No. 24-297

IN THE

Supreme Court of the United States

TAMER MAHMOUD, ET AL.,

Petitioners,

v.

THOMAS W. TAYLOR, ET AL.,

Respondents.

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

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

This amicus brief is submitted on behalf of the National Education Association ("NEA"), Maryland State Education Association ("MSEA"), Montgomery County Education Association ("MCEA"), American Federation of Teachers ("AFT"), Education Law Center ("ELC"), and People United for the American Way ("PFAW").[1]

NEA is the nation's largest professional association and union representing approximately three million members, the vast majority of whom serve as educators, counselors, and education support professionals in our nation's public schools. NEA is committed to fulfilling the promise of public education to prepare every student to succeed in a diverse and interdependent world.

MSEA is NEA's Maryland affiliate and represents 75,000 educators and school employees who work in Maryland's public schools, teaching and preparing our almost 900,000 students both for career jobs of the future and for citizenship in a diverse society.

MCEA represents 14,000 educators who work in Montgomery County Public Schools. MCEA is an affiliate of MSEA and NEA. MCEA and its members are committed to teaching the students in the school system and encouraging each of them to understand, analyze, and appreciate the diversity of our society, thereby cultivating good citizens.

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[1] Amici state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than Amici—contributed money that was intended to fund preparing or submitting the brief. *See* Sup. Ct. R. 37.6.

AFT, an affiliate of the AFL-CIO, was founded in 1916 and today represents 1.8 million members. AFT members include preK-12 educators, paraprofessionals, higher education faculty and administrative staff, nurses and health care workers, and public employees. Since its founding, the AFT has been devoted to preserving and strengthening our nation's commitment to high-quality public education and educational opportunity for all.

ELC is a non-profit organization that pursues justice and equity for public school students by enforcing their right to a high-quality education in safe, equitable, non-discriminatory, integrated, and well-funded learning environments. ELC seeks to support and improve public schools as the center of communities and the foundation of a multicultural and multiracial democratic society. To achieve these goals, ELC engages in federal and state litigation nationwide—including frequently serving as amicus curiae—as well as research and data analysis, policy advocacy, and communications.

PFAW is a national nonpartisan civic organization established to promote and protect civil and constitutional rights and other important values, including public education and religious liberty. PFAW has promoted public education and religious liberty through such activities as research, litigation, legislative advocacy, and outreach and advocacy to parents, teachers, school board members, and school administrators. Founded in 1981 by a group of civic, educational, and religious leaders, PFAW now has hundreds of thousands of members nationwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners urge this Court to declare that parents have a broad constitutional right to insist that public schools affirmatively provide them with advance notice, opt-out procedures, and alternative learning arrangements to shield their children from ideas that offend their religious beliefs. Amici submit this brief to highlight both the lack of legal support for such a ruling and the unadministrable burdens it would impose on individual educators, local school districts, and federal courts alike.

Petitioners claim that they are entitled to relief primarily under the First Amendment's Free Exercise Clause, *see* Pet. Br. at 24–35, while many of their supporting amici argue that it is also required under the substantive protections of the Fourteenth Amendment's Due Process Clause, *see*, *e.g.*, Amicus Br. of Parents Defending Educ. at 4–20. But neither of these provisions supports the recognition of a far-reaching right to burden schools with an obligation to anticipate parents' religious objections and to shield their children from ideas the parents deem objectionable.

With respect to the First Amendment's Free Exercise Clause, it is well established that mere exposure to ideas—even ones that offend an observer's sincerely held religious convictions—is not a substantial burden on religious exercise that the Constitution will recognize. Given our nation's commitment to robust and wide-open debate, as well as its wide variation of religious views, our democratic charter and the needs of a pluralistic society require toleration of conflicting views. The Constitution's interlocking protections for speech and religion therefore do not treat mere exposure to objectionable ideas as a wrong the state must prevent.

Moreover, Petitioners' Free Exercise claims are incompatible with the nation's tradition of public education, which is founded on the idea that engaging students on a broad range of ideas will bring together disparate elements in our society, prepare them prepare them for citizenship, and allow them to become productive members of an increasingly interconnected world. The inclusive curriculum of Montgomery County Public Schools is in harmony with both the toleration of conflicting beliefs that our Constitution requires and the embrace of diverse viewpoints that fuels our tradition of public education.

And with respect to the Due Process Clause's substantive protections for the right of parents to direct the upbringing of their children, Petitioners' and their amici's claims here are too far-reaching to accept. Neither history nor tradition supports a right to require public schools to anticipate parents' religious objections and to customize individual learning environments accordingly. On the contrary, the long-standing rule is that the operational needs of schools are superior to a parent's desire to direct the individual educational experience of a child within the school.

Whether it arises under the Free Exercise Clause or the substantive protections of the Due Process Clause, the broad right asserted here would also impose new and inappropriate burdens on individual educators, local school districts, and federal courts. Public-school educators should not be in the business of scouring instructional materials and guessing at what might conflict with a parent's religious beliefs. And federal judges should not be in the business of policing day-to-day curricular decisions, homework assignments, and classroom-management techniques. Yet, a ruling in Petitioners' favor would inevitably thrust schools and the judiciary into those roles.

