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 *AMICUS CURIAE* INDEPENDENCE LAW CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Independence Law Center is a Pennsylvania-based law firm focusing on constitutional rights and other public policy issues. Independence Law Center attorneys have been retained by numerous public school districts to craft policies that address issues such as those presently before this Court.

The zealous orthodoxy thrust upon schoolchildren by teachers and even school districts has become all too common. This new orthodoxy emerges with a religious-like fervor and often involves the over-sexualization of children and adults coercing children into gender ideology. As a result of widespread parental opposition to such practices, many parents were elected to school boards to make changes. Independence Law Center has worked with school boards to return schools' focus to the academic advancement of the children in their care. In these cases, our freedoms are advanced as a result of the political process.

Other times, school boards imposing sexual orthodoxies remain entrenched in their ways. The impact is unavoidable when topics are as difficult and sensitive as those at issue in this case because they strike deeply at the heart of parents' desire to direct the upbringing of their children. If the ideological zeal in certain schools cannot be controlled, parents

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[1] No party's counsel authored any part of this brief. No person other than *amici* and their counsel contributed any money intended to fund the preparation or submission of this brief.

ought to at least be provided transparency and the opportunity to opt out their children in order to maintain control over the education of their children. Independence Law Center's expertise in providing counsel to school districts concerning neutrality, transparency, and parental rights provides a unique perspective to this Court.

SUMMARY OF ARGUMENT

Society's core freedoms are in jeopardy when the government attempts to impose a belief system on its people. Historically, we have recognized that differences on certain important issues, like religion, are best respected when the government declines to take sides. Increasingly, however, schools like those governed by the Montgomery County Board of Education (the Board) seek to impose an orthodoxy over the competing belief systems of our day, including the nature of human sexuality and gender.

Sometimes these impositions of orthodoxy are remedied through elections, as it was after Terry McAuliffe, running for Virginia governor, stated, "I don't think parents should be telling schools what they should teach."[2] Virginia parents disagreed, the statement went viral, and Glenn Youngkin was elected instead. Other times, like here, the government doubles down. Not only is the Board imposing this orthodoxy, it is preventing parents from

[2] John Clark, *McAuliffe: 'I don't think parents should be telling schools what they should teach,'* WTVO, September 29, 2021, https://www.mystateline.com/news/politics/mcauliffe-i-dont-think-parents-should-be-telling-schools-what-they-should-teach/

knowing what is taught and opting out their children. This burdens the oldest of liberties—the right of parents to direct the upbringing of their children.

A governmental burden on such fundamental rights is subject to strict scrutiny. Indeed, when parental rights are pitted against the actions of a school, policy considerations dictate that we ought always take a parental primacy approach and invoke strict scrutiny. Finally, there can be no compelling interest that justifies imposing this kind of training in school, especially without the ability of parents to meaningfully opt out.

ARGUMENT

I. Public School Districts Must Never Prescribe a State-Sponsored Orthodoxy.

One of the most precious gifts of a free society is the ability to think and speak without restriction. It is no wonder why freedom of conscience is considered the "mark of a free people." *Lee* v. *Weisman*, 505 U.S. 577, 592 (1992). To preserve this freedom, all clauses of the First Amendment work together to prevent the government from compelling any particular orthodoxy. When the government puts its imprimatur on a specific form of expression—whether it is religious expression, political speech, or any other ideology—it conveys a message of exclusion to all those who do not adhere to those favored beliefs.

It is for this reason that neutrality in the public school system is not a new concept. To avoid the danger of indoctrination and too much power in the

hands of a school over students, the United States Supreme Court has encouraged public schools to adhere to ideological neutrality:

> Free public education, if faithful to the idea of instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system.

