No. 24-297

IN THE

Supreme Court of the United States

TAMER MAHMOUD, *et al.*,

Petitioners,

v.

THOMAS W. TAYLOR, *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Cited Authorities

Page

Constitutional Provisions

Statutes, Rules and Regulations

Other Authorities

Cited Authorities

Cited Authorities

Page

INTEREST OF *AMICI CURIAE*[1]

Amici are law professors[2] who are interested in preserving parental rights and religious liberty. *Amici* teach at Liberty University School of Law, a school dedicated to equipping future leaders in law with a superior legal education in fidelity to the Christian faith expressed through the Holy Scriptures. This fidelity includes the promotion of unalienable rights like religious liberty and the parental right to educate children.

Professor Rena Lindevaldsen has represented parents and students on a variety of First Amendment claims against school districts, including a parental rights challenge to a school district that administered a psychological assessment to kindergarten students, when the assessment contained questions that were sexual in nature. *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187 (9th Cir. 2005). She has also authored numerous law review articles that deal squarely with the intersections between biblical values, public schooling, and social norms. *Sacrificing Our Children at the Altar of Modern*

1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

2. *Amici* are the following: Vice Dean and Professor of Law Rodney D. Chrisman, J.D., University of Kentucky College of Law; Professor of Law Rena M. Lindevaldsen, J.D., Brooklyn Law School; Professor of Law Joseph J. Martins, University of Tennessee College of Law; Assistant Professor of Law Erik Stanley, J.D., Temple University School of Law; Professor of Law Scott E. Thompson, J.D., Regent University School of Law.

K-12 Public Education, 18 Liberty U.L. Rev. 961 (2024); *Holding Schools Accountable When They Teach Factually Inaccurate Information Concerning Sexual Orientation*, 5 Liberty U.L. Rev. 463 (Spring 2011); *The Fallacy of Neutrality from Beginning to End: The Battle Between Religious Liberties and Rights Based on Homosexual Conduct*, 4 Liberty U.L. Rev. 425 (Fall 2010).

Professor Joe Martins litigated First Amendment rights before joining the faculty at Liberty Law.

Professor Erik Stanley was lead counsel in the case of *Citizens for a Responsible Curriculum v. Montgomery Cnty. Pub. Sch.*, No. CIV.A. AW-05-1194, 2005 WL 1075634, at *1 (D. Md. May 5, 2005), which was a successful First Amendment challenge to pro-LGBT curriculum by the Montgomery County.

As academics and legal scholars at one of the few Christian law schools in the country, each *amicus* has an interest in not only advancing a proper interpretation of the law in this area but also in seeing this Court ensure that school boards protect the constitutional rights of parents. Therefore, *amici* seek to provide the Court with historical evidence supporting a robust interpretation of parental rights in the context of the education of children.

SUMMARY OF THE ARGUMENT

This nation's respect for parental rights has deep roots in history. At common law, it was understood that parents have a duty and corresponding right to raise their children. This right included the ability to direct the child's education. In addition, this right—stemming

from a duty—is crucially important, and has historically been understood as such, in part because the parent-child relationship is the foundation of civil society.

As time progressed, the nation saw the systematization and centralization of public education. As community-based education became available through the efforts of parents, parents chose to delegate some of this authority to educators. Often parents made this choice because formal schooling was financially out-of-reach. But this community-based model, which still gave parents authority over whether and how to educate their children, was then gradually transformed into what we know today: a compulsory public school system, funded by taxpayer dollars, that gives parents—like those in Montgomery County—very little say over what their children learn.

This Court has spoken in years past, in cases like *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Wisconsin v. Yoder*, about parents' right to direct the education and upbringing of their children, even when that right comes into conflict with the state's opinion on how children should be raised. But this right has come to mean little in the modern public-school context, leaving parents without recourse except to remove their children from the system altogether. This lack of a meaningful choice, coupled with school boards' deep disregard and even disdain for parents' religious convictions, demonstrates that this issue is at a boiling point.

Given the deep *regard* for parental rights that is inherent in our legal tradition, and given the obvious threat to those rights in places like Montgomery County, this Court should speak on this issue in a way that restores authority to the right-holders: the parents.

ARGUMENT

Montgomery County School Board member, Lynne Harris, demonstrated her belief that the government—through the actions of the school board—had the authority to disregard a parent's Free Exercise and Fourteenth Amendment rights if the board deemed the parent's religious beliefs hateful. Dismissing a parent's concern regarding the lack of an opt-out for storybooks based on human sexuality and family life, Harris argued: "Saying that a kindergartner can't be present when you read a book about a rainbow unicorn because it offends your religious rights or your family values or your core beliefs is just telling that kid, 'Here's another reason to hate another person.'" Lynne Harris, Remarks at the MCPS Board Meeting at 1:48:00–1:48:15 (Mar. 28, 2023) (transcript available at https://perma.cc/AW3T-DMJB).