Accordingly, this Court should affirm the decision below.

ARGUMENT

A. Exposure to Diverse Ideas Is Not a Cognizable Burden on Religious Exercise; It Is the Foundation for Education in the United States

Petitioners' Free Exercise claims hinge entirely on the notion that students' mere exposure to books and ideas in a public-school setting qualifies as a substantial burden on their parents' religious beliefs. According to Petitioners, the Constitution requires public schools to alleviate this burden by taking affirmative steps—not only to anticipate parents' religious objections and provide advance notice of any exposure to potentially objectional ideas—but also to provide alternative learning arrangements to shield students from exposure to those ideas.[2] *See* Pet. Br. at 2, 22, 34–35.

Petitioners' claims have no grounding in the protections the Constitution affords for religious liberty, which instead recognize that members of our pluralistic society must tolerate the expression of ideas that might conflict with their religious views. Petitioners' claims are also fundamentally incompatible with our national tradition of public education, which is based on the notion that engaging students on a broad and varied range of ideas will prepare them to become citizens who uphold the values necessary for the

[2] As explained in greater detail *infra* at 28–29, although Petitioners claim to seek only a right to opt their children out of instruction they object to, *see* Pet. Br. at 28–29, schools have an obligation to supervise students throughout the school day. As a result, these opt-outs will translate in practice to a requirement that schools provide ad hoc alternative learning arrangements for every parental objection.

maintenance of our democratic order and give them the tools to become productive members of a diverse and interconnected society. By contrast, the inclusive curriculum of Montgomery County Public Schools is in harmony with both the toleration of conflicting beliefs that our Constitution requires and the embrace of diverse ideas that underlies our tradition of public education.

1. The Constitution does not recognize mere exposure to ideas as an actionable burden on religion

Thomas Jefferson famously observed that "it does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg." Thomas Jefferson, *Notes on the State of Virginia* (1781), in THE COMPLETE JEFFERSON 675 (Saul K. Padover ed., 1943). It is precisely this sentiment that animates the First Amendment's complementary protections for freedom of speech and freedom of religious exercise.

"Our political system and cultural life rest upon" the notion that "each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). The First Amendment's Free Speech Clause therefore reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (citation and quotation marks omitted). And, implicit in that is a recognition that it is not the role of government to "prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). In other words, no matter how "pernicious an opinion may seem, we depend for its correction…on

the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974).

The same principle extends to the First Amendment's protections for religious belief and exercise. The Founders were keenly aware of the wide variation of religious views in the country, "of the violence of disagreement" among those views, "and of the lack of any one religious creed on which all…would agree." *United States v. Ballard*, 322 U.S. 78, 87 (1944). The democratic charter they fashioned in response to this challenge was not one that obligated the government to anticipate and protect citizens from ideas that offend their religious sensibilities. Instead, it was one that "envisaged the widest possible *toleration* of conflicting views." *Id.* (emphasis added).

As Justice Gorsuch has observed, in "a large and diverse country, offense can be easily found." *American Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 88 (2019) (concurring opinion). And even though such offense may be "sincere" or "even wise," allowing it to serve as a basis for overturning governmental action is incompatible with "a society that holds among its most cherished ambitions mutual respect, tolerance, self-rule, and democratic responsibility." *Id.*

Thus, even though exposure to certain ideas may cause observers to "feel excluded and disrespected," the Constitution does not recognize that "sense of affront" as an actionable burden on religious belief. *Town of Greece v. Galloway*, 572 U.S. 565, 589 (2014); *see also Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485–86 (1982) (holding that the "observation of conduct with which one disagrees" is not a constitutionally cognizable injury); *Elk Grove Unif. Sch. Dist. v. Newdow*, 542 U.S. 1, 44 (2004) (O'Connor, J., concurring) ("[T]he Constitution does not guarantee

citizens a right entirely to avoid ideas with which they disagree."). "After all, much political and religious speech might be perceived as offensive to some." *Morse v. Frederick*, 551 U.S. 393, 409 (2007). But this Court has recognized that the "state has no legitimate interest in protecting any or all religions from views distasteful to them." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952).

Accordingly, Petitioners cannot claim that their children's exposure to certain ideas in school—even ones that conflict with their religious beliefs—is a violation of their free-exercise rights. Of course, this is not to say that their religious convictions are anything other than genuine. Nor is it to say that their sense of affront is illegitimate. The point is simply that the Constitution's interlocking protections for freedom of speech and religion do not—and cannot—recognize the mere exposure to objectionable ideas as a wrong that the state must prevent.

