No. 24-297

In the
Supreme Court of the United States

TAMER MAHMOUD, *et al.*,
Petitioners,
v.
THOMAS W. TAYLOR, *et al.*,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE SUTHERLAND INSTITUTE IN SUPPORT OF PETITIONERS

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March 10, 2025

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INTEREST OF AMICUS[1]

Amicus Sutherland Institute is a Utah nonprofit, nonpartisan public policy organization with a mission to promote the constitutional values of faith, family and freedom. Sutherland promotes the constitutional right of free exercise of religion and works to explain the individual and societal benefits that come from the involvement of people of faith and religious organizations in our communities.

This case provides an opportunity for this Court to clarify the protections of religious exercise that allow parents to provide direction for their children in a way that benefits all Americans, whether or not they participate in or adhere to any particular faith.

SUMMARY OF THE ARGUMENT

The laws of nearly every State (including Maryland) require schools to accommodate parents' right to determine how their children are taught about sensitive topics. These laws typically require notice of the teaching, provision for parents to review the materials used and an opportunity for parents to excuse their children from the instruction. Many States are even more accommodating. This widespread recognition of the right makes clear how

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[1] Pursuant to Supreme Court Rule 37.2, counsel for amicus notified all known parties of intention to file a brief of amicus curiae in this case. In accordance with Supreme Court Rule 37, this brief was not authored by counsel for any party in this action. No party or person not related to amicus made any kind of monetary contribution to the preparation or submission of this brief. All funding for this brief came from the amicus.

significantly Montgomery County Public Schools (MCPS) has burdened the religious exercise of the parents in this case. These parents have been denied an accommodation provided to almost all other parents across the nation.

The widespread recognition of these parental rights also illustrates a consensus that providing the accommodation is not onerous to schools. Any administrative difficulties associated with allowing parents to direct how their children are taught about sensitive subjects is surely not so overwhelming as to justify the burden a denial imposes on the religious exercise of parents. If this were not the case, why would nearly every State voluntarily impose those administrative responsibilities on their schools?

Accommodations of religious exercise of the sort denied by MCPS in this case, but recognized nearly uniformly throughout the nation, should be promoted and respected, not ignored. They prevent litigation and provide security to religious organizations and people of faith in their exercise of their religious commitments.

ARGUMENT

The First Amendment protection of religious freedom reflects an understanding that there are crucial qualities on which ordered liberty depends, but which the government itself cannot directly transmit. Structural limitations on government power and specific protections of the scope of action by mediating institutions like family and religion protect that transmission process. *See* Richard W,

Garnett, *Religious Freedom, Church Autonomy, and Constitutionalism* 57 Drake L. Rev. 901 (2009); Michael W. McConnell, *Religion and Its Relation to Limited Government* 33 Harv. J. L. & Pub. Pol'y 943 (2010).

The petitioners here, like the Amish parents in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), are "engaged in a soul-making competition with government" with their beliefs "and the state's ambitions as rival claimants for the loyalty of their children." Richard W. Garnett, *The Story of Henry Adams' Soul: Education and the Expression of Associations* 85 Minn. L. Rev. 1841, 1847 (2001). These parents also merit relief from the burden on their religious exercise caused by the denial of their right to determine how their children are taught about sensitive matters.

I. State Laws Demonstrate that Parents' Religious Exercise is Burdened When They are Denied the Right to Determine How Their Children Are Taught Sensitive Topics.

In *Yoder*, this Court noted 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). A stark illustration of this reality is the remarkable consistency in State law protections of parents' ability to determine how their children are taught about sensitive matters.

All but three States and the District of Columbia provide some legal means for parents to exempt their children from instruction related to sexual subjects. Of these outlying states, the relevant laws in Delaware (14 Del. Admin. Code §851, at 2.1.3) and North Dakota (N.D. Cent. Code §15.1-21-24) do not address the role of parents. South Dakota does not require any teaching about sexuality, only that schools "impress upon the minds of the students the importance of . . . sexual abstinence." S.D. Cod. Laws §13-33-6.1.

The typical elements of laws protecting parents' ability to determine how their children will be taught about sexual topics are (1) a requirement that parents be given notice of the instruction, (2) a requirement that parents be allowed to review the proposed instruction and related materials, and (3) a requirement that parents be allowed to exempt children from the instruction. This latter element takes two forms. In most states, parents are given an opportunity to request their children be excused from the instruction (opt-out). In others, schools cannot provide the instruction absent affirmative parental consent (opt-in).

