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DEFENDING FAITH AND FAMILIES AGAINST GOVERNMENT OVERREACH: MAHMOUD V. TAYLOR

HEARING

BEFORE THE

SUBCOMMITTEE ON EARLY CHILDHOOD, ELEMENTARY, AND SECONDARY EDUCATION

OF THE

COMMITTEE ON EDUCATION AND WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINETEENTH CONGRESS

SECOND SESSION

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DEFENDING FAITH AND FAMILIES AGAINST GOVERNMENT OVERREACH: MAHMOUD V. TAYLOR

Tuesday, February 10, 2026

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON EARLY CHILDHOOD, ELEMENTARY,
AND SECONDARY EDUCATION,
COMMITTEE ON EDUCATION AND WORKFORCE,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:16 a.m., in Room 2175, Rayburn House Office Building, Hon. Kevin Kiley (Chairman of the Subcommittee) presiding.

Present: Representatives Kiley, Miller, Owens, Rulli, Harris, Messmer, Walberg, Bonamici, Hayes, Lee, Mannion, Adams, Grijalva, and Scott.

Staff present: Lauren Blunt, Intern; Vlad Cerga, Director of Information Technology; Hope Dennis, Intern; Halle Greenbaum, Staff Assistant; Charlie Hatcher, Legislative Assistant; Amy Raaf Jones, Director of Education and Human Services Policy; Libby Kearns, Press Assistant; Campbell Ladd, Clerk; R.J. Laukitis, Staff Director; Jack Leonard, Staff Assistant; Danny Marca, Director of Information Technology; R.J. Martin, Professional Staff Member; Audra McGeorge, Communications Director; Ethan Pann, Deputy Press Secretary and Digital Director; Sara Robertson, Press Secretary; Katherine Anne Russo, Director of Member Services and Coalitions; Brad Thomas, Deputy Director of Education and Human Services Policy; Thomas White, Deputy Clerk; James Whittaker, General Counsel; Shaunice Afriyieb, Minority CBCF Intern; Ilana Brunner, Minority General Counsel; Rashage Green, Minority Director of Education Policy & Counsel; Christian Haines, Minority General Counsel; A'Ishah Johnson, Minority Grad Intern; Raiyana Malone, Minority Press Secretary; Marie McGrew, Minority Press Assistant; Eleazar Padilla, Minority Staff Assistant; Véronique Pluviose, Minority Staff Director; Theresa Tilling-Thompson, Minority Professional Staff; Banyon Vassar, Minority Director of IT.

Chairman KILEY. The Subcommittee on Early Childhood, Elementary and Secondary Education will come to order. I note that a quorum is present. Without objection, the Chair is authorized to call recess at any time.

Parental rights are fundamental. That means parents have a right to direct their child's education and a right to the information necessary to do so. Across the country, a number of school districts

are introducing controversial materials into classrooms while keeping parents in the dark. One of the worst examples is Maryland's Montgomery County Public Schools, which introduced curriculum promoting gender ideology for children as young as kindergarten during the 2022–2023 school year.

If a student dared to even question the content of these lessons, the district coached teachers to chastise students and repeat the same line "That comment is hurtful." These teachings conflict with the sincerely held beliefs of many parents, who are concerned about the rise of classroom content that is not age appropriate for young children.

A group of parents from many faiths, including Muslim, Catholic and Ukrainian Orthodox families, asked the Montgomery District for advanced notice of days on which these concepts will be taught so they could opt their students out. The parents did not ask to dictate curriculum or forbid other families from participating in these lessons. They merely wanted the opportunity to keep their kids home for a day in accordance with their beliefs.

The district said no. The case went to the Supreme Court. In *Mahmoud v. Taylor*, the Court granted a preliminary injunction on the grounds that the parents' right to opt out of the district's gender and sexuality teachings was protected under the free exercise clause of the U.S. Constitution. The Court held that "A government burdens the religious exercise of parents when it requires them to submit their children to instruction that poses a very real threat of undermining the religious beliefs and practices that the parents wish to instill."

