No. 25-77

IN THE

Supreme Court of the United States

STEPHEN FOOTE, INDIVIDUALLY AND AS GUARDIAN AND NEXT FRIEND OF B. F. AND G. F., MINORS, *et al.*,

Petitioners,

v.

LUDLOW SCHOOL COMMITTEE, *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* PARENTAL RIGHTS FOUNDATION AND THE WAGNER CENTER IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a public school violates parents' constitutional rights when, without parental knowledge or consent, the school encourages a student to transition to a new gender or assists in that process.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Cited Authorities

Page

Other Authorities

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amici Curiae*, *Parental Rights Foundation* and the *Wagner Center* submit this brief.[1]

The *Parental Rights Foundation* (PRF) is a national, nonprofit, nonpartisan advocacy organization with supporters in all fifty states. The PRF is concerned about the erosion of the legal protection of loving and fit parents to raise, nurture, and educate their children without undue state interference. The PRF is committed to protecting children by preserving the liberty of their parents. It advances this mission by educating public officials and the broader public about the urgent need to reverse intrusive state policies that have, in many cases, caused more harm than benefit to children. The PRF also works to strengthen fundamental parental rights at all levels of government.

Housed on the campus of Spring Arbor University, the Wagner Center serves as a national academic voice for freedom of thought, conscience, and religion. Most importantly for this case, the Wagner Center works to preserve the freedom of parents to direct and control the upbringing of their children and is a leading voice in this area.

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1. Pursuant to Rule 37(2), *Amici curiae* gave 10-days' notice of its intent to file this brief to all counsel. *Amici Curiae* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amici curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

Amici Curiae hold a significant interest in the preservation of parental rights. *Amici Curiae* have special knowledge helpful to this Court in this case, about the inalienable fundamental nature of a parent's right to direct and control the upbringing of their children.

SUMMARY OF THE ARGUMENT

This Court should grant the Petition for a Writ of Certiorari because significant confusion exists among the federal courts as to how much protection the Constitution affords parents when government substantially infringes on their liberty to direct and control the upbringing of their children. The instant case provides an opportunity to resolve the jurisprudential confusion created by the Circuit splits. This Court ought to do so now since predictability in the law is necessary for good governance under the Rule of Law, especially during times of cultural discord. In doing so, this Court should confirm that because the liberty of parents to direct and control the upbringing of their children is deeply rooted in the legal traditions and history of this nation, that it is a fundamental inalienable liberty interest protected under the Fourteenth amendment. Government conduct substantially infringing on this liberty, therefore, ought to receive strict scrutiny—where government must demonstrate that its policy advances interests of the highest order and is narrowly tailored to achieve those interests.

ARGUMENT

THE CONSTITUTIONAL LIBERTY INTEREST OF PARENTS TO DIRECT AND CONTROL THE UPBRINGING OF THEIR CHILDREN IS AN INALIENABLE FUNDAMENTAL RIGHT THAT REQUIRES STRICT SCRUTINY OF GOVERNMENT ACTION INFRINGING ON THIS RIGHT

This Court should grant the Petition for a Writ of Certiorari because significant confusion exists among the federal courts as to how much protection the Constitution affords parents when government substantially infringes on their liberty to direct and control the upbringing of their children.

A. Context

Here parents challenged a government school mandate that its staff use biologically false gender pronouns preferred by their child at school. *Foote v. Ludlow*, No. 23-1069 at 9-12 (1st Cir. 2024). The parents further challenged the government's teachers "discussing gender identity" with their child, "providing gender-identity resources" to their child, and authorizing their female child to use the boys' bathroom. *Id.* at 20. The parents further challenged the government's mandate requiring staff *not to notify* them of their daughter's social transition from female to male.

Parents maintain the government action here "interferes with their parental rights as guaranteed by the United States Constitution." *Foote v. Ludlow*, No. 23-1069 (1st Cir. 2024).

The appellate court cursorily recognized the fundamental right of a parent to direct and control the upbringing of their child. *Foote,* at 15-24 citing, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925) and *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). The appellate court thereafter held, though, that the government did not engage in conduct that infringed upon this inalienable fundamental right. *Foote,* at 24-41. Because the appellate court found no infringement of a fundamental right, it refused to apply strict scrutiny to the government action here. *Foote,* at 41. Applying mere rational basis review, the appellate court upheld the government action as rationally related to a legitimate government interest. *Id.* at 41-45.

