No. 24-297

In the Supreme Court of the United States

TAMER MAHMOUD, *et al.*,

Petitioners,

v.

THOMAS W. TAYLOR, *et al.*,

Respondents,

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

BRIEF OF *AMICI CURIAE* PARENTS NICHOLAS BROWN, ZEINA EL DEBS, TIMOTHY JANSS, DAGMAR JANSS, AND STEPHANIE PATE *in Support of the Petitioners*

Frederick W. Claybrook, Jr.
(Counsel of Record)
Claybrook LLC
655 15th Street, NW., Ste. 425
Washington, D.C. 20005
(301) 622-0360
rick@claybrooklaw.com

Paul R. Rivera
Paul R. Rivera,
Attorney at Law
P.O. Box 394
Rockville, MD 20848
(301) 949-6367
law.rivera@gmail.com

Steven W. Fitschen
James A. Davids
National Legal Foundation
524 Johnstown Road
Chesapeake, Va. 23322
(757) 463-6133
sfitschen@nationallegalfoundation.org

Counsel for *Amici Curiae*

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STATEMENT OF INTERESTS[1]

The *amici curiae* are all parents of school children currently enrolled in the Montgomery County Public Schools ("MCPS"). They have each requested and been denied an opt-out for their children from MCPS's recent decisions to infuse instruction about LGBTQ+ matters ("LGBTQ+ instruction") throughout the curriculum, most notably by requiring "LGBTQ-Inclusive Texts" to be read in classes starting in kindergarten, purportedly as part of the English and Language Arts curriculum. The *amici* parents, therefore, have a strong interest in the outcome of this appeal, as their children are at risk of being instructed with respect to LGBTQ+ issues in what they believe is an inappropriate manner considering their children's ages, personalities, and circumstances. For most of the *amici curiae*, the stated purpose of MCPS's LGBTQ+ instruction to normalize and valorize alternative sexual behavior is also in violation of their sincerely held religious beliefs.

SUMMARY OF ARGUMENT

This case addresses a situation that has become all too common in our public schools. Respondent MCPS has adopted a policy of requiring teachers to use "LGBTQ+-Inclusive Texts" in all classes, starting in pre-K, and parents object to this policy because they want to protect their children

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

from the school's chosen instruction about alternative lifestyles. MCPS has frustrated the parents' efforts to do so by refusing to disclose to parents which specific materials teachers will use with their children and when teachers will use them. This "No-Opt-Out, No-Notice" policy not only violates free exercise rights, but also the parents' fundamental rights to direct the education and ethics of their children. These two constitutional rights work hand in hand in this instance, and violation of neither is ameliorated by parents being able to instruct their children about these matters outside of school.

Finally, a ruling in the parents' favor in these circumstances does not open the floodgates to allow parents a veto power over any part of public school curriculums, as the state already provides an opt-out for sexual material of this type. That legislative opt-out appropriately recognizes the traditional centrality of parental control over this important area of their children's education, the importance of parental involvement in deciding when their children are best ready and able to receive such instruction, and the differences of religious opinion concerning sexual practices in the community.

ARGUMENT

I. Absent Notice and Opt-out, Public School Instruction Can Infringe Free Exercise and Parental Rights

MCPS has instructed its teachers to use selected LGBTQ+-Inclusive Texts at some time during the school year. At the same time—in an obvious attempt to frustrate parental and free

exercise rights—it has instructed teachers *not* to give advance notice to parents of when they will use the texts, *not* to allow parents to review the class materials in advance, and *not* to inform parents when they have conducted such instruction. Pet.App.606a-608a. This violates the constitutional rights of parents.

Free exercise rights are buttressed by fundamental parental rights in this instance. Parents have a fundamental right to direct and control the upbringing of their children. This Court's decisions that recognize this right (which was firmly established in the common law) include *Troxel v. Granville,* 530 U.S. 57, 65-66 (2000) (cataloging cases); *Santosky v. Kramer,* 455 U.S. 745, 753 (1982); *Parham v. J.R.,* 442 U.S. 584, 602 (1979); *Wisconsin v. Yoder,* 406 U.S. 205 (1972); and *Stanley v. Illinois,* 405 U.S. 645, 651–52 (1972). In *Parham*, the Court explained the law's deference to the role of parents and some of the reasons for it:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925). See also *Wisconsin v. Yoder,* 406 U.S. 205, 213 (1972); *Prince v. Massachusetts,* 321 U.S. 158,

> 166 (1944); *Meyer v. Nebraska,* 262 U.S. 390, 400 (1923). . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190.

