

No. 24-297

In the
Supreme Court of the United States

TAMER MAHMOUD, ET AL.,

Petitioners,

v.

THOMAS W. TAYLOR, ET AL.,

Respondent.

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

**Brief *Amici Curiae* of Maryland Family Institute,
Hawaii Family Forum, Alabama Policy Institute,
Massachusetts Family Institute, Alaska Family
Council, Center for Christian Virtue (Ohio),
Nebraska Family Alliance, New York
Families Foundation, The Family
Foundation (Virginia), The Family Foundation
(Kentucky), Kansas Family Voice, and Louisiana
Family Forum, in Support of Petitioners**

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INTERESTS OF *AMICI CURIAE*

All *Amici Curiae*, the Maryland Family Institute, the Hawaii Family Forum, the Alabama Policy Institute, the Massachusetts Family Institute, the Alaska Family Council, the Center for Christian Virtue (Ohio), the Nebraska Family Alliance, the New York Families Foundation, the Family Foundation (Virginia), the Family Foundation (Kentucky), the Kansas Family Voice, and the Louisiana Family Forum, are state-based, nonprofit organizations seeking to protect religious freedom and parental rights, and to enshrine support for religious freedom and the family in law and policy.¹

SUMMARY OF ARGUMENT

At some point in their lives, children will be introduced by someone to matters concerning human sexuality, a subject inextricably intertwined with matters overlapping their religion, health, and family lives. This Court has repeatedly held that as a matter of federal constitutional law, when there is a contest between parents and the state about who has primary authority over these aspects of children's upbringing, parents' authority comes first.

Certainly, the state has important interests in education – most particularly in fostering students' later

¹ This brief was prepared and funded entirely by amici and their counsel. No party and no person other than the amici, its members, and counsel, made contributions to this brief. Counsel for all parties have consented to the filing of this brief.

self-sufficiency and their ability to participate in a pluralistic, democratic society. But these do not at all require normatively instructing children about the particular sexual activities or identity covered in the Pride Storybooks' material disputed in this case. These matters are, instead, plainly within parents' zone of prior authority as recognized by this Court in cases stretching back 100 years - authority that is at its zenith when parents are asserting the right to direct their children's *religious* education. The history and tradition of states' family laws concerning parents' authority over their children's religious education also robustly support this conclusion. Consequently, Montgomery County owes parents, at the very least, notice of upcoming lessons involving the Pride Storybooks, and an opportunity to opt-out.

ARGUMENT

I. The Pride Storybooks Program Makes Normative Claims About Sexual Relations and Identity That Conflict With Religious Tenets and Affect Children's Health And Family Lives.

A. The Pride Storybooks Program

The books and teachers' guides constituting the Pride Storybooks Program ("the Program") instruct children normatively about sexual orientation and transgender scientific claims. They also effect the state's choice about the age at which to introduce children to various sexual subjects. They are not, as Montgomery County ("the County") claims, simply "provid[ing] an educational experience that represents the wide range of families that call Montgomery

County home,” or a guide to “embrace[ing] all unique and individual differences”² or to “reflect the diversity of the global community,”³ or simply to support “a student's ability to empathize, connect, and collaborate with diverse peers.”⁴

The materials the County uses rather depict as kind and loving and authoritative those persons who affirm a child’s thinking that sex is just a matter of subjective decision-making, or those who support LGBTQ sexual expression. They depict no one who disagrees. There is a kind uncle who affirms a child in the process of deciding his own pronouns,⁵ and an affectionate mother who assures her sons that sexual identity is a subjective and irrational determination. She tells her children that a person’s belief about his sex doesn’t have to “make sense.”⁶ The materials feature a teacher who, after hearing a biological girl identify as a boy, says that “today, you’re *my* teacher!”⁷ Regarding the question whether sex is related to human biology, County teachers are instructed to tell children that parents and doctors only “make a guess about our

² Br. of Defs.-Appellees, *Mahmoud v. McKnight*, 102 F.4th 191 (4th Cir. 2024) (No. 23-1890), 2023 WL 7219946, at *4.