The appellate court's holding adds to the significant confusion in the federal courts over how much protection the Constitution affords parents when government substantially infringes on their liberty to direct and control the upbringing of their children. *Contrast*, *Foote v. Ludlow*, No. 23-1069 (1st Cir. 2024); *Blau v. Fort Thomas Pub. Sch. Dist.,* 401 F.3d 381 (6th Cir. 2005); *Crowley v. McKinney*, 400 F.3d 965 (7th Cir. 2005); *Parents for Priv. v. Barr*, 949 F.3d 1210 (9th Cir. 2020) (stripping parental rights at the schoolhouse door), with *C.N. v. Ridgewood Bd. of Educ.,* 430 F.3d 159 (3d Cir. 2005); and *Gruenke v. Seip*, 225 F.3d 290, 307 (3d Cir. 2000) (holding "that 'in loco parentis' does not mean 'displace parents'")

This case provides this Court with an opportunity to dispel the confusion among the federal courts by confirming that the right of parents to direct and control the upbringing of their children is a fundamental, inalienable right—and that government conduct infringing

on this liberty ought to receive strict scrutiny—where government must demonstrate that its policy advances interests of the highest order and is narrowly tailored to achieve those interests.

The appellate court presupposed that the level of scrutiny varies depending on which branch of government is infringing upon a citizen's constitutionally protected liberty. The appellate court further presupposed that the government's conduct did not infringe on the parent's constitutionally protected liberty. Operating under such erroneous presuppositions, the appellate court failed to apply the scrutiny required when the government interferes with a fundamental inalienable constitutional right. Thus, instead of properly applying strict scrutiny to the State's action, the lower court erroneously applied mere rational basis review.

B. Fundamental Liberty, Strict Scrutiny, and the Deeply Rooted Legal History and Tradition of a Parent's Right to Direct and Control the Upbringing of Their Children

This Court looks to "history and tradition" in determining Fourteenth Amendment liberty limits on the exercise of government power. See, e.g., *Dobbs v Jackson Women's Health Org.*, 597 U.S. 215, 240 n.22 (2022). The liberty of parents to direct and control the upbringing of their children is deeply rooted in the legal history and traditions of this nation. This Court first examined the issue of parental rights over a century ago in *Meyer v. Nebraska,* 262 U.S. 390 (1923). In *Meyer,* the State made it unlawful to teach any subject in languages other than English. *Id.* Prior to the government's action in that

case, no conflict existed between the state and parents. The reason no conflict existed is because deeply rooted historical and legal traditions of the nation properly recognized the family as the backbone of society. See e.g., John Locke, Second Treatise of Civil Government, 1690, Sec. 56, Sec. 63. (authority "to govern the minority of their children" rests with parents); 1 W. Blackstone, Commentaries * 447; 2 J. Kent, Commentaries on American Law * 190 (recognizing that natural bonds of affection lead parents to act in the best interest of the children). The deeply rooted historical and legal traditions were well in place before the founding of our nation and existed in the common law at the time we ratified our Constitution. Wagner, *Revisiting Divine, Natural, and Common Law Foundations Underlying Parental Liberty to Direct and Control the Upbringing of Children,* 5 W. Australian Jurist 1 (2014); Estrada, *Homeschooling in the United States: A Seismic Parental Rights Victory*, 18 Liberty L. Rev. 865 (2024). And see, *Dobbs v Jackson Women's Health Org.*, 597 U.S. 215, 240 n.22 (2022) (looking to our "history and tradition" in determining Fourteenth Amendment liberty limits on the exercise of government power)

Political and social activism in the early 20th century sought to alter those deeply rooted historic views on family and government. The *Meyer* Court responded by holding that "it is the natural duty of the parent to give his children education suitable to their station in life." *Meyer,* 262 U.S. at 400. The Court explained that "[t]he individual has certain fundamental rights which must be respected. . . . [The individual] cannot be coerced by methods which conflict with the Constitution — a desirable end cannot be promoted by prohibited means." *Id.* at 401.

Meyer recognized the family as the building block of society—rejecting Plato's musing that "children are to be common" as contrary to our nation's founding. *Id.* at 402. *Meyer* conclusively held that parental rights are a constitutional right under the Fourteenth Amendment. *Id.* at 398.

Two years later the Court unanimously reaffirmed that parental rights are a constitutional right under the Fourteenth Amendment. *Pierce,* 268 U.S. 510 (1925) (striking down an Oregon law requiring children between 8 and 16 to attend only public schools). Building upon the foundation laid in *Meyer,* the *Pierce* Court confirmed that "[t]he 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." *Pierce,* 268 U.S at 535.