West Virginia v. *Barnette*, 319 U.S. 624, 637 (1943).[3]

Any pressure exerted by a school to dictate a particular orthodoxy weakens the educational system and jeopardizes our freedom of conscience. *Id*. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion[.]"). When public school programming is not neutral, it has the effect of dictating "authoritarian selection" of a favored viewpoint by compelling uniformity with the school's asserted position either in a belief or attitude of mind, because students are pressured to view the school's belief as right:

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[3] Even though *Barnette* addressed both the issues of compelled speech and the free exercise of religion, the Court's holding was not limited to those issues but was written broadly to apply to all forms of ideological expression, orthodoxy, or beliefs that could be coerced by the State.

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritarian selection.

Keyishian v. *Board of Regents*, 385 U.S. 589, 603 (1967) (cleaned up). Such practices require students to "forego any contrary convictions of their own and become unwilling converts to the prescribed [message]." *Barnette*, 319 U.S. at 634; see also *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1968) ("[S]tudents may not be regarded as closed circuit recipients of only that which the State chooses to communicate."). It is this very danger of "authoritarian selection" that occurs when public school teachers advocate their positions on controversial topics to advance their viewpoints as correct and shame dissenting viewpoints as wrong. To be sure, the problems are even more pronounced where the imposition of gender ideology on minors is concerned because of the ubiquitous assertion by its ideological proponents that any student or parent who dissents to the sexual orthodoxy is guilty of bigotry and hate.

This is a case about a public school district prescribing what is orthodox in conflict with the fundamental liberty interest of parents in the

religious upbringing of their children. Pressuring students to conform to viewpoints on LGBTQ issues under the guise of "inclusion" has swiftly generated controversy in school districts throughout the country. Even young children are targeted with ideological messaging and sexualized content in their most tender and impressionable years, positioning certain viewpoints on these matters as acceptable and dissenting viewpoints as wrong.

II. The Storybooks and Supplemental Material Prescribe a State-Sponsored Orthodoxy that Burdens Petitioners' Right to Direct the Religious Upbringing of Their Children.

Petitioners come from diverse religious backgrounds, but they are nonetheless unified in their belief that biological sex, sexuality, and marriage are part of a larger created order designed by God. *Mahmoud* v. *McKnight*, 102 F.4th 191, 200 n.3 (4th Cir. 2024). Specifically:

> [T]hey believe they have a religious duty to train their children in accord with their faiths on what it means to be male and female; the institution of marriage; human sexuality; and related themes. Their respective religious faiths direct and inform their views about those issues, and they want to maintain control over what, how, and when these matters are introduced to their children.

Id. at 201. All petitioners believe that mankind is divinely created as male and female, biological sex

and gender cannot be separated, and their religions condemn dressing or behaving as the opposite sex. See *Mahmoud* v. *McKnight*, 688 F. Supp. 3d 265, 274-76 (D. Md. 2023). It is these religious views that motivate petitioners' desire to opt their children out of the Storybooks. See *Mahmoud*, 102 F.4th at 201 (citations omitted); *Mahmoud*, 688 F. Supp. 3d at 274 (citations omitted).

The Board's decision to insert over 22 LGBTQ texts for use in the classroom (Storybooks), is a radical effort to prescribe a state-sponsored orthodoxy that directly conflicts with petitioners' religious beliefs. See *Mahmoud*, 688 F. Supp. 3d at 272. These Storybooks contain age-inappropriate material and materials that expose young children to a singular viewpoint favoring LGBTQ and gender ideology. *Id.* at 272-273. Even more than exposing children to this content, the Storybooks are accompanied with non-neutral directives for the teachers to use in their discussions to pressure children into dismissing parental and religious guidance on these deeply personal issues. *Id.* at 277-280. These materials instruct teachers to change the children's beliefs on these issues by infusing comments into discussions that oppose what petitioners are teaching their children about the immutable and binary nature of biological sex. *Ibid.*

Specifically, the material encourages teachers to "disrupt the either/or thinking" of the children and assert that "people of any gender can like whoever they like[,]" shame children into thinking that their viewpoints are "not fair," while instructing them in contradiction with their parents' religious beliefs that

"gender comes from the inside[.]" *Mahmoud*, 102 F.4th at 198-99. Even the guidance offered on how to respond to parents displays the favored state-sponsored position. *Id*. at 199.