³ Appellants’ App. 496-497.

⁴ *Id.* at 539 ¶22.

⁵ Appellants’ App. 423.

⁶ Compl., at 4, *Mahmoud v. McKnight*, 688 F. Supp. 3d 265 (D. Md. 2023) (No. 23-1380).

⁷ *Id.* at 21.

gender” at birth, but that “sometimes they’re wrong” because “gender comes from inside.”⁸

The county also encourages children as young as four to see people in sexual terms, when teachers read a book about a parade involving persons who identify as LGBTQ, and instruct the children to search for vocabulary including an “intersex [flag],” a “[drag] queen,” “leather,” a “lip ring,” “underwear,” and an image of “Marsha P. Johnson,” a self-described LGBTQ activist and sex worker.⁹ The material also sexualizes fourth graders by reading a book and prompting discussion concerning a same-sex romantic attraction between very young children that describes a child “blushing hot” as she thinks of her classmate.¹⁰

The County’s Program is clearly intended to introduce even very young children to various sexual attractions and the possibility of being a different sex, even long before parents wish to introduce children to human sexuality. It is also plainly designed to influence children’s normative beliefs about all these matters. Were the County really interested in familiarizing children with “the wide range of families that call Montgomery County home,” “all unique and individual differences,” between people, or the “ability to empathize, connect, and collaborate with diverse peers,”

⁸ *Id.* at 5.

⁹ Compl. at 2, *Mahmoud, supra* (No. 23-1380).

¹⁰ *Id.* at 3.

it would use materials that were not completely emotionally and substantively weighted in one direction. It would include, *inter alia*, reading units treating the beliefs and practices of religious families on these same matters. Instead, it is an inescapable conclusion that the County intends to influence children to affirm *particular* sexual practices and beliefs.

B. The Program Contradicts Fundamental Religious Teachings

Sexual attraction and identity are matters of deep religious significance for many faiths, even as they are also scientific and social matters. There is no reasonable dispute about this. The example of Christianity, with its roots in Judaism, will suffice. Here, sexual attraction and identity touch core beliefs about God's creative authority and his loving and overarching plan for human lives and human relations. The book of Genesis, for example, states plainly that "God created mankind in his image; in the image of God he created them; male and female he created them." *Genesis* 1:27. Jesus declares that "a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh." *Matthew* 19:5. And both the Old Testament and the New Testament speak directly in opposition to same-sex relations. *Leviticus* 18:22; *Romans* 1:19-27.

These teachings have been part of Christianity since its beginning, and remain unchanged today. The current edition of the *Catechism of the Catholic Church* counsels both avoiding all "unjust discrimina-

tion” against homosexual persons, and showing “respect, compassion, and sensitivity,” while “under no circumstances” approving of same-sex relations.¹¹ In 2024, Pope Francis directly rejected gender theory, writing:

[H]uman life in all its dimensions, both physical and spiritual, is a gift from God. This gift is to be accepted with gratitude Desiring a personal self-determination, as gender theory prescribes, apart from this fundamental truth that human life is a gift, amounts to a concession to the age-old temptation to make oneself God¹²

It should further be noted that Christian teachings concerning human sexuality are integral to some of the deepest questions of faith, for example, regarding the Trinitarian identity of God, how God loves humanity, and how human beings are to love God and one another. This traces to the Bible’s teachings that human beings are created in God’s “image and likeness,” “male and female” and instructed to “be fruitful and multiply.” *Genesis* 1:28, thus offering a glimpse of the three persons of the Trinity who are both separate and in a relationship of interpenetrating and overflowing love. Furthermore, both the Old and New Testaments instruct that God loves humanity as a bridegroom loves a bride, see, *e.g.*, *Isaiah* 62:5, *Jeremiah* 16:9, *Matthew* 9:15, 25:6, and that we are to love Him and

¹¹ Catechism of the Catholic Church, ¶¶2357-58.

