No. 23-_____

In the
Supreme Court of the United States

JOHN AND JANE PARENTS 1; JOHN PARENT 2,
Petitioners,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION and SHEBRA L. EVANS, BRENDA WOLFF, JUDITH DOCCA, KARLA SILVESTRE, REBECCA SMONDROWSKI, LYNNE HARRIS, SCOTT JOFTUS, and MONIFA B. MCKNIGHT, individually and in their official capacities as Members of the Montgomery County Board of Education,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Like a multitude of other school districts across the nation, the Montgomery County (Md.) Board of Education ("MCBE") has recently adopted a policy that requires school employees to hide from parents that their child is transitioning gender at school if, in the child's or the school's estimation, the parents will not be "supportive" enough of the transition. Petitioner Parents claim this "Parental Preclusion Policy" violates their fundamental rights to direct the care and upbringing of their children. The district court dismissed for failure to state a claim. The Fourth Circuit, over a dissent, dismissed on standing grounds.

The questions presented are:

1. When a public school, by policy, expressly targets parents to deceive them about how the school will treat their minor children, do parents have standing to seek injunctive and declaratory relief in anticipation of the school applying its policy against them?

2. Assuming the parents have standing, does the Parental Preclusion Policy violate their fundamental parental rights?

PARTIES TO THE PROCEEDING

The three Petitioner Parents proceeded with pseudonyms to protect their privacy and that of their minor children and to prevent retaliation against them and their children for raising this issue. (App'x109a (¶5).)

The named Respondents are:

- Montgomery County Board of Education, which supervises the Montgomery County Public School ("MCPS") system.

- Board Members Sherbra L. Evans, Brenda Wolff, Judith Docca, Karla Silvestre, Rebecca Smondrowski, Lynne Harris, Scott Joftus, and Monifa B. McKnight (who also serves as Superintendent of MCPS).

Due to recent elections, Grace Rivera-Owens and Julie Yang have replaced Judith Docca and Scott Joftus as MCBE members.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Parents 1 v. Montgomery Cnty. Bd. of Educ.,* No. 22-2034, *reported at* 78 F.4th 622 (4th Cir. 2023), App'x 1a-50a. Judgment entered August 14, 2023.

- *Parents 1 v. Montgomery Cnty. Bd. of Educ.*, No. 8:20-cv-03552-PWG, *reported at* 622 F. Supp. 3d 118 (D. Md. 2022), App'x 51a-105a. Judgment entered August 18, 2022.

- *Parents 1 v. Montgomery Cnty. Bd. of Educ.*, No. 483809-V, Complaint filed Oct. 20, 2020, in Montgomery County (Md.) Circuit Court. App'x106a-167a. Removed to United States District Court for the District of Maryland and assigned No. 8:20-cv-03552, on Dec. 7, 2020.

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PETITION FOR WRIT OF CERTIORARI

This petition presents one of the most pressing issues of our day. Schools across the country over the past few years have adopted policies similar to that involved here that require school personnel to hide from parents—lying if need be—that the school is assisting their child to transition gender at school. One monitoring organization lists over 1,000 such policies affecting over 10,000,000 school children.[1] At the same time, surveys of minors show that they are exhibiting gender confusion in record and ever-increasing numbers.[2] These Parents challenge their local policy as violating their fundamental rights to care and make decisions for their minor children.

The Panel majority below, while labeling the policy as "staggering" and the merits arguments of Plaintiff Parents as "compelling" (App'x15a, 26a), declined to address the merits because Plaintiff Parents did not know for sure that the school was keeping secrets from them about any of their seven children, even though their complaint is that the policy intentionally keeps them in the dark through silence and deception. The dissenting judge criticized the majority's decision as inconsistent with this Court's precedent and an "unfortunate abdication" of the judicial duty to safeguard our liberties. (App'x28a.) He was right. This Court should grant review, find standing, and vindicate the fundamental rights of parents to

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[1] *See* https://defendinged.org/investigations/list-of-school-district-transgender-gender-nonconforming-student-policies/ (last visited Sept. 1, 2023).

[2] *See* https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/ (last visited Sept. 22, 2023).

make important life decisions for their minor children. *See Parham v. J.R.*, 442 U.S. 584, 602 (1979).

OPINIONS BELOW

The opinion of the Court of Appeal is reported at 78 F.4th 622 (4th Cir. 2023) and is appended at App'x1a-50a. The Panel majority's opinion is appended at App'x1a-26a; the dissent, at App'x27a-50a. The district court's opinion is reported at 622 F. Supp. 3d 118 (D. Md. 2022) and is appended at App'x51a-105a.

JURISDICTION

The Fourth Circuit issued its opinion on August 14, 2023. (App'x1a.) This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, §2, cl. 1, provides, in relevant part, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . ."

The Fourteenth Amendment, §1, provides, in relevant part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Factual Background

The district court decided this case on a motion to dismiss, so the allegations in the Complaint are accepted as true. The Complaint must be read liberally

in Plaintiff Parents' favor. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

1. The Parental Preclusion Policy

MCBE adopted the "Guidelines for Gender Identity" for MCPS ("Guidelines") (App'x148a-163a), and they apply to all students in the MCPS system, from prekindergarten through twelfth grade. The Guidelines define *gender identity* as a "person's deeply held internalized sense or psychological knowledge of the person's own gender." They define *transgender* as an "adjective describing a person whose gender identity or expression is different from that traditionally associated with the person's sex assigned at birth." (App'x114a-115a (¶20).)

