No. 24-297

IN THE

Supreme Court of the United States

TAMER MAHMOUD, ET AL.,

Petitioners,

v.

THOMAS W. TAYLOR, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL.,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF is interested in this case because protection of the freedoms of expression and association, guaranteed by the First Amendment, is essential for an open and diverse society.

AFPF is committed to ensuring the freedom of expression and association guaranteed by the First Amendment for all Americans, including students and their parents. Campuses are not just a place where free expression should be protected; it is vital to their mission. And they are uniquely positioned to instill in the next generation an appreciation for free speech. This is why "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citation omitted).

SUMMARY OF ARGUMENT

Constitutional rights often travel together. The First Amendment rights of freedom of speech, religion, and assembly frequently overlap in education cases. Here that overlap includes parents'

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief. AFPF notified counsel for all parties of its intent to file this brief more than ten days before filing.

right to guide the education of their children and the limits of parental delegation of authority to schools.

Longstanding precedent regarding parental rights over the rearing of children runs the gamut from free exercise, to economic freedom, to speech, to physical control over the child's body. Indeed, parental authority is near-plenary. There are certain well-recognized categories where parental delegation to schools is presumed to be limited, requiring either an opt out or supplemental grants of authority. These include subjects that may conflict with religious beliefs, physical punishment, transporting children off school grounds (field trips), etc.

Moreover, as with all delegations, the scope of this delegation is determined by the holder of the original power. Where parents expressly withdraw the delegation—especially in sensitive areas that are well-established as subject to parental control—the state must recognize that limitation or risk unlawfully infringing the rights of the parents.

This case involves just such a withdrawal of authority and sits comfortably within the topics for which parental authority is clearly established. The parents request nothing new here—indeed Maryland statutory law allows parents to withdraw their students from just such instruction. What is new in this case is the Montgomery County Board of Education's assertion that if too many parents withdraw their consent, then it can overrule them.

Thus, although this case comes before the Court on Free Exercise grounds, it could have been brought on Free Speech grounds subjecting it to a standard of review that would be nearly impossible for the state to overcome. This difference has been dispositive in

cases such as *303 Creative*, requiring strict scrutiny as a viewpoint-based infringement of speech. *303 Creative LLC v. Elenis*, 600 U.S. 570, 583, 593 (2023).

Finally, the court below suggested that the parents could cure infringement of their own free exercise rights by re-educating their children to reject the viewpoint imposed by the school, thus compounding the First Amendment violation by compelling the parents to implement curative speech at home. This Court floated that remedy in *Minersville School Dist. v. Gobitis,* 310 U.S. 586, 599 (1940) but later overruled it in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 642 (1943) ("The decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few *per curiam* decisions which preceded and foreshadowed it are overruled").

It is now well established that schools cannot compel viewpoint-based participation from students, especially when such participation has been prohibited by parents.

ARGUMENT

I. PARENTS' RIGHT TO EDUCATE THEIR CHILDREN IS IMPERILED WHEN SCHOOLS SEEK TO EXTEND THEIR AUTHORITY BEYOND THE AUTHORITY DELEGATED BY PARENTS.

The Montgomery County Board of Education ("the Board") seeks to instruct grade school children on sexual material contrary to the express will of their parents and without an opportunity for the parents to withdraw their children from exposure to that material. This overreach sets up a conflict between the limited authority of the school and the rights of parents.

Concurring in *Morse v. Frederick*, Justices Thomas and Alito presented competing models of school authority: the *in loco parentis* model and the state-agent model. 551 U.S. 393, 413 (2007). Each model is limited in scope, providing an outside boundary to school authority. Coupled with longstanding recognition of parents' rights over rearing and educating their children, both caution against expansive interpretation of school authority to censor or impose expression except in the narrow circumstances set forth in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 512–14 (1969) (articulating the substantial disruption standard for censorship in school). *See also*, *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 534–35 (1925) (recognizing the right of parents to raise and educate their children).

