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 *AMICUS CURIAE* PEN AMERICAN CENTER, INC. IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS CURIAE*[1]

PEN American Center, Inc. ("PEN America") is a nonpartisan, nonprofit organization working at the intersection of literature and human rights. Founded in 1922, PEN America advocates for free expression and the interests of writers and readers in the United States and abroad. Through advocacy on issues ranging from campus free speech to book bans affecting public schools, and from disinformation and online abuse to educational censorship, it works to protect not only the freedom to create literature, but also the freedom to convey information and ideas and to access the views, ideas, and literature of others. Its membership includes more than 5,000 writers and literary professionals nationwide.

SUMMARY OF ARGUMENT

Buried more than fifty pages into their Opening Brief, Petitioners reveal the aim of their campaign—to have LGBTQ-inclusive books "be left on shelves, rather than . . . read and discuss[ed]." Pet'rs Br. 51-52. But, of course, books are not decorative objects; they are meant to be read and discussed. As the Supreme Court has recognized for over 50 years, free speech is essential—including in the educational context—to ensure that future participants in a democracy are exposed to a diversity of viewpoints. Efforts like Petitioners' to censor books are antithetical to those First Amendment values.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. *Amicus* provided timely notice of this brief to the parties.

Two important principles—sometimes in tension with one another—here operate in tandem and independently support Respondents' position: (1) the discretion of local school boards to manage curricular affairs within constitutional bounds, and (2) the First Amendment rights of teachers to discuss a range of ideas in the classroom and of students to be presented with a broad array of stories and viewpoints. Authors and publishers also have a First Amendment interest in their books not being excluded from schools on the basis of the ideas expressed therein. These interests, taken together, weigh heavily in Respondents' favor and underscore the serious constitutional concerns that Petitioners' requested injunction presents.

Thus, while the Fourth Circuit properly concluded that the Montgomery County school board's decision to incorporate LBGTQ-inclusive books into the curriculum without an opt-out for parents was not, on the limited record, coercive, and did not violate the parents' First Amendment right to free exercise of religion, it is likewise true that this case implicates the Free Speech clause of the First Amendment. This amicus brief will focus on those freedom of speech concerns. The First Amendment includes provisions regarding freedom of religion and freedom of speech, and both must be applied before any court injunction may issue.

More specifically, the Free Speech clause prohibits laws, policies, and judicial orders that require adherence to orthodoxy and that discriminate against "offensive" speech on the basis of viewpoint, such as injunctions that distinguish between LGBTQ-inclusive books and those that depict only straight or cisgender people. Thus, any court-imposed injunction

against Montgomery County not only would need to be justified by the Free Exercise clause, but would need to comply with the Free Speech clause of the First Amendment—and here would clash with it. Viewpoint discrimination is presumptively unconstitutional. As one court succinctly stated in the context of a similar religion-based challenge to a book taught in a school, "[b]y couching a personal grievance in First Amendment language, one may not stifle freedom of expression." *Todd v. Rochester Community Schools*, 41 Mich. App. 320, 329 (1972). In short, even if this Court reaches a different conclusion than the Fourth Circuit on whether this case presents any level of coercion of Petitioners' religious beliefs, its ruling and related injunctive relief must also be squared with the Free Speech clause of the First Amendment and its condemnation of viewpoint discrimination.

Section I of this amicus brief explains that Petitioners' efforts should be understood in the context of growing efforts to limit exposure to books because of disagreement with their ideas. Section II discusses the real-world impact of an opt-out option. Section III establishes that teachers, students, and authors have First Amendment rights relating to the challenged books. Section IV discusses local school districts' discretion to make curricular decisions, within constitutional boundaries. Finally, Section V argues that a court order imposing Petitioners' requested opt-out regime would violate the First Amendment's Free Speech guarantee and constitute impermissible viewpoint discrimination.

ARGUMENT

I. Granting Petitioners' Request Would Embolden the Troubling and Pernicious Movement to Ban Books

Petitioners frame their position in terms of "parental choice" and religious freedom. Pet'rs App'x at 2a. But the Court should also view this lawsuit in the context of a broader and concerted movement by certain groups of parents to override the decisions of educators and ban books from schools and libraries because of disagreement with their ideas, restricting the rights of all students to receive information and access literature.

School book bans are properly viewed as "any action taken against a book based on its content and as a result of parent or community challenges, administrative decisions, or in response to direct or threatened action by lawmakers or other governmental officials, that leads to a previously accessible book being either completely removed from availability to students, or where access to a book is restricted or diminished."[2] This "Court has recognized that the distinction between laws burdening and laws banning speech is but a matter of degree and that the Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Sorrell v. IMS Health*, 564 U.S. 552, 565-66 (2011) (internal citation omitted).

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[2] Jonathan Friedman, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN America (Sept. 19, 2022), https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/.

