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 THE CENTER FOR AMERICAN LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*[1]

The Center for American Liberty (CAL) is a 501(c)(3) non-profit law firm dedicated to protecting free speech and civil liberties. CAL has represented litigants across the country, including in this Court, in cases seeking to vindicate individuals' religious freedom, free speech, and parental rights, among other things, against oppressive state action. *See, e.g.*, *B.W. v. Austin Indep. Sch. Dist.*, 121 F.4th 1066 (5th Cir. 2024), *petition for certiorari docketed* No 24-871 (Feb. 10, 2025); *Doe v. Weiser*, No. 1:24-CV-2185-CNS-SBP, 2025 WL 295015 (D. Colo. Jan. 24, 2025), *appeal docketed* No. 25-1037 (10th Cir. Jan. 31, 2025); *Regino v. Staley*, 2023 WL 4464845 (E.D. Cal. July 11, 2023), *appeal docketed* No. 23-16031 (9th Cir. July 25, 2023); *Antonucci v. Winter*, No. 2:24-CV-783, 2025 WL 569928, at *1 (D. Vt. Feb. 20, 2025), *appeal filed* (1st Cir. Mar. 4, 2025). CAL has an interest in ensuring that courts apply the correct legal standard in cases involving First Amendment rights.

SUMMARY OF THE ARGUMENT

Montgomery County Public Schools (MCPS) and many other schools across the country are actively working to supplant parents' traditional views about gender and sexuality and indoctrinate children in new views preferred

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1. No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Supreme Court Rule 37.6. Counsel for all parties were notified of amicus curiae's intention to file this brief at least 10 days prior to the deadline to file this brief.

by the State. The lower courts' anemic view of parental rights and expansive view of *in loco parentis* gives schools *carte blanche* to continue to do so. Affirming would mean that parents, practically, have no say over their children's religious upbringing Monday through Friday from the first day of kindergarten until they reach the age of majority. This result flouts precedent, history, and common sense.

Amicus CAL urges this Court to reverse and hold that parents have a fundamental right to opt out of ideological gender identity instruction for their elementary school children. This brief makes three points.

1. Views about sexuality and gender are fundamental worldview issues. They go to the core of what it means to be human. Motivated by hostility toward some religious views on these existential questions, MCPS's gender identity curriculum supplants parents' values on these crucial topics and replaces them with the District's. The entire point is to "disrupt" disfavored religious beliefs and replace them with new ones. Why? MCPS thinks religion—and parents—are teaching the "wrong lessons" about sex and gender and wants to impart different ones.

2. This 21st-century indoctrination project evokes earlier attempts to erase disfavored religious beliefs and identities through the school system. Though prevailing orthodoxies have changed, the statist tendency to force preferred views on children hasn't. But this Court has long maintained that such attempts, which strike at the heart of families, also strike at the heart of our constitutional order.

3. Points one and two show why *in loco parentis* cannot justify MCPS's no-opt-out policy. *In loco parentis* is a limited delegation of parental authority to educate children. But it does not include the authority to replace deeply held religious beliefs with state-sanctioned ones. Such a sweeping view of *in loco parentis* defies precedent, history, tradition, precedent, and common sense. It also ignores the compulsory nature of modern education, where roughly 90% of American children attend public school. Unfortunately, this sweeping view of *in loco parentis* holds sway in the lower courts. This Court should right the ship.

ARGUMENT

I. Gender identity curriculum aims to root out religious understandings of gender and sexuality.

A. Most everyone agrees that sexuality and gender are important topics—indeed, they touch the heart of the "concept of existence . . . and of the mystery of human life." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). Our pluralistic society is currently engaged in a contentious debate about what these fundamentally religious topics mean. *See Janus v. Am. Fed. of State, Cnty., and Mun. Emps.*, 585 U.S. 878, 913–14 (2018) (noting that sexual orientation and gender identity are "sensitive political topics . . . of profound value and concern to the public"). Part of that debate centers on who gets to introduce children to these concepts. Many religious people believe parents bear the primary responsibility for teaching children about sexuality and gender. Others view the State as the primary influence

and believe that children should explore these concepts from an early age. For good or ill, there is little common ground between these two positions.

