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 AMERICAN ATHEISTS, INC. AND OTHER SECULAR GROUPS IN SUPPORT OF RESPONDENT

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April 9, 2025

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF AMICI CURIAE[1]

American Atheists, Inc., is a national 501(c)(3) civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. American Atheists strives to promote understanding of atheists through education, advocacy, and community-building; works to end the stigma associated with atheism; and fosters an environment where bigotry against our community is rejected. To that end, American Atheists opposes any effort to allow religious doctrine to govern public education in the United States, whether by injecting religious content into the curriculum or, as in the case before the Court, by excluding content that happens to contradict a parent's religious beliefs.

The Secular Student Alliance (SSA) is a 501(c)(3) educational nonprofit and network of over 200 student chapters on high school and college campuses. Dedicated to advancing nonreligious viewpoints in public discourse, the mission of the Secular Student Alliance is to organize, unite, educate, and serve secular students and student communities that promote the ideals of scientific and critical inquiry, democracy, secularism and human-based ethics. SSA empowers secular students to proudly express their identity, build welcoming communities, promote secular values, and set a course for lifelong activism. SSA and its

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[1] Amici have no parent company nor have they issued stock. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than amici made a monetary contribution to the preparation or submission of this brief.

chapters and affiliates value the efforts of high schools, colleges, and universities to ensure an inclusive and welcoming educational environment.

The Secular Coalition for America (SCA) is a group of diverse organizations large and small representing atheists, agnostics, humanists, and other nonreligious Americans. As such, the Secular Coalition for America is a dedicated 20-year-old lobbying organization whose mission is to advocate for the equal rights of nonreligious Americans and defend the separation of religion and government in Congress, in the executive branch, in the courts, and more recently, in public schools. SCA is also dedicated to amplifying the diverse and growing voice of the nontheistic community in the United States.

INTRODUCTION

Parents have a *limited* right under the Due Process Clause of the 14th Amendment to control the upbringing of their children. This Court has always acknowledged that this protection falls short of granting parents the equivalent of a line-item veto over the public school curriculum. Such a system would be wholly unworkable in light of the multitude of disparate and contradictory religious beliefs American parents hold that may conflict with teachers' lesson plans.

Furthermore, Petitioners present this Court with a question not raised by this case. Petitioners *do* have the opportunity to opt their children out of the instruction they find objectionable: They can send their children to a religious private school. Petitioners, however, do not like this option because private schools cost money. This, they contend, means that the Montgomery County Board of Education

("Montgomery County" or the "Board") is burdening their religious exercise. They demand that the Board convert its public school system to an a-la-carte system of education wherein every parent may pick and choose each individual lesson for their child, based on their personal religious beliefs. But the independent decisions of private schools to charge tuition payments is not attributable to Montgomery County. Private schools may indeed be burdening the Petitioners' exercise of their religious beliefs but that is their prerogative and not within the control of Montgomery County.

ARGUMENT

I. Montgomery County's actions do not infringe the due process rights of parents.

The parental right to control the upbringing of children is found nowhere in the Constitution. It is, instead, a creature of judicial creation dating back only to the 1900s. Nevertheless, there is no serious doubt that parents have a *limited* right to control the upbringing of their children, protected against encroachment by the government by the Due Process Clause of the 14th Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923). This substantive due process right applies only in specific contexts, however: school choice and private instruction of children, custody determinations, and control over third parties' access to a child. This Court has also clearly stated a number of areas into which the right does not extend: child labor and, crucially, curricular decisions made by public schools.

A. The scope of the parental due process right is narrow.

1. Private Instruction

The Supreme Court first explicitly acknowledged a parent's right to "bring up children" not in a case brought by a parent but in a German-language teacher's appeal of a criminal conviction. *Meyer*, 262 U.S. at 396. Nebraska law prohibited the teaching of "[l]anguages, other than the English language," to children prior to completion of eighth grade. *Id.* at 397. In holding that the law violated the 14th Amendment's Due Process Clause, the Court stated that the liberty guaranteed therein:

> 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.[2]

Id. at 399 (emphasis added). The Court then cited a string of cases supporting elements of this declaration. None of the cited cases deal directly with the upbringing of children, however.

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[2] Notably, the Supreme Court recently identified this language as dicta, *Kerry v. Din*, 576 U.S. 86, 93-94 (2015), though the Court acknowledged the existence of parents' Due Process Clause right nonetheless, *id.* at 94-95.

The Court did not expand further on the right to bring up children and noted that the decision had no bearing on "[t]he power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English," and, of particular importance in the present case, "to prescribe a curriculum for institutions which it supports." *Id.* at 402.

2. School Choice

The Supreme Court next expounded on parents' Due Process right in *Pierce v. Society of Sisters*, a consolidation of two cases brought by private schools in Oregon. 268 U.S. 510, 529-30 (1925). The schools had been granted preliminary injunctions prohibiting the enforcement of Oregon's Compulsory Education Act, which required parents and guardians of children between eight and sixteen years old to send their children to *public* schools. *Id.* at 530. Failure to do so was a misdemeanor offense. *Id*. With very little discussion, the Court declared:

> Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. 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 534-35.

