No. 24-297

In the Supreme Court of the United States

TAMER MAHMOUD, ET AL.,
Petitioners,

v.

THOMAS W. TAYLOR, ET AL.,
Respondents.

On A Writ of Certiorari To
The United States Court of Appeals
For The Fourth Circuit

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

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Amici are both Professors at Regent University School of Law. Professor DeGroff has taught courses in the Regent University Schools of Law, Government, and Education in administrative law, education law, and legal history. His scholarship has focused on parental rights, education policy, and religious liberty. He has lectured on topics related to the history and principles of American education and law and contemporary public-school issues. Associate Dean Walton, who also serves as an Assistant Professor and as the faculty director of the Regent Law Center for Global Justice, is also a prominent lecturer and scholar on the intersection of parental authority and public schools' gender policies. Their publications include Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting* Mozert *after 20 Years*, 38 J.L. & Educ. 83 (2009); *Sex Education in the Public Schools and the Accommodation of Familial Rights*, 26 Child. Legal Rts. J. 21 (2006); S. Ernie Walton, In Loco Parentis*, The First Amendment, and Parental Rights–Can They Coexist in Public Schools?*, 55 Tex. Tech L. Rev. 461 (2023); and *Gender Identity Ideology: The Totalitarian, Unconstitutional Takeover of America's Public Schools*, 34 Regent U. L. Rev. 219 (2022), among other law review articles and frequent opinion/editorial pieces in a variety of outlets.[1]

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[1]Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

The idea that parents bear the primary responsibility for educating their children, and thus hold the primary authority over that education, has long been a part of western legal thought. English Common Law, and the political and legal philosophers who influenced the founders, all acknowledged that it was parents, not the state, who directed and controlled their children's upbringing and education, especially about subjects as sensitive as values, identity, and religious beliefs.

Schooling free from values and religious instruction was largely unknown for much of the first half of our Nation's history. When education was largely a private affair, this merging of values with reading, writing, and arithmetic was of little consequence, and even less so because, with few exceptions, our new Nation was relatively religiously homogeneous. Every person was free to exercise his religion as he saw fit, without federal interference, and it generally went without saying that every child's education was at least informed and influenced by his parent's religious beliefs.

As America grew, it became more dedicated to education and, simultaneously, more religiously diverse. Early efforts to encourage cultural (and religious) conformity through education led to conflicts between the budding educational institutions and growing religious minority groups. For a time, these conflicts played out in state legislatures and frequently led to the kind of religious and ethnic segregation that public school advocates

were trying to avoid when they envisioned education as a way of improving community cohesion. Eventually, courts began to step in to remind local governments that both State constitutions and (after Reconstruction) the Federal Constitution protected the right of parents to direct the religious upbringing of their children. The right to exercise one's religion includes the right to pass it on to one's children, and that right is severely curtailed when the child's public-school curriculum overtly inculcates ideas that directly conflict with the values being taught at home.

Today, the vast majority of parents find themselves with little choice but to entrust their children to others for the purpose of education. Those third parties (whether public or private schools, or individual tutors) act in loco parentis within clear boundaries, exercising only the limited authority delegated to them by parents. No parents willingly delegate to anyone the authority to teach their children values that directly contradict the religious values parents are teaching at home. Such efforts by a school constitute a direct attack on parents' religious exercise, whether done overtly by forced participation in religious activities that parents find objectionable or through the subtle infusion of values into an ostensibly "non-religious" curriculum intended only to teach language arts. Courts have consistently recognized that forcing a child to use a curriculum that conflicts with the values a parent is teaching at home exceeds any authority a parent might willingly delegate. In such circumstances, a religiously based opt-out from the curriculum preserves both the rights of the parents and the goals of public education.

The Montgomery County School Board's refusal to allow parents to opt out of a language arts curriculum heavily-laden with ideas about gender and sexuality that conflict with their religious beliefs exceeds any reasonable limit to the in loco parentis doctrine. The Board's actions abrogate the rights of parents by forcing their children to participate in lessons that advance values fundamentally in conflict with those the parents are instilling at home. In so doing, the Board has infringed upon the parents' right to practice their religion by undermining their efforts to pass it on to their children.

This Court should affirm the principle that parents need not choose between a public education and their right to protect their children from values antithetical to their religious convictions. History shows that parental opt-outs, such as the one sought by Petitioners in this case, are an appropriate compromise between the parents' religious duty to guide their children's development and the state's desire to foster community in a religiously heterogeneous society.

