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 *AMICA CURIAE* MELISSA MOSCHELLA, PH.D. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICA CURIAE*[1]

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[1] *Amica Curiae* affirms pursuant to Supreme Court Rule No. 37.6 that no counsel for any party authored or assisted in the drafting of this brief, in whole or in part, and no person other than the *amica curiae* and her counsel made any monetary contribution intended to fund the preparation or submission of this brief.

(forthcoming 2025) and numerous other scholarly publications on moral and legal questions regarding parental rights and religious freedom. She also delivered the 2024 Vaughan Lecture at Harvard Law School on the subject: "How Broad and Strong are Parental Rights Under *Pierce*?" (which can be seen at https://www. youtube.com/watch?v=9OI0Dh5z4L4).

SUMMARY OF ARGUMENT

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Among these freedoms is the right to the free exercise of religion. "No liberty guaranteed by our constitution is more important or vital to our free society than is a religious liberty protected by the Free Exercise Clause of the First Amendment." *State v. Yoder*, 49 Wis.2d 430, 434 (1971). This constitutionally protected religious liberty includes "the rights of parents to direct 'the religious upbringing' of their children." *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 486 (2020) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 213-14). On the basis of *Carson v. Makin, Espinoza v. Montana*, *Wisconsin v. Yoder*, and related precedents, the free exercise claims of the Petitioners in this case are in themselves sufficient to warrant the application of strict scrutiny, which in turn requires vindicating Petitioners' rights to exempt their children from controversial instruction on sexuality and gender that is contrary to their sincerely-held religious beliefs.

Also among the constitutional freedoms that must be protected in the public schools is the related "fundamental right of parents to make decisions concerning the care, custody, and control of their children" which the United States Supreme Court in *Troxel v. Granville* referred to as "perhaps the oldest of the fundamental liberty interests recognized by this Court." 530 U.S. 57, 65 (2000). When free exercise rights and parental rights are both implicated – as they are in this case – the warrant for stringent constitutional protection is even stronger. Indeed, the

need to apply strict scrutiny becomes incontrovertible "when the interests of parenthood are combined with a free exercise claim." *Wisconsin v. Yoder*, 406 U.S. at 233. The case currently before the court clearly falls into this category.

Further, a proper, historically-informed understanding of *Meyer v. Nebraska* and *Pierce v. Society of Sisters* would indicate that the infringement of parental rights in this case would also in itself be sufficient to warrant strict scrutiny and a corresponding vindication of the Petitioners' constitutional rights. Yet the failure of the Supreme Court to articulate a clear standard of review in parental rights cases has left parental rights jurisprudence in a state of confusion, resulting in inconsistent lower court decisions, and leading many lower courts to adopt a historically inaccurate, narrow and weak interpretation of parents' educational rights under *Meyer* and *Pierce*. This approach is contrary to the now well-established *Glucksberg* test for identifying and defining purported substantive due process rights by examining the relevant history and tradition – a test reaffirmed and applied recently by this Court in *Dobbs*. *Washington v. Glucksberg*, 521 US 702, 721 (1997); *Dobbs v. Jackson*, 597 U.S. 215 (2022).

Thus, although the parents' free exercise claims (either alone or in conjunction with their parental rights' claims) provide sufficient constitutional grounds for applying strict scrutiny and finding the School Board's actions unconstitutional, this case presents an important and timely opportunity for the Court to clarify the confused and historically inaccurate state of current parental rights

jurisprudence. This is especially true given that it has been half a century since the Supreme Court took a case concerning parental rights in education, and that the increasingly controversial nature of what the public schools teach on sensitive issues such as sexuality and gender (as exemplified in the current case) has led to a proliferation of conflicts between parents and public schools.

ARGUMENT

I. The Free Exercise Clause Alone Requires Granting Petitioners the Relief They Seek

"A State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Carson v. Makin*, 596 U.S. 767, 778 (2022) (relying on *Sherbert v. Verner*, 374 U.S. 398, 404 and *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16). To exemplify this principle, the *Carson* court cites *Sherbert* (in which a Seventh-day Adventist lost her job for refusing to work on the sabbath, and was denied unemployment benefits), noting that "[a] State may not withhold unemployment benefits…on the ground that an individual lost his job for refusing to abandon the dictates of his faith." Id. (citing Sherbert, 374 U. S. at 399-402). Similarly, both *Trinity Lutheran v. Comer* and *Espinoza v. Montana* held that it is unconstitutional to force individuals or institutions to choose between forgoing their religious exercise or forgoing a valuable public benefit. *Trinity Lutheran* held that it is "odious to our constitution" to condition a church's "free[dom] to continue operating as a church" on "exclusion from the benefits of a public program." *Trinity Lutheran v. Comer*, 582 U.S. 499,

467, 462 (2017). And *Espinoza* held that the state policy at issue violated parents' free exercise rights "by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one." 591 U.S. at 486.