This Court's decision in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), drives this point home in the context of our public schools. There, this Court flatly rejected the notion that a football coach at a public high school burdened the religious-freedom rights of students or members of the public by engaging in on-the-job prayer at midfield in view of players and spectators. This Court recognized that onlookers, including students, would have "seen his religious exercise" and that those "close at hand might have heard him too." *Id.* at 538. And this Court even acknowledged that some of those onlookers might "take offense" at what they were witnessing because they did not share the religious beliefs being espoused. *Id.* at 538–39. Nevertheless, this Court held that mere exposure to expressive activity that might conflict with one's religious convictions did not amount to a cognizable

burden on anyone's religious exercise, because "learning how to tolerate speech or prayer of all kinds is 'part of learning how to live in a pluralistic society,' a trait of character essential to 'a tolerant citizenry.'" *Id.* at 538 (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

2. Public education in the United States is founded on the importance of exposure to diverse ideas

The nation's tradition of public education is built on similar principles. "Education is perhaps the most important function of state and local governments." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (cleaned up). It is grounded in the idea that, through "wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues," *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (cleaned up), the nation's public schools will work as an "assimilative force by which diverse and conflicting elements in our society are brought together on a broad but common ground," *Ambach*, 441 U.S. at 77. Exposure to diverse ideas advances the goals of public education in two distinct ways.

First and foremost, education rooted in exposure to diverse ideas prepares students for "participation as citizens" and preserves "the values on which our society rests." *Id.* at 76 (cleaned up). This is because the "fundamental values" that are "essential to a democratic society" include "tolerance of divergent political and religious views, even when the views expressed may be unpopular." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). And as this Court has explained:

> America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, "I disapprove of what you say, but I will defend to the death your right to say it."

Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 190 (2021).

Second, exposure to—and toleration of—diverse ideas is essential to public education's goal of preparing students to realize their full potential for success in an increasingly diverse and interconnected world. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (explaining that education is a "principal instrument" for preparing students "for later professional training"); *see also Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (recognizing that "education prepares individuals to be self-reliant and self-sufficient participants in society"). Particularly "in today's increasingly global marketplace," that capacity for success "can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

The importance of public education rooted in exposure to diverse ideas is a tradition that dates back to the very founding of the nation. *See* Stephen E. Bennett et al., *Reading's Impact on Democratic Citizenship in America*, 22 POL. BEHAV. 167, 167 (2000) ("Puritans

at Massachusetts Bay colony in the seventeenth century, visionaries…in the late eighteenth century, [and] the creators of public schools in the early nineteenth century…all believed that literacy was a *sine qua non* for effective participation in public affairs.") (internal citations omitted).

For example, in 1779, Thomas Jefferson proposed "A Bill for the More General Diffusion of Knowledge" to create a public school system in Virginia, founded on the belief that "the most effectual means of preventing" governmental abuse is to "illuminate…the minds of the people at large" and give them knowledge of "the experience of other ages and countries." THE COMPLETE JEFFERSON 1048. His bill therefore sought to establish a system to provide "liberal education" without "regard to wealth, birth or other accidental condition or circumstance," that would act "to guard the sacred deposit of the rights and liberties of their fellow citizens." *Id*.

In 1780, John Adams engrafted that principle onto the Massachusetts Constitution, which recognized that "[w]isdom and knowledge…diffused generally among the body of the people" is "necessary for the preservation of their rights and liberties," and that it was therefore the state's duty "to cherish the interests of literature and the sciences" in "public schools and grammar schools." MASS. CONST. pt. II, ch. V, § 2 (ratified 1780).[3]

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[3] Other early State constitutions contained similar exhortations. For example, the New Hampshire Constitution of 1783 proclaimed:

> Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the

(*continued*…)

And in his famous Farewell Address in 1796, George Washington urged his successors to promote, "as an object of primary importance, institutions for the general diffusion of knowledge." A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1902 220 (James D. Richardson ed., 1903). He explained that exposure to ideas and the acquisition of knowledge was vital to the survival of the Republic because, in "proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened." *Id.*

3. Montgomery County Public Schools' inclusive curriculum is consistent with constitutional principles and reflects the traditional role of public education

The curriculum of Montgomery County Public Schools ("MCPS") is compatible with both the Constitutional imperatives and the tradition of public education outlined above. That curriculum is designed to be inclusive and reflect the diversity of identities and experiences both within the school community and more

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> country, being highly conducive to promote this end; it shall be the duty of the [the State]…in all future periods of this government, to cherish the interest of literature and the sciences, and all…public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people.

N.H. CONST. Pt. 2, art. LXXXIII; *see also* ME. CONST. art. VIII (ratified 1820); IND. CONST. art. VIII, § 1 (ratified 1851).

broadly in our society. This exposure to rich and diverse ideas and experiences not only helps prepare students for citizenship in a multiracial and multicultural democracy, it also helps them thrive both emotionally and academically while they remain in school.

MCPS's inclusive curriculum helps ensure a learning environment that is safe and welcoming for all. School climates where some students are targeted for unequal treatment have an impact on all students. Of relevance here, it is well known that LGBTQ youth are particularly vulnerable to bullying. In addition, "youths who bully others are more likely to be depressed, engage in high-risk activities such as theft and vandalism, and have adverse outcomes later in life compared to those who do not bully." [4] That being so, there is a particular need to affirmatively welcome and encourage acceptance of LGBTQ students and families by, for example, including books and stories in the school curriculum that represent the lives and experiences of LGBTQ people.[5] In this sense, teaching inclusion is a rising tide that lifts all boats: policies that recognize the equality and dignity of all students benefit not only LGBTQ students, but also their non-LGBTQ peers.[6]

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[4] Board on Children, Youth & Families, Nat'l Acad. of Sci., Eng'g & Med., *Report in Brief: Preventing Bullying Through Science, Policy and Practice* at 2 (2016).

