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 COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

- I. This is an excellent vehicle. 2
  - A. The factual record is clean. 2
  - B. This case is not moot. 3
- II. The decision below is egregiously wrong and conflicts with this Court's precedent on free speech and free exercise. 8
- III. The decision below is egregiously wrong and conflicts with the Court's decisions on parental rights. 10
- IV. This is an issue of nationwide importance. 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

303 Creative v. *Elenis*,
600 U.S. 570 (2023) 8-9

Arkansas Writers' Project v. *Ragland*,
481 U.S. 221 (1987) 4

Blais v. *Hunter*,
493 F.Supp.3d 984 (E.D. Wash. 2020) 5

Brokaw v. *Mercer County*,
235 F.3d 1000 (7th Cir. 2000) 6

Brown v. *Entertainment Merchs. Ass'n*,
564 U.S. 786 (2011) 9

Chafin v. *Chafin*,
568 U.S. 165 (2013) 8

Counterman v. *Colorado*,
600 U.S. 66 (2023) 8

Dunn v. *Blumstein*,
405 U.S. 330 (1972) 4

FEC v. *Wisconsin Right to Life*,
551 U.S. 449 (2007) 3-4, 6, 7

Fulton v. *City of Philadelphia*,
141 S.Ct. 1868 (2021) 10

Givhan v. *Western Line Consol. Sch. Dist.*,
439 U.S. 410 (1979) 9

Janus v. *AFSCME*,
138 S.Ct. 2448 (2018) 9

June Med. Servs. v. *Russo*,
140 S.Ct. 2103 (2020) 4

Kingdomware Techs. v. *United States*,
579 U.S. 162 (2016) 4

Knick v. *Township of Scott*,
139 S.Ct. 2162 (2019) 6

Lasche v. *New Jersey*,
No. 20-2325, 2022 WL 604025
(3d Cir. 2022) 5

M.S. v. *Indiana Dep't of Child Servs.* (*In re M.S.*),
140 N.E.3d 279 (Ind. 2020) 7

Matal v. *Tam*,
582 U.S. 218 (2017) 8

McCullen v. *Coakley*,
573 U.S. 464 (2014) 10

Meadows v. *Indiana*,
854 F.2d 1068 (7th Cir. 1988) 6

Moore v. *Sims*,
442 U.S. 415 (1979) 6

Quilloin v. *Walcott*,
434 U.S. 246 (1978) 10-11

Roe v. *Wade*,
410 U.S. 113 (1973) 4

Rosario v. *Rockefeller*,
410 U.S. 752 (1973) 4

Stanley v. *Illinois*,
405 U.S. 645 (1972) 3

Storer v. *Brown*,
415 U.S. 724 (1974) 4

Tingley v. *Ferguson*,
144 S.Ct. 33 (2023) 9

Troxel v. *Granville*,
530 U.S. 57 (2000) 3, 11

Bartrum v. *Grant Cnty. Off. of Fam. & Child.* (*In re W.B.*),
772 N.E.2d 522 (Ind. Ct. App. 2002) 7

Wisconsin v. *Yoder*,
406 U.S. 205 (1972) 10

Statutes

Cal. Fam. Code § 3424 5

Ind. Code § 31-33-6-1 6

Ind. Code § 31-34-1-6 .... 2, 3

Ind. Code § 31-34-19-1 2

Ind. Code § 31-34-20-1 2

Minn. Stat. § 518D.204 5

Wash. Rev. Code § 13.32A.082 5

Other Authorities

Jen Christensen, *Judge gives grandparents custody of Ohio transgender teen*, CNN, Feb. 16, 2018 5

Jeri L. Dammon et al., *Factors associated with the decision to investigate child protective services referrals: A systematic review,* 25 Child & Family Soc. Work 785 (2020) 6-7

Tony Grew, *Inquiry into surge in gender treatment ordered by Penny Mordaunt*, The Times, Sept. 16, 2018 7

Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?*, Williams Inst., UCLA, June 2022 7

Jackson Walker, *Montana 14-year-old moved to Canada after gender identity custody dispute, parents say*, ABC 15, Feb. 7, 2024 5

INTRODUCTION

This case presents a legal question of nationwide importance: when can the state muzzle parental speech and remove a child from the home of admittedly fit parents? The decision below squarely conflicts with this Court's precedents on parental rights, free speech, and religious exercise. That decision increases governments' power to remove children from fit parents, limits Free Exercise defenses to removal of children, and puts speech that occurs in the home beyond the reach of the First Amendment.