ARGUMENT

The Board's refusal to allow parents to opt their elementary-school-aged children out of language-arts lessons laden with emphasis on sexuality and gender identity violates the parents' free exercise right to direct the religious development of their children and the fundamental right of parents to control the upbringing of their children. This right has been recognized by this Court for more than one

hundred years. *See, e.g., Troxel v. Granville*, 530 U.S. 57 (2000). Although schools play a role in the development of children, the primary responsibility for, and authority over, the development of a "child's social and moral character" lies with parents. *Id.* at 78 (Souter, J., concurring).

Essential to preserving the parents' rights is the authority to limit their children's exposure to instruction that contradicts their own values, especially when children are most impressionable. When state actors assume responsibility for shaping children's attitudes and beliefs concerning moral principles on which religious faiths differ, they intrude upon a role reserved in our legal tradition for parents. Just as parents control their children's social companions, they also have a say in "the designation of the adults who will influence the child in school," *id.*, and, by extension, the ideas those adults will present.

This fundamental right is protected by the Fourteenth Amendment. "[T]o carry th[e] burden" of justifying a law or regulation that infringes on fundamental rights, "the government must generally point to *historical* evidence about the reach of the First Amendment's protections." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 24–25 (2022) (emphasis added). Thus, "an analysis focused on original meaning and history" is "the rule rather than some exception" when it comes to constitutional interpretation of such issues. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 536 (2022) (cleaned up) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)). Historically, the First Amendment has

provided "broad protection for religious liberty." *Fulton v. City of Philadelphia*, 593 U.S. 522, 575 (2021) (Alito, J., concurring). This protection has often included exemptions when generally applicable laws conflicted with the religious practices of particular groups, so long as the religious practice in question did not endanger "public peace and safety." *Id*. at 582.

I. The Right of Parents to Oversee Their Children's Religious Formation Has Long Been Part of the Western Legal Tradition

Under English common law, parents had both the responsibility and the authority to "guide their children's development." Eric A. DeGroff, *supra,* at 108 (2009) (citing 1 William Blackstone, *Commentaries* *452–53). In fact, as early as the seventeenth century, English philosopher John Locke and his contemporaries could point to a common law system in which parents were considered to have "a God-given duty to nourish, protect, and educate their young, and to have a corresponding right" to "fulfill those duties." DeGroff, *supra,* at 117 (citing *John Locke on Politics and Education: The Second Treatise on Civil Government* 106–08 (Howard R. Penniman, intro., 1947)). Thus, when Blackstone asserted in his *Commentaries* that it was "the duty of parents to their children" to provide for their education, he was explicating a body of law that had already been developing for generations. 1 William Blackstone, *Commentaries* *450–51.

This duty, originally considered a moral responsibility, *see id.*, was recognized by the Court of

Chancery as a legal right. Thus, English courts as early as the eighteenth century were enforcing "the right of parents to make educational choices for their children despite the wishes of the child or even the preferences of civil authorities." DeGroff, *supra*, at 110 (collecting English cases). By the nineteenth century, the right of parents to make educational decisions for their child had become so ingrained in the common law that one scholar described that right as "absolute against all the world." Robert Wolstenholme Holland, *The Law Relating to the Child: Its Protection, Education, and Employment* 60 (1914).

When a child's education involved *religious* matters, the common law was even more solicitous of parental choices. *See* Lee M. Friedman, *The Parental Right to Control the Religious Education of a Child*, 29 Harv. L. Rev. 485, 488 (1916). By the early 1700's, following centuries of sometimes violent conflict between Protestant and Roman Catholic adherents, and despite the fact that English statute books still reflected anti-Catholic and anti-Jewish sentiment, the Courts were taking modest but meaningful steps toward vindicating the God-given authority of parents to direct their children's religious upbringing. DeGroff, *supra*, at 111; Friedman, *supra,* at 485–88. For example, despite its concern for the children's eternal welfare if raised in other faiths, the Court of Chancery held that a guardian was not punishable for educating his ward as a Roman Catholic and affirmed the right of Jewish parents to educate their children in the Jewish faith. Friedman, *supra,* at 487; John David Chambers, *A Practical Treatise on the Jurisdiction of the High Court of Chancery Over the*

Persons and Property of Infants 117–18 (2015). Ultimately, parental authority with respect to a child's religion became so firmly established in the common law that a father's right to determine the religion in which a child would be educated continued even after the father's death. Friedman, *supra,* at 488.