The Petitioners in this case ("the Parents") are in a similar position, due to the Montgomery County School Board's refusal to allow their children to be exempted from lessons contrary to their religious beliefs. Because of this refusal, the Parents must choose between failing to fulfill their religious obligation to educate their children in line with their faith, or forgoing the valuable benefit of a free public education. And this Court has already recognized that education is among the "services and benefits provided by the State," comparable to social assistance programs like welfare or unemployment benefits. *San Antonio v. Rodriguez*, 411 U.S. 1, 35, 37 (1973) (arguing against the claim that education should be considered distinct from other state benefits, and comparing state provision of education to state provision of "food and shelter"). The same principle applied in *Sherbert*, *Trinity Lutheran*, *Espinoza*, and *Carson* – that it is unconstitutional for the state to force someone to choose between living out one's faith and receiving a public benefit – therefore applies here.

Indeed, due to the School Board's refusal to grant opt-outs, some of the Parents have already had to remove their children from the public schools – thereby losing a valuable public benefit – in order to fulfill their religious obligation to educate their children in line with their faith. *Complaint* at record 7, ¶35. Thus, their situation is analogous to that of

the woman in *Sherbert* who was denied unemployment benefits because she lost her job for refusing to violate her religious obligation to abstain from work on the sabbath. It is also analogous to the situation of Trinity Lutheran Child Learning Center, which was forced to choose between exercising its religious mission and eligibility for a public benefit program. Finally, the situation of religious parents in this case is analogous to that of the petitioners in *Espinoza*, who were denied access to "scholarship funds they otherwise would have used to fund their children's educations at religious schools." *Carson*, 596 U.S. at 779 (describing the facts in *Espinoza*, 591 U.S. 464).

Just as in these analogous cases, requiring the Parents in this case either to violate their religious obligation to educate their children in line with their faith or to forgo the benefit of a free public education is state coercion inhibiting the free exercise of religion. Moreover, given that education is compulsory, and that many parents lack the means to pay for private schooling, for some parents the state coercion to violate their religious obligations is even more direct. Parents in this situation must choose between violating the compulsory education law or violating their faith.

In either case, such state coercion inhibiting the exercise of religion will only pass constitutional muster if it meets the requirements of strict scrutiny – that is, if it is narrowly tailored to a compelling state interest. But the School Board's refusal to allow the parents to opt their children out of these controversial lessons on sexuality and gender clearly fails to meet these requirements. Exposing impressionable

elementary-school children to highly contested views about sexuality and gender could hardly be considered a compelling state interest. And even if one grants a compelling state interest in promoting tolerance and civic respect, there are countless other ways of achieving this interest that are less burdensome to the Parents' religious exercise. It is, at any rate, implausible to claim that the state's interest in tolerance and civic respect will be defeated unless it forces *every* child to participate in *these* controversial lessons, regardless of the parents' religious objections. The Supreme Court of Wisconsin's comment in *State v. Yoder* regarding the unwillingness of the state to exempt Amish children from the last two years of the compulsory education requirement – an unwillingness that failed to meet the requirements of strict scrutiny – applies equally to this case: "Here, the state has substituted its judgment of the type of education for the judgment of the natural parent and has made no allowance for the religion of the child or the religion of the parent." 49 Wis.2d at 440. The Supreme Court of Wisconsin – and eventually the United States Supreme Court – ruled that failure to grant the exemption was a violation of Amish families' free exercise rights that could not survive strict scrutiny, because granting the exemption would not "defeat the purpose" of the compulsory education law. Id. at 441. Applying the same standard, the Court in this case should rule that it is a violation of the Parents' free exercise rights to deny their request to opt their children out of these controversial lessons on sexuality and gender.

It is also noteworthy that *State v. Yoder* was decided purely on free exercise grounds. "We view this case as involving solely a parent's right of religious

freedom to bring up his children as he believes God dictates." Id. at 438. Further, although *Wisconsin v. Yoder* mentions parental rights, written correspondence between Justices Stewart and Brennan and Chief Justice Burger indicates that the constitutional basis of the decision was solely the First Amendment's Free Exercise Clause (applied to the states via the Fourteenth Amendment). Justice Potter Stewart, *Memorandum to Chief Justice Warren E. Burger, No. 70-110* - Wisconsin v. Yoder (Apr. 11, 1972); Chief Justice Warren E. Burger, *Memorandum to Justice Potter Stewart*, *No. 70-110* - Wisconsin v. Yoder (Apr. 11, 1972); Justice William J. Brennan, *Memorandum to Chief Justice Warren E. Burger, re: No. 70-110* - Wisconsin v. Yoder (Apr. 12, 1972).