Harris' response epitomizes the developing blur between the jurisdictions of the government and the parent in the education of children. An examination of history demonstrates that parents have fundamental rights, which are informed by corresponding duties, in the education of their children. As cases like these continue to arise over the boundaries of government involvement in education, recognition of parental rights is imperative in safeguarding constitutional liberties from government infringement.

I. Under A Limited Jurisdiction Approach, Parents Have A Duty, And Therefore A Right, To Control The Education Of Their Children.

"The American people have always regarded education and acquisition of knowledge as matters of

supreme importance which should be diligently promoted." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). However, "[i] t is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights." *Gruenke v. Sip*, 225 F.3d 290, 295 (4th Cir. 2000). Yet, as time has passed, and societal changes have transformed how people have conducted their daily lives—by moving from smaller hegemonic communities to a more urban and interconnected global world—there has been a shift in how the collective has chosen to further a shared goal of educating the populous. *Id.*

Who bears the duty, and therefore, the corresponding right, to educate children? Parental authority is not a privilege bestowed by the state but instead exists independent of it. The parent-child relationship is one of divine meaning and importance. Across human history, the family has represented the fundamental unit responsible for procreating and raising the next generation. Thus, the parent-child relationship, which is central to the family unit, sits at the cornerstone of society. Parents have been ordained by God to effectuate this relationship, who has bestowed upon mankind the sacred duty to properly raise their offspring. *Deuteronomy* 4:9 (English Standard) ("Only take care, and keep your soul diligently, lest you forget the things that your eyes have seen, and lest they depart from your heart all the days of your life. Make them known to your children and your children's children."); *Ephesians* 6:4 (English Standard) ("Fathers, do not provoke your children to anger, but bring them up in the discipline and instruction of the Lord."). This responsibility is the parent's—and the parent's alone.

The American experiment is a social covenant between the governing and the governed. Through this covenant, the governed delegate authority to the governing powers. However, as the existence of constitutional exemptions and protections clearly implies, universal truths precede and subordinate the governing powers in service of the governed. As James Madison argued in his *Memorial and Remonstrance Against Religious Assessments*:

> Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.

James Madison, *Memorial and Remonstrance Against Religious Assessments* 1 (1785). As stated in the covenant that founding-era Americans made with their government, the God-given rights of the people are "inalienable." *The Declaration of Independence* para. 2 (U.S. 1776). This

protection extends not only to religious freedom, but also to all areas of life outside the limited jurisdiction of the state—including, and of importance here, the fundamental authority of parents to control the upbringing of their children. *See Meyer*, 262 U.S. at 400 ("Corresponding to the right of control, it is the natural duty of the parent to give his children suitable education to their station in life.").

The parental duty to educate involves not only the duty to teach things traditionally seen as anodyne, like reading, writing, and arithmetic, but also to "prepare [one's children] for additional obligations." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925). "[A]dditional obligations . . . include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). The Bible teaches the same principle. *Proverbs* 22:6 (English Standard) ("Train up a child in the way he should go; even when he is old he will not depart from it."). Furthermore, the family unit—made up of parents and children—serves as the foundational unit of civilization, predating and even shaping the structure of the state. *See generally Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (discussing how the family unit is the most foundational tribal structure and has endured as the primary force responsible for inculcating values). Because the family is the primary institution of moral and social formation, the state's jurisdiction must remain subordinate to the exercise of fundamental parental obligations. *See Yoder*, 406 U.S. at 232 ("[The] primary role of the parents in the upbringing of their children is . . . an enduring American tradition."). This parental right is axiomatic. Furthermore, the parental right to educate is not conditional upon whether one is a "model parent[]." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

However, in modern times, the state has largely assumed for itself primary jurisdiction over matters involved in and through education. *See generally Parents Protecting Our Children, UA v. Eau Claire Area School District*, 95 F.4th 501 (7th Cir. 2024) (holding that, absent a concrete injury in fact, a school's involvement in discussions of personal and sexual identity with students without parental consent does not sufficiently infringe on the parent-child relationship to establish standing for a constitutional challenge), *cert. denied*, 145 S. Ct. 14, 14-15 (2024) (Alito, J., dissenting) ("I am concerned that some federal courts are succumbing to the temptation to use the doctrine of Article III standing as a way of avoiding some potentially contentious constitutional questions."); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005) ("While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child.").

