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 FOR *AMICI CURIAE* DEFENSE OF FREEDOM INSTITUTE FOR POLICY STUDIES; JILLIAN BALOW; MICHAEL DIMATTEO; PATRICK GARRISON; CLAUDINE "BEANIE" GEOGHEGAN; NATHAN GWINN; MARK LENHARDT; TAMMY RAE MCMAHON-GORAN; PAUL ROSSI; DICKY SHANOR; AND MITCHELL M. ZAIS IN SUPPORT OF PETITIONERS

DONALD A. DAUGHERTY, JR.
Counsel of Record
MARTHA A. ASTOR
DEFENSE OF FREEDOM
INSTITUTE FOR POLICY STUDIES
1455 Pennsylvania Avenue NW
Suite 400
Washington, DC 20004
(414) 559-6902
Don.Daugherty@dfipolicy.org
Counsel for Amici Curiae

March 10, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Brief of *Amici Curiae* in Support of Petitioners

Pursuant to Supreme Court Rule 37.2, *amici curiae* identified below respectfully submit this brief in support of Petitioners.[1]

Statement of Interest of Amici Curiae

Amicus the Defense of Freedom Institute for Policy Studies ("DFI") is a nonprofit, nonpartisan 501(c)(3) institute dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker, and to protecting the civil and constitutional rights of Americans at school and in the workplace. DFI was founded in 2021 by former senior leaders of the U.S. Department of Education who are experts in education law and policy. As part of its mission, DFI focuses on protecting students and their parents from the dangers to First Amendment rights presented by conduct like that at issue here by the Montgomery County Board of Education (the "Board").

Individual amici ("Amici"), identified below, are current and former educators with 166 total years of experience as superintendents, administrators and teachers in K-12 public school systems in ten states across the country. Amici have specific and unique expertise with "notice and opt-out" processes like those provided for in the Board's 2022-2023 Religious Diversity Guidelines (the "Guidelines"), as well as

---

[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* or their counsel made any monetary contributions to fund the preparation or submission of this brief.

otherwise making academic accommodations for students whose parents prefer for religious or other personal reasons that they not participate in portions of the standard curriculum.

Specifically, amicus Jillian Balow is Chief Strategy Officer with an education technology corporation. Previously, she served as Superintendent of Public Instruction for Virginia and for Wyoming for a total of ten years. Before that, she taught English Language Arts in public middle and high schools in Wyoming for nine years.

Michael DiMatteo has taught history, government, and related subjects at six different public high schools in Illinois over thirty-five years.

Patrick Garrison is Founder and President of The True Corrective, an education startup in New York. Previously, he taught history, economics and psychology at public high schools in New York for seven years.

Claudine "Beanie" Geoghegan is Co-founder of, and currently the Manager of Content & Solutions for, Freedom in Education in Kentucky. Previously, she taught full-time and as a substitute for grades K-5 in public schools in Kentucky and Georgia for twelve years.

Nathan Gwinn is currently principal of a Catholic high school in Tennessee. Previously, he served as an assistant principal and biology teacher at rural and urban public middle and high schools in Tennessee, Washington, and Kentucky for twelve years.

Mark Lenhardt is a middle school activities director for a public school system in Wyoming.

Previously, he taught social studies in public high schools in the state for fourteen years.

Tammy Rae McMahon-Goran is a teacher for grades K-5 in public school systems in California. She has taught full-time for thirty-five years and has been a long-term substitute teacher for four.

Paul Rossi is Director for Terra Firma Teaching Alliance, a national network for traditional educators. Previously, he taught math at public and public charter high schools in New York for fourteen years.

Dicky Shanor is Chief of Staff at the Wyoming Department of Education. Previously, he served as Chief of Staff at the Virginia Department of Education. He has served in those roles for a total of ten years.

Mitchell M. Zais is a retired Brigadier General in the United States Army. He served as Superintendent of Education for South Carolina for four years. From 2018 to 2021, he worked in the U.S. Department of Education as Deputy Secretary and Acting Secretary.