¹² Dicastery for the Doctrine of the Faith, *Dignitas Infinita*, On Human Dignity, April 2, 2024, ¶57.

one another as He has loved us. *John* 13:34. St. Paul writes specifically that marriage between a man and woman is intended to help illuminate the relationship between God and his people. *Ephesians* 5:32. And on all these matters, Roman Catholic parents are instructed by the Church’s leading document on education that their roles are “primary and inalienable.”¹³

In sum, Christians closely link visible traits and experiences of the human body, including sexual traits and experiences, to divine realities. To deny these teachings – and to state instead that human sexual identities are self-constructed, and that same-sex relations are attractive – is therefore to strike at the architecture of Christianity. To affirm transgender identification is to deny God’s creative power and his bestowing a person’s sex as a gift, made for gifting to others. To affirm same-sex relations is to deny that the structure and dynamics of love itself – within the Trinity, between human beings, and between the human person and God – involve differences, oriented toward fulfillment in unity.¹⁴ Unsurprisingly, then, studies of faith transmission report that significant percentages of those leaving the Catholic faith say that they are dissatisfied with Catholic sexual teachings, including

¹³ Pope Paul VI, Declaration on Christian Education, *Gravissimum Educationis* ¶3 (1965).

¹⁴ Helen M. Alvaré, *Religious Freedom After the Sexual Revolution: A Catholic Guide* 199-215 (Catholic University of America Press 2022).

especially on homosexuality.¹⁵ While it is not necessary to demonstrate that the state’s actions threaten the very continued existence of a faith in order to demonstrate that they burden religious exercise,¹⁶ the state’s actions here could very well endanger some young children’s religious faith.

C. The Program Concerns Children’s Health and Family Lives Too

There are several ways in which the County Program affects children’s health and family lives, which are matters inextricably tied to children’s religious formation. First, introducing children to human sexuality at too young an age, according to one of the most consulted pediatric textbooks in the United States, *Nelson Textbook of Pediatrics*, “may be frightening, reinforcing children’s feelings of powerlessness in the

¹⁵ Pew Research Center, *Report: Leaving Catholicism*, April 27, 2009 (Revised February 2011), <https://www.pewresearch.org/religion/2009/04/27/faith-in-flux3/>; Robert J. McCarty and John M. Vitek, *Going, Going, Gone: The Dynamics of Disaffiliation in Young Catholics* (St. Mary’s Press Sept. 2017), https://www.smp.org/dynamicmedia/files/51e8a5af231c9f2672ad751acb1e1827/5926_Sampler.pdf?srsltid=AfmBOoqa-NwdolM-ZV9OYzJOO21xT5Z5EhfPk9afSq429w0I_g4KCTx3. Reported in Nicholas Wolfram Smith, *Study shows young adults leaving church start down that path at age 13*, National Catholic Reporter (Dec. 11, 2018), <https://www.ncronline.org/news/study-shows-young-adults-leaving-church-start-down-path-age-13#:~:text=Although%20their%20work%20focused%20on,%2C%20dignity%2C%20justice%20and%20community>.

¹⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014).

larger world.”¹⁷ For girls, in particular – according to the landmark American Psychological Association study – early sexualization may provoke lower levels of self-esteem, and a greater risk of depression.¹⁸

Second, it is a matter of common sense that introducing uncertainty into children’s convictions about their biological sex could cause confusion and distress, and deeply affect familial and other interpersonal relationships. In the federal district court opinion in *Tatel v. Mt. Lebanon School District*, a parent was pressured to speak with her young daughter after a teacher introduced without warning the statement that parents only guess at their children’s gender. “After school . . . Tatel’s daughter asked Tatel ‘how do you know that I am a girl?’ . . . [And] the following day, Tatel’s daughter was ‘upset’ and brought up that ‘when you change a baby’s diaper . . . you know if they’re a boy or a girl.’”¹⁹ The mother also reported that after talking with her daughter: “[S]he was still confused. Because why would her teacher tell her something wrong.”²⁰

¹⁷ Mutiat T. Onigbanjo and Susan Feigelman, Middle Childhood, Chapter 26, in Robert A. Kliegman, et al., eds., *Nelson Textbook of Pediatrics*, 167-171, p. 171 (22d ed. 2025).