[5] *See* Am. Psych. Ass'n, *School-Based Risk and Protective Factors for Gender Diverse and Sexual Minority Children and Youth* at 26 (2015).

[6] *See* U.S. Ctr. for Disease Control & Prevention, *LGBTQ-Supportive School Policies and Practices Help All Students Thrive* (June 2022) ("All young people do better in LGBTQ-inclusive schools."); Wojciech Kaczkowski et al., *Examining the Relationship Between LGBTQ-Supportive School Health Policies and Practices and Psychosocial Health Outcomes of Lesbian, Gay,* (*continued*…)

MCPS's inclusive curricula also help all students achieve academically and prepare to flourish in a dynamic economy. Research confirms that a school curriculum that highlights the lived experiences of members of the community from diverse backgrounds yields improvements in students' critical thinking skills, as well as increases in direct measures of academic success such as GPA, school attendance, standardized test performance, and graduation rates.[7] These educational benefits accrue not just to students from minority or marginalized communities, but to *all* students.[8]

* * *

Although the First Amendment rightly provides expansive protection for Petitioners' exercise of their religious beliefs, the offense they have taken at MCPS's inclusive curriculum is not a ground for this Court's intervention. Particularly in a community as diverse as Montgomery County, tolerance of speech, ideas, and religious expression of all kinds is essential.

B. The Right of Parents to Direct the Upbringing and Education of their Children Does Not Include the Prerogative to Burden Schools with Unworkable Obligations

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Bisexual, and Heterosexual Students, 9 LGBT HEALTH 43, 43–53 (2022) (finding that "LGBTQ-supportive policies and practices are significantly associated with improved psychosocial health outcomes among both LGB *and* heterosexual students") (emphasis added).

[7] *See* Law Firm Anti-Racism All. & Nat'l Educ. Ass'n, *The Very Foundation of Good Citizenship: The Legal and Pedagogical Case for Culturally Responsive and Racially Inclusive Public Education for All Students* at 14–15 (Sept. 29, 2022) (citing studies).

[8] *See id.*

Petitioners' claims are also not cognizable as a fundamental parental right. Although not mentioned explicitly in the Constitution, the right of parents to "direct the upbringing and education" of their children, especially in religious matters, has long been recognized as entitled to protection under the substantive component of the Due Process Clause. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925). Such a right, however, is not unlimited. And that is particularly true when it comes to parents' desires to require public schools to operate in accordance with their beliefs. As Justice Thomas has explained, the established rule is that "[i]f parents do not like the rules imposed by [their public] schools, they can seek redress in school boards or legislatures; they can send their children to private schools or homeschool them; or they can simply move." *Morse*, 551 U.S. at 420 (Thomas, J., concurring).

What the Petitioners propose here would upend that traditional rule. It would do so without a firm basis in history and tradition. And the result would be the imposition of unworkable new burdens on schools, as well as the conscription of federal courts into supervising the day-to-day classroom decisions of educators.

1. History and tradition do not recognize the right of parents to insist that a school operate in accordance with their religious beliefs

The right that Petitioners assert here is not one that this Court's caselaw has recognized. Even this Court's seminal parental rights decision in *Meyer v. Nebraska*, was quick to note that it involved no challenge to a "State's power to prescribe a curriculum for institutions which it supports." 262 U.S. 390, 402 (1923). Recognizing a new fundamental right therefore carries with it "a serious risk of judicial overreach." *U.S. Dep't of State v. Muñoz*, 602 U.S. 899, 910 (2024).

To guard against that risk, this Court "exercises the utmost care" whenever it is "asked to break new ground." *Id.* (cleaned up). Thus, any claim asserting a new fundamental right must be supported by a "careful description of the asserted fundamental liberty interest." *Id.* (cleaned up). And that carefully described interest must, in turn, be shown to be "objectively, deeply rooted in this Nation's history and tradition." *Id.* (cleaned up). Together, these requirements "direct and restrain" this Court's exposition of fundamental rights and "rein in the subjective elements that are necessarily present" in recognizing such rights. *Washington v. Glucksberg*, 521 U.S. 702, 721–22 (1997).

Carefully described, *see Muñoz*, 602 U.S. at 910, the right that Petitioners assert here would affirmatively require a public school to provide advance notice, opt-out procedures, and alternative learning arrangements for their children in order to avoid exposure to ideas that offend their beliefs—despite the fact that they remain free to instill those beliefs at home. Given both the nature and the broad implications of the right they seek to assert, concerns about judicial overreach should be particularly acute. "[N]o one believes" that "parental rights are to be absolute." *Troxel v. Granville*, 530 U.S. 57, 92–93 (2000) (Scalia, J., dissenting). And, as Justice Scalia warned, unless those rights are carefully delineated, this Court runs the risk of "ushering in a new regime of judicially prescribed, and federally prescribed, family law." *Id.* at 93. Moreover, this Court has repeatedly recognized the "obvious fact" that courts are "ill-equipped" to make determinations about "discrete aspects" of schools' curricula and operations. *Yoder*, 406 U.S. at 235; *see also Morse*, 551 U.S. at 421 (Thomas, J., concurring) ("Local school boards, not the courts, should determine what

pedagogical interests are legitimate and what rules reasonably relate to those interests.") (cleaned up).