MCPS has planted its flag firmly on one side of this intrinsically religious debate. It requires every student from kindergarten through fifth grade to undergo gender identity instruction. And because it believes objecting parents are teaching the wrong lessons, it bars parents from opting their children out. The point of MCPS's curriculum is to erase traditional religious beliefs about sexuality and gender.

MCPS has, at times, claimed that gender identity curriculum is about teaching basic concepts rather than changing children's opinions on these core topics. *See* Pet. App. 103a (claiming that parents are worried simply because "a book . . . has an LGBTQ character in it"); Pet. App. 520a ("There are no planned explicit lessons related to gender and sexuality[.]"); Pet. App. 640a ("No child who does not agree with or understand another student's gender expression, or their sexual identity is asked to change how they feel about it."). The Fourth Circuit accepted this claim at face value and thought the curriculum merely exposes children to "other views" without "exert[ing] pressure to believe or act differently than one's religious faith requires." Pet. App. 35a. But the facts simply don't bear this out.

For one thing, the books at issue are candid about their goals. Consider *IntersectionAllies*—a book for children in Kindergarten through 5th grade—which begins with a foreword by Dr. Kimberlé Crenshaw, a leader in the critical theory movement. Dr. Crenshaw explains that

we normally associate elementary school with "learning things like numbers and letters, colors and shapes," but we "less often consider[] . . . that youth is also an *opportunity for planting the seeds of social conscience*." *Id.* (emphasis added). *IntersectionAllies*, Dr. Crenshaw explains, "is an invaluable tool" for "bringing about [a] future" where "all children" are "taught about justice, equity, and solidarity" along with their ABC's. App.311a

IntersectionAllies follows Dr. Crenshaw's foreword with "A Letter To Grown-Ups" penned by the Chair of Gender and Sexuality Studies at the University of Southern California. Pet. App. 312a–313a. The book, this academic explains, answers a "classic parenting dilemma: How do we teach children how to treat each other in a world that promotes *all the wrong lessons*?" Pet. App. 312a (emphasis added). The answer to these "wrong lessons" is "[m]aking room," a concept that "is stronger than ideas like 'respect' and 'tolerance' because it asks for a positive action from us rather than a minimal response." Pet. App. 312a. Like brushing one's teeth, "[m]aking room' . . . is something that is *necessary* to do over and over again to be healthy." Pet. App. 312a. It is "something anyone *can* learn and everyone *needs to* learn." Pet. App. 313a. (emphasis added).

It's no mystery what *InterSectionAllies* thinks are the "wrong lessons" that prevent the "seeds of social conscience" from being implanted. Take the story of one character, Kate:

(Pet. App. 322a–323a)

The moral of the story is straightforward. Good friends will affirm Kate's feelings about and expression of her gender. Those who disagree are "confused" and are not "friends." After all, who would want to deny a friend "a safe space"?

Lest there be any risk that kindergartners miss the point, *IntersectionAllies* ends with "Book Notes" to help teachers reinforce the not-so-subtle message of the Kate story. Pet. App. 350a. The lesson? "When we are born, our gender is often decided for us based on our sex. . . . But at any point in our lives, we can choose to identify with one gender, multiple genders, or neither gender." Pet. App. 350a. This is not simply about kindness, tolerance, or respect. It is about worldview formation—"planting the seeds of social conscience" in Dr. Crenshaw's phrasing.

MCPS's guidance to teachers reinforces the point. If a student states a traditional religious view about sexuality, teachers are encouraged to "[d]isrupt the either/or thinking by saying something like: actually, people of any gender can like whoever they like. People are allowed to like whoever they want. How do you think it would make (character's name) feel to hear you say that? Do you think it's fair for people to decide for us who we can and can't like?" Pet. App. 629a. If a kindergartener says, "That's weird. He can't be a boy if he was born a girl," the teacher should characterize this as a "hurtful" and "negative" way "to talk about peoples' identities." Pet. App. 630a. The teachers' guide also anticipates that reading the books at issue will lead preschoolers to ask, "What's transgender?" Teachers are urged to answer that "[w]hen we're born, people make a guess about our gender and label us 'boy' or 'girl' based on our body parts.

