No. 23-601

In The Supreme Court of the United States

JOHN AND JANE PARENTS 1; JOHN PARENT 2,

Petitioners,

v.

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

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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

The questions presented are:

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

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

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute ("GI") is a public policy foundation devoted to individual freedom and limited government. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when it or its clients' objectives are implicated.

One of GI's main objectives is enforcing constitutional protections for the right of parents to control the education and upbringing of their children. In 2022, GI initiated a project devoted to public school transparency, which, among other things, engages in policy research and analysis about the threats to parents' rights, especially the lack of transparency in public schools, and hosts instructional meetings across the country to explain to parents how to obtain information about the materials being taught in public school classrooms. GI has also appeared in courts across the country representing parents in cases involving this right, *see*, *e.g.*, *National Education Ass'n of Rhode Island v. Solas*, PC-21-05116 (Providence Super. Ct. filed Aug. 2, 2021) (pending); *Fairfax County School Board v. Tisler*, No. 2021-13491 (Fairfax Cnty. Cir. Ct. Dec. 15, 2021); *Lavigne v. Great Salt Bay Community School Board*, No. 2:23-cv-00158-JDL (D. Me. filed Apr.

[1] Pursuant to Rule 37, counsel for amicus affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than amicus, its members, or counsel, made any monetary contribution to its preparation or submission. All parties received notice of amicus' intention to file at least ten days before the due date.

5, 2023) (pending), and as an amicus curiae, *see*, *e.g.*, *McElhaney v. Williams*, No. 22-5903, 2022 WL 17995423 (6th Cir. Dec. 21, 2022); *Foote v. Ludlow School Committee*, No. 23-1069 (1st Cir. filed Apr. 12, 2022) (pending); *LittleJohn v. School Bd. of Leon Cnty.*, No. 23-10385 (11th Cir. filed Oct. 18, 2021) (pending).

GI scholars have also published extensive research on how public schools have attempted to limit the rights of parents in the educational context. *See*, *e.g.*, Matt Beienburg, *De-Escalating the Curriculum Wars: A Proposal for Academic Transparency in K-12 Education*, Goldwater Institute (Jan. 14, 2020).[2]

GI believes its policy expertise and litigation experience will assist this Court in its consideration of this petition.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

Parents have a fundamental right to control and direct the education and upbringing of their children. That is black letter law. The right was first recognized as protected by the "liberty" clause of the Fourth Amendment in *Meyer v. Nebraska*, 262 U.S. 390 (1923), where this Court held that Nebraska unconstitutionally infringed on parental rights by outlawing the teaching of German. Likewise, in *Pierce v. Society of*

[2] https://www.goldwaterinstitute.org/policy-report/curriculum-wars/.

Sisters, 268 U.S. 510 (1925), this Court struck down an Oregon law that prohibited parents from sending their children to private schools. And *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000), explained that parental rights are the oldest of the rights this Court has characterized as fundamental under the Fourteenth Amendment.

MCBE, however, has authorized its employees to violate these constitutional protections through its adoption of the "Guidelines for Gender Identity for 2020–2021." These guidelines authorize school officials to develop "gender support plans" for students whose gender identity differs from their birth sex without the knowledge or consent of their parents, and even to *affirmatively hide* such plans from the parents. If the school believes a parent would be "unsupportive" of that support plan, the guidelines authorize school officials to withhold that information from parents. App.14a.

The problem with that is, there is *no* "unsupportiveness" exception to a parent's fundamental right to control and direct the education and upbringing of his or her child. This Court has already held 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." *Parham v. J. R.*, 442 U.S. 584, 603 (1979). That is exactly what is happening here. MCBE, by basing the decision of whether school officials may affirmatively hide these plans from parents based on the parents' perceived

"supportiveness" of the transgender student has transferred the power of decision-making from the parent to the school.

But rather than applying that unambiguous precedent, the court below dismissed the case based on the theory that the parents did not suffer "injury in fact." The Court of Appeals found that the parents did not allege that a school official had placed their children on a plan (current injury), or that their child was either considering such a change or was at a heightened risk for being placed on such a plan (impending injury or a substantial risk of future harm). App.12a.