SUMMARY OF ARGUMENT

This brief focuses on the governmental interests asserted by Respondents to justify rescinding the right of parents to receive notice and to opt their children out of participation in reading and discussion of "LGBTQ-Inclusive Books as part of the English Language Arts Curriculum." Pet.App.10a. Respondents' asserted interests in compelling schoolchildren to read these books (the "Storybooks"), starting in pre-kindergarten, boil down to either administrative considerations, which do not justify

restrictions on activity protected by the First Amendment, or legally dubious concerns, which can be ignored.

Respondents' complaints about the practical difficulty of offering parental opt-out rights also do not comport with the considerable experience of Amici. Contrary to Respondents' assertion, implementing notice and opt-out processes for controversial portions of a curriculum is common and presents no significant burden for K-12 public schools. Furthermore, the administrative burden that Respondents complain of is self-inflicted; that large number of parents want to protect their children from reading materials, which creates additional work for school office staff, simply means that Respondents should never have tried to make the material part of the curriculum in the first place. Respondents' disingenuous classification of LGBTQ+ texts as part of the English Language Arts ("ELA") curriculum, not human sexuality (for which parental opt-out is mandated by Maryland statute), further reveals a slippery approach to parental rights.

Because the majority in *Mahmoud v. Taylor*, 102 F.4th 191 (4th Cir. 2024) found no cognizable burden on Petitioners' constitutional rights, it did not discuss Respondents' governmental interest at any length. However, it is impossible to adequately consider whether Petitioners' rights are burdened in complete isolation from the asserted governmental interest given that here, it is the governmental interest that led to the alleged burden in the first place. That is, Respondents' reasons for rescinding parental opt-out rights and the rescission of those rights are two sides of the same coin. Notwithstanding the formal sequence set forth in, for

example, *Kennedy v. Bremerton*, 597 U.S. 507 (2022), under which the asserted governmental interest is not addressed until after plaintiffs have established a burden on their Free Exercise rights, as a substantive matter, the Court should not entirely exclude that interest from its threshold analysis. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) provides a basic framework to use here.[2]

Teaching children the tolerance and respect for others that is required in a civil society is different from indoctrinating them with new ideologies that run counter to their families' religious beliefs. As public schools increasingly encroach on aspects of a child's upbringing that are beyond the core curriculum of reading, writing, and mathematics, and that were previously left to parents, the importance of constitutional bulwarks like the First Amendment increases. This Court should reinforce the Free Exercise bulwark and reverse the decision below.

ARGUMENT

I. THE COURT SHOULD CONSIDER THE STRENGTH OF RESPONDENTS' ASSERTED GOVERNMENTAL INTERESTS.

The analytical framework used in *Yoder* allows this Court to consider the governmental interest

[2] In addition, as Petitioners contend (Pet.Br.3a), a burden exists and strict scrutiny should apply, which would require that any governmental interest be compelling. Respondents' administrative interest is not.

asserted here. *Yoder*, which was decided before the Free Exercise analysis was more formalized by *Emp't Div. v. Smith*, 494 U.S. 872 (1990) and later cases, employed a straightforward balancing test, weighing the state's interest in compulsory school attendance beyond the eighth grade against the right of the Amish to freely practice their sincerely-held religious beliefs. *Yoder*, 406 U.S. at 214 ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). Here, there is no dispute that Petitioners' religious claims are legitimate and made in good faith, and they can only be "overbalanced" by government "interests of the highest order."

Like Wisconsin in *Yoder*, Respondents effectively contend that their interests for rescinding parental opt-out rights, as described in an Associate Superintendent's declaration, are "paramount" to Petitioners' undisputed claim that protecting their children from exposure to materials like the Storybooks "is an essential part of their religious belief and practice." *Yoder*, 406 U.S. at 219. This leads to the absurd situation here, where teachers have more discretion over when and how children will be exposed to controversial materials than the children's parents, who have no say in the matter. *See* Pet.App.12a (quoting Pet.App.89a-90a ("'Teachers have a choice regarding which [of the Storybooks] to use and when to use them throughout each unit . . . .'")).