Polls show that the overwhelming majority of Americans oppose book bans.[3] Nevertheless, since 2021, there have been nearly 16,000 book bans in public schools nationwide.[4] In the 2023-2024 school year alone, the number of book bans exceeded 10,000—a marked increase just since PEN America began tracking them in 2021.[5] Those book bans targeted 4,231 titles by 2,662 authors, 195 illustrators, and 31 translators.[6] Two-thirds of all banned books are intended for young adult or younger audiences.[7]

Book banning efforts also are gaining momentum with state legislatures. From 2020 to 2023, "at least 68 bills" were introduced that would "facilitate censorship in schools" by "chang[ing] or expand[ing] definitions of 'obscene,' 'harmful to minors,' and 'sexually explicit' in educational contexts."[8] According

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[3] Every Library Institute, *Review of Recent Book Bans and Voter Surveys* (Jan. 27, 2023), https://www.everylibraryinstitute.org/review_recent_book_ban_polls; Fred Backus & Anthony Salvanto, *Big majorities reject book bans*, CBS NEWS (Feb. 22, 2022), https://www.cbsnews.com/news/book-bans-opinion-poll-2022-02-22/.

[4] PEN America, *Banned Book List 2025* (Feb. 4, 2025), https://pen.org/banned-books-list-2025/.

[5] *Id.*; Madison Markham & Tasslyn Magnusson, *Cover to Cover: An Analysis of Titles Banned in the 23-24 School Year* (Feb. 27, 2025), https://pen.org/report/cover-to-cover/.

[6] Markham & Magnusson, *supra* note 5; Madison Markham et al., *Banned in the USA: Beyond the Shelves*, PEN America (Nov. 1, 2024) ("*Banned in the* USA—November 2024"), https://pen.org/report/beyond-the-shelves/.

[7] Markham & Magnusson, *supra* note 5.

[8] Sam LaFrance et al., *Educational Intimidation,* PEN America (Aug. 23, 2023), https://pen.org/report/educational-intimidation/.

to PEN America's research, by the end of December 2024, at least 15 states enacted these or similar restrictions. In Louisiana, for example, then-Attorney General Jeff Landry established a tip line to report educators and librarians under the guise of protecting children from "taxpayer-subsidized sexualization."[9] Two of the newly enacted laws, in Florida and in Iowa, led to more than 8,000 banned books during the 2023-2024 school year.[10]

Books with LGBTQ characters and themes are often the targets of censorship efforts. In the 2022-2023 school year, they made up 30% of all book bans.[11] "[B]ook challengers often cite long-standing stereotypes that stigmatize and dehumanize LGBTQ people as inherently sexual or 'inappropriate.'"[12]

Petitioners argue that making LGBTQ-inclusive books available in the classroom implicates their free exercise of religion. But the limited record in this case, in addition to lacking proof of coercion, indicates that

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[9] LaFrance et al., *supra* note 8; Ashley White, *Louisiana attorney general creates 'protecting minors' tip line to report library books*, DAILY ADVERTISER (Dec. 1, 2022), https://www.theadvertiser.com/story/news/2022/12/01/louisiana-attorney-general-tip-line-report-library-banned-books/69690230007/.

[10] Markham et al., *Banned in the USA*—November 2024, *supra* note 6.

[11] Kasey Meehan, et. al., *Banned in the USA: The Mounting Pressure to Censor*, PEN America (Sept. 1, 2023), https://pen.org/report/book-bans-pressure-to-censor/.

[12] Sabrina Baêta & Sam LaFrance, *Banned in the USA: Narrating the Crisis*, PEN America (Apr. 16, 2024), https://pen.org/report/narrating-the-crisis/. As for the books referenced in the Fourth Circuit's decision, Petitioners' characterizations of *Pride Puppy* were highly misleading and focused largely on an appendix.

religion was not the only concern of parents requesting opt-outs. One Montgomery County official attested that "[m]any of the opt out requests were not religious in nature"; some parents opposed "what they believed was an effort to teach students about sex [or] LGBTQ issues, or to use instructional materials that were not age-appropriate." Pet'rs App'x at 606a.

The same motivations that earlier propelled the movement to remove books with LGBTQ-inclusive themes appear to be at work in the push for opt-outs in Montgomery County. Claims of religious liberty and parental rights are being used to impose the religious views of some on the entire community, unconstitutionally restricting disfavored viewpoints and intruding upon students' First Amendment rights to receive information.[13]

II. A Court-Ordered Opt-Out Regime Would Significantly Impact Students, Teachers, and Authors

Petitioners seek a court-mandated right to "opt out" before teachers read LGBTQ-inclusive books aloud in class or even permit students to read books of their choosing to themselves. Requiring opt-outs would have a significant impact on students, teachers, and authors, including students from LGBTQ families, students who identify as LGBTQ or

[13] The Fourth Circuit's decision, which addressed a preliminary injunction motion, makes clear that the record is undeveloped. Respectfully, this Court may wish to address the complex First Amendment issues raised by this case in a matter with a more developed record and a final decision on the merits.

have questions about their sexuality or gender identity, and the student body at large.

Let us start with students from LGBTQ families. This Court has ruled that recognition of same-sex marriage is constitutionally required in this country, and "hundreds of thousands of children are presently being raised by such couples." *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015). As this Court stated, "sexual orientation is both a normal expression of human sexuality and immutable." *Id.* at 661. *Obergefell* underscored that, "[b]y giving recognition and legal structure to their parent's relationship, [same sex] marriage allows children 'to understand the integrity and closeness of their family and its concord with other families in their community and in their daily lives.'" *Id.* at 668. This Court has pointedly concerned itself with preventing the "suffer[ing]" that arises when the children of same-sex parents have to bear "the stigma of knowing their families are somehow lesser." *Id.* at 646.