But this holding misses the forest for the trees. It defeats the purpose of the standing inquiry by focusing on the minutiae of that inquiry. Sometimes, it is obvious that a plaintiff has an injury in fact when the situation as a whole is considered, rather than focusing unduly on individual elements and tests. Such is the situation here.

Here, a fundamental constitutional right is directly implicated: the right of parents to control and direct the education and upbringing of their children. The policy at issue gives school officials complete, unfettered discretion to abridge this right. What's more, the injury in question consists of concealment—that is, affirmatively withholding information from parents—which by definition means those injured will be unaware of it, perhaps until long afterwards. This is a textbook example of an "informational injury"—which occurs when a person is unable to obtain information

to which the law entitles her, *see FEC v. Akins*, 524 U.S. 11, 21 (1998)—and such an injury is "concrete when the plaintiff is entitled to receive and review substantive information" and does not get it. *Robertson v. Allied Sols., LLC*, 902 F.3d 690, 697 (7th Cir. 2018).

Moreover, standing doctrine does not require *certainty* of future injury. *NB ex rel. Peacock v. D.C.*, 682 F.3d 77, 85 (D.C. Cir. 2012) ("absolute certainty is not required."). All that is required is a realistic likelihood that the offending policy will be implemented to the parents' detriment. Here, that test is met because the policy authorizes, and may even mandate, that parents will be denied information—not through passivity or inaction but through active, official concealment—and parents from whom such information is withheld are unlikely to learn of the concealment until afterwards. That is injury in fact for standing purposes.

There is an additional reason why the petition should be granted, however. As the decision below demonstrates, standing doctrine has strayed significantly from the original meaning of the term "cases and controversies," which appears in Article III. Today's jurisprudence focuses so specifically on concrete "injuries in fact" that they end up excluding disputes that undeniably would have qualified as "cases" as that term was understood at the time the Constitution was written. As explained in Section II.B below, a parent in the position of these Petitioners would certainly have had cause of action against these Respondents in an analogous case in 1788. And *that*—a "case," not a concrete injury to present rights—is all the Constitution

requires. The Court should grant the Petition to realign standing doctrine in keeping with its other recent decisions regarding original meaning.

ARGUMENT

I. A policy that allows school officials carte blanche authority to withhold information from parents about decisions made and actions taken that directly affect the mental health or physical wellbeing of their children violates the constitutionally protected rights of parents.

This Court has consistently recognized for over a century now that the right of parents to control and direct the education, upbringing, and healthcare of their children is one of the fundamental "liberty interests" protected by the Fourteenth Amendment's Due Process Clause. *See Meyer*, 262 U.S. at 401; *Pierce*, 268 U.S. at 534–35; *Troxel*, 530 U.S. at 65.

The Court has even gone as far as to say that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

The reason parents have this right is simple: parents have a "high duty" to raise their children—to help them in attaining adulthood and dealing with the challenges and responsibilities of maturity and citizenship, *Pierce*, 268 U.S. at 535, and it logically follows that if

one has a duty, one must have the right to discharge that duty. *See* Henry B. Veatch, *Human Rights: Fact or Fancy?* 164–65 (1985).

It is clear, then, that this right is "objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal marks and citations omitted).

MCBE's policy, however, empowers, and even compels, school officials to effectively nullify this right. Obviously parents cannot exercise their right to direct the upbringing of their children, or fulfill their "high duty" to do so, if public officials actively conceal information about decisions made and actions taken with respect to their children.

This is particularly true of information that—as in this case—is so central to a child's wellbeing that any conscientious parent would consider it of the gravest significance. If a school is withholding information from parents about decisions made and actions taken that directly affect their child's mental health, physical wellbeing, and psychosexual development, then parents simply cannot make a meaningful decision about how to educate the child with regard to psychosexual matters, emotional and physical development, or even to decide whether to seek alternative educational opportunities or environments for their children. "[P]arents 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)—but a parent who, if made aware of the child's concerns about her gender, might seek (e.g.,) a more appropriate educational environment, would be *unable* to act without that information.