¹⁸ American Psychological Association, Task Force on the Sexualization of Girls, *Report of the APA Task Force on the Sexualization of Girls*, (2007), <http://www.apa.org/pi/women/programs/girls/report-full.pdf>.

¹⁹ *Tatel v. Mt. Lebanon Sch. Dist.*, No. 22-837, 2024 WL 4362459, at *13 (W.D. Pa. Sept. 30, 2024).

²⁰ *Ibid.*

Third, the material in dispute here obviously concerns sexual choices that importantly concern physical, psychological and emotional health, and family outcomes as well. Regarding the relationship between health and sexual choices, perhaps the leading sex-education publisher and proponent in the United States, the Sexuality Information and Education Council of the United States (“SIECUS”), clearly teaches: “[S]ex is a part of total health. . . . It’s part of your total health and your total personality structure.”²¹

It should further be noted that there exists important research about health conditions associated with homosexual or transgender identification. While the medical literature is undecided as to whether these conditions are caused by the sexual identity itself or from external social stress,²² it is agreed that

²¹ SIECUS, *The History of Sex Education*, 26 (quoting Sarah Cunningham, *The First 35 Years: A History of SIECUS*, 4-13, SIECUS Report, 27(4) (1999)), https://siecus.org/wp-content/uploads/2023/12/2021-SIECUS-History-of-Sex-Ed_Final.pdf.

²² A study claiming that minority stress caused a shorter life expectancy in gay persons was deemed unreliable and not replicable due to a coding error, Retraction Watch, *Study that says hate cuts 12 years off gay lives failed to replicate*, Feb. 1, 2018, <https://retractionwatch.com/2018/02/01/study-said-hate-cuts-12-years-off-gay-lives-fails-replicate/>. The original study: Mark L. Hatzenbuehler, et al., *RETRACTED: Structural stigma and all-cause mortality in sexual minority populations*, 103 *Soc. Sci. & Med.* 33-41 (2014).

sexual minorities suffer more mood, anxiety, and substance abuse problems, and heightened suicide risk.²³ In a widely-hailed review of the literature responding to the dramatic rise in number of young people claiming transgender identification, the authors reached two relevant conclusions. First, that the rise is due to psychological and social as well as biological factors. And second, that there is no quality research indicating net benefits from medical interventions such as puberty suppression or cross-sex hormone treatments.²⁴ In short, the County's efforts to influence children favorably toward transgender identification involve life-altering matters of children's health and safety.

The relationship between family outcomes and instruction regarding same-sex relations and identity is equally clear. For such instruction concerns choices about future romantic partners and family form, and whether to chemically or surgically alter one's body so as to affect future sexual experience, the possibility for

²³ Cochran SD, Mays VM, Sullivan JG. *Prevalence of Mental Disorders, Psychological Distress, and Mental Health Services Use Among Lesbian, Gay, and Bisexual Adults in the United States*. *J Consult Clin Psychol.* (Feb., 2003) ;71(1):53-61. doi: 10.1037//0022-006x.71.1.53; Kohnepoushi, P., Nikouei, M., Cheraghi, M. *et al. Prevalence of suicidal thoughts and attempts in the transgender population of the world: a systematic review and meta-analysis*. *Ann. Gen. Psychiatry* 22, 28 (2023), <https://doi.org/10.1186/s12991-023-00460-3>.

²⁴ Hilary Cass, *Independent review of gender identity services for children and young people: Final report* (2024), <https://cass.independent-review.uk/home/publications/final-report/>.

procreation, and the need for ongoing medical intervention to maintain the appearance of the opposite sex.²⁵

Given religious convictions about how human beings' experience of their bodily selves as male or female, and their experiences of sexual pleasure and attraction, are the source of irreplaceable understandings of God's identity and love for us, and our love for him and one another, the County's materials teaching otherwise plainly undermine parents' authority over their children's religious education.

II. Parents' Constitutional Rights Respecting Their Children's Religious, Educational, and Familial Well-Being, Are Superior to the State's Interest in The Pride Storybook Program.

