No. 23-450

In the Supreme Court of the United States

M.C. AND J.C.,

Petitioners,

v.

INDIANA DEPARTMENT OF CHILD SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* ABIGAIL MARTINEZ IN SUPPORT OF PETITIONERS

KAYLA A. TONEY
FIRST LIBERTY INSTITUTE
1331 Pennsylvania Ave. NW
Suite 1410
Washington, DC 20004
(202) 921-4105

KELLY J. SHACKELFORD
Counsel of Record
JEFFREY C. MATEER
DAVID J. HACKER
JUSTIN E. BUTTERFIELD
HOLLY M. RANDALL
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy
Suite 1600
Plano, TX 65065
(972) 941-4444
kshackelford@firstliberty.org

Counsel for Amicus Curiae

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2((b), *amicus* Abigail Martinez respectfully moves the Court for leave to file an *amicus curiae* brief in support of the petition for *certiorari.*

This brief is being filed timely, "within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later." Rule 37.2. The petition was docketed on October 30, 2023. This *amicus* brief is being filed on November 29, 2023, within 30 days after docketing.

Counsel for Petitioners consented to the filing of this brief. Counsel for Respondent stated they took no position on this motion for leave. However, they objected to the filing of the brief because they received nine days' notice instead of ten. Thus, *amicus* respectfully moves to file the brief without ten days' notice as ordinarily required by Rule 37.2(a).

I. Statement of the Movant's Interest

Amicus Abigail Martinez is a bereaved mother who lost her daughter Yaeli Galdamez to suicide in September 2019. Ms. Martinez is a devout Christian who immigrated from El Salvador as a teen and has raised four children in southern California. She shares her family's tragic story in hopes that other families will not experience similar heartache from harmful state policies that exclude parents and pressure vulnerable minors to pursue gender transitions, often at the expense of their mental and physical health.

Ms. Martinez urges this Court to consider the consequences of its decision for the family of M.C. and J.C., especially their child A.C., and for families around the country who face similar situations.

II. The Proposed *Amicus Curiae* Brief is Desirable and Relevant

Amicus provides extensive analysis which will assist the Court in considering issues not fully addressed by Petitioners.

First, *Amicus* provides analysis of the First Amendment violations that occur when states interfere with the relationship between religious parents and their children, as they seek to raise them in accordance with their faith. Because *amicus* has personally experienced the tragic injustice of losing custody of her daughter because she could not affirm gender-transition measures that violated her faith and that she knew to be harmful, she also provides insight into the unique damage that occurs when governments violate the constitutional rights of religious families.

Second, *Amicus* provides extensive insight into the sincere religious beliefs of families from diverse faith traditions, including Muslim, Jewish, Hindu, and Christian families. *Amicus* urges this Court to uphold free exercise rights and consider the impact of such policies on religious families nationwide.

Third, *Amicus* provides analysis of the rapidly changing legal landscape as states seek to regulate gender-transition treatments and custody rights. This research will assist the Court's consideration as to whether its review is needed.

CONCLUSION

For these reasons, the proposed *amicus* respectfully requests that the Court grant this motion and accept her attached *amicus* brief.

Respectfully submitted,

KAYLA A. TONEY
FIRST LIBERTY INSTITUTE
1331 Pennsylvania Ave. NW
Suite 1410
Washington, DC 20004
(202) 921-4105

KELLY J. SHACKELFORD
Counsel of Record
JEFFREY C. MATEER
DAVID J. HACKER
JUSTIN E. BUTTERFIELD
HOLLY M. RANDALL
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy
Suite 1600
Plano, TX 65065
(972) 941-4444
kshackelford@firstliberty.org

November 29, 2023

Counsel for Amicus Curiae

QUESTIONS PRESENTED

I. Whether a prior restraint barring a religious parent's speech about the topic of sex and gender with their child while allowing and even requiring speech on the same topic from a different viewpoint violates the Free Speech or Free Exercise clause of the First Amendment.

II. Whether a trial court's order removing a child from fit parents without a particularized finding of neglect or abuse violates their right to the care, custody, and control of their child under the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

Abigail Martinez is a bereaved mother from southern California, who lost her daughter Yaeli Galdamez to suicide in September 2019. She shares her family's tragic story in hopes that other families will not experience similar heartache from harmful state policies that exclude parents and pressure vulnerable minors to pursue gender transitions, often at the expense of their mental and physical health.

Yaeli (right) and her mother Abigail Martinez. Photos courtesy of Abigail Martinez.

Ms. Martinez urges this Court to consider the consequences of its decision for the family of M.C. and J.C., especially their child A.C., and for families around the country who face similar situations.

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[1] All parties were notified of the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or her counsel made a monetary contribution to this brief's preparation or submission.