These precedents therefore indicate that remedying the free exercise violation in the current case is sufficient reason to rule in favor of the Parents.

II. Combining Free Exercise Claims With Parental Rights Claims Further Strengthens the Parents' Case

Although – as argued above – the Parents' free exercise claim should itself trigger strict scrutiny and be a sufficient basis for a ruling in their favor, the Parents' case is further strengthened by recognizing that the School Board's actions violate not only free exercise rights but also parental rights. Under *Employment Division v. Smith*, in a "hybrid situation" in which "free exercise rights" are combined with another constitutional right such as "the right of parents … to direct the education of their children," strict scrutiny is required even when considering a "neutral, generally applicable law." 494 U.S. 872, 881

(1990). If such hybrid situations exist, this case is clearly one. Thus, *even if* the policy at issue in this case were neutral or generally applicable – I argue below that it is neither – strict scrutiny ought to apply.

The religious obligation that the School Board's policy interferes with is precisely the Parents' religious obligation to educate their children in accordance with their faith. The books/lessons to which the Parents object touch upon sensitive and intimate matters regarding sexuality and family life that are central to their religious beliefs. *Complaint* at record 8-12, ¶50-83. As one scholar explains, "Old and New Testament scriptures persistently point to human beings' ordinary romantic and familial relationships and experiences as pathways for glimpsing foundational religious beliefs." Helen Alvare, *Families, Schools, and Religious Freedom*. 54 LOY. U. CHI. L.J. 579, 580 (2022). Moreover – precisely because these books deal with intimate moral and religious beliefs – failing to accommodate parents' objections to them strikes at the core of parents' educational rights. "The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters." *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944). *See also* Melissa Moschella, *To Whom Do Children Belong?* 2016, 66 ("The particularly weighty and personal nature of parents' obligation to educate their children morally and religiously implies that respecting parents' right[s] ... requires granting them a highly protected sphere of authority to make decisions about the moral and religious content of education.") And all of these concerns are magnified due to the very young ages of

the children involved. "[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." *Wisconsin v. Yoder*, 406 U.S. at 213-214. Thus, the Petitioners' parental rights claim strengthens and is closely connected to their free exercise claim.

The policy at issue in this case is neither neutral nor generally applicable, given that the very accommodation requested by the parents was routinely granted in the past, that similar opt-outs continue to be routinely granted, and that officials' defenses of the policy reflect hostility toward religion. *Complaint* at record 30-31, ¶200-209, 225-233. Nonetheless, *even if* the policy were neutral and generally applicable, strict scrutiny should still apply under *Smith* because the case presents a hybrid situation in which the policy infringes upon both parental rights and free exercise rights. And, as explained in the previous section, the policy clearly fails to meet the requirements of strict scrutiny.

III. The Parental Rights Claim Alone Warrants Strict Scrutiny and a Ruling in Favor of the Parents

A. The Importance of Parental Rights and the Need to Correct the Confused, Inconsistent, and Historically Inaccurate State of Current Parental Rights Jurisprudence

In *Pierce v. Society of Sisters*, Justice McReynolds, writing for a unanimous court, famously stated: "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." 268 U.S. 510, 534 (1925). Every Supreme Court decision touching upon parental rights – including those reversing other *Lochner*-era substantive due process decisions – has reaffirmed *Pierce* unequivocally. *See* Emily Buss, *Passively Virtuous Parental Rights*, NOTRE DAME L. REV. (forthcoming 2025). Most recently, the Supreme Court in *Troxel* spoke of the "fundamental right of parents to make decisions concerning the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by this Court." 530 U.S. 66, 65 (2000). Nonetheless, *Troxel*, like previous decisions related to parental rights, failed to clarify the appropriate standard of review for parental rights cases, leading to confusions and inconsistencies in lower courts, which have applied "various levels of scrutiny…without much method, logic, or reason." Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 130 (2018). *See also* Elizabeth Kirk, *Parental Rights: In Search of Coherence*, 27 TEX. REV. L. & POL. 730, 742 (2023) (concluding that parental rights jurisprudence currently is "weak, chaotic, and inconsistent").