This common law heritage built on even older canonical laws dating back to the ninth century, which held in high regard the right of parents to direct the education and upbringing of their children. Following the teachings of Aquinas and earlier medieval authorities concerning parental prerogatives, the ecclesiastical courts, for example, ordered the return of abducted Jewish infants to their parents despite their conviction that the children would lose the "advantage[] of the faith" and suffer eternal damnation if raised as Jews. Aviad M. Kleinberg, *A Thirteenth-–Century Struggle Over Custody: The Case of Catherine of Par-aux-Dames*, 20 Bull. Medieval Canon L. 67 (1990). Thus, the right of parents to direct their children's education in both religious and secular environments is evident in both the common law and the canonical law that heavily influenced American traditions.

II. The Founders Saw Educating Children as a Religious Duty

America's legal history has, if anything, been even more sensitive to the link between education and religion and thus more protective of parental rights than the English common law. *See* Joseph K. Griffith II, *Is the Right of Parents to Direct Their Children's Education "Deeply Rooted" in Our "History and*

Tradition"? 28 Tex. Rev. L. & Pols. 795, 801–02 (2024). Jurist James Kent described the role of parents in directing their children's development and education as the "discharge of their *sacred* trust." *Id.* at 801 (quoting 2 James Kent, *Commentaries* *203) (emphasis added).Likewise, Joseph Story—an Associate Justice of this Court—explained that "parents are 'ordinarily entrusted with the care of [their] children,' . . . because it is reasonably and rightfully presumed that parents 'will best execute the trust reposed in [them]; for [it] is a trust, and of all trusts the most *sacred*.'" *Id.* at 801–02 (quoting 2 Joseph Story, *Commentaries on Equity Jurisprudence* § 1343 (2d ed. 1839)) (emphasis added) Even Thomas Jefferson, a champion of local public education, stated that it would be preferable to risk the miseducation of a child than to forcibly interfere with his parents' right to direct his upbringing: "It is better to tolerate the rare instance of a parent refusing to let his child be educated than to shock the common feelings and ideas by the forcible asportation and education of the infant against the will of the father." Thomas Jefferson, *Bill for Establishing Elementary Schools* (Sept. 9, 1817), https://founders.archives.gov/documents/Jefferson/03-12-02-0007 [https://perma.cc/WH8V-A2EL].

At the time of the Founding, philosophers and leading political thinkers alike acknowledged the basic truth that God gave to parents the natural right, duty, and responsibility to educate their children, and to direct and govern their moral improvement. Education, as we think of it today, devoid of moral direction and distinct from religious instruction, was

entirely alien to the founders of our Republic. John Adams, a signer of the Declaration of Independence and our Nation's second president, clearly understood the connection between education and morality and the natural role of parents in inculcating values: "The foundations of national Morality must be laid in private Families. In vain are Schools, Academies and universities instituted, if loose Principles and licentious habits are impressed upon Children in their earliest years. The Mothers are the earliest and most important Instructors of youth." John Adams, Entry of June 2, 1778, *in The Adams Papers, Diary and Autobiography of John Adams* vol. 4 123 (Lyman H. Butterfield ed., 1961).

Early Americans' understanding of education did not restrict the purpose of teaching to the mere accumulation of knowledge. Rather, education was suffused with moral, and ultimately religious, instruction, focused on the formation of a civilized and virtuous man. "Any system of education," wrote Noah Webster, "which limits instruction to the arts and sciences, and rejects the aids of religion in forming the characters of citizens, is essentially defective." Letter from Noah Webster to David McClure (Oct. 25, 1836), *in Letters of Noah Webster* 453–54 (Harry A. Warfel ed., 1953). Gouverneur Morris, a signer of the Constitution, put the prevailing view on education succinctly: "I believe that religion is the only solid base of morals and that morals are the only possible support of free governments. [T]herefore education should teach the precepts of religion and the duties of man towards God." Jared Sparks, *The Life of Gouverneur Morris, with Selections from His Correspondence and Miscellaneous Papers* 483 (1832).