For MCBE to actively conceal that information—as part of its official policy—means that MCBE is purposely taking actions that undermine or even nullify this fundamental constitutional right. And government actions that make the exercise of a constitutional right effectively impossible do inflict sufficient injury to give rise to standing. *See Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (where ordinance made it effectively impossible to obtain bullets, plaintiffs could sue for violation of Second Amendment rights); *Stein v. Thomas*, 672 F. App'x 565, 568 (6th Cir. 2016) (plaintiffs had standing to sue where statute imposed waiting period on election recounts, which made it impossible to exercise state law recount rights).

In other words, the concealment policy cuts to the core of the right identified in *Meyer* and *Pierce*: the right of parents to control their children's education.

II. A policy that gives government officials the *sole discretion* to violate the constitutional rights of parents at will imparts a constitutional injury on those whose rights can be violated at will for standing purposes.

The court below dismissed this case because the parents did not sufficiently allege an "injury in fact."

That was incorrect under existing standing doctrine. But it also reveals why debates persist regarding certain aspects of that doctrine. This case offers an opportunity to revisit and clarify the doctrine, particularly in cases involving fundamental constitutional rights.

A. Informational injury caused by purposeful concealment satisfies Article III.

When a plaintiff alleges that the law entitles her to certain information, and the government withholds that information, that constitutes an informational injury that satisfies Article III requirements.

In *Akins*, 524 U.S. at 13–14, for example, a voters group sued the Federal Election Commission because the Commission had deemed the American Israel Public Affairs Committee ("AIPAC") to not be a political committee under certain statutes. This meant that AIPAC was not required to disclose certain information that the voters group claimed the law entitled them to disclose. This Court said the voters had suffered an injury in fact, and thus had standing. *Id.* at 20. Specifically, the injury "consist[ed] of their inability to obtain information." *Id.* at 21. There was "no . . . doubt" that the information in question "would help them . . . to evaluate candidates for public office," among other things. *Id.* Thus the Commission's decision that the information did not have to be disclosed inflicted a judicially cognizable injury. This Court also rejected the proposition that the nondisclosure was too general to count as an injury: the information in

question was "directly related to voting, the most basic of political rights," and that made the injury "sufficiently concrete and specific such that the fact that it is widely shared [did] not deprive" the plaintiffs of standing. *Id.* at 24–25.

The same logic applies here. There is equally "no doubt" that MCBE's concealment policy applies to information about decisions made and actions taken that would help parents discharge their "high duty," *Pierce*, 268 U.S. at 535, and exercise their right to guide the upbringing of their children and help them navigate the difficult straits between childhood and adulthood. Just like the voting rights at issue in *Akins*, this parental right is sufficiently fundamental that MCBE's active interference with it constitutes a concrete injury. And there can be no doubt that this injury is central here; as the dissent below observed, it is specifically cited in the complaint. App.28a (Neimeyer, J., dissenting).

The withholding of information here is not merely incidental, either. This concealment directly interferes with parental choices—and that is its express *intent*. The whole purpose of withholding this information is because the MCBE believes such parents are insufficiently "support[ive]." App.6a. *Cf. Mirabelli v. Olson*, No. 3:23-cv-00768-BEN-WVG, 2023 WL 5976992 at *9 (S.D. Cal. Sept. 14, 2023) ("excluding a parent from knowing of, or participating in, [a child's gender-related choices], is as foreign to federal constitutional and statutory law as it is medically unwise."). But support or non-support in this context is within a parent's

proper discretion. The policy is therefore designed to override that discretion—and that is a constitutional injury.

Courts have often found standing where a government policy is such as to render it impossible for the plaintiff to exercise her legal rights. In *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1038 (5th Cir. 1982), for example, the court found that Congress had created a statutory right for people to seek political asylum in the United States, but that the government had then "created conditions which negated the possibility that a Haitian's asylum hearing would be meaningful in either its timing or nature." *Id*. at 1040. The court found that it was a constitutional injury for the government to "create[] a right . . . and then make[] the exercise of that right utterly impossible." *Id.* at 1039. *Accord, Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 378 n.33 (C.D. Cal. 1982).

