No. 23-601

In the Supreme Court of the United States

JOHN AND JANE PARENTS 1, ET AL.,
Petitioners,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 16 OTHER STATES IN SUPPORT OF PETITIONERS

PATRICK MORRISEY
Attorney General
OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
mwilliams@wvago.gov
(304) 558-2021

MICHAEL R. WILLIAMS
Principal Deputy Solicitor General
Counsel of Record

FRANKIE A. DAME
SPENCER J. DAVENPORT
Assistant Solicitors General

Counsel for Amicus Curiae *State of West Virginia*
[additional counsel listed after signature page]

QUESTIONS PRESENTED

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?

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

When parents send their kids to school, they expect educators to tell them about important things that might come up. Parents need to know what's happening in their children's lives to raise them and care for them well. After all, while schools play a crucial role in educating children and preparing them to perform "our most basic public responsibilities," *Brown* v. *Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954), "the custody, care and nurture of the child reside first in the parents," *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).

For the most part, schools have respected the relationship between parents and children. From medical issues to disciplinary matters to bullying to grades, and everything between, schools relay key information to parents that may affect how they raise their young ones. Schools usually recognize that the big decisions still lie with the child's parents.

The Montgomery County Board of Education is different. The Board's "Guidelines for Student Gender Identity" includes a Parental Preclusion Policy that in turn tells schools to develop a "gender-support plan" without involving the parents. Worse still, schools affirmatively withhold information about a student's gender-support plan from the student's parents. Children can go by a different name, use a different restroom, and identify as a different gender at school—all without their parents knowing. So the Policy boxes parents out from an issue with "medical, social, and policy" implications. *L. W.*

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[*] Under Supreme Court Rule 37.2, *amici* timely notified counsel of record of their intent to file this brief.

by & through Williams v. *Skrmetti*, 83 F.4th 460, 491 (6th Cir. 2023) (Sutton, J.). It prevents parents from fulfilling their parental role.

Montgomery County's policy disrupts "perhaps the oldest of the fundamental liberty interests recognized by the Court," the right of parents to direct the care and custody of their children. *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000). "[R]eal, everyday ties" are indispensable to meaningful parent-child "connection[s]." *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 64-65 (2001). Those connections then "promot[e] the 'peace and tranquility of States and families.'" *Michael H.* v. *Gerald D.*, 491 U.S. 110, 125 (1989) (Scalia, J. plurality). And the *Amici* States—all States, really—have "an interest in not undermining that [family] unit." *Wynn* v. *Carey*, 582 F.2d 1375, 1385 (7th Cir. 1978). They should avoid anything that "hinder[s]" parents' ability to carry out their duties. *Prince*, 321 U.S. at 166.

But in the Fourth Circuit, parents have no right to challenge policies like the Parental Preclusion Policy—despite their affront to these core rights—because most parents will now be found to lack standing. According to a majority opinion here, only parents of children that "have gender support plans, are transgender or are … struggling with issues of gender identity" might have standing. Pet.App.5a. But among other things, that approach presents a catch-22. The Policy's secret nature deprives parents of key information about their children's lives *and* deprives them of the information they'd need to sue. And once parents know that their child is exploring his or her gender identity, the parents' harm—and thus standing to sue—may be gone. Family ties, then, will fall by the wayside.

This logic can't be right. Parents must have the right to ask for the courts' help in securing the fundamental right to know what schools are doing with their kids. So the Court should grant certiorari here to ensure all parents have a way to vindicate their fundamental familial interests. And beyond that, the Court should grant certiorari to explain that policies like this one—policies that intentionally keep parents in the dark—cannot be justified in our parent-first society.

SUMMARY OF ARGUMENT

In the past several years, school districts have enacted policies that forbid school officials from disclosing information about a student's transgender status to parents unless the student authorizes the disclosure. These policies violate parents' fundamental rights by preventing them from making crucial decisions about their child's identity and health. Yet in the Fourth Circuit, most parents have no means to even ask for relief.

I. The Fourth Circuit did not suggest that the Policy passes constitutional muster, as it refused to even engage the issue. Instead, the court said that parents must wait until they learn their "children have gender support plans, are transgender or are even struggling with issues of gender identity." Pet.App.5a. But this limitation misunderstands the harm the Policy causes. The Policy's secretive nature hurts Parents by shutting them out of the decision-making process. The Fourth Circuit's holding deepens conflicts in the circuit courts related to transgender minors and school policies. It worsens confusion on these issues all around. And without this Court's review, parents in Montgomery County and other places where similar policies have taken effect will have no recourse.