Under the *in loco parentis* model, school authority over students derives from the concept that while children are in the school's care, the school acts "in place of the parent." This legal doctrine, which originally governed the legal rights and obligations of tutors and private schools, has been applied to public schools as well. *Morse*, 551 U.S. at 413 (Thomas, J. concurring) (citing 1 W. Blackstone, Commentaries on the Laws of England 441 (1765) ("[A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis,* and has such a portion of the power of the parent committed to his charge, *viz.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed")). Under this model, the authority of a school to act *in*

loco parentis is coterminous with the authority delegated by the parent.

The state-agent model, conversely, advises tighter boundaries on school authority arising from the threat posed by state power. As Justice Alito cautioned: "It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State." *Morse*, 551 U.S. at 413 (Alito, J. concurring). This is so, in part, because "[m]ost parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school." *Id.*[2]

Under either model, school authority does not displace the authority of the parent to guide the development of their children.

This interpretation is consistent with the Court's longstanding recognition that the Fourteenth Amendment protects "those privileges long recognized at common law as essential to the orderly pursuit of

[2] *See also State Compulsory Education Laws*, FindLaw, June 20, 2016 ("All states have compulsory education laws and allow exemptions for private schools and homeschooling, although the regulation of non-public schooling varies from state to state. . . . Parents who fail to comply with state compulsory education laws may be charged with a misdemeanor, punishable upon conviction by a fine or—for particularly serious violations—up to 30 days in jail." http://bit.ly/3cc0y2b.

happiness by free men," which include the rearing and education of children. *Meyer*, 262 U.S. at 399.[3] Thus, while recognizing state power to compel school attendance and to make reasonable regulations for schools, the Court has acknowledged "it is the natural duty of the parent to give his children education suitable to their station in life." *Meyer*, 262 U.S. at 402–03. And interfering with "the power of parents to control the education of their own" children violates the Fourteenth Amendment. *Id*. at 399–401.

The Court has rarely found a state interest to transcend the interest of the parent in the child's upbringing. *Prince v. Massachusetts*, 321 U.S. 158, 161 (1944) (upholding child labor law that prohibited girls under age eighteen from selling magazines in a street or public place.). But in *Prince*, the Court was careful to annunciate the cardinal rule 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" and to affirm the ruling should not extend beyond its facts. *Id*. at 166, 171.

Accordingly, even where a school may have a valid interest in protecting its ability to deliver education, the Court has consistently found school interests must yield to parental rights in all but the most compelling circumstances. Here, no such circumstance has been identified much less proven.

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[3] Amicus does not endorse the methodology the Court has used to identify this right as being protected by the due process clause of the Fourteenth Amendment. But it nonetheless recognizes its existence and believes the same or similar right would be identified using a privileges or immunities, or Ninth Amendment methodology.

A. Parents' Rights Are Chilled When Schools Impose a Viewpoint on a Child that Conflicts with the Parents' Rights of Conscience.

When schools present viewpoint-laden material on topics that are deeply intertwined with religious or other fundamental beliefs and disparage alternative viewpoints, that viewpoint imposition affects more than just the children, reaching into the relationships within the family home and burdening the rights of family members. The conflict here is thus not simply whether certain information should be conveyed in school, but rather the imposition of viewpoints outside the schoolhouse walls that goes with it.

Here, "Board members publicly accused [dissenting parents] of promoting 'hate' and compared them to 'white supremacists' and 'xenophobes.'" Pet. at 1–2. In addition to interfering with the parents' rights to raise their children, the school board has attacked the fundamental freedoms of the adults, using the children as leverage over parents by imposing on those children the public ignominy of vilifying their parents.

The only way for parents to preclude unwanted scrutiny of themselves and imposition of public shaming on their children would be to withdraw children from public school and place them in an alternative form of education. For many parents that alternative is not feasible, leaving them with a Hobson's choice, either sacrifice their own constitutional protections or violate compulsory education laws. As here, the First Amendment is particularly vulnerable to infringement by zealous school authorities and thus commands that school

authority be clearly limited. Thankfully, nearly all states have resolved this quandary by allowing parents to opt their children out of particularly sensitive course material, such as sexual education. But here, the Board refuses to allow that opt out.