SUMMARY OF ARGUMENT

When governments usurp the essential role of parents in the lives of their children, tragedy ensues. The unspeakable suffering Ms. Martinez endured at the hands of California officials who separated her from her daughter because of her religious beliefs has many parallels with the trauma that J.C. and M.C. are enduring at the hands of Indiana officials. As state courts increasingly pressure families to "affirm" alternate gender identities or lose custody in some states, they create a harrowing split with other states which have outlawed gender-transition treatments for minors. No matter a state's policy on rapidly changing issues of gender and medical treatment, the Constitution is clear: states cannot target parents because of their religious beliefs, interfere with the religious upbringing of their children, or impose prior restraints on speech in their own homes. This Court should grant certiorari to address this deepening split and prevent state officials from committing any more violations of constitutional rights with impunity.

ARGUMENT

The Constitution protects parents' freedom to raise their children in accordance with their sincere religious beliefs. When states trample on those rights, as Ms. Martinez and Petitioners experienced, the harm is irreparable. Indiana violated the First Amendment when Department of Child Services (DCS) removed Petitioners' child from their home because of their religious beliefs and censored their speech. The decision below also deepened an existing split between states that threaten custody for parents

who cannot affirm gender transitions, and states where gender transitions are prohibited.

I. Ms. Martinez' tragic loss illustrates the irreparable harm that occurs when states target religious families.

Ms. Abigail Martinez is a devout Christian who immigrated from El Salvador as a teen and has raised four children in southern California.

In 2015, Ms. Martinez' teenage daughter Yaeli, a student in Arcadia Unified School District, began questioning her sexuality. She was bullied in middle school and struggled with depression, but this questioning was new. School staff told Yaeli to clandestinely join the LGBTQ club, where she was persuaded that the only way to be happy was to change her gender. An older transgender student, also a female transitioning to male, convinced Yaeli that her depression was because she was transgender. That same year, the Arcadia Unified School District adopted a policy requiring staff to use preferred names and pronouns for transgender students without parental notification or permission, or any "medical or mental health diagnosis or treatment threshold."[2] The district directed staff to keep students' actual or perceived gender identity "private" from parents. Doubling down on the social pressure, Yaeli's school psychologist also encouraged her to pursue a gender

[2] "Transgender Students – Ensuring Equity and Nondiscrimination," Arcadia Unified School District Policy Bulletin (Apr. 16, 2015), https://1.cdn.edl.io/93AmzJRTCq6suoldNojjDs08MNuS39NaH7QaZaDgRKhXY2pU.pdf.

transition instead of treating her depression, which was now severe.

Ms. Martinez tried to advocate for her daughter's mental health and recalls, "the school staff should have helped me, but they became my worst enemy." When Yaeli was hospitalized after attempting suicide, her former principal came to the hospital and pressured Ms. Martinez to call her daughter "Andrew," blaming Ms. Martinez and scornfully asking, "Is it too hard for you to call your child a new name?"[3]

At age 16, Yaeli was taken from her home and hidden for two days by the parent of her transgender classmate. The school psychologist pushing Yaeli's gender transition told her to accuse her mother of abuse at the police station, so that she would lose custody and the state would pay for gender-transition treatments without parental consent. Based on this brainwashing, instead of sending Yaeli home or allowing her to talk with her mom, the California Department of Child and Family Services (DCFS)

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[3] "The 'transition or die' narrative, whereby parents are told that their only choice is between a 'live trans daughter or a dead son' (or vice-versa), is both factually inaccurate and ethically fraught. Disseminating such alarmist messages hurts the majority of trans-identified youth who are not at risk for suicide. It also hurts the minority who are at risk, and who, as a result of such misinformation, *may forgo evidence-based suicide prevention intervention in the false hopes that transition will prevent suicide*." Stephen B. Levine, E. Abbruzzese & Julia W. Mason (2022) *Reconsidering Informed Consent for Trans-Identified Children, Adolescents, and Young Adults*, Journal of Sex & Marital Therapy, 48:7, 713, https://www.tandfonline.com/doi/pdf/10.1080/0092623X.2022.2046221 (emphasis added).

placed her in a group home. DCFS simultaneously placed Ms. Martinez on a child abuse registry even though it allowed her to continue raising her other three children.

Siding with the school psychologist, a judge ruled that Yaeli could receive cross-sex hormones. Because Yaeli was still a minor, the judge had to allow Ms. Martinez to be present in court, but she ignored Ms. Martinez' pleas to treat Yaeli's underlying depression. Instead, the judge said she could not "wait any longer" for Ms. Martinez to agree to hormone transition treatments for her "son." The judge then went against Ms. Martinez' express wishes and signed the order in her place, with a smile.

Meanwhile, Ms. Martinez was shut out of Yaeli's life, only allowed one hourly visit per week, and her visits were heavily monitored by members of RISE, activists from the Los Angeles LGBT Center who told her to "have a funeral for your daughter and adopt your son." "I was told not to talk about God,'" Martinez recalls. "They told me if you do that, you'll never see your daughter."