By assuming control over education, the government has created a dynamic that raises an unavoidable constitutional question: does the state have the legal authority to override parents' duty to direct the moral instruction of their children? The American system of limited government requires the recognition and protection of parents' rights to educate and train their children in accordance with their moral and religious convictions. When government schooling policies contradict or undermine a family's responsibility to instill moral and spiritual values, the government obstructs parents' ability to fulfill their duties.

Finally, even when parents delegate aspects of education to others—including to the state—such delegation does not sever the parents' responsibility. John Locke, *Second Treatise of Government 32* (1690) ("The nourishment and education of their children is a charge so incumbent on parents for their children's good, that nothing can absolve them from taking care of it."). Parents retain the duty, and therefore the right, to intervene when the state exceeds or violates its delegated authority. *Morrow v. Wood*, 35 Wis. 59, 64 (1874).

II. Parents Have Historically Enjoyed the Right to Determine to What Extent and How Their Child Shall Be Educated.

In 1877, the Illinois Supreme Court articulated a fundamental legal principle reflecting centuries of English common law and early American law: "[T]he policy of our law has ever been to recognize the right of the parent to determine to what extent his child shall be educated." *Tr. of Sch. v. People*, 87 Ill. 303, 308 (1877). This right of the parent to determine the extent of his child's education could be cleft into two questions at common law: (1) does the parent wish to educate the child at all; and (2) if so, how does the parent wish to educate the child? Erik M. Zimmerman, *Defending the Parental Right to Direct Education:* Meyer *and* Pierce *as Bulwarks Against State Indoctrination*, 17 Regent U.L. Rev. 311, 316 (2005).

A. At Common Law, Parents Had Sole Discretion to Determine *Whether* Their Child Should be Educated.

In the early English common law, the parent enjoyed the right and absolute discretion to determine whether

his child would receive an education. *See Bd. of Educ. v. Purse*, 28 S.E. 896, 900 (Ga. 1897) (discussing how the common law would not require a parent to educate his child). Of course, the parent was believed to have a *moral* duty to educate his child, but the imposition of a legal duty to educate was a thing unknown to the law. *See id.*; *see generally* 1 *William Blackstone, Commentaries* *450–51 (describing the parent's moral duty to educate his child as the greatest parental obligation).

This absence of a legal duty to educate was due, in no small part, to many families not having the luxury of deciding to educate their children; it was often in a family's pecuniary interest that a child work to support the family. Zimmerman, *supra*, at 316; *see* Barbara Bennett Woodhouse, '*Who Owns the Child?*': Meyer *and* Pierce *and the Child as Property*, 33 WM. & Mary L. Rev. 995, 1090 (1992) (discussing how minor children historically worked to support their families). Moreover, even if a family did not financially depend upon a child's working, that family still may not have had the requisite economic resources to be able to educate the child. *See* Zimmerman, *supra*, at 316. More affluent families could afford homeschooling, tutoring, sectarian education, or some combination thereof. *See* Robert A. Sedler, *From Blackstone's Common Law Duty of Parents to Educate Their Children to a Constitutional Right of Parents to Control the Education of Their Children*, Forum on Public Policy: A Journal of the Oxford Round Table 1, 4 (2007). But this was not the reality for many families. In other words, under the common law, the right of the child to an education depended not only upon the will of his parent, but also upon his parents' pecuniary ability. Zimmerman, *supra*, at 316 n.27; *Purse*, 28 S.E. at 900.

This held true not only under the English common law, but also under early American law. The American Colonists brought with them from England the notion that it was within the parent's singular discernment to determine whether his child would be educated. *See* Sedler, *supra*, at 5–6 ("[I]n the United States the common law duty of parents to provide for the education of their children . . . was not legally enforceable against the parents."). However, this is not to say that early Americans did not recognize the importance of childhood education. A moral obligation to educate one's child still existed, and many Colonists viewed educating children as a religious duty that was necessary to the development of a successful society. *See Indiana v. Peterman*, 70 N.E. 550, 552 (Ind. 1904) ("One of the most important natural duties of the parent is his obligation to educate his child."). John Winthorp and the Puritans believed that it was their God-given duty to ensure that all in their faith were literate. *See generally* John Winthorp, *A Model of Christian Charity* 1 (1630) (asserting that the Puritans shall establish a colony of model human behavior, thereby implying a duty to educate children to ensure they could read and follow biblical teachings). Many of the American Founders valued education as essential for a successful nation. George Washington, *Farewell Address* 17 (1796) ("Promote then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened."). Thomas Jefferson advocated for publicly funded education to ensure that all who sought it could affordably access it. Thomas Jefferson, A Bill for the More General Diffusion of Knowledge (1779), *in* 2 The Papers Of Thomas Jefferson 526 (Julian P. Boyd ed., 1950). Notwithstanding aspirations

for a largely educated populous, early Americans and the Founders never challenged that the duty to educate ultimately rested upon the shoulders of the parents.