Sometimes they're right and sometimes they're wrong. When someone's transgender, *they guessed wrong*[.]" Pet. App. 629a (emphasis added). These responses derive from "sources" such as "Correcting Kids' Stereotypes," and "Responding to Sexism, Homophobia and Transphobia: Tips for Parents and Educators of Younger Children." Pet. App. 635a.

MCPS's explanation for why it chose these books confirms the obvious. MCPS looked for books that would "disrupt[]" "heteronormativity," "cisnormativity," and "power hierarchies that uphold the dominant culture[.]" Pet. App. 622a.

And when parents pushed back on this curriculum, the mask came all the way off. At a board meeting, one board member equated parents' invocation of their religious rights, "family values," and "core beliefs" to "hate." Pet. App. 103a. She argued that "saying that a kindergartner can't be present when you read a book about a rainbow unicorn because it offends your religious rights or your family values is just telling that kid, '*here's another reason to hate another person*.'" Pet. App.103a–104a (emphasis added). *Cf. Masterpiece Cakeshop* v. *Colo. Civil Rights Comm'n*, 584 U.S. 617, 635 (2018) (criticizing state official's "inappropriate" characterization of "[f]reedom of religion" as a justification for "all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust").

The same Board member implied that these parents' children may not "feel safe being who they are at home, or in their other community," Pet. App. 103a, and suggested that parents seeking opt-outs were engaging

in a "dehumanizing form of erasure," Pet. App. 187a. A Montgomery County Council member lamented that concerns about the books at issue put "some Muslim families on the same side of an issue as White supremacists and outright bigots." Pet. App. 107a.

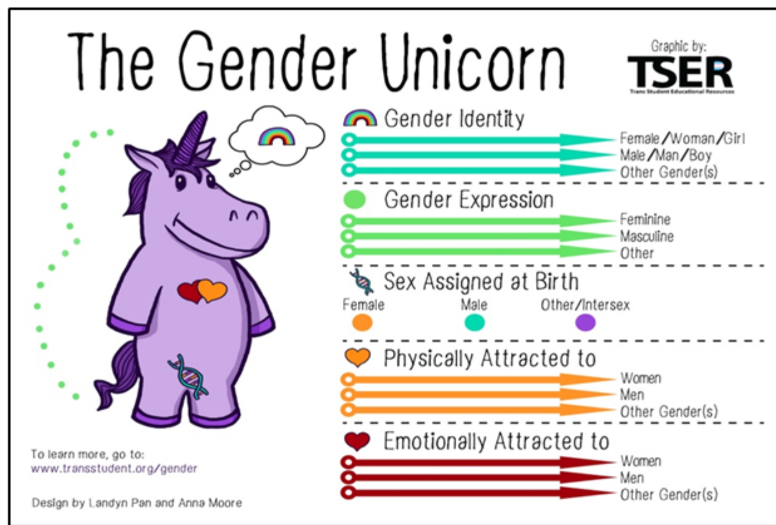
In short, there's no question that MCPS believes parents with traditional beliefs about sexuality and gender are teaching the wrong lessons. It chose these books to "disrupt" those religious beliefs and replace them with controversial ideas grounded in critical gender theory and intersectionality.

MCPS's gender identity curriculum is designed to send a clear message to young children: good people reject traditional understandings of gender and sexuality. Those who resist are "confused," Pet. App. 323a, not "safe," full of "hate," and "are outsiders, not full members of the political community." *Santa Fe Indep. Sch. Dist.* v. *Doe*, 503 U.S. 290, 309 (2000). All this aims to preempt parents' inculcation of religious values in their children.

B. MCPS's curriculum is just one node in a "national network of" school policies "aimed at coercing" children to adopt these beliefs. *Wiemann* v. *Updegraff*, 344 U.S. 183, 193 (1952) (Black, J., concurring). Like MCPS, schools across the country are finding creative ways to "disrupt" the way children think about gender and sexuality. *See generally* S. Ernie Walton, *Gender Identity Ideology: The Totalitarian, Unconstitutional Takeover of America's Public Schools*, 34 Regent U. L. Rev. 219, 253–283 (2021).