II. In truth, the Policy does not pass constitutional muster. It conflicts with how our Constitution treats parental rights. Parents get "to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66. "Parents can and must make those judgments." *Parham* v. *J.R.*, 442 U.S. 584, 603 (1979). And "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Id.* Montgomery County forgets all that. Its choice to erase parents from the equation can have severe consequences for the child, the parents, and the community.

REASONS FOR GRANTING THE PETITION

I. The Court should grant the Petition to clarify that parents have standing to bring cases in this confused area of the law.

A. In the last five-or-so years, the number of transgender-identifying children has rapidly grown. In 2017, just 0.7% of high schoolers so identified. See JODY L. HERMAN ET AL., AGE OF INDIVIDUALS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES, WILLIAMS INST. (2017), https://tinyurl.com/29tvbdbk. By 2022, that number "doubled" to 1.43%—or around 300,000 high schoolers. JODY L. HERMAN ET AL., HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES, WILLIAMS INST. (2022), https://tinyurl.com/345tyu65. Younger teens are particularly likely to identify as transgender: while only 7.6% of the population, they're 18% of transgender people. See Azeen Ghorayshi, *Report Reveals Sharp Rise in Transgender Young People in the*

U.S., N.Y. TIMES (June 10, 2022), https://tinyurl.com/3anymcs3.

Schools have struggled with how to address this growing population, wrestling with whether and how to support various means for students to transition to a different gender identity. See Leor Sapir, *The 'T' Piggybacking on the 'LGB,'* CITY JOURNAL (Sept. 27, 2022), http://tinyurl.com/5n7ut997 (providing statistics). But across the board, transitioning has "significant effects" on children in terms of "psychological functioning." HILARY CASS, INDEPENDENT REVIEW OF GENDER IDENTITY SERVICES FOR CHILDREN AND YOUNG PEOPLE: INTERIM REPORT, CASS REV. (2022), https://tinyurl.com/3z6bkcay (UK NHS-commissioned independent report). And the jury is still out on whether those effects are overall positive—that is, if transitioning on balance helps. See, *e.g.*, James S. Morandini et al., *Is Social Gender Transition Associated with Mental Health Status in Children and Adolescents with Gender Dysphoria?*, 52 ARCHIVES OF SEXUAL BEHAVIOR 1045, 1057 (2023) (noting, for example, that living a double life introduces another harm called "concealment stress"). What's clear to everyone, though, is that transitioning "is not a neutral act." Cass, *supra*, at 63.

Rather than engage with these difficult questions by working openly and building consensus, schools have often chosen secrecy. Organizations like the Human Rights Campaign or National Education Association encourage schools to exclude parents from decision-making. See GLSEN, MODEL LOCAL EDUCATION AGENCY POLICY ON TRANSGENDER AND NONBINARY STUDENTS, https://tinyurl.com/yrjefsm6 (2020); Michael Torres, *Whether You Like It Or Not*, CITY JOURNAL (July 18, 2023), https://tinyurl.com/33z27shc. And schools have

listened. Right now, over 1,000 districts that include over 18,000 schools and nearly 11 million students across 37 States and the District of Columbia have parental-preclusion policies. *List of School District Transgender – Gender Nonconforming Student Policies*, PARENTS DEFENDING EDUC., https://tinyurl.com/2p8twbe8 (last updated Jan. 3, 2023). Under these policies, teachers and administrators secretly help students "obtain medical care, housing and legal advice without the parents' knowledge." Katie Baker, *When Students Change Gender Identity, and Parents Don't Know*, N.Y. TIMES (Jan. 23, 2023), https://tinyurl.com/2m99ey9h (cataloguing examples across every demographic). And some push for an even more aggressive approach, in which school personnel work with other authorities to remove students from homes considered insufficiently supportive. See, *e.g.*, Melissa Moschella, *Natural Law, Parental Rights, and the Defense of "Liberal" Limits on Government: An Analysis of the Mortara Case and Its Contemporary Parallels*, 98 NOTRE DAME L. REV. 1559, 1582-91 (2023).