Later, in *Prince v. Massachusetts*, the Supreme Court again recognized parental rights stating:

> [i]t 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. . . . It is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

321 U.S. 158, 166 (1944).

Thereafter, this Court in *Wisconsin v. Yoder,* decisively reaffirmed the fundamental nature of parental

rights under both the First and Fourteenth Amendments. 406 U.S. 205 (1972) (confirming "the fundamental interest of parents" in overturning convictions of Amish citizens convicted of violating a State's compulsory attendance statute). The Court reasoned,

> "[t]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. … Even more markedly than in *Prince*, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Yoder*, 406 U.S. at 213-214, 232.

After affirming the inalienable nature of the parental rights, Yoder made clear that government actions infringing on this constitutional liberty must face strict scrutiny:

> 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. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory

> education, it is by no means absolute to the exclusion or subordination of all other interests. *Id.* at 215.

In *Washington v. Glucksberg*, this Court upheld Washington's law banning assisted suicide. 521 U.S. 702 (1997). The Court in that case held that the Fourteenth Amendment did not include a fundamental right to physician-assisted suicide, while reaffirming that parental rights were a fundamental right—and that courts must use strict scrutiny in reviewing governmental actions infringing upon parental rights:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights . . . to direct the education and upbringing of one's children. . . . The Fourteenth Amendment forbids the government to infringe 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Id.* at 720-721 (cleaned up).

While physician-assisted suicide killing was not deeply rooted in the legal history or traditions of the nation, the right of parents to direct the upbringing and education of their children was—and was part of our common law at the founding of our Constitution, as later amended by the Fourteenth Amendment. Thus, for the same reason the Court found no fundamental right for physician-assisted suicide in the Constitution under the

Due Process Clause, it found there a fundamental right for parents to direct the education and upbringing of their children. See Phillips, *Liberating Liberty: How the Glucksberg Test Can Solve the Supreme Court's Confusing Jurisprudence on Parental Rights,* 16 Liberty L. Rev 347 (2022). https://digitalcommons.liberty.edu/cgi/viewcontent.cgi?article=1319&context=lu_law_review (last visited July 15, 2025); Wagner, *Revisiting Divine, Natural, and Common Law Foundations Underlying Parental Liberty to Direct and Control the Upbringing of Children,* 5 W. Australian Jurist 1 (2014).

In the grandparent visitation case of *Troxel v. Granville*, 530 U.S. 57 (2000), this Court summed up almost a century's worth of precedence, stating,

> "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. … In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. … The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 65-66, 72-73.

Recognizing that the Fourteenth Amendment "provides heightened protection against government

interference with certain fundamental rights and liberty interests," a plurality of the Court in *Troxel* reaffirmed the fundamental nature of parental rights and found that the State's nonparental visitation statute "unconstitutionally infringe[d] on that fundamental parental right" *Troxel,* 530 U.S. at 65, 67. While *Troxel* strongly reaffirmed a parent's right to direct and control the upbringing of their children as a fundamental liberty interest under the Fourteenth Amendment, the lack of consensus among the Justices on the appropriate level of scrutiny to apply to government interference created a catalysis for jurisprudential confusion. 530 U.S. at 80 (Thomas, J., concurring).

In *Mahmoud v. Taylor*, No. 24-297, slip op. (U.S. June 27, 2025)) this Court recently helped to clarify some of the jurisprudential confusion. The Court did so by reaffirming the longstanding recognition of parental rights as fundamental, and by applying strict scrutiny to government actions infringing on this inalienable liberty.

Focusing this time on the First Amendment, *Mahmoud* reasserted the lesson in *Yoder* that:

> A government burdens the [fundamental right] of parents when it requires them to submit their children to instruction that poses "a very real threat of undermining" the . . . beliefs and practices that the parents wish to instill. *Wisconsin v. Yoder*, 406 U. S. 205, 218 (1972). And a government cannot condition the benefit of free public education on parents' acceptance of such instruction. *Mahmoud*, No. 24-297, slip op. at 1-2

In *Mahmoud,* the State of Maryland "introduced a variety of LGBTQ+ inclusive storybooks into the elementary school curriculum." *Id.* The government sought to "disrupt children's thinking about sexuality and gender" and to that end the government mandated attendance of children and refused to notify parents. *Id.* Relying on *Yoder,* the parents here contended the government's no parental notification / no opt out policy "infringed on their right as parents to the free exercise of their religion" in violation of the First Amendment. *Id* at 14.