And for precisely that reason, the District Courts of Kansas and Wyoming have found that concealment policies virtually identical to the one at issue here inflicted just that injury on parents: "it is illegitimate to conceal information from parents for the purpose of frustrating their ability to exercise a fundamental right," said the Kansas court. *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-cv-040150HLT-GEB, 2022 WL 1471372, at *8 n.12 (D. Kan. May 9, 2022). And the Wyoming court observed that "[t]o the extent the Student Privacy Policy prohibits a teacher or school employee . . . from responding or providing accurate and complete information concerning their minor child

. . . it burdens a parent's fundament right to make decisions concerning the care, custody and education of their child." *Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees*, No. 23-CV-069-SWS, 2023 WL 4297186, at *14 (D. Wyo. June 30, 2023).

In short, even under existing standing doctrine, these Petitioners meet the test. The court below, however, found that they lacked standing, by claiming that they were seeking only to be informed about their particular children, and since they had not shown that their specific children were likely to manifest the transgender tendencies giving rise to the policy, they lack standing. App.12a.

The dissent explains with great precision why this mischaracterizes the complaint, *id.* at 34a-37a, but there is one point worth emphasizing: it is in the nature of *concealment* that a person will not learn that she has been subjected to it at the moment that it occurs. The victim of, say, a battery knows at the time that she has been injured. But a policy that conceals information from a parent regarding decisions made and actions taken by school officials—and even invites the child to participate in that concealment, *see* App.37a—is by definition unknown to the parent, even while it violates the parents' rights. Thus "[p]arents . . . cannot know whether their children have acted on that invitation because of the Policy's provisions authorizing the exclusion of parents." *Id.*

Prospective relief serves *precisely* such a situation: to prevent the likely violation of individual rights. The

court below characterized the Petitioners' allegations of harm as "attenuated" and "speculative," App.13a, 14a, but that is simply not true. Attenuation refers to a situation in which multiple contingent steps must occur before the plaintiff will suffer the concrete harm. *Cf. Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411–14 (2013). But there is no attenuation or speculation *at all* here, because the concealment policy is already in place, meaning that whenever a student speaks to a school administrator, school officials must collaborate with that student to fashion the "gender support plan," which includes deciding whether to conceal that information from the parent. App.6a-7a. *That* is the injury.

Whereas in *Clapper*, a chain of contingencies had to fall into place before the right at issue would be transgressed, here, the policy already in place is such that the right is *now being* transgressed, because instead of the parents being informed and consulted, the school *will* do something different: it will choose whether to conceal that information from them (and will, of course, not consult them as part of that decision). That alone is an injury.

By way of analogy, if the school had a policy whereby it would refer any students' questions about gender identity to the Roman Catholic Archdiocese of Washington for resolution, there can be no doubt that parents would have standing to allege an Establishment Clause violation even if their children had not yet asked such questions—or that if the MCBE policy was to inform parents if their children were dating a student of one race, but not if they were dating a

student of another race, parents would have standing to allege an Equal Protection violation even if their child was not dating anyone yet.

The reason is because standing does not require a plaintiff to show that a future injury is "literally certain" to occur; "a 'substantial risk'" of future harm is enough. *Clapper*, 568 U.S. at 414 n.5; *see also N.Y. Republican State Comm. v. SEC*, 927 F.3d 499, 504 (D.C. Cir. 2019) ("*Clapper* does not require certainty."). All that's required is that MCBE's existing policy creates a "substantial" "increased risk of harm." *Union of Concerned Scientists v. U.S. Dep't of Energy*, 998 F.3d 926, 930 (D.C. Cir. 2021).