Although the lower courts in the instant case applied rational basis scrutiny, *Yoder* seemed dubious that such review would be adequate in situations like

here. *See Yoder*, 406 U.S. at 233 ("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"). Invocation by the government of the need for administrative efficiencies in the face of alleged infringement on First Amendment rights deserves skepticism.

As this Court has recognized, the tiers of scrutiny used in much constitutional analysis are a judicial construct of relatively recent vintage. *See, e.g., United States v. Rahimi*, 602 U.S. 680, 731-32 (2024) (Kavanaugh, J., concurring) (means-end tests "are a relatively modern judicial innovation in constitutional decisionmaking," and appear to have been adopted "'by accident' in the 1950's and 1960's . . ., 'rather than as the result of considered judgment'") (internal citations omitted). The Court's review here should not be overly constrained by analytical formalism, but should consider the substance of Respondents' excuse for making it more difficult for Petitioners to raise their children in their religious faith.

II. RESPONDENTS' ASSERTED INTERESTS PROMOTE EITHER MERE ADMINISTRATIVE CONVENIENCE OR LEGALLY DUBIOUS ENDS.

The relevant government interest here is not pedagogical but Respondents' goal for rescinding the rights of parents to opt their children out of a portion of one aspect (viz., ELA) of the broader school curriculum. Respondents' earlier recognition of parental opt-out rights for the 2022-23 school year undermines any claim later that compulsory exposure to the Storybooks is essential to furthering some broader educational interest. If Respondents did not believe in 2022 that such exposure was critical to ELA development, they cannot credibly contend that it is now. Texts other than the Storybooks have for many decades been, and can still be, "used to assist students with mastering reading concepts like answering questions about characters, retelling key events . . . and drawing inferences about story characters based on their actions." Pet.App.90a.

Further, as Respondents admit, their real purpose for adding the Storybooks to the ELA curriculum in 2022 was "to make [the] curriculum more representative of and inclusive to students and families" in Montgomery County. Pet.App.53a; *see also id.* at 615a ("Central office leaders have communicated to principals that the purpose of the materials is to portray and represent LGBTQ+ characters in literature, for students to be able to see themselves and/or family in their learning, and to promote inclusivity"); *id.* at 622a ("Is

heteronormativity reinforced or disrupted? Is cisnormativity reinforced or disrupted?"); *id.* at 629a (teachers should "[d]isrupt the either/or thinking" of students about gender). Regardless of the merits of, for example, promoting non-heteronormative inclusivity among kindergarteners, such purposes do not directly relate to ELA, and are not needed to develop children's skills in that area.[3]

Although "[w]hat motivated the policy change [rescinding opt-out rights in March 2023] is largely unknown," Respondents offer three "after-the-fact explanations" through the Associate Superintendent's declaration. Pet.App.15a.

First, the declaration "claims that the original notice-and-opt-out policy had led to 'high student absenteeism,' and it cited concerns from principals and teachers regarding the feasibility of 'accommodat[ing] the growing number of opt out requests without causing significant disruptions to the classroom environment and undermining [the school system's] educational mission.'" Pet.App.15a-16a (quoting J.A. 542-43). Second, the declaration "represented that allowing notice and an opt-out option placed too great a burden on school staff charged with (1) remembering which students could be present during lessons involving the Storybooks or otherwise be permitted access to those books, and (2) developing alternative plans for those students who could not be present across a range of language-arts

[3] If anything, the Storybooks series is more pertinent to "instruction related to family life and human sexuality," for which opt-out rights are statutorily mandated, Md. Code Regs. 134.18.01(D)(2), as discussed *infra*.

activities." *Id.* at 16a. "Lastly, the declaration recounts the Board's concern about stigmatizing and isolating individuals whose circumstances were reflected in the Storybooks." *Id.*

This Court should "searchingly examine the interests" put forth by Respondents in the declaration, and "require a more particularized showing from [them] on this point." *Yoder*, 406 U.S. at 221, 227. They cannot merely describe their interests "at a high level of generality [because] the First Amendment demands a more precise analysis. Rather than rely on 'broadly formulated interests,' courts must 'scrutinize[]" the government's assertions. *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021). The three interests cannot survive such review.