The school's ideology teaches that boys could be a girl or neither, and girls can be boys or neither while the religious beliefs of the petitioners teach that there is only the immutable sex of male and female from which gender cannot be separated. *Mahmoud,* 102 F.4th at 199. The collision of these orthodoxies exhibits one ideological belief that bears the imprimatur of the government, while the other scientific and religious beliefs are treated as views that need to be corrected. *Any* prescribed orthodoxy administered by the state exerts great coercive pressure on young children to change their beliefs, thus striking at the heart of the parent-child relationship in matters of greatest importance such as the religious and moral beliefs that shape a child's identity.

III. Strict Scrutiny Is Mandated When the Government Infringes Upon Parental Rights.

A. Fundamental rights should be afforded strict scrutiny.

Government may only interfere with the parent-child relationship when strict scrutiny is satisfied. In *Troxel* v. *Granville*, this Court powerfully reaffirmed that "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." 530 U.S. 57, 65 (2000). Justice O'Connor's

plurality opinion emphasized that this liberty interest is not merely important but fundamental, stressing that the Due Process Clause "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id*. at 66. While *Troxel* did not explicitly articulate the standard of review, its recognition of parental rights as fundamental necessarily triggers strict scrutiny.

This Court has consistently held that government actions infringing upon fundamental rights must survive strict scrutiny. *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997) (noting that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests"). The fundamental nature of parental rights is further strengthened when religious upbringing is at stake. In *Wisconsin* v. *Yoder*, this Court struck down compulsory education laws as applied to Amish parents, recognizing the special weight of parental decisions concerning religious formation. 406 U.S. 205, 233-34 (1972).

The unity of these two fundamental interests—parental authority and religious liberty—presents precisely the kind of "fundamental right" that demands strict scrutiny. The Board's refusal to accommodate parents' religious objections to the inculcation of gender ideology in the classroom directly infringes upon this dual-layered fundamental right. It forces children to receive instruction that contradicts their parents' religious teachings on matters central to identity, sexuality, and the family.

This Court has never held that schools may override parental religious authority on profound moral and spiritual matters. To the contrary, in *Pierce* v. *Society of Sisters*, this Court protected parents' rights to direct their children's education in accordance with religious convictions, declaring that "[t]he child is not the mere creature of the State." 268 U.S. 510, 535 (1925).

B. Even when schools are involved, the primacy of parents counsels in favor of strict scrutiny.

Nothing in this Court's parental rights jurisprudence suggests that fundamental familial liberties receive less protection in the schoolhouse. Rather, the captive nature of the classroom environment—where attendance is mandatory and the state holds significant authority—demands higher, not lesser, vigilance against government overreach. That is why the Third Circuit, using a parental primacy framework, has applied strict scrutiny when a school's actions strike at the heart of the parent-child relationship:

> **It is not educators, but parents who have the primacy of rights in the upbringing of children.** School officials have only a secondary responsibility and must respect those rights. State deference to parental control over children is underscored by the Court's admonitions that "the child is not the mere creature of the State,"

> *Pierce*, 268 U.S. at 535, and that it is the parents' responsibility to inculcate "moral standards, religious beliefs, and elements of good citizenship." *Yoder*, 406 U.S. at 233.

Gruenke v. *Seip,* 225 F.3d 290, 307 (3d Cir. 2000) (emphasis added); see also *ibid* ("Public schools must not forget that 'in loco parentis' does not mean 'displace parents.'").