3. Child Labor

Twenty years later, in *Prince v. Massachusetts*, the Court reaffirmed parents' right to control "the custody, care[,] and nurture of the child," 321 U.S. 158, 166 (1944), but also significantly limited the scope of that right (as well as the right to the free exercise of religion), *id.* at 169-70. *Prince* reached the Supreme Court on appeal from the conviction of a nine-year-old girl's guardian for the violation of Massachusetts' child labor laws, which declared:

> No boy under twelve and no girl under eighteen shall sell, expose[,] or offer for sale any newspapers, magazines, periodicals[,] or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place.

Id. at 159-60. Holding that the state statute violated neither the Free Exercise Clause nor the 14th Amendment's Due Process Clause, the Supreme Court stated:

> Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor[,] and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. . . . It is sufficient to show what indeed appellant hardly disputes, that the

> state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

Id. at 166-67. The Court went on to note that parents' right did not invalidate this restriction on child labor even though the same law, if it were applied "to adults or all persons generally, would be invalid." *Id.* at 167.

> The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection. . . . *It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.*

Id. at 168-69 (emphasis added).

4. *Mandatory School Attendance*

Society of Sisters had expressly left open the question of the state's power "to require that all children of proper age attend some school[.]" *Id.* at 534. That question would be partially answered half a century later in *Wisconsin v. Yoder*, in which the Court heard three Amish parents' appeal of their convictions under a Wisconsin statute that mandated that children attend school (whether public or private) until they turn 16.

406 U.S. 205, 207 (1972). The parents argued that it violated their right to the free exercise of their religion to send their children to school beyond 8th grade. *Id*.

Although primarily focused on applying the Free Exercise Clause, *id.* at 215-29, the Court also addressed Wisconsin's argument that the statute should survive both free exercise and parents' right challenges based on the Court's decision in *Prince*. Citing the language of *Society of Sisters*, the Court stated that parents' "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. "[A]ccommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education" beyond eighth grade would not undermine the state's interest in maintaining "the health or safety of the child, or have a potential for significant social burdens." *Id.* at 234.

Nevertheless, this Court unequivocally stated that its parental rights cases "lend[] no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society; . . . ." *Id.* at 239. Once a parent has chosen to send their children to public school, their due process right does not require the school or district to tailor its curriculum or policies to the parent's beliefs. *See Meyer*, 262 U.S. at 402; *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 533-34 (1st Cir. 1995) (addressing parent's objection to public school's sex education curriculum); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005) (addressing challenge to school dress code); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206

(9th Cir. 2005) (challenge to psychological survey of students that included questions relating to sexual topics); *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020) (challenge to policy protecting transgender children).

> If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter.

Brown, 68 F.3d at 534.

B. State actions that implicate parental rights are subject to rational basis review.

This Court has never applied strict scrutiny in the context of a parental rights claim. *Meyer* and *Society of Sisters* applied only rational basis review when invalidating the laws at issue. 262 U.S at 402-403 ("We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State."); 268 U.S. at 534-35 ("rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State").[3]

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[3] These cases predate *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), in which the Court first indicated that heightened scrutiny may be warranted where a challenged government action "appears on its face to be within a specific prohibition of the Constitution," including particularly the Fourteenth Amendment, *id.* at 152 n.4, and eventually led to the development of the intermediate and strict scrutiny standards.

The Court likewise subjected the child labor statute challenged in *Prince* to rational basis review when it concluded "that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action." 321 U.S. at 169. "The state's authority over children's activities is broader than over like actions of adults." *Id.* at 168.

> Massachusetts has determined that an absolute prohibition [of child labor], though one limited to streets and public places and to the incidental uses proscribed, is necessary to accomplish its legitimate objectives. Its power to attain them is broad enough to reach these peripheral instances in which the parent's supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct.

Id. at 170.

This Court also implicitly subjected the state's law governing the custody of illegitimate children to rational basis review. Prior to 1972, Illinois' family law included an irrebuttable presumption that the fathers of "illegitimate" children were unfit and that, upon the death of the mother, and without a hearing, the children became wards of the state. *Stanley v. Illinois*, 405 U.S. 645, 646-47 (1972). The father's actual fitness "was irrelevant." *Id.* at 647. Unwed fathers who wished to regain custody of their children had to do so through either guardianship or adoption proceedings. *Id.* at 647-48.

The Supreme Court, while acknowledging that the state undoubtedly had an interest in protecting

children from "neglectful parents," *id.* at 652, determined that the state's interest was not served by presumptively declaring all unwed fathers to be unfit simply because some of them were. *Id.* at 652-53, 654 n.6. The Court recognized the state's declared interests in protecting the wellbeing of children and the community, 405 U.S. at 652, and in establishing efficient procedures, *id.* at 656, as legitimate. Nevertheless, the Court went on to invalidate the statute on the ground that "the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family." *Id.* at 652-53.