442 U.S. at 602. The law presumes that parents know their own children best and are best positioned and motivated to protect and counsel them. *Id.*

"[I]t is not a novel proposition to say that parents have a recognized legal interest in the education and upbringing of their child." *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 529 (2007). In *Prince v. Massachusetts*, this Court ruled, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. 158, 166 (1944). Of course, such instruction includes religious instruction. *See Yoder*, 406 U.S. at 214-18. But to hinder parents when it comes to instruction about LGBTQ+ issues is exactly the purpose of the MCPS policies that the parents challenge here. This violates parental rights.

The action of this school district might be saved from constitutional infirmity, as in some other cases, by providing parents with notice and opt-out for the offending instruction. *See, e.g., Florey v. Sioux Falls*

Sch. Dist. 49-5, 619 F.2d 1311, 1319 (8th Cir. 1980). However, that is exactly what MCPS refuses to provide, with the obvious purpose to advance its own viewpoint while hamstringing parents who might wish to teach their children differently. This is not a situation in which parents are attempting to dictate curriculum for all students, and the Constitution allows them to protect their own children without having to forfeit the benefits of public schools.

II. These Constitutional Violations Are Not Excused by the Ability of Parents to Educate Their Children Outside of School or by Their Right to Remove Their Children from Public School

The Fourth Circuit excused the school district's infringement of free exercise and parental rights by noting that parents had the ability to instruct their children about alternative lifestyles such as homosexuality, same-sex marriage, bi-sexuality, and transgenderism outside of the school setting. *Mahmoud v. McKnight,* 102 F.4th 191, 209 (4th Cir. 2024). This is not the first court to brush off a school's constitutional violations in this way, *see, e.g., Fleishfesser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 690 (7th Cir. 1994), but it is an insidious suggestion that this Court should quash.

When the government infringes constitutional rights, it does not suffice to argue that the individuals wronged may still exercise their rights at a different time or in a different place.[2] For example, when a city

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[2] Of course, this case does not involve a time, place, or manner restriction.

prohibits use of a public park by some denominations but not others, it is no defense to say that those foreclosed can still practice their religion elsewhere. *See Fowler v. R.I.*, 345 U.S. 67 (1953). Nor could the school district be excused for its sanctioning of Coach Kennedy for his praying on the field because he could have said the same prayer elsewhere. *See Kennedy v. Bremerton Sch. Dist.,* 597 U.S. 507 (2023). Similarly, just because the parents may exercise their free exercise and parental rights when their children are not at school does not excuse this school district's violation of parental rights while the children are at school.

It is not only a complete bar that violates constitutional rights. *Any* infringement or hindrance of the rights is a violation. *See Prince,* 321 U.S. at 166. In this context, two aspects of parental rights are most relevant.

First, parents have a well-recognized right to decide whether their child should attend, or continue to attend, a public school, instead of their attending a private school or being home schooled. *See Pierce*, 268 U.S. at 534-35. Obviously, a key reason parents may wish to remove their child from public school is if they have no ability to stop their child being instructed in a way they consider inimical to their religious beliefs. This requires information about which of the many LGBTQ+-Inclusive Texts are going to be used and when.

A federal district court has well stated that parents:

> have a right to direct their minor child's education[,] which cannot be accomplished unless they are accurately informed in response to their inquiries. Similarly, parents could not make a reasonable choice regarding the type of education—public, private, or home schooling—if they are unaware of circumstances that have a significant bearing on that decision because of the school's withholding of information or active deception, despite their inquiry.

Willey v. Sweetwater Cnty. Sch. Dist., 680 F. Supp. 3d 1250, 1277-78 (D. Wyo. 2023) (citations omitted); *accord Ricard v. USD 475 Geary Cnty., Kan., Sch. Bd.,* 2022 WL 1471372 at *8 (D. Kan., Mar. 9, 2022).

Here, the response of the school district that parents know the risk and so they can simply take their children out of public schools fails in several respects: (a) Parents do not know how pervasive the use of the texts will be due to the "No-Notice" policy. (b) Parents do not know which text(s) a teacher will use. Not all texts will be equally problematic to the many parents involved. (c) Many parents, for financial and other reasons, cannot afford to withdraw their child from public school. *See Morse v. Frederick,* 551 U.S. 393, 424 (2007) (Alito, J., concurring). (d) Providing notice would allow parents to absent their child when an offensive text was to be used.