This Court has variously phrased the strength of parents' rights respecting the care, custody and control of their children. But in contests concerning parental authority over children's upbringing – it has required states *at a minimum* to give significant deference to parental authority. It has also clearly upheld parents' fundamental Free Exercise rights regarding their children's religious education. These rights plainly require states to provide parents prior notice and an opportunity to opt out of materials concerning sexual identities and behaviors. Existing Supreme

²⁵ See, *e.g.*, The Mayo Clinic, Masculinizing Surgery, <https://www.mayoclinic.org/tests-procedures/masculinizing-surgery/about/pac-20385105>.

Court opinions regarding parental authority, as well as a long history and tradition of state laws prioritizing parents' authority (*infra* Part III), support this constitutional conclusion.

A. Existing Supreme Court Precedents Confirm Parents' Prior Authority

Existing Supreme Court decisions do not speak to the precise situation here: schools' refusing to consult parents about when to introduce their children to sexual materials, and their employing materials designed to shape children's opinions in favor of same-sex relations and transgender identities. But taken together, the array of Supreme Court opinions treating contests between parental and state authority over children plainly support recognizing parents' primary place regarding children's exposure to sexual materials of the kind at issue here.

This case does not require the Court to limn the entire boundary between parental and state authority where the contents of public schools' curricula is concerned. The question is rather a narrow one about materials intersecting children's religion, health, and family lives. *Someone* will choose when and how to offer children perspectives on these matters. The question is whether it should be the state or the child's parents. It is the parents. Such materials fall squarely *within* the constellation of matters this Court has repeatedly consigned *first* to parental authority, and *outside* what this Court has repeatedly identified as the state's interests in education.

But before turning to a description of these matters, there is the preliminary question of the *level* of protection the Constitution accords parents' decisions regarding their children's education. A brief review of this Court's relevant opinions shows that the state may *never do less than first defer* to the parents, and in the case of *religious education*, acknowledge parents' *fundamental* constitutional rights. The limits to these parental rights – when the state is preventing harm to children – have no application here.

In *Meyer v. Nebraska*, concerning the right to have children instructed in German as against a legal ban, the Court recognized parents' "*liberty*" to "establish a home and bring up children."²⁶ In *Pierce v. Society of Sisters* – about parents' rights to send children to private, including religious, education – the Court spoke of parental "*liberty . . . to direct the upbringing and education of children.*"²⁷ In *Wisconsin v. Yoder*, vindicating Amish parents' right to withdraw their children from school after the eighth grade – this Court referred to parental authority over education as "*beyond debate.*"²⁸ It also referred to the "*interest of parents in directing the rearing of their off-spring,*"²⁹ and wrote that the "values of parental direction of the religious upbringing and education of their children in their

²⁶ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added).

²⁷ *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (emphasis added).

²⁸ 406 U.S. 205, 232 (1972).

²⁹ *Id.* at 213 (emphasis added).

early and formative years have a *high place* in our society.”³⁰ But then it immediately referred to “*fundamental rights and interests*, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the *traditional interest of parents* with respect to the religious upbringing of their children.”³¹

In *Parham v. J.R.*, the Court referred to “*broad parental authority* over minor children”³² in connection with parents’ ability to admit a child to a mental institution without a prior adversarial proceeding. And in *Prince v. Massachusetts* – about a religious freedom claim for exemption from child labor law – the Court quoted that portion of *Pierce* stating that it “is cardinal with us that the custody, care and nurture of the child *reside first* in the parents[.]”³³ And it noted further that “it is in recognition of this that [our] decisions have *respected the private realm of family life* which the state cannot enter.”³⁴

In the most recent significant case discussing parents’ interests, *Troxel v. Granville*, a plurality called parents’ role “in the upbringing of their children” “es-

³⁰ *Id.* at 213-14 (emphasis added).

³¹ *Id.* at 214 (emphasis added).

³² *Parham v. J. R.*, 442 U.S. 584, 602 (1979).