First, Respondents' concern about "high student absenteeism" and the "growing number of opt out requests" simply demonstrates that many families object to the Storybooks portion of the ELA curriculum, which hardly supports denying them the option of protecting their children from it. The assertion of Free Exercise rights – even when done by numerous individuals – cannot be a proper basis for Respondents' conclusion that allowing parental opt-out was no longer "feasible" under the Guidelines.

If anything, the large number of families wanting to opt out indicates that Respondents made little effort to obtain their input before implementing the Storybooks program, which is consistent with concerns raised by principals and teachers in a November 2022 memorandum to the Board ("November 2022 Memo"). *See* Pet.App.618a (flagging as an issue that "given the sensitive nature of the

materials, there needs to be a more robust, inclusive, public-facing process that includes deliberate attempts to include administrators, teachers, and parents as stakeholders"); *see also id.* at 619a (expressing concern that school system's "communication around the [Storybooks] materials and messaging has been wrought with confusion"). This asserted interest just begs the question, why did Respondents select a program that so many parents (not to mention principals and teachers) object to?

The second asserted reason relates to the first: "too great a burden on school staff" results directly from Respondents' decision to foist a hugely unpopular set of books on children without their parents' consent. Any "feasibility" issues are of Respondents' own making. Moreover, in Amici's extensive experience, Respondents' assertion about the extent of the burden is simply not true, as discussed *infra*. *See also Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1080 n.9 (6th Cir. 1987) ("I do not think there is any evidence that actually accommodating pupils in practice need be as difficult as the state contends.") (Boggs, J., concurring).

Finally, concern about "stigmatizing and isolating" students "whose circumstances were reflected in the Storybooks" reinforces the conclusion that Respondents prioritize the classroom status of those students over the constitutional rights asserted by Petitioners. The November 2022 Memo shows worry among teachers and principals that responses suggested by the school administration ("Suggested Responses") to children's questions about the Storybooks may be "dismissive of religious beliefs," or

foster "shaming comment[s] to a child." Pet.App.619a-620a. In addition, the November 2022 Memo indicates that the Suggested Responses about gender being "a guess" "based on our body parts" that is "[s]ometimes . . . right and sometimes . . . wrong" are "[s]tated as a fact," even though "[s]ome would not agree this [i]s a fact." *Id.* at 620a. The Storybooks simply confuse children and, for no good reason, create a disconnect between what they are taught at school and at home. *See Tatel v. Mt. Lebanon Sch. Dist.*, No. 22-837, 2024 U.S. Dist. LEXIS 176782, at *5 (W.D. Pa. Sept. 30, 2024)("How to resolve whether the teacher's beliefs or the Parents' beliefs are correct would be beyond the ability of most first graders.").[4]

As the concerns expressed in the November 2022 Memo show, Respondents never intended for the Storybooks to be presented in a neutral manner but, instead, wanted to promote positions that are hostile to the religious beliefs of families like Petitioners'. *See, e.g.,* J.A.45-46 (acknowledging that children "may come away from public school instruction [like the Storybooks] with a new perspective not easily contravened by their parents"). This Court has rejected such governmental hostility, *see Fulton*, 593 U.S. at 533; *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 584 U.S. 617, 638-39 (2018), and should do so here.

---

[4] *Tatel* involved Free Exercise and related claims brought by parents after a school's Transgender Awareness Day, in which first graders were taught, like in the instant case, that "when children are born, parents make a guess whether they're a boy or a girl. Sometimes parents are wrong." *Tatel*, 2024 U.S. Dist. LEXIS 176782, at *2.

At bottom, the three interests described in the declaration either are improper as a legal matter or amount to mere considerations of administrative convenience. The former can be ignored and with regard to the latter, appeals by the government to administrative efficiencies in the face of alleged infringement on First Amendment rights are properly viewed with skepticism.