At issue are those portions of the Guidelines (together with associated materials and teacher training) that allow children while at school to change names from those given by their parents and to exhibit as other than their birth sex, all without consulting or even notifying parents. These portions of the Guidelines, which Plaintiff Parents have called the "Policy" or the "Parental Preclusion Policy," further allow MCPS to deceive parents by reverting to the child's given birth name when communicating with parents:

> All students have a right to privacy. This includes the right to keep private one's transgender status or gender nonconforming presentation at school.
> . . . .

> Transgender and gender nonconforming students have the right to discuss and demonstrate their gender identity and expression openly and decide when, with whom, and how much to share private information. The fact that students choose to disclose their status to staff members or other students does not authorize school staff members to disclose students' status to others, including parents/guardians and other school staff members, unless legally required to do so or unless students have authorized such disclosure. . . .
>
> . . . .
>
> Unless the student or parent/guardian has specified otherwise, when contacting the parent/guardian of a transgender student, MCPS school staff members should use the student's legal name and pronoun that correspond to the student's sex assigned at birth.

(App'x115a-116a (¶¶21-29).)

To implement the Guidelines and Policy, MCPS has generated Form 560-80, "Intake Form: Supporting Student Gender Identity," with which MCPS personnel evaluate minor students without parental knowledge or consent. (App'x164a-167a.) The form requires the minor student to respond "yes" or "no" to, "Is parent/guardian aware of your gender identity?" Form 560-80 then requires these minor students, in consultation with school personnel, to identify a

"Support Level" they believe their parents would provide, ranking it from "(None) 1" to "10 (High)." The form does not specify the score needed for a parent to be considered "supportive." However, it does continue, "If [parental] support level is low[,] what considerations must be accounted for in implementing this plan?," leaving a space to be filled in. Such "considerations" would include withholding information from parents about their minor children and using pronouns when speaking to the parents about their children that conform to the children's birth gender, even though other pronouns are used at school, making it impossible for parents to know whether the school is directly interfering in their relationship with their child. (App'x118a (¶26).) The limited distribution specified for Form 560-80 is designed, in part, to deny parents the ability to review the form if their child does not consent, in violation of federal and state law. (App'x117a-119a (¶¶24-27).)

MCPS has trained its personnel to follow and apply the MCPS Guidelines and Form 560-80. However, the large majority of MCPS personnel acting pursuant to the Policy and interacting with students who experience gender dysphoria are not professionally trained, certified, or licensed in the diagnosis or treatment of gender dysphoria. (App'x119a-120a (¶¶29-31).)

2. Additional Complaint Allegations

Plaintiff Parents, in addition to reciting the Policy and attaching the Guidelines and Form 560-80, repeatedly allege that the Parental Preclusion Policy violates their parental rights, both presently and potentially. In the very first paragraph, they state that

they "brought this action to enforce their rights to access certain information generated and retained about their minor children by the defendants and their agents, to whom the Plaintiff Parents have entrusted their children for their education, and to enforce their right to provide consent on behalf of their minor children." (App'x107a (¶1).) In the second paragraph, they allege that the Policy is "expressly designed to circumvent parental involvement" (App'x108a (¶2)), and they also complain that the Policy "is taking over the rightful position of the Plaintiff Parents" (App'x121a (¶34)), which it did "by promulgation of," "putting into effect," "execution," and "adoption" of the MCPS Policy. (App'x124a, 142a (¶¶49, 94).)

Plaintiff Parents underscore the serious nature of the decision of whether a minor should transition gender by noting, in part, that (a) studies show that those minors transitioning to the gender other than their birth sex have demonstrated significantly higher rates of suicide ideation, suicide attempts, and suicide, both with respect to the average population and to those of a homosexual sexual orientation; (b) multiple studies have found that the vast majority of children (roughly 80-90%) who experience gender dysphoria ultimately find comfort with their biological sex and cease experiencing gender dysphoria as they mature (assuming they do not transition); and (c) professional organizations have noted that there is insufficient evidence at this point to predict the long-term outcomes of completing a gender role transition during early childhood. (App'x112a-113a (¶¶15-17).) They also observe that there is significant consensus that children with gender dysphoria and their parents can substantially benefit from professional assistance

and counseling (App'x113a(¶18)) and that professionals "have concluded that many children with gender dysphoria can benefit by assistance that only their parents can provide." (App'x122a (¶42).)

In this context, Plaintiff Parents complain again that the Guidelines contain specific provisions that interfere with their rights to be fully informed and involved in addressing issues relating to their minor children's gender transformation and that are designed to hinder parents from deciding what is in their minor children's best interests. (App'x117a (¶23).) They note that issues regarding whether and how children perform a gender transformation are of fundamental importance and that their improper handling could have long-lasting, negative ramifications for a child's physical, mental, and spiritual well-being. (App'x122a (¶41).)