Family visit at the group home for Yaeli's 17th birthday.
Photos courtesy of Abigail Martinez.

By age 19, Yaeli was sent to an independent living situation but continued to struggle with deep depression and poverty. Desperate for food, she reached out to her mom who immediately brought her groceries. In response, Yaeli texted, "Mom, I wanted to cry because no matter what you're always there for me." Yaeli also told her mom she understood that she would never be able to become a boy, and that the cross-sex hormone treatments were causing her severe pain in her bones. Yet instead of providing the care and medical treatment that Yaeli needed for her severe depression, the state of California gave her testosterone and took her away from her mom – the one support she knew she could always rely on.

After a grueling legal battle, Ms. Martinez was absolved of all claims of abuse and removed from the child abuse registry. But it was too late. Two months later, on September 4, 2019, Yaeli committed suicide by lying down on the tracks in front of a train. Her death was so gruesome that the funeral home was not able to show her body to Ms. Martinez.

After Yaeli's tragic death, Ms. Martinez requested meetings with the school staff and state workers who advised Yaeli, but no one responded. She eventually filed a civil lawsuit against the school district and DCFS. In response, DCFS admitted that they "aggressively pursued the implementation of inclusive, gender-affirming laws, policies, and supportive services for LGBTQ+ youth." According to the school district, "a claim suggesting our school or a staff member did not properly treat a student's severe depression is both completely inaccurate and troubling as our schools and staff would not be authorized or

medically qualified to treat clinical depression." Yet the district thought itself medically qualified to facilitate Yaeli's transition behind her mother's back and even advocate that she be removed from her home absent any evidence of abuse.

The legal system's utter failure to provide any adequate response, let alone remedy, only compounded the Martinez family's grief. "To them, my child was a number in the system. It's all political," said Ms. Martinez. "I want them to change this broken system, not to play with our children's lives, to give them what they really need. Not to go for what they believe. I don't want any other parent to suffer and go through what I've been going through. This pain doesn't have a beginning or end."

II. States violate the Free Exercise Clause when they target religious families because of their sincerely held beliefs.

DCS officials made clear that their reason for removing M.C. and J.C.'s child from their custody was their sincere religious beliefs. After finding that the parents were fit and dismissing all allegations of abuse and neglect, DCS still removed A.C. due to their views on transgenderism. App.61a. Indiana violated the Free Exercise Clause by singling parents out for differential treatment because of their beliefs and interfering with their ability to raise their child according to their faith.

The First Amendment provides robust protection for the religious liberty of families seeking to raise their children in accordance with their religious beliefs. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 214 (1972) (parental rights regarding religious upbringing

are "specifically protected by the Free Exercise Clause," "[l]ong before . . . universal formal education"). *Yoder* reaffirmed the Court's holding in *Pierce* v. *Society of Sisters*, describing it "as a charter of the rights of parents to direct the religious upbringing of their children." *Yoder*, 406 U.S. at 233 (quoting *Pierce*, 268 U.S. 510, 534-535 (1925)) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.") The Court in *Yoder* drew a direct connection between parental rights and religious beliefs, explaining that "[t]he duty to prepare the child for 'additional obligations,' referred to by the Court, must be read to include the inculcation of moral standards, [and] religious beliefs." *Id.* at 233.

Parental rights are closely linked with free exercise rights and are especially strong for religious families seeking to teach their faith to the next generation. For nearly 100 years, the Supreme Court has reaffirmed the "enduring American tradition" of "the rights of parents to direct 'the religious upbringing' of their children." *Espinoza* v. *Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (quoting *Yoder*, 406 U.S. at 213-214); see also *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2065-2066 (2020) (describing how many religious traditions entrust parents with primary responsibility for imparting their faith to their children without government interference). Not only does the First Amendment protect parents' freedom to teach their faith to their children, but for many, including *amicus* Ms. Martinez and Petitioners, this is an obligation at the core of the parents' own religious exercise.

Any targeting or infringement of these First Amendment rights is subject to strict scrutiny. See *Yoder*, 406 U.S. at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). While the Court in *Yoder* did not face a situation where minor children disagreed with their Amish parents' decision to forgo the later years of public education, the Court observed that "such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here." *Id.* at 231-232. Further, the government may not "'act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.'" *Masterpiece Cakeshop, Ltd.* v. *Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018).