This education, both moral and temporal, was the natural prerogative, and the Divinely commanded duty, of parents. Men such as James Wilson, who signed the Declaration of Independence before later serving as an Associate Justice of this Court, promoted the traditional, common law understanding of the parental duty to educate children, locating its origins in the Bible. "It is the duty of parents to maintain their children decently," Wilson said, "and according to their circumstances; to protect them according to the dictates of prudence; and to educate them according to the suggestions of a judicious and zealous regard for their usefulness, their respectability, and their happiness." James Wilson, *Of the Natural Rights of Individuals* (1790), *reprinted in 2 Collected Works of James Wilson* loc. Ch. XII (Kermit L. Hall & Mark D. Hall eds., 2007), https://oll.libertyfund.org/titles/wilson-collected-works-of-james-wilson-vol-2 [https:// perma.cc/9VRY-J59F].

In an overwhelmingly Christian society, fathers understood that it was a religious imperative, ordered by the Almighty, to "train a child up in the way he should go," *Proverbs* 22:6, and to "bring [children] up in the nurture and admonition of the Lord," *Ephesians* 6:4. And if parents were not aware of this religious mandate, preachers such as John Witherspoon, another signer of the Declaration of Independence, would remind them: "Let us consider the duties incumbent on parents. . . . [P]arents should be . . . early and diligent in instruction. . . . Let not, therefore, the devil and the world be too far before-hand with you, in possessing their fancy, engaging

their affections, and misleading their judgement. . . ." John Witherspoon, *The Religious Education of Children: A Sermon, Preached in the Old Presbyterian Church in New-York, on the Second Sabbath in May, 1789* 10–11 (1790).

Because the Founders understood the moral and religious nature of education, and the religious duty of parents to direct their children's education, this Court can easily infer that the Founders considered parental control over their children's education to be, at least in part, a religious exercise protected by the First Amendment's Free Exercise Clause. As Yale Professor Stephen Carter has well said, the practice of religion "represents a story extended over time" and "across the generations." *See* Stephen L. Carter, *Parents, Religion, and Schools: Reflections on* Pierce*, 70 Years Later*, 27 Seton Hall L. Rev. 1194, 1204 (1997). "A religion survives through tradition, and tradition is multi-generational. A religion that fails to extend itself over time . . . might be a . . . collection of folk tales . . . or a list of interesting rules, but . . . it is not . . . a religion." *Id.* at 1205. If state authorities unduly interfere with the transmission of religious values from parent to child, they effectively deny parents the free exercise of religion.

III. Enforced Conformity Has Jeopardized Legitimate Rights; Opt-Outs Have Been an Effective Judicial Solution

A. This Court has recognized the harm done when states and state-run schools marginalize religious differences.

The Founders enjoyed a society in which a large majority shared a "Christian" worldview and religious adherents could live in states that supported their preferred denominations. That changed, however, as our Nation grew. As the common school movement took root, and the Nation grew more religiously diverse, efforts to impose conformity in public education bred conflict, discrimination, and deep division. The issue was apparent in the treatment of Catholic students and families, who faced coercive classroom practices and even physical punishment for resisting Protestant-dominated public education. John T. McGreevy, *Catholicism and American Freedom: A History* 7–8 (2004). These conflicts were not merely cultural; they were deeply embedded in state laws, school policies, and judicial rulings that sought to erase religious differences in the name of national unity. *See* Ian Bartrum, *The Political Origins of Secular Public Education: The New York School Controversy 1840-1842*, 3 N.Y.U. J.L. 267, 291–92 (2008). From the New York School Controversy to the Eliot School Rebellion and the passage of Blaine Amendments, Catholic families fought to protect their children from state-enforced ideological indoctrination. *Id.*; McGreevy, *supra.* Over time, courts began to recognize these injustices,

affirming that government-mandated educational conformity violated Free Exercise rights and the fundamental right of parents to direct their children's upbringing.

The New York School Controversy of 1840–1842 was an early example of systemic discrimination against Catholicism in education. When Catholic leaders petitioned for equal funding for Catholic schools, they were denied, while Protestant-affiliated schools continued to receive public support. Bartrum, *supra,* at 299. The message was clear: public education would serve as a vehicle for Protestant assimilation, not a system that accommodated religious pluralism. *Id.* at 286. As Protestant control over public schools remained unchallenged, Catholic families were forced to choose between exposing their children to religious coercion or bearing the financial burden of private education.