Recognition of such a broad right is also at odds with this Court's usual understanding of substantive due process as a *limit* on governmental power, rather than an affirmative right to the government's assistance. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). That, is, Petitioners seek the public schools' affirmative assistance in identifying, warning them about, and shielding their children from ideas that conflict with their religious beliefs. Yet, generally speaking, the government's decision not to assist "the exercise of a fundamental right does not infringe the right." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983); *see also Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009).

Even more importantly, Petitioners' asserted right is not one that is "objectively, deeply rooted in this Nation's history and tradition." *Muñoz*, 602 U.S. at 910. At the heart of their claim is the notion that the Constitution requires near-absolute deference to parental authority—to the exclusion of the operational needs of a school. To be sure, the early English (and, before that, Roman) legal tradition gave a father an almost absolute right to the custody, labor, and earnings of his minor children. *See* 1 William Blackstone, COMMENTARIES *441 (explaining that children lived in "the empire of the father" until they reached the age of majority). But that tradition never fully took hold as part of the American legal tradition, especially in the context of schools.

For example, Joseph Story acknowledged the earlier common-law rule that a father had an "absolute right to the care and custody of his children" and that the state lacked the authority to "control the conduct

of the father in the education of his children," but he explained that continuing to adhere to such an inflexible rule would now "strike all civilized countries with astonishment." Joseph Story, 2 COMMENTARIES ON EQUITY JURISPRUDENCE § 1347 (1836). Other commentators were even more pointed. *See* James Kent, 2 COMMENTARIES ON AMERICAN LAW 205 (O.W. Holmes, Jr., ed., 12th ed. 1873) (explaining that the code of parent-child relations under Roman law "was barbarous and unfit for a free and civilized people"); Lewis Hochheimer, THE LAW RELATING TO THE CUSTODY OF INFANTS § 22 (3d ed. 1899) (explaining that "the general result of the American cases" is an "utter repudiation" of the English common-law notion granting parents an absolute "proprietary right of interest in or to the custody" of children). And courts, too, recognized that the American legal tradition did not adopt the absolutist conception of parental rights from English or Roman law. *See People ex rel. Barry v. Mercein*, 3 Hill 399, 411 (N.Y. Sup. Ct. 1842) ("Those countries in which the father has a general power to dispose of his children, have always been considered barbarous. Our own law never has allowed the exercise of such power."); *Commonwealth ex. rel. Hart v. Hart*, 14 Phil. Rep. 352, 353–54 (Pa. 1880) (acknowledging that English common law "conceded to a father the undoubted right as guardian by nature and for nurture of his minor child," but that "it may safely be affirmed" that this rule "was never received as recognized law of Pennsylvania").

Instead, the American tradition of protecting parental rights has been more tempered. And that is especially true when parental prerogatives come into conflict with the operation of public schools. *See Morse*, 551 U.S. at 413–16, 420 (Thomas, J., concurring) (surveying 19th Century cases that affirm the authority of schools to "enforce rules" and to "maintain order,"

including over the objections of parents). While there were undoubtedly instances where Early American courts upheld a parent's request to excuse a child from some aspect of the school curriculum,[9] the majority of cases from this era recognize that the operational needs of schools are superior to any individual parent's desire to direct the individual educational experience of a child.[10] As one of those courts observed:

> [T]he power of each parent to decide the question what studies the scholars should pursue, or what exercises they should perform, would be a power of disorganizing the school, and practically rendering it substantially useless. However judicious it may be to consult the wishes of parents, the disintegrating principle

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[9] *See, e.g., Hardwick v. Bd. of Sch. Trs.*, 205 P. 49 (Cal. App. 1921) (excusing child from dancing exercises); *School Bd. Dist. No. 18 v. Thompson*, 103 P. 578 (Okla. 1909) (singing lessons); *State ex rel. Sheibley v. Sch. Dist. No. 1*, 48 N.W. 393 (Neb. 1891) (grammar instruction); *Rulison v. Post*, 79 Ill. 567 (1875) (bookkeeping class); *Morrow v. Wood*, 35 Wis. 59 (1874) (geography class).

[10] *See Ferriter v. Tyler*, 48 Vt. 444, 467 (1876) (explaining that the operational needs of a school could not be subjugated "to the peculiar faith, personal judgment, individual will or wish of" a parent, "however his conscience might demand or protest"); *Board of Educ. v. Purse*, 28 S.E. 896, 900 (Ga. 1897) (explaining that "it is the right of the state, through its constituted authorities, to require of the parent that he shall do nothing inconsistent with the peace, good order, and authority of the [school] system"); *State v. Webber*, 8 N.E. 708, 713 (Ind. 1886) (explaining that the wishes of an individual parent "must yield and be subordinated to the governing authorities of the school" and "their reasonable rules and regulations for the government of the pupils of its high school"); *accord Sewell v. Bd. of Educ. of Defiance Union Sch.*, 29 Ohio St. 89, 92 (1876); *Samuel Benedict Mem'l Sch. v. Bradford*, 36 S.E. 920, 920–21 (Ga. 1900); *State v. Bailey*, 61 N.E. 730, 732 (Ind. 1901).

