

No. 24-297

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In the Supreme Court of the United States

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TAMER MAHMOUD, ET AL.,  
*Petitioners,*

*v.*

THOMAS W. TAYLOR, ET AL.,  
*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**BRIEF FOR PROFESSORS S. ERNIE WALTON  
AND ERIC A. DEGROFF AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONERS**

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**INTEREST OF *AMICI CURIAE***

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<sup>1</sup> Under Rule 37.2, *amici* provided timely notice of their intention to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

## SUMMARY OF THE ARGUMENT

For centuries before the Founding, parents directed and controlled their children's upbringing and education, especially about subjects as sensitive as values, identity, and religious beliefs. This historical right continued at the Founding and later after the advent of public education in the nineteenth century. Although parents have long entrusted their children to others for the purposes of education, those third parties (whether public or private schools, or individual tutors) act *in loco parentis* within clear boundaries, exercising only the limited authority delegated to them by parents. At no time are schools, public or private, empowered to usurp parental authority over a child's moral development or decision-making. Throughout the history of this nation, this Court has enforced limits on the authority of educators acting *in loco parentis* and protected the rights of parents to direct the care, custody, education, and upbringing of their children.

The Montgomery County School Board's refusal to allow parents to remove their children from instruction on gender and sexuality violates this time-honored tradition of parental rights. The Board's actions abrogate the rights of parents by forcing their children to participate in lessons that advance values fundamentally in conflict with those the parents attempt to instill. In so doing, the Board has violated the deeply rooted parental right to control a child's education and religious upbringing.

This is not the first time courts have been called on to stop the Board's ideological indoctrination of schoolchildren. See *Citizens for a Responsible Curriculum v. Montgomery Cnty. Public Schs.*, No. 05-

cv-1194, 2005 WL 1075634 (D. Md. May 5, 2005). The Court should grant the petition to resolve the circuit split noted by Petitioners and affirm the principle that parents need not choose between a public education and their right to protect their children from values antithetical to their religious convictions.

### ARGUMENT

The Board's refusal to allow parents to opt their elementary-school-aged children out of lessons dedicated to issues of sexuality and gender identity violates the fundamental right of parents to direct and control the upbringing of their children recognized by this Court in *Troxel v. Granville*, 530 U.S. 57 (2000). Although schools play a role in the development of children, the primary responsibility for, and authority over, the development of a "child's social and moral character" lies with parents. *Id.* at 78 (Souter, J., concurring). This right does not disappear when parents send their children to public school. Indeed, "[w]hether for good or ill, adults not only influence but may indoctrinate children." *Id.* Just as parents control their children's social companions, they also have a say in "the designation of the adults who will influence the child in school." *Id.*

This fundamental right is protected by the Fourteenth Amendment. "[A]n analysis focused on original meaning and history" is "the rule rather than some exception" when it comes to constitutional interpretation. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 536 (2022) (cleaned up) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)). "[T]o carry th[e] burden" of justifying a law or regulation



that infringes on fundamental rights, “the government must generally point to *historical* evidence about the reach of the First Amendment’s protections.” *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 24–25 (2022) (emphasis added). “[I]f earlier generations addressed [an analogous] societal problem, but did so through materially different means,” that “could be evidence that a modern regulation is unconstitutional.” *Id.* at 26–27. Or if they “attempted to enact analogous regulations,” “but those proposals were rejected on constitutional grounds, that rejection surely would [also] provide some probative evidence of unconstitutionality.” *Id.* at 27.

The government can make no such showing here. Parental rights in education—including at public schools—have long been recognized within the historically analogous legal framework. Time and again, the Supreme Court has recognized the right of parents to “control the education of their own” without significant state interference. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). Those holdings are grounded in the historical tradition of the natural law right of parents to direct their children’s moral upbringing and education. See S. Ernie Walton, *The Fundamental Right to Homeschool: A Historical Response to Professor Bartholet*, 25 *Tex. Rev. L. & Pol.* 377, 400–02 (2021). Essential to that right is the ability of parents to limit their children’s exposure to instruction that contradicts their own values, especially when they are most impressionable.