"'One does not have to await the consummation of a threatened injury to obtain preventative relief.'" *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974) (citation omitted). Instead, standing where an "asserted injury would be concretely felt in the logical course of probable events flowing from" the implementation of an existing policy, *McCardell v. U.S. Department of Housing & Urban Development*, 794 F.3d 510, 520 (5th Cir. 2015), the plaintiff stands in a different position from one who alleges a merely speculative chain of possibilities. Here, the injury is not threatened, but *actual*: the Petitioners and their children are already subject to the policy empowering school officials to withhold information from them—information about the school's treatment of their children—information to which parents have a right, because without it they cannot discharge their basic parental obligation to oversee the upbringing of their children. Simply put,

under existing standing doctrine, the Petitioners have standing.

B. This case presents an important opportunity to correct deviations in standing doctrine.

However, this petition also offers the Court a valuable opportunity to orient standing doctrine in a manner more consistent with the Constitution's original meaning. That is because the injury-in-fact analysis applied below manifests a number of confusions that have crept into Article III doctrine over the years.

As Judge Newsom has noted, "[i]t is now all but gospel that any plaintiff bringing suit in federal court must satisfy what the Supreme Court has called the 'irreducible minimum' of Article III standing," which includes "an injury in fact," *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring) (internal marks and citation omitted), but the Constitution's text and history do not warrant limiting "injury in fact" too narrowly, at a minimum because the Constitution does not use the phrase "injury in fact" at all. That requirement has been inferred from the "case and controversy" requirement, and while it's necessary to preserve the separation of powers,[3] "nothing in Article III's language compels our current standing doctrine, with all its attendant rules about the

[3] *See* Letter from Supreme Court to George Washington (Aug. 8, 1793), https://founders.archives.gov/documents/Washington/05-13-02-0263.

kinds of injuries—'concrete,' 'particularized,' 'actual or imminent'—that suffice to make a 'Case.'" *Id.* at 1122.

In other words, if the "focus[] [must be] on original meaning and history," *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2428 (2022), then the standing inquiry should be satisfied by the existence of whatever constituted a "case" or "controversy" within the prevailing understanding of 1788. Imposing too many limits today on the kinds of injuries that courts will view as constituting a "case" risks substituting judicially manufactured prudential considerations for the Constitution's meaning—which amounts to judicial policymaking and contradicts "the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (internal marks & citations omitted); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province *and duty* of the judicial department to say what the law is." (emphasis added)).

In other words, an overly granular focus on *certainty* or on "injury in fact" can distract courts from the broader question posed by the Constitution's actual words, and certainly can smuggle in modern conceptions alien from those of the Constitution's ratifiers. At the time of ratification, a "case" existed whenever a plaintiff had grounds to seek a remedy in law or equity. Ernest A. Young, *Standing, Equity, and Injury in Fact*, 97 Notre Dame L. Rev. 1885, 1889–90 (2022). As Judge Newsom writes, a case "exists so long

as—and whenever—a plaintiff has a cause of action, whether arising from the common law, emanating from the Constitution, or conferred by statute." *Sierra*, 996 F.3d at 1122 (Newsom, J., concurring).

This Court observed in *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 595 (1871), that "[t]he words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, or action." *See also Muskrat v. United States*, 219 U.S. 346, 356 (1911) ("A 'case' was defined by Mr. Chief Justice Marshall as early as . . . *Marbury v. Madison* . . . to be a suit instituted according to the regular course of judicial procedure."); *Kundolf v. Thalheimer*, 12 N.Y. 593, 596 (App. 1855) ("The primary meaning of the word case, according to lexicographers, is *cause*." (emphasis in original)).

And under *that* test, the Petitioners certainly have a "case," because early American courts often decided suits for normal damages without requiring any "stand-alone requirement of a factual injury, separate and apart from a legally cognizable cause of action." *Sierra*, 996 F.3d at 1123 (Newsom, J., concurring). In *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 798 (2021), this Court noted that plaintiffs could seek nominal damages as a preventative against potential harm, and that doing so did not transgress any rule against "abstract" judicial rulings. And courts "inferred damages whenever a legal right was violated," *id*. at 799, and could award both nominal damages and equitable relief *without* what now passes for a "concrete injury"—that is, based on "'no farther inquiry than

whether there has been the violation of a right.'" *Id*. (quoting Joseph Story, *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508 (D. Me. 1838)).