Plaintiff Parents expressly complain that they cannot wait to challenge the Parental Preclusion Policy until they learn that one of their children experiences gender dysphoria because, by the time they learn the truth, MCBE personnel may have already enabled their child(ren) to go through the process of transitioning socially to a different gender identity without Plaintiff Parents being able to counsel and advise their children and without allowing the children to take advantage of professional assistance Plaintiff Parents may believe is in their children's best interest, to their minor children's immediate and permanent injury. (App'x120a-122a (¶¶33-40).) They note that whether to transition is "an important decision that will have lifelong repercussions" and is a decision that "directly relates to the Plaintiff Parents' primary responsibilities to determine what is in their minor

children's best interests with respect to their support, care, nurture, welfare, safety, and education." (App'x121a (¶34).) They complain that the Policy interferes with their ability to (a) provide acceptance, support, understanding, and professional assistance to their children; (b) facilitate, in the way they deem best, their children's coping, social support, and identity exploration and development of their sexual orientation; (c) provide neutral interventions to prevent or address unlawful conduct or unsafe sexual practices to which transgender youth show greater susceptibility; and (d) provide expert professional assistance their children may need. (App'x121a-122a (¶¶37-40).)

Plaintiff Parents also expressly complain that, by virtue of the Policy, MCBE is harming family relations by telling their minor children they have a "right" to withhold information from their parents in all situations relating to transgender relations, even though the minor has informed unrelated third parties of the information, and that the parents should not be trusted or informed if they might be "unsupportive." (App'x121a (¶¶34-35).)

In the federal causes of action relevant here,[3] Plaintiff Parents recite that they have fundamental rights to direct the care, custody, education, and

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[3] Plaintiff Parents raised several counts under Maryland law that it waived for purposes of its appeal to the Fourth Circuit. The Plaintiffs originally filed in the Circuit Court for Montgomery County, Maryland, pursuant to §§1-501, 3-402, 3-403, and 3-409 of the Courts and Judicial Procedures Article of the Code of Maryland. (App'x111a (¶11).) Defendants removed to federal court pursuant to 28 U.S.C. §§1441 and 1331.

control of their minor children, rights protected under the Fourteenth Amendment. These fundamental rights include being able to counsel their children on important decisions related to their health and safety and to determine what is in the best interests of their minor children. (App'x140a-141a (¶87).) Plaintiff Parents request corresponding declaratory and injunctive relief and nominal damages. (App'x143a-146a.)

B. Decisions Below

The Defendants moved to dismiss for failure to state a claim, without raising standing. The district court also did not raise standing, but granted the motion on the merits. (App'x51a-105a.)

The district court's reasoning was basically two-fold. First, it ruled that the Policy involved a curricular matter and so only needed a rational basis. It found that basis in its stated goal of protecting the privacy and safety of students who were transitioning genders. (App'x67a-82a.) Second, the district court ruled that, even if strict scrutiny applied, the Policy also met that standard based on those same interests. (App'x82a-87a.)

On appeal, the Defendants for the first time raised, in two pages, an issue of standing, based on the fact that Plaintiff Parents did not allege that MCPS was currently implementing the Parental Preclusion Policy with any of their children. The Panel majority agreed.

While labeling the Policy "staggering" and describing the Parents' merits arguments as

"compelling" (App'x15a, 26a), the majority nonetheless found that these parents did not have standing to contest the Policy because they lacked current or imminent injury. While admitting that Plaintiff Parents are in largely identical circumstances to the parents for whom this Court found standing in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), the Panel majority found *Parents Involved* inapplicable because that school policy discriminated based on race, while the Parental Preclusion Policy violates parental rights. (App'x21a-24a.)

Judge Niemeyer dissented. (App'x27a-50a.) He wrote that Plaintiff Parents have standing, both because they are suffering current injury and because they are the targets of threatened injury, as MCPS is currently enforcing the policy throughout its system and at every age level. In particular, he found the Panel majority erred in limiting *Parents Involved* only to racial discrimination cases when this Court did not do so and even though parental rights are also fundamental, individual, and constitutionally protected. (App'x39a-42a.)

On the merits, Judge Niemeyer would have reversed the district court. He concluded that the Policy did not fall under the rubric of curriculum and that the school had no reasonable or compelling interests to take from parents their fundamental rights to make important life decisions for their minor children. (App'x43a-50a.)

REASONS FOR GRANTING THE WRIT

This issue is not going away, and these Parents have standing to present it. The Panel majority egregiously misread this Court's precedent and put itself in conflict with other circuits. Moreover, this case presents an issue on the merits that is roiling parents and school districts from Maine to California. It is important for parents, their children, and public schools alike to have this issue addressed and resolved now.

I. The Panel Majority Egregiously Misapplied This Court's Precedent on Standing

Plaintiff Parents complain that (a) they and their minor children are currently subject to, and affected by, the Parental Preclusion Policy; and (b) they are at risk that MCPS will apply (or is applying) its Policy to them and will keep (or is keeping) secret from them that the school is assisting their children to transition gender. Under several lines of precedent, this is more than adequate to confer standing. The Panel came to a different conclusion by misreading and misapplying this Court's precedents and by unduly restricting the Plaintiff Parents' allegations.

A. The Panel Majority Restricted This Court's Holding in *Parents Involved* in a Novel and Improper Manner; Similar Holdings Also Confirm That Parents Have Current Injury

This Court's decision in *Parents Involved* controls here, as Judge Niemeyer recognized. (App'x 39a-42a.) There, parents challenged a school district's racially discriminatory admissions policy for certain

schools. The school district countered that the parents lacked an imminent injury because they would only be affected if their children later were denied enrollment by the policy's racial tiebreaker. 551 U.S. at 718-20. This Court rejected the school district's argument on two, independent grounds. As will be discussed in greater detail in the next subsection, the first was that the threatened harm was sufficiently imminent, even though the policy might not end up costing the children a place in their favored school. *Id.*

As the second ground for standing, this Court found parents had a *current*, *immediate* injury due to the violation of constitutional rights on the face of the policy—"being forced to compete in a race-based system." *Id.* at 719. This case has the same posture—Plaintiff Parents have children in MCBE schools and are subject to a policy that, on its face, violates their constitutional rights and inflicts immediate injury. *See also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (noting that intangible, constitutional harms are concrete and confer standing); *Ne. Fla. Chapter v. Jacksonville*, 508 U.S. 656, 665-66 (1993) (holding that a plaintiff challenging a policy that potentially would deny him a government benefit does not also have to allege the policy will actually do so to have standing).

