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 FOR PROTECT OUR KIDS (CALIFORNIA), COLORADO PARENTS ADVOCACY NETWORK, PROTECT OHIO CHILDREN COALTION, NEBRASKANS FOR FOUNDERS' VALUES AND TEXAS EDUCATION 911 AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Amici described below are all statewide coalitions of parents and other concerned citizens in states across the country, which demonstrates how widespread and urgent is the legal issue addressed in this case. Primarily *amici* are from major population centers, but more rural states and areas also are represented here, indicating that in virtually all parts of this nation, parents are gravely concerned about exercising their rights to opt-out their children from what many of them determine to be contra-religious, school-based, sexual indoctrination.[1]

Amicus **Protect Our Kids** (POK) is a statewide coalition of California parents, community leaders, attorneys, pastors, teachers and concerned citizens who acknowledge that public schools have a role in educating children on matters of basic biology, anatomy and reproduction, but not the promotion of controversial sexual ideas and other ideologies far exceeding the rightful boundaries of the public-school system. POK exists to inform parents about the scope of these threats, their rights as parents, and to protect children from the harms of public-school indoctrination. POK adheres to Biblical truth which teaches that God created mankind in His image, male and female. POK supports the use of opt-outs in school-based, sexual-education controversies.

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1. In accord with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission.

Amicus **Colorado Parent Advocacy Network** (CPAN) is a collaborative statewide network in which parents, educators, and concerned citizens are purposefully working together to secure parental rights and restore a rigorous, non-political, safe and fulfilling educational experience for all students. Among other issues, CPAN works on the pressing issue of controversial school sexual-education lessons, which require the protection of parental rights, including religion-based rights. CPAN promotes the use of opt-outs to address disagreements over school-based sexual education issues and, in fact, provides a recommended opt-out form on its website.

Amicus **Nebraskans for Founders Values** (NFFV) started in 2013 and expanded in 2016, when approximately 1,500 parents and other citizens attended a meeting of a local school board to voice their concerns over proposals that the parents thought would sexualize their children under the guise of comprehensive sex education. Since then, NFFV has grown into a statewide, grass-roots organization that monitors legislative and school developments to make sure its members are able to be informed and involved. NFFV's guiding principles are Judeo-Christian beliefs. NFFV long has promoted the use of opt-outs to address disagreements over school-based, sexual-educations issues.

Amicus **Protect Ohio Children Coalition** (POCC) is a statewide grassroots volunteer organization that monitors schools and school boards across Ohio. When schools take steps to introduce indoctrination into the classrooms, POCC identifies and publicizes controversial materials being presented to children. POCC empowers citizens to exercise their First Amendment rights

to peacefully speak at meetings and petition their government and representatives to redress grievances. POCC advocates for civil and professional behavior when speaking to government representatives. POCC supports child-protection and parental rights legislation. POCC is grounded in Judeo-Christian beliefs and promotes the use of opt-outs in school-based, sexual-education controversies.

Amicus **Texas Education 911** (TexEd 911) is a statewide coalition of parents interested in exposing serious problems in Texas public education and in advocating for change. TexEd911 assists parents when they believe their rights have been violated or their child has been harmed by a public school. In seeking the best education possible for children, free of avoidable controversy, one of its goals is to end ideological manipulation in instructional content. Parents and teachers both must be included in the conversation, at the school, board and legislative levels. Many of the members of TexEd 911 are motivated by Judeo-Christian beliefs. TexEd 911 encourages its members to know their rights, be prepared, and to keep love at the center of all interactions. TexEd 911 supports the use of opt-outs and promotes the use of opt-ins to address disagreements over school-based sexual-education and mental health educational issues.

SUMMARY OF ARGUMENT

One of the key facts in this case is that the Petitioners, primarily parents of young school children (Parents), never requested any change in school curriculum. Rather, they simply wanted to remove their children ("opt-out") from several discrete book readings that conflicted with

their religious beliefs, as was allowed at the time of their requests under Maryland law and the Montgomery County Board of Education's (Board) written policies. The Parents' goals brought them under the protection of a long line of United States Supreme Court precedent allowing parents to remove their children from discrete educational situations, particularly when Free Exercise issues exist.

What is now widely known as an "opt-out" is relatively easy for schools to administrate, as is demonstrated by the nationwide enactment of "opt-out" or "opt-in"[2] statutes in nearly every state. Opt-outs also are relatively easy for courts to apply, as compared to the more complicated process when courts are asked to evaluate broadly based curricular disputes.