In short, the growing population of affected students, a lack of clarity in legal standards, the increasing prevalence of proposals for parental-preclusion policies, and opaqueness in the relevant medical evidence has made "the transgender student parental notification debate … one of the most prevalent and complex issues that states and educational institutions must address." Stephen McLoughlin, *Toxic Privacy: How the Right to Privacy Within the Transgender Student Parental Notification Debate Threatens the Safety of Students and Compromises the Rights of Parents*, 15 DREXEL L. REV. 327, 331 (2023).

In fact, most every level and branch of government has had trouble responding to these issues; sound legal

analysis is disappointingly absent. Many school districts, for example, justify withholding a child's transgender status based on flawed interpretations of the Family Educational Rights and Privacy Act or Title IX. Torres, *supra*; see also Priscilla DeGregory & Katherine Donlevy, *NJ school districts temporarily blocked from enforcing requirement to notify parents if child changes gender identity*, N.Y. POST (Aug. 18, 2023, 9:36 p.m.), https://tinyurl.com/ykums6na (describing a New Jersey district's litigation over a parental-preclusion policy). And federal law isn't the only thing to blame. For years, "[u]ncertainties in state legislative activity" have plagued this issue as well. Erin Cranor, *Out in Public: Legal and Policy Benefits of Open, Cooperative K-12 Transgender Policy Development*, 2019 B.Y.U. EDUC. & L.J. 191, 204 (2019) (naming it the "unpredictable milieu"). Meanwhile, state and federal agencies alike have created "a messy landscape of confusing and conflicting rules" for transgender students and their parents. Drew Fabricius, *Competing for the Starting Line: How Ombuds Programs Can Help Transgender Student-Athletes Participate Under Various State Policies*, 2023 J. DISP. RESOL. 85, 112 (2023).

So it's no surprise that lawsuits "about the nature and scope of parental rights" related to their children's sexual identities are "proliferat[ing]." Elizabeth R. Kirk, *Parental Rights: In Search of Coherence*, 27 TEX. REV. L. & POL. 729, 730 (2023). The common thread through these lawsuits is that schools make a practice of acting "without [] parents' knowledge or consent." *Id.*; see also Maggie Paino & Suzanne Eckes, *Do Parents Have A Fundamental Right to Know About Their Child's Gender Identity in School?*, 405 EDUC. L. REP. 17 (2022) (noting schools' struggle to respect "parents' right to know about their child's gender identity"). Just between 2020 and

2023, parents filed nearly a dozen high-profile lawsuits challenging parental-preclusion policies. Baker, *supra*; see also Kirk, *supra* (listing those lawsuits as one category among many). This case, of course, is one of them.

These lawsuits have produced an inconsistent mass of decisions about how schools and other institutions must address children who raise questions about their gender identity. See Ryan Bangert, *Parental Rights in the Age of Gender Ideology*, 27 TEX. REV. L. & POL. 715, 724 (2023) (observing "starkly divergent results" in federal parental rights cases); Desirée LeClercq, *The Disparate Treatment of Rights in U.S. Trade*, 90 FORDHAM L. REV. 1, 53 (2021) (noting this uncertainty by federal courts). For example, circuits disagree about whether state laws concerning gender-related treatments for minors likely violate parental rights. Compare *Brandt by and through Brandt* v. *Rutledge*, 47 F.4th 661, 671 (8th Cir. 2022) (likely violate), with *L.W.*, 73 F.4th at 413 (likely do not violate). "[T]here is a fundamental circuit split" between the First and Third circuits on the extent of parents' right to direct in-school instruction on transgender issues, too. *Tatel* v. *Mt. Lebanon Sch. Dist.*, No. 22-cv-837, 2023 WL 3740822, at *12 (W.D. Pa. May 31, 2023) (summarizing cases). And on our specific issue—parents' right to know about a student's wish to transition—courts disagree sharply. Compare *Willey* v. *Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees*, No. 23-cv-69, 2023 WL 4297186, at *14 (D. Wyo. June 30, 2023) (right to know), and *Ricard* v. *USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-cv-4015, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022) (same), with *Regino* v. *Staley*, No. 22:3-cv-32, 2023 WL 4464845, at *3 (E.D. Cal. July 11, 2023) (no right to know).