Like MCPS, many schools are using books, music, and children's characters to introduce young children

to gender fluidity, often without notifying parents and allowing them to opt-out. *See, e.g.*, *Tatel v. Mt. Lebanon Sch. Dist.*, 2024 WL 4362459 (W.D. Pa. Sept. 30, 2024) (similar books and topics); *Jones* v. *Boulder Valley Sch. Dist. RE-2*, 2021 WL 5264188 (Oct. 4, 2021) (transgender choir performance for first graders). Many schools, for instance, use "tools" like the "Gender Unicorn" and the "Genderbread Person" to guide young children through an exploration of their gender identity and sexual preferences, Walton, *Gender Identity Ideology*, 34 Regent U. L. Rev. at 278–79, as shown below:[2]



Like MCPS, many schools have gone to great lengths to prevent parents from interfering with these pedagogical

2. Trans Student Educational Resources, 2015, "The Gender Unicorn," *available at* https://perma.cc/2ZPN-8P9E (last visited Mar. 7, 2025).

experiments. *See* Walton, *Gender Identity Ideology*, 34 Regent U. L. Rev. at 253–62.

Many schools are also adopting "social transitioning" policies. *See, e.g.*, *Foote v. Ludlow Sch. Comm.*, No. 23-1069, — F.4th —, 2025 WL 520578 (1st Cir. Feb. 18, 2025); *Doe v. Weiser*, No. 1:24-CV-2185-CNS-SBP, 2025 WL 295015 (D. Colo. Jan. 24, 2025), *appeal docketed* No. 25-1037 (10th Cir. Jan. 31, 2025); *Doe v. Delaware Valley Reg'l High Sch. Bd. of Educ.*, 2024 WL 5006711 (D. N. J. Nov. 27, 2024); *Regino v. Staley*, 2023 WL 4464845 (E.D. Cal. July 11, 2023), *appeal docketed* No. 23-16031 (9th Cir. July 25, 2023); *Willey v. Sweetwater Cnty. Sch. Dist. No. 1. Bd. of Trustees*, 680 F. Supp. 3d 1250 (D. Wyo. 2023). Under these policies, school administrators, teachers, and students are required to accept a student's assertion of their gender identity, including the use of new names and pronouns. *See, e.g.*, *Regino*, 2023 WL 4464845, at *1–2; *see also Doe*, 2025 WL 295015, at *2; Walton, *Gender Identity Ideology*, 34 Regent U. L. Rev. at 256–60. But unless the child expressly consents to parental disclosure or the school deems parental disclosure "necessary," these policies require the school to conceal the social transition from the child's parents. *See, e.g.*, *Regino*, 2023 WL 4464845, at *1–2; *see also Doe*, 2025 WL 295015, at *2 (policy prohibiting parental disclosure unless "legally required").

This Court has long recognized the "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee*, 505 U.S. at 592. But "coercive pressure" is not just a "subtle" byproduct of gender identity curriculum—*it is the point*. That's why it starts

young. That's why MCPS's "educational mission" can brook no opt-outs. And that's why MCPS's latent hostility toward traditional religious beliefs turned overt when parents pushed back on the policy. While the Fourth Circuit questioned whether anything beyond "mere exposure" took place, Pet. App. 39a, the record is clear: eradicating traditional views is "the very point." *Lee*, 505 U.S. at 593. Whatever one thinks about these efforts, parents should be able to opt their children out.

II. MCPS's gender identity instruction evokes earlier attempts to root out disfavored beliefs through the school system, attempts this Court has rejected.

Like MCPS, States have often used early childhood education "to coerce uniformity of sentiment in support of some end thought essential to their time and country," *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943), often at a high cost to religious communities with dissenting views. But this Court has long made clear that such attempts have no place in our constitutional order.

In the wake of World War I, a surge of ethnocentrism swept the nation, sparking "a spate of legislation to restrict the teaching of foreign languages"—especially German—to schoolchildren. William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 U. Cin. L. Rev. 125, 126 (1988). These laws sought to dismantle the distinctive German-American culture and replace it with a patriotic, homogenized monoculture. *Id.* at 130–34. Nebraska, for instance, derided German as a "mental poison" that prevented the "sunshine of American ideals" from "permeat[ing] the life of the future citizens of this republic." *Id.* at 177 (cleaned up).