The application of the Third Circuit's parental primacy position can be seen in *Tatel* v. *Mt. Lebanon*, 637 F. Supp. 3d 295 (W.D. Pa. 2022), a case that vividly illustrates the problems of state-sponsored orthodoxy in the context of this cultural moment. The problems arose when a teacher was discovered teaching gender ideology to children in her first-grade classroom. *Id.* at 304. The teacher developed lesson plans for six and seven-year-old children that included videos and books on transgender topics. *Id.* at 305. Although the materials were not initially part of the school's curriculum, the school adopted a "de facto" policy allowing her instruction to continue. *Id.* at 307. The teacher told the children that parents can sometimes make mistakes about the child's gender, that she would never lie about their gender (implying that their parents may lie), and that children can dress and groom to be a different gender. *Id.* at 302, 323. This conflicted with the parents' belief in the natural created order of the biological sexes as male and female, which "cannot be changed regardless of individual feelings, beliefs, or discomfort with one's identity[.]" *Id.* at 306.

The district court recognized the "contradictions between these worldviews" as it examined the competing orthodoxy between gender ideology and the parents' religious beliefs. *Tatel*, 637 F. Supp. 3d at 320-321 ("In short, the Parents seek to teach that sex and gender are synonymous and immutable and that humans are created beings who must accept their place in a larger reality. The transgender movement asserts that human beings are autonomous, self-defining entities who can impose their internal beliefs about themselves on the larger world."). The court understood that the teacher's actions stretched beyond merely exposing children to controversial topics but were instead advocating in favor of a different ideological position than what the parents were trying to teach their children at home. *Id*. at 321. The failure of the district to allow opt-outs further exposed the school's desire to undermine parental authority, as if they knew better than the parents about their own children's sexuality and identity. See *Troxel*, 530 U.S. at 68-69 (holding that parents have the fundamental right, absent any finding that they are unfit, to make decisions concerning the care, custody, and control of their children).

Furthermore, directing discussions on gender ideology to children as young as first grade "directly repudiates parental authority," particularly when it is supplemented with commentary from the teacher that "the child's parents' beliefs about gender identity may be wrong and the teacher's beliefs are correct[.]" *Tatel,* 637 F. Supp. 3d at 321. This coercive power is worsened with the additional authority exercised by the government through mandatory attendance

requirements. *Tatel*, 637 F. Supp. 3d at 316 (citations omitted). See also *Barnette*, 319 U.S. at 631 ("The sole conflict is between the authority and rights of the individual. The State asserts power to coerce attendance by punishing both parent and child."). Ultimately, the district court in *Tatel* recognized that the "parents' fundamental right to inculcate their important moral and religious values in their young children cannot be purely hypothetical—it must be enforceable." *Tatel,* 637 F. Supp. 3d at 323 (citations omitted). In light of these facts, *Tatel* applied the parental primacy test, and thus applied strict scrutiny, because "[t]eaching a child how to determine one's gender identity" is "a matter of great importance that goes to the heart of parenting," since "[i]ntroducing and teaching a child about complex and sensitive gender topics before the parent would have done so can undermine parental authority." *Id.* at 320, 321 (citations omitted).

C. Strict scrutiny should be applied to the Board's failure to provide a meaningful opt-out to parents.

As with the indoctrination in *Tatel*, the Storybooks and supplemental material go beyond promoting tolerance and instead advocate a prescribed orthodoxy that strikes at the heart of parental decision-making. Worse, teachers were provided with a script to instruct children as young as three and four by redirecting, or "correcting," the child's thinking, by shaming their viewpoints as wrong and advocating for the Storybooks' asserted position as correct. *Mahmoud* v. *McKnight*, 102 F.4th 191, 198-199 (4th Cir. 2024). The effort put forth by the Board to

precisely control any discussion manifests the school's struggle to coerce this uniformity of sentiment. See *West Virginia* v. *Barnette*, 319 U.S. 624, 641 (1943) ("Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men.").