In one particularly egregious example of anti-Catholic animosity, the Eliot School Rebellion of 1859 highlighted the dangers of forcing conformity in education by compelling students to violate their religious beliefs. On March 7, 1859, in a Boston classroom, Thomas Whall, a ten-year-old Irish Catholic student, was whipped for thirty minutes for refusing to read from the King James Bible. McGreevy, *supra,* at 7–8. The school principal later declared that any boy unwilling to recite the Ten Commandments from the King James Bible must leave, leading to the expulsion of approximately one hundred Catholic students. *Id.* at 8. Whall's father pursued legal action against the assistant principal for excessive use of force, but the court ruled in favor

of the school, reinforcing the institutionalized discrimination against Catholic students. *Id.* In response, Boston's Catholic community founded St. Mary's Institute, one of the first Catholic parochial schools, to provide an avenue for parents to honor their religious convictions in the education of their children. *Id.* at 42. Rather than fostering community, the school's policy of dictating conformity drove a wedge between the Catholic and Protestant populations.

As Catholic families sought alternatives to state-imposed discrimination, Protestant-led public-school systems responded with a legal strategy designed to deprive the parochial schools of resources. Bartrum, *supra,* at 300. In 1875, Congressman James Blaine introduced a federal constitutional amendment to permanently enshrine this exclusion, but it failed by a narrow margin. Elizabeth Maddock McCarley, *Blaine in the Joints: The History of Blaine Amendments and Modern Supreme Court Religious Liberty Doctrine in Education*, 18 Duke J. Const. L. & Pub. Pol'y 195, 200 (2023). However, the damage was already done; many states incorporated Blaine provisions into their own constitutions, often as a prerequisite for statehood. Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 516 (2003); *see also State ex rel. Chambers v. Sch. Dist.*, 472 P.2d 1013, 1016 (Mont. 1970). For example, Montana's Blaine Amendment, imposed through the 1889 Enabling Act, ensured that Catholic schools were denied public support, reinforcing a system of religious exclusion that persisted well into the twentieth century. *Chambers*, 472 P.2d at 1016.

While originally enacted to target Catholics, Blaine Amendments remained embedded in over half of state constitutions, where they continued to restrict religious families' educational choices and prevented faith-based institutions from participating in generally available public programs. Duncan, *supra* at 493. It took constitutional challenges, through cases such as *Trinity Lutheran Church v. Comer*, 582 U.S. 449 (2017), and *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), to finally undo this long history of state-sponsored religious discrimination.

The Fourteenth Amendment provided a constitutional foundation for legal challenges to religious discrimination in public schooling. Over time, courts increasingly recognized that state laws forcing children to participate in school activities that conflicted with their parents' religious convictions—while excluding alternatives—violated fundamental principles of religious liberty and parental authority.

In *Meyer v. Nebraska*, 262 U.S. 390, 400–01 (1923), this Court ruled that the liberty protected by the Fourteenth Amendment encompasses the right of parents to direct their children's education. This principle laid the groundwork for *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925), where the Court struck down an Oregon law mandating public school attendance for all children. Citing *Meyer*, the Court held that Oregon's compulsory public-school law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing of children under their control." *Id.* Rejecting state-imposed

ideological uniformity, the Court firmly established the following:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. *The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*

Id. at 535 (emphasis added).

The decision was not simply about Catholic education; it was a broad reaffirmation of the principle that parents—not the government—hold the primary responsibility for directing their children's moral and religious formation.

The legal barriers faced by Catholics in directing their children's religious upbringing reflected the broader pedagogical failure of attempting to impose ideological conformity through the education system, rather than accommodating a diverse student body. Courts, including this Court, eventually recognized that excluding religious schools from state programs designed to support education, solely because of their religious character, violated the Free Exercise Clause. In *Trinity Lutheran,* 582 U.S. at 565, this Court struck down Missouri's exclusion of a religious preschool from a generally

available grant program, holding that denying a public benefit solely based on religious identity is "odious to our Constitution" and "cannot stand." Building on this principle, in *Espinoza*, 591 U.S. at 482, this Court ruled that Montana's Blaine Amendment violated the Free Exercise Clause by prohibiting religious schools from receiving public scholarship funds solely due to their religious status. The Court explicitly recognized that Blaine Amendments were "born of bigotry" and cannot justify modern-day religious discrimination. *Id*. (quoting *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000)).