The Panel majority, while recognizing that *Parents Involved* "might suggest that the parents have standing" (App'x22a), limited its reach to policies that abridged equal protection. But the Panel overlooked that this Court has consistently found standing to challenge school policies simply on the basis that the parents' children attended the school and so were

subject to the policy or practice.[4] *See Lee v. Weisman*, 505 U.S. 577, 584 (1992) (challenging graduation ceremony prayer that student was not compelled to pray herself); *Sch. of Abington Twnshp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963) (challenging Bible readings in class to which students could absent themselves); *see also Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (assuming standing of parents challenging 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); *cf. Marsh v. Chambers*, 463 U.S. 783, 786 n.4 (1983) (finding standing based on plaintiff being member of legislature subject to challenged practice he could have avoided).

Moreover, the Panel majority did not explain why, in its view, its distinction of *Parents Involved* should matter when both equal protection and parental rights are individual and fundamental and both arise under the Fourteenth Amendment. For that reason, Judge Niemeyer had it exactly right: "not only did the Court not so limit its holding [in *Parents Involved*], 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." (App'x41a-42a.) Indeed, in its analogous 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

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[4] The Panel majority did not ask for supplemental briefing on its novel theory of distinguishing *Parents Involved*. MCBE did not cite, much less try to distinguish, *Parents Involved*.

gerrymandering was racial or otherwise: if the Plaintiff lives in the affected district, he has standing now, no matter the outcome of future elections. *Compare Gill v. Whitford*, 138 S. Ct. 1916, 1929-30 (2018) (political), *with 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*, 504 U.S. at 577 (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. *Compare Carney v. Adams*, 141 S. Ct. 493 (2020) (finding no standing when plaintiff was not ready to assume the duties of the challenged provision).

Practical reasons also demonstrate why the rationale of *Parents Involved* (and other school policy cases) applies here. There, students experienced current injury by attending a school that, by policy, taught that discriminating by race is acceptable. Here, the Parental Preclusion Policy immediately harms family relations in multiple ways that are just as serious:

- it teaches children to hide important matters from their parents;

- it teaches children they should trust school personnel more than their parents about sexual matters; and
- it requires parents to ask their children whether they are hiding that they are ex transitioning gender at school.

Living under this Policy affects them *now*. As Judge Niemeyer put it, "the dynamics and dialogue between parent and child have been changed on an ongoing basis." (App'x38a.) *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 347 (2016) (Thomas, J., concurring) ("Our contemporary decisions have not required a Plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement.").

Plaintiff Parents have monitored and guided their minor children's sexual development and instruction, and they desire to continue to do so according to their own assessment of their children's bests interests, but they are being impeded by the Parental Preclusion Policy. *Parents Involved* and similar cases dictate that these parents have standing due to their current injury. At the very least, this petition presents the important question of whether the rationale of *Parents Involved* applies to individual rights other than those protected by the Equal Protection Clause.

B. In Conflict with Other Circuits, the Panel Majority Misread This Court's Decisions Finding Standing Based on Threatened Enforcement

The Panel majority paid lip service to the decisions of this Court that plaintiffs may establish

standing when injury is only threatened. In reality, it essentially adopted a rule that denies standing any time a hypothetical chain of events is involved to show impending injury, unless it is an equal protection case like *Parents Involved*. This, of course, is well off the mark.

This Court confers standing when there is a credible threat of future enforcement so long as the threat is not "imaginary or wholly speculative," *Babbitt v. Farm Workers Nat'l Union,* 442 U.S. 289, 302 (1979), "chimerical," *Steffel v. Thompson,* 415 U.S. 452, 459 (1974), "wholly conjectural," *Golden v. Zwickler*, 394 U.S. 103, 109 (1969), or relying on "a highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2014). It has further explained that the most obvious way to demonstrate a credible threat of enforcement in the future is an enforcement action in the past. *See Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 164 (2014); *O'Shea v. Littleton,* 414 U.S. 488, 496 (1974)). And the threat of government use of a challenged statute or policy is especially credible when defendants have not "disavowed enforcement." *Driehaus*, 573 U.S. at 165-66 ("administrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review").