The laws of twenty-seven States and the District of Columbia contain all three of these elements, employing the opt-out approach.[2] Of these, all but

[2] Ala. Code §§ 16-40A-5, 16-41-6; Alaska Stat. §§ 14.30.355(b)(7), 14.30.356(b)(6); Ark. Code § 6-16-1006(c); Colo. Rev. Stat. §§ 22-25-104(6)(d), 22-1-128(3)(a), (4) and (5); Fla. Stat. §§ 1001.42(8)(c)(3), 1002.20(3)(d), 1003.42(5); Haw. Dep't of Educ.,

Oregon use imperative commands (usually "shall" but Oregon uses "may") to describe the school's responsibilities.

Four other States include protection for a parental right to review curriculum and to an opt-out but do not specify a requirement for the school to provide notice of instruction.[3] An additional eleven States only specify the requirement to allow an opt-out.[4]

Bd. of Educ. Policy 103-5; Haw. Dep't of Educ., Bd. of Educ. Policy 101-13; Keith T. Hayashi, Superintendent, Haw. Dep't of Educ., Annual Memorandum: Notice on Board of Education Policy 101-13 Controversial Issues (June 23, 2023), in Opening of the School Year Packet for School Year 2023- 2024, Haw. Dep't of Educ. 61 (June 2023), https://perma.cc/T6DSXSWP; Ind. Code § 2030-5-17(c), (d); Idaho Code § 33-1611; 105 Ill. Comp. Stat. 5/27-9.1a(d); Mass. Gen. Laws ch. 71, § 32A; Md. Code Regs. §§ 13A.04.18.01(D)(2)(e)(i) and (iii); Mich. Comp. Laws § 380.1507(4); Minn. Stat. § 120B.20; Mo. Stat. § 170.015(5)(2); Mont. Code § 20-7-120; N.C. Gen. Stat. § 115C-81.30(b); Neb. Rev. Stat. § 79-532(3); N.H. Rev. Stat. § 186:11(IX-c); Okla. Stat. tit. 70, § 11-103.3(C); Or. Rev. Stat. § 336.465(1)(b); Or. Dep't of Educ. Admin. R. 581-022-2050(5); Or. Dep't of Educ. Admin. R. 581-021-0009; 22 Pa. Code §§ 4.29(c), 4.4(d)(3); S.C. Code. § 59-32-50; Tenn. Code §§ 49-6-1305, 49-6-1307, 49-6-1308; Tex. Educ. Code § 28.004(i) and (i-2); Utah Code §§ 53E-9-203(3), 53G-10-205, 53G-10-403; Wash. Rev. Code. § 28A.230.070(4); Wis. Stat. §§ 118.019(3) and (4); D.C. Mun. Regs. subtit. 5, § E2305.5.

[3] Cal. Educ. Code § 51937; R.I. Gen. Laws §§ 16-22-17(c), 16-2218(c), 16-22-24(b); Va. Code. § 22.1-207.2; W. Va. Code § 18-2-9(c).

[4] Conn. Gen. Stat. § 10-16e; Ga. Code § 20-2143(d); Iowa Code § 256.11(6)(a); Kan. Admin. Regs. § 91-31-35; La. Stat. §§ 17:281(D), 17:412; Me. Rev. Stat. tit. 22, § 1911; N.J. Stat. §

Eight States are even more protective of parents' influence, requiring notice, review, and that children cannot be taught without affirmative consent by the parent through an opt-in requirement.[5]

The introduction of classroom discussions on topics like sexual orientation and gender identity is relatively new so many of these statutes are situated in the context of "sex education" instruction and do not specifically address these questions. Nine States, however, have specified that parental rights are not limited to the context of health education (consistent with the initial approach of the schools in this case).[6]

18A:35-4.7; N.M. Code R. § 6.29.6.11; N.Y. Comp. Codes R. & Regs. tit. 8, § 135.3; Ohio Rev. Code § 3313.60(A)(5)(c), (d) and (f); Vt. Stat. tit. 16, § 134.

[5] Ariz. Rev. Stat. §§ 15-711(B), 15-716(E); Ky. Rev. Stat. § 158.1415(1)(e); Miss. Code § 37-13-173; Nev. Rev. Stat. § 389.036(4); Tenn. Code §§ 49-6-1305, 49-6-1307, 49-6-1308; Tex. Educ. Code § 28.004(i) and (i-2); Utah Code §§ 53E-9-203(3), 53G-10-205, 53G-10-403; Wyo. Stat. § 21-9-104(b). Tennessee, Texas, and Utah include both opt-in and opt-out provisions.