Here, Petitioners share the Christian religious beliefs of *amicus* Abigail Martinez and millions of other Americans. Indiana's actions violated the free exercise rights of M.C. and J.C. by destroying their ability to raise their child in accordance with their sincere religious beliefs.[4] Indeed, the state's unlawful

[4] At least two federal courts have recently protected free exercise rights in disputes about gender identity. In *Tatel* v. *Mt. Lebanon School District*, the Western District of Pennsylvania vindicated parents' Free Exercise claims based on their "sincerely held religious beliefs about sexual or gender identity and the desire to inculcate those beliefs in their children." 637 F. Supp. 3d 295, 330 (W.D. Pa. 2022). There, a first-grade teacher advocated her own agenda and beliefs about gender identity despite parents' objections. Contrasting the parents' beliefs that "humans are created beings who must accept their place in a larger reality" with the transgender movement's assertion that "human beings

targeting of their religious beliefs prevented them from raising their child at all. Not only did the state single out J.C. and M.C. because of their religious beliefs, but it mandated that their child be placed in a home that would teach the opposite: affirm A.C.'s identification as a girl and use a cross-gender name and pronouns. App.104a-105a. This action demonstrates hostility toward J.C. and M.C. because of their faith, which is an additional Free Exercise violation. *Kennedy* v. *Bremerton Sch. Dist.,* 142 S. Ct. 2407, 2422 n.1 (2022).

A. Many different faith groups hold traditional beliefs about sex and gender.

Religions from diverse cultures and geographic regions assert—as they have for millennia—that sex is an objective, binary category that cannot be changed by self-perception or medical intervention.[5] Millions of Christians worldwide hold to this belief. Catholic

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are autonomous, self-defining entities who can impose their internal beliefs about themselves on the exterior world," the court recognized the "contradictions between these worldviews" and upheld the parents' free exercise rights. *Id.* at 321. In *Mirabelli* v. *Olson*, the Southern District of California enjoined a school policy requiring teachers to conceal gender transitions from parents, finding that this violated religious teachers' free exercise rights. The court rejected the "mistaken view that the District bears a duty to place a child's right to privacy above, and in derogation of, the rights of a child's parents. The Constitution neither mandates nor tolerates that kind of discrimination." No. 3:23-cv-00768-BEN-WVG, 2023 WL 5976992, at *15 (S.D. Cal. Sept. 14, 2023).

[5] See, e.g., Christopher Yuan, *Gender Identity and Sexual Orientation,* The Gospel Coalition, https://www.thegospelcoalition.org/essay/gender-identity-and-sexual-orientation/.

teaching makes clear that "[e]veryone, man and woman, should acknowledge and accept his sexual identity" and that "[p]hysical, moral, and spiritual difference and complementarity are oriented toward the goods of marriage and the flourishing of family life."[6] The Orthodox Church of America teaches that "[o]ur sexuality begins with our creation," and "[t]he Bible says 'Male and female He created them' (Gen. 1:27)." [7] Within the Protestant tradition, most denominations believe the Bible's teaching that God created humans male and female in His image, and that this reality cannot be changed based on perceived gender identity, including but not limited to the Anglican Church, Assemblies of God, the Church of God in Christ, the Lutheran Church, the Presbyterian Church in America, and Southern Baptists. [8] For millions of Christians, including Ms. Martinez and the Petitioners, "[p]arents are to teach their children spiritual and moral values and to lead them, through consistent lifestyle example and loving discipline, to make choices based on biblical truth."[9]

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[6] Catholic Catechism, No. 2333, https://www.usccb.org/sites/default/files/flipbooks/catechism/562/#zoom=z.

[7] *"In the Beginning…" Healing our Misconceptions*, Orthodox Church of America, https://www.oca.org/the-hub/two-become-one/session-2-in-the-beginning-.-.-.-healing-our-misconceptions (quoting *Genesis* 1:27).

[8] For a complete list of sources, *see* First Liberty Institute, *Public Comment on Section 1557 NPRM* (Oct. 3, 2022), at 4-9, https://perma.cc/97NU-VCMZ (detailing religious beliefs of 20 faith groups on sex and gender).

[9] Baptist Faith and Message (2000), https://bfm.sbc.net/bfm2000/#xviii.

These religious beliefs are not just the province of traditional Christianity. Sacred texts that define beliefs on marriage, sexuality, chastity, and sex as binary (male and female) include not only the Catholic Catechism [10] and the Bible, but also the Quran, [11] Hadith, [12] the Torah, [13] and the Book of Mormon. [14] The First Amendment provides robust protection for religious believers who adhere to these faiths, as well as for individuals who do not participate in a specific religious tradition but who hold sincere religious

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[10] Catholic Catechism, No. 2361, https://www.usccb.org/sites/default/files/flipbooks/catechism/569/#zoom=z.

[11] *Marriage in Islam*, Why Islam? Facts About Islam (March 5, 2015), https://www.whyislam.org/social-issues/marriage-in-islam/; *Women are the Twin Halves of Men*, Observer News Service, (March 9, 2017), https://kashmirobserver.net/2017/03/09/women-are-the-twin-halves-of-men/.