B. Longstanding Precedent Reveals no Doctrine Allowing Schools to Displace Parents' Right to Guide Their Children's Upbringing.

There is a long line of precedent addressing the education of children that cabins the extent to which a state may mandate where a child receives education and what the child may or may not be taught. "The tension turns on who gets to decide the appropriate education for the child—the state or the individual."[4] "These cases presume the state has a legitimate interest in ensuring the child is educated, but they hold that various constitutional provisions limit how that interest may be satisfied." *Id*. "The Constitution protects children, their parents, and even their teachers when the state treads on fundamental liberty interests. Although the cases have a common theme and consistent outcomes, protecting the rights of parents and their children to make their own educational choices, they rely on a variety of constitutional rights." *Id*. The remedy has been to stop the government from limiting their freedom.

[4] Crawford, Cynthia, *Children Have Liberty Interests in Pursuing Education and Freedom of Movement that Can be Protected through Litigation Seeking a Plaintiff-Focused Remedy* at 20 (August 28, 2024). Available at SSRN: https://ssrn.com/abstract=5052593 or http://dx.doi.org/10.2139/ssrn.5052593

Some claims relied on the Fifth and Fourteenth Amendments' due process protection against deprivation of liberty. *Id.*

In *Meyer*, the issue was whether prohibiting the teaching of students, who had not completed eighth grade, in any modern language other than English, "unreasonably infringe[d] the liberty guaranteed . . . by the Fourteenth Amendment." *Meyer*, 262 U.S. at 396–97. The plaintiff was a teacher who taught parochial school in the German language and had been convicted under the challenged statute. *Id.*

The Court, while acknowledging that the exact forms of liberty protected by the Fourteenth Amendment have not been defined, provided examples of freedoms that "without doubt" it includes, such as "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." *Meyer*, 262 U.S. at 399 (collecting cases).

"*Farrington v. Tokushige* presented a similar issue when Hawaii attempted to regulate 'foreign language schools' to such a degree that it threatened to squeeze them out of existence." Crawford at 22 (citing *Farrington v. Tokushige*, 273 U.S. 284 (1927)). The Court in *Tokushige* recognized the liberty interests of the teachers in running the schools and of the parents in directing the education of their children as superior to the state's interest in controlling them. Crawford, at 23.

Similarly, in *Pierce*, plaintiff, the Society of Sisters, challenged the compulsory public school attendance law under the Fourteenth Amendment claiming deprivation of property without due process. 268 U.S. at 532–33. The Court held 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," and rejecting "any general power of the state to standardize its children by forcing them to accept instruction from public teachers only;" holding that 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.

Yoder, by contrast, presented a constitutional challenge to compulsory attendance under the Free Exercise Clause of the First Amendment. 406 U.S. at 207. The question was whether Old Order Amish children who had completed eighth grade could be compelled to attend public school until age 16 when formal high school education beyond eighth grade is contrary to Amish beliefs. *Id*. at 211. Compelled attendance at public school removed students "from their community, physically and emotionally, during the crucial and formative adolescent period of life" depriving them of the time in which "the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife." *Id*. at 211. Thus "high school attendance with teachers who are not of the Amish faith—and may even be hostile to it—interpose[d] a serious barrier to the integration of the Amish child into the Amish religious community." *Id*. at 211–12.

The state, by contrast, professed an "interest in universal education" which it executed by "establishing and maintaining an educational system." *Id.* at 213, 214. The Court found the state's interest in its system inadequate to override the defendants' individual rights to educate their children in accordance with their religious beliefs. *Id.* at 221, 236.

All of these bedrock cases recognized some state interest in education. But none of the cases articulated any doctrine allowing public school officials to displace parents' choice of education.

C. Parental Delegation of Authority to Schools is Deemed Limited in Many Areas.

Parental delegation of authority to schools is presumed to be limited in scope in a variety of circumstances. It is thus not unusual to respect those limits, which in many cases are expressly acknowledged in law and policy.