This petition is an excellent vehicle for addressing that crucial question because it is presented on clean facts. First, unlike most other cases, Indiana *found the parents fit* but still removed the child over an ideological dispute: a disagreement over gender identity. Although Indiana found all allegations of abuse and neglect unsubstantiated, it refused to return A.C. to Petitioners' home, substituting the judgment of the state for that of admittedly fit parents.

Indiana claims mootness. But if Indiana is right, all child welfare cases will become unreviewable when the child turns 18. That is textbook capable-of-repetition-yet-evading-review.

Given the urgent national debates over parental rights and the treatment of gender dysphoria—debates all parties agree involve important and life-changing questions—the Court should take this uniquely apt vehicle to clarify the rights of parents to share their religious beliefs about gender with their own children.

ARGUMENT

I. This is an excellent vehicle.

A. The factual record is clean.

This case has a straightforward and largely undisputed factual record. Pet.6-15.

Attempting to muddy the facts, Indiana rehashes the initial ugly allegations against Petitioners. BIO.4. But Indiana itself investigated and concluded that these allegations were unsubstantiated—*i.e.*, Petitioners are fit parents. App.88a-90a.

Petitioners objected to A.C.'s removal from their home. App.78a-82a. Indiana pretends Petitioners did not object to removal by conflating the question of whether A.C. needed help with the question of whether A.C. should be removed from fit parents. BIO.7. But Petitioners *didn't* object to A.C. receiving services under CHINS-6. App.86a-87a. The CHINS-6 determination hinges on the child's *self*-endangerment when the child is unlikely to "accept[]" treatment absent "coercive intervention of the court." Ind. Code § 31-34-1-6(2)(B); BIO.6-7.

But Petitioners *did* object to the removal: M.C. testified "There is no reason for him to be outside of our home." App.78a. CHINS-6 provides Indiana with multiple options short of removal. Ind. Code § 31-34-20-1; Ind. Code § 31-34-19-1 (dispositional determination separate from CHINS determination); App.88a. Petitioners recognized that A.C.'s eating disorder worsened while out of their home and in the state's custody. App.78a, 142a. And they, in their judgment as fit parents, knew that A.C. would do best in their home while receiving treatment. App.78a,

142a. Petitioners promptly objected to removal at the dispositional hearing and continue to object today. App.47-49a, 78a, 88a.

The factual basis for the CHINS-6 finding also shows that Petitioners consented to services for A.C. but not removal. App.78a, 142a. Petitioners agreed that A.C. needed intervention since A.C. "denie[d]" the eating disorder, "believe[d] that additional treatment [was] unnecessary," "fueled" the eating disorder by isolating from Petitioners, and claimed isolation would continue if placed back in Petitioners' safe home. App.80a, 134a-135a, 142a. This behavior is, as DCS pleaded and as A.C. admitted, dangerous and required correction by the court. App.50-55a, 142a; see Ind. Code § 31-34-1-6. Children do best with their fit parents, and Indiana and constitutional standards do not leave up to unemancipated minors the decision of residing with fit parents. App.210-228a; see *Stanley* v. *Illinois*, 405 U.S. 645, 657 (1972); *Troxel* v. *Granville*, 530 U.S. 57, 68-69 (2000) (plurality op.). Thus Petitioners agreed A.C. needed services not because *they* were unwilling to *provide* treatment, but because *A.C.* wasn't prepared to *accept* it without court supervision. App.17a n.3, 77a-78a.

B. This case is not moot.

1. An inherently timebound custody dispute between a teenager's parents and the government is an archetypal case capable of repetition yet evading review. That exception applies "where '(1) the challenged action is in its duration too short to be fully litigated," and "(2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *FEC* v. *Wisconsin Right to Life*,

551 U.S. 449, 462 (2007) ("*WRTL*"). Petitioners satisfy both prongs.

First, "a period of two years is too short to complete judicial review." *Kingdomware Techs.* v. *United States*, 579 U.S. 162, 170 (2016); see also *WRTL*, 551 U.S. at 462). Indiana's rule would condemn *any* custody dispute involving a teenager nearing 18 to a duration "too short to be fully litigated" before mootness.

Second, this Court has dispensed with the exception's second prong where no similarly situated litigant could ever seek relief. The Court has recognized that state election law challenges were not moot even though the election was "long over" when the Court heard the case. *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974); accord *Rosario* v. *Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n.2 (1972). Similarly, in challenges to abortion restrictions, this Court has stated that pregnancy's duration means "appellate review will be effectively denied." *Roe* v. *Wade*, 410 U.S. 113, 125 (1973), overruled on other grounds by *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 286-87 (2022) (not criticizing mootness exception); *see also June Med. Servs.* v. *Russo*, 140 S.Ct. 2103, 2169 (2020) (Thomas, J., dissenting) ("her claim will survive the end of her pregnancy under the capable-of-repetition-yet-evading-review exception"). So too here—Indiana's argument would "effectively insulate" all similar cases "from constitutional challenge." *Arkansas Writers' Project* v. *Ragland*, 481 U.S. 221, 227 (1987).