B. At Common Law, Parents had Sole Discretion to Determine *How* Their Child Should be Educated.

Under English common law, parents had the authority to delegate their duty to educate their children to third parties. This delegation was not based on a deference to the "technical subject matter expertise" of educators, *Loper-Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2267 (2024), but rather on the doctrine of *in loco parentis*. Under this doctrine, parents grant educators "such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed." 1 *William Blackstone, Commentaries* *441. Teachers and educators standing *in loco parentis* are "[] vested with all the authority and immunity of the parent." *Lander v. Seaver*, 32 Vt. 114, 122 (1859). Teachers may do what they "reasonably believe[] to be necessary for [the child's] proper control, training, or education." *Ingraham v. Wright*, 430 U.S 651, 661 (1977) (second alteration in original). This delegated authority is necessarily limited in scope and duration.

Such delegation of parental authority to educate at common law was workable for a number of reasons. First, as mentioned, parents had the discretion, in so far as finances permitted, to educate their children. Second, schooling was a private endeavor. Third, schooling was not compulsory. The state did not presume that its

jurisdiction extended into the home in this way. Delegation of parental authority operated in a contractual nature. The curricula were molded by the private interests of those that owned and operated the schools and by the parents involved in sending their children to these schools. In sum, teachers employed the powers that were authorized by the parents hiring them to the degree that those powers were delegated.

The application of *in loco parentis*, of course, faces different challenges in the public schooling context today. Insofar as students disrupt the learning of others, teachers may impose discipline, as such authority falls within the implied delegation of parental authority. *See Ingraham*, 430 U.S. at 683 (holding that corporal punishment, when applied as moderate correction, has long been recognized as part of the authority delegated to teachers). However, when a parent proscribes his child from being exposed to certain subjects in school, the limits of *in loco parentis* must apply, too. If the delegation of authority to educators merely extends the rights and duties assigned by the parents, then a teacher cannot act where the parents have expressly withheld consent. For where "the teacher [is] promptly and fully advised of this wish of the parent, and also kn[ows] that the [child] had been forbidden by his parent from taking that study," the teacher who proceeds to teach the subject anyway exceeds the limits of his delegated authority. *Morrow*, 35 Wis. at 62; *see also School Board District No. 18 v. Thompson*, 103 P. 578, 582 (Okla. 1909) (holding that a student in public school may not be punished by the school for opting out of required curriculum where his parent has instructed him to not participate).

In loco parentis has long been recognized under American law, both before and after the rise of public schools in American culture. *See* S. Ernie Walton, *In Loco Parentis, The First Amendment, and Parental Rights–Can They Coexist in Public Schools?*, 55 Tex. Tech L. Rev. 461, 469–76 (2023) (discussing the history of *in loco parentis* in American education). While educational models have evolved over time, the fundamental nature of this delegation remains unchanged. *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 201 (2021) (Alito, J., concurring) ("[P]arents are treated as having relinquished the measure of authority that the schools must be able to exercise in order to carry out their state mandated educational mission, as well as the authority to perform any other functions to which parents expressly or implicitly agree."). Accordingly, compulsory education laws and the public education system must not work in opposition to the rights of parents to control how their children are educated.

To protect the right of parents to control how their children are educated, it must be understood that the delegation of parental authority to educate in public schools does not extinguish a parent's ongoing duty to his child. Parents retain their duty, and therefore, their right, to restrict, modify, or revoke their delegation of authority at any time. *See Troxel v. Granville*, 530 U.S 57, 66 (Thomas, J., concurring) ("[P]arents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them.").

But some schools, rather than acting as agents of parental delegation, have positioned themselves as the arbiters of what children learn, disregarding parental

objections and imposing curricula without meaningful recourse. This shift has transformed public education from a system that once supplemented parental authority into one that supplants it.

III. The Rise of Centralized Public Education in the Nineteenth and Twentieth Century Saw the Gradual Erosion of Parental Rights in the Education of Children.