Like MCPS's policy, this legislative effort came with a steep religious cost. Many German Americans didn't know enough English to "give their children religious instruction in the English as well as in the German." *Meyer v. State*, 187 N.W. 100, 101 (Neb. 1922) *rev'd sub nom. Meyer v. Nebraska*, 262 U.S. 390 (1925). For these families, teaching their children the German language was not merely political. Rather, it was necessary so children "could be able to worship with their parents" and "to keep the parents and children in a religious way in contact with each other and not diminish the influence of the parents in the home." *Ibid.*

State supreme courts brushed these concerns aside. They told parents that if they wanted to read the Bible to their children, then they could learn English. *See id.* at 101–02 (arguing that "religious teaching could, manifestly, be as fully and adequately done in the English as in the German language"); *see also State v. Bartels*, 181 N.W. 508, 514 (Iowa 1921), *rev'd sub nom. Bartels v. Iowa*, 262 U.S. 404 (1923). Believing that "permitting foreigners . . . to rear and educate their children in the language of their native land" would "naturally inculcate in them the ideas and sentiments . . . foreign to the best interests of this country," state courts upheld these laws. *Meyer*, 187 N.W. at 101; *Bartels*, 181 N.W. 508; *Pohl v. State*, 132 N.E. 20 (Ohio 1921), *rev'd by Bartels*, 262 U.S. 404.

But in *Meyer*, this Court rejected this reasoning in a landmark decision. It affirmed the "right" and "natural duty of the parent to give his children education suitable to their station in life." 262 U.S. at 400. That right, this Court held, extended to choosing how children should be educated, even in German. *Id.* at 401. *Meyer* famously

rejected using the schools—as the Spartans and Plato envisioned—"to submerge the individual and develop ideal citizens." *Id.* at 401–02. The State's desire to "foster a homogenous people with American ideals" did not justify disrupting the fundamental liberty of parents to direct their children's upbringing. *Id.* at 402.

Two years later, in *Pierce v. Society of Sisters*, this Court held unconstitutional an Oregon law compelling all children from eight to sixteen to attend public schools. 268 U.S. 510, 534–535 (1925). Like the anti-German laws in *Meyer*, Oregon's law was enacted during a nativist paroxysm; it was intended to prevent Roman Catholic children from attending Catholic School. *See* William G. Ross, *The Role of Religion in the Defeat of the 1937 Court-Packing Plan*, 23 J.L. & Religion 629, 636 (2008); S. Ernie Walton, 34 Reg. Univ. L. Rev. at 264. *Pierce* reaffirmed that the "child is not the mere creature of the State," and that Oregon's law could not stand under "the doctrine of *Meyer*" because it "interfere[d] with the liberty of parents . . . to direct the upbringing and education of children under their control." *Id.* at 534–35.

The same principles animated this Court's seminal decision in *Barnette*. 319 U.S. at 641–42. There, the Court confronted a West Virginia statute that required all schools to orient instruction "for the purpose of teaching, fostering, and perpetuating the ideals, principles and spirit of Americanism." *Id.* at 625. Part of this program required students to salute the American flag. *Id.* at 625, 628–29. Here again, the State's attempt to "standardize" children came at the expense of those with religious beliefs—this time, Jehovah's Witnesses. *Id.* at 629–30; *see also Wisconsin v. Yoder*, 406 U.S. 205, 244 (1972)

(Douglas, J., dissenting in part) (opining that the "chief vice of [West Virginia's] regime was its interference with the child's free exercise of religion").

In enjoining the law—and reversing *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)—this Court contrasted the American system with totalitarian attempts to eradicate disfavored religious beliefs—from the Roman Empire's attempt to snuff out nascent Christianity; to the Inquisition's persecution of Jews, Muslims and Protestants; to the then-contemporary examples of Nazi and Communist governments. History, *Barnette* explained, shows that "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters." *Barnette*, 319 U.S. at 641. And "no deeper division could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing." *Ibid.*

Meyer, *Pierce*, and *Barnette* make clear that State attempts to enforce preferred views through schools have no place in the American system. This is true especially for topics like gender and sexuality, "things that touch the heart of the existing order." *Barnette*, 319 U.S. at 642. Later precedents confirm this core teaching. *Yoder*, 406 U.S. at 231–234; *see also Wallace v. Jaffree*, 472 U.S. 38, 50–52 (1985).