## I. Historically, Parents Controlled Their Children's Education.

Under English common law, parents had the right and responsibility to “guide their children’s development.” Eric A. DeGroff, *Parental Rights and Public School Curricula, Revisiting Mozart After 20 Years*, 38 J.L. & Educ. 83, 108 (2009) (citing 1 William Blackstone, *Commentaries on the Laws of England* 440–41 (1983)). In fact, Blackstone asserted that it was “the duty of parents to their children” to provide for their education. 1 Blackstone, *supra*, at 438–39. This duty, originally recognized as a moral duty, *see id.*, was quickly recognized by the Court of Chancery as a legal right. Thus, early English courts began to enforce “the right of parents to make educational choices for their children despite the wishes of the child or even the preferences of civil authorities.” DeGroff, *supra*, at 110 (collecting English cases). By the nineteenth century, the right of a parent to make educational decisions for their child had become so ingrained in the common law that one scholar described that right as “absolute against all the world.” Robert Wolstenholme Holland, *The Law Relating to the Child: Its Protection, Education, and Employment* 60 (1914).

When a child’s education involved *religious* matters, the English common law went even further to protect the decisions of parents. The right was so strong at common law that a father’s right to determine the religion in which a child would be educated continued after the father’s death. *See* Lee M. Friedman, *The Parental Right to Control the Religious Education of a Child*, 29 Harv. L. Rev. 485, 488 (1916). Even when the courts believed the

parents' decision to raise their children in a specific religion would jeopardize the child's eternal welfare, they respected the decision of the parents. DeGroff, *supra*, at 111.

The English common law built on even older canonical laws dating back to the ninth century. Under those laws too, parents had a right to direct the education and upbringing of their children. For example, if a child decided to join a monastery before reaching legal age, "the parents ha[d] up to a year to demand that the child be returned to their custody." *Id.* at 119 (quoting Aviad M. Kleinberg, *A Thirteenth-Century Struggle Over Custody: The Case of Catherine of Par-aux-Dames*, 20 Bull. Medieval Canon L. 51, 58 (1990)). Ecclesiastical courts also supported parents' right to choose how to raise their children. Even when those courts thought that keeping a child with his or her parents would compromise the child's future, the courts upheld the parents' rights to make those choices. *Id.*

Thus, the right of parents to direct their children's education in both religious and secular environments is evident in both the common law and the canonical law that heavily influenced American traditions. That right might be exercised either by educating their children at home or by delegating limited authority to a third party.

## **II. *In Loco Parentis* Is Limited In U.S. Law.**

Blackstone recognized that while a parent had the primary duty to ensure their child was educated, and enjoyed corresponding authority over the child's education, a parent could delegate that authority to a third party. 1 Blackstone, *supra*, at 453. In doing so,

the parent authorized the third-party educator to stand *in loco parentis*, meaning “in the place of the parent.” *Id.* From the start, however, this delegation of authority was limited. Tutors or schoolmasters exercised only “that portion of the power of the parent . . . as may be necessary to answer the purposes for which he is employed.” *Id.* This limitation was echoed by American jurists in the early days of our Nation. See James Kent, *Commentaries On American Law*, Lecture 29 (1826–30) (“the power allowed by law to the parent over . . . the child, may be delegated to a tutor or instructor”).