Second, the rights of parents to teach their children and to shield them from religiously offensive literature does not end with a right to remove their child from the school. Parents also have a

constitutional right to supplement their children's education by instruction of their own, especially about subject matters like alternative lifestyles, and they have a right to do so with specificity, knowing what has been presented to their children at school in a timely manner. *See Winkelman,* 550 U.S. at 529; *Yoder,* 406 U.S. at 213-14; *Prince,* 321 U.S. at 166. If the school district can legally force the parental hand as to when the children are mature enough to consider LGBTQ+ topics by raising such instruction in whatever curriculum it wants to do so and whenever it wants to do so, it cannot also withhold from parents the specifics of that instruction without infringing their constitutional rights.

Of course, sufficient information on this score is unavailable from the children themselves. Any parent knows that most children are neither capable nor willing to provide a play-by-play of the school day to their parents. Family relations are also affected by parents having to probe their children repeatedly about subjects. Plus, the probing is difficult on subjects concerning which the parents do not wish to expose their children.

It is as simple as this: to be able to exercise their rights and responsibilities intelligently, parents need to know what is going on at school. "[I]t is illegitimate to conceal information from parents for the purpose of frustrating their ability to exercise a fundamental right." *Ricard,* 2022 WL 1471372 at *8. MCPS's hiding the ball by directing teachers not to disclose when they use the LGBTQ-Inclusive Texts is an unconstitutional infringement of their parental and associated free exercise rights.

At a bare minimum, then, the "no-notice" part of the MCPS policy must be set aside. Public schools have no right to hide from parents what the schools are teaching their children and when they are doing so. Not all parents have the economic or other wherewithal to put their children in private schools or to home school them. As a result, their only alternative to comply with the compulsory education laws is to send them to public school. That being the case, for a public school to deprive parents of their ability to supplement the education of their children, perhaps to counter the slant taken on a particular subject by the school, unconstitutionally infringes the parents' right to control the education and upbringing of their children. When religious beliefs are in play, as they frequently are, so is the Free Exercise Clause.

III. Requiring an Opt-out in These Circumstances Will Not Open the Floodgates to a Parental Veto over All Curriculum

In these circumstances, though, the Constitution demands more than just notice. It requires MCPS to give these parents both notice and a right to opt out their children from this sex-related instruction about LGBTQ+ topics.

In their opposition to the petition, MCPS raised alarmist arguments that, if these parents have an opt-out right, then any parent has a right to object to the school's curriculum and require the school to tailor a curriculum for their own children. Pet.Opp.25-26. To the contrary, this case presents an extreme case of overreach by the local school, and curbing it here will

not open the floodgates to wholesale veto power by individual parents over all parts of the school curriculum.

First, sex education is at the center of parental and familial rights. *See Amicus* Br. of Profs. Walton & Troxel in Support of Pet. for Cert. at 3-6 (filed Oct. 14, 2024). The first public schools did not provide any such education, leaving it wholly within the family. *See Amicus* Br. of America First Legal Fdtn. in Support of Pet. for Cert. at 5-10 (filed Oct. 16, 2024). Even when they did, the states in almost every case have provided an opt-out or opt-in for parents for the sex education part of the public school curriculum. *See Amicus* Br. of W. Va. *et al.* in Support of Pet. for Cert. at 15-17 (filed Oct. 16, 2024) (collecting state laws). That reflects an understanding that traditional sex education, let alone the expansive view of the topic that this school district has, is not considered essential to a public school's mission, but only an option that must be carefully controlled so as not to abridge parental rights. It also reflects an acknowledgment of different maturation rates of adolescents, differing family circumstances, and varying religious beliefs and practices, any of which might make the sex education proffered by a particular public school unwise or inappropriate for a particular student at a given time. And, of course, it reflects that parents, not schools, are best able to make informed choices in that regard for their own children. *See Troxel*, 530 U.S. at 69 (applying the "traditional presumption that a fit parent will act in the best interest of his or her child"); *Parham*, 442 U.S. at 602.