The effect would be drastic. With increasing frequency, governments run roughshod over parents' religious beliefs on gender identity, including

removing children from parents,[1] favoring certain beliefs in divorce custody disputes,[2] and preventing adoptions.[3] These cases are sure to proliferate. Some state legislatures are now authorizing the state to take custody where parents refuse full-steam-ahead gender transitions. Cal. Fam. Code § 3424(a) (granting "emergency jurisdiction" over children "unable to obtain gender-affirming health care"); Minn. Stat. § 518D.204(a) (same); Wash. Rev. Code § 13.32A.082 (seeking "gender-affirming treatment" is a "compelling reason[] not to notify the parent" of runaway minor's whereabouts); see also Martinez Br.23-24 (Oregon law permits minors to transition without parental consent). And by one estimate, ten million students nationwide attend schools that will actively conceal a child's gender identity from his parents. AAF Br.14-15 & n.19.[4]

Yet in all these cases, relying on the passage of time, governments could impose constitutional injury with impunity by arguing that challenged orders "no

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[1] Jackson Walker, *Montana 14-year-old moved to Canada after gender identity custody dispute, parents say*, ABC 15, Feb. 7, 2024, https://perma.cc/YD7V-V5AU; Jen Christensen, *Judge gives grandparents custody of Ohio transgender teen*, CNN, Feb. 16, 2018, https://perma.cc/ZL7J-37UJ; Martinez Br.3-7 (middle-school-aged child).

[2] AAF Br.13-14.

[3] *Blais* v. *Hunter*, 493 F.Supp.3d 984 (E.D. Wash. 2020); *Lasche* v. *New Jersey*, No. 20-2325, 2022 WL 604025 (3d Cir. 2022).

[4] See*, e.g.*, *Foote* v. *Ludlow Sch. Comm.*, No. 23-1069 (1st Cir. argued Sept. 13, 2023); *Vitsaxaki* v. *Skaneateles Cent. Sch. Dist.*, No. 24-cv-155 (N.D.N.Y. Jan. 31, 2024), ECF 1.

longer ha[ve] any continuing force" and vacatur would not return the child "to the parent's custody." BIO.14.

The harm from such a mootness rule would be especially pronounced because while parents may raise defenses in child-welfare proceedings, they have limited ability to seek damages. See, *e.g.*, *Meadows* v. *Indiana*, 854 F.2d 1068, 1069 (7th Cir. 1988) (Eleventh Amendment immunity); *Brokaw* v. *Mercer County,* 235 F.3d 1000, 1023 (7th Cir. 2000) (qualified immunity); Ind. Code § 31-33-6-1(6) (immunity for child abuse reporting and testimony, "even if the reported child abuse or neglect is * * * unsubstantiated"). And any attempt by parents to challenge an active child welfare case in federal court runs into the high bar of *Younger* abstention. *Moore* v. *Sims*, 442 U.S. 415, 433 (1979) (*Younger* applied to child welfare case).

Indiana wants it both ways: Petitioners' appeal is moot, but any separate suit for backward-looking relief is barred by res judicata. See Br. Supp. Defs.' Mot. Dismiss at 24-34, *M.C.* v. *Indiana Dep't of Child Servs.*, No. 1:23-cv-00957 (S.D. Ind. 2023), ECF 33 ("Defs.' Mot. Dismiss") (claiming the instant case bars the lawsuit); cf. *Knick* v. *Township of Scott*, 139 S.Ct. 2162, 2167 (2019) ("[P]laintiff thus finds himself in a Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court.").

In any event, a "reasonable expectation" remains that Indiana will subject Petitioners themselves to the same wrongful conduct. *WRTL*, 551 U.S. at 462. Petitioners have minor children at home, and multiple studies confirm that an interaction with child services increases the likelihood of future investigations. See, *e.g.*, Jeri L. Dammon et al., *Factors associated with the*

decision to investigate child protective services referrals: A systematic review, 25 Child & Family Soc. Work 785 (2020). And the number of youth identifying as transgender has exploded, with referrals at some institutions increasing by more than 4,000 percent.[5] Given Petitioners' religious beliefs and Indiana's refusal to disavow its actions, it is reasonable to expect that Petitioners "will again be subjected to the alleged illegality" in child welfare proceedings. *WRTL*, 551 U.S. at 463.