The Court concluded that "For many people of faith, there are few religious acts more important than the religious education of their children," thereby receiving "a generous measure of constitutional protection." These are common sense principles. Religious freedom is a cornerstone of American life, and parents do not surrender it for their children when they enroll them in public school.

Unfortunately, we will hear testimony today that some districts are trying to circumvent or even defy the Court's holding in Mahmoud. The State of California is attempting to minimize the scope of Mahmoud by giving local districts vast discretion over how and when opt-outs are allowed.

Seattle public schools have gone even further by banning parental optouts from certain classes. These reports are gravely concerning to this Committee. For the past century, the Supreme Court has repeatedly held that parents have a fundamental right to direct the upbringing, health and education of their children, including faith.

As recently as 2000, the Court called it perhaps the oldest of the fundamental liberty interests recognized. Today's hearing will examine the Mahmoud case, the State of parental rights in America and whether districts are complying with the law. In a world where new and controversial types of content are finding their way into classrooms, it is essential that parents maintain control over their child's education. The Committee stands on the side of parents, students and the Constitution.

With that, I yield to the Ranking Member for an opening statement.

[The opening statement of Chairman Kiley follows:]

COMMITTEE ON EDUCATION & WORKFORCE
CHAIRMAN TIM WALBERG

COMMITTEE STATEMENT

Opening Statement of Rep. Kevin Kiley (R-CA), Chairman
Early Childhood, Elementary, and Secondary Education Subcommittee
"Defending Faith and Families Against Government Overreach:
Mahmoud v. Taylor"
February 10, 2026

(As prepared for delivery)

Parental rights are fundamental. That means parents have a right to direct their child's education, and a right to the information necessary to do so.

Yet across the country, a number of school districts are introducing controversial materials into the classrooms while keeping parents in the dark.

One of the worst examples is Maryland's Montgomery County Public Schools (MCPS), which introduced curriculum promoting gender ideology for children as young as kindergarten during the 2022-2023 school year. If a student dared to even question the content of these lessons, the district coached teachers to chastise students and repeat the same line: "That comment is hurtful."

These teachings conflict with the sincerely held beliefs of many parents who are concerned about the rise of classroom content that is not age-

appropriate for young children. A group of parents from many faiths – including Muslim, Catholic, and Ukrainian Orthodox families – asked the Montgomery district for advanced notice of days on which these concepts would be taught so they could opt their students out. The parents did not ask to dictate curriculum nor forbid other families from participating in these lessons – they merely wanted the opportunity to keep their kids home for a day in accordance with their beliefs. The district said no.

The case went to the Supreme Court. In *Mahmoud v. Taylor*, the Court granted a preliminary injunction on the grounds that the parents' right to opt out of MCPS gender and sexuality teachings was protected under the Free Exercise Clause. The Court held that "a government burdens the religious exercise of parents when it requires them to submit their children to instruction that poses 'a very real threat of undermining' the religious beliefs and practices that the parents wish to instill." The Court concluded that, "For many people of faith, there are few religious acts more important than the religious education of their children," thereby receiving, "a generous measure of constitutional protection."

These are common-sense principles. Religious freedom is a cornerstone of American life, and parents do not surrender it for their children when they enroll in public school.

Unfortunately, we'll hear testimony today that some districts are trying to circumvent – or even defy – the Court's holding in *Mahmoud*. The state of California is attempting to minimize the scope of *Mahmoud* by giving local districts vast discretion over how and when opt-outs are allowed. Seattle Public Schools has gone even further by banning parental opt-outs from certain classes.

These reports are gravely concerning to the Committee. For the past century, the Supreme Court has repeatedly held that parents have a fundamental right to direct the upbringing, health, and education of their children – including faith. As recently as 2000, the Court called it "perhaps the oldest of the fundamental liberty interests recognized."