In *Americans for Prosperity v. Bonta*, 594 U.S. 595 (2021), this Court called out the administrative interest cited by the State of California to explain its infringement on First Amendment rights of association. In *Bonta*, charitable organizations challenged California's requirement that before soliciting funds in the state, they disclose to its Attorney General their major donors' identities. *Id.* at 618-19. The Court found that the State's asserted interest in preventing charitable fraud was largely pretextual, and that its real interest – administrative ease – did not justify the disclosure requirement:

> California's interest is less in investigating fraud and more in ease of administration. This interest, however, cannot justify the disclosure requirement. The Attorney General may well prefer to have every charity's information close at hand, just in case. But "the prime objective of the First Amendment is not efficiency." Mere administrative convenience does not remotely "reflect the seriousness of the actual burden" that the demand for [donors' identities] imposes on donors' association rights.

Id. at 614 (citation and internal quotation marks omitted). Similarly, Respondents may prefer that all Montgomery County schoolchildren participate in the Storybooks programs. (The Suggested Responses and November 2022 Memo indicate that they do.). However, this administrative interest does not reflect the actual, serious burden that forcing children to read and participate in discussions about the Storybooks imposes on Petitioners' constitutional rights to freely practice their religion and raise their children as they see fit. *See Bonta*, 594 U.S. at 618 (burden on First Amendment rights "cannot be justified on the ground that . . . the State's interest in administrative convenience is sufficiently important"); *Friends of the Vietnam Mem. v. Kennedy*, 899 F. Supp. 680, 686 (D. D.C. 1995) (government's claim that complete ban on sale of t-shirts on Capital Mall needed because of difficulty regulating vendors rejected because "[a]dministrative convenience is not a justification for significant restrictions on First Amendment activity").

In *Yoder*, this Court accepted as true the State's argument that compulsory secondary education would prepare citizens both able to preserve an open political system of freedom and to act as self-reliant participants in society. 406 U.S. at 221. However, even those interests, which clearly exceed Respondents' in importance, could not justify the burden on Free Exercise rights in *Yoder*.

Of course, "an administrative problem of such magnitude" that it will "render[] the entire statutory scheme unworkable" may justify a burden on Free Exercise rights. *See Sherbert v. Verner*, 374 U.S. 398, 408-09 (1963) (citing *Braunfeld v. Brown*, 366 U.S.

599, 605 (1961) (rejecting Free Exercise challenge to state criminal statute forbidding certain retail sales on Sundays by members of faith requiring abstention from work on Saturdays)). However, this is not the case with modest parental opt-out rights like those at issue here. Petitioners "seek[] only an accommodation that will allow" them to raise their children "in a manner consistent with [their] religious beliefs; [they do] not seek to impose those beliefs on anyone else." *Fulton*, 593 U.S. at 542.

While the unique ways of Amish life justified an exemption from all compulsory schooling beyond the eighth grade, *see Yoder*, 406 U.S. at 216-18, Petitioners only seek relief from one portion of the ELA curriculum. Contrary to the *Mahmoud* majority's assertion, an "unusual degree of separation from modern life" should not be required for recognition of fundamental Free Exercise rights. Pet.App.38a n. 15.

III. SCHOOL NOTICE AND OPT-OUT REQUIREMENTS ARE UBIQUITOUS AND NOT DIFFICULT TO ADMINISTER.

As Judge Boggs suspected in his *Mozert* concurrence, *see supra*, a notice and opt-out process like that provided for by the Guidelines is not difficult to administer, consistent with Amici's combined 166 years of experience at public schools in ten states and contrary to the assertions in Respondents' declaration.

