No. 24-297

In the Supreme Court of the United States

TAMER MAHMOUD, *et al.*,
Petitioners,

v.

THOMAS W. TAYLOR, *et al.*,
Respondents,

On Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* PARENTS NICHOLAS BROWN, ZEINA EL DEBS, TIMOTHY JANSS, DAGMAR JANSS, AND STEPHANIE PATE *in Support of the Petitioners*

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Table of Contents

Table of Authorities

Cases

STATEMENT OF INTERESTS[1]

The *amici curiae* are all parents of school children currently enrolled in the Montgomery County Public Schools ("MCPS"). They have each requested and been denied an opt-out for their children from MCPS's recent decisions to infuse instruction about LGBTQ+ matters ("LGBTQ+ instruction") throughout the curriculum, most notably by requiring "LGBTQ-Inclusive Texts" to be read in classes starting in kindergarten, purportedly as part of the English and Language Arts curriculum. The *amici* parents retain a strong interest in the outcome of this appeal, as their children are at risk of being instructed with respect to LGBTQ+ issues in what they believe is an inappropriate manner considering their children's ages, personalities, and circumstances. For most of the *amici curiae*, the stated purpose of MCPS's LGBTQ+ instruction to normalize and valorize alternative sexual behavior is also in violation of their sincerely held religious beliefs.

SUMMARY OF ARGUMENT

This petition arises from a situation that is becoming all too common in our public schools. This school district, transparently because it does not want parents to be able to protect their children from the school's chosen instruction about alternative lifestyles, has adopted a policy of requiring teachers to use "LGBTQ+-Inclusive Texts" in all classes, starting in pre-K, but not to disclose to parents when they will use, or have used, these materials. This "No-Opt-Out, No-Notice" policy not only violates free exercise rights, but also the parents' fundamental rights to direct the education and ethics of

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice was provided to the parties.

their children. These two constitutional rights work hand-in-hand in this instance, and violation of neither is ameliorated by parents being able to instruct their children about these matters outside of school, as the school policy prevents effective exercise of their rights. The question presented, arising in this context, demonstrates its importance and the need for prompt resolution by this Court.

ARGUMENT

I. The Petition Should Be Granted to Resolve That, Absent Notice and Opt-out, Public School Instruction Can Infringe Free Exercise and Parental Rights

MCPS has instructed its teachers to use selected LGBTQ+-Inclusive Texts at some time during the school year. At the same time—in an obvious attempt to frustrate parental and free exercise rights—it has instructed teachers *not* to give advance notice to parents of when they will use the texts, *not* to allow parents to review the class materials in advance, and *not* to inform parents when they have conducted such instruction. This violates the constitutional rights of parents.

The petition focuses on the need to resolve the circuit split over whether public school instruction can violate Free Exercise rights. Your *amici* emphasize that parental rights also are directly involved.

Parents have a fundamental right to direct and control the upbringing of their children. This Court's decisions that recognize this right (which was firmly established in the common law) include *Troxel v. Granville,* 530 U.S. 57, 65-66 (2000) (cataloging cases); *Santosky v. Kramer,* 455 U.S. 745, 753 (1982); *Parham v. J.R.,* 442 U.S. 584, 602 (1979); *Wisconsin v. Yoder,* 406 U.S. 205 (1972); and *Stanley v. Illinois,* 405 U.S. 645, 651–52 (1972). In

Parham, the Court explained the law's deference to the role of parents and some of the reasons for it:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925). See also *Wisconsin v. Yoder,* 406 U.S. 205, 213 (1972); *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944); *Meyer v. Nebraska,* 262 U.S. 390, 400 (1923). . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190.

442 U.S. at 602. The law presumes that parents know their own children best and are best positioned and motivated to protect and counsel them. *Id.*

"[I]t is not a novel proposition to say that parents have a recognized legal interest in the education and upbringing of their child." *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 529 (2007). In *Prince v. Massachusetts*, this Court ruled, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor

hinder." 321 U.S. 158, 166 (1944). Of course, such instruction includes religious instruction. *See Yoder*, 406 U.S. at 214-18. But to hinder parents when it comes to instruction about LGBTQ+ issues is exactly the purpose of the MCBE policies that Parents challenge here. This violates parental rights.

The action of the school district here is not saved from constitutional infirmity, as in some other cases, by providing parents with notice and opt-out for the offending instruction. *See, e.g.*, *Florey v. Sioux Falls Sch. Dist. 49-5*, 619 F.2d 1311, 1319 (8th Cir. 1980). That is exactly what this school district refuses to provide, with the obvious purpose to frustrate parental rights. This is not a situation in which parents are attempting to dictate curriculum for all students, and the Constitution allows them to protect their own children without having to forfeit the benefits of public schools.

