that the petition does not discuss in detail.

I. The Seventh Circuit's Ruling Is in Conflict with the Fifth Circuit's Recent Decision Granting Standing to a Parent to Challenge Governmental Policies of Keeping Secret from Him What Governmental Agents May Do with His Minor Children

In *Deanda v. Becerra*, 96 F.4th 750 (5th Cir.

2024), a father challenged the federal government's regulatory guidance under Title X that grantee clinics were not allowed to inform parents that the clinics were providing contraceptives to the parents' minor children. The father complained that this violated his statutory and constitutional rights to provide consent for any such distribution to his minor daughters. The Fifth Circuit found he had standing.

First, the Fifth Circuit noted that the father alleged a sufficient injury because the federal guidance deprived him of a statutory right that was more than a "bare procedural violation." *Id.* at 756, citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016); *Warth v. Seldin*, 422 U.S. 490, 500 (1975). In making that analysis, the Fifth Circuit applied this Court's instruction to determine whether the claimed injuries bore "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." 96 F.4th at 757-58, quoting *TransUnion L.L.C. v. Ramirez*, 594 U.S. 413, 425 (2021). It noted this Court's instruction that "intangible" harms can also be "concrete" for standing purposes and that parental rights such as those advanced by the father (and by the Petitioner-Parents here) "have perennially been honored by American courts." 96 F.4th at 758 , citing *Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464, 486 (2020); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality op.); *Wash. v. Glucksberg*, 521 U.S. 702, 720 (1997). Whether grounded in a statute or the Constitution, the notice and consent rights of parents with respect to sexual treatment of their minor children is of a substantial

and concrete nature.[2]

Second, the Fifth Circuit batted away the government's objection that the father had not alleged that his minor daughters had obtained or tried to obtain (or were likely to obtain) contraceptives from a Title X provider. The court remarked, "That is a puzzling argument. A key goal of the Secretary's policy is to get contraceptives into children's hands *without their parents knowing*." 96 F.4th at 759 (italics in original). It then provided this example showing the illogic of the suggestion, an example well fitted to this case:

> [I]magine two dads. One dad's daughter gets the Pill from a Title X clinic [in the present case, gender transition counseling from the school], and the dad never finds out. According to the Secretary [here, the school board], he has no standing to sue. The other dad finds out. According to the Secretary [school board], he can sue. That makes little sense. Parents' standing to sue should not depend on whether the Secretary [school board] has successfully kept them in the dark about their children's sex lives.

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[2] The Fifth Circuit also noted that the Texas statute providing for parental notice and consent allowed parents to sue to vindicate those rights. 96 F.4th at 756-57. The federal counterpart here is 42 U.S.C. § 1983. *See also Warth*, 422 U.S. at 501 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1928), for the proposition that parental rights protected by the Constitution imply a right of action).

Id. The Fifth Circuit then continued to explain that a parent's immediate injury of the deprivation of his notice and consent rights alone confers standing:

> In any event, the Secretary misunderstands the claimed injury. Deanda asserts injury to his state-secured parental rights to notice and consent. Contrary to the Secretary's argument, that injury is not "premised on [his] minor children's receiving family-planning services." It is premised on the Secretary's express goal of overriding Deanda's parental rights under Texas law. The attempted erasure of those rights is "sufficient . . . to constitute [an] injury in fact," without Deanda's needing to "allege any *additional* harm beyond the one [he] has identified." *Spokeo*, 578 U.S. at 342 (citations omitted); *see also Warth*, 422 U.S. at 500 ("The actual or threatened injury required by Art[icle] III may exist *solely* by virtue of 'statutes creating legal rights, the invasion of which creates standing[.]'") (emphasis added) (citations omitted)). To be sure, if one of Deanda's daughters did get contraceptives from a Title X provider without his knowing, that would also injure Deanda. But it would mean Deanda had been injured not once but *twice*—once by the Secretary's nullifying his parental rights and a second

> time by the Secretary's succeeding in delivering birth control to Deanda's daughter behind his back.

Id. The application here is four-square: Petitioner-Parents are injured immediately by their parental notice and approval rights being violated by the school district's preclusion policy. They do not have to allege an additional injury.

Third, the Fifth Circuit rejected the government's argument that the father's complaint was too generalized because, if he had standing, a host of other parents did as well. After quoting *Spokeo* for the "fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance," 578 U.S. at 339 n.7, the Fifth Circuit remarked, "The Secretary's policy is to spend millions to get contraceptives to minors without telling their parents. It should not come as a shock that there could be a correspondingly large number of parents who can challenge it in court." *Id.* at 760. The same reasoning applies in this case. The fact that the school district's policy targets all parents does not mean that the only parents who have standing are those few who can prove the policy has been applied against them in a specific case or that they are more likely than most to experience such additional injury.

The Seventh Circuit's ruling below is in direct conflict with the Fifth Circuit's ruling and reasoning in *Deanda*. This independently supports the grant of the petition.

II. *Parents Involved* Is Only One in a Line of This Court's Decisions That Confirm That Parents Have Standing to Complain of Any School Policy to Which Their Children Are Subject, Whether or Not Its Application Can Be Avoided or Is Currently Being Applied Against Their Children

This case is controlled by *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), as the petition amply demonstrates. But that decision is only one of those from this Court that confirms, in an unbroken line, that parents have standing to complain of a school policy to which their children are subject, even before it is applied against their child and even though its application can be avoided.