Altogether, courts appear just as confused as schools are when it comes to how to grapple with transgender

students in schools. See Rachel N. Morrison, *Gender Identity Policy Under the Biden Administration*, 23 FEDERALIST SOC'Y REV. 85, 122 (2022) (saying it's generally unclear how agencies, "schools, and courts will treat" transgender-related policies).

B. This confusion in this area of the law now infects standing. Ronna Greff Schneider, *School Matters*, 92 U. CIN. L. REV. 1, 8 (2023) (noting sharp increase in lower-court opinions handling issues discussed in *John Doe*). But America can't afford confusion over standing in these cases because standing is an indispensable component of resolving *all* these substantive questions in court. If the courts aren't clear on standing—and especially on the standing of children's guardians and next friends—then resolving the downstream questions about the intersection of parental rights and care of students (particularly those identifying as transgender) becomes impossibly difficult. Parents, state legislatures, schools, interest groups, courts—everyone remains in the dark until clear answers emerge on standing. And these issues won't disappear. In fact, the numbers say they're just beginning. Whether the Parents have standing is therefore an important question of federal law not yet settled.

The Court should thus grant the Petition to settle the question in Parents' favor. No one disagrees that Parents show causation and redressability—the only question is whether they show an "injury in fact" that is "imminent." *Thole* v. *U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020). Parents' children attend schools that employ the challenged policy, but the parents haven't provided any evidence their children identify as transgender. Even so, it's plain enough Parents have standing. Basic standing principles yield this proposition: a party with a right to

know certain information has standing to challenge a governmental policy that says if the government discovers that information it will intentionally hide it from the right-holding party. And so "[w]here a school district or its employees affirmatively act to prevent a parent from having information necessary to make informed decisions about their child's safety, the parent has standing to bring their own claims." *Posey* v. *S.F. Unified Sch. Dist.*, No. 23-cv-2626, 2023 WL 8420895, at *6 (N.D. Cal. Dec. 4, 2023).

First, imminence (one of the decisive factors in the decision below) is an "elastic concept" intended only to ensure injuries aren't "too speculative." *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 564 n.2 (1992). *Clapper* itself says this Court doesn't always or "uniformly require plaintiffs to demonstrate that it is literally certain" parties will suffer the alleged harm, *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)—though that's how the lower-court opinion reads. Indeed, this Court often allows parties to show "imminence" in flexible, creative ways—as in pre-enforcement challenges, for example. *Laird* v. *Tatum*, 408 U.S. 1, 13-14 (1972). Those challenges most often protect First Amendment rights, see, *e.g.*, *Jones* v. *Coleman*, 848 F.3d 744, 749 (6th Cir. 2017), but courts allow "preenforcement review of facial due process challenge" like the one here, too, *Seegars* v. *Gonzales*, 396 F.3d 1248, 1254 (D.C. Cir. 2005); see also *Draper* v. *Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (Souter, J.) (Due Process pre-enforcement challenge to state firearm law). Another example is data-breach cases, where plaintiffs have standing when it's "reasonable to infer that there remain[ed] a substantial risk" their data could be stolen again. *In re U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 54-55 (D.C. Cir. 2019) (cleaned up). In these forward-looking sorts of cases, even a "small"

"probabilistic" injury can suffice. *Vill. of Elk Grove Vill.* v. *Evans*, 997 F.2d 328, 329 (7th Cir. 1993).

Second, and relatedly, this Court doesn't always require "a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). Cases involving especially vulnerable persons are good examples. *Helling* v. *McKinney*, 509 U.S. 25, 33-34 (1993). Prisoners, for example, needn't "wait until actual casualties occur" to challenge "unreasonable threat[s]" to their safety. *Hoptowit* v. *Spellman*, 753 F.2d 779, 784 (9th Cir. 1985).