2. This case also isn't moot because (contrary to Indiana, BIO.15) Petitioners are still harmed by the determination below. Indeed, Indiana has already argued elsewhere that the Court of Appeals' decision gives DCS a "reasonable suspicion of past or imminent abuse" by Petitioners. Defs.' Mot. Dismiss at 30.

For similar reasons, the Indiana Supreme Court recognizes child welfare appeals are not moot because they "have legal implications that continue beyond a particular proceeding such that they may be relevant in future CHINS proceedings." *In re M.S.*, 140 N.E.3d 279, 285 n.4 (Ind. 2020). Evidence regarding siblings' removal from the home is admissible in a petition to terminate parental rights as to a different child. See *In re W.B.*, 772 N.E.2d 522, 531 (Ind. Ct. App. 2002) (relying on evidence of siblings' adjudications).

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[5] AAF Br.17-18; Tony Grew, *Inquiry into surge in gender treatment ordered by Penny Mordaunt*, The Times, Sept. 16, 2018, https://perma.cc/9XRV-FL2J; see also Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?*, Williams Inst., UCLA, June 2022, https://perma.cc/YHT5-F5SM (13-17 cohort is 8% of population but 18% of transgender individuals).

Petitioners are thus gravely concerned that Indiana will make similar claims and allegations about one of their minor children. App. 147a-162a. These collateral consequences mean "[t]his dispute is still very much alive." *Chafin* v. *Chafin*, 568 U.S. 165, 173 (2013).

II. The decision below is egregiously wrong and conflicts with this Court's precedent on free speech and free exercise.

1. The decision below upheld a prior restraint on parents' religiously motivated speech with their child about gender identity. That restriction was viewpoint-based: the problem was that the parents' view was "discord[ant]" with their child's. App.80a-81a. And the court concluded that parental speech to a gender-dysphoric child about gender identity—one of the most contentious and consequential topics in our national discourse—is "of purely private concern" unimportant to "the marketplace of ideas." App.28a-29a. That is egregious error conflicting with the First Amendment, this Court's precedents, and the decisions of six other States' courts. Pet.16-24.

The BIO only underscores certworthiness. First, Indiana claims the Court of Appeals applied the right test by considering the "'nexus' between" Petitioners' speech and A.C.'s "self-harm." BIO.23-26. But this highlights the error: banning speech because "it expresses ideas that offend" isn't even legitimate, much less compelling. *Matal* v. *Tam*, 582 U.S. 218, 223 (2017); cf. *Counterman* v. *Colorado*, 600 U.S. 66, 76-77 (2023) (incitement requires intent). The First Amendment applies "regardless of whether" the government considers speech "likely to cause 'anguish' or 'incalculable grief,'" *303 Creative* v. *Elenis*, 600 U.S. 570, 586

(2023)—and more so here, where parents seek to *ease* their child's distress and bring about their child's flourishing according to their (and millions of other Americans') best understanding. App.122a.

Indiana is also wrong about strict scrutiny. While Indiana attempts to identify a "correlation between" the speech and the eating disorder, BIO.24, "correlation" (rather than "causation") "is not compelling." *Brown* v. *Entertainment Merchs. Ass'n*, 564 U.S. 786, 800 (2011). And while the Court of Appeals invoked a gauzy "nexus" between speech and harm, App.13a-14a, under true strict scrutiny, "ambiguous proof will not suffice." *Brown*, 564 U.S. at 799-800.

Indeed, the court didn't purport to apply ordinary strict scrutiny, determining petitioners' speech was "purely private" and thus "of less First Amendment concern." App.28a-29a. Indiana tries to downplay this reasoning, BIO.26 n.3, but the Court of Appeals explicitly took "guidance" from it. App.29a. This Court's precedents have categorized "gender identity" among the "sensitive political topics" that are "undoubtedly matters of profound 'value and concern to the public.'" *Janus* v. *AFSCME*, 138 S.Ct. 2448, 2476 (2018); see *Givhan* v. *Western Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979) (rejecting claim that "private expression of one's views is beyond constitutional protection"). And were the reasoning below correct, nothing would stop the many jurisdictions that have already "silenced" counselors from attempting to "help minors accept their biological sex" from targeting parents next. *Tingley* v. *Ferguson*, 144 S.Ct. 33, 33 (2023) (Thomas, J., dissenting from denial of cert.). This approach turns free speech and parental rights on their heads, as if government intervention to control speech

were *most* justified when speech is between parent and child.