Today's hearing will examine the *Mahmoud* case, the state of parental rights in America, and whether districts are complying with the law. In a world where new and controversial types of content are finding their way into classrooms, it is essential that parents maintain control over their child's education. The Committee stands on the side of parents, students, and the Constitution.

Ms. BONAMICI. Thank you very much, Mr. Chairman, and thank you to the witnesses for being here today. Public K–12 schools across the country are right now facing a deluge of crises that affect the safety, security, and academic future of students. According to Sandy Hook Promise, nearly 400,000 children have experienced gun violence at school since the turn of the century, and that is far more than any other developed country.

Some kids go to school with built-in bullet shields in their backpacks, and parents live in fear that their child might not come home. Children across the country are also experiencing trauma at the hands of their own government, as ICE rips families apart and preys on people near schools and hospitals. Right now, educators are asking me what to do when ICE agents appear on their school grounds. They are sharing stories of children distracted by fear, families afraid to ask for help, and staff struggling to support students who are carrying adult-size burdens into the classroom.

One superintendent told me about a first-grade classroom where every student had a story about being afraid of ICE. These stories are heartbreaking, and they demand our attention and action. As our communities experiencing this overwhelming fear, Donald Trump and Secretary McMahon continue to illegally dismantle the Department of Education. Students who experience discrimination are left without recourse as Secretary McMahon has implemented a mass reduction in force that essentially emptied the Office of Civil Rights, and a new GAO report confirmed that the agency has dismissed 90 percent of the discrimination cases that have been filed.

Add to that post-pandemic loneliness, device addiction, gun violence and social media addiction; it paints an alarming picture for both K–12 education and the overall well-being of our Nation's children. This Committee, and especially this Subcommittee, has a responsibility to help children thrive regardless of their neighborhood, their family income, or, according to the U.S. Supreme Court in 1982, immigration status.

Instead of addressing these many real dangers to students, my colleagues on the other side of the aisle are once again turning

classrooms into an epicenter of culture wars to the detriment of students and families. No one is arguing that parents should not be involved in their children's education. I know that firsthand because I was an active parent volunteer for years and know firsthand that family involvement is critical to a child's development and educational success.

We all agree on that, but unfortunately, instead of focusing on community schools or other support that would help students succeed, today's hearing will further perpetuate a culture of fear and censorship. Instead of having a meaningful discussion about how to improve education or conducting oversight on what is left of the Trump Department of Educ—Trump Administration's Department of Education, Republicans are using parental rights as another means to undermine public education.

Students deserve to learn all of the nuance and intricacies of the world around them in an age-appropriate manner. Preventing students in public schools from learning certain material based on the religious objections of a vocal minority sets a dangerous precedent. Further, it increases the administrative burden on already resource-strapped schools and educators who fear retribution for teaching about topics that some might think is controversial: world religions, classic literature, African American history, evolution, climate science, and the history of the LGBTQ Community.

Inclusion is not indoctrination. Differences exist in the world around us, and part of a good education includes teaching students about tolerance and understanding. Banning books or preventing students from learning about differences serves to perpetuate a culture of hatred and fear.

I do want to note some hypocrisy here. Countless times in this Committee, my colleagues have said they want to give education back to the states. I have heard that numerous times over the years. For the most part, they are talking about curriculum. As we have repeated again and again in this Committee, the Federal Government is not in charge of curriculum or what books are in schools.

If parents do not like books or curriculum, they can go to the school board and ask for a change. If they do not like the school board's decision, they can elect a new school board. That is the kind of local control I thought my colleagues wanted.

My Democratic colleagues and I are committed to fighting against politicizing education. We will continue to work with students, parents, educators, and communities until every student receives an accurate and high-quality education in a safe, well-funded environment without fear of gun violence or masked Federal agents breaking down the classroom door.

I look forward to the conversation, Mr. Chairman. I yield back the balance of my time.