The opt-out regime at issue has the effect of "stigmatizing and isolating students whose circumstances are reflected in the Storybooks," Pet'rs App'x at 16a, causing precisely the suffering *Obergefell* sought to prevent. Imagine the feelings of a six- or eight-year old with two moms or two dads after many of her classmates leave the classroom when the teacher reads the only alphabet book or storybook featuring families like hers. Any intended message that her family has the same "integrity and closeness" as other families will vanish; if anything, she will receive only the opposite message. *Obergefell*, 576 U.S. at 668. Indeed, a teacher watching the crestfallen faces of the children from LGBTQ families

may decide that it is best not to read these books at all, effectively resulting in a ban. On the other hand, making LGBTQ-inclusive books available to all students—without the opt-out regime's implications that such stories are somehow problematic or immoral—reduces stigma.

LGBTQ-inclusive books are also critical for students who identify as LGBTQ or who have questions about their sexuality or gender identity. "Students who are isolated, afraid of telling their families, or socially conditioned to believe their identity is transgressive can harbor feelings of shame and self-loathing."[14] For these young people, LGBTQ-inclusive books can be a lifeline, helping them to feel less alone and to make sense of their place in the world. A school-condoned program of giving disparate treatment to books about LGBTQ characters, on the other hand, sends a strong negative message to LGBTQ students that their identities are unwelcome or immoral.[15] In this sense, book bans "chill[] not only [students'] freedom to read and learn in schools, but even their personal self-expression."[16] In the words of pediatrician and children's book author Dr. Sayantani DasGupta, "[b]eing deprived of stories about people

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[14] LaFrance et al., *supra* note 8.

[15] *See generally* Rudine Sims Bishop, *Mirrors, Windows, and Sliding Glass Doors,* 6 PERSPECTIVES: CHOOSING AND USING BOOKS FOR THE CLASSROOM 3 (Summer 1990) (explaining how children "learn a powerful lesson about how they are devalued in the society of which they are a part" when they "cannot find themselves reflected in the books they read").

[16] LaFrance et al., *supra* note 8.

like those in your own community is not simply unfair or unjust, it is also deeply unhealthy."[17]

This harm falls upon an already vulnerable population. LGBTQ youth are more than four times as likely to attempt suicide than their peers.[18] In Maryland, 40% of LGBTQ young people seriously considered suicide in 2023. Ten percent of LGBTQ youth attempted suicide.[19] LGBTQ students thus have a powerful interest in accessing books that speak to them.

More broadly, every student benefits from an inclusive learning environment. Books are an "accessible and vital means of exposing students to different viewpoints and facets that make up the world around them."[20] They foster curiosity, build

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[17] Sayantani DasGupta, *Banning Books Isn't Just Morally Wrong. It's Also Unhealthy*, TIME (Oct. 19, 2024), https://time.com/7094430/book-banning-health-consequences/.

[18] Michelle M. Johns et al, *Transgender identity and experiences of violence victimization, substance use, suicide risk, and sexual risk behaviors among high school student–19 states and large urban school districts, 2017*, 68 MORBIDITY & MORTALITY WKLY. REP. 3, 67-71 (2019), https://www.cdc.gov/mmwr/volumes/68/wr/mm6803a3.htm; Michelle M. Johns et al., *Trends in violence victimization and suicide risk by sexual identity among high school students — Youth Risk Behavior Survey*, *United States, 2015–2019*, 69 MORBIDITY & MORTALITY WKLY. REP. 1, 19-27 (2020), https://www.cdc.gov/mmwr/volumes/69/su/su6901a3.htm.

[19] Ronita Nath et al., *2024 U.S. National Survey on the Mental Health of LGBTQ+ Young People by State*, The Trevor Project (2025), http://www.thetrevorproject.org/survey-2024-by-state/.

[20] Sabrina Baêta, *Spineless Shelves: Two Years of Book Banning,* PEN America (December 14, 2023), https://pen.org/report/spineless-shelves/.

empathy, and create more informed citizens. But "when books are vilified to the point where the knowledge they provide is confused with 'indoctrination,' the core principles of public education and the freedom to read, learn, and think are in jeopardy."[21]

Petitioners' requested exemptions from the approved school curriculum also have a profound impact on schools, including both administrators and teachers. At the most basic level, an opt-out regime like the one at issue interferes with a school district's considered decisions, consistent with the Constitution, about what to teach and what the community values. Further, as a practical matter, opt-out regimes are problematic and often unworkable. Are teachers suddenly unable to talk about LGBTQ people at all? If a child writes a short story about going to the zoo with his two moms, can he not share his story to the class without allowing the other students to opt out first?

Montgomery County tried, in good faith, to implement a notice-and-opt-out option. Not surprisingly, however, the opt-outs led to difficulties. The school board had "concern about stigmatizing and isolating individuals whose circumstances were reflected in the Storybooks." Pet'rs App'x at 16a. The process was disruptive. *Id.* at 607a. And opt-outs are administratively onerous for teachers and administrators, who are forced to keep track of opt-outs and create alternative lesson plans—or at a

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[21] *Id.*

minimum arrange for adult supervision of the opt-out students. *Id.* at 607a-608a.