This principle of *in loco parentis*, with third parties exercising limited, delegated authority from parents, has long been recognized by American courts, both before the existence of public schools and after they became a regular fixture of American culture. See S. Ernie Walton, *In Loco Parentis, The First Amendment, and Parental Rights—Can They Coexist in Public Schools?*, 55 *Tex. Tech L. Rev.* 461, 469–76 (2023). Historically, the familial freedom to educate overrode “state-mandated education about civic values.” Noa Ben-Asher, *The Lawmaking Family*, 90 *Wash. U. L. Rev.* 363, 377 (2012). The home was “considered as the keystone of the governmental structure,” with parents ruling “supreme during the minority of their children.” *Sch. Bd. Dist. No. 18 v. Thompson*, 103 P. 578, 581 (Okla. 1909).

In the nineteenth century, state courts applied the doctrine of *in loco parentis* to public schools primarily to resolve conflicts when teachers imposed physical discipline on students. Walton, *In Loco Parentis*, *supra*, at 472. For example, in 1837 the North Carolina Supreme Court opined that “the

authority of the teacher is regarded as a delegation of parental authority.” *State v. Pendergrass*, 19 N.C. 365, 365–366 (1837). Vermont’s Supreme Court issued a similar ruling in 1859, with the qualification that a schoolmaster’s authority to inflict discipline is more limited than a parent’s, given the absence of “natural affection.” *Lander v. Seaver*, 32 Vt. 114, 122 (1859).

**A. State courts routinely constrained school authority in favor of parents.**

When public schools stand *in loco parentis*, the delegation of authority has its limits. This has been true throughout history, and early state court decisions recognized a right of parents to hold their children out of classwork that conflicted with their values. This recognition came despite the rapid expansion of public schools across the nation. In *Morrow v. Wisconsin*, for instance, the Supreme Court of Wisconsin resolved a disagreement between a parent and a teacher regarding the child’s course selection. 35 Wis. 59, 62–63 (1874). The parent wanted his child to focus on orthography, reading, writing, and arithmetic at the expense of geography. *Id.* His teacher disagreed. *Id.* The court ruled for the parent and held that the teacher “does not have an absolute right to prescribe and dictate what studies a child shall pursue.” *Id.* at 64. Instead, the court held that the father had “the right to direct what studies, included in the prescribed course, his child shall take.” *Id.* “[I]n case of a difference of opinion between the parent and teacher upon the subject, [the court] see[s] no reason for holding that the views of the teacher must prevail.” *Id.* at 66.

Several Nebraska cases in the late nineteenth and early twentieth century likewise affirmed the right of parents to direct the details of their children's education. Two of those cases involved parents' attempts to opt their children out of classes in the public-school curriculum. *See State v. Sch. Dist.*, 48 N.W. 393, 394 (Neb. 1891) (attempting to remove the child from grammar class); *State v. Ferguson*, 144 N.W. 1039, 1042 (Neb. 1914) (attempting to remove the child from home economics). The Supreme Court of Nebraska resolved both cases with a basic maxim: "the right of the parent . . . is superior to that of the school officers and the teachers." *Ferguson*, 144 N.W. at 1042 (quoting *Sch. Dist.*, 48 N.W. at 394). To rule for the school, the court reasoned, would "destroy both the God-given and constitutional right of a parent to have some voice in the bringing up and education of his children." *Ferguson*, 144 N.W. at 1043. The Supreme Court of Nebraska refused to allow "the doctrine of governmental paternalism [to go] too far, for, after all is said and done, the prime factor in our scheme of government is the American home." *Id.* at 1044. These decisions expressed the longstanding tradition that parents can elect to opt their children out of specific classes and thereby direct their children's education.

When religion is concerned, state courts have been particularly sensitive to parental objections. Courts in Colorado, Massachusetts and California allowed plaintiff-parents to opt their children out of specific school activities because their children's participation violated their own and their children's religious beliefs. *See Vollmar v. Stanley*, 81 Colo. 276 (1927), *overruled on other grounds*; *Conrad v. City & Cnty. of Denver*, 656 P.2d 662, 670 (Colo. 1982);

*Spiller v. Inhabitants of Woburn*, 94 Mass. 127, 128–29 (1866); *Hardwick v. Bd. of Sch. Trs.*, 205 P. 49, 50 (Cal. App. 1921).