[The opening statement of Ranking Member Bonamici follows:]

ED & WORKFORCE DEMOCRATS

OPENING STATEMENT

House Committee on Education and Workforce
Ranking Member Robert C. "Bobby" Scott

Opening Statement of Ranking Member Suzanne Bonamici (OR-01)
Subcommittee on Early Childhood, Elementary, and Secondary Education Hearing
"Defending Faith and Families Against Government Overreach: Mahmoud v. Taylor"
Tuesday, February 10, 2026 | 10:15 a.m.

Thank you very much, Mr. Chairman, and thank you to the witnesses for being here today.

Public K-12 schools across the country are, right now, facing a deluge of crises that affect the safety, security, and academic future of students. According to Sandy Hook Promise, nearly four-hundred thousand children have experienced gun violence at school since the turn of the century – that's far more than any other developed country. Some kids go to school with built-in bullet shields in their backpacks, and parents live in fear that their child might not come home.

Children across the country are also experiencing trauma at the hands of their own government as ICE rips families apart and preys on people near schools and hospitals. Right now, educators are asking me what to do when ICE agents appear on school grounds. They are sharing stories of children distracted by fear, families afraid to ask for help, and staff struggling to support students who are carrying adult-sized burdens into the classroom. One superintendent told me about a 1st grade classroom where every student had a story about being afraid of ICE. These stories are heartbreaking, and they demand our attention and action.

And as our communities experience this overwhelming fear, Donald Trump and Secretary McMahon continue to illegally dismantle the Department of Education (ED). Students who experience discrimination are left without recourse since Secretary McMahon has implemented a mass reduction in force that essentially emptied the Office for Civil Rights (OCR). And a new Government Accountability Office (GAO) report confirmed that the agency has dismissed 90 percent of the discrimination cases that have been filed.

Add post-pandemic loneliness, device addiction, gun violence, and social media addiction — it paints an alarming picture for both K-12 education and the overall well-being of our nation's children. This Committee, and especially this subcommittee, has a responsibility to help children thrive regardless of their neighborhood, their family income, or, according to the United States Supreme Court in 1982, immigration status.

Instead of addressing these many real dangers to students, my colleagues on the other side of the aisle are once again turning classrooms into the epicenter of their culture wars to the detriment of students and families.

No one is arguing that parents should not be involved in their children's education. I know that firsthand, because I was an active parent volunteer for years and know firsthand that family involvement is critical to a child's development and educational success. We all agree on that. Unfortunately, instead of focusing on community schools or other support that would help students succeed, today's hearing will further perpetuate a culture of fear and censorship. Instead of having meaningful discussions about how to improve education or conducting oversight on what's left of the Trump Administration's Department of Education, Republicans are using "parental rights" as another means to undermine public education.

Students deserve to learn all the nuances and intricacies of the world around them in an age-appropriate manner. Preventing students in public schools from learning certain material based on the religious objections of a vocal minority sets a dangerous precedent. Further, it increases the administrative burden on already resource-strapped schools and educators who fear retribution for teaching about topics that some might think of as controversial, such as world religions, classic literature, African American history, evolution, climate science, and the history of the LGBTQ+ community.

Inclusion is not indoctrination. Differences exist in the world around us and part of a good education includes teaching students about tolerance and understanding. Banning books or preventing students from learning about differences only serves to perpetuate a culture of hatred and fear.

I do want to note some hypocrisy here. Countless times, in this committee, my colleagues say they want to give education back to the states. I've heard that numerous times over the years, and for the most part, they are talking about curriculum. As we have repeated again and again in this committee, the federal government is not in charge of curriculum or what books are in schools. If parents don't like books or curriculum, they can go to the school board and ask for a change. And if they don't like the School Board's decision, they can elect a new school board. That's the kind of local control I thought my colleagues wanted.

My Democratic colleagues and I are committed to fighting against the politicizing of education. We will continue to work with students, parents, educators, and communities until every student receives an accurate and high-quality education in a safe, well-funded environment without fear of gun violence or masked federal agents breaking down the classroom door.

I look forward to the conversation, Mr. Chairman, and I yield back the balance of my time.