Second, Maryland conforms to the norm. It provides that its sex education curriculum, known in its parlance as the "Family Life and Human Sexuality" unit of the Health curriculum, must be made available to parents in advance and that parents have an unfettered right to opt out their children from that unit. The Code of Maryland Regulations § 13A.04.18.01.D provides as follows:

> (e) Student Opt-Out.
>
> (i) The local school system shall establish policies, guidelines, and/or procedures for student opt-out regarding instruction related to family life and human sexuality objective. . . .
>
> (iv) The local school system shall provide an opportunity for parents/guardians to view instructional materials to be used in the teaching of family life and human sexuality objectives.

The mandatory "framework" for Health instruction for the local schools issued by the Maryland Department of Education limits instruction on alternative sexual lifestyles to the Family Life and Human Sexuality part of the curriculum and expressly recognizes the opt-out requirement. It states (at 6), "The opt-out provision reflects the State Board's and [Maryland State Department of Education]'s respect for individual parents' values and beliefs concerning family life and human sexuality instruction." https://marylandpublicschools.org/about/Documents/DCAHealth/Health_Education_Framework_July_2022/pdf. Whatever interests MPCS may claim to have in making sure all its

students are indoctrinated with its viewpoint on alternative sexual lifestyles like LGBTQ+ or to avoid disruption from parents objecting to particular parts of its curriculum, those interests are overriden here by Maryland law.

Third, MCPS's authority to teach a particular subject in its curriculum is best understood as a conditioned consent or delegation from parents. Parents are primarily responsible for their children's education, particularly when religious beliefs come into play. *See Yoder*, 406 U.S. at 413-18; *Meyer v. Neb.*, 262 U.S. 390, 401 (1923). When they send their children to public school along with the children of other parents who may well have other philosophical and religious beliefs, they consent in the main to a generalized, common instruction for their children. But that does not give the public school *carte blanche* to set whatever curriculum it wishes. It is also commonly understood that parental consent is conditioned on the school staying in its lane, teaching in accord with its central mission. *See generally* Douglas Laycock, *High-value Speech and the Basic Educ. Mission of a Pub. Sch.*: *Some Prelim. Thoughts*, 12 Lewis & Clark L. Rev. 111 (2008). Professor Laycock gives an outside-its-lane example of a public school teaching its students that they should all support the Democratic Party. *Id.* at 117. This would be improper even if the district's populace, like that of MCPS, is heavily Democratic. The stakes are even higher with topics that implicate appropriate sexual lifestyles and the religious beliefs concerning them.

While writing in the context of free speech rights, what Professor Laycock says is apropos here:

> Parents entrust the public schools with their children for important but particular purposes. Parents may expect the school to teach skills and values conducive to success in later life, and they may expect the schools to teach fundamental democratic values. But they do not expect the schools to indoctrinate their children on current political or religious questions that may be the subject of substantial disagreement among the parents themselves, either locally or nationally. Indoctrination on that sort of question is not part of the school's basic educational mission . . . .

Id. at 119. Parental consent to having the public school set the curriculum is not unconditional. Schools can go too far and exceed that consent (or delegation). MCPS has done so here, especially considering its encroachment on the free exercise rights of parents and students. Schools cannot leverage compulsory school attendance laws into a trampling of parental and religious rights. *See generally* Eric A. DeGroff, *Parental Rights and Pub. Sch. Curricula: Revisiting* Mozert *after 20 Years*, 38 J. of Law & Educ. 83 (2009) (arguing that parental rights are fundamental and require public schools to provide an opt-out when the curriculum violates religious beliefs).

CONCLUSION

The Fourth Circuit applied the wrong test in this case, shorting both free exercise and parental rights. This Court should reverse and remand.

Respectfully submitted this
10th day of March 2025,

/s/ Frederick W. Claybrook, Jr.
Frederick W. Claybrook, Jr.
(Counsel of Record)
Claybrook LLC
655 15th St., NW, Ste. 425
Washington, D.C. 20005
(301) 622-0360
Rick@claybrooklaw.com

Paul R. Rivera
Paul R. Rivera, Attorney at Law
P.O. Box 394
Rockville, Md. 20848
(301) 949-6367
Law.rivera@gmail.com

Steven W. Fitschen
James A. Davids
National Legal Foundation
524 Johnstown Road
Chesapeake, Va. 23322
(757) 463-6133
sfitschen@nationallegalfoundation.org
jdavids@nationallegalfoundation.org

Counsel for *Amici Curiae*