Though prevailing orthodoxies change, the government's desire to enforce those orthodoxies through the public school system has proven evergreen. But just as the States may not use the coercive power of schools to root out German identity or steamroll Jehovah's Witnesses

in the name of American patriotism, they may not root out traditional views of gender and sexuality in the name of Diversity, Equity, and Inclusion. In our constitutional order, "no official"—not even a public-school teacher—"can prescribe what shall be orthodox." *Barnette*, 319 U.S. at 642.

III. *In loco parentis* does not give public schools the authority to indoctrinate children about gender and sexuality.

Like the Fourth Circuit below, the lower courts have been loath to vindicate parental rights in the public schools. They have consistently—and incorrectly—framed cases like this as parents attempting to "create a preferred educational experience for their child in public school," rather than public schools attempting to indoctrinate children. *Foote*, 2025 WL 520578, at *16; *see also Parents for Priv. v. Barr*, 949 F.3d 1210, 1229–33 (9th Cir. 2020); *Parker v. Hurley*, 514 F.3d 87, 101 (1st Cir. 2008); *Crowley v. McKinnery*, 400 F.3d 965, 971 (7th Cir. 2005); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 534 (1st Cir. 1995) ("*Meyer* and *Pierce* do not encompass [the] broad-based right to restrict the flow of information in public schools.").

Echoing *Gobitis*'s concern over making federal courts "the school board for the country," 310 U.S. at 598, *overruled by Barnette*, 319 U.S. 624, courts have given public schools free rein over and against parents' objections, *see, e.g.*, *Brown*, 68 F.3d at 529, 533–34 (no parental right to notice and opt-out of assembly where adult performer "had a male minor lick an oversized

condom with her"); *Parents for Priv.*, 949 F.3d at 1229–33 (no parental right to protect children from changing and showering in front of students of the opposite biological sex in high school facilities); *Regino*, 2023 WL 4464845 (no parental right to stop schools from socially transitioning students without parental notice or consent).

The theme of these decisions is a sweeping view of *in loco parentis*. By sending children to public school, the lower courts reason, parents impliedly waive their fundamental right to control their children's education; thus, school instruction on sex, gender, and other existential topics can never burden parents' rights. *See Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005), *am. on denial of reh'g*, 447 F.3d 1187 (9th Cir. 2006).

The Ninth Circuit's *Fields* decision epitomizes this line of reasoning: "Parents have a right to inform their children when and as they wish on the subject of sex; they have no constitutional right, however, to prevent a public school from providing its students with *whatever information it wishes to provide*, sexual or otherwise, when and as the school determines that it is appropriate to do so." 427 F.3d at 1206 (internal quotation marks omitted; emphasis added). In other words, parental rights do "not extend beyond the threshold of the school door." *Id.* at 1207.[3]

3. In *Fields*, the Ninth Circuit deleted this sentence from its opinion in response to a petition for rehearing "to make [its] holding more precise," 447 F.3d at 1187, but at least one subsequent Ninth Circuit decision has cited this sentence as binding, *see, e.g.*, *California Parents for the Equalization of Educ. Materials v. Torlakson*, 973 F.3d 1010, 1020 (9th Cir. 2020).

Of course, parents entrust public schools with *some* control over what their children see, hear, and say. *See, e.g.*, *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 196–98 (2021) (Alito, J., concurring); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 279 (1988) (Brennan, J., dissenting) ("The young polemic who stands on a soapbox during calculus class to deliver an eloquent political diatribe interferes with the legitimate teaching of calculus."). But by sending their children to public school, do parents really waive *all* their fundamental rights, including the right to decide when, how, and what children learn about gender and sexuality? Precedent, history, and the compulsory nature of modern public education all compel that the answer must be no.

First, precedent. This Court has long recognized the coercive power the State wields in public schools and rejected attempts to catechize children in state-approved orthodoxies. *See Barnette*, 319 U.S. at 641–42; *Meyer*, 262 U.S. at 400–02. These cases reveal that parents' rights do, in fact, extend beyond the schoolhouse door despite *Fields*' suggestion otherwise.