Concerns over excessive entanglement in generalized curricular disputes was a motivating factor in the past for courts to defer to the educational establishment. Although curricular entanglement is not involved in the case now before this Court, it was the foundational context of *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1068 (6th Cir.1987), a case dealing with broad curricular controversies. *Mozert* has been improperly

2. Opt-in statutes typically require that the school cannot teach particular matters to a child unless the child's parents first expressly agree. It requires the parent to take an affirmative act before certain teaching can take place. From some perspectives, particularly that of a conscientious parent, opt-in statutes are preferable to opt-outs. An opt-in statute assures parents that their child is not being subjected to arguably controversial moral teaching simply because of forgetfulness in providing an opt-out form or some sort of communication breakdown. It also resolves recurring issues of inadequate notice to parents.

cited as authority for denying relatively discrete "opt-outs," as opposed to *Mozert's* generalized curriculum dispute. Significantly, the Fourth Circuit Court of Appeals and the Respondents in this case, as well as other courts, wrongly have cited *Mozert* as authority for denying otherwise appropriate opt-outs.

ARGUMENT

A. The case before this Court is a pure opt-out case, not an attempt to make broad changes in a school's curriculum.

The Petitioner Parents only have asserted religiously based opt-out requests to discrete units of instruction. The Parents have never maintained that the Pride Storybooks, or other specified controversial texts, cannot be taught to other Montgomery County students. The Parents merely do not want their own children to be subjected to what they view as attempted indoctrination.

They never attacked the Montgomery County schools' curriculum on a broader basis. "The Parents do not challenge the Board's adoption of the Storybooks or seek to ban their use in Montgomery County Public Schools." *Mahmoud v. Taylor*, 102 F.4th 191, 201 (4th Cir. 2024). The Parents "do not claim the use of the books is itself unconstitutional. And they do not seek to ban them. Instead, they only want to opt their children out of the instruction involving such texts." *Id.* at 219 (Quattlebaum, dissenting) "They claim the board's denial of their opt-out requests burdened their First Amendment free exercise rights in a way that was neither neutral nor generally applicable. . . ." *Id.* at 220.

Thus, this case does not require any court to dig into curricular details or to evaluate competing ideologies.

B. Opt-outs avoid entangling the courts in curricular details.

As a pure opt-out case, the case before this Court follows in a long history of decisions in which this Court has confirmed parents' rights to have their children removed from aspects of public education, particularly where it conflicts with their religious convictions. *See e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (children in religious schools exempted from attending public schools); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish parents' Free Exercise rights exempts their children from high school); *Board of Education v. Barnette*, 319 U.S. 624 (1943) (Jehovah Witness child exempted from school board regulation compelling flag salute and pledge).

The Constitutional history and tradition that grew out of these cases, *see Yoder*, 406 U.S. at 232, led to and informed the growth of the opt-out/opt-in statutes that swept in the nation during the rise of the sex-ed era. Beginning with a few state statutes in the 1970s and continuing through the last decade, forty-seven states and the District of Columbia now provide parental opt-outs or opt-ins, as detailed in the chart below. This was a popular movement for parents' rights to protect their children from what they considered to be pernicious, contra-religious teaching, usually on sexual topics. Many of these statutes indicate a religious foundation or motivation, whether express or implied.

State	Type	Statute(s)/ Regulation(s)	Date
Alabama	Opt-out	Ala. Code § 16-40A-5	2022 (effective)
Alaska	Opt-out	Alaska Stat. §§ 14.30.355(b)(7) and 14.30.356(b)(6)	2015
Arizona	Hybrid	Ariz. Rev. Stat. §§ 15-711(B) (as amended 2021); 15-716(E); 15-102(A)(4)	1991
Arkansas	Opt-out	Ark. Code § 6-16-1006(c)	2021
California	Opt-out	Cal. Educ. Code §§ 51240, 51937	2003
Colorado	Opt-out	Colo. Rev. Stat. §§ 22-25-104(6)(d) and 22-1-128(3)(a), (4) and (5)	2013 (effective)
Connecticut	Opt-out	Conn. Gen. Stat. §§ 10-16e, 10-19(b)	2023
Delaware	None		
Florida	Opt-out	Fla. Stat. §§ 1001.42(8)(c)(3), 1002.20(3)(d) and 1003.42(5)	2002
Georgia	Opt-out	Ga. Code § 20-2-143(d)	1988