[12] Dr. Sikiru Gbena Eniola, *An Islamic Perspective of Sex and Sexuality: A Lesson for Contemporary Muslims*, 12 IOSR JOURNAL OF HUMANITIES AND SOCIAL SCIENCE 2 (May–Jun. 2013), at 2028, https://www.iosrjournals.org/iosr-jhss/papers/Vol12-issue2/C01222028.pdf.

[13] *Issues in Jewish Ethics: Homosexuality*, JEWISH VIRTUAL LIBRARY, https://www.jewishvirtuallibrary.org/homosexuality-in-judaism.

[14] *Chastity, Chaste,* The Church of Jesus Christ of Latter-Day Saints, https://www.churchofjesuschrist.org/study/scriptures/tg/chastity?lang=eng.

beliefs about the body, sexuality, marriage, and gender.[15]

Millions of Jewish Americans follow traditional *halachic* teaching that is rooted in Jewish law dating back three millennia. The Torah is very clear about the divine creation of human beings as distinctly male and female.[16] Observant Jews are careful to follow the timeless prescriptions of the Torah and Talmud and to respect their specific commands regarding sexual purity and holiness. The Torah does not recognize the possibility of changing sex or gender. "This distinction between women and men is also reflected in the role parents have in determining the identity of their child. The essence of Jewishness is determined by the mother, whereas the particulars of Jewishness, such as tribal identity, are determined by the father."[17] Jews also believe they are under a biblical obligation to teach their children God's commandments.[18] This is an obligation of the highest order, for "the world exists

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[15] *See Thomas* v. *Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

[16] *Genesis* 1:27, The Contemporary Torah, Sefaria ("And God created humankind in the divine image, creating it in the image of God—creating them male and female.") https://www.sefaria.org/Genesis.1.27?lang=bi&aliyot=0.

[17] Yehuda Shurpin, *Why Are Women Exempt From Certain Mitzvahs?*, Chabad.org, https://www.chabad.org/library/article_cdo/aid/4407982/jewish/Why-Are-Women-Exempt-From-Certain-Mitzvahs.htm.

[18] *See Deuteronomy* 6:7, The Contemporary Torah, Sefaria ("Impress them upon your children. Recite them when you stay at home and when you are away, when you lie down and when you get up.") https://www.sefaria.org/Deuteronomy.6.7?lang=bi&aliyot=0.

only by virtue of the breath coming from the mouths of children who study Torah."[19]

For Hindu Americans, their sacred texts, culture, and values emphasize marriage and child-rearing as a parent's highest righteous (*Dharmic*) duty. Hindu teaching makes clear that men and women have distinct identities and roles.[20] Hindus also believe that a parent's rights and responsibilities in child-rearing are sacred and must be protected against government infringement. "Parents are indeed the first guru . . . [t]he child's deepest impressions come from what the parents do and say." [21] Hindu legal texts (*Dharmaśāstras*) dating back two millennia provide detailed instructions regarding the rights and responsibilities of both parents in child-rearing and the importance of child welfare in society. Thus, parental instructions on a *Dharmic* life, without government interference, are essential to a child's education.

For Muslim Americans, both sacred writings and specific teachings make clear that men and women are two distinct biological sexes with important differences and relationships toward one another. The

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[19] Maimonides, Mishne Torah, Hilkhot Talmud Torah 1:2; 2:1, 3, https://www.sefaria.org/Mishneh_Torah%2C_Torah_Study.2?lang=bi.

[20] *See, e.g.,* Dharma Sastra, Vol. 6 Manu Sanskrit, Chapter III, pp. 80–93, https://archive.org/details/dharmasastra-with-english-translation-mn-dutt-6-vols-20smritis/Dharma%20Sastra%20Vol%206%20Manu%20Sanskrit/page/80/mode/2up.

[21] *Raising Children as Good Hindus*, HINDUISM TODAY (Apr. 1, 2021), https://www.hinduismtoday.com/magazine/apr-may-jun-2021/raising-children-asgood-hindus/.

Quran makes this clear: "We created you from a male and a female."[22] Both Shi'ah and Sunni Muslims hold to the words of the Prophet Mohammad who has stated that "men and women are twin halves of each other."[23] Muslims' belief that sex is binary, fixed, and immutable is closely linked to the creation narrative. Islamic teaching does not recognize alternate gender identities, because even when someone changes his or her outer appearance or receives hormones or surgery, there is no fundamental change in biology at the cellular level and thus "the rulings of that [biological] sex continue to apply."[24] Muslims also believe that "the acquisition of at least rudimentary knowledge of religion and its duties [is] mandatory for the Muslim individual."[25] This obligation, which applies to parents as they raise children, comes from the Prophet Mohammad, who proclaimed that "'[t]he pursuit of knowledge is incumbent on every Muslim.'"[26]

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[22] Surah Al-Hujurat 49:13, https://quran.com/en/al-hujurat/13.

[23] *Marriage in Islam*, Why Islam? Facts About Islam (March 5, 2015), https://www.whyislam.org/social-issues/marriage-in-islam/.