³³ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

³⁴ *Ibid.* (emphasis added).

established beyond debate as an enduring American tradition,”³⁵ and “perhaps the *oldest of the fundamental liberty interests* recognized by this Court,”³⁶ citing a line of cases stretching back to the 1920s.³⁷ It further referred to the mother’s “*fundamental right* to make decisions concerning the rearing of her two daughters.”³⁸ The *Troxel* plurality did not, however, apply a strict scrutiny analysis to the challenged law, but stated rather that the state owed parental decisions about grandparent visitation “special weight”³⁹ and “deference.”⁴⁰

In putting parents before the state, *Troxel* thus echoes this Court’s decisions going back over one hundred years recognizing that authority over children’s upbringing, especially their religious education

³⁵ *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (emphasis added) (quoting *Yoder*, 406 U.S. at 232).

³⁶ *Id.* at 65 (emphasis added).

³⁷ *Id.* at 66 (citing *Parham*, 442 U.S. at 602 (“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course”); *Santosky v. Kramer*, 455 U.S. 745, 753, (1982) (discussing “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child”); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one’s children”).

³⁸ *Id.* at 68.

³⁹ *Id.* at 69.

⁴⁰ *Id.* at 75.

“resid[es] first” in parents (*Prince*), is accorded a “high place,” (*Yoder*), and is “broad” (*Parham*). At the very minimum, this requires a state to give parents notice and an opportunity to opt out of materials within parents’ realm of authority.

Certainly, this Court has recognized that parental actions may not cause “harm to the physical or mental health of the child or to the public safety, peace, order, or welfare.”⁴¹ But there is no claim here – and it would be absurd to make such a claim – that children will be harmed if not exposed to the *Pride Storybooks* should parents obtain notice and a right to opt out.

We turn now to how the matters at issue in this case – when and how to expose children to sexual topics touching upon the intersection of their faith, health, and family life – are within parents’ realm of primary authority. Such matters are easily at the core of this realm, and only distantly related at best to any state interests in education.

This Court has recognized limited state interests in matters concerning children’s education, most particularly, to develop children’s potential for adult self-sufficiency and to prepare them to exercise the role of citizen in a pluralistic democracy. The *Meyer* Court, for example, acknowledged state power to “prescribe a curriculum”⁴² directed to “foster[ing] a homogeneous

⁴¹ *Yoder*, 406 U.S. at 229-230.

⁴² *Meyer*, 262 U.S. at 402.

people with American ideals prepared readily to understand current discussions of civic matters.”⁴³ In *Pierce*, it recognized state authority to provide “certain studies plainly essential to good citizenship.”⁴⁴ The *Prince* Court, in a case concerning a ban on child labor, spoke about how a “democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.”⁴⁵ Regarding the contents of education, *Yoder* described educational content that “prepare[s] citizens to participate effectively and intelligently in our open political system . . . to preserve freedom and independence,” and that “prepare[s] individuals to be self-reliant and self-sufficient participants in society.”⁴⁶

We turn now to the substantive realms in which this Court has recognized parents’ primary authority. The *Meyer* Court recognized parents’ superior authority to choose to introduce or to pass on a culture to a child. It located this choice within parents’ right to “establish a home and bring up children, . . . and to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”⁴⁸ *Pierce* recognized parents’ “traditional interest . . . with respect to the religious upbringing of their

⁴³ *Id.*

⁴⁴ *Pierce*, 268 U.S. at 534.

⁴⁵ *Prince*, 321 U.S. at 168.

⁴⁶ *Yoder*, 406 U.S. at 221.

⁴⁸ *Meyer*, 262 U.S. at 399.

children,”⁴⁹ their “liberty . . . to direct the upbringing and education of children,”⁵⁰ and their authority to “nurture him and direct his destiny.”⁵¹

Yoder described parent’s prior authority over the social and educational environments shaping their children’s “way of life”⁵² and their “values,”⁵³ such as the value of a life of “‘goodness,’ rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.”⁵⁴ It strongly supported “family decisions in the area of religious training.”⁵⁵

West Virginia State Board of Education v. Barnette,⁵⁶ (concerning the right of Jehovah’s Witness children not to honor the American flag) articulated robust protection for parents’ primary authority to form their children’s religious beliefs in a case wherein free speech and the free exercise of religion intersected. The Court there affirmed “[t]he rights of . . . parents to give [children] religious training and to encourage

⁴⁹ *Yoder*, 406 U.S. at 214.