Hawaii	Opt-out	Haw. Dep't of Educ., Bd. of Educ. Policy 103-5 and Policy 101-13	2015
Idaho	Opt-out	Idaho Code § 33-1611	1970
Illinois	Opt-out	105 Ill. Comp. Stat. 5/27-9.1a(d)	2021 (effective)
Indiana	Hybrid	Ind. Code §§ 20-30-5-17(c), (d) (as amended 2018); 20-30-5-9(d)	2005
Iowa	Opt-out	Iowa Code § 256.11(6)(a)	2016
Kansas	Hybrid	Kan. Admin. Regs. § 91-31-35(a)(6)	2005
Kentucky	Opt-in	Ky. Rev. Stat. § 158.1415(1)(e) (as amended in 2023)	2023
Louisiana	Opt-out	La. Stat. §§ 17:281(D) and 17:412 (effective August 1, 2024)	1979
Maine	Opt-out	Me. Rev. Stat. tit. 22, § 1911	2001
Maryland	Opt-out	Md. Code Regs. §§ 13A.04.18.01(D)(2)(e)(i) and (iii)	2022
Massachusetts	Opt-out	Mass. Gen. Laws ch. 71, § 32A	1996

Michigan	Opt-out	Mich. Comp. Laws §§ 380.1507(4); 380.1506; 380.1170(3); 380.1507a	1976
Minnesota	Opt-out	Minn. Stat. § 120B.20	1993
Mississippi	Opt-in	Miss. Code § 37-13-173	1998
Missouri	Opt-out	Mo. Stat. § 170.015 (5)(2)	1999
Montana	Opt-out	Mont. Code § 20-7-120	2021 (effective)
Nebraska	Opt-out	Neb. Rev. Stat. §§ 79-531(1)(b) and 79-532(1)(c) (as amended 2024)	1994
Nevada	Opt-in	Nev. Rev. Stat. § 389.036(4)	1979
New Hampshire	Opt-out	N.H. Rev. Stat. § 186:11(IX-c)	2011
New Jersey	Opt-out	N.J. Stat. § 18A:35-4.7	1980 (effective)
New Mexico	Opt-out	N.M. Code R. § 6.29.6.11	2009
New York	Opt-out	N.Y. Comp. Codes R. & Regs. tit. 8, § 135.3 (c)(2) (as amended 1970, 1978, 1987, 1992)	unknown

North Carolina	Opt-out	N.C. Gen. Stat. § 115C-81.30(b)	2017
North Dakota	None		
Ohio	Opt-out	Ohio Rev. Code § 3313.60(A)(5) (c), (d) and (f) (as amended 1993, 2010, 2014, 2023, 2024)	unknown
Oklahoma	Opt-out	Okla. Stat. tit. 70, §§ 11-103.3(C), 11-105.1(A) tit. 25, § 2003(A)(2)-(5)	1987 (effective)
Oregon	Opt-out	Or. Rev. Stat. § 336.465(1)(b)	1993
Pennsylvania	Opt-out	22 Pa. Code §§ 4.29(c) (effective February 16, 2008) and 4.4(d)(3) (effective January 9, 2010)	2008 2010
Rhode Island	Opt-out	R.I. Gen. Laws §§ 16-22-17(c) (1987), 16-22-18(c) (1987) (as amended 1996) and 16-22-24(b) (2007)	1987 2007
South Carolina	Opt-out	S.C. Code. § 59-32-50	1988
South Dakota	None		

Tennessee	Hybrid	Tenn. Code §§ 49-6-1305 (2012), 49-6-1307 (2012) and 49-6-1308 (2021)	2012 2021
Texas	Hybrid	Tex. Educ. Code § 28.004(i) and (i-2) (as amended 2021)	1995
Utah	Hybrid	Utah Code §§ 53E-9-203(3) (1994), 53G-10-205 (1993) and 53G-10-403 (effective January 24, 2018)	1993 1994 2018 (effective)
Vermont	Opt-out	Vt. Stat. tit. 16, § 134	1977
Virginia	Opt-out	Va. Code. § 22.1-207.2	1989
Washington	Hybrid	Wash. Rev. Code. § 28A.230.070(4)	1994
West Virginia	Opt-out	W. Va. Code § 18-2-9(c) (as amended 2015)	1988
Wisconsin	Opt-out	Wis. Stat. § 118.019(3) and (4)	1985
Wyoming	Opt-in	Wyo. Stat. § 21-9-104(b)	2018 (effective)
District of Columbia	Opt-out	D.C. Code Mun. Regs. tit. 5-E § 2305.1	1979

The ubiquity of these opt-out/opt-in provisions shows a virtual national consensus on the rights of parents to control the way their children are introduced to the sensitive, spiritual issues that surround sexuality. These statutes also represent a rational compromise between parents' rights and educators' curricular-control interests.