This lack of clarity and consistency regarding both the strength and scope of parents' constitutional rights, particularly in the educational arena, has led many lower courts to be dismissive of parental rights in education, claiming, for instance, that "the *Meyer-Pierce* right does not extend beyond the threshold of

the schoolhouse door." *Fields v. Palmdale School District*, 427 F.3d 1187, 1207 (9th Cir. 2005).[2] Some lower courts – including the Fourth Circuit in the current case – have failed to apply strict scrutiny even in hybrid cases involving both parental rights and free exercise rights (*see*, e.g. *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987); *Brown v. Hot, Sexy & Safer*, 68 F.3d 525 (1st Cir. 1995)), while others have argued that parental rights violations merit strict scrutiny in and of themselves. See, e.g. *Gruenke v. Seip*, 225 F.3d 290, 305 (3d Cir. 2000). The Supreme Court should put an end to this legal confusion and inconsistency, and should do so by rectifying the historically inaccurate narrow and weak reading of *Pierce* that many lower courts have adopted.

The need to rectify the confused and frequently mistaken state of current parental rights jurisprudence is strengthened by this Court's affirmation in *Dobbs v. Jackson* that substantive due process rights need to be identified and defined in light of our Nation's history and tradition. 572 US __ (2022). Reading *Pierce* and *Meyer* in light of the common law tradition's understanding of parental rights leads to the conclusion that parents do have constitutional rights to direct the education and upbringing of their children, and that those rights are both broad and strong. Parents' educational rights are broad in encompassing rights of educational control well beyond the right to send one's child to a private

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[2] This line was later amended to soften and add more nuance to the claim (*Id.* at 1191 (9th Cir. 2006). Nonetheless, the Ninth Circuit's narrow interpretation of *Pierce* in this case remained unaltered.

school at one's own expense – including the right to certain exemptions and accommodations within the public schools. And they are strong in the sense that violations of these rights merit strict scrutiny.

B. *Meyer* and *Pierce* Incorporated the Common Law Understanding of Parental Rights into the Liberty Protected by the Fourteenth Amendment

Properly understanding *Meyer* and *Pierce* requires recognizing that *Meyer* – and by extension, *Pierce*, which built upon *Meyer* – declared parental rights as understood by the common law tradition to be part of the liberty protected by the Fourteenth Amendment. As the *Meyer* Court states: The "liberty guaranteed … by the Fourteenth Amendment" includes, "without doubt," the right "to marry, establish a home and bring up children," along with other "privileges long recognized at common law as essential to the ordered pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Further, *Meyer* echoes the common law understanding of parental rights as based on parents' natural, pre-political obligations to maintain, protect, and educate their children: "[I]t is the natural duty of the parent to give his children education suitable to their station in life." Id. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *435 ("The duty of parents … is a principle of natural law; an obligation … laid on them not only by nature herself, but by their own proper act, in bringing them into the world."); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 159, 169 (indicating that parents' natural duties to their children "consist in maintaining and educating them,"

and explaining that these duties fall naturally to parents because "[t]he wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person.") This same common law view of parental duties, and corresponding rights to perform those duties without undue state interference, is even more strongly articulated in *Pierce*: "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." 268 U.S. at 534.

The common law tradition regarding parental rights that *Meyer* and *Pierce* incorporate into the liberty protected by the Fourteenth Amendment recognizes children to be primarily (and naturally) under the jurisdiction of parents, with the state's role being viewed as *subsidiary* to that of parents. In other words, the state's role is to ensure that parents are at least minimally fulfilling their duties, and to assist parents in fulfilling those duties when needed, but to do so in a way that respects the primacy of parents' authority insofar as possible. Joseph Story writes that the state is justified in interfering "with the ordinary rights of parents, as guardians by nature, or by nurture, in regard to the custody and care of their children" only in exceptional cases in which the "natural presumption … that the children will be properly taken care of" is overridden by proof of "gross ill treatment" on the part of the parent." 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §1341 (2d. ed., 1839). Courts in the mid-nineteenth century (around the time of the ratification of the Fourteenth Amendment) frequently echoed this

language as well. For instance, the Illinois Supreme Court stated that "[t]he parent has the right to the care, custody and assistance of his child. The duty to maintain and protect it, is a principle of natural law. . . . Before any abridgment of the right, gross misconduct or almost total unfitness on the part of the parent, should be clearly proved." *People ex rel. O'Connell v. Turner*, 55 Ill. 280, 284-85 (1870).