Chairman KILEY. Pursuant to Committee Rule 8(c), all members who wish to insert written statements into the record may do so by submitting them to the Committee Clerk electronically in Microsoft Word format by 5 p.m., 14 days after this hearing. Without objection, the hearing record will remain open for 14 days to allow such statements and other extraneous material noted during the hearing to be submitted for the official hearing record.

I will now introduce our witnesses. Our first witness is Mr. Eric Baxter, the Vice President and Senior Counsel at the Becket Fund for Religious Liberty from Washington, DC.

Our second witness is Donald Daugherty, a senior litigation counsel for Defense of Freedom Institute from River Hills, Wisconsin.

Our third witness is Mr. Zalman Rothschild, an assistant professor of law at Yeshiva University Cordoza School of Law from New York City.

Our fourth witness is Ms. Sarah Parshall Perry, a Vice President and Legal Fellow at Defending Education from Arlington, Virginia.

We thank our—we thank the witnesses for being here today and we look forward to your testimony. Pursuant to Committee rules, I would ask that each limit your oral presentation to a 3-minute summary of your written statement. As Committee members have many questions for you, the clock will count down from 3 minutes. However, pursuant to Committee Rule 8(d) and Committee practice, we will not cutoff your testimony until you reach the 5-minute mark.

I would also like to remind the witnesses to be aware of your responsibility to provide accurate information to the Subcommittee. I will first recognize Mr. Baxter for your testimony.

STATEMENT OF ERIC BAXTER, VICE PRESIDENT AND GENERAL COUNSEL, THE BECKET FUND FOR RELIGIOUS LIBERTY, WASHINGTON, D.C.

Mr. BAXTER. Good morning, Chair Kiley, Ranking Member Bonamici and distinguished Committee members. I am Eric Baxter from the Becket Fund for Religious Liberty and the lead attorney for the plaintiffs in *Mahmoud v. Taylor*. Mahmoud is the Supreme Court's most significant parental rights case in half a century. It affirms parents' right to opt their children out of public school instruction that violates their religious belief, but it also signals a move to strengthen religious liberty more broadly.

The case arose after the Montgomery County, Maryland School Board introduced LGBTQ storybooks with a stated goal of disrupting students thinking about gender and sexuality. The curriculum introduces children as young as three to pride parades, playground romance and gender transitions.

Teachers are instructed to emphasize that doctors only guessed at student sex at their birth, and to frame contrary views as unfair and hurtful. The curriculum was immediately controversial. Even the elementary school principals union warned it was age inappropriate, factually dubious and dismissive of religious beliefs.

Parents were first told they could opt their kids out, but the board soon reversed, saying they could not even be notified when the books were read. At a board meeting over a thousand parents, largely Muslim and Ethiopian Orthodox, expressed concern. The board responded by comparing them to xenophobes and white supremacists. The parents sued, seeking not to remove the curriculum but simply to restore the optouts. After two lower Courts rejected the parents' claims, the Supreme Court in a 6–3 ruling reversed. It said the curriculum was unmistakably designed to impose values hostile to many faiths, and that it exerted psychological pressure on young children to conform.

The Court concluded that parents' right to a direct the religious upbringing of their children would be an empty promise if it did

not extend into the classroom. This ruling has enormous significance. Schools nationwide must now adopt policies to accommodate students' religious beliefs or risk financial exposure for themselves and their employees. The ruling also calls into question the widespread school policies that support gender transitioning behind parents' backs.

Any effort to undermine parents on such religiously sensitive matters cannot be squared with Mahmoud. Beyond this immediate impact, Mahmoud also bypassed *Employment Division v. Smith*, an earlier Supreme Court ruling that significantly limited free exercise protections. That move undermines Smith's continued viability.

If the parents here get to bypass Smith, why should teachers challenging the same policy have to satisfy its higher standards? If not teachers, why anyone else defending their own religious liberty? In this sense, Mahmoud portends Smith's demise, which will strengthen religious liberty for all. Thank you for shining a light today on this remarkable Supreme Court opinion.