[24] *Male, Female, or Other: Ruling of a Transgender Post Sex Change Procedures*, AMERICAN FIQH ACADEMY (May 2, 2017), http://fiqhacademy.com/res03/.

[25] *Our Ladye of Guadalupe*, 140 S. Ct. at 2065 (citing Asma Afsaruddin, *Muslim Views on Education: Parameters, Purview, and Possibilities*, 44 J. CATH. LEGAL STUDIES 143, 143–44 (2005)).

[26] *Id.*

B. Government officials are ill-equipped to understand these religious beliefs and their effect on parenting.

Government officials are likely to misunderstand the beliefs and practices of religious families, and child services departments are no exception. See, *e.g.*, *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1875, 1887 n.20 (2021) (Department of Human Services refused to refer foster children to Catholic nonprofit, telling them that "it would be great if we followed the teachings of Pope Francis" and "things have changed since 100 years ago"). It is unconstitutional for government officials to question the merits of an individual or family's sincerely held religious beliefs. *Holt* v. *Hobbs*, 574 U.S. 352, 362 (2015); *see also Ben-Levi* v. *Brown*, 136 S. Ct. 930, 934 (2016) (Alito, J., dissenting from cert. denial) ("[T]he government cannot define the scope of personal religious beliefs.").

Here, Indiana officials removed a child from custody of fit parents because of Petitioners' religious beliefs about gender identity. Indiana officials falsely assumed that J.C. and M.C. could not provide a safe home to A.C. because of their beliefs, when in fact they had proven they were caring for all of A.C.'s needs, App.211a-213a, and DCS had agreed by dismissing all allegations of abuse and neglect. App.86a-90a. DCS testimony reveals these lingering negative assumptions about Petitioners' religious viewpoint: "We just feel that at this point in time this child needs to be in a home that's not going to teach her that trans, like everything about transgender… tell her how she should think and how she should feel." App.127a-128a. This subjective decision violates the First Amendment

under *Holt* and *Thomas v. Review Board*, 450 U.S. 707, 715-716 (1981) (government actors must not "undertake to dissect" sincere religious beliefs, because they "are not arbiters of scriptural interpretation").

Further, when a child expresses a desire to change gender identities, states like Indiana are requiring government officials to evaluate parents' religious beliefs. Religious parents are increasingly labeled as "non-affirming" or "non-supportive" by state officials. Ms. Martinez experienced these *ad hominem* attacks when school officials repeatedly shut her out of Yaeli's life. Despite Ms. Martinez' consistent, loving support of Yaeli and her advocacy that Yaeli receive the mental health support she desperately needed, the state resorted to personal attacks instead of reasoned logic. This is a dangerous trend that is having an unconstitutional chilling effect on religious expression. For example, religious families are pressured to downplay or hide their beliefs when interacting with school and state officials, and parents whose children are struggling with mental health issues including gender dysphoria may be afraid to seek treatment from a medical doctor or counsel from a therapist, for fear that their religious beliefs will become known and their custody threatened.

This state surveillance erodes the crucial, formative relationship between children and their parents, which the Supreme Court has protected for nearly 100 years. *Yoder*, 406 U.S. at 213-214. And it ignores the fact that parents are uniquely equipped to provide helpful guidance and support for their child, as they know their child best and can best address

influences such as peer pressure and mental health challenges. Yet, if their children are removed from their homes while dealing with their most difficult physical and mental health struggles, loving parents like Ms. Martinez and Petitioners *cannot* provide the support that their children desperately need. For all these reasons, Indiana's actions violate the Free Exercise Clause in a way that, if left unchecked, will continue to harm religious families.

III. DCS violated the Free Speech Clause when it imposed a prior restraint on the speech of J.C. and M.C. toward their own child.

After removing Petitioners' child from their home, DCS doubled down by censoring the speech of J.C. and M.C., allowing visitation only "so long as certain topics are not addressed." App.52a. Prohibiting parents from talking about important issues of faith and sexuality with their children is impermissible viewpoint discrimination which violates the bedrock protections for free speech enshrined in the First Amendment.

A. The First Amendment prohibits viewpoint discrimination.

State officials violate the Constitution when they engage in viewpoint discrimination. "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The First Amendment violation is "all the more blatant" when "the government targets not subject matter, but particular views taken by speakers on a subject." *Id.* This principle applies in the

context of educating children. In *Lamb's Chapel* v. *Center Moriches Union Free School District*, the Court held that excluding *religious* viewpoints about family issues and childrearing (while allowing all others to be proclaimed) "discriminates on the basis of viewpoint." 508 U.S. 384, 390 (1993). Private speech merits even greater protections than government speech; "licensing and monitoring private religious speech is an entirely different matter," and governments cannot exclude speech "on the basis of the religious nature of the speech." *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 105, 126 n.3 (2001) (Scalia, J., concurring). Viewpoint discrimination violates the Free Speech Clause without proceeding to strict scrutiny analysis. *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2302 (2019).