C. Petitioners' interpretation of the due process rights of parents would break the public school system.

From the moment this Court first recognized parents' due process right to raise children, it has acknowledged the impracticability of giving parents individualized control over the school curriculum. *Meyer*, 262 U.S. at 402; *see also Yoder*, 406 U.S. at 239. Demanding that schools permit parents to opt their children out of any element of the curriculum that conflicts with their religious beliefs would impact every lesson in every subject. The number of topics that may conflict with an individual parent's religious beliefs is as numerous as the varied religious beliefs held by American parents.

One need not look further than the numerous Christian sects with adherents in the United States. School districts would need to present every parent with a list of all books that may potentially be included in class, lest any of them run counter to the parents'

beliefs. A parent could veto any storybook that features an interracial couple, *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983). A "young Earth" creationist parent may object to world history lessons that examine (or even acknowledge) any events occurring more than approximately 6,000 years ago, or object to their child taking high school physics because it would introduce them to the principles that undergird radio-carbon dating, which again show that the world existed more than 6,000 years ago. *See generally*, *McLean v. Ark. Bd. of Ed.*, 529 F. Supp. 1255 (E.D. Ark. 1982). A Christian Scientist parent may object to instruction concerning the germ theory of disease. *Tayag v. Lahey Clinic Hosp., Inc.*, 632 F.3d 788, 791 (1st Cir. 2011); *see also Bordeaux v. Lions Gate Ent., Inc.*, 703 F. Supp. 3d 1117, 1126 (C.D. Cal. 2023). A Catholic parent might object to lessons on capitalism and economics as a promotion of greed, one of the seven deadly sins. David Meconi, "The Seven Deadly Sins: And how to overcome them in your life," Catholic Answers (Feb. 1, 2020), available at https://www.catholic.com/magazine/print-edition/the-seven-deadly-sins. A Mormon parent may wish to opt their child out of significant portions of American History courses—such as those describing the migration of humans from Asia to North America across the Bering Strait—which contradict the Book of Mormon. Ugo A. Perego, "The Book of Mormon and the Origin of Native Americans from a Maternally Inherited DNA Standpoint," Brigham Young University Religious Studies Center (2011) available at https://rsc.byu.edu/no-weapon-shall-prosper/book-mormon-origin-native-americans-maternally-inherited-dna-standpoint. Such a situation would make planning for instruction and testing a practical impossibility.

II. Montgomery County is not responsible for the independent actions of private schools.

The Petitioners contend that Montgomery County must give them an opportunity to opt their children out of the instruction they disagree with and that it has not given them such an opportunity. At the same time, the Petitioners repeatedly acknowledge that they *may* choose to send their children to private school rather than to the public schools. Br. for Pet'rs 15-16, 21, 45. Indeed, the Petitioners *do* send their children to private school and they do not allege that they have been punished in any way for doing so. *Id.* Nevertheless, they contend that this option is insufficient because the private schools they have chosen to send their children to charge tuition. Id. at 16, 18, 21, 45. The *state* imposes no penalty for sending a child to private school, nor does Montgomery County. The government imposes no fine or fee, no special tax, no criminal sanction, on anyone who wishes for their children to receive an education that fully comports with their religious beliefs. Md. Code Ann., Educ. § 7-301(a)(3) (LexisNexis 2024). Petitioners' argument, stripped of spin and obfuscation, is that the government unconstitutionally burdens their free exercise of religion when it provides a free service to the community and allows private, religious entities to provide the same service, but the religious entities charge money for that service. This is a shocking argument. The contention that the Montgomery County Board of Education burdens the Petitioners' religious exercise because *someone else* charges money for the equivalent service flies in the face of basic understandings of state action.

To prevail on a constitutional claim brought under 42 U.S.C. § 1983, a litigant must demonstrate, among other things, that the act giving rise to their claim is attributable to state action. It has long been understood that the actions of a private entity are only attributable to the government in specific circumstances. *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 (2001). These are limited to situations in which the private entity (i) is performing a traditional, exclusive public function, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-54 (1974), (ii) is compelled by the government to take a particular action, *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005 (1982); or (iii) is working jointly with the government, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941-942 (1982). Absent such a connection between an action of the government and the alleged harm, a claim cannot survive.

Petitioners in the present case have not, and *cannot*, show that the burden on their free exercise—the financial costs of sending their children to religious private schools—is imposed by any state action. Private schools do not perform a function that has traditionally been exclusively performed by the state. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (plaintiff could not sustain 1983 action against private school for termination of employment, despite public funding). Nowhere do petitioners contend that the Respondents compelled the private schools to which the Petitioners send their children to charge the tuition, fees, and other costs imposed by those schools on the Petitioners. Nor do Petitioners make any allegation that the government is working jointly with the private schools where their children are enrolled. In short, the Petitioners have made no attempt to show that the burden imposed on their religious

exercise, i.e., the costs associated with religious education, are caused in any way by the Respondents or any other state actor. Without this key element of any § 1983 claim, the Petitioners cannot succeed in their challenge to the Board's actions.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to AFFIRM the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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