The effectiveness of these nationwide statutes hangs in the balance of the decision in this case, which encompasses whether school boards can casually disregard them when it suits their purposes, as did the Montgomery County Board here.

The existence of opt-out and opt-in provisions also should be seen as a welcome development for courts across the country that are tasked with resolving these thorny issues. Such provisions are particularly beneficial for the courts as they alleviate the stated and unstated reservation of courts from being repeatedly dragged into the details of curricular disputes. Also, it makes sense for court decisions to encourage popular support for treating matters of sexual development with restraint and with principled compromise, as demonstrated by applying opt-out and opt-in provisions.

C. Courts understandably avoid entanglement in complicated curricular disputes.

The Fourth Circuit's decision below expressed its determination not to be drawn into a dispute over public school curricular minutia. According to the court below, "[i]t is not our station to determine the pedagogical or childhood development value of the Storybooks or the related topics." 102 F.4th at 212. That determination even

showed up in the appellate court's holding in this case: "Without such evidence [of direct or indirect coercion], this case presents only an objection to their children's public school curriculum." *Id.* at 216. Fair enough, as to the judiciary's attempted avoidance of curricular details.

But it is not at all fair as to the way that attitude of curricular aversion may have warped the court's holding in this case. More significantly, the Fourth Circuit is flat-out wrong if it characterizes this case as an "objection to . . . curriculum." This case most certainly does not involve a broad-based curriculum dispute. Instead, it is a pure and relatively simple opt-out case, which should have been resolved using the opt-out statutorily available in Maryland.

The Fourth Circuit majority in this case is not alone in being skittish about entering a skirmish over broader curricular questions. Many other courts over the years have erected such initial barricades—sometimes reasonably—in litigation involving public education. One of the more extended discussions of curriculum aversion came from the Eighth Circuit:

> [S]chool boards are accorded comprehensive powers and substantial discretion to discharge the important tasks entrusted to them. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. . . . Necessarily included

> within the board's discretion is the authority to determine the curriculum that is most suitable for students and the teaching methods that are to be employed, including the educational tools to be used.

Pratt v. Independent Sch. Dist. No. 831, 670 F. 2d 771, 775 (8th Cir. 1982) (citations omitted). Likewise, the Third Circuit held "that in certain circumstances the parental right to control the upbringing of a child must give way to a school's ability to control curriculum." *C.N. v. Ridgewood Board of Education*, 430 F.3d 159, 182 (3rd Cir.2005) (*citing Brown v. Hot, Sexy & Safer Productions*, 68 F.3d 525 (1st Cir.1995)).

These First and Third Circuit opinions are particularly significant, because they demonstrate how excessive judicial deference to school officials can lead to deeply troubling and bizarre outcomes, as exemplified in *Brown v. Hot, Sexy and Safer Productions, Inc.* In that case, the court upheld a school's decision to subject students to sexually explicit and highly controversial AIDS-awareness program, despite numerous parental objections. The facts of the case are staggering, highlighting the extent to which some courts have prioritized school discretion over parental rights and student protection.

While indicating sympathy for such courts' hesitancy to get involved in curricular disputes, this Court has acknowledged that there are times courts have no choice but to jump into the curricular fray . . . particularly when significant constitutional issues are at stake. In *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (Establishment Clause), this Court succinctly stated the quandary:

> Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . .'

Fourteen years later, the Supreme Court reiterated:

> Our precedents have long recognized certain constitutional limits upon the power of the State to control even the curriculum and classroom. For example, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), struck down a state law that forbade the teaching of modern foreign languages in public and private schools, and *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968), declared unconstitutional a state law that prohibited the teaching of the Darwinian theory of evolution in any state-supported school.

Board of Education v. Pico, 457 U.S. 853, 861 (1982) (Free Speech); *see also*, *Barnette*, 319 U.S. 624, 640 (1943).