> of parental authority to prevent all classification and destroy all system in any school, public or private, is unknown to the law.

Kidder v. Chellis, 59 N.H. 473, 476 (1879).

The same sentiment was voiced by the Late Justice Jackson, who explained that it would "leave public education in shreds," if parents were given the right to "eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines." *McCollum v. Bd. of Educ.*, 333 U.S. 203, 235 (1948) (concurring opinion). And he added that nothing but "educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits" challenging what or how students are taught. *Id.*

Other influential jurists have noted the same concern. Judge O'Scannlain posited that if the Constitution were violated "each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a 'curriculum review committee' unto himself or herself." *Brown v. Woodland Joint Unif. Sch. Dist.*, 27 F.3d 1373, 1379 (9th Cir. 1994). And Judge Posner explained that the "government's interest in providing a stimulating, well-rounded education would be crippled by attempting to accommodate every parent's hostility to books inconsistent with their religious beliefs." *Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757, 759 (7th Cir. 2001) (citation omitted).

Simply put, the specific right that Petitioners claim here—a right to burden schools with affirmative obligations to anticipate parents' religious objections and provide alternative learning arrangements—is not sufficiently rooted in our legal traditions to

warrant recognition. And giving force to such a right in this case would be the very kind of "judicial overreach" that this Court's decisions condemn. *Muñoz*, 602 U.S. at 910.

2. Requiring schools and educators to anticipate parents' religious objections and provide alternative learning arrangements is practically unworkable

Petitioners claim that they are entitled to both advance notice of any instruction that conflicts with their religious convictions and alternative learning arrangements for their children while that instruction is provided to others. But the constitutional rule that Petitioners ask this Court to adopt is one that will generate endless administrative confusion, impose burdensome unfunded mandates on schools, and mire federal courts in litigation over matters far outside their expertise. That is a sure sign that adopting Petitioners' position would lead this Court—and the nation's public schools—down the wrong path. *See Harris v. Quinn*, 573 U.S. 616, 636–37 (2014) (explaining the dangers of adopting constitutional rules that will be fraught with "conceptual difficulty" and "practical administrative problems").

Public-school educators and administrators "have a difficult job, and a vitally important one." *Morse*, 551 U.S. at 409. Not only are they charged with providing an education that prepares each new generation to become citizens, *see Ambach*, 441 U.S. at 75–76, they also often act as the primary social safety net for many vulnerable young people—from providing free school lunches for students who are food-insecure to serving as mandatory reporters of childhood abuse and neglect. *See Ohio v. Clark*, 576 U.S. 237, 246–47 (2015).

Nowhere is that more true than in a place as culturally and economically diverse as Montgomery County. As Petitioners note, its residents are the most religiously diverse in the nation. *See* Pet. Br. at 6. Its school district is also one of the nation's largest, with an enrollment of over 160,000 students at 211 different schools and a workforce of over 25,000 employees.[11] At that scale, a rule requiring schools to provide parents with both advance notice of any instruction that may conflict with their religious convictions and alternative learning arrangements for their children would quickly hit a wall of practical impossibility.

Which "instruction"? Petitioners' claim deals only with "instruction" in the form of books that were specifically assigned or read to students. *See* Pet. Br. at 9–11. But the thrust of their argument is that *any* school-based exposure to religiously objectionable ideas triggers a constitutionally mandated obligation for the school to provide parents with advance notice and an opportunity to opt-out. *Id*. at 28–29, 34. The administrative difficulties created by this constitutional rule should be readily apparent.

For example, are a school's notice, opt-out, and alternative learning obligations triggered when a book with objectionable content is merely suggested reading or among a list of other books from which students may choose? Are they required when objectionable books are merely stocked in classroom or school libraries to which students have access? Are they required for

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[11] *See* Montgomery County Pub. Sch., *2023–2024 Annual Report to the Community* at 6 (July 2024); *see also* Nat'l Ctr. for Educ. Stats., *Digest of Education Statistics*, Table 215.30, Enrollment, poverty, and federal funds for the 120 largest school districts, by enrollment size in 2021: School year 2019-20 and fiscal year 2022 (2022) (listing Montgomery County Public Schools as the 15th largest in the nation).

students' in-school access to the internet? In each of these situations, there is certainly a risk that a student will be exposed to ideas a parent finds objectionable. But the logistical challenges for a school to identify that risk and provide parents with advance notice of it are effectively insurmountable.

Even more vexing questions arise when it comes to contributions that other students make to the school environment. For example, to help students develop crucial public speaking skills, educators often require them to deliver oral presentations. For younger students, that might involve a description of the student's family. And for older students, it might involve a research project that presents a perspective on a contemporary social or political issue. How should an educator respond if a younger student presents on being the child of a same-sex couple? Or if an older student conducted her research on this Court's decisions in *Obergefell v. Hodges*, 576 U.S. 644 (2015), or *Bostock v. Clayton County*, 590 U.S. 644 (2020)? Is the teacher required to review all presentations beforehand and delay those that a parent might find objectionable?