Here, Indiana ignored and contradicted this Court's jurisprudence on viewpoint discrimination. DCS prohibited religious parents from speaking to their own child from their religious viewpoint on the entire topic of sexuality, while requiring speech from an opposite viewpoint. The opinion dismissed speech between parents and child as "private" speech that did not merit heightened protection, App.29a. Yet private religious speech merits heightened protection. *Good News Club*, 533 U.S. at 105. Tragically, Ms. Martinez experienced a similar constitutional violation when state officials commanded her not to speak about her faith at all during visits with Yaeli, even though faith played a central role in Yaeli's upbringing and their mother-daughter relationship. State officials cannot silence a viewpoint they disagree with simply because it is religious. That is a clear First Amendment violation compelling this Court's review.

It is important to note here that Indiana dismissed *all* allegations of abuse against Petitioners as unfounded—and yet still removed their child from their custody. When a child expresses a desire to change genders, some parents may choose to use names or pronouns that conflict with biological sex, and they are free to do so. What infringes on constitutional rights is Indiana's decision that the use of birth names and biological pronouns because of the parents' religious beliefs *per se* constitutes grounds for removing a child from fit parents and placing that child in a home that uses cross-gender names and pronouns. That is viewpoint discrimination, and that violates the First Amendment with ominous implications for religious families.

B. The First Amendment provides double protection for religiously motivated speech.

The First Amendment extends "double protection for religious expression," including speech that is motivated by sincere religious beliefs. *Kennedy*, 142 S. Ct. at 2431. In *Kennedy*, the Court upheld Coach Kennedy's First Amendment right to say a brief post-game prayer, holding that "[b]oth the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's." *Id.* at 2416. The Court rejected the "'modified heckler's veto, in which . . . religious activity can be proscribed' based on 'perceptions' or 'discomfort.'" *Id.* at 2427 (quoting *Good News Club*, 533 U.S. at 119). The Court recently applied similar principles to the context of religious beliefs about sexuality in *303 Creative* v. *Elenis*, finding that Colorado violated the Free Speech Clause

of the First Amendment by compelling a Christian web designer to create wedding websites for same-sex couples that affirm concepts about marriage contrary to her sincere religious beliefs. See 143 S. Ct. 2298 (2023). Drawing on a long tradition of jurisprudence including *West Virginia* v. *Barnette*, *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, and *Boy Scouts of America* v. *Dale*, the Court held that "the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided,' . . . and likely to cause 'anguish' or 'incalculable grief.'" *303 Creative*, 143 S. Ct. at 2312 (internal citations omitted).

These bedrock protections for religious speech apply in a wide variety of contexts. In *Tinker* v. *Des Moines Independent Community School District*, the Supreme Court rejected school officials' concern about quelling potential disturbance as an excuse for banning students' expression protesting the Vietnam War. 393 U.S. 503, 508 (1969). The Court found that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression . . . Any word spoken, in class, in the lunchroom, or on the campus that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk." *Id.* (citing *Terminiello* v. *City of Chicago,* 337 U.S. 1 (1949)); see also *Ward* v. *Polite*, 667 F.3d 727, 733 (6th Cir. 2012) ("The free-speech guarantee also generally prohibits the most aggressive form of viewpoint discrimination—compelling an individual 'to utter what is not in [her] mind' and indeed what she might find deeply offensive.")

The Ninth Circuit recently protected religious speech in *Fellowship of Christian Athletes* v. *San Jose Unified School District*, 82 F.4th 664 (9th Cir. 2023) (en banc), holding that the school district violated Christian students' free exercise, free speech, and free association rights when it targeted and derecognized their student ministry club because of their religious beliefs about sexuality. The court held, "We do not in any way minimize the ostracism that LGBTQ+ students may face because of certain religious views, but the First Amendment's Free Exercise Clause guarantees protection of those religious viewpoints even if they may not be found by many to 'be acceptable, logical, consistent, or comprehensible.'" *Id.* at 695 (quoting *Fulton*, 141 S. Ct. at 1876).

Here, the lower courts ignored this Court's First Amendment jurisprudence when they rubber-stamped DCS' decision to remove Petitioners' child from their home. Petitioners' speech to their own child deserved heightened protection because it implicated their faith and their parental rights. Yet the Indiana courts ignored this "double protection," *Kennedy*, 142 S. Ct. at 2431, and approved state censorship with far-reaching implications. Indiana's mandate imposed the most devastating Hobson's choice on Petitioners: violate your faith or lose custody of your child. That choice violates the Constitution.

IV. This Court should grant certiorari to resolve the deepening split between circuits and state courts on gender identity issues.