It should also be noted that, although *Meyer* rooted parental rights in the Fourteenth Amendment's Due Process Clause – following the favored jurisprudence of the day – the deeply-rooted history and tradition of respect for parental rights at common law (as well as in statutory law and in common-law based state supreme court decisions around the time of the ratification of the Fourteenth Amendment) could also be the basis for anchoring parents' constitutional rights in the Privileges or Immunities Clause, or in the Ninth Amendment. *See Brown v. Ent. Merchs. Ass'n.*, 564 U.S. 786, 834 (2011) (Thomas, J., dissenting) (providing further evidence of our nation's strong tradition of respect for parental rights); *McDonald v. City of Chicago*, 561 U.S. 742, 806 (2010) (Thomas, J., concurring in part and concurring in the judgment) (suggesting that some unenumerated constitutional rights could be rooted in the Privileges or Immunities Clause). *See also* Randy Barnett and Evan Bernick, *The Privileges or Immunities Clause, Abridged,* 95 Notre Dame L. Rev. 499 (2019) (arguing that the original meaning of the 14th Amendment's privileges or immunities clause protects unenumerated rights); Joseph Griffith II, "'Tender and Sacred Ties': The Abolitionist Defense of Parental Rights and the Thirteenth and Fourteenth Amendments," in CONSTITUTIONALISM AND LIBERTY

216-231 (2025); and Daniel E. Witte, *People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, B.Y.U. L. REV. 183, 261 (1996). Thus, the analysis provided here will be relevant regardless of one's views regarding the best constitutional anchor for parental rights.

C. Parental Rights Are Essential to Limited Government

Meyer also emphasizes that respect for parental rights is at the core of limited, constitutional government. Discussing Plato's proposal for communal childrearing in the *Republic* and the Ancient Spartan practice of taking male children away from their parents at age seven to be educated by state officials, the *Meyer* Court comments that such measures could not be imposed "without doing violence to both the letter and the spirit of the Constitution." 262 U.S. at 402. Although it may seem hyperbolic to compare Plato's communal childrearing proposal or the practices of Ancient Sparta with the Nebraska law at issue – which merely forbade the teaching of foreign languages prior to the ninth grade – the Court's point was to highlight that these policies all reflect an erroneous, statist denial of the primacy of parental educational authority over the state's authority in this arena. And this denial is fundamentally incompatible with limited, constitutional government committed to preserving the liberty of the people. Indeed, the connection between respect for the primacy of parents' educational authority and limited government is a matter of common sense, for "the ideal of government serving the people's will" is incompatible with the

state using its power to mold people's will by controlling children's education. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 24-25 (2005). See also Melissa Moschella, *Defending the Fundamental Rights of Parents,* NOTRE DAME J.L. ETHICS & PUB. POL'Y 397, 411-12 (2023) ("Recognizing and respecting that the family … is an authoritative community with the right to direct its own internal affairs is an essential and crucial feature of limited government. Indeed … a hallmark of totalitarianism is the effective elimination of all mediating institutions between the individual and the state. The family is arguably the original and most crucial of these mediating institutions.").

D. Parental Rights Under *Pierce*, *Meyer*, and the Common Law Tradition Extend Beyond the Schoolhouse Door

The narrow reading of *Pierce* common in lower courts – as requiring *only* that parents be legally free to educate their children at private schools – is mistaken, out of step not only with the text of *Pierce*, but also with the common law understanding of parental rights that *Pierce* (following *Meyer*) presupposes and affirms. Although *Pierce* explicitly forbids the state from "standardiz[ing] its children by forcing them to accept instruction from public teachers only," the historical context indicates that *Pierce* mentioned this particular mode of standardizing children simply because the freedom to educate one's child at a private school was the issue in the case, but *not* because the *Pierce* court thought this was the only constitutionally-forbidden way for the state to attempt to standardize children. Those same justices' interpretation of their own ruling two years

later in *Farrington v. Tokushige* makes this clear. Relying on *Pierce* and *Meyer*, *Farrington* held that undermining private schools' autonomy through extensive government regulation was also an unconstitutional violation of parental rights. *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927).

Further, the text of the *Pierce* Opinion suggests that the state's educational authority has limited scope and should be understood as subsidiary to the educational authority of parents. *Pierce* states: "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." 268 U.S. at 534. Note the semicolon after the first clause. The four things listed after the semicolon should therefore be understood to indicate the scope of reasonable state educational regulation about which "no question is raised." Thus the state may require: (1) "that all children of proper age attend some school," (2) "that teachers shall be of good moral character and patriotic disposition," (3) that certain studies plainly essential to good citizenship must be taught," and (4) "that nothing be taught which is manifestly inimical to the public welfare." Any state action in the educational arena falling outside of these four categories is therefore an action about which constitutional questions *would* be raised. *Farrington* supports this interpretation, because the regulations deemed unconstitutional in that case were outside these

categories. Moreover, unless one interprets *Pierce* in this way, the Opinion's claim that the Act in question "has no reasonable relation to some purpose within the competency of the State" makes no sense, for the Act has a clear relation to many state interests (such as the assimilation of immigrants). Nonetheless, requiring all students to attend public schools is an educational regulation that goes beyond the four categories listed above, and arguably *for that reason* falls outside the competency of the state and intrudes upon the prior educational authority of parents. (For a more detailed defense of this interpretation, see Melissa Moschella *Do Parental Rights Extend Beyond the Schoolhouse Door? Correcting Misinterpretations of* Pierce *in Light of History and Tradition*, NOTRE DAME L. REV., forthcoming 2025.)