And while this Court has recognized a State's "power to prescribe a curriculum" for public schools, *Meyer*, 262 U.S. at 402, it has never approved the use of that power to root out disfavored religious beliefs. Parents "entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). Even if the lower courts have cabined this principle to the Establishment Clause context, the Free Exercise Clause and Establishment Clause "appear

in the same sentence of the same Amendment," and "have complementary purposes, not warring ones[.]" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 533 (2022) (citation and quotation marks omitted). Parents do not consent to religious indoctrination by sending children to public school; neither do they consent to putatively non-religious indoctrination intended to deconstruct their family's religious beliefs. "State power is no more to be used so as to handicap religions than it is to favor them." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

MCPS's hostility toward religious beliefs further confirms that it is attempting a form of indoctrination that has no place in our pluralistic constitutional order. *Compare Masterpiece Cakeshop*, 584 U.S. at 635 *with* Pet. App.103a–104a, 187a (calling parents' invocation of their rights "hate" and a "dehumanizing form of erasure"). The "denigration of those who continue to adhere to traditional moral standards . . . as outmoded at best and bigoted at worst" has no place in our constitutional order. *Espinoza* v. *Mont. Dep't of Rev.*, 591 U.S. 464, 496 (2020) (Thomas, J., concurring).

Second, history. When interpreting the First Amendment, any "line that courts must draw" should "accord with history and faithfully reflect the understanding of the Founding Fathers." *Kennedy*, 597 U.S. at 535–36 (cleaned up). Allowing schools to deny any religious exemptions from instruction that touches upon topics like sexuality and gender is incongruous with our Nation's history of religious tolerance.

Of course, there are no Founding-era examples of exemptions from compulsory public school in the

public-school context because widespread compulsory public education did not exist at the time. *Mahanoy*, 594 U.S. at 216 (Thomas, J., dissenting) (noting that when the Fourteenth Amendment was ratified, only three jurisdictions had compulsory education laws).

But the right to religious exemptions, even from critical State functions, is deeply rooted in our Nation's history. *See Fulton v. City of Phila.*, 593 U.S. 522, 582–83 (2021) (Alito, J., concurring). For instance, the Colonies and States granted religious exemptions from critical public duties like swearing an oath before entering public office, testifying in court, and voting. *Id.* at 583. Colonies and States allowed religious objectors to opt out of militia service, even though the "militia was regarded as essential to the security of the State and the preservation of freedom." *Id.* at 583. And the Continental Congress granted religious exemptions from military conscription during the Revolutionary War. *Id.* at 583–84. Public school is, doubtless, important. But it seems unlikely that the founding generation would have granted religious exemptions to military-aged males during the Revolutionary War—when "the very survival of the new Nation often seemed in danger"—but not to school children from instruction that is inherently imbued with religious overtones. *Id.* at 583–84.

Also, Blackstone treated *in loco parentis* "primarily as an implied term in a private employment agreement" in which parents would delegate their exclusive authority over children's education to educators. *Mahanoy*, 594 U.S. at 198–99 (Alito, J., concurring). But petitioners, like many MCPS parents, didn't contract with the school board to "disrupt heteronormativity" in their elementary schoolers.

MCPS made its *volte-face* on parental opt-outs precisely because it knew that parents didn't approve of the instruction and viewed these concerns as an impediment to its "educational mission." Pet. App. 16a. This is a far cry from Blackstone's England. *See Mahanoy*, 594 U.S. at 198–200 (Alito, J., concurring).

The gender identity indoctrination efforts of MCPS, and many other schools, also invert the Constitution's presumptions about parental fitness and affection—that the "natural bonds of affection lead parents to act in the *best* interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (emphasis added). MCPS's gender identity curriculum, by contrast, presumes that parents are teaching the wrong lessons at home. When the State's purpose is to "fix" what parents are teaching about sexuality and gender—what the State calls "hate" and "erasure"—this runs afoul of the constitutional presumption that parents act in the best interests of their children.

Third, the lower courts' expansive application of *in loco parentis* fails to consider the compulsory nature of modern public education. The most recent data suggest that between 80% and 90% of American children attend public school.[4] It cannot be that eight or nine out of ten Americans lose their fundamental right to direct their children's religious upbringing five days a week from the child's first day of kindergarten until they reach the age of majority.