While a chain of assumed events sometimes becomes too attenuated, *all* forward-looking, injunctive cases, by definition, involve some chain of possibilities ending in the challenged provision "may be" applied against the plaintiff. For example, in *Babbitt* this Court found standing by assuming that the plaintiff would (a) engage in publicity and (b) inadvertently state an untruth (c) that would be apprehended as

such by state authorities (d) who would bring charges (even though they had never done so before). 442 U.S. at 301-02. This Court found the plaintiffs in that situation were "not without some reason" to fear application of the challenged statute, such that "the positions of the parties [we]re sufficiently adverse . . . to present a case or controversy . . . ." *Id.* at 302. *All* forward-looking cases involve assumptions of certain events that may not occur. "The difference between an abstract question and a 'case or controversy' is one of degree." *Id.* at 297-98; *see also Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

The relevant considerations all dictate that Plaintiff Parents have standing: MCBE is currently applying the Parental Preclusion Policy in hundreds of cases, and it is staunchly defending its desire to continue to do so as more minors express a desire to transition gender at school. (App'x41a.) Moreover, recent surveys show that the incidence of minors claiming gender fluidity has markedly increased over the last few years.[5]

Parents Involved also controls here by its finding of sufficiently imminent harm when an unconstitutional school policy may be applied in the future. This Court noted that the parents all "have children in the district's elementary, middle, and high schools" that are subject to the policy and, therefore, "*may be*

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[5] A June 2022 report from the Williams Institute (UCLA School of Law), analyzing CDC data, presented an estimate of youth 13-17 who identify as transgender that was almost double its estimate from five years prior. https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/ (last visited Sept. 22, 2023).

'denied admission to the high schools of their choice when they apply for those schools in the future'" by virtue of the challenged policy. 551 U.S. at 718 (emphasis added). It explained that the fact that "[some] children of group members will not be denied admission to a school based on their race . . . does not eliminate the injury claimed." *Id.* at 718-19. Indeed, Plaintiff Parents are in a unique position and have an even stronger case: if they cannot preemptively challenge the policy, then they will be *required* to suffer the harm before they are able to contest it, because MCBE will hide the harm from them, as it is currently doing with hundreds of minor children. Plaintiff Parents have standing to complain about this situation now.

The Panel majority suggested *Parents Involved*'s forward-looking application should also be restricted to equal protection cases. (App'x22a-23a.) But this Court from early on has applied its rulings in forward-looking situations to *all* constitutional interests. In *Driehaus*, this Court related, "Building on *Steffel,* we explained that a plaintiff could bring a preenforcement suit when he 'has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" 573 U.S. at 160 (quoting *Babbitt* 442 U.S. at 298 (collecting cases)). In *Driehaus*, the constitutional interest involved was free speech; in *Babbitt*, it was free association. The Panel majority asserted that, if *Parents Involved* and similar cases are not restricted to equal protection claims, then all of this Court's cases finding potential future injury too remote to confer standing are undermined. (App'x 22a-23a.) That assertion is unfounded. In *Parents Involved,* this Court simply found that the potential for

enforcement was sufficiently imminent, while in other cases it has not been.

The Panel majority principally relied on *Clapper* (App'x13a, 15a), a case at one extreme. There, the plaintiffs challenged FISA, but they were not foreign nationals, those targeted by the statute. By contrast, the Parental Preclusion Policy *expressly targets* parents with children in the MCPS 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 deals with education, a prototypical parental and local issue. School personnel see children five days a week, they need no warrant to speak with them, and they may freely discuss sexual identity issues. 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). MCBE cannot have it both ways. It cannot trumpet in its Guidelines its goal to provide a "safe space" for "gender nonconforming" students "to keep their gender identify or transgender status private and confidential" (App'x150a) and, at the same time, disclaim that parents are at substantial risk that it will apply its Policy to them.

This Court has emphasized that a court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Plaintiff Parents certainly satisfy both prongs of that test: the Parental Preclusion Policy is in place and is being staunchly defended, and Plaintiff Parents will suffer real-world consequences if the Policy is applied to them without their knowledge.

Unless they may sue now, they will be restricted to bringing suit after the fact when they discover information and actions that have been unconstitutionally kept from them, perhaps with distressing results for their child. *See, e.g., Perez v. Broskie*, No. 3:22-cv-0083-TJC-JBT (M.D. Fla., amended complaint filed Mar. 11, 2022) (parents alleging that school assisted their child to transition at school without informing them of such counseling or their child's suicide attempts); App'x120a-122a (¶¶33-42).

The Eighth and Fifth Circuits have recently resolved similar cases properly and in tension with the Panel here. In *Religious Sisters of Mercy v. Bacerra*, 55 F.4th 583 (8th Cir. 2022), and *Franciscan Alliance, Inc. v. Bacerra*, 47 F.4th 368 (5th Cir. 2022), DOJ argued that doctors didn't have standing to seek injunctive relief concerning recently issued federal regulations because the agency had not yet decided whether the regulations would apply if doctors, due to their religious beliefs, refused to provide certain services to transgender youth. Both circuit courts held that, by virtue of DOJ saying the issue was up in the air, it conceded a credible threat of enforcement. *Religious Sisters*, 55 F.4th at 602-06; *Franciscan Alliance*, 47 F.4th at 376. That the agency had enforced the regulation against similarly situated doctors also showed the harm was sufficiently imminent. *Religious Sisters,* 55 F.4th at 606. Here, MCBE doesn't hesitate to say that it will enforce the Parental Preclusion Policy against Plaintiff Parents if the situation, in the school's view, so dictates, as it has in many other cases. That provides sufficient immediacy to provide standing under this Court's precedents. *See Babbitt,* 422 U.S. at 459 (relying on enforcement of challenged

ordinances in another instance to establish standing for injunctive and declaratory relief).