In the decades after the Founding, the role of the states in providing public education grew slowly, but inexorably, toward centralized state control over the education of its population. Originally, centralization of the education system was intended to improve access to and the efficacy of education. Stated differently, public schooling was crafted in response to pecuniary struggle. Zimmerman, *supra*, at 316; *see* Sedler, *supra*, at 4. A public education system "allow[ed] needy families to educate their children at public expense." Zimmerman, *supra*, at 316. These early public school systems had two significant characteristics worth mentioning here. First, the parent still retained absolute authority to determine whether his child would be educated. *Id.* at 316 n.29, 317. Second, parents who delegated authority to a public school to teach their children still retained authority over what the children would be taught. *Id.* at 317; *Nebraska ex rel. Sheibley v. Sch. Dist. No. 1*, 48 N.W. 393, 395 (Neb. 1891) ("The right of the parent . . . to determine what studies his child shall pursue[] is paramount to that of the . . . teacher."). The purpose of the public school was not to usurp the parental right to educate, but to aid that right in cases of economic toil. *See* Zimmerman, *supra*, at 316–17.

But gradually, public education shifted from a response to economic need to a mandate that parents must educate their children in public school or some functional equivalent. The reason for this was threefold: first, states hoped that a common public school would ease social tensions between largely Protestant nativist and Catholic immigrant populations; second, these schools would serve as a place for the inculcation of government policies; and third, it allowed for the state to intervene through the new Boards of Education whenever a new public common school was established. Bartrum, Ian C., The Political Origins of Secular Public Education: The New York School Controversy 1840-1842 281, (2008). *Id.* at 317–18; Sedler, *supra*, at 4–5. States began to pass statutes compelling parents to enroll their children in school, and parents who failed to do so were left to suffer legal consequences. Sedler, *supra*, at 5; *see generally Jackson v. Mason*, 108 N.W. 697 (Mich. 1906) (discussing a Michigan law forcing parents to send children between the ages of seven and fifteen to school). The policy underpinning these compulsory education laws "was to ensure that all children would receive a *basic* education." Zimmerman, *supra*, at 318 (emphasis added).

These changes to education systems marked a steep change from earlier years, hollowing out the right of parents to determine *whether* their child would be educated in a public school. Yet many parents still largely retained authority to determine *how* their child would be educated. Zimmerman, *supra*, at 318; *People v. Levisen*, 90 N.E.2d 213, 215 (Ill. 1950) ("The object is that all children shall be educated, not that they shall be educated in any particular manner or place."). However, by the 1900s, this authority, too, was challenged.

A. The History of Public Education in the United States Moves from Local Autonomy to Centralized Control.

Prior to the American Revolution, public education was largely regulated by the individual colonies themselves. Horace B. Sellers. *Constitution and Religious Education* 72-74 (1950). For instance, in 1647, the colony of Massachusetts enacted a general law providing that every township with a population greater than fifty householders (or men) must appoint a master for the education of children, who would be paid out of the general inhabitants or by the parents of students. Nathaniel Southgate Shaler, *United States of America: A Study of the American Commonwealth, Its Natural Resources, People, Industries, Manufactures, Commerce, and Its Work in Literature, Science, Education, and Self-Government* 314 (1894). Thus, while parents were required to create a school, they still retained authority at first over who they hired to teach their children and what subjects would be taught. Massachusetts would retain this system until the establishment of a state Board of Education in 1837. Likewise, New Hampshire provided for the public funding of schoolhouses and schoolmasters in its general law enacted in 1693. William T. Davis, *New England States: Their Constitutional, Judicial, Educational, Commercial, Professional and Industrial History* 1607 (1897). However, despite the state statutes providing for the creation and public funding of schools, the colonies rarely retained any kind of control over the creation of and maintenance of the common school. This control would come later.

The first example of a systematized public elementary school took the form of a "district school," as seen in Massachusetts. These schools were fashioned after the monitorial system. This model, proposed in England by Joseph Lancaster in 1803, would become the starting point for public school models throughout the world by 1806. The monitorial system overcame the limitations of organized education at the time, namely, limited numbers of trained teachers, textbooks that were not standardized, and a general focus on teaching students in the same classroom regardless of age. Shaler, *supra*, at 318. The teacher would teach superior or older students directly, who would then pass the teacher's instructions to inferior or younger students. *Monitorial System*, Encyc. Britannica (Jan. 16, 2015), https://www.britannica.com/topic/monitorial-system. The monitorial system was widely adopted, largely because it only required one schoolmaster, kept costs of running schools low, and allowed for more local control over the quality of education that children received.