The discrimination against religious practice that this Court rejected in *Espinoza* and *Trinity Lutheran* is nowhere near as severe as in this case, where Petitioners are not just deprived of an educational opportunity because of their religious practice, but face active opposition from the schools. Petitioners are being denied even the option of keeping their children from instruction that directly contradicts their values and hinders their efforts to teach those values to their children. This mindset harkens back to the "bad old days" when children were forced, in school, to read a version of the Bible that their church found heretical. McGreevy, *supra* at 7. It must not stand.

B. State courts have also affirmed the role of parents in overseeing their children's moral and religious development.

Even before *Pierce*, state courts had begun resisting compulsory ideological instruction by invoking constitutional protections and recognizing religious opt-outs. As early as *Spiller v. Inhabitants of Woburn*, 94 Mass. 127, 129 (1866), the Massachusetts Supreme Court ruled that compelling students to engage in activities contrary to their religious convictions violated the state constitution, which guaranteed that no person shall be "hurt or molested in his person, liberty, or estate" for worshipping God according to his conscience. The court upheld a local rule requiring daily Bible readings and prayer—only because parents had the right to excuse their children from this portion of the curriculum. *Id.* at 130.

By the late 19th and early 20th centuries, courts increasingly recognized that parents had the right to exempt their children from school activities that conflicted with their beliefs. In *State v. School District*, 48 N.W. 393, 395 (Neb. 1891), and *State v. Ferguson*, 144 N.W. 1039, 1042 (Neb. 1914), the Nebraska Supreme Court affirmed parents' authority to opt their children out of school subjects, including grammar and home economics. The court unequivocally stated that "the right of the parent . . . is superior to that of the school officers and the teachers." *Ferguson*, 144 N.W. at 1042. To rule otherwise, it warned, would "destroy both the God-given and constitutional right of a parent to have

some voice in the bringing up and education of his children." *Id*. at 1043.

State courts have long recognized a constitutional barrier to forced participation in school activities when the school orders a child to do something the parents forbid. In *Morrow v. Wisconsin*, 35 Wis. 59, 62–63 (1874), for instance, the Supreme Court of Wisconsin resolved a disagreement between a parent and a teacher regarding the child's course selection. The parent wanted his child to focus on orthography, reading, writing, and arithmetic at the expense of geography. *Id.* His teacher disagreed, but the court ruled for the parent, holding that the teacher "does not have an absolute right to prescribe and dictate what studies a child shall pursue." *Id.* at 64. The father had "the right to direct what studies, included in the prescribed course, his child shall take." *Id.* "[I]n case of a difference of opinion between the parent and teacher upon the subject," there was "no reason for holding that the views of the teacher must prevail." *Id.* at 66.

Other states would later extend this primacy of the parent's wishes when the conflict crossed into the realm of religion. In *State v. Weedman*, 226 N.W. 348, 354 (S.D. 1929), the South Dakota Supreme Court held that compelling Catholic students to attend Protestant Bible readings violated the Free Exercise protections of the state constitution, emphasizing that "[i]t is essential to religious liberty that one be free to worship according to the dictates of his own conscience, and not only that, but to live and teach his religion."

Similarly, in *Vollmar v. Stanley*, 81 Colo. 276, 282 (1927), the Colorado Supreme Court upheld a Catholic parent's right to excuse his child from readings from the King James Bible, ruling that forced participation violated both state and federal constitutional protections. These decisions demonstrate that, even before *Pierce* and around the time of the *Pierce* decision, courts recognized the fundamental injustice of compelling children to participate in educational practices that violated their parents' convictions.

This Court's ruling in *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972), reaffirmed a principle that had been emerging in state courts for decades: parents, not the government, hold the ultimate authority over their children's religious and moral education. In striking down Wisconsin's compulsory school attendance law for Amish students, the Court ruled that state interests in educational uniformity do not override parental and religious liberty rights. *Id*. The Court explicitly reaffirmed that "the primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id*. at 232.

From the Catholic school conflicts of the 19th century to *Yoder*, courts have consistently affirmed that the government cannot impose ideological conformity in public education at the expense of parental and religious liberty rights. The persecution and exclusion faced by Catholic families—ranging from compulsory religious exercises to legal barriers against Catholic schools—demonstrate the

significant consequences of disregarding this principle.