Indiana's gestures at waiver are likewise meritless. BIO.26-27. The Court of Appeals recognized "Parents objected on First Amendment grounds"; it just rejected their argument that the trial court's order was based on their "disagreement with Child's transgender identity." App.24a-25a, 27a. And no "boil[ing] the ocean", BIO.27, is needed to see that prohibiting vulgar or disparaging language is a less "extreme" measure the State should have considered. *McCullen* v. *Coakley*, 573 U.S. 464, 494-497 (2014); see Pet.23-24.

2. Indiana's actions also violated the Free Exercise Clause, which protects the "rights of parents to direct the religious upbringing of their children." *Wisconsin* v. *Yoder*, 406 U.S. 205, 233 (1972); Pet.24. Indiana's primary response is that there was no "intentional targeting of religion." BIO.28. But Free Exercise claims don't require intentional targeting, *Fulton* v. *City of Philadelphia*, 141 S.Ct. 1868, 1877 (2021)—and Indiana's persistence in this error, even after *Fulton* and *Tandon,* only highlights the need for review. Rather, the "discretion" to accommodate triggers strict scrutiny, *id.* at 1878-1879, and few inquiries are more discretionary than the "best interest of the child." App.11a-12a.

III. The decision below is egregiously wrong and conflicts with the Court's decisions on parental rights.

States can't "force the breakup of a natural family * * * without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Quilloin* v. *Walcott*, 434 U.S.

246, 255 (1978). Indiana conceded Petitioners were fit, but removed their child anyway, App.81a-82a, violating "perhaps the oldest of the fundamental liberty interests recognized by this Court," *Troxel*, 530 U.S. at 65 (plurality op.).

Indiana says strict scrutiny substitutes for unfitness. BIO.16-20. But the Court of Appeals said it applied the "Child's best interest." App.16a-17a. That is exactly the standard this Court's precedents reject. *Quilloin*, 434 U.S. at 255.

In arguing otherwise, Indiana conflates the CHINS-6 and removal determinations. As explained *supra* p.2, they are not the same. Indiana's heavy emphasis on petitioners' "failure to contest the findings" underlying the CHINS-6 determination, BIO.20-21, is rank misdirection.

So too for Indiana's effort to whitewash the proceedings below, insisting the removal concerned the eating disorder, not the gender disagreement. BIO.22. Even setting aside the initial proceedings (which focused overwhelmingly on gender identity and required placement in a transition-affirming home, Pet.6-13), the lower courts' decisions hinged on A.C.'s claim that the eating disorder was "fueled in part by Child's self-isolation," which in turn was "connected to the discord at home regarding Child's transgender identity." App.17a, 30a. So under the decision below, threatening self-harm allows a child struggling with gender identity to swap out loving (but non-transition-affirming) parents for a transition-affirming home selected by ideologically captured state officials.

As Indiana knows, that result is anything but "narrow." Cf. BIO.22. "Around 70% of individuals with gender dysphoria have serious mental health comorbidities, such as severe anxiety and depression or eating disorders." Br. *Amici Curiae* of States Incl. Indiana at 16, *Fain* v. *Crouch*, No. 22-1927 (4th Cir. May 25, 2023), 2023 WL 3790943. Treating those comorbidities "often 'greatly facilitate[s]'" resolving the dysphoria. *Ibid.* But under Indiana's position, parents who want to treat the comorbidity without affirming the dysphoria—based on their beliefs and a growing body of research—are gambling with the custody of their children. App. 214a-239a. This Court's parental rights precedents require otherwise.

IV. This is an issue of nationwide importance.

This case poses a question of national importance that is bound to recur absent this Court's intervention. As described above, the numbers of transgender youth are rising, matched by governmental willingness to remove gender-dysphoric children from their parents' custody. Indiana's tack—blame a comorbidity and dodge adjudication of parental fitness—provides a playbook that any state can use to eviscerate bedrock constitutional protections while guaranteeing they remain insulated from review.

This is particularly true since, as Indiana argues, "[n]early every State has a statute similar" to the CHINS-6 procedure Indiana leveraged here. BIO.3. The decision below thus paves the way for any of these states to use this tool to remove children from fit parents if the child is seeking a gender transition.

This case is especially apt for review since here, Indiana conceded and the trial court determined that

petitioners were fit parents. App.80a-82a. Amid this fraught landscape, with the lives of real children and families hanging in the balance, this Court should grant this petition and affirm its precedents on the right of fit parents to custody of their children.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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