However, state school boards objected to the decentralized nature of the "district schools." State superintendents like Horace Mann summarized the new set of problems under three issues: little money, poor schoolhouses, and short school years (because poorer districts could not afford a teacher for a full academic year). Shaler, *supra*, at 321. In addition, parents objected that their children were learning from other students, not the schoolmaster, whose salary they were paying. Horace B. Sellers. *Constitution and Religious Education* 74-75 (1950). This model would start to be replaced in the Northeast as schools consolidated and states began to exercise more control over the education of students through boards of education.

B. As Schools Consolidated Under State Control, Parents' Ability to Direct the Education of Their Children Eroded.

As systematized public schools and school districts were established in the Northeast, parents retained less and less ability to assert their rights over their children's education. The original organizing point for schools was the church. *Id.* at 315. However, another form of organization was also adopted, known as the district. *Id.* Districts were formed out of townships, usually no more than four square miles in area, servicing households with both schools and the maintenance of roads and highways. *Id.* Each of these schools had an average of forty pupils of all ages, and students were usually taught by one single schoolmaster at a time. *Id.* These schoolmasters were employed by a "school committee," but were usually paid by the parents of the schoolchildren who attended the school. *Id.* While this was a beneficial organization for parental rights, especially since parents held the ultimate authority over the hiring of teachers and payment for their services, after a few decades there was a call for reorganization and consolidation in New England.

Led by Massachusetts, New England states started to establish boards of education to ensure that teachers were properly trained, creating the professional teacher that we would recognize today. *Id.* at 318. There was also a push, primarily led by Horace Mann, to establish a modern grading system. *Id.* Under this new system, imported from Prussia, students were organized by age into classes known as grades. Grade classifications allowed teachers to spend more time with each student and the school committees to create consolidated schools

and school districts. *See id.* at 319–20. This new system also allowed for more top-down, state-level control of the curricula that were taught at schools. In 1813, New York created the office of State Superintendent of Education, followed by sixteen other states before 1850. *Id.* at 322. By 1890, all forty-four states in the Union had state superintendents of education. *Id.*

Centralization of the school system led to the degradation of parental control over who taught their children, the curricula that their children were taught, and even what school they funded. Instead of a school being at the center of the local community, now school districts might connect communities that are many miles away from one another. Furthermore, the rise of a professional teacher, both as a class and as a position, meant that parents did not decide who was hired to teach their children. Often, the decision was made by the school committee, which was no longer dependent on the funding of parents to operate local schools. During this time, schools began to be funded by local taxes levied against all inhabitants rather than the parents of the pupils themselves. This expansion largely prevented parents from having a say in the education of their children, especially since the focus of public education shifted from fulfilling parents' duty to ensure that their children are educated, to accomplishing a social good in and of itself.

C. The Issue of Taxpayer Funded Education Was An Unsettled Question, and Early Court Rationales For Supporting This Show The Curtailing of Parental Rights.

In *Stuart v. School District No. 1 of the Village of Kalamazoo*, 30 Mich. 69 (1874), the Michigan Supreme Court heard a novel argument that was a turning point in the state's ability to provide public education. The court held that it was proper to have a regular tax levied against citizens of Michigan for the establishment and maintenance of public schools. *Id.* The court discussed the long history of the state requiring the establishment of a public school system and the fact that taxpayers funded public schools for over twenty years without challenge. *See id.* at 76–83 (discussing the history of the establishment of public schools in Michigan).

The decision in *Kalamazoo* highlights the state of American public education in the latter part of the 19th century. No longer were schools confined to a locality, with teachers chosen by parents teaching basic skills out of primers. Shaler, *supra*, at 315–16, 319–20. No longer were students confined to a three-month or four-month school year for learning. *Id.* at 315–17. Now, states could not only establish public schools but could also fund them out of general taxes levied on the whole population. Before these changes, parental control was largely enforced due to parents' direct funding of public schools. Now, not only could states fund schools out of taxes, but states could and would require that any challenge to the public school system be contemporaneous with their establishment, else the parents' challenges would be foreclosed by statute. Parental rights had been successfully curtailed from

where they were just a century prior,[3] and the deprivation of their rights would only continue.

IV. The Status of Parental Rights in Education Throughout the 20th Century

The 20th century was characterized by the emergence of obstacles to parental rights in education, in light of legislative decisions that infringed on constitutional protections. Landmark decisions such as *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Wisconsin v. Yoder* were pivotal in laying the foundation for both parental rights in the educational upbringing of children and the relationship between parental rights and the Free Exercise Clause.

A. After the Nineteenth Century, the Public School System Continued to Curtail Parental Rights by Enacting Compulsory Education Laws.