The perceived specter hovering over the judiciary is that every time a parent is alarmed by a subject being taught in a state-funded school, the courts could be dragged in to referee the conflict. And, the worrying continues, curricular conflicts tend to be detail-oriented, involving moral and metaphysical conundrums about which the method for resolution is not even apparent, much

less clear. That feared nightmare—realistic or not—could not have come to reality in the case before this Court. That is because of the opt-out mechanism at play here, and its distinction from generalized curricular disputes.

D. *Mozert* involved a complicated curricular dispute, not an opt-out request.

One of the more striking statements of curriculum aversion comes from *Mozert v. Hawkins County Board of Education*: "For me, the key fact is that the Court has almost never interfered with the prerogative of school boards to set curricula, based on free exercise claims." 827 F.2d 1058, 1079 (6th Cir. 1987) (Boggs, concurring). Likewise, the majority opinion in *Mozert* was hung on the framework that "[w]hen asked to 'interpose,' courts must examine the record *very carefully* to make certain that a constitutional violation has occurred *before they order changes in an educational program adopted by duly chosen local authorities*." *Id.* at 1070 (emphasis added.) As might be expected in light of these comments, the *Mozert* court did not order any curricular changes in that case.

In *Mozert*, the plaintiffs' complaints were directed against a significant part of the school system's entire curriculum. The school district's curriculum purposefully integrated the whole curriculum by using a standard set of reading textbooks for all students in 1st through 8th grades, supplied by the Holt, Rinehart and Winston company. 827 F.2d at 1059-60. "The schools maintain an integrated curriculum which requires that ideas appearing in the reading programs reoccur in other courses," which included "character education." *Id.* at 1059. The parents in that case had religious objections to ideas and themes

that ran throughout the various textbooks, stretching to 17 categories. *Id.* at 1060, 1061-62.

With that as a background, the plaintiffs requested in litigation "an order requiring the school system to . . . provid[e] alternative reading instruction" for the plaintiff's children. *Mozert v. Hawkins County Public Schools*, 647 F.Supp. 1194, 1195 (E.D. Tenn. 1986). Plaintiffs alleged that "*any* value-laden reading curriculum that did not affirm the truth of their beliefs would offend their religious convictions." 827 F.2d at 1069 (emphasis added). Thus, the *Mozert* plaintiffs' aims were interwoven with all the school system's curriculum, not just a discrete part or parts of it.

The *Mozert* appellate court's language reflected the extensiveness of the curriculum-wide battle in that case: "We do point out that under certain circumstances the plaintiffs, by their own testimony, would only accept accommodations that would violate the Establishment Clause." *Id.* at 1070.

E. *Mozert* should have been a cautionary tale for the Montgomery County Board.

At one point, early in the *Mozert* controversy, it appeared the whole matter could have been defused simply by honoring something like an opt-out. The antagonists had reached an agreement early in the factual history of the case to allow the departure of objecting students from controversial classes and to attend an alternative reading program instead. *Id.* at 1060. Then the school board eliminated that alternative program. *Id.* at 1061-62.

The reported cases about this controversy appear to only tell a small part of the actual complexity surrounding this case. As the controversy developed, so did the human drama in the community in which the schools were located. Eventually, the saga of this case resulted in a book written by a Harvard Law-trained journalist, Stephen Bates.

In *Battleground* (1993), Bates recounted how the matter started with face-to-face courtesy in a relatively small town in rural Tennessee, and the objectors were allowed to leave the classroom to read an older series of unobjectionable readers in the school library. *Id.* at 71. Eventually with media coverage, though, school board meetings grew larger and testier, and local people formed into two camps. *Id.* at 81-84, 131-37. The earlier opt-out compromise was withdrawn, children were suspended from school, and one mother was arrested for trespass when she showed up at school. *Id.* at 85, 110, 118. When opposing, well-funded national groups (People of the American Way and Concerned Women of America) got whiff of the controversy, *id.* at 117-18, 121-30, "a ragtag schoolbook protest in Southern Appalachia mushroomed into a national spectacle— . . . 'Scopes II,' as journalists dubbed the case. . . ." *Id.* at 11.

Lawyers got involved (never a good sign), including Wilmer Cutler & Pickering of Washington, D.C., *id.* at 164, and the whole matter got out of hand. Years later—after discovery (including bitter depositions), motion practice, trial, national news interviews and two trips to the Fourth Circuit (one overturning a summary judgment order)—all the parties ended up essentially in the same place they started . . . except they were much more frustrated, angry and divided.