Notice requirements also can invite distracting political involvement in day-to-day instructional matters. In Tennessee, a librarian complied with state law by notifying parents that she planned to read two picture books as part of her Mother's Day lesson: one about a girl with two dads who experiences "anxiety about not fitting in with other kids with traditional birth mothers,"[22] and another about a male bear who "faces up to the complications of acting as a mother to goslings."[23] After she alerted parents to her planned lesson, members of Moms for Liberty—a political organization that advocates against school curricula mentioning, among other topics, LGBTQ rights—"rallied members to oppose the lesson. The librarian faced a torrent of abuse, and her superintendent canceled the lesson."[24]

Moreover, permitting these kinds of opt-outs puts schools in the unenviable position of determining which opt-out requests are bona fide religious objections and which are not. And parental notification provisions invite censorship because they "[i]nherently . . . involve[] selecting certain topics for special scrutiny."[25] Schools are forced to make viewpoint-based determinations about what books

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[22] Greg Sargent, *A Tennessee teacher planned a Mother's Day class. Then came the MAGA rage*, WASH. POST (May 9, 2023), https://www.washingtonpost.com/opinions/2023/05/09/moms-for-liberty-book-bans-maga-culture-war/.

[23] *Id.*

[24] *Id.*; LaFrance et al., *supra* note 8.

[25] LaFrance et al., *supra* note 8.

are seen as dangerous and subject to opt-out regimes and which are not.

Given the difficulty of assessing what books may be religiously offensive to whom, the effect of restricting certain books is often to "compel teachers, librarians, and school administrators to preemptively pull [all] books that have any chance of landing them in hot water."[26] Put differently, if Petitioners prevail, Montgomery County teachers are likely to steer clear of any lessons that include LGBTQ individuals and content rather than risk violating a court order. "Soft censorship" arises "when fears of real censorship may cause educators and librarians, school administrators, and school boards to self-censor or suppress speech well beyond what may have been banned or prohibited."[27] In Florida and Missouri, for example, vague censorship laws relating to school libraries have already resulted in educators "proactively remov[ing] books from shelves, in the absence of any specific challenges."[28] "[B]ooks pulled in Missouri"—where the law "mak[es] it a Class A misdemeanor for librarians or teachers to provide 'explicit sexual material' to a student"—include "classics like Shakespeare and Mark Twain, The Children's Bible, a graphic novel of The Gettysburg Address, comic books," and books "about the Holocaust," as well as books about "the LGBT

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[26] *Id.*

[27] Markham et al., *Banned in the USA*—November 2024, *supra* note 6.

[28] Tasslyn Magnusson & Kasey Meehan, *Banned in the USA: State Laws Supercharge Book Suppression in Schools*, PEN America (Apr. 20, 2023), https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/.

community."[29] Laws requiring parental notification and otherwise constraining how certain topics are addressed in schools have a significant chilling effect on teachers and amount to soft censorship.

Finally, if Petitioners are allowed to exempt their children from exposure to LGBTQ issues, other parents could object to books addressing any number of other issues, including gender equality, interracial marriage, consumption of alcohol, or divorce, that may also be at odds with particular faiths. Indeed, there is no theoretical difference between Petitioners' claims of religious coercion here, and hypothetical demands from, say, Orthodox Jewish parents that a school provide an opt-out option for any books depicting a cheeseburger (which is not kosher), or from observant Muslim parents for any books depicting women without a hijab or burka. These "slippery slope" concerns are far from fanciful: for example, the parents in *Mozert v. Hawkins County Board of Education* opposed on free-exercise grounds their children's exposure to such concepts as "magic," "pacifism," and "women who have been recognized for achievements outside their homes." 827 F.2d 1058, 1062 (6th Cir. 1987). And these concerns are aggravated by the fact that religion may in some cases be a post hoc rationalization given that, as noted,

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[29] *Id.*; Alisa Nelson, *Pen America Says Missouri Law Canceling Some School Library Books Is 'Slippery Slope,'* MissouriNet (Nov. 30, 2022), https://www.missourinet.com/2022/11/30/pen-america-says-missouri-law-canceling-school-library-books-is-slippery-slope/.

"[m]any of the opt out requests were not religious in nature." Pet'rs App'x at 606a.

In short, the accommodations that Petitioners seek could create a dangerous precedent, "risk[ing] the possibility that the most sensitive and ideologically extreme parent could use these notifications . . . to challenge all kinds of routine lessons and effectively narrow the educational experience of every student."[30] These accommodations could leave many teachers and districts with little choice but to cater to that one parent's beliefs, or "simply to what they imagine could be the most extreme possible biases, on any end of the political spectrum—even when doing so would erode every student's freedom to learn."[31]

At the same time, authors of children's and young adult books will be chilled in their efforts to write about LGBTQ issues and other potentially sensitive topics. Books deemed unfit for the classroom may experience losses in sales.[32] Authors of LGBTQ-inclusive books currently report a decline in invitations to visit schools and "abrupt cancellations" of scheduled visits.[33] Even authors whose books do not

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[30] LaFrance et al., *supra* note 8.

[31] *Id.*

[32] Jenny Gold, *As children's book bans soar, sales are down and librarians are afraid. Even in California*, L.A. TIMES (Dec. 12, 2024), https://www.latimes.com/california/story/2024-12-12/book-bans-succeed-schools-libraries-buy-fewer-books-on-lgbtq-race.