The Panel majority misread this Court's standing precedent for forward-looking cases, in conflict with other circuits. This Court has summarized, "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Md. Cas. Co.*, 312 U.S. at 273; *see also Babbitt,* 442 U.S. at 297-98. The risk to Plaintiff Parents is certainly sufficiently imminent and substantial when MCBE does not deny that it has hundreds of transitioning plans currently in place for students without parental knowledge. The importance of the decisions involved for the Plaintiff Parents, and their minor children, could not be greater.

C. The Panel Majority Simply Ignored the Cases Finding Standing When the Plaintiffs Have a Right to Information Needed to Perform Their Duties

As Plaintiff Parents argued below, this case is also controlled by this Court's decisions finding standing when parties allege improper denial of information they have a right to receive that affects their performance of duties. In *FEC v. Akins*, 524 U.S. 11 (1998), this Court held that voters had standing to challenge the FEC's failure to disclose contributions made to an organization and distributions made by that organization to candidates for office. *Id.* at 13-14. It explained that the voters suffered an "injury in fact" because of "their inability to obtain information"

that would "help them . . . evaluate candidates for public office." *Id.* at 21; *see also Public Citizen v. DOJ,* 491 U.S. 440 (1989).

Similarly here, Plaintiff Parents assert that they are injured by the schools withholding information from them, information to which they are legally entitled and which would help them carry out their parental responsibilities. Parents have a right to direct the upbringing of their children, including deciding what school they attend. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925). Even the risk of a school intentionally hiding information from parents improperly and *immediately* burdens that right. Moreover, a free public school education is a generally available public benefit to parents. The Parental Preclusion Policy conditions that benefit (which for many parents is a compulsory requirement due to personal circumstances) on their surrendering a constitutionally protected right of being kept informed of how the school is treating their children. These harms are more than sufficient to establish "informational injury" standing, but the Panel majority simply ignored them.

D. The Panel Majority Failed to Read the Complaint Liberally, As Required by This Court's Precedents

Judge Niemeyer also justly criticized the Panel majority for its restrictive reading of the Complaint. (*E.g.*, App'x27a, 34a-35a.) The majority violated two legal rules: First, at the "pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those

specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. at 561 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). Second, as this Court emphasized in *TransUnion*, standing is more easily attained when injunctive, rather than monetary, relief is requested. *See* 141 S. Ct. at 2210-11. That is because forward-looking relief is attempting to prevent injury from occurring. Thus, it is simply wrong, as a matter of law as well as fact, to suggest, as the Panel majority does, that Plaintiff Parents do not allege that they suspect that "the schools are currently withholding information from them or that there is a substantial risk the schools might do so in the future." (App'x25a-26a.) This Court's precedents disallow such a stingy reading of the Complaint.

Nor does it assist the Panel majority to list several potential allegations Plaintiff Parents might have made to buttress their standing. That is *always* true when plaintiffs seek forward-looking relief. And the Panel majority's suggestions don't even make sense. It suggested that Plaintiff Parents could have alleged "that their children are transgender" (but the Parental Preclusion Policy is designed to preclude that knowledge), that they "are transitioning" (same), that they "are considering transitioning" (but how are parents meant to know if their child believes they may be "unsupportive" and doesn't want to tell them, like the Policy encourages), and that they "are struggling with gender identity issues or are at a heightened risk for questioning their biological gender" (same). (App'x25a-26a.)

Fairly and liberally read, Plaintiff Parents complain that their parental rights are being infringed right now by the Parental Preclusion Policy,

which alone gives them standing. Because of that very Policy, they also don't know whether the schools are treating their children as transgender. They have standing to find out and to prevent it from happening.

For these multiple reasons, the Panel majority's conclusion that Plaintiff Parents lack standing to challenge the Parental Preclusion Policy is grievously wrong and contrary to this Court's precedent in multiple respects. This Court should grant the petition to correct these errors.

II. The District Court Egregiously Misapplied This Court's Precedents Affirming Parental Rights

Should this Court find that Plaintiff Parents have standing, the merits are squarely presented for resolution. Judge Niemeyer in dissent explained why the district court improperly applied this Court's precedents when upholding the Parental Preclusion Policy. He was correct, and this Court should grant review on this important issue.

A. The District Courts Are Divided on Whether Parental Preclusion Policies Are Curricular Determinations Subject to Rational Basis Review

The district court principally rested its decision on those cases that hold that, when parents send their child to public school, they delegate some level of discretion to the school to set the curriculum. (App'x68a-74a, citing cases.) Plaintiff Parents have no quarrel with this as a general matter. But that is not the issue

here. As Judge Niemeyer noted (and to which the other Panel members gave nodding recognition (App'x26a), the Parental Preclusion Policy does not deal with curriculum taught to all students. (App'x46a-47a.)

The Parental Preclusion Policy decidedly does not fit within the curricular exception, for multiple reasons:

- Whether to transition gender is something initiated by the child, not the school.
- It deals with the child's very identity, not the child's education.
- The name and gender expression of a particular child doesn't start when the child starts going to school; it starts when parents first say, "It's a boy!" or "It's a girl!" and when they name their child. These have always been family matters central to the parent-child relationship.
- Whether a particular child socially transitions isn't relevant to how the school is run for all students.
- The primary purpose of the Parental Preclusion Policy is to control what happens *at home*, not at school, by keeping what happens at school secret from the parents at home, even to the extent of deceiving the parents.