Common law courts often granted nominal damages even when plaintiffs could not make out compensatory damages. *See*, *e.g.*, *Robinson v. Byron*, 30 Eng. Rep. 3, 3 (1788) (awarding nominal damages for violation of riparian rights); *Marzetti v. Williams*, 109 Eng. Rep. 842, 846 (KB 1830) (Parke, J.) ("[W]herever there is a breach of contract or any injury to the right arising out of that contract, nominal damages are recoverable."). And for many torts at common law, no showing of concrete or even actual harm was necessary to receive judicial relief. *See* 3 W. Blackstone, *Commentaries* *120–24 (explaining that in England a party could seek relief even though "no actual suffering is proved."); 1 Theodore Sedgwick, *A Treatise on the Measure of Damages* 166 (9th ed. 1920) ("Wherever the breach of an agreement or the invasion of a right is established, the English law infers some damage to the plaintiff.").

More specifically, eighteenth century courts recognized a parent's right to seek legal and equitable relief against other adults who interfered with his parental authority, *see*, *e.g.*, *Jones v. Brown*, 170 Eng. Rep. 334 (1794) (recovery for battery of a child resulting in loss of services, where loss was purely nominal); *Bedford v. McKowl*, 170 Eng. Rep. 560 (1800) (recovery for seduction of daughter which deprived parent of "the comfort as well as the service of her daughter" and exposed her to fear for "other children, whose morals may

be corrupted by her example."). In early American law, too, parents could sue those who "enticed" their children away. *See*, *e.g.*, *Jones v. Tevis*, 14 Ky. 25, 25 (App. 1823); *Kirkpatrick v. Lockhart*, 4 S.C.L. 276 (S.C. Const. App. 1809). *See further Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 832–34 (2011) (Thomas, J., dissenting) (describing this legal history).

Thus if courts should be guided by "the original understanding of the 'judicial Power,'" *Biden v. Nebraska*, 143 S. Ct. 2355, 2377 n.2 (2023) (Barrett, J., concurring), today's judiciary should be guided not the crabbed notion of "injury in fact" that "first appear[ed] in a Supreme Court opinion . . . about 180 years after the ratification of Article III," *Sierra*, 996 F.3d at 1117 (Newsom, J., concurring), and which appears to reflect prudential policymaking by courts. Instead, they should be guided by the original meaning of the words "cases and controversies." *Cf. Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 766 (2000) ("the long tradition of *qui tam* actions in England and the American Colonies . . . conclusively demonstrates that such actions were 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" (citation omitted)).

In this case, Petitioners have sought nominal damages for a violation of their rights via an official policy that specifies that government officials will conceal information from Petitioners about decisions made and actions taken that they have a constitutional right

to know.[4] Since such a lawsuit would have been "'historically viewed as capable of resolution through the judicial process,'" it falls within the "cases and controversies" requirement of Article III—and that should be the end of the inquiry. *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013) (citation omitted).

The "test" for determining injury in fact employed below risks missing the forest for the trees. Because it *seems* that parents are claiming a potential future injury, the lower court focused on the extent to which the future injury was likely to occur. But pulling back and viewing the situation as a whole makes clear that parents have sufficiently alleged a *case*. They have a constitutional right and the policy now in place undermines and perhaps nullifies that right—for the very purpose of keeping parents from knowing that such a violation has occurred. If this is not an "injury in fact," then that requirement is as misguided as it is ahistorical.

[4] It is of course true that there may be circumstances where informing a parent of certain sensitive information may pose a risk to a child. It is doubtful whether even this would warrant the state actively concealing information from the parent, as opposed to summoning its child protection authorities. *Ricard*, 2022 WL 1471372, at *8. But in any event, there's no suggestion of such a risk in this case, and the policy incorporates no individualized assessment of risk. Instead, it is based on "generalized concern[s] of parental disagreement," and lacks any constitutionally mandated tailoring. *Id.*

CONCLUSION

For the reasons stated above, this Court should *grant* the petition.

Respectfully submitted,

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