⁵⁰ *Pierce*, 268 U.S. at 534.

⁵¹ *Id.* at 535.

⁵² *Yoder*, 406 U.S. at 209.

⁵³ *Id.* at 210.

⁵⁴ *Id.* at 211.

⁵⁵ *Id.* at 231-232.

⁵⁶ 319 U.S. 624 (1943).

them in the practice of religious belief, as against preponderant sentiment and assertion of state power.”⁵⁷ It also stated that “[f]ree public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, *creed*, party, or faction.”⁵⁸

In *Moore v. City of East Cleveland*,⁵⁹ upon striking down a zoning law forcibly separating a grandmother and grandson, the Court affirmed the priority of family in the process of “inculcat[ing] and pass[ing] down many of our most cherished values, moral and cultural.”⁶⁰

Finally, this Court has several times underlined the *particular* strength of parents’ authority when education, upbringing and religious transmission overlap. The *Prince* Court wrote: “The parent’s conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters.”⁶¹ This led to its holding that the most exacting scrutiny is due in these circumstances: “when state action impinges upon a claimed

⁵⁷ *Prince*, 321 U.S. at 165.

⁵⁸ *Id.* at 637 (emphasis added).

⁵⁹ 431 U.S. 494 (1977).

⁶⁰ *Id.* at 503-504.

⁶¹ *Prince*, 321 U.S. at 165.

religious freedom, it must fall unless shown to be necessary for or conducive to the child's protection against some *clear and present danger*....”⁶²

The *Yoder* Court upheld the same, writing that “when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State's requirement under the First Amendment.”⁶³ And *Employment Division v. Smith*⁶⁴ carefully preserved *Yoder*’s application of strict scrutiny to protect parents’ rights respecting their children’s religious education. It treated *Yoder* as a special “hybrid situation” meriting such heightened scrutiny because it involved the connection between religious freedom and “a parental right.”⁶⁵

Applying all of these pronouncements about parents’ and the state’s interests to the case at hand, it is clear that parents’ interests are primary and demand state deference. The County has not shown any relationship between inviting minors to approve of various sexual behaviors or subjective sex determination, and its interests in attaining adult self-sufficiency or the skills necessary for civic participation. It cannot claim, as an element of the latter interest, that the Program

⁶² *Id.* at 167 (emphasis added).

⁶³ *Yoder*, 406 U.S. at 233.

⁶⁴ 494 U.S. 872 (1990).

⁶⁵ *Id.* at 881-882.

is directed to encouraging students to empathize and collaborate with peers. For the Pride Storybooks aim way beyond *respectfully acknowledging and showing kindness to different persons* in one's community. Instead, they are directed toward *approving behaviors* of only a small set of neighbors (while disapproving many others') and, in the case of transgender identification, *accepting highly-contested sexual facts about oneself and others*. These constitute matters central to the intersection of religion, health and family life. And again, at no time has the absurd claim been made that removing children's access to the Pride Storybooks through parental opt-outs would be harmful to children. Consequently, and at the very least then, granting proper constitutional deference to parents requires notice and an opportunity to opt their children out of exposure to this Program.

III. State Family Law Reveals a History and Tradition of Recognizing Parents' Primary Rights Respecting Children's Religious Education

Part II demonstrated that this Court has repeatedly upheld parents' primary authority respecting their children's religious education. Its conclusions are strengthened and supported by a long history and tradition of state family laws supporting parental primacy in this area, including over children's sexual education.

Parents' have been sending their children to religious schools in the United States since before the Revolution. They have sent them, for example, to

Quaker schooling since 1689,⁶⁶ to Jewish day schooling since 1731,⁶⁷ and to Catholic schools since 1606.⁶⁸ Attendance at religious schools has persisted uninterrupted to today, when about three-quarters of privately educated K-12 students in the United States attend religious schools.⁶⁹ Homeschooling too, has been a vehicle for parental transmission of faith through education, since before the Revolution.⁷⁰ Even today, about one-half of parents who homeschool report that they do so for religious reasons.⁷¹

State family laws concerning custody also acknowledge parents' primary authority over their children's religious education. Generally speaking,

⁶⁶ The William Penn Charter School, About Us, <https://www.penncharter.com>.