In addition, the curricular exception has never been stretched so far, by any court until now, as to allow the schools to keep what happens at school

secret from parents. To take a common example, consider a child who knows that his parents will be disappointed in his grades, so he comes to the teacher and says, "I don't want you to send my grades to my parents. They'll be mad and will probably ground me." Grades certainly involve curricular affairs, but the curricular exception doesn't allow schools to keep a child's grades secret from his parents. Much less does it allow schools to hide major life decisions from the parents, decisions that involve much more than what happens at school.

Other district courts have recognized this. In *Ricard v. USD 475 Geary County, KS School Board*, 2022 WL 1471372 (D. Kan., May 9, 2022), the court expressed amazement over a similar policy: "It is difficult to envision why a school would even claim—much less how a school could establish—a generalized interest in withholding or concealing from the parents of minor children[ ] information fundamental to a child's identity, personhood, and mental and emotional well-being such as their preferred name and pronouns." *Id.* at *8 (footnote omitted). Similarly, in *Tatel v. Mt. Lebanon School District*, 2022 WL 15523185 (W.D. Pa., Oct. 26, 2022), *on rehearing* 2023 WL 3740822 (May 31, 2023), the district court held that a *de facto* policy allowing a teacher to express her personal beliefs about the appropriateness of transgender behavior and to tell the elementary school children of her class that they could confide in her rather than their parents was neither curricular nor constitutional. And, in *Mirabelli v. Olson*, the court held that a school "policy of elevating a child's gender-related choices to that of paramount importance, while excluding a parent from knowing of, or participating in, that kind of choice, is as foreign to

federal constitutional and statutory law as it is medically unwise." 2023 WL 5976992 at *9 (S.D. Cal., Sept. 14, 2023).

B. The District Court's Decision Is in Conflict with Decisions of This Court and of Circuit Courts That a Child's Perceived Interests Cannot Overcome Parents' Fundamental Rights to Direct a Child's Upbringing

Doubling down, the district court held that, even if the Parental Preclusion Policy were subject to strict scrutiny because it infringed on parental rights, the interests espoused by MCBE in student privacy and security sufficed. (App'x82a-87a.) As Judge Niemeyer remarked, that argument fails at the outset. Moreover, it is in conflict with rulings of other circuits.

Whether a child should socially transition as transgender is a difficult and critically important decision that will have repercussions for the rest of the child's life. It is well established that *parents* get to make such decisions for their minor children. As this Court explained in *Parham v. J.R.*, children lack the "maturity, experience, and capacity for judgment required for making life's difficult decisions." 442 U.S. at 602. And in *Troxel v. Granville,* 530 U.S. 57 (2000), this Court repeated that parents have a "fundamental right to make decisions concerning the care" of their minor children. *Id.* at 72.

It naturally follows from this principle that the perceived interests of the child in safety and privacy do not, as a matter of law, trump the parents' right to make decisions for the child. This Court elucidated in

Parham that the fact that the decision of the parents "is not agreeable to a child or . . . involves risks . . . does not diminish the parents' authority to decide what is best for the child" or "automatically transfer the power to make that decision from the parents to some agency or officer of the state." 442 U.S. at 603-04. MCBE's purported "interests" are illegitimate because they are simply attempted justifications for wanting to displace parents as the ones primarily responsible for the care and nurturing of the parents' children. But it is parents, not schools, whom the law assumes act in their children's best interests. *Id.* at 602; *see also Troxel*, 530 U.S. at 68-69.

At its base, the "interests" asserted by MCBE and the district court are nothing more than a statement that the school might not agree with what the parents might instruct their children. Thus, as Judge Niemeyer observed, this situation is directly analogous to a governmental entity justifying a restriction on speech by arguing that it does not like the substance of what is being said. This, of course, is not a legitimate interest, but a repudiation of a fundamental right. *See Matal v. Tam*, 582 U.S. 218, 244 (2017) (plurality op.). Similarly, a school may not subvert parental rights merely because the school prognosticates that it may disagree with how parents will exercise their fundamental rights with their minor children. Paraphrasing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 579 (1995), a public school "is not free to interfere with [parental rights] for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." Indeed, Justice Thomas in his *Troxel* concurrence noted that second-guessing a fit

parent's decision about socialization of her child is not a legitimate governmental interest. 530 U.S. at 80.

The district court in *Ricard* applied this teaching in the context of a school policy very similar to that here:

> Presumably, the [school] District may be concerned that some parents are unsupportive of their child's desire to be referred to by a name other than their legal name. Or the District may be concerned that some parents will be unsupportive, if not contest, the use of pronouns for their child that the parent views as discordant with a child's biological sex. But this merely proves the point that the District's claimed interest is an impermissible one because it is intended to interfere with the parents' exercise of a constitutional right to raise their children as they see fit. And whether the District likes it or not, that constitutional right includes the right of a parent to have an opinion and to have a say in what a minor child is called and by what pronouns they are referred.