Many states have statutory notice and opt-out provisions for use when parents do not want their children to participate in parts of a public school's

curriculum that conflict with the family's religious beliefs, *see, e.g.,* 22 Pa. Code § 4.4(d)(3) (guaranteeing parents' "right to have their children excused from specific instruction that conflicts with their religious beliefs"); Utah Code Ann. § 53G-10-205 (ensuring opt-out for "student's parent [to] waive the student's participation in any aspect of school that violates the student's or the student's parent's religious belief or right of conscience"), or are otherwise objectionable, *see, e.g.,* Haw. Dep't of Educ., Bd. of Educ. Policy 101-13 & Haw. Dep't of Educ. Reg. No. 2210.1, https://perma.cc/6QAT-B6EL (opt-outs for instruction on "controversial issues"); Minn. Stat. § 120B.20 (opt-out for any "instruction" where a parent "objects to the content"). For instruction on issues regarding human sexuality specifically, forty-seven states provide statutory parental opt-out or opt-in rights. *See, e.g.,* Tenn. Code Ann. §§ 49-6-1305, 49-6-1307, 49-6-1308. (Maryland mandates parental opt-out rights for any "instruction related to family life and human sexuality objectives." Md. Code Regs. §§ 13A.04.18.01(D)(2)(e)(i) & (iii).) Various other types of school notice and opt-out requirements abound. *See, e.g.,* 20 U.S.C. § 1232h (requiring that school districts provide parental notice and opt-out for certain student information surveys, marketing, and physical exams and screenings).

Given the ubiquity of legal requirements that parents be given notice and the choice to opt their children out of certain types of instruction and activities, public schools have long had to be adept at handling such requests. Fortunately, the rise of the internet and other technological developments have made it much easier for schools to identify and make

accommodations for children whose parents choose to opt them out of a portion of the curriculum. School districts offer abundant notice and opt-out resources online, *see, e.g.,* Harrisonburg, VA Public Schools, *Healthy Life Skills Opt-Out Forms,* https://www.harrisonburg.k12.va.us/District/Department/26-Student-Support/5460-Untitled.html (last visited Mar. 9, 2025); Naperville, IL 203 Unit Community School Dist., *Curriculum Opt-Out*, https://www.naperville203.org/Page/10614 (last visited Mar. 9, 2025); Frederick County MD Public Schools, *Opt Out Form For Family Life*, https://apps.fcps.org/forms/parents-students-curriculum-instruction-innovation/159 (last visited Mar. 9, 2025); Middle Township, NJ, *Opt Out Forms Health 2024-2025*, https://middletownshippublicschools.org/opt-out-forms/ (last visited Mar. 9, 2025), which in turn helps them perform data collection and evaluation, and other related tasks, electronically. Respondents are no exception, providing various opt-outs online (other than the one sought by Petitioners). *See, e.g.,* Montgomery County, MD Public Schools, A*nnual Notice for Directory Information and Student Privacy*, https://ww2.montgomeryschoolsmd.org/departments/forms/pdf/281-13.pdf (last visited Mar. 9, 2025).

The Storybooks program is more properly considered part of human sexuality instruction, not ELA. How learning about LGBTQ+ issues furthers children's ability to read and write is difficult to understand. It is hard not to conclude that Respondents placed the Storybooks in the ELA curriculum to avoid the opt-out required by Maryland

law. In fact, principals and teachers called out Respondents' disingenuous classification in their November 2022 Memo. *See* J.A. at 621a ("Throughout this document, many of the answers provided contradict the overarching messaging and seem to support the explicit teaching of gender and sexual identity"); Pet.App.616a (although the Board "communicated that [the school system] is not teaching about sexual orientation and gender identity as stand alone concepts in elementary school . . . , several of the [Story]books seemingly contradict this message"). Amici concur with the Montgomery County principals and teachers that the Storybooks are not properly part of the ELA curriculum, and should be subject to notice and opt-out rights so that parents are not hindered in raising their children in their religious faith.

CONCLUSION

For the foregoing reasons, as well as those set forth in Petitioners' merits brief, Amici and DFI respectfully request that this Court reverse the decision below.

Respectfully submitted,

DONALD A. DAUGHERTY, JR.
Counsel of Record

MARTHA A. ASTOR
DEFENSE OF FREEDOM
INSTITUTE FOR POLICY STUDIES
1455 Pennsylvania Avenue NW
Suite 400
Washington, DC 20004
(414) 559-6902
Don.Daugherty@dfipolicy.org
Counsel for Amici Curiae

March 10, 2025