As cases such as *Spiller*, *Ferguson*, *Vollmar*, and *Yoder* illustrate, the solution to balancing a shared curriculum with respect for religious and parental rights lies in recognizing reasonable opt-outs. Today, as in the past, such accommodations serve as constitutional safeguards, ensuring that public education remains inclusive while respecting the religious diversity of American society. America has an "enduring . . . tradition" of protecting the right of parents to direct "the religious upbringing" of their children." *Espinoza*, 591 U.S. at 486 (quoting *Yoder*, 406 U.S. at 213–14). This tradition must not be limited to forcing (or allowing) religious parents to seek alternate schools for their children. Curriculum opt-outs further that tradition without forcing parents to uproot their children from an otherwise acceptable school.

IV. Opt-Outs Recognize the Historical Limits to In Loco Parentis.

As discussed, English common law recognized the natural law right of parents to educate their children. 1 William Blackstone, *Commentaries* *446–47, *452. The educational right belonged "exclusively" to parents. S. Ernie Walton, In Loco Parentis, *The First Amendment, and Parental Rights–Can They Coexist in Public Schools?*, 55 Tex. Tech L. Rev. 461, 466 (2023). Indeed, "[s]o strong" was the educational right of parents at common law that third parties could only educate another person's children if and when "parents chose to delegate that right to them."

S. Ernie Walton, *The Fundamental Right to Homeschool: A Historical Response to Professor Bartholet*, 25 Tex. Rev. L. & Pol. 377, 402 (2021). "And even then, the third party stood '*in loco parentis*,' i.e., in place of the parents." *Id.* (quoting 1 William Blackstone, *Commentaries* *453).

This tradition, and the corresponding principle of in loco parentis, was recognized in the early history of our Nation by commentators such as Justice James Wilson and Chancellor James Kent. Walton, In Loco Parentis, *supra*, at 469; 2 James Kent, *Commentaries* *205 ("[T]he power allowed by law to the parent over . . . the child, may be delegated to a tutor or instructor."). American courts, both before the existence of public schools and after they became a regular fixture of American culture, applied the doctrine of in loco parentis to public schools to resolve conflicts between teachers and students. Walton, In Loco Parentis, *supra*, at 472–76. Yet even then, tutors or schoolmasters exercised only "that portion of the power of the parent . . . as may be necessary to answer the purposes for which he is employed." 1 William Blackstone, *Commentaries* *453; *see also Mahanoy Area School District v. B.L.*, 594 U.S. 180, 200 (2021) (Alito, J., concurring) (calling in loco parentis a "doctrine of inferred parental consent" for the school to wield the degree of authority "commensurate with the task that the parents ask the school to perform").

While the delegation of authority from parents to public schools *might* have been broader in the nineteenth century, a number of changes arising over the past two hundred years mandate that courts

construe the delegation of authority "much more narrowly than was done in the early days of the Republic." Walton, In Loco Parentis, *supra*, at 492. These changes include the rise of compulsory education, the inability of parents to sign employment contracts with public schools, the increasingly coercive economic power of the state in public education, and state-mandated educational agendas that often directly conflict with parents' values. *Id.* at 489–92; *see also Mahanoy*, 594 U.S. at 199–201 (Alito, J., concurring) (discussing changes in education since the rise of in loco parentis in common law England).

In addition to these changes, this Court has also made clear that the state has no authority to indoctrinate children against parental wishes. Starting with *Meyer*, this Court located in parents the power and duty to educate children and acknowledged that schools exercise educational power only to the extent that parents delegate it to the schools. 262 U.S. at 399–400. Referencing the practice of Sparta under which children were removed from their parents at an early age and educated solely by "guardians," this Court noted that any practice empowering agents of the state above a child's parents in matters of character development rests on ideas about "the relationship between individual and state" that would do "violence to both letter and spirit of the Constitution." *Id.* at 402. *Pierce* reaffirmed this concept with its reminder that a child "is not the mere creature of the State." 268 U.S. at 534–35. These cases, and those from state courts discussed above, make clear that parents retain their right to direct their children's moral upbringing and education in

public schools. Walton, In Loco Parentis, *supra*, at 497.