By the early 1900s, the public school system dominated the world of education, with private schools encompassing only a small percentage of educational opportunities. Dick M. Carpenter II, *A History of Private School Choice*, Peabody J. of Educ. 336, 338–40 (2012). Though private schools such as Catholic, nonsectarian independent, Jewish, and non-Catholic Christians schools existed, they

3. Of course, neither Petitioners nor amici are advocating for a return to the 19th century model of schooling. Rather, this explanation of historical developments demonstrates that over time, parents lost more authority as the state correspondingly took it.

did not receive government funding and heavily relied on tuition, the generosity of the community, and support from churches. *Id.* at 338. Proponents of the public school system began to push these private schools out of the education market through restricting their growth and limiting the parental right to school choice. *Id.* at 338–39.

In light of the push for public education, concerns developed over the feasibility of school choice. The lack of public funds for private education inhibited the idea of "universal school choice." *Id.* at 338. Instead, the market supported families with the means to afford private school tuition and those who received donations for such fees. *Id.* Cases throughout the twentieth century supported parental rights in education. However, legal acknowledgement of a parent's choice to leave the public school system for private education and to direct their child's education did not render these choices workable for every family. *Id.* at 339. The public school system provides a public benefit based on public funding through taxes and government support, and the functional availability of school choice is not a reality for many parents. *Id.* While conversations surrounding vouchers and support for school choice began to emerge in the 1970s and 1980s, parental rights were still curtailed as issues surrounding the neutrality of aid to religious and independent schools surfaced. *Id.* at 340–41.

Additionally, the 1900s marked a pivotal shift in the United States's public education system as compulsory education laws were officially enacted in every state. Compulsory education laws require children who are of school age to attend school for certain periods of time. Emily Rauscher, *Hidden Gains: Effects of Early*

U.S. Compulsory Schooling Laws on Attendance and Attainment by Social Background, 36 Educ. Evaluation and Pol'y Analysis 501, 502 (2014). Compulsory education laws became an increasing topic of discussion as states sought to expand their impact beyond school attendance and as legislation interfered with parental liberties under the Free Exercise Clause. As school districts centralized and increasingly came under the control of the state through state superintendents, through departments of education, and even through local school boards acting as arms of local governments, parental rights over the education of children were gradually and consistently curtailed.

These changes meant that parents now a choice between three realities. One, accept the public benefit of sending children to public school, but forfeit all rights to have a say in the education of their children other than participation in political processes. *See McDaniel v. Paty*, 435 U.S. 618, 626 (1978) ("To condition the availability of benefits including access to the ballot upon this appellant's willingness to violate a cardinal principle of his religious faith by surrendering his religiously impelled ministry effectively penalizes the free exercise of his constitutional liberties."). Two, send children to private school where parents have slightly more freedom to direct the education of their children, but where school is, at best, more expensive or, at worst, unaffordable. Three, remove children from the school system entirely and homeschool, instead; but there, too, the parents can face enormous expense, resulting often from the removal of one parent from the workforce. While the parents, of course, have the authority to select among these realities, the fact remains that the first is the only one that many

parents find feasible. Contrasted with the tradition of parental authority over education, which reflects a duty and corresponding right, the state of affairs in the nation today is one in which an abrogation of parental rights is *the* reality for many families—like those in Montgomery County.

B. Foundational Cases Show That Parents Retain the Rights They Possessed Under the Common Law Despite The Challenges to Those Rights.

Certain landmark cases from this Court aided in protecting parental rights in education from government interference and laid the foundation for approaching the Free Exercise Clause and Fourteenth Amendment issues in the educational context today. In addition, state courts, hearing cases largely from Catholic parents who sought to avoid having their children participate in Protestant instruction, increasingly decided these issues under constitutional law rather than common law. See, *e.g., Spiller v. Inhabitants of Woburn*, 94 Mass. 127 (1866) (citing state free exercise provision); *Hardwick v. Board of Sch. Trs.*, 205 P. 49 (Cal. App. 1921) (citing First Amendment and state free exercise provision); *People ex rel. Vollmar v. Stanley*, 255 P. 610 (Colo. 1927) (citing First Amendment and state free exercise provision); *State v. Weedman*, 226 N.W. 348, 354 (S.D. 1929) (citing "the broad constitutional ground of an infringement of religious liberty").

In *Meyer*, a teacher taught a student the German language in violation of a state statute prohibiting the teaching of any modern language other than English to students who had not passed the eighth grade. 262 U.S.

at 396–97. This Court placed heavy emphasis on parents' liberty interests in educating their children under the Fourteenth Amendment. *Id.* at 399.

> The liberty guaranteed under U.S. Const. Amend. XIV denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. The state had exceeded its authority by interfering with parental rights to engage educators to teach their children. *Id.* at 402.