Likewise, student art is often selected for display in classrooms or common areas. And that art may be open to interpretations that challenge or even offend the religious sensibilities of students or parents. Is the school required to suppress the art entirely because the children of objecting parents cannot avoid it? Or is it sufficient to provide parents with advanced notice of its existence?

Also, good pedagogy engages students in discussion. In the course of that, students may spontaneously ask questions or make comments touching on matters that conflict with the religious beliefs of parents or other students. In the split-second when such a comment is made, is an educator's obligation to shut

down free-flowing discussion until parents can be notified?

Which religious convictions? Petitioners' claim here deals specifically with "instruction on gender and sexuality"—by which they mean, not just material explicitly depicting sexual acts or anatomy, but also material that references the existence of LGBTQ people. *See* Pet. Br. at 9–12 (describing the material they object to); *see also* Resp. Br. at 26. As a result, identifying instructional material that may conflict with Petitioners' specific beliefs is itself no straightforward matter. And because Petitioners are asking this Court to adopt a broad constitutional rule requiring advance notice, opt-out, and alternative learning procedures for conflicts with *any* parent's religious beliefs, the uncertainty and burden it will place on schools in future cases is essentially boundless.

Consider that, even if this Court's ruling were limited only to instructional materials that reference LGBTQ people, intractable problems would still arise. How, for example, would schools address books where the sexuality of characters is only hinted at, or the subject of literary debate, such as Nisus and Euryalus in Virgil's THE AENEID, Nick Carraway in Fitzgerald's THE GREAT GATSBY, or Young Emerson in Ellison's THE INVISIBLE MAN? How would they address the tropes of cross-dressing and gender confusion in the comedies of William Shakespeare?[12]

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[12] See Nancy Roberts Trott, *School District Anti-Gay Policy Splits N.H. Town*, L.A. TIMES (March 17, 1996) (reporting on the removal of Shakespeare's TWELFTH NIGHT from schools after the play was deemed to violate a school district's policy on "alternative lifestyle instruction" that prohibited instruction "portraying homosexuality as an acceptable way of life").

And the problem grows exponentially more complex when schools must anticipate, not just the specific religious beliefs about gender and sexuality at issue in this case, but any religious objections to instruction that parents might have. This will be an extraordinary task, given both the wide variation of religious views in the country, *see Ballard*, 322 U.S. at 87, and the fact that those views need not be "'logical, consistent, or comprehensible to others in order to merit First Amendment protection,'" *Fulton v. Philadelphia*, 593 U.S. 522, 532 (2021) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981)). If a school confined itself just to religious objections that have been asserted in extant caselaw, notice and opt-out procedures would still be required for a vast array of topics, including:

- interracial dating and marriage;[13]
- "immodest" apparel;[14]
- a number of specific works of literature;[15]
- movies, television, radio, or audio-visual projections;[16]
- play acting, singing, and dancing;[17]

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[13] *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983).

[14] *Moody v. Cronin*, 484 F. Supp. 270, 275 (C.D. Ill. 1979).

[15] *See Linnemeir*, 260 F.3d at 758 (Terrence McNally's CORPUS CHRISTI (1998)); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1534 (9th Cir. 1985) (Gordon Parks's THE LEARNING TREE (1963)); *Todd v. Rochester Cmty. Sch.*, 200 N.W.2d 90, 95 (Mich. App. 1972) (Kurt Vonnegut's SLAUGHTERHOUSE-FIVE (1969)).

[16] *Davis v. Page*, 385 F. Supp. 395, 397–405 (D.N.H. 1974).

[17] *Id.*; *Hardwick*, 205 P. at 55; *Thompson*, 103 P. at 578.

- "humanist" philosophy;[18]
- The "Womans' [sic] Liberation Movement," feminism, and "biographical material about women who have been recognized for achievements outside their homes";[19]
- home economics and shop class;[20]
- "poetic chants";[21]
- substance-abuse prevention;[22]
- yoga;[23]
- Earth Day[24]
- community service;[25]
- telepathy, magic, witches, wizards, and "creatures with supernatural powers,"[26]

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[18] *Davis*, 385 F. Supp. at 397–405; *Smith v. Bd. of Sch. Comm'rs*, 827 F.2d 684, 690–93 (11th Cir. 1987); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1062–70 (6th Cir. 1987).

[19] *Davis*, 385 F. Supp. at 397–405; *Mozert*, 827 F.2d at 1062–70.

[20] *Davis*, 385 F. Supp. at 397–405; *Smith*, 827 F.2d at 690–93.

[21] *Brown*, 27 F.3d at 1377.

[22] *Leebaert v. Harrington*, 332 F.3d 134, 136 (2d Cir. 2003); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 57–63 (2d Cir. 2001).

[23] *Altman*, 245 F.3d at 57–63; *Sedlock v. Baird*, 185 Cal. Rptr. 3d 739, 759 (Cal. App. 2015).

[24] *Altman*, 245 F.3d at 57–63.

[25] *Herndon v. Chapel Hill–Carrboro City Bd. of Educ.*, 89 F.3d 174, 176 (4th Cir. 1996).