The *Mozert* debacle should have served the Montgomery County Board of Education as a cautionary tale as to why honoring opt-outs, statutorily available in Montgomery County, would have been a principled way to maintain operational peace in its school system.

By the time of the *Mozert* trial, the viability of an opt-out solution had been overwhelmed by the ever-growing list of generalized curricular challenges and the locked-in antagonism of the parties. The district court attempted to craft its own remedy by holding that the students could "opt out of the school district's reading program." 647 F.Supp. at 1203. (This was the district court's own crafted remedy, not pursuant to an opt-out or opt-in statute, which were not passed in Tennessee until 2012.) By the time of trial, though, it was much too late. The Sixth Circuit opinion did not address the district court's suggested opt-out remedy. Instead, the *Mozert* court held that the school board's curriculum decisions did not create an impermissible burden on students' exercise of their religion. 827 F.2d at 1070.[3]

To see it in retrospect, perhaps all of this could have been avoided if the *Mozert* parties had just continued on their early path of courtesy and compromise, however frustrating and laborious that had seemed at the time. *Mozert* is an object lesson. It is unfortunate the Montgomery County Board did not learn from it. Instead,

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3. *Mozert*, of course, pre-dated *Employment Division v. Smith*, 494 U.S. 872 (1990) by about three years and so was not required to apply its tests of neutrality and general applicability. Even if the *Smith* test had been in existence at the time, though, the *Mozert* court may not have gotten to those tests, given its ruling on burden.

the Board unceremoniously and inexplicably yanked the statutorily available opt-outs away from concerned parents.

And here we are.

F. *Mozert* spawned confusing caselaw, including the Fourth Circuit's opinion here.

The *Mozert* court dealt with a dispute implicating nearly all of the school's curriculum, and it ruled accordingly. It did not make any rulings about more simple, discrete opt-outs. *Mozert* never may have reached that issue anyway, having decided there existed no burden to the plaintiffs' Free Exercise rights. If the *Mozert* court had reached the issue of opt-outs, though, it would have had to rule that opt-outs simply did not apply to the facts of that case. Discrete opt-outs would not have resolved the issues in *Mozert*, since the plaintiffs in that case claimed that various ideas and themes running throughout the 1st-through-8th grade textbooks were religiously objectionable.

As the *Mozert* court dealt only in the context of curriculum-wide disputes, it did not expressly make the distinction between such a curricular dispute and the more manageable opt-out resolution. With the eventual passage of state opt-out/opt-in statutes across the nation, that distinction became more clear only after *Mozert*.

Unfortunately, in the years following *Mozert*, other courts also failed to make the distinction between complicated, generalized curricular disputes and more discrete opt-outs. Some of these courts dealing with opt-outs incorrectly cited *Mozert* for their conclusions.

A case in point is the very Fourth Circuit opinion in the case before this Court. For its "mere exposure" conclusion, the Fourth Circuit improperly cited *Mozert*, 102 F.4th at 210, despite that the fact scenarios of the cases are extremely different: *Mozert* wrestled with a broad curricular dispute, while the case before this Court is nearly a quintessential opt-out matter, dealing with discrete readings of storybooks.

Likewise, in their Brief in Opposition to certiorari, the Respondents repeatedly cited *Mozert* as authority. Br. Opp. 17, 18 n.4, 20.

The Fourth Circuit opinion below also cited *Parker v. Hurley*, 514 F.3d 87, 90, 106 (1st Cir. 2008) as a case that "rejected free exercise challenges to public school curriculum and requests to opt out of materials" on religious grounds. 102 F.4th at 211-12. *Parker* did *not* involve a broadly based challenge to school curriculum. Rather, it was solely an opt-out case, dealing with discrete readings of three specified books. 514 F.3d at 90. The *Parker* controversy could have been resolved by requiring the school to follow the appropriate statutory opt-out. Instead, the First Circuit denied such relief in *Parker*, citing *Mozert*, *id.* at 105, 106, inappropriately, since *Mozert* dealt with a decidedly different factual context. Thus, the Fourth Circuit opinion below inappropriately cited *Parker*, doubling down on its misuse of *Mozert*.

This is not to say that opt-out cases could never cite cases dealing with curricular disputes for any propositions whatsoever, or vice versa. Rather, it is a caution against doing so generally, since the factual situations are often quite different.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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MARCH 2025