[The prepared statement of Mr. Baxter follows:]

Written Testimony of Eric Baxter[1]

Before the House Committee on Education and Workforce
Subcommittee on Early Childhood, Elementary, and Secondary Education

Mahmoud v. Taylor
February 10, 2026

[1] Vice President and Senior Counsel, the Becket Fund for Religious Liberty.

Chairman Kiley, Ranking Member Bonamici, and distinguished Members of the Committee, I'm honored to be here today to offer testimony concerning the Supreme Court's landmark decision in *Mahmoud v. Taylor*, which recognized that the fundamental right of parents to direct the religious upbringing of their children is not surrendered at the doors of a public school. My name is Eric Baxter, and I am Vice President and Senior Counsel at the Becket Fund for Religious Liberty, a nonprofit, public-interest law firm dedicated to protecting religious liberty for people of all faiths. I served as the lead attorney in *Mahmoud* and argued before the Supreme Court on behalf of the parents of Montgomery County, Maryland.

I plan to organize my testimony into three sections: detailing the astonishing facts surrounding the litigation, outlining the Court's decision, and discussing its implications moving forward.

Facts of the Case

Montgomery County is the most religiously diverse county in America and has for years respected the beliefs of its residents by offering generous opt-outs to curriculum, instruction, and extracurricular activities that violate parents' and students' religious beliefs. As a long-time resident and parent of the county myself, I had success utilizing opt-outs throughout my own children's education. Yet, in November 2022, the Montgomery County School Board introduced a new series of "LGBTQ-inclusive" storybooks designed for children in pre-kindergarten through 5th grade. Explicitly chosen to "disrupt" "stereotypes," "cisnormativity," and "power hierarchies," these age-inappropriate books explore various aspects of sexual orientation and gender identity.

Pride Puppy, a picture book written for three and four-year-olds, describes a Pride parade and what a child might find there. It includes an interactive picture hunt for children to search for images of "underwear," "leather," "lip ring," "[drag] queen" and more. *My Rainbow* tells the story of an autistic boy who convinces his family to support his social gender transition using a rainbow wig. *Intersection Allies* invites children to ponder what it means to be "transgender" or "non-binary" and asserts that "[w]hen we are born, our gender is often decided for us based on our sex," "[b]ut at any point in our lives, we can choose to identify with one gender, multiple genders, or neither gender." *Born Ready* tells the story of a biological girl named Penelope who identifies as a boy, tells her mom that she "doesn't want tomorrow to come because tomorrow I'll look like you," and convinces her family to treat her as a boy because this issue is about "love" and doesn't need "to make sense." *Love, Violet* tells the story of a budding same-sex playground romance between two little girls who "blush hot" over their attractions. Other storybooks convey similar messages about the "right" way to approach sex and gender.

In addition to the books, the school board issued guidance on how to instruct children on the books' themes.[2] This guidance tells teachers to "'[d]isrupt the either/or thinking' of elementary students about biological sex," to explain to students that doctors "guess about our gender" at birth, and to provide real life examples of same sex relationships and non-gender conforming activities. For children who object to these ideas, teachers are directed to frame their disagreement as "hurtful."

Local parents were naturally outraged with the controversial content of the new curriculum and worried about its effects on their children's religious development. Even Montgomery County's own school principals' union objected to the storybook instruction. They warned that the books and teaching guidance "support the explicit teaching of gender and sexual identi[t]y," state as "fact" things that "[s]ome would not agree are facts," invite "shaming comment[s]" toward students who disagree, and were "dismissive of religious beliefs."[3]

Still, Montogomery County insisted on implementing its curriculum. For most of the 2022-2023 school year, parents across the county utilized existing opt-out procedures to shield their children from the controversial content. Up through March of that school year, the school board repeatedly affirmed its opt-out policy in public statements. But in a dramatic reversal, after its final affirmation, the next day the Board issued a new policy saying it would no longer allow parents to opt their children out of the storybook instruction and would not even notify them when the books were being read.