School personnel cannot, for example, take students to other locations outside the typical school locations without parental permission even though schools have physical custody of children during the school day. Montgomery County Public Schools has forms for providing parental authority for field trips,[5]

[5] Montgomery County Public Schools, Office of School Support and Improvement, *Parent/Guardian Approval for Trips MCPS Transportation is Provided*: https://ww2.montgomeryschoolsmd.org/departments/forms/pdf/555-6.pdf; Montgomery County Public Schools, Office of School Support and Improvement, *Parent/Guardian Approval for Trips*

including for "virtual fieldtrips."[6] Prior to requesting parental approval, the trip sponsor must request approval for the trip itself.[7] The expectation in Montgomery County Public Schools is that the school does not have authority to physically move a child to another location without additional express parental consent even for a curricular reason, like a school trip.

Likewise, school personnel have limited authority over the bodily integrity of students. They are prohibited from administering medication without express written permission: "No medication will be administered in school or during school-sponsored activities without the parent's/guardian's written authorization and a written physician order. This includes both prescription and over-the-counter medications."[8] Similarly, Maryland outlawed corporal

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MCPS Transportation is ***Not*** *Provided*: https://ww2.montgomeryschoolsmd.org/departments/forms/pdf/560-31.pdf

[6] Montgomery County Public Schools, Office of School Support and Improvement, *Parent/Guardian Approval MCPS Virtual Field Trip/Program Addendum*: https://ww2.montgomeryschoolsmd.org/departments/forms/pdf/210-7.pdf

[7] Montgomery County Public Schools, Office of School Support and Improvement, *Approval for Extended Day, Out-of-Area, and Overnight Field Trips*, https://ww2.montgomeryschoolsmd.org/departments/forms/pdf/210-4.pdf

[8] Montgomery County Public Schools Montgomery County Department of Health And Human Services, *Authorization to Administer Prescribed Medication*, available at: https://www.montgomeryschoolsmd.org/siteassets/schools/elementary-schools/a-c/burningtreees/uploadedfiles/authorization-to-administer-prescribed-medication.pdf

punishment in public schools in 1993,[9] representing a hard line over which parental authority cannot be delegated.

It is thus not unusual for public schools to recognize a limit on the parental authority delegated to them, particularly in sensitive areas.

D. Instruction in Human Sexuality is One of the Areas in Which Parental Delegation is Limited and Subject to Withdrawal Under Maryland Law.

Among the variety of topics over which delegation of parental authority is presumed to be limited, subject to withdrawal, or required to be express, the teaching of human sexuality is well-established. *See* Pet. at 6–7, n. 5, 6, & 7 (collecting state laws). Maryland statutory law recognizes and provides for parents to opt-out of such instruction for their children and places the burden on the school system to facilitate opt-outs and provide "appropriate alternative learning activities and/or assessments in health education" and the "opportunity for parents/guardians to view instructional materials to be used in the teaching of family life and human sexuality objectives."[10] Guiding the manner in which

[9] Jade Yeban, J.D., Susan Mills Richmond, Esq. (legal review), *State Laws Regarding Corporal Punishment*, FindLaw (May 23, 2024)

[10] (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 objectives.

(ii) For students opting out of family life and human sexuality instruction, each school shall establish a procedure for providing

their children are instructed in sexuality is widely recognized as among the topics over which parents have the right to direct their children's instruction.

II. DISCRIMINATION AGAINST MATTERS OF CONSCIENCE PROTECTED BY THE FIRST AMENDMENT MERITS STRICT SCRUTINY.

The First Amendment is a single sentence that does not establish a hierarchy among its clauses. This Court has noted that "it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme." *Prince v. Massachusetts*, 321 U.S. 158 (1944). *See also Gobitis*, 310 U.S. at 595 ("Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom.") (overruled on other grounds). Yet the level of scrutiny applied to infringement of religious exercise is both inconsistent—subject to exceptions, burden shifts, and assessment of mental state—and dramatically different from the scrutiny routinely applied to free speech, with speech more easily vindicated.[11] To the

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a student with appropriate alternative learning activities and/or assessments in health education.

(iii) Each school shall make arrangements to permit students opting out of the objectives related to family life and human sexuality to receive instruction concerning menstruation.

(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.