II. The Petition Should Be Granted to Resolve That Constitutional Violations of This Type Are Not Excused by the Ability of Parents to Educate Their Children Outside of School or by Their Right to Remove Their Children from Public School

The Fourth Circuit excused the school district's infringement of free exercise and parental rights by noting that parents had the ability to instruct their children about alternative lifestyles outside of the school setting. *Mahamoud v. McKnight,* 102 F.4th 191, 209 (4th Cir. 2024). This is not the first court to brush off a school's constitutional violations in this way, *see, e.g., Fleishfesser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 690 (7th Cir. 1994), but it is an insidious suggestion that this Court should use this case to quash.

When the government infringes constitutional rights, it does not save it to argue that the individuals

wronged may still exercise their rights at a different time or in a different place.[2] For example, when a city prohibits use of a public park by some denominations but not others, it is no defense to say that those foreclosed can still practice their religion elsewhere. *See Fowler v. R.I.*, 345 U.S. 67 (1953). Nor could the school district escape its sanctioning of Coach Kennedy for his praying on the field because he could have said the same prayer elsewhere. *See Kennedy v. Bremerton Sch. Dist.,* 597 U.S. 507 (2023). Similarly, it does not save this school district to say that parents may exercise their free exercise and parental rights outside of school.

It is not only a complete bar that violates constitutional rights. *Any* infringement or hindrance of the rights is a violation. *See Prince,* 321 U.S. at 166. In this context, two aspects of parental rights are most relevant.

First, parents have well-recognized right to decide whether their child should attend, or continue to attend, a public school, instead of a private school or be home schooled. *See Pierce*, 268 U.S. at 534-35. Obviously, a key reason parents may wish to remove their child from public school is if they have no ability to stop their child being instructed in a way they consider inimical to their religious beliefs. This requires information about which of the many LGBTQ+-Inclusive Texts are going to be used and when.

A federal district court has put it succinctly in a recent opinion:

> While parents do not have the right to manage the operations of a school or even the courses and curriculum, they do have a right to direct their minor child's education[,] which cannot be accomplished unless they are accurately

[2] Of course, this case does not involve a time, place, or manner restriction.

> informed in response to their inquiries. Similarly, parents could not make a reasonable choice regarding the type of education—public, private, or home schooling—if they are unaware of circumstances that have a significant bearing on that decision because of the school's withholding of information or active deception, despite their inquiry.

Willey v. Sweetwater Cnty. Sch. Dist., 680 F. Supp. 3d 1250, 1277-78 (D. Wyo. 2023) (citations omitted); *accord Ricard v. USD 475 Geary Cnty., Kan., Sch. Bd.,* 2022 WL 1471372 at *8 (D. Kan., Mar. 9, 2022).

The response of the school district that parents know the risk and so they can simply take their children out of public schools fails in several respects: (1) Parents do not know how pervasive the use of the texts will be due to the "No-Notice" policy. (2) Parents do not know which text(s) a teacher will use. Not all texts will be equally problematic to the many parents involved. (3) Many parents, for financial and other reasons, cannot afford to withdraw their child from public school. *See Morse v. Frederick,* 551 U.S. 393, 424 (2007) (Alito, J., concurring). (4) Providing notice would allow parents to absent their child when an offensive text was to be used.

Second, the rights of parents to teach their children and to shield them from religiously offensive literature does not end with a right to remove their child from the school. Parents also have a constitutional right to supplement their children's education by instruction of their own, especially about subject matters like alternative lifestyles, and they have a right to do so with specificity, knowing what has been presented to their children at school in a timely manner. *See Winkelman,* 550 U.S. at 529; *Yoder,* 406 U.S. at 213-14; *Prince,* 321 U.S. at 166. If the school district can legally force the parental hand as to when the children are mature enough to consider LGBTQ+

topics by raising such instruction in whatever curriculum it wants to do so and whenever it wants to do so, it cannot also withhold from parents the specifics of that instruction without infringing their constitutional rights.

Of course, sufficient information on this score is unavailable from the children themselves. Any parent knows that most children are neither capable nor willing to provide a play-by-play of the school day to their parents. Family relations are also affected by parents having to probe their children repeatedly about subjects. Plus, the probing is difficult on subjects that the parents do not wish to expose their children.

It is as simple as this: to be able to exercise their rights and responsibilities intelligently, parents need to know what is going on at school. "[I]t is illegitimate to conceal information from parents for the purpose of frustrating their ability to exercise a fundamental right." *Ricard,* 2022 WL 1471372 at *8. MCPS's hiding the ball by directing teachers not to disclose when they use the LGBTQ-Inclusive Texts is an unconstitutional infringement of their parental and associated free exercise rights.

CONCLUSION

This Court should grant the petition.

Respectfully submitted this
16th day of October 2024,

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