[26] *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 683, 690 (7th Cir. 1994); *Mozert*, 827 F.2d at 1062–70; *Brown*, 27 F.3d at 1377.

- tricks, deceit, and disrespect or rebellion against parents; [27]
- evolution;[28]
- vaccinations;[29]
- pacifism;[30]
- Christianity, Judaism, Hinduism, Islam, and other world religions;[31] and
- the absence in history and social science texts of "a sufficient discussion of the role of religion."[32]

In other words, Petitioners' rule would place public schools—and, inevitably, courts—in the impossible position of the film censors in *Joseph Burstyn*, left to "apply [a] broad and all-inclusive definition of 'sacrilegious'" that would leave them "adrift upon a boundless sea amid a myriad of conflicting currents of religious views." 343 U.S. at 504.

What kind of notice? "Questions frequently arise as to the adequacy of a particular form of notice in a particular case." *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). But with Petitioners' proposed rule broadly

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[27] *Fleischfresser*, 15 F.3d at 683; *Mozert*, 827 F.2d at 1062–70.

[28] *Mozert*, 827 F.2d at 1062–70; *Reinoehl v. Penn-Harris-Madison Sch. Corp.*, No. 23-cv-889, 2024 WL 4008301, at *5 (S.D. Ind. Aug. 30, 2024); *Davis*, 385 F. Supp. at 397–405.

[29] *Nikolao v. Lyon*, 875 F.3d 310, 319 (6th Cir. 2017).

[30] *Mozert*, 827 F.2d at 1062–70.

[31] *Id.; California Parents for the Equalization of Educ. Materials v. Torlakson*, 973 F.3d 1010, 1020–21 (9th Cir. 2020); *Wood v. Arnold*, 915 F.3d 308, 316 (4th Cir. 2019); *C.H. v. Sch. Dist. of the Chathams*, 698 F. Supp. 3d 752, 764–66 (D.N.J. 2023); *Altman*, 245 F.3d at 57–63.

[32] *Smith*, 827 F.2d at 690–93.

requiring advance notice of *any* religiously objectionable school materials, those questions would be especially insoluble.

Ordinarily, notice must be "reasonably calculated, under all the circumstances, to apprise" interested parties of a proposed action "and afford them an opportunity to present their objections." *Id.* But given the "sharp differences" that arise in matters of religious faith, *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940), educators and school administrators would struggle to find predictable criteria for determining what kind of information or what level of detail would be sufficient to fully apprise parents of a potential conflict between instructional materials and their religious convictions.

What kind of "opt out"? Petitioners claim that they only seek to allow parents to opt their children out of instruction that offends their religious beliefs. *See* Pet. Br. at 28–29. But, in practice, these opt-outs will require schools to provide ad hoc alternative learning arrangements that will tax schools' resources and leave them mired in uncertainty.

Schools are entrusted with protecting the safety of students while they are at school. *See Morse*, 551 U.S. at 424 (Alito, J., concurring). As a result, students generally must be supervised throughout the school day. When parents make opt-out requests that necessitate removing students from class, the school must find both the space and the personnel to ensure adequate supervision. This will prove especially challenging in schools that already struggle with overcrowding and teacher shortages.[33]

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[33] *See, e.g.*, Lianna Golden, *Overcrowding has kids sitting on the floor at MCPS school; parents demand action*, ABC 7 NEWS (*continued…*)

Petitioners' request to constitutionalize opt-out rights will also raise innumerable questions about how missed assignments will factor into instruction and grading. For example, will educators be required to develop and provide alternate assignments to ensure that opted-out students are not deprived of instruction? How should a student be graded if opt-outs result in missing especially challenging assignments or a substantial amount of the coursework?

Opt-out arrangements could also have divisive and disruptive effects on the classroom. Consider, for example, how a student with same-sex married parents might react when told that references to the mere existence of families like his are so objectionable that several of his fellow classmates must leave the room. Or how a Jewish student might feel when she is required to bring home a note alerting parents that lessons on of her religious heritage could be offensive and offering alternative learning arrangements for the children of objecting parents.

* * *

This Court has repeatedly warned about the dangers of federal judicial interference in local school matters. *See*, *e.g.*, *Endrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. 386, 404 (2017) (cautioning that courts do not have "an invitation…to substitute their own notions of sound educational policy for those of the school authorities which they review") (citation and quotation marks omitted); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (reiterating this Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents,

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(Jan. 28, 2025) (discussing "widespread" problems with insufficient building space and staff shortages in Montgomery County Public Schools).

teachers, and state and local school officials, and not of federal judges"). Petitioners' claims, by contrast, would thrust courts into the role of exercising general supervisory authority over the day-to-day decisions of educators and administrators with regard to curriculum, assignments, and classroom management.

"There simply are certain things that courts, in order to remain courts, cannot and should not do." *Missouri v. Jenkins*, 515 U.S. 70, 132 (1995) (Thomas, J., concurring). Adopting the unfounded and unworkable rule advanced by the Petitioners here is chief among them.

CONCLUSION

For the reasons stated above, the judgment of the Fourth Circuit should be affirmed.

Respectfully submitted,

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