This correction comes from a government authority, serving as a role model, whom parents and school administration are undoubtedly teaching their children to respect. See *Mahmoud* v. *McKnight*, 688 F. Supp. 3d at 275 (D. Md. 2023) (citing that at least one of the petitioner's children "loves his teachers and implicitly trusts them."). The hypothetical exchanges outlined in the materials envision an unrealistic dialogue with elementary school-age children who are at an age where their religious and moral convictions have not yet taken root and critical thinking skills are not developed. The natural consequence of these discussions is that children will question the authority of their parents' views.

Moreover, teachers are given broad power in selecting among materials. Books like *Pride Puppy!* and *Love, Violet* could be used regularly, exposing students to radically controversial topics on a regular basis. Broad discretion and the lack of transparency render it impossible for parents to know what is being presented and the extent of the indoctrination. See *Parker* v. *Hurley*, 514 F.3d 87 (2008) at 106-107 (discussing the influence-to-indoctrination continuum, where there could be evidence of systematic indoctrination when ideological material is continuously displayed to children). Furthermore,

there are no limits that will prevent a teacher from going beyond the suggested guidance to make even more coercive comments. Instead, teachers could instruct students to keep discussions with the teacher about transgender topics a secret as the teacher did in *Tatel* or even persuade individual children to consider changing their gender without the parents' consent. See *Tatel*, 637 F. Supp. 3d at 302.

The school district's purported opt-out policy offers nothing but an illusory accommodation when notice and opt-outs can be denied at the discretion of the school with "administrative infeasibility" guidelines that are impossible to define. See *Mahmoud*, 102 F.4th at 200. This public school will never be able to effectively provide an accommodation for either the fundamental rights of parents or religious liberty if the school retains unlimited authority to deny notice and opt-outs to parents whenever those requests become administratively infeasible due to poor curriculum choices. See also *Barnette*, 319 U.S. at 641 ("Authority here is to be controlled by public opinion, not public opinion by authority."). Moreover, administrative infeasibility has a perverse effect because the worse a school's policy choices become—driving parents to seek an opt-out—the easier it is for the school to deny parents any options.[4]

Governmental burdens on a parent's fundamental right to direct the upbringing of their child should

[4] Nor is it sufficient to say that parental rights ends once a decision is made to send a child to public school. That line of reasoning is incompatible with the principles of neutrality set forth in *Barnette* and the necessary obligation of the state to refrain from prescribing what is orthodox.

always be subject to strict scrutiny. But the policy rationale for strict scrutiny is all the more obvious when, as here, the Board has implemented a curriculum with a prescribed orthodoxy as well as an excessive retention of government power that "strikes at the heart of parental decision-making in a matter of greatest importance in their relationship with their children[.]" *Tatel*, 637 F. Supp. 3d at 321.

IV. The Storybooks and Supplemental Materials Fail Strict Scrutiny Because This Imposition on Parental Decision-Making is Not Narrowly Tailored to Any Compelling Governmental Interest.

The school's imposition of Storybooks and supplemental materials—without parental opt-outs—can only survive if it is narrowly tailored to a compelling governmental interest. No compelling interest exists that would justify the school forcing children to interact with these materials over the objection of their parents. Many of the materials, like finding the name of a sex worker in a word search targeting three and four year-olds, see *Mahmoud* v. *McKnight*, 688 F. Supp. 3d 265, 276 (D. Md. 2023), should never even survive rational basis. Taken as a whole, the Storybooks and supplemental materials are not only unnecessary for any compelling governmental interest, they actually work to undermine the ordered liberty on which our society rests. Tolerance and respect are not advanced by a policy that disrespects the values held by parents and their children. No parent should have its parental authority undermined by the educational institution

with which it entrusts its dearest possessions—its children.

CONCLUSION

This case involves a public school system that has done what no public school should do—impose an orthodoxy on impressionable students in an area of significant societal disagreement. This undermines public trust—parental trust. The Board's failure to provide even the most minimal recourse to parents—notice and an opt-out—violates strict scrutiny. Therefore, the decision below should be reversed.

Respectfully submitted,

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