The States' experience shows all too clearly that children are the "least powerful of groups and most vulnerable of persons." *In re K.H.*, 773 S.E.2d 20, 29 n.10 (W. Va. 2015) (cleaned up). They are the group "most in need of" care and protection. *Id.* So requiring Parents to "wait" to sue "until [they] actually lose[]" parental rights and see their children suffer devastating harm from any decisions that result "place[s] [them] between the devil and the deep blue sea." *Sciolino* v. *City of Newport News*, 480 F.3d 642, 649 (4th Cir. 2007) (cleaned up). The Parents shouldn't have to wait for "a tragic event" to ensure their children are protected. *Vega* v. *Semple*, 963 F.3d 259, 276 (2d Cir. 2020). Yet under the lower court's logic, no one could preemptively challenge this policy "until it is too late" for students and parents. See *Massachusetts* v. *U.S. Dep't of Health & Hum. Servs.*, 923 F.3d 209, 222 (1st Cir. 2019). That answer not only violates our moral sensibilities, see Nat Stern, *Separation of Powers, Executive Authority, and Suspension of Disbelief*, 54 HOUS. L. REV. 125, 142 (2016), but it's legally unnecessary, too.

At least in other contexts, courts at all levels have usually taken a practical approach that should support Parents' standing here. Take *Bay County Democratic Party* v. *Land*, 347 F. Supp. 2d 404, 423 (E.D. Mich. 2004), where the court held the Democratic Party had standing to challenge state rules about ballot casting and tabulating. The court reasoned that the Party's members wouldn't "know about their impending disenfranchisement until election day when it [would] be too late to challenge the rules of the secretary and director of elections." *Id.* The court's point was pragmatic: making the Party wait to sue until the policies were implemented on Election Day would work the precise voting-rights harm the Party was trying to stop.

The same practical considerations say standing should exist for Parents here. Making Parents wait to sue until their child is on the Policy *and* Parents independently discover their child's status would hurt their parental rights exactly like they're worried about. Parents' inability to identify specific harms here "is understandable" because Montgomery County's actions "by their nature" "cannot be specifically identified in advance." *Sandusky Cnty. Democratic Party* v. *Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004). The Court should therefore adopt a more pragmatic approach to standing than the Fourth Circuit did. See *NAACP* v. *Alabama*, 357 U.S. 449, 459 (1958) (showing that each case's standing analysis should carefully consider how standing affects underlying rights).

Third, the circuit court's decision gives rise to a catch-22: Parents can show standing only if they overcome Montgomery County's secrecy efforts and discover their child is transitioning. That may be an impossibility, as schools have even been known to alter documentation to

hide that information. See, *e.g.*, Compl. ¶¶ 114-36, *Mead* v. *Rockford Pub. Sch. Dist.*, No. 1:23-cv-1313 (W.D. Mich. Dec. 18, 2023), ECF No. 1. But even if the parents do find out about enough information to show standing under the Fourth Circuit's test, then their secrecy injury dissipates in the same moment, and they don't need a claim at all anymore. The Court should reject this result. *NAACP*, 357 U.S. at 459 (rejecting a standing theory that would "nullif[y]" the claimed "right" the "moment" the plaintiff asserts it). The Policy subjects Parents to a secret policy and boxes them out of their child's life indefinitely—that's enough harm for standing purposes.

C. Along the way to stripping Parents of their otherwise self-evident right to bring suit, the Fourth Circuit majority also warped some of this Court's key standing decisions.

Most obviously, the lower court got this Court's decision in *Parents Involved* wrong. *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). *Parents Involved* gave parents standing "even though it was far from clear that the school district would ever apply that system to any of their children." Robin Kundis Craig, *Administrative Law in the Roberts Court: The First Four Years*, 62 ADMIN. L. REV. 69, 84 (2010). But what mattered to this Court was that the school district policy forced parents to participate in an unconstitutional system. *Parents Involved*, 551 U.S. at 719; see also Pet.App.21a. So too here.

The circuit court incorrectly elided *Parents Involved* by narrowing *Parents Involved* to apply to just equal-protection cases. Pet.App.22a ("But nothing about *Parents Involved* nor subsequent Supreme Court decisions indicate the standing standard from *Parents Involved* applies beyond the context of equal protection