Based on the record before it, the Court agreed:

> We hold that the Board's introduction of the "LGBTQ+-inclusive" storybooks—combined with its decision to withhold notice to parents and to forbid opt outs—substantially interferes with the religious development of their children and imposes the kind of burden on religious exercise that *Yoder* found unacceptable. *Id.* at 21-22

Relying on *Yoder,* the *Mahmoud* Court stated:

> Here, the Board requires teachers to instruct young children using storybooks that explicitly contradict their parents' religious views, and it encourages the teachers to correct the children and accuse them of being "hurtful" when they express a degree of religious confusion. Such instruction "carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Yoder*,

> 406 U. S., at 218. (cleaned up) *Mahmoud*, No. 24-297, slip op. at 26

Mahmoud confirmed that "when a law imposes a burden of the same character as that in *Yoder,* strict scrutiny is appropriate" even if the "law is neutral or generally applicable." *Id.* at 36 In *Mahmoud,*

> the board's policies, like the compulsory-attendance requirement in *Yoder*, substantially interfered with the religious development of the parents' children. And those policies pose "a very real threat of undermining" the religious beliefs and practices that the parents wish to instill in their children. *Id.* at 37

Because the burden in *Mahmoud* was "of the exact same character as the burden in *Yoder*," the Court applied strict scrutiny to the government action. *Id.* The Court then reaffirmed that "[t]o survive strict scrutiny, a government must demonstrate that its policy advances interests of the highest order and is narrowly tailored to achieve those interests." *Id.,* citing, *Fulton v. Philadelphia*, 593 U. S. 522, 541 (2021) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 546 (1993)). (cleaned up) Under this standard of review, the Court found Maryland's action unconstitutional.

The appellate court's decision cannot be reconciled with this Court's decisions in *Meyer, Pierce, Troxel, Yoder,* and *Mahmoud*. If school officials knowingly contradict parents and hide vital information from them, no way exists for the parents to guide the future, education, or healthcare, of their children. *Yoder*, 406 U.S. at 232. There is also no way that the parents can exercise "parental

concern for the nurture and upbringing of their children." *Id.*

Indeed, the appellate court's reasoning undermines the core teaching of this Court's decision in *Yoder,* and the Supreme Court's recognition that parents, not government officials (even public-school teachers) are the ones with the "primary role … in the upbringing of their children…" *Id.* See also, *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974) (confirming "freedom of personal choice in matters of marriage and family life" as constitutionally protected liberties); *Moore v. East Cleveland*, 431 U.S. 494, 503-504 (1977) (holding that "the institution of the family is deeply rooted in this Nation's history and tradition."; *Smith v. Organization of Foster Families,* 431 U.S. 816, 845 (1977) (documenting the fundamental nature of liberty associated with family matters as deeply rooted in history and tradition of the American nation, predating even the Bill of Rights); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (confirming that "the relationship between parent and child is constitutionally protected"); *Stanley v. Illinois*, 405 U.S. 645, 651 (1978) (reaffirming the fundamental nature of parental rights); *Parham v. J. R.,* 442 U.S. 584, 602-604 (1979) (reaffirming the fundamental nature of parental rights, rejecting "any notion that a child is the mere creature of the State"); *Santosky v. Kramer*, 455 U.S. 745, 753, 760 (1982) (reaffirming "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child); *Reno v. Flores,* 507 U.S. 292, 303-304 (1993) (confirming that parental rights must be respected as a constitutional limit on the exercise of state power, even if nonparents think they would do a better job making decisions for a child than the child's parents).

A century of U.S. Supreme Court precedents firmly establishes that the Constitution protects the right of a parent to direct and control the upbringing of their children as a fundamental right. As such, government infringement of such inalienable liberty requires judicial review using a strict scrutiny analysis where government must demonstrate that its policy advances interests of the highest order and is narrowly tailored to achieve those interests.

Notwithstanding the deeply rooted legal history and tradition affirming parental rights as fundamental, significant jurisprudential confusion exists among the federal courts. Reflecting this division, federal appellate courts, as outlined in the Petition, continue to split over how to decide these kinds of issues. This case provides an opportunity for this Court to resolve the significant jurisprudential disagreement evident in these Circuit splits. It should do so now, since predictability in the law is necessary for good governance under the Rule of Law, especially during times of cultural discord.

Consistent judicial decisions, grounded in honest interpretation, give government officials and others notice of what is prohibited. When it comes to judicial review of government action and constitutional provisions, consistent decisions provide predictability for officials seeking to act in accordance with constitutional standards. Inconsistent judicial precedents lead to unpredictability in the law, providing no beneficial guidance for government officials or others trying to act within the law. *Mahmoud* helped by confirming the fundamental nature of parental rights in the context of the First Amendment. *Amici* requests this Court finish the jurisprudential task by doing the same here under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, *Amici Curiae* urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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