In *Pierce*, private primary schools argued that Oregon's compulsory education law, applying to children between the ages of eight and sixteen, interfered with parental rights and harmed their business interests. *Pierce*, 268 U.S. at 530, 532–33. Parents who failed to enroll their children in public schools would be charged with a misdemeanor. *Id.* at 530. This Court referenced its decision in *Meyer v. Nebraska* in holding the law unreasonably interfered with the right of parents to decide how to raise and educate their children. *Id.* at 534. "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

In *Wisconsin v. Yoder*, this Court addressed parental rights in education in light of the Free Exercise Clause. The plaintiffs there, belonging to the Amish tradition, believed that children should not be sent to public school after the age of fourteen. *Yoder*, 406 U.S. at 209. The plaintiffs believed that at that stage of a child's development, the child should engage in a more informal style of learning through doing, which meant they could not be exposed to worldly influences past the eighth grade. *Id.* at 211. This belief came into conflict with Wisconsin's compulsory education law, which required the children to attend school for two more years. *Id.* at 208. The plaintiffs argued the law violated their rights under the First and Fourteenth Amendments. *Id.* at 208–09. This Court stated:

> A State's interest in universal education, however highly [the Court] rank[s] it, is not totally free from a balancing process when it impinges on 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 so long as they . . . "prepare [them] for additional obligations."

Id. at 214 (alteration in original) (quoting *Pierce*, 268 U.S. at 535). Indeed, "The duty to prepare the child for 'additional obligations' . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Id.* at 233 (quoting *Pierce*, 268 U.S. at 535). Therefore, requiring the Amish children to attend school in compliance with the compulsory education law was a violation of the Free Exercise Clause. *Id.* at 236.

Increased governmental involvement in the education system in the twentieth century led to cases that underlined the importance of protecting parental rights in education. While these decisions were important in delineating some boundaries of state authority, they did not make it universally practical for parents to exercise their rights. Carpenter, *supra*, at 339. Further legal recognition of parental rights in education is imperative, therefore, to protect parents whose beliefs do not align with those of the state.

V. Today, the Court Must Clearly Emphasize Parental Rights in Education in Order to Prevent Further State Infringements Upon These Constitutional Liberties.

As demonstrated, the ultimate duty to oversee the education of children belongs to parents. It is therefore the parents' right to stop those who impede their ability to fulfill this duty. This relationship is the foundation of all common law, articulated by Blackstone as "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." 3 *William Blackstone, Commentaries* *23. While parents can delegate this duty to others, the ultimate responsibility for ensuring these duties are fulfilled remains with the parents.

The facts of this case should give rise to an easy victory for parents: Provide them an opt-out for intimate material related to human sexuality. The parents here do not seek to become school administrators, and they do not ask for control over all of school curriculum. The parents merely seek to protect their own jurisdiction: the custody, care, and control of their children.

Today, forty-seven states (including Maryland) and the District of Columbia require opt-outs or opt-ins for sex education in public schools. Brief for Petitioner at 15, *Mahmoud v. Taylor* (2024) (No. 24-297). Allowing an opt-out is consistent with the constitutional protection of parental rights and aligns with fundamental principles that have existed since before this nation's founding. These policies reflect the principle that parents have the duty and right to instruct children on human sexuality and family life. It cannot be the case that by simply avoiding the words "sex education," schools can get around this common-sense principle, one which is reflected in the policies of the overwhelming majority of states. Thus, it is imperative that school boards respect parental jurisdiction by continuing to provide opt-outs under these circumstances—even if the material is not labelled as "sex education." An opt-out for the plaintiffs here, so clearly required by principles informing the doctrine of parental rights, is a minimal step that states can take to respect those rights. It is, essentially, the least that a public school district can do when the district wishes to instruct children on matters of such fundamental and moral importance.

Only through recognition of these critical parental duties, and the rights that flow from them, will these inherent constitutional liberties be safeguarded from state infringement. Moving forward, clear boundaries must be established delineating the state's delegated authority and the jurisdiction of the parent. But at this stage, disallowing an opt-out when dealing with exposure to literature related to human sexuality not only infringes upon parental rights, but also subjects parents to the inequitable choice of being denied a public benefit or

forfeiting their God-given rights. This Court has the opportunity here to begin placing the authority back in the hands of the parents, those to whom it rightfully belongs.

CONCLUSION

Therefore, in light of this historical tradition, and in furtherance of a robust protection for parental rights, this Court should reverse the decision of the Fourth Circuit.

Respectfully submitted,

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