In *Vollmar*, the Colorado Supreme Court upheld the right of a Catholic parent to have his child excused from daily readings from the King James version of the Bible. Emphasizing that the Colorado Constitution gave the parent “a right . . . to have his child attend the public schools,” the court held that the school board could not force the parent to surrender that right as a condition of exercising his constitutional right to direct his child’s education. 81 Colo. at 282–83.

Similarly, in *Spiller*, Massachusetts instituted a practice that began each school day with a reading from the Bible and prayer. 94 Mass. at 128. The plaintiff-parents disagreed with the practice and wanted to opt their child out of it. *Id.* at 129. Only because the practice allowed “a child to be excused from it” “if the parent requested” was the exercise allowed to continue. *Id.* at 130. In essence, the ability of parents to opt out of the practice was its saving grace. *Id.*

Lastly, in *Hardwick*, the court allowed the parents to opt their children out of portions of physical education classes that included dancing because it violated the family’s religion. 205 P. at 714. The court sided with the parents, concluding that granting the school an “overreaching power” that would deny parents “their natural as well as their constitutional right to govern or control” their children was a step too far. *Id.* at 709.

**B. This Court also limits schools' authority to act *in loco parentis*.**

This Court has likewise limited the control of public schools in favor of parental authority. Starting with *Meyer*, this Court grounded the power and duty to educate children in parents. 262 U.S. at 400. This Court declared that parental control over the education of their children was protected by the Fourteenth Amendment and acknowledged schools exercise educational power only to the extent that parents have delegated it to the schools. *Id.* at 400. Referencing the practice of Sparta under which children were removed from their parents at an early age and educated solely by “guardians,” this Court noted that any practice empowering agents of the state above a child’s parents in matters of character development rests on ideas about “the relationship between individual and state” that would do “violence to both letter and spirit of the Constitution.” *Id.* at 402. Just two years later, in *Pierce v. Society of Sisters*, this Court affirmed the rights of parents to direct the education of their children and pointed out that a child “is not the mere creature of the State.” 268 U.S. 510, 534–35 (1925).

In *Wisconsin v. Yoder*, this Court held that although states have authority to impose “reasonable regulations for the control and duration of basic education,” that authority was limited by “fundamental rights and interests” of parents, including Free Exercise rights. 406 U.S. 205, 213–14 (1972). This Court noted that Western civilization includes a “strong tradition of parental concern for the nurture and upbringing of their children” and that the “primary role of the parents in the upbringing of



their children is now established beyond debate as an enduring American tradition.” *Id.* at 232.

These cases and those from state courts make clear that parents retain their right to direct their children’s moral upbringing and education in public schools. Walton, *In Loco Parentis*, *supra*, at 497. Accordingly, while public schools stand *in loco parentis*, they do so only with respect to traditional subjects and non-ideological matters. *Id.* at 499. “In other words, education in ‘matters of public concern’ should be deemed to fall outside the scope of the parental delegation of authority[.]” *Id.* This is particularly true given the changes in public education over the last two centuries—changes including compulsory education, the increasingly coercive economic power of the state in public education, and state-mandated educational agendas. *Id.* at 489–92; *see Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 198–200 (2021) (Alito, J., concurring). These changes mandate that courts construe the delegation of authority from parents to public schools “much more narrowly than was done in the early days of the Republic.” Walton, *In Loco Parentis*, *supra* at 492.

The simplest way to recognize this limit on a school’s delegated authority is with a parental opt-out provision, as petitioners are seeking in this case. Such concessions to parents’ desires cannot extend to every aspect of school administration or curriculum, lest they become an organizational nightmare for educators. *See, e.g., Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001) (recognizing that parent’s rights do not extend to objecting to “a public-school Uniform Policy” and that parental rights “can be subject to reasonable regulation”). But

reasonable opt-outs are employed throughout the nation with little effect on the day-to-day functioning of our nation's schools, and they are normally applied in subject areas where questions of values, morals, and religious ideas are at stake. DeGroff, *Revisiting Mozart*, *supra* at 129–30.

