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

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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SUMMARY OF ARGUMENT

MCBE's Brief in Opposition is more telling in what it fails to address than in what it does:

- While admitting that the Parental Preclusion Policy allows the school district to withhold from parents that their children are transitioning genders at school,
    - it fails to deal with the fact that MCBE is currently doing so with hundreds of students, including perhaps those of Plaintiff Parents.
- While finding no distinction between this case and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), other than that the challenged school policy in *Parents Involved* imposed racial classifications and this one does not,
    - it fails to mention that it could find no other case limiting the holding of *Parents Involved* to equal protection cases.
- While noting that the Fifth Circuit has just found a parent to have standing to complain that governmental guidance overrode his notice and consent rights before clinics gave contraceptives to minor children,
    - it fails to mention that the Fifth Circuit rejected precisely the rationales relied upon by the Panel majority below to deny standing to Plaintiff Parents.

- While admitting that the merits issue is of critical importance to millions of school children and subject to conflicting decisions in the district courts,

    - it fails to put forward any substantive reason that the issues are not appropriate for resolution now.

MCBE in its Opposition, parroting the Panel majority, presses the proposition that, when individuals are the target of a secrecy policy that violates their legal rights, they have no standing unless they can prove that the policy is already being applied against them or they are in a subgroup of those to whom it is most likely to be applied. That is not the law. It is enough that the policy already violates their constitutional rights, that it might already have been applied against them without their knowledge, or that there is a non-frivolous chance that it will be applied against them. The facts that Plaintiff Parents are in the targeted group and the Parental Preclusion Policy is currently being applied against hundreds in the group establishes standing as a matter of law.

This Court should correct the Fourth Circuit's erroneous analysis and thereby cure the circuit split on the standing issue. It should also vindicate the Plaintiff Parents' constitutional rights by resolving the merits issue presented, which is of overarching, national importance.

ARGUMENT

I. MCBE Does Not Deny That the Panel Majority Minted a Novel Interpretation of *Parents Involved*

The Plaintiff Parents in their Petition pointed out, as did Judge Niemeyer in dissent, that the majority's distinction of *Parents Involved* was *sui generis* and unsupportable. MCBE in its Opposition could point to no other court that has ever limited *Parents Involved* and its rationale to equal protection cases. This is unsurprising, because the Fourteenth Amendment protects as fundamental *both* the right not to be discriminated against on account of one's race *and* parental rights. The Panel majority did not propose any reason to distinguish these two fundamental rights for standing purposes, and neither did MCBE in its Opposition. Nor is there any reason to believe that living under the threat of application of a racially discriminatory policy is any more real or constitutionally ready for review than living under the threat of application of a parental secrecy policy that explicitly undermines the long-protected parental right to direct the care and upbringing of their children. *Parents Involved* controls, and the Petition should be granted to correct the Panel majority's improper and novel restriction of it.

The *amicus* brief of the 17 states demonstrates that *Parents Involved* is not so limited, as it cites multiple cases in various legal contexts in which *Parents Involved* is cited as authority. *See* Br. of *Amici Curiae* State of W. Va. and 16 Other States at 14. MCBE's attempted refutation (at 14) obviously is

inadequate when it tries to slough off with irrelevancies only two of the cases the states cited and ignores the other five.

II. MCBE Does Not Deny That the Plaintiff Parents Are Part of the Group Targeted by the Challenged Policy

All of the cases involved with the challenge of a school policy are consistent with the principle that, absent unusual circumstances, if a plaintiff is in the group targeted by the policy, then he has standing to challenge it. That is the express holding of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992), quoted in the Petition (at 19) but ignored by MCBE in its Opposition. And there can be no question that the Plaintiff Parents qualify as targets of the Parental Preclusion Policy; they are parents who have children in the public schools. Thus, the Parental Preclusion Policy is directed right at them.

MCBE doesn't deny that the Plaintiff Parents are targets of the challenged policy, nor does it deny the possibility that the Plaintiff Parents' own children are currently affected by the policy. Instead, MCBE focuses on the likelihood of the policy's application to these parents. That focus mischaracterizes this Court's precedent, and it avoids one simple fact: MCBE's policy is to keep secret from parents what is happening, so parents may never know that MCBE has applied the challenged policy to them. When MCBE is currently keeping secret from hundreds of parents that it is helping their children transition gender at school—including possibly Plaintiff Parents' children—no more need be shown under this Court's precedent or that of other circuits.