Md. Code Regs. 13A.04.18.01

[11] This Court's decision in *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010) is an especially clear illustration of the error of

extent the discord should be harmonized, it is this Court's province to do so. The Court's recent ruling in *Fulton* provides one means to narrow the gap by applying strict scrutiny to any law that fails to satisfy general-applicability by imposing additional burdens on religious exercise.

Justice Thomas highlighted the unexplained discrepancy in the treatment of the clauses in his concurrence in *United States v. Sineneng-Smith*.[12] Justice Alito, concurring in *Fulton*, discussed the anomalous "hybrid-rights" theory of free-exercise jurisprudence in which a free-exercise claim, to merit full constitutional protection, must be joined with another independently viable constitutional claim, such as free speech. *Fulton*, 141 S. Ct. 1868, 1918

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rank ordering First Amendment freedoms, allowing a public law school to require waiver of core free exercise and free association rights in order to enter a public speech forum. This decision is inconsistent with the Court's precedents before and since and should be reconsidered in an appropriate case.

[12] "Such arguments are typically raised in free speech cases, but the Court has occasionally entertained overbreadth challenges invoking the freedom of the press, *see, e.g., Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940), and the freedom of association*, see, e.g., Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). Curiously, however, the Court has never applied this doctrine in the context of the First Amendment's Religion Clauses. In fact, the Court currently applies a far less protective standard to free exercise claims, upholding laws that substantially burden religious exercise so long as they are neutral and generally applicable. *See Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). The Court has never acknowledged, much less explained, this discrepancy." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1584 (2020) (Thomas, J. concurring).

(2021) (Alito, J. concurring). The hybrid-rights philosophy appears to be unique among constitutional models, imposing an additional burden solely on free exercise claims.

Taken together, assorted arbitrary differences inject substantial uncertainty and unequal treatment into freedoms that the First Amendment itself treats as equals.

Two key inquiries—burden and tailoring—may be dispositive in a First Amendment case based on viewpoint. But the outcome may vary depending on whether free speech or free exercise is implicated, with government bearing the initial burden to justify the infringement and show narrow tailoring in free speech cases but bearing a lesser and often unclear burden in free exercise cases.

If this case were evaluated under the free-speech rubric, the burden would fall squarely on the government to rebut the presumption that the infringement is unconstitutional. That is because "[d]iscrimination against speech [due to] its message is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 828–29 (1995). That the burden must be borne by the government would be pellucid given the viewpoint-specific nature of the infringement. "When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.*

These standards reflect the principle that governments have "'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citation omitted). And, this Court has

almost uniformly rebuffed attempts to compel speech in the name of a never-ending string of assertedly important government interests. *See, e.g.*, *303 Creative*, 600 U.S. at 603 (rejecting Colorado's attempt to use its public accommodations law to compel speech in the context of website design); *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021) (protecting associative rights from purported state interest in administrative convenience of access to information for possible future need); *Nat'l Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361, 2365 (2018) (rejecting law requiring clinics that primarily serve pregnant women to display notices providing information about abortion services); *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448, 2456 (2018) (holding compelled membership in and financial support for a public employee union violated the First Amendment).

To carry its burden under the free speech rubric, the government would have to demonstrate that the infringement passes strict scrutiny—that it "is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merch. Ass'n,* 564 U.S. 786, 799 (2011). This means the "State must specifically identify an actual problem in need of solving, . . . and the curtailment of free speech must be actually necessary to the solution." *Id*. (citations omitted). To be narrowly drawn, a restriction may not be overinclusive, prohibiting too much speech, or underinclusive, restricting too little to meet its goal. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). "Underinclusiveness raises serious doubts about whether the government is . . . pursuing the interest it invokes, rather than

disfavoring a particular speaker or viewpoint." *Entm't Merch. Ass'n*, 564 U.S. at 802.

Here, Maryland has a long and ongoing tradition of allowing parents to opt-out of instruction on sexual topics for their children. *Supra* at n. 10. The State identified no "actual problem in need of solving" that would explain why its existing policy should be suspended for grade school children. Thus, were the underinclusiveness test applied to the compelled participation here, the Board would be required, and almost certainly unable, to show why high school students can be opted-out of instruction on sexuality the Board argues is a compelling interest, *i.e.*, the program is underinclusive.