[33] Andrew Bauld, *Disinvited: Amid Censorship, Schools Abruptly Cancel Author Visits*, SCHOOL LIBRARY J. (Aug. 30, 2024), https://www.slj.com/story/disivited-amid-censorship-schools-libraries-abruptly-cancel-author-visits.

directly address LGBTQ issues have suffered from the climate of book banning. For example, the author of a book about bullying noted a sharp decrease last year in school visit invitations because of her identity as a member of the LGBTQ community.[34] Authors also report the "psychological impacts of [] book bans on their creativity and concern about potential blowback to future works because of this response to their previous ones."[35]

These consequences of Petitioners' requested relief—the restriction on students' access to certain viewpoints and ideas as well as the chilling effect on authors—are consequences the First Amendment was designed to avoid.

III. Teachers and Students Have First Amendment Rights to Read and Discuss the Challenged Books, and Authors and Publishers Have First Amendment Rights to Reach Audiences

A court-mandated opt-out regime for LGBTQ-inclusive books directly implicates the Free Speech clause of the First Amendment. Teachers and students alike enjoy First Amendment freedoms to read, speak, listen, and discuss. As the Court recognized in *Tinker v. Des Moines Independent Community School District*:

> It can hardly be argued that either students or teachers shed their constitutional rights to

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[34] *Id.*

[35] Markham et al., *Banned in the USA*—November 2024, *supra* note 6.

> freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.

393 U.S. 503, 506 (1969); *see also Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527-28 (2022) ("[T]he First Amendment's protections extend to 'teachers and students,' neither of whom 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'") (quoting *Tinker*, 393 U.S. at 506). Further, authors and publishers have a First Amendment interest in telling their stories.

Free speech rights are particularly important in the educational context because schools play an essential role in preparing young people to be informed and engaged participants in the democratic enterprise, and in increasingly diverse settings. *See, e.g.*, *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979) (schools "inculcat[e] fundamental values necessary to the maintenance of a democratic political system"); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("[E]ducation . . . is the very foundation of good citizenship."); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (schools "educat[e] the young for citizenship").

A. Teachers

It is the job of teachers, including elementary school teachers, to present students with unfamiliar ideas and invite them to debate and grapple with those ideas. As Justice Frankfurter put it:

> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is . . . not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion.

Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

Echoing that sentiment, the Court in *Keyishian v. Board of Regents* observed:

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, rather than through any kind of authoritative selection."

385 U.S. 589, 603 (1967) (internal alterations and citations omitted).

Teachers—who "must be exemplars of open-mindedness and free inquiry"—"cannot carry out their noble task" of developing responsible citizens "if the conditions for the practice of a responsible and critical mind are denied to them." *Wieman*, 344 U.S. at 196 (Frankfurter, J., concurring). Consistent with that principle, the Supreme Court has on at least two occasions recognized the freedom of teachers to teach.

First, in *Meyer v. Nebraska*, the Court overturned a conviction for teaching German in violation of a Nebraska statute prohibiting the teaching of any language other than English, holding that the statute "interfere[d] with the calling of modern language teachers" and that the teacher's "right thus to teach" was protected under the Constitution. 262 U.S. 390, 400-01 (1923);[36] *see also Bartels v. Iowa*, 262 U.S. 404 (1923) (overturning convictions of teachers on the same grounds). Next, in *Epperson v. Arkansas*, the Court held unconstitutional a law prohibiting teachers from teaching Darwinian evolution. 393 U.S. 97, 109 (1968). The majority emphasized that the law—whose sole justification was "the religious views of some of its citizens"—could "[]not be defended as an act of religious neutrality" and therefore ran afoul of the Establishment Clause, while Justice Stewart, concurring in the result, suggested that the state could not constitutionally "punish a teacher for letting his students know that other languages are also spoken in the world" or for "mention[ing] the very existence of an entire system of respected human thought." *Id.* at 107, 109; *id.* at 116 (Harlan, J., concurring). As these cases suggest, teachers have constitutionally-protected interests in employing inclusive teaching methods and invoking topics of public concern in the classroom.

To be sure, teachers do not enjoy unlimited free speech rights in the school setting. For example, in several cases, this Court has needed to balance the

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[36] *Meyer* was decided before the Court applied the First Amendment to the states and was therefore decided on substantive due process grounds as an "arbitrary" restriction on the teacher's freedom. 262 U.S. at 403.

First Amendment rights of public employees like teachers against "the government's countervailing interest in controlling the operation of its workplaces," or, in the educational context, the school district's interest in controlling curriculum. *Lane v. Franks*, 573 U.S. 228, 236 (2014). *Compare Kennedy*, 597 U.S. at 531, 542-44; *Lane*, 573 U.S. at 242 and *Pickering v. Bd. of Educ. Of Township High Sch. Dist. 205, Will Cnty.*, 391 U.S. 563, 568 (1968) *with Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006) (holding that a memorandum prepared by a prosecutor in the course of his ordinary job responsibilities was not protected speech). But none of those concerns are present here, where the school district's interests and teachers' interests are aligned in wanting students to be exposed to books with LGBTQ stories and characters in inclusive and age-appropriate ways, and the mere reading of books to, or by, children does not constitute any coercion to act contrary to Petitioners' religious beliefs. *See infra* Section IV.