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4. https://perma.cc/NDD7-YVMP (last visited Mar. 4, 2025); see *also* United States Census Bureau, *School Enrollment in the United States: 2021*, (Jun. 2023), *available at* https://perma.cc/P27T-HY7P (last visited Mar. 4, 2025).

The lower courts have often responded to parental concerns by telling parents that if they don't like what the school is teaching, they have two options: (1) keep children in public school and teach different views at home or (2) send children to private school. *See* Pet. App. 35a; *Fields*, 427 F.3d at 1205–06; *Cf. Meyer*, 187 N.W. at 101–02.

But parents' ability to counteract school indoctrination is limited. Schools wield a unique power to coerce due to "students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Edwards*, 482 U.S. at 584. This is particularly true today, considering the significant amount of time students spend at school and school-related tasks and events.[5] Societal trends also make parents' jobs more challenging: With each generation, cultural forces make it more difficult to pass on religious beliefs and easier to pass on nonreligious ones.[6]

Nor is private school a realistic option for many families. According to one recent report, the average private elementary school costs $9,210 per year.[7] For many, public school is thus the only realistic financial choice. *See*

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5. Gretchen Livingston, Pew Research Center, The way U.S. teens spend their time is changing, but differences between boys and girls persist, (Feb. 20, 2019), *available at* https://perma.cc/W9JF-P3ZL (last visited Mar. 5, 2025).

6. Pew Research Center, How U.S. religious composition has changed in recent decades (Sep. 13, 2022), (describing the increasing "stickiness" of nonreligion and decreasing "stickiness" of religion), *available at* https://perma.cc/KAU2-AM5W

7. Melanie Hanson, Education Data Initiative, *Average Cost of Private School*, *available at* https://educationdata.org/average-cost-of-private-school (last visited Mar. 10, 2025).

Morse v. Frederick, 551 U.S. 393, 424 (2007) (Alito, J., concurring). And even for parents of means, private school availability varies greatly from state to state, and rural communities have far fewer private schools than urban and suburban ones.[8] Parents' fundamental rights over their children's religious upbringing shouldn't hinge on their ability to pay or their zip code. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Mayer v. Chi.*, 404 U.S. 189 (1971). Putting parents "to the choice" of losing their ability to direct their children's religious upbringing or paying for private school is antithetical to this Court's Free Exercise precedents. *Fulton*, 593 U.S. at 532.

Treating most Americans' decision to send their children to public school as an implicit waiver of their parental rights also doesn't track how constitutional waiver normally works. There is generally a "presumption against waiver of constitutional rights" that is overcome only when the State shows a waiver is knowing and voluntary. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (cleaned up); *Brewer v. Williams*, 430 U.S. 387, 412 (1977) (Powell, J., concurring) ("It is settled law that an inferred waiver of a constitutional right is disfavored."). But the lower courts have decided that parents who send their children to public school have *implicitly* waived their fundamental right to direct their children's upbringing—even over parents' explicit objections—despite the fact many parents don't have a real alternative. *See, e.g.*, *Fields*, 427 F.3d at 1206–07. Perhaps the lower courts think religious constitutional rights may be waived more easily than others, but Free

8. Katherine Schaeffer, Pew Research Center, *U.S. public, private and charter schools in 5* charts, (Jun. 6, 2024), *available at* https://perma.cc/NDD7-YVMP

Exercise freedoms should not be placed "on the lowest rung of the Court's ladder of rights." *Espinoza*, 591 U.S. at 496–97 (Thomas, J., concurring).

Finally, courts shouldn't allow "modest estimates of [their] own competence in such specialties as public education" to cause them to shirk their duty to step in "when liberty is infringed." *Barnette*, 319 U.S. at 640. And the limited scope of relief requested by the petitioners here should assuage concerns about entangling federal courts in the minutiae of public-school affairs. If the basis for public schools' authority over children is inferred parental consent, *see Mahanoy*, 594 U.S. at 196–98 (Alito, J., concurring), parents should have a chance to make that consent explicit—especially when the school introduces a program to systematically change pre- and elementary-schoolers' ways of thinking about controversial religious topics. That's all petitioners seek here.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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