Indeed, respondents here originally allowed such an opt-out for the very materials at issue. App. 14a. Pursuant to Maryland educational regulations, they continue to offer opt-outs for other areas of curriculum that implicate values and sexuality. App. 170a–173a. It was only the District's sudden and unexplained elimination of that opt-out relative to the Pride Storybooks which gave rise to the instant litigation. App. 16a–17a.

### **III. The District's Policy Exceeds The School's Delegated Authority.**

Gender identity ideology is a “matter of public concern.” *Janus v. Am. Fed. of State, Cnty., and Mun. Employees*, 585 US. 878, 913–14 (2018) (referring to sexual orientation and gender identity, among other things, as “sensitive political topics” and “matters of profound ‘value and concern to the public’”). Courts should therefore not construe parents to have delegated to public schools their authority over how their children are instructed about matters of such profound moral significance. See S. Ernie Walton, *Gender Identity Ideology: The Totalitarian, Unconstitutional Takeover of America's Public Schools*, 34 Regent U. L. Rev. 219, 261 (2022). Gender ideology is rooted in a worldview called expressive individualism, which holds that human identity is primarily sexual and is rooted in a person's own

psychological and subjective view of oneself. It “touches on the deepest moral, social, and religious questions, even going to the heart of what it means to be human.” Walton, *Gender Identity Ideology*, *supra*, at 261.

Accordingly, decisions about what children will be taught about sexuality, gender identity, and gender expression—and at what age they will be taught, remain solely a matter of parental authority. Because courts have historically recognized parents’ rights to control the religious development of their children in public school, parents must always have a superior claim over that of educators when it comes to fundamental worldview issues and a child’s moral formation regarding sexual orientation and gender identity. Isolating parents from their children by requiring children to participate in curriculum exercises that expressly contradict the parents’ values on these sensitive topics, without notification and without the option of removing their children from the lessons, exceeds the authority delegated by parents to the state for the purpose of educating their children.

The Fourth Circuit wrongly found that there was no free-exercise burden because no one was forced “to change their religious beliefs or conduct.” What the Fourth Circuit decision failed to recognize is that religion is inherently inter-generational. *See* Stephen L. Carter, *Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later*, 27 *Seton Hall L. Rev.* 1194, 1204 (1997). The transfer of core values and beliefs from one generation to the next is central to the practice of any of the major religions. If the State has the power through its institutions to inhibit the transfer of moral and religious values by parents, then religious freedom has lost its meaning. Thus, the

School Board must not be allowed to negate parental authority to decide how their children will be taught, and what they will be taught, about matters of such profound moral and religious concern as human sexuality, sexual behavior, individual identity. *See id.* at 270–73.

The Pride storybooks and associated curriculum, combined with the School Board’s refusal to provide notice or allow parents to opt-out their children from these lessons, deliberately isolate parents from their children with respect to the development of moral values and religious beliefs. This usurpation of parental authority is inconsistent with the history and traditions of this country respecting parental rights. *See Morrow*, 35 Wis. at 65 (finding it a “most unreasonable claim” by a teacher that a parent “has not the right...to direct [his child’s] studies”); *see also Pierce*, 268 U.S. at 534–35 (states may not “unreasonably interfere with the liberty of parents . . . to direct the upbringing and education” of their children); *Yoder*, 406 U.S. at 232 (recognizing the “fundamental interest” of parents, against the state, to “guide the religious future and education of their children”).

Granting the petition and reversing the decision of the Fourth Circuit will once more realign the relationship between parents and schools with the longstanding history and tradition of this Nation respecting parents’ ability to direct their children’s upbringing, moral formation, and education.

## CONCLUSION

The Court should grant the petition.

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