⁶⁷ My Jewish Learning, *History of Jewish Schooling in America*, <https://www.myjewishlearning.com/article/jewish-schooling/>.

⁶⁸ Richard M. Jacobs OSA, *U.S. Catholic Schools and the Religious Who Served in Them: Contributions in the 18th and 19th Centuries*, 1 *Catholic Education: A Journal of Inquiry and Practice* 364 (1998).

⁶⁹ Katherine Schaeffer, *U.S. public, private and charter schools in 5 charts*, Pew Research Center, June 6, 2024, <https://www.pewresearch.org/short-reads/2024/06/06/us-public-private-and-charter-schools-in-5-charts/#:~:text=Private%20schools%20are%20known%20for,of%20all%20private%20school%20enrollment>.

⁷⁰ Angela Watson, et al., *The fall and rise of home education*, in *Homeschooling in the 21st Century* ch. 1 (Routledge 2018).

⁷¹ Laura Meckler Peter, et al., *Home schooling today is less religious and more diverse, poll finds*, *The Washington Post*, Sept. 28, 2023, <https://www.washingtonpost.com/education/2023/09/26/home-schooling-vs-public-school-poll/>.

absent evidence that a child would be harmed, a custodial parent has the authority to pursue a particular religious upbringing; and even the noncustodial parent retains the right to educate the child in his or her religion.⁷²

The history and tradition of states' handling of elementary and secondary schools' sex education also indicates that states have acknowledged parent's superior authority over this subject. This is well-documented in a comprehensive history of U.S. sex education, Jeffrey Moran's *Teaching Sex: The Shaping of Adolescence in the 20th Century*⁷³ The author chronicles how, beginning sporadically in the 1920s (as a reaction to venereal diseases and prostitution during World War I)⁷⁴ and rising and falling through the 1960s,⁷⁵ limited sex education appeared in some high schools. Courses did not treat the subjects and perspectives proposed here by the County, but rather taught the biology of the reproductive system, the harm of venereal diseases and nonmarital sexual relations, and – toward the latter decades of this period – a “family life education” concerning how successfully to marry and parent. Some school districts during this period were supportive of some forms of sex-education, while others

⁷² See, e.g., George L. Blum, *Religion as a Factor in Child Custody Cases*, 124 A.L.R.5th 203 (2004). See also Kevin M. Smith, *Parental Rights and the Child's Best Interests: Resolving Conflicts over Religion, Education and Health Care Choices in Custody Cases*, 91 Kan. B.J. 20, 23 (2022).

⁷³ (Harvard University Press 2000).

⁷⁴ *Id.* at 82.

⁷⁵ *Id.* at 105-108, 124-125, 129-132, 165.

continued to ban it given religious and moral opposition.⁷⁶

When some programs in the 1970s began to offer normative instruction favorable to nonmarital or same-sex relations – more similar to the County’s Program here – parents quickly reacted against states’ usurpation of their authority, even organizing opposition across dozens of states simultaneously, regularly on religious grounds.⁷⁷ States conceded parental authority. As the Petitioners’ Brief documents, forty-seven states and the District of Columbia allow for parental opt-outs, or require parental opt-ins, before schools may offer sex education. Three states laws are silent on the subject, and no state has completely barred opt- outs.⁷⁸

In sum, a long history and tradition of state family laws support this Court’s constitutional conclusion that parents’ rights respecting their children’s religious education include their authority over sex education and demand deference from the state.

CONCLUSION

For the reasons set forth above, we urge this Court to reverse the decision below.

⁷⁶ *Id.* at 143.

⁷⁷ *Id.* at 181-184. See also SIECUS, *supra* at 9-36.

⁷⁸ Pet. Brief at 7.

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Respectfully submitted.

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