claims."). That's wrong; the Court applied it differently just a year ago. See *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2594 (2022) (applying the *Parents Involved* voluntary-cessation-as-mootness rule in an APA action). Other lower courts haven't read *Parents Involved* that way, either; they've used *Parents Involved* in all sorts of standing contexts. See, *e.g.*, *Parents Defending Educ.* v. *Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 666 (8th Cir. 2023) (applying *Parents Involved* to show standing in First Amendment context); *Franciscan All., Inc.* v. *Becerra*, 47 F.4th 368, 376 n.37 (5th Cir. 2022) (Title IX/RFRA); *Planned Parenthood of Greater Wash. & N. Idaho* v. *DHHS*, 946 F.3d 1100, 1108-1109 (9th Cir. 2020) (competitor-standing issue in lawsuit challenging DHHS Rule on statutory grounds); *Liddell* v. *Special Admin. Bd. of the Transitional Sch. Dist. of the City of St. Louis*, 894 F.3d 959, 965-66 (8th Cir. 2018) (interpretation of a settlement agreement); *Ollier* v. *Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 864 (9th Cir. 2014) (Title IX). And at least one lower court has used *Parents Involved* to find due-process-claim standing to challenge potential "future injury." *Martinez* v. *Malloy*, 350 F. Supp. 3d 74, 88 (D. Conn. 2018).

The Fourth Circuit majority's take on *Clapper* as the central, clinching case was also wrong, as *Clapper* is different from this case. There, the Court held that the plaintiffs failed to satisfy the imminence requirement when they tried to show a potential future harm using only a "speculative chain of possibilities." *Clapper*, 568 U.S. at 414; see also *id.* at 410 (outlining the five detailed and complicated steps in the plaintiffs' inferential chain). But the Parents don't need anything like *Clapper*'s speculative chain here. The Board has already admitted it enforces its preclusion policy. So the only thing missing from Parents' allegations is this two-word sentence from one of

the Parents' children to school personnel: "I'm transgender." And because the Policy hides that disclosure, it might well have already happened. The lack of a speculative chain "distinguish[es]" *Clapper* from this case. *Schuchardt* v. *President of the U.S.*, 839 F.3d 336, 350-51 (3d Cir. 2016) (awarding standing to a plaintiff challenging NSA information-collection when plaintiff showed only that he was possibly harmed). *Clapper* is also inapplicable because it applied an "especially rigorous" "standing inquiry" to a claim that touched the "fields of intelligence gathering and foreign affairs." 568 U.S. at 408; see also *Hassan* v. *City of N.Y.*, 804 F.3d 277, 291 (3d Cir. 2016) (holding certain Muslims had standing to sue New York's surveillance program although they couldn't allege that they *personally* had been surveilled because they "possesse[d] something more than a general interest in the proper execution of the laws" (quoting *Stark* v. *Wickard*, 321 U.S. 288, 304 (1944))).

So the Fourth Circuit's mistreatment of several of this Court's key standing authorities calls for intervention, too. See *Lambert* v. *Wicklund*, 520 U.S. 292, 293 (1997) (summarily reversing a lower court decision on parental notification that was "in direct conflict with [this Court's] precedents").

D. Finally, the court below ignored prudential aspects this Court considers in resolving justiciability concerns. Standing isn't "an exercise in conceptual analysis but an attempt to advance the purposes behind the case-or-controversy requirement of Article III, including the guaranty of actual adversity between the parties, the limitation on the power of federal courts, and the reservation of judicial resources to resolve more concrete and pressing disputes." *Fla. State Conf. of NAACP* v. *Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008) (cleaned

up). What matters is if the party has a "personal stake" in the matter. *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 403 (1980).

Here, the Policy specifically targets the parents challenging the policy. The Policy does not harm the general population. Nor does this Policy affect parents who are fine with the steps to be taken under the Policy (even if they miss the chance to consent expressly). So Parents' suit isn't some kind of "generalized grievance[]"—that is, "undifferentiated and 'common to all members of the public.'" *Lujan*, 504 U.S. at 573-74. Instead, the Policy harms parents of children subject to the Policy who want to raise their children as they see fit counter to the school's preferred approach. They bring the very thing targeted as proof of standing. The court below got it wrong in ignoring these real harms.

Thus, granting certiorari here would give this Court a chance to remind courts to approach standing with a clear eye toward the realities of the situations they are asked to address.

II. The Court should also grant the Petition to protect crucial parental rights.

A. Beyond standing, Parents have it right on the broader point: Policies like the one here interfere with the parent-child relationship in an unconstitutional way.