[6] Ariz. Rev. Stat. § 15-102(a)(4) ("any learning material or activity"); Keith T. Hayashi, Superintendent, Haw. Dep't of Educ., Annual Memorandum: Notice on Board of Education Policy 101-13 Controversial Issues (June 23, 2023), in Opening of the School Year Packet for School Year 2023- 2024, Haw. Dep't of Educ. 61 (June 2023), https://perma.cc/T6DSXSWP ("controversial issues"); Minn. Stat. § 120B.20 ("instructional materials to be provided to a minor child"); Neb. Rev. Stat. §§ 79-531, 79-532(1)(a)-(c) ("specific instruction or activities"); Okla. Stat. tit 25, §2003(a)(2)-(4) ("any learning material or activity"); Okla. Admin. Code 210:10-2-3(a)(3) ("Sex or Sexuality or any other instruction questioning beliefs of practices in Sex, morality, or religion."); Or. Dep't of Educ. Admin. R. 581-021-

Four States specifically extend opt-out protection for instruction that covers "sexual orientation" or "gender identity" (Ohio's law refers to "gender ideology").[7]

Nine States specify that the opt-out or opt-in provisions are intended to accommodate parents' religious beliefs.[8]

Taken together, this survey of State laws demonstrates an extraordinarily broad consensus that parents' right to determine how their children are taught about controversial topics, particularly those involving sexual matters should be accommodated.

This virtually unanimous recognition of parental rights in the context of education on sensitive subjects underscores the significance of the protections. When Montgomery County Public Schools announced it would no longer allow parents the ability to determine how their children would be taught about sensitive topics of gender and sexuality, it was denying them a

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0009 ("a state required program or learning activity"); 22 Pa. Code § 4.4(d)(3) ("specific instruction that conflicts with their religious beliefs"); Tex. Educ. Code § 26.010(a) ("a class or other activity that conflicts with the parent's religious or moral beliefs"); Utah Code § 53G-10-205 ("any aspect of school").

[7] Ark. Code § 6-16-1006(c); Mont. Code § 20-7-120; Ohio Rev. Code § 3313.473(b)(1)(b); Tenn. Code §§ 49-6-1305, 49-6-1307, 49-6-1308.

[8] Ala. Code § 16-41-6; Kan. Admin Regs. § 91-31-35(a)(6); N.H. Rev. Stat. § 186.11(IX-b); N.J. Stat. § 18A:35-4.7; Or. Dep't of Educ. Admin. R. 581-021-0009; Pa. Code § 4.29(c); Tex. Educ. Code § 26.010(a); Utah Code § 53G-10-205(2)(a); Vt. Stat. art. 16, § 134.

right almost universally recognized throughout the nation.

That fact starkly demonstrates the magnitude of the burden that has been placed on their ability to exercise their faith. The parents in this case who chose to fulfill their religious responsibility to direct their children's instruction on matters of sexuality and gender were denied an accommodation available to nearly all other American parents.

II. The Broad Recognition of Parental Rights, including in Maryland, Undercuts the Schools' Asserted Interest in Limiting Petitioners' Free Exercise.

The school district asserts three "concerns" that it believes justify its decision to deny parents the opportunity to determine how their children will be taught about sensitive topics: "high student absenteeism, the infeasibility of administering opt-outs across classrooms and schools, and the risk of exposing students who believe the storybooks represent them and their families to social stigma and isolation." Brief in Opposition at 7.

It is hard to credit these concerns as very pressing when Maryland itself, and nearly every other State, has adopted the approach to accommodating parents' religious exercise that the school district has said it must abandon in order to address them.

Allowing students to pursue other activities during discussions about sexuality and gender identity is less disruptive of the schools' educational

goals than the exemption of Amish students from compulsory attendance after eighth grade. *Wisconsin v. Yoder*, 406 US 205, 219 (1972).

Administrative difficulties the school might experience pale in comparison to the harm to religious exercise of parents who can no longer direct how their children will be taught about subjects that implicate their core religious commitments. "[E]ase of administration" and "administrative convenience" cannot justify such a burden. *See Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2387 (2021).

There is also no reason to believe that parents will be less effective at teaching tolerance and respect for others than the schools will be. In fact, by accommodating parents, the schools will be providing students with a tangible example of these qualities as they demonstrate how different viewpoints are accommodated in a school setting.

The fact that the policy of accommodation the school district has repudiated is the law of Maryland and almost every State provides strong evidence that the concerns the district has raised are not insurmountable and certainly don't justify the heavy burden that repudiation has placed on parents' free exercise.

III. Legal Accommodations of Religious Exercise Should Be Encouraged Rather than Diluted.

Statutory accommodation of religious exercise should be promoted. It can preclude litigation and its attendant costs to litigants and the courts. It also provides an assurance to people of faith and religious organizations that their rights are secure. Where, as here, a policy of accommodation is initially followed but then abandoned without any change in underlying legal rules, that security is eroded or entirely lost.

Allowing the school district to do that in this case risks signaling to parents, and people of faith in other contexts, that accommodations secured through the legislative process cannot be counted on. That would have negative implications far beyond this particular dispute.

CONCLUSION

Amicus respectfully urges this Court to reverse the decision of the court below.

Respectfully submitted,

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