The idea that state educational authority should be limited in this way also follows from the general common law principles that *Pierce* and *Meyer* presupposed, for those principles make it clear that *parents* have the primary duty and corresponding authority to control their children's education and upbringing, and thus that state action in this arena should respect parental authority except when this is incompatible with the state's interest in ensuring that all children have access to an education that will prepare them to be law-abiding and productive citizens. *Pierce*'s enumeration of constitutionally unquestionable state educational regulations – i.e. that all children receive a basic education, that teachers themselves be good citizens, that studies "plainly essential to good citizenship" be taught, and that those "manifestly inimical to the public welfare" be forbidden – makes sense in light of this general principle.

State supreme court decisions based upon common law likewise support this interpretation, and provide even clearer evidence that parents' rights were historically understood to include the right to direct their children's education *even within the public schools*. From the mid-nineteenth to the early twentieth century, there was a string of eight cases in which parents sought to exempt their children from some aspect of the public school curriculum, while still being able to enjoy the benefit of a free public school education for their children. In seven out of eight such cases, the parents prevailed. The state supreme courts in these seven cases argued on the basis of common law that parents by nature possess primary educational authority over their children, and that this implies a right to control their children's education even within the public schools, as long as this is not incompatible with the discipline and efficiency of the schools. *Sch. Bd. Dist. No 18 v. Thompson*, 1909 OK 136 (Okla. 1909); *Morrow v. Wood*, 35 Wis. 59 (1874), *Rulison v. Post*, 79 Ill. 567 (1875), *Trustees of Schools v. People*, 87 Ill. 303 (1877), *State ex rel. Sheibley v. School District No. 1, Dixon County*, 31 Neb. 552 (1891), *State ex rel. Kelley v. Ferguson*, 95 Neb. 63 (1914). (*The outlier is State ex rel. Andrew v. Webber,* 108 Ind. 31 (1886), which ruled against the parents.)

To take just one example that is representative of (and makes reference to) parallel cases from other states, *Thompson* is an Oklahoma case in which parents brought suit because their children were expelled from the public school due to their refusal (at their parents' command) to participate in singing lessons. The parents sought for their children to be reinstated in the schools, but exempted from the

singing lessons, and the Oklahoma Supreme Court decided in their favor.

The court's argument is based explicitly on the common law view that parents possess natural duties and corresponding rights to direct the education and upbringing of their children: "At common law the principal duties of parents to their legitimate children consisted in their maintenance, their protection, and their education. These duties were imposed upon principles of natural law and affection laid on them not only by Nature herself, but by their own proper act of bringing them into the world." *Thompson*, 103 at p. 578-79 (citing Blackstone). The court also clarifies that the "common-law doctrine that the parent had entire control over the education of his child" remains intact even after the introduction of compulsory education laws, because such laws simply make it legally compulsory for parents to fulfill their natural duty in a minimally-satisfactory way. Further, the court emphatically denies that "the mere act of sending children to school amounts to a delegation of parental authority which the law of the land places in the hands of the parent." Id. at p.580, quoting *State v. School District No. 1, Dixon County*, 31 Neb. 552 (1891) (internal quotation marks omitted). As one scholar observes, "[s]chools in the common-law era were viewed as service providers whose authority stems from the delegation of the parents." Noa Ben-Asher, *The Lawmaking Family*, 90 WASH. U. L. REV. 363, 381 (2012). Thus, parents are "free to a great extent to select the course of study" within the public schools, as long as this is compatible with the "proper discipline, efficiency and well-being of the common schools" - and the *Thompson* court, along with the other courts that made similar rulings, judges that it

is indeed compatible. *Thompson*, 103 at p.580, quoting *Morrow v. Wood*, 35 Wis. 59 (internal quotation marks omitted).

The court further argues that one strong reason for deferring to parents' judgments about what their child should (and shouldn't) be taught is that parents generally have a much greater interest in the child's welfare and knowledge of the child's needs and capacities than any teacher or school official. Id. at p.580. This argument also echoes the common-law presumption that "the voice of nature has pointed out the parent as the most fit and proper person" to make child-rearing decisions. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 169. *See also Parham v. J.R.* 422 U.S. 584, 602 (1979) (The law "historically … has recognized that natural bonds of affection lead parents to act in the best interests of their children.")