Parental rights are a "fundamental liberty interest." *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982). They come from natural law—Blackstone called it "the most universal relation in nature." 1 William Blackstone, Commentaries on the Laws of England *446 (1753). Or as John Locke put it: "[t]he power ... that parents have over their children, arises from that duty which is incumbent on them, to take care of their offspring, during the

imperfect state of childhood." John Locke, *Second Treatise of Government* ch. 6, § 58 (1690). This right recognizes that children lack the "maturity, experience, and capacity for judgment" that adults do and that the "natural bonds of affection lead parents to act in the best interests of their children." *Parham*, 442 U.S. at 602. Often, our laws accordingly "restrict[] certain choices that … [children] are not yet ready to make with full benefit of the costs and benefits attending such decisions." *Thompson* v. *Oklahoma*, 487 U.S. 815, 825 n.23 (1988). So parents have a duty to raise their children, and with that duty comes the attendant right to make choices for their child.

This Court has consistently recognized that raising one's child is an "essential" right, *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), grounding the right in the liberty interest of the due process clause, *id.* at 399-400. Over and over again, the Court has noted that a parent's right to raise one's own child is a "basic civil right[] of man," *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942), and "far more precious … than property rights," *May* v. *Anderson*, 345 U.S. 528, 533 (1953). And this right comes from history and tradition: "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children." *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972). Quite simply, parental freedom to raise their children is "older than the Bill of Rights" with its source "in intrinsic human rights." *Smith* v. *Org. of Foster Families for Equal. & Reform,* 431 U.S. 816, 845 (1977).

This Court recognizes the primacy of parents in rearing their children, and it has rejected the view that "children are merely wards of the state." Bangert, *supra*, at 720. In *Prince*, for example, this Court said that

parents prepare their children "for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." 321 U.S. at 166 (cleaned up). Or as the Court put it in *Pierce* v. *Society of the Sisters of the Holy Names of Jesus and Mary*: "[t]he child is not the mere creature of the State," but "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. 510, 535 (1925). So when it comes to a child's upbringing, parents decide.

B. This case calls out for review because it directly concerns parental rights to direct central, critical aspects of their children's lives. *Parham*, 442 U.S. at 604; *Meyer*, 262 U.S. at 400; *Yoder*, 406 U.S. at 231. For example, in *Parham*, this Court addressed Georgia's procedures for committing a child to a mental hospital based on a parent's request. The Court found that the Constitution presumes that parents act in their child's best interest and that parents have wide latitude to make tough decisions—"[n]either state officials nor federal courts are equipped to review such parental decisions." *Parham*, 442 U.S. at 604. And that "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Id.* at 603. That's because "significant intrusion into the parent-child relationship" is "at odds with the presumption that parents act in the best interests of their child." *Id.* at 610.

A parent's right to direct the care and custody of their minor children is also acute when directing their religious upbringing and education. "[I]t is the natural duty of the parent to give his children education suitable to their

station in life." *Meyer*, 262 U.S. at 400. So whether parents choose to send their children to religious schools or teach them at home, this Court has recognized that the Constitution ensures that "parents have the fundamental liberty to choose how and in what manner to educate their children." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 680 n.5 (2002) (Thomas, J., concurring). And like medical decisions, to hold otherwise would "call into question traditional concepts of parental control over the religious upbringing and education of their minor children." *Yoder*, 406 U.S. at 231.

Many State constitutions likewise "protect the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *In re Visitation of L.M.*, 859 S.E.2d 271, 279 (W. Va. 2021). But many States have recognized the importance of parental rights beyond those guaranteed by their state constitutions and have led the way in ensuring parental involvement in their child's education. For example, at least 32 States are considering legislation related to creating a "parental bill of rights," which is designed to give parents a greater say in their education.

States often understand that parental rights are served by greater transparency. One common way is by requiring public schools to post curriculums and instructional materials online, which allows parents to then object to a school's use of a specific material. See FLA. STAT. § 1006.28(2); W. VA. CODE § 18-5-27; GA. CODE § 20-2-786. Many States today also provide support to parents to allow them to send their children to private schools or other nonpublic education. See, *e.g.*, ARK. CODE § 6-41-901(b); MISS. CODE § 37-173-3; UTAH CODE § 53F-4-302. These programs reflect the States' commitment to

empowering parents to make decisions for their children's education that they believe is best.