In *Lee v. Weisman*,, this Court found parents had standing to challenge a graduation ceremony prayer, even though the student was not compelled to attend graduation or to pray the prayer herself. 505 U.S. 577, 584 (1992). In *School District of Abington Township v. Schempp*, , this Court allowed parents to complain of Bible readings in class, even though the policy allowed children to absent themselves if they did not wish to hear them. 374 U.S. 203, 224 n.9 (1963). This principle is so well established that, in many other cases, the standing of parents to challenge school policies is simply assumed and goes unremarked upon. *See, e.g.*, *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (assuming standing of parents to challenge school policy when their children were students); *Edwards v. Aguillard*, 482 U.S. 578,

584 (1987) (same); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (same).

The same principle plays out in non-school situations as well. For example, in *Marsh v. Chambers*, this Court found a legislator had standing to challenge the practice of opening sessions in prayer, even though he could have avoided being present during the prayers. 463 U.S. 783, 786 n.4 (1983). And in its gerrymandering cases, this Court has recognized the "right to vote" as an individual right and has applied the same standing rule, whether the reason for the gerrymandering was racial or otherwise: if the Plaintiff lives in the affected district, he has standing now, no matter the outcome of future elections. *E.g., Gill v. Whitford*, 585 U.S. 48, 65-66 (2018) (political); *United States v. Hays*, 515 U.S. 737, 744-45 (1995) (race).

The distinction that this Court has repeatedly drawn is between cases brought to vindicate a generalized grievance in the "public interest in proper administration of the laws" versus claims "of infringement of individual rights . . . by the exertion of unauthorized administrative power," the latter being the type of cases for which Congress established Article III courts. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (quoting *Stark* v. *Wickard,* 321 U.S. 288, 309-10 (1944)). This action is brought by parents already exercising their caretaking responsibilities for their school-age children, and so they have particularized and concrete interests at stake. *Cf. Carney v. Adams*, 592 U.S. 53 (2020) (finding no standing when plaintiff was not ready to assume the duties of the challenged provision). Thus,

they have standing.[3]

III. The Seventh Circuit's Sole Reliance on *Clapper* Was Misplaced

The Seventh Circuit below relied on one case to support its conclusion that the Petitioner-Parents lacked standing to complain: *Clapper*. But *Clapper*'s facts are a far cry from those here, and the contrast only confirms that these parents have standing.

Clapper is a case at one extreme of the attenuation continuum. There, the plaintiffs

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[3] A Fourth Circuit majority in *John and Jane Parents 1 v. Montgomery County School Board*, 78 F.4th 622 (4th Cir. 2023), found, similarly to the Seventh Circuit below, that parents did not have standing to complain when they did not know whether the secrecy policy was already being applied to them and their children. The Fourth Circuit recognized that *Parents Involved* was on point, except, it ruled, for the fact that the parents were pursuing their liberty interests under the Due Process Clause of the Fourteenth Amendment, rather than proceeding under the Equal Protection Clause of the amendment as in *Parents Involved*. *Id.* at 633-35. This distinction of *Parents Involved* was not only unique, it is negatived by this Court's precedents cited above. Moreover, as Judge Niemeyer stated in dissent, the distinction is illogical: "the majority's argument suggests that injury under the Due Process Clause yields rank to injury under the Equal Protection Clause. This argument makes no sense and has no basis in constitutional law." *Id.* at 643 (Niemeyer, J., dissenting).

challenged the constitutionality of §1881a of the Foreign Intelligence Surveillance Act of 1978, but they were not foreign nationals, those targeted by the statute. By contrast, the school privacy policy here *expressly targets* parents with children in the school system. In such a situation, this Court has instructed,

> When the suit is one challenging the legality of government action or inaction, standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

Lujan, 504 U.S. at 561-62.

Clapper also involved a highly attenuated chain of assumptions for potential injury. The plaintiffs there had to assume that, among the untold number of possibilities, the government would target foreigners with whom they communicated; it would use FISA rather than another authority to do so; the FISA judges would issue a warrant; the government would succeed in intercepting the communications of the plaintiffs' foreign contacts; and they would be party to the particular conversations intercepted. 568 U.S. at 410-14. This essentially made the case one to vindicate the "public interest in proper administration of the laws," *see Lujan,* 504 U.S. at 577, which this Court has been especially reluctant to allow "in the fields of intelligence gathering and foreign affairs." *Clapper,* 568 U.S. at 409.

The present case could hardly be less alike—it is at the opposite end of the attenuation continuum. It deals with education, a prototypical parental and local issue. School personnel see children five days a week, and they need no warrant to speak with them. At school, easy access and communication is the rule, not the exception. And far from being an accumulation of mere guesswork, as in *Clapper*, here the challenged "course of action is within the plain text of a policy," establishing that "a 'credible threat' of enforcement exists." *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 667 (8th Cir. 2023); *accord Armstrong v. Davis,* 275 F.3d 849, 861 (9th Cir. 2001).

Clapper does not cut against these parents. A comparison of the facts of *Clapper* with those here further confirms that they have standing to complain, and to complain *now*, before damage, or any further damage, is done to their children and to their own constitutional rights.

CONCLUSION

The decision below is wholly inconsistent with this Court's precedents and with that of the Fifth Circuit in *Deanda.* It should be summarily reversed. In the alternative, the petition should be granted for plenary briefing and argument.

Respectfully submitted this
8th day of July 2024,

/s/ Frederick W. Claybrook, Jr.
Frederick W. Claybrook, Jr.
(Counsel of Record)
Claybrook LLC
655 15th St., NW, Ste. 425
Washington, D.C. 20005
(301) 622-0360
rick@claybrooklaw.com

Steven W. Fitschen
James A. Davids
National Legal Foundation
524 Johnstown Road
Chesapeake, Va. 23322
(757) 463-6133
sfitschen@nationallegalfoundation.org