As tragic stories like Petitioners' and Ms. Martinez' experiences are unfolding around the country with

conflicting results in court, this Court must step in to ensure that constitutional rights are protected.

Indiana is not the only state whose courts have based custody decisions on a parent's religious beliefs about gender. Illinois and Ohio courts have made similar decisions in at least three recent cases.[27] Worse, several states have enshrined misguided legal standards into state law. While states have the power to regulate family law issues, they do not have the power to violate fundamental First and Fourteenth Amendment rights. The current patchwork of contrasting policies is leading to absurd results.

For example, California law allows a state juvenile court to take temporary custody of a child *without a finding of parental unfitness* if "the child has been unable to obtain gender-affirming health care." Cal. Fam. Code § 3424(a). The state of Washington also recently passed a law that allows the state to legally hide runaway children from their parents if the parents do not consent to their child receiving "gender affirming treatment." Wash. Rev. Code Ann. § 13.32A.082(1)(d). Oregon recently passed a law

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[27] Mary Hasson, "Judge Who Removed Trans Teen from Parents Highlights What's at Stake," *The Federalist* (Feb. 21, 2018), https://thefederalist.com/2018/02/21/judge-removed-trans-teen-parents-highlights-whats-stake/; Kelsey Bolar, "Chicago Mother Loses Custody of Her Daughter—For Insisting that Her Daughter Is a Girl," *Independent Women's Forum*, https://www.iwf.org/identity-crisis-jeannette/; Lucas Holtvluwer, "Ohio father loses custody of 14-year-old transgender child, could lose right to object to injections or surgery," *The Post Millennial* (May 2, 2019), https://thepostmillennial.com/ohio-father-loses-custody-of-14-year-old-transgender-child-could-lose-right-to-object-to-injections-or-surgery/.

allowing minors over 15 to consent to "sterilization" without parental consent, and referring to laws of other states that limit "gender-affirming treatment" as "contrary to the public policy of this state." Or. Rev. Stat. § 436.225; H.B. 2002, § 48(2).

Meanwhile, other states are banning gender-transition treatments and recognizing the harm they pose to minors. At least twenty-one states including Florida, Kentucky, Tennessee, and Alabama, have outlawed gender-transition treatments for minor children in many instances. See *L.W. by & through Williams* v. *Skrmetti*, 83 F.4th 460, 471 (6th Cir. 2023) (*petition for cert. filed*) (No. 23-466) (listing 19 states that have passed laws similar to the Tennessee and Kentucky restrictions at issue). These laws are facing challenges in court with mixed success, causing further confusion and a deepening circuit split. Compare *L.W.* v. *Skrmetti* and *Ecknes-Tucker* v. *Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023) (upholding regulation of gender-transition treatments for minors), with *Brandt* v. *Rutledge*, 47 F.4th 661 (8th Cir. 2022) (finding Arkansas' regulation of gender-transition treatment for minors triggered heightened scrutiny, likely violating the Equal Protection Clause). Some of these laws implicate custody proceedings. In Florida, a newly-enacted state law permits a warrant for physical custody if a child is likely to "imminently suffer serious physical harm or removal from this state," which includes "sex reassignment prescriptions or procedures." Fla. Stat. § 61.534.

Thus, under state laws in California, Washington, and Oregon, and court decisions in Indiana, Ohio, and Illinois, parents can lose custody if they do *not* seek

gender transition treatments for their child or affirm that path. Yet in Florida, parents in custody disputes can lose their children if they *do* seek gender transition. Issues of gender transition are a "vexing and novel topic of medical debate," *Skrmetti*, 83 F.4th at 471, and so is the quickly evolving legal landscape. As the split between states deepens, this Court's guidance is needed to ensure that First Amendment rights are not trampled upon as states seek to regulate these complex and novel issues.

This case is an ideal vehicle because the Court can focus on the fundamental First Amendment rights and parental rights at stake when a state makes custody and removal decisions, without limiting states' ability to regulate medical care.

CONCLUSION

Indiana violated the First Amendment rights and the parental rights of J.C. and M.C. when it ordered the removal of their child from their home because of their religious beliefs. This Court should heed the concerns of religious parents like Ms. Martinez, and the dire consequences of practices that destroy the trust and bond between a child and her parents, so that Yaeli's tragic story is never repeated again.

The Court should grant certiorari.

Respectfully submitted,

KAYLA A. TONEY
FIRST LIBERTY INSTITUTE
1331 Pennsylvania Ave. NW
Suite 1410
Washington, DC 20004
(202) 921-4105

KELLY J. SHACKELFORD
Counsel of Record
JEFFREY C. MATEER
DAVID J. HACKER
JUSTIN E. BUTTERFIELD
HOLLY M. RANDALL
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy
Suite 1600
Plano, TX 65065
(972) 941-4444
kshackelford@firstliberty.org

Counsel for Amicus Curiae

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