2022 WL 1471372 at *8 (footnote omitted).

Circuit courts have applied the principle that the state may not preempt parental rights due to perceived countervailing interests of the child in related contexts. In *Wyatt v. Fletcher*, 718 F.3d 496 (5th Cir. 2013), the Fifth Circuit noted that it "has never held that a person has a constitutionally-protected privacy interest in her sexual orientation, and it certainly has

never suggested that such a privacy interest precludes school authorities from discussing with parents matters that relate to the interests of their children." *Id.* at 505. The same applies to gender identity. Similarly, in *Doe v. Heck,* 327 F.3d 492 (7th Cir. 2003), the Seventh Circuit found a violation of parents' rights when State actors "not only failed to presume that the plaintiff parents would act in the best interest of their children, they assumed the exact opposite." *Id.* at 521. And the Third Circuit in *Croft v. Westmoreland County Children and Youth Services*, 103 F.3d 1123 (3d Cir. 1997), underscored that "a state has no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Id.* at 1126; *accord Brokaw v. Mercer Cnty.,* 235 F.3d 1000, 1019 (7th Cir. 2000). Simply put, absent "'some definite and articulable evidence'" of a child being abused, "neither the state nor its officials have any interest whatsoever 'in protecting children from their parents,' and no further inquiry (i.e., balancing of interests) is necessary." *Heck,* 327 F.3d at 521 (citing *Brokaw,* 235 F.3d at 1019; *Croft,* 103 F.3d at 1126).

That is exactly the infirmity of the Parental Preclusion Policy, and it also implicates the procedural due process rights of parents. This Court has repeatedly made clear that parental rights to make decisions for their minor children may only be disregarded when parents have been found abusive or negligent. But due to the fundamental nature of parental rights, this Court in a series of cases has held that those rights may only be withdrawn after

- the State gives notice to the parents, *see Santosky v. Kramer,* 455 U.S. 745, 753-54 (1982); *Stanley v. Ill.*, 405 U.S. 645, 654-58 (1972);
- the State has given parents an opportunity to explain themselves, *see id.* at 656-58;
- the State has proven the parents are unfit by clear and convincing evidence, *see Santosky*, 455 U.S. at 747-48; and
- an impartial judicial officer has made the determination, *see Stanley*, 405 U.S. at 653-58; *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-32 (1981).

The Parental Preclusion Policy's very purpose is to avoid giving notice to parents the school deems potentially "unsupportive." That predictive judgment call is made by a school teacher or counselor based on a private interview with a child who could be as young as six. The teacher or counselor circles a number from 1 to 10 on the parental "Support Level" scale of the intake form. (App'x118a (¶26).) And, of course, there is no independent review of any kind of the school teacher's judgment call on this, nor a definition of what "supportive" means or what number a parent must get to be considered "supportive" enough.

This falls far short of the process due for a State to override parental rights. Even if there were evidence of abuse occurring in some parent-child situations, it does not permit a broad, prophylactic abridgement of other parents' constitutional rights by public school personnel: "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." *Parham,* 442 U.S. at 603 (emphasis in original); *see also In re Winship*, 397 U.S. 358, 365-66 (1970) (remarking that "labels and good intentions do not themselves obviate" due process safeguards); *John Doe 1 v. Madison Metro. Sch. Dist.,* 976 N.W.2d 584, 609 (Wis. 2002) (Roggensack, J., dissenting) (finding a similar school policy defective because it "deprive[s] parents of their constitutional rights without proof that parents are unfit, a hearing, a court order, and without according parents due process").

The district court's decision flies in the face of the precedent of this Court and conflicts with that of circuit and other district courts. MCBE is trampling on parental rights. This Court should grant the petition to correct the situation. School officials by the expedient of publishing their own "guidelines" should not be able to give themselves authority to bypass the due process protections set up to regulate parental neglect and abuse, implementing their own standards, in their own ways, on an unreviewable basis.

III. This Case Presents a Matter of Exceptional Importance, as Similar Parent Preclusion Policies Are Multiplying Rapidly Throughout the Country

This case is not a "one off." It deserves this Court's attention on both a micro and a macro level.

Considering just the school system that is the focus of this case, a spokesman for MCBE stated that, for the last school year, MCPS had over 300 situations in which parents are not being told of their children

transitioning gender at school.[6] No reason exists to think that number has done anything but grown, taking into account the trends among our nation's youth and the school district's recent decision to include LGBTQ+ instruction throughout the curriculum. *See Mahmoud v. McKnight*, No. 8:23-cv-1380 (D. Md. filed May 23, 2023) (suit challenging MCPS's inclusion of "LGBTQ-Inclusive Texts" starting in prekindergarten and refusing to give parents advance notice of their use in class or an opt-out).

The macro level is even more compelling. An organization tracking policies that allow schools to hide from parents that their minor child is transitioning gender at school puts the numbers at the beginning of the current school year at over 1,000 school districts in 37 states and the District of Columbia, affecting over 18,000 schools with over 10,000,000 students.[7] These policies have spawned litigation across the country.[8] They emasculate parental rights to the

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[6] https://www.washingtonpost.com/education/2022/07/18/gender-transition-school-parent-notification/(last visited Sept. 28, 2022).

[7] *See* http://defindinged.org/ investigations/list-of-school-district-transgender-gender-nonconforming-student-policies/ (last visited Sept. 1, 2023).

[8] Flipping the scenario, the Attorneys General of California and New Jersey have recently sued school districts that require their teachers to inform parents if their child wishes to socially transition at school. *See* https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-lawsuit-challenging-chino-valley-unified-school (last visited Sept. 21, 2023); https://www.njoag.gov/ag-platkin-dcr-announce-filing-of-civil-rights-complaints-and-applications-seeking-to-

detriment not just of parents, but to their children as well.

The time for this Court to step in is now. There is no good reason to wait to resolve these issues of critical importance. This Court should reconfirm the priority of parents' rights to assure the well-being of their minor children, and it should do so promptly.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,
this 13th day of November 2023,

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immediately-prohibit-implementation-of-lgbtq-parental-notification-policies/ (last visited Sept. 21,2023).