B. Students

Students, too, have First Amendment interests at stake—interests that "may be directly and sharply implicated" by proscriptions on reading certain books. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866 (1982). As indicated above, children with LGBTQ parents, for example, have a strong interest in reading or hearing read aloud books about families that resemble theirs, while children who may be thinking about their own gender or sexuality are likely to feel less alone when presented with characters in storybooks confronting those same questions. *See supra* Section II. Given the unworkability and stigmatizing effect of the notice

and opt-out regime, the practical effect of the injunction Petitioners seek would be to deprive all children of being able to read the challenged books, during "literature circles," "book clubs," "paired reading groups," "read aloud," or even independent reading in the classroom. Pet'rs App'x at 604a-605a. Notably, Petitioners do not want students even to be able to "find" the challenged LBGTQ-inclusive books "on their own" "on a shelf" or to "recommend [the] book[s] to a student who would enjoy [them]." Pet'rs App'x at 604a. Granting Petitioners' requested injunction would thus restrict students' exposure to ideas about inclusivity, sexuality, and gender identity in violation of their First Amendment rights.

In *Pico*, as here, a group of parents sought to ban certain books they deemed inappropriate and "anti-Christian" from schools. 457 U.S. at 857. Unlike the Montgomery County Board of Education, the Island Trees Board of Education caved to the parents and at least provisionally removed them from the school library. *Id.* After a group of students filed suit, a plurality of this Court held that the First Amendment prohibits the removal of books from school shelves based on disagreement with the ideas therein. *Id.* at 872.[37] If, in *Pico*, the Court understood that students'

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[37] Even the dissenting Justices emphasized that "[w]e can all agree that as a matter of *educational policy* students should have wide access to information and ideas," even if there was dispute as to whether school boards ought to be left "to determine the substance of that policy," *Pico*, 457 U.S. at 891 (Burger, C.J., dissenting), and that choices about books in schools may not be made "in a narrowly partisan or political manner," recognizing that "[o]ur Constitution does not permit the official suppression if *ideas*," *id.* at 907 (Rehnquist, J., dissenting).

First Amendment interests might outweigh the school board's "discretion" to remove certain books, *id.* at 863, here—where the school board *supports* students' right to read the challenged books, *see infra* Section IV—the students' First Amendment interests should be afforded even greater deference.

Students' First Amendment interests also are no less important if they are being read to, rather than reading themselves. This Court has repeatedly recognized that the First Amendment protects not only the right of the speaker but also the right of the listener, especially when the speech restriction is motivated by disapproval of the ideas reflected. *See, e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (recognizing the First Amendment's "role in affording the public access to discussion, debate, and the dissemination of information and ideas"); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976) ("freedom of speech 'necessarily protects the right to receive'") (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972)); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010) (holding that the First Amendment protects "[t]he right of citizens" not only "to speak" but also "to inquire" and "to hear"); *Pico*, 457 U.S. at 866-67.

That the would-be readers are minors does not deprive them of their First Amendment rights. "[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them."

Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 790 (2011) (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-13 (1975)). The Supreme Court has routinely recognized that the First Amendment applies not only in universities but also in school settings. *See, e.g.*, *Barnette*, 319 U.S. at 642; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (holding that a school violated the First Amendment when it prohibited a private Christian organization for children aged six to twelve from holding meetings at the school). "The Barnett[e] sisters were in elementary school and are described in the opinion as 'little children,'" while "in *Tinker*, two of the defying students were eight-year-old Paul Tinker, and his sister, eleven-year-old Hope Tinker." *Morgan v. Swanson*, 659 F.3d 359, 404 (5th Cir. 2011) (quoting *Barnette*, 319 U.S. at 644 (Black, J., concurring) and *Tinker*, 393 U.S. at 516 (Black, J., dissenting)). The fact that schools "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of government as mere platitudes." *Barnette*, 319 U.S. at 637.

Of course, similar to teachers, students do not have unbounded freedom to read or learn whatever they want at school. Nevertheless, they have First Amendment interests in listening to "information from diverse sources" and "determin[ing] for [themselves] what speech and speakers are worthy of consideration." *Citizens United*, 558 U.S. at 341. "[A]ccess to ideas . . . prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult

members." *Pico*, 457 U.S. at 868. And, again, the forces typically serving as limits on students' First Amendment interests in the classroom—the authority of schools and school boards, and teachers' own expressive freedom—here also support students' access to LGBTQ-inclusive literature. Just as teachers have First Amendment interests in reading and discussing books that touch on social and political concerns, so too students have First Amendment interests in engaging—in age-appropriate ways—with a broad range of perspectives and ideas, including stories acknowledging LGBTQ people and families.

C. Authors and Publishers

Authors and publishers' rights are likewise implicated here, as they have First Amendment interests in telling the stories of their own choosing and reaching a broad audience. It is axiomatic that, under the First Amendment, "a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995). "A requirement that literature . . . conform to some norm prescribed by an official smacks of an ideology foreign to our system." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158 (1946).

Authors and publishers have "a First Amendment interest" in distributing books "without being coerced to speak the State's preferred message." *Book People, Inc. v. Wong*, 91 F.4th 318, 329 (5th Cir. 2024); *see also Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989) ("[T]here is no question that publishers who wish to communicate with [certain audiences] have a legitimate First Amendment interest in access to

[those readers]."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116-17 (1991) (authors and publishers have First Amendment interests in not having "disincentives to speak" imposed "only on speech of a particular content"); *Penguin Random House LLC v. Robbins*, Case No. 4:23-cv-00478, ECF No. 113, at 11, 15 (S.D. Iowa Mar. 25, 2025) (authors have First Amendment interests in "reach[ing] their intended audiences" and not being "'stigmatized' by the removal of their books from public school libraries"); *PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd.*, 711 F. Supp. 3d 1325, 1330 (N.D. Fla. 2024) (holding that authors and publisher could challenge book ban where "removal and/or restricted access to the specific books they wrote or published deprives them of the target audience for their books and a previously available forum for the speech embodied in those books").