When things work as they should, States promote parental rights because they recognize that parents have the "primary role" "in the upbringing of their children." *Yoder*, 460 U.S. at 232. Beyond that, though, States know that protecting the interpersonal dynamics and relationships between parents and children benefits everyone. "[T]he family is the primary unit through which social values and moral precepts are transmitted to the young." *Wynn*, 582 F.2d at 1385. And sound parent-child relationships have both "short and long-term consequences for positive mental well-being," Mai Stafford et al., *Parent-child relationships and offspring's positive mental wellbeing from adolescence to early older age*, 11 J. POSITIVE PSYCH. 326, 335 (2015), and "allow[] adolescents to form their own secure attachments with friends and romantic partners," Grace Iarocci & Emily Gardiner, *Social Competence During Adolescence Across Cultures*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 216, 217 (2015 2d ed.). So "the State has an interest in not undermining that unit" because the children today become the citizens of tomorrow. *Wynn*, 582 F.2d at 1385.

Generally, States recognize the opposite is true, too. Intruding on parent-child relationships often imposes a heavy social and financial toll on society. "[P]oor family relationships in adolescence can have severe and long-lasting health consequences." Susanne Alm et al., *Poor Family Relationships in Adolescence and the Risk of Premature Death: Findings from the Stockholm Birth Cohort Study*, 16 INT'L J. OF ENV'T RSCH. AND PUB. HEALTH, no. 10, 2019, at 1, available at https://bit.ly/3NFUz84. A poor relationship with parents

is "associated with psychological distress in mid-adulthood," makes adult interpersonal conflict more likely, lowers "educational attainment, social class, and income" and, by extension, increases ill-health and mortality. *Id.* at 2. And where relationships break down, the States end up bearing the brunt of these medical, criminal, and social costs. See, *e.g.*, *Johnson's Prof'l Nursing Home* v. *Weinberger*, 490 F.2d 841, 843 (5th Cir. 1974) (noting that generally the States "bear" medical costs); Gerard E. Lynch, *Sentencing: Learning from, and Worrying About, the States*, 105 COLUM. L. REV. 933, 936 (2005) (saying the States "bear the brunt of the war on crime and its associated costs."). So the States want to do everything in their power to promote healthy and thriving parent-child relationships.

But the Policy threatens the integrity of the family unit by fostering distrust and fear—and shows what happens when States and local officials forget the centrality of parents. This Court should take up the Petition and preserve parental rights—and the States' interests in them.

A final note: there's no time to wait. Percolation has judicial and social costs. Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 439 (2013). So its benefits "arise under" "limited and context-specific" conditions. Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 423 (2021). Yet percolation shouldn't be the default: it's valuable only "on a sporadic and infrequent basis" and not "presumptively worthwhile." *Id.* This "underlying issue" isn't the sort of legal question the Court should wait years to decide. *Id.* This Court has often noted that children are an especially vulnerable population, see generally *Abington Sch. Dist.*

v. *Schempp*, 374 U.S. 203 (1963)—doubly so for those children dealing with mental health problems or gender- or sex-identity confusion. Decisions made for those children—in either direction—permanently change their lives. Both sides agree that, in these sensitive and charged situations, the wrong move could shatter a person. Granting the Petition would therefore ensure that these irreversible decisions are being made in the way our Constitution intends.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

PATRICK MORRISEY
Attorney General

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
mwilliams@wvago.gov
(304) 558-2021

MICHAEL R. WILLIAMS
Principal Deputy Solicitor General
Counsel of Record

FRANKIE A. DAME
SPENCER J. DAVENPORT
Assistant Solicitors General

Counsel for Amicus Curiae *State of West Virginia*

ADDITIONAL COUNSEL

TREG TAYLOR
Attorney General
State of Alaska

ASHLEY MOODY
Attorney General
State of Florida

CHRIS CARR
Attorney General
State of Georgia

RAÚL LABRADOR
Attorney General
State of Idaho

KRIS KOBACH
Attorney General
State of Kansas

JEFF LANDRY
Attorney General
State of Louisiana

ANDREW BAILEY
Attorney General
State of Missouri

AUSTIN KNUDSEN
Attorney General
State of Montana

MICHAEL T. HILGERS
Attorney General
State of Nebraska

DREW WRIGLEY
Attorney General
State of North Dakota

GENTNER DRUMMOND
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

MARTY JACKLEY
Attorney General
State of South Dakota

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

JASON MIYARES
Attorney General
Commonwealth of Virginia