The *Thompson* court therefore ruled in favor of the parents, holding that "The parent … has a right to make a reasonable selection from the prescribed course of study for his child to pursue, and this selection must be respected by the school authorities, as the right of the parent in that regard is superior to that of the school officers and the teachers." Id. at p.581. And the right of the parent is superior for the reasons noted above: that, by nature and common law, education is primarily the duty of the parent; and that the parent has greater interest in the child's welfare and knowledge of the child's capacities.

E. History and Tradition Indicate that the Proper Standard of Review in Parental Rights Cases is Strict Scrutiny

Correcting the historically-inaccurate interpretation of parents' *Meyer-Pierce* rights requires not only recognizing that parents' educational rights extend far beyond the right to send one's child to a private school at one's own expense, but also recognizing that strict scrutiny is the appropriate standard of review in parental rights cases. Indeed, looking carefully not only at *Meyer* and *Pierce* but also at the string of state supreme court cases discussed in the previous section indicates that in these cases the courts were implicitly applying what today would be called a strict scrutiny test. Further, the requirement that laws interfering with parental rights be narrowly tailored to a compelling state interest is simply a way of capturing the strong deference to parental authority that has been present throughout our nation's legal history and tradition. *See* Melissa Moschella, *Strict Scrutiny as the Appropriate Standard of Review in Parental Rights Cases: A Historical Argument*, TEX. REV. L. & POL. 771 (2024)

Of course, *Meyer*, *Pierce*, and the preceding state supreme court cases related to parental rights in education were decided prior to the development of current doctrine regarding tiers of scrutiny. Thus, we cannot expect them to explicitly indicate that they are applying a heightened level of scrutiny. To determine this, we therefore need to examine their reasoning to see if they are effectively requiring that the laws or policies at issue be narrowly tailored to a compelling state interest, and also to see if the courts are placing the burden of proof on the state (which is also

indicative of heightened scrutiny). Even a fairly superficial reading of these cases makes it clear that this is in fact what they were doing.

In *Pierce*, for instance, the law at issue did have a reasonable relationship to a legitimate state interest. If *Pierce* had been applying what we today call the rational basis test, the Court would have upheld the law. Instead, following the reasoning of the Oregon District Court whose ruling *Pierce* affirmed, we see that the burden of proof is being placed on the state to defend its law, rather than on the petitioners to prove that the act lacks a reasonable relation to a legitimate state interest. Consider the core of the Oregon District Court's argument:

> Compulsory education being the paramount policy of the state, can it be said, with reason and justice, that the right and privilege of parochial and private schools to teach in the common school grades is inimical or detrimental to, or destructive of, that policy? … No one has advanced the argument that teaching by these schools is harmful, or that their existence with the privilege of teaching in the grammar grades is a menace, or of vicious potency, to the state or the community at large… It would seem that the act in question is neither necessary nor essential for the proper enforcement of the state's school policy. *Society of Sisters v. Pierce*, 296 F. 928, 937 (D. Oregon 1924).

The court clearly puts the burden of proof on the state here, and requires the state to prove not merely that the law is related to some legitimate interest, but rather that the law is "necessary" or "essential" to the state's compulsory education policy and the interests it serves. This is the language of what we today call strict scrutiny, not the language of the rational basis test.

Similar things could be said about the reasoning in *Meyer*. Indeed, Justice Holmes explicitly pointed out in his dissent in *Bartels v. Iowa* that the law at issue in *Meyer* had a reasonable relationship to a legitimate state interest, and should therefore have survived a rational basis test. *Bartels v. Iowa*, 262 U.S. 404 (1923).

Finally, the same is true of *Thompson* and of the six similar pre-*Meyer* state supreme court cases related to parental rights in education. Like the *Meyer* and *Pierce* courts, the *Thompson* court places the burden of the proof on the state to justify its action, and criticizes the one outlier case in which the parents lost because the burden of proof was placed upon them rather than the state:

> We think it would be a reversal of the natural order of things to presume that a parent would arbitrarily and without cause or reason insist on dictating the course of study of his child in opposition to the course established by the school authorities. A better rule, we think, would be to presume, in the absence of proof to the contrary, that the request of the parent was reasonable and just, to the

> best interest of the child, and not detrimental to the discipline and efficiency of the school. *Thompson*, 103 at p.582. (Criticizing the reasoning in *State ex rel. Andrew v. Webber*, 108 Ind. 31 (1886).)

Further, the *Thompson* court effectively requires the state to show that its action is narrowly tailored to its interest in the education of future citizens, and in the efficiency of the public schools established for that end – an interest presumed to be compelling. Due to the lack of evidence proving that accommodating the parents' request would be incompatible with that interest, the court rules that it is unnecessarily restrictive of parents' educational authority to require that all students participate in all the lessons offered in the public school.