In view of the onerousness of implementing a notice and opt-out regime before every story time in the classroom, the practical effect of Petitioners' request will likely be for LGBTQ-inclusive books to be excluded from the classroom. Children's book authors who continue to write LGBTQ-inclusive literature may be stigmatized for writing books deemed unfit for the classroom. Meanwhile, those who want to reach public school students will be forced to change their message—a chilling effect only compounded by the vagueness of Petitioners' objection to any book that implicates "family life" or "human sexuality." Pet'rs App'x at 205a-206a. *See infra* Section V. The likely outcome of Petitioners' requested injunction—authors and publishers feeling compelled to adopt a single preferred or permitted viewpoint under penalty

of being excluded from school classrooms—is directly contrary to First Amendment values and amounts to unconstitutional "suppression of ideas." *Pico*, 457 U.S. at 871-72.

IV. The Montgomery County School District's Interests Also Support Preserving Access to Books

When students or teachers' First Amendment rights in the classroom have been limited in other cases, it is because of the countervailing interest of schools in setting curriculum and otherwise regulating instruction and public employment. *See supra* Section III(A). Here, critically, the Montgomery County Board of Education is *defending* the First Amendment interests of teachers, students, and authors in including books in their classrooms that feature or discuss a range of depictions of gender or sexuality and opposing the suppression of disfavored ideas. At least when a school board's curricular decisions are not politically motivated or discriminatory, well-established precedent indicates that those decisions be accorded substantial deference.

"[P]ublic education in our Nation is committed to the control of state and local authorities." *Epperson*, 393 U.S. at 104. For decades, local school districts—which have both the necessary expertise and democratic legitimacy—have had substantial freedom to make curricular choices within constitutional boundaries. *See, e.g.*, *Pico*, 457 U.S. at 863 ("The Court has long recognized that local school boards have broad discretion in the management of school affairs.") (citations omitted); *see also, e.g.*, *Epperson*,

393 U.S. at 104 (cautioning that federal courts should not ordinarily "intervene in the resolution of conflicts which arise in the daily operation of school systems"); *Tinker*, 393 U.S. at 507 (emphasizing "the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools"); *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 341 (6th Cir. 2010) ("The curricular choices of the schools should be presumptively their own—the fact that such choices arouse deep feelings argues strongly for democratic means of reaching them.") (quoting *Boring v. Buncombe Cnty. Bd. of Educ.*, 236 F.3d 364, 371-72 (4th Cir. 1998) (en banc) (Wilkinson, C.J., concurring)).

Democratically elected school boards like the Montgomery County Board of Education enjoy substantial "discretion in matters of *curriculum*" in no small part because of their role in advancing community values, including here, the realities of a pluralistic world. *Pico*, 457 U.S. at 869. While Petitioners decry the fact that "children may 'come away from'" exposure to LGBTQ-inclusive storybooks "with a new perspective," Pet'rs Br. at 2, introducing students to different viewpoints in a pluralistic society is a feature not a bug of the system: "Because of the essential socializing function of schools, local education officials may attempt 'to promote civic virtues,' *Ambach v. Norwick*, 441 U.S., at 80, and to 'awake[n] the child to cultural values.' *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)." *Pico*, 457 U.S. at 876 (Blackmun, J., concurring). Exposure to a diverse range of perspectives is critical to educating future participants in our increasingly

diverse and pluralistic democracy. No one is suggesting that schools could or should force particular beliefs on young people. But they ought to equip them to engage civilly with beliefs different from, and sometimes at odds with, their own. Petitioners' requested opt-out regime undermines that goal by suppressing access to certain ideas.

Decisions of school boards about what books to approve or disapprove in the classroom are entitled to deference when, as here, they are made for politically neutral reasons related to legitimate pedagogical aims. *See, e.g.*, *Pico*, 457 U.S. at 880 (Blackmun, J., concurring) ("School officials must be able to choose one book over another, without outside interference, when the first book is deemed more relevant to the curriculum, or better written, or when one of a host of other politically neutral reasons is present."). The Montgomery County Board of Education explained that it "strives to 'provide a culturally responsive Prekindergarten to Grade 12 curriculum that promotes equity, respect, and civility among our diverse community." Pet'rs App'x at 598a-599a. It selected the LGBTQ-Inclusive books at issue after a committee comprised of four reading specialists and two instructional specialists evaluated them and found that they "contained narratives and illustrations that would be accessible and engaging to students." *Id.* at 604a. And the school board determined that the notice-and-opt-out policy was unworkable because it was logistically difficult for teachers and administrators to track and implement opt-out requests, and exposed students who saw value in the LGBTQ-inclusive books to social stigma. *Id.* at 607a-608a. While Petitioners would have this Court

mandate a policy of discriminating against certain books on the basis of viewpoint, the school district's considered decision to include certain books rather than others (including over other LGBTQ-inclusive books) for legitimate pedagogical reasons is entitled to substantial deference.