III. MCBE Cannot Sidestep That the Fifth Circuit Has Just Decided a Case in Favor of a Parent's Standing in Direct Conflict with the Panel Majority in This Case and That the Circuit Split Is Widening

Since the Plaintiff Parents filed their Petition, the circuit split on standing has widened. This March, the Seventh Circuit decided a similar case against parents, while the Fifth Circuit ruled that parents kept in the dark by a governmental policy do, indeed, have standing to complain immediately.

The Seventh Circuit in *Parents Protecting Our Children, UA v. Eau Claire Area School District*, 2024 WL 981436 (7th Cir. Mar. 7, 2024), ruled that an association of parents did not have standing to complain of a school preclusion policy when the policy provided for notice to parents of the transition support plans the school generated with students. While the facts are distinguishable from those here, the Seventh Circuit, like the Panel majority in this case, analogized to *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013)—wrongly so, for the reasons set out in the Petition (at 19-20).[1]

The Fifth Circuit provided a contrary, more extensive, and proper standing analysis in *Deanda v. Becerra*, 2024 WL 1058721 (5th Cir. Mar. 12, 2024). There, a father challenged the federal government's regulatory guidance under Title X that grantee clinics were not allowed to inform parents that they were

[1] The Seventh Circuit did not cite, much less address, *Parents Involved* or any of this Court's other standing precedents.

providing contraceptives to their minor children. The father complained that this violated his statutory and constitutional rights to provide consent for any such distribution to his minor daughters. The Fifth Circuit found he had standing.

First, the Fifth Circuit noted that the father alleged a sufficient injury because the federal guidance deprived him of a statutory right that was more than a "bare procedural violation." 2024 WL 1058721 at *3-*5, citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016); *Warth v. Seldin*, 422 U.S. 490, 500 (1975). In making that analysis, the Fifth Circuit applied this Court's instruction to determine whether the claimed injuries bore "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." 2024 WL 1058721 at *5, quoting *TransUnion L.L.C. v. Ramirez*, 594 U.S. 413, 425 (2021). It noted this Court's instruction that "intangible" harms are also "concrete" for standing purposes and that parental rights such as those advanced by the father (and by Plaintiff Parents) "have perennially been honored by American courts." 2024 WL 1058721 at *5, citing *Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246, 2261 (2020); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality op.); *Wash. v. Glucksberg*, 521 U.S. 702, 720 (1997). Whether grounded in a statute or the Constitution, the notice and consent rights of parents with respect to sexual treatment of their minor children is of a substantial and concrete nature.[2]

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[2] The Fifth Circuit also noted that the Texas statute providing for parental notice and consent allowed parents to sue to vindicate those rights. 2024 WL 1058721 at *4. The federal counterpart here is 42 U.S.C. § 1983. (App'x

Second, the Fifth Circuit batted away the government's objection that the father had not alleged that his minor daughters had obtained or tried to obtain (or were likely to obtain) contraceptives from a Title X provider. The court remarked, "That is a puzzling argument. A key goal of the Secretary's policy is to get contraceptives into children's hands *without their parents knowing*." 2024 WL 1058721 at *6 (italics in original). It then provided this example showing the illogic of the suggestion, an example well fitted to this case:

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

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

> In any event, the Secretary misunderstands the claimed injury. Deanda asserts injury to his state-secured parental

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141a-143a.) *See also Warth*, 422 U.S. at 501 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1928), for the proposition that parental rights protected by the Constitution imply a right of action).

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

Id.

The application here is foursquare: Plaintiff Parents are injured immediately by their parental notice and approval rights being violated by the Parental Preclusion Policy. They do not have to allege an additional injury, contrary to what the Panel majority here held and as MCBE in its Opposition repeatedly argues.

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

The Fifth Circuit's ruling and reasoning in *Deanda* are in direct conflict with those of the Panel majority below. The Seventh Circuit's decision in *Parents Protecting Our Children* also widens the conflict between the circuits. This independently supports the grant of the Plaintiff Parents' Petition.

IV. MCBE Does Not Deny That the Merits Issue Is of Critical Importance to Millions of Children and Their Parents

This Court should also grant review of the merits question. MCBE in its Opposition does not contest that it is an issue affecting literally millions of school children and their parents across the country. Pet. at 34-35. Nor does it contest that the issue is

receiving different resolutions by the district courts.

In these circumstances, there is no reason to heed MCBE's plea that this Court let the issue percolate further in the lower courts. Parental preclusion policies are doing grievous injury now, and the issues have been fully vetted in the lower courts. This Court should grant review of both questions presented. *Cf. Parents Involved,* 551 U.S. at 718-20 (resolving merits after finding standing).

CONCLUSION

For the reasons stated in the Petition and this reply, the Petition should be granted with respect to both questions presented.

Respectfully submitted this
25th day of March 2024,

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