Even though doctrines regarding tiers of scrutiny are a relatively recent development, examination of these cases shows that there is clear historical precedent for using heightened scrutiny when fundamental rights – like parental rights – are at stake, and therefore provides strong historical grounds for recognizing strict scrutiny to be the appropriate standard of review for parental rights cases. (For more detailed arguments in defense of these claims, see Melissa Moschella, *Strict Scrutiny as the Appropriate Standard of Review in Parental Rights Cases: A Historical Argument*, Tex. Rev. L. & Pol. 771 (2024).)

F. Application to the Current Case

The application to the case currently before this Court is obvious. A historically-informed understanding of parental rights under *Pierce* and *Meyer* indicates that parents have the right to opt their children out of certain lessons in the public schools, as long as this is not incompatible with the ability of the schools to operate in a reasonably-efficient manner. And this opt-out right is precisely what the Petitioners are asking this Court to vindicate.

The Court might worry that the broad interpretation of parents' educational rights recommended here will lead to a flurry of litigation. But this worry is unfounded.[3] Litigation is extremely costly, so parents are unlikely to litigate without serious cause. Further, if the Supreme Court clarifies that parents have rights to opt their children out of lessons to which they object, schools will take notice and be more accommodating at the outset, eliminating the need for litigation. It might then be objected that such accommodations will be unworkable for schools, but it has long been common practice to offer opt-outs for sex ed lessons, and public schools already offer individualized education programs for special needs students as well as programs for gifted students. Surely they ought to be willing to do at least as much to respect parents' constitutional rights.

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[3] For a refutation, *see* Helen Alvare*, Families, Schools and Religious Freedom,* 54 LOY. U. CHI. L.J. 579, 621 (2022).

Further, it is essential to the rule of law that there be clarity and consistency regarding the law's requirements and application. Such clarity and consistency are sorely lacking with regard to parents' constitutional rights, especially in the educational sphere. Such rights touch upon a matter of no small importance to the millions of conscientious parents who take seriously their child-rearing responsibilities. For many of these parents – including the Petitioners in this case – educating their children in accord with their beliefs is not only a natural duty that love for their children moves them to fulfill solicitously, but also a grave religious obligation. And in striving to fulfill these duties conscientiously, they are not only seeking to promote the welfare of their children, but are also providing a crucial service to the nation as a whole. The Court should therefore not only vindicate the fundamental rights of the parents in this case, but should also take this opportunity to remedy the confused and largely erroneous state of parental rights jurisprudence, bringing it into line with the broad and strong respect for parental rights that is "deeply rooted in this Nation's history and tradition," and that is essential to limited government and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 US 721 (internal quotations and citations omitted).

CONCLUSION

There are (at least) three conclusive reasons for the Court to rule in favor of the Parents in this case and vindicate their fundamental constitutional rights. First, the School Board's refusal to grant the Parents the opt-out they seek for their children is a violation of their religious free exercise rights under the First

Amendment. As result of this refusal, the Parents must either forgo the valuable public benefit of a free public education for their children, or fail to fulfill their grave religious obligation to educate their children in accord with their faith. Under *Carson*, *Espinoza*, and their precedents, the School Board's refusal therefore amounts to an unconstitutional condition on the Parents' free exercise of religion.

Second, this is a case in which "the interests of parenthood are combined with a free exercise claim." *Wisconsin v. Yoder*, 406 U.S. at 233. These two rights' claims mutually reinforce one another, creating a situation in which the need to apply strict scrutiny and rule in favor of the Parents becomes even more incontrovertible.

Third, and finally, the School Board's actions also violate the fundamental constitutional rights of parents to direct the education and upbringing of their children under *Meyer* and *Pierce*. If the *Meyer-Pierce* rights of parents are correctly understood in light of our nation's history and tradition of state deference toward parents as possessing primary educational authority *even within the public schools*, these rights should in themselves be a sufficient basis for a ruling in favor of the Parents. Even though the Parents' free exercise claims alone would warrant granting them the relief they seek, the Court should take this opportunity to clarify the confused, inconsistent, and in most cases historically inaccurate state of constitutional jurisprudence regarding parental rights in education. Using the approach outlined in *Glucksberg* and reaffirmed in *Dobbs*, the Court should bring constitutional jurisprudence on this matter into line with our nation's strong history and tradition of

respect for parental rights, making it clear that state infringements on parental rights warrant strict scrutiny, and that parents' educational rights extend well beyond the schoolhouse door.

Respectfully Submitted,

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