Given the drastic changes in education and this Court's repeated pronouncements in favor of parental authority, this Court should construe the delegation of authority from parents to public schools to correspond only to education in traditional subjects and non-ideological matters. Walton, In Loco Parentis, *supra*, at 499. In other words, "education in 'matters of public concern' should be deemed to fall outside the scope of the parental delegation of authority[.]" *Id.* Gender identity ideology is a "matter of public concern." *Janus v. Am. Fed. of State, Cnty., and Mun. Emps.*, 585 US. 878, 913–14 (2018) (referring to sexual orientation and gender identity, among other things, as "sensitive political topics" and "matters of profound 'value and concern to the public'"). Courts should therefore not construe parents to have delegated to public schools their authority over how their children are instructed about matters of such profound moral significance. *See* S. Ernie Walton, *Gender Identity Ideology: The Totalitarian, Unconstitutional Takeover of America's Public Schools*, 34 Regent U. L. Rev. 219, 261 (2022). Gender ideology is rooted in a worldview called expressive individualism, which holds that human identity is primarily sexual and is rooted in a person's own psychological and subjective view of oneself. It "touches on the deepest moral, social, and religious questions, even going to the heart of what it means to be human." *Id.* at 261. Accordingly, decisions about what children will be taught about sexuality, gender identity, and gender expression—and at what age

they will be taught, remain solely a matter of parental authority.

The curriculum and books at issue involve instruction in gender identity ideology. Teachers in Montgomery County Public Schools are *required* to utilize the Pride Storybooks. App. 12a. And when they do, the district provides teachers with a toolkit to "[d]isrupt the either/or thinking" of any child who expresses traditional views on sexuality. App. 12a. One tool is to contradict the child's belief: "[A]ctually, people of any gender can like whoever they like." App. 12a. Another tool is to shame the child: "How do you think it would make (character's name) [feel] to hear you say that? Do you think it's fair for people to decide for us who we can and can't like?" App. 12a. It should go without saying that the parent petitioners did not explicitly or implicitly grant the school authority to *secretly* repudiate and shame their children for expressing the very beliefs the parents taught them. In other words, it is "not reasonable to infer that [the parents] gave the school th[at] authority . . . ." *Mahanoy*, 594 U.S. at 210 (Alito, J., concurring).

Contrary to the Fourth Circuit's holding, intentionally disrupting their children's "either/or" thinking about biological sex imposes a burden on the parent petitioners' right to freely exercise their religion. What the Fourth Circuit decision failed to recognize is that religion is inherently intergenerational. *See* Stephen L. Carter, *supra*, at 1204. The transfer of core values and beliefs from one generation to the next is central to the practice of any of the major religions. If the State has the power through its institutions to inhibit the transfer of

moral and religious values by parents, then religious freedom has lost its meaning. The School Board must not be allowed to negate parental authority to decide how children will be taught, and what they will be taught, about matters of such profound moral and religious concern as human sexuality, sexual behavior, and individual identity.

The simplest way for schools to respect the limits on their delegated authority and comply with the First Amendment is with a parental opt-out provision, as petitioners are seeking in this case. Walton, In Loco Parentis, *supra*, at 488–89. Reasonable opt-outs are employed throughout our Nation with little effect on the day-to-day functioning of our Nation's schools, and they are normally applied in subject areas where questions of values, morals, and religious ideas are at stake. DeGroff, *Revisiting* Mozert, *supra* at 129–30.

Importantly, this Court need not even consider whether imposing an opt-out in this case would be too burdensome on the school. This is because Respondents themselves originally allowed such an opt-out for the very materials at issue. App. 14a. And they continue to offer opt-outs for other areas of the curriculum that implicate values and sexuality. App. 170a–173a. It was only the District's sudden and unexplained elimination of the Pride Storybooks opt-out which gave rise to this litigation. App. 16a–17a.

Granting an opt-out in this case will uphold our Nation's longstanding tradition of honoring parental rights in education, vindicate the right of parents to transmit core values as part of their free exercise of

religion, and remind public schools that they have no authority to indoctrinate children in matters of public concern. For far too long lower courts have effectively told parents that they have no rights at public schools. This Nation's history belies that notion. Parents have the primary educational right in the United States, and they do not lose that right when they send their children to public schools. This Court has recognized this right, as have many state courts. While schools do stand *in loco parentis*, this Court should hold that they only do so with respect to traditional subjects, and the Court should bar school districts from indoctrinating children in ideologies that conflict with their parents' faith. The history of the world—and this Nation—demonstrate the danger and folly of allowing the state to use public education to undermine parental authority. This Court should reverse the Fourth Circuit's decision and restore the primacy of parental authority in education to its rightful place.

CONCLUSION

The Court should reverse the decision of the Fourth Circuit and realign the relationship between parents and schools with this Nation's history and tradition of respecting parents' ability to direct their children's upbringing, moral formation, and education.

Respectfully submitted,

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