V. Petitioners' Requested Injunction Would Violate the First Amendment's Free Speech Guarantee

In the name of avoiding offense to their personal religious beliefs, Petitioners ask the judiciary to enter an order that distinguishes on the basis of viewpoint. A court order treating books with heteronormative assumptions differently than LBGTQ-inclusive books based on their message is patent viewpoint discrimination (or, at a minimum, content discrimination).

Viewpoint discrimination has long been recognized as anathema under the Free Speech clause. It is the most "egregious form of content discrimination" and generally "doom[s]" a regulation. *Iancu v. Brunetti*, 588 U.S. 388, 392-93 (2019). "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394 (1993) (citation omitted). As this Court recently reiterated, it is a "'bedrock First Amendment principle' that the government cannot discriminate against 'ideas that offend.'" *Iancu*, 588 U.S. at 393 (2019) (quoting *Matal v. Tam*, 582 U.S. 218, 223 (2017)); *see also Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) ("[A]bove all else,

the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.")

Even content-based discrimination that does not rise to the level of viewpoint discrimination is heavily disfavored under this Court's jurisprudence. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. City of Gilbert*, 576 U.S. 155, 163 (2015).

Petitioners ignore entirely the serious free speech harms of their requested injunction, seeking to override the "core postulate of free speech law" that "[t]he government may not discriminate against speech based on the ideas or opinions it conveys." *Iancu*, 588 U.S. at 393. They would have this Court treat LGBTQ-inclusive books as dangerous, rather than follow the school board's view that they should be read and discussed. Pet'rs Br. at 10-11. And they would do so despite this Court's holding that the Constitution requires legal recognition of gay marriage and that children of gay families should not be made to feel their families are lesser.

Petitioners of course are free to raise their children in the religion of their choosing and to reiterate their values at home and elsewhere. But the free exercise clause does not give them the right to prevent their children from being exposed to certain ideas about inclusivity in public school—much less to effectively prevent *other* children from exposure to those ideas.

This Court repeatedly has "unequivocally condemned" "officially prescribed orthodoxy." *Pico*, 457 U.S. at 871-72 (citing *Barnette*, 319 U.S. at 642). That is perhaps nowhere more true than in the classroom, which is "peculiarly the 'marketplace of ideas'": the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603. The Petitioners' opt-out scheme would impose a significant burden on those who want to read and discuss LGBTQ-inclusive books—a burden not imposed on those who want to read and discuss books about straight and cisgender people. An order granting Petitioners' requested injunction would therefore "cast a pall of orthodoxy over the classroom," *id.*, 385 U.S. at 603, and "restrict[] or burden[] expression because of its message, its ideas, its subject, or its content," *Vidal v. Elster*, 602 U.S. 286, 292 (2024) (citation omitted).

Petitioners' desired opt-out regime must be understood as simply the latest front in the rising and disturbing educational censorship movement. And if some other book ban efforts raise harder questions by pitting the discretion of school boards against free speech principles, this is a case where the interests of the school board align with the First Amendment interests of students, teachers, and authors in preserving access to books. Any analysis of this case must account for the profound free speech implications.

Finally, Petitioners' requested injunction also raises serious free speech concerns for another reason: it is unconstitutionally vague. They ask this Court to order that the school board "provide advance notice and an opportunity for opt-outs to any other

instruction related to family life or human sexuality." Pet'rs App'x at 206a. But what is "instruction related to family life"? Does reading a book about a child with heterosexual parents constitute "instruction related to family life"? Are the children's classics *Are You My Mother?*, about a baby bird searching for its mother, or *Hansel and Gretel*, about a girl saving her brother from a witch, about "family life"? What about a lesson on family trees? Just recently, a federal court in Tennessee denied a motion to dismiss a lawsuit brought by teachers challenging proscriptions on what they could include in the curriculum as unconstitutionally vague. The court held that the meaning of the Tennessee law, which prohibits teachers from including in the curriculum concepts like whether the United States is "fundamentally" "racist or sexist," "depend[s] in significant part on the political, social, and moral assumptions of the party enforcing it" and does not give educators the "bare minimum of notice regarding what it takes to actually steer clear of violating the Act." *Tenn. Educ. Assoc. v. Reynolds*, 732 F. Supp. 3d 783, 794, 807, 816 (M.D. Tenn. 2024). So too, here, a restriction on all "instruction related to family life" "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standard-less that it authorizes or encourages seriously discriminatory enforcement." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citation omitted).

For all these reasons, the injunction that Petitioners seek is a constitutionally suspect book ban by another name. Restricting access to certain ideas in public schools offends free speech principles and values, while not intruding on the freedom of parents

to raise their children with the religious views of their choosing. At a minimum, even if this Court were to conclude that the Montgomery County Board of Education policy has some element of religious coercion, it cannot ignore the countervailing First Amendment implications of burdening certain speech because of disagreement with the ideas espoused therein. Finally, because Petitioners are seeking a preliminary injunction, the incursion into the discretion of the Montgomery County Board of Education and the significant harm to the free speech rights of students, teachers, authors, and publishers must be weighed in balancing the equities and evaluating the public interest.

CONCLUSION

For the reasons set forth herein, the decision below should be affirmed.

Respectfully submitted,

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April 9, 2025