III. THE BOARD CANNOT CURE ONE FIRST AMENDMENT INJURY BY IMPOSING ANOTHER.

The court below excused the constitutional infringement in part by opining that parents could cure it through their own instruction.

> Although the Parents allege that the Board's decision not to provide notice and an opt-out option burdens their right to form their children on a matter of core religious exercise and parenting: how to understand who they are, they do not show anything at this point about the Board's decision that affects what they teach their own children. . . . the Parents still may instruct their children on their religious beliefs regarding sexuality, marriage, and gender, and each family may place contrary views in its religious context.

App. 34a–35a (cleaned up).

This reasoning, in which one constitutional violation allegedly can be vindicated by shifting the burden to the victim to cure the harm was attempted in the now-overruled *Gobitis* opinion, in which the Court minimized the infringement by amplifying the power of the parents.

> What the school authorities are really asserting is the right to awaken in the child's mind considerations as to the significance of the flag contrary to those implanted by the parent. In such an attempt the state is normally at a disadvantage in competing with the parent's authority, so long-and this is the vital aspect of religious toleration-as parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state's educational system is seeking to promote."

Gobitis, 310 U.S. at 599.

Of course, any "disadvantage" suffered by the school authorities is not the point. The constitutional injury occurs in the first sentence, in which school authorities assert "the right to awaken in the child's mind considerations as to the significance of the flag contrary to those implanted by the parent," *Id.*, which cannot be effaced by compelling remedial action by the parent. In dissent, Justice Stone expressed hesitancy to rely on remedial political measures to excuse an unconstitutional act. *Id.* at 605–06 (Stone, J. dissenting) ("I am not persuaded that we should refrain from passing upon the legislative judgment 'as

long as the remedial channels of the democratic process remain open and unobstructed.'"). While the mechanism Justice Stone identified is different, his rejection of potential remedial measures to excuse the initial infringement is the same.

Gobitis, of course, was overruled by *Barnette* where the Court focused on the very issue presented here: the school's attempt to step beyond mere presentation of information to promote adoption of a certain ideal and in-class expression of the promoted viewpoint. *Barnette*, 319 U.S. at 630 ("Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means."). The record here indicates that the school's intent is the same: molding the viewpoint of the students. The schoolboard promotes this goal by providing guidance to teachers on how to "[d]isrupt the either/or thinking" App. 12a, and explains that the "purpose of learning about gender and sexual[] identity diversity is to demonstrate that children are unique and that there is no single way to be a boy, girl, or any other gender." App. 13a. Moreover, compelled participation and vilification of dissenters implies that discussion of sexuality between school aged children and their teachers is appropriate.

The court below declined to find injury, holding "the existing record does not show that mere exposure to the Storybooks is affirmatively compelling" the Parents or their children to perform acts undeniably at odds with "their religious views." App. 29a (cleaned up). But any lack of clarity on the results of the compulsion does not excuse the attempt, nor does the

assertion that children are not coerced to agree with the lessons. *Barnette* instructs otherwise. *Barnette*, 319 U.S. at 633 ("It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning.").

Moreover, it blinks reality to assert that parents can avoid or cure harm when the school has taken steps to foreclose their ability to remediate the risk on the front end by simply opting out. Indeed, the popularity of this approach, in which parents declined to involve their children in these discussions, was so broad the Board professed its inability to deal with the sheer number of dissenting parents as the basis for eliminating the ability to opt-out: "First, it claims that the original notice-and-opt-out policy had led to high student absenteeism," and "cited concerns from principals and teachers regarding the feasibility of accommodating the growing number of opt out requests without causing significant disruptions to the classroom environment and undermining the school system's educational mission," App. 15a–16a.(cleaned up). Having taken steps to eliminate parental control up-front, shifting the burden to parents after-the-fact, and compelling them to speak if they are to address the infringement they were unable to avoid, simply adds another layer of constitutional injury that is unsupported by law.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Fourth Circuit.

Respectfully submitted,

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