This extreme action sparked a series of protests, with nearly *one thousand* parents appearing at Board meetings to object to the withdrawal of opt-outs. School board members compared the religiously and racially diverse parents (mostly of the Ethiopian orthodox and Muslim faiths) "racists" and "xenophobes," accused students of "parroting" their parents' "dogma," and refused to amend the Board's new policy.

With no other choice, the parents of Montgomery County took their school board to federal district court, where my team at the Becket Fund and I argued for their First Amendment constitutional rights. For two years, we battled through district and appellate courts simply to restore the parents' notice and opt-out rights, without seeking removal of the books themselves from the schools. The district court judge ruled that once parents place their children in the public schools, they have no further say in what their children are taught. The Fourth Circuit court of appeals affirmed, suggesting that the only available remedy was for parents to leave the public school system altogether by homeschooling or putting their children in private schools (an impossibility for most families). Following these losses, we petitioned the Supreme

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[2] Brief for Petitioners at 11-12, *Mahmoud v. Taylor*, 606 U.S. 522 (2025) (No. 24-297).

[3] *Id.* at 13.

Court to hear the case. In December 2024, review was granted, and the Court heard oral argument early in 2025.

The Supreme Court's Decision

In a 6-3 decision, the Supreme Court sided with our parent clients, recognizing the normative nature and coercive execution of the curriculum as a substantial burden on the free exercise of religion. Justice Samuel Alito wrote the Court's opinion, joined by Chief Justice Roberts and Justices Thomas, Barrett, Kavanaugh, and Gorsuch. Justice Thomas also wrote a concurring opinion, and Justice Sotomayor issued a dissent joined by Justices Kagan and Jackson.

The legal question of the case centered on whether the parents merited a preliminary injunction restoring their notice and opt-out rights while the litigation proceeded. In its primary holding, the Supreme Court found that Montgomery County was unconstitutionally requiring parents to submit their children to instruction that "substantially interfere[d] with" and posed "a very real threat of undermining" the religious beliefs and practices of the parents in directing the religious development of their children. Thus, the parents were entitled to a preliminary injunction, and the case was remanded to the lower courts for settlement discussions.

To reach this conclusion, the Court detailed how the curriculum and denial of opt-outs presented a constitutionally impermissible substantial burden on parents' religious exercise. The Court relied heavily on *Wisconsin v. Yoder*, a 1972 case that upheld what it called the "enduring American tradition" of parental religious direction—specifically in that case, the right of Amish families to withdraw their children from public school after the eighth grade. In *Mahmoud*, the Court found that the burden in this case is of the exact same character as the burden in *Yoder*.[4] Further, it held that the books in question were "unmistakably normative,"[5] "present as a settled matter a hotly contested view of sex and gender that sharply conflicts with the religious beliefs that the parents wish to instill in their children,"[6] and "impose upon children a set of values and beliefs that are 'hostile' to their parents' religious beliefs."[7] The nature of the books and instruction "exert upon children a psychological 'pressure to conform.'" [8] Taken together, the Court found the state's actions represented an "objective danger to the free exercise of religion."[9] Unlike for many other free exercise claims, such burdens do not require a further showing of government discrimination—that is, a showing that the challenged policy is not

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[4] *Id.* at 565.

[5] *Id.* at 550.

[6] *Id.* at 553.

[7] *Id.* at 553-54.

[8] *Id.* at 554.

[9] *Id.*

either "generally applicable" or "neutral." Instead, the Court held that burdens on parental religious exercise "bypass[] those issues" under *Yoder* given the "special character" of such burdens.[10] So the Court proceeded directly to strict scrutiny—the most exacting test known to constitutional law.

Applying that demanding test, the Court found that, while some religious burdens may be justified by compelling state interests, Maryland's stated interest in "maintaining a school environment that is safe and conducive to learning for all students"[11] was inadequate. Pointing out the robust "system of exceptions"[12] that exists in Maryland for curriculum opt outs in a wide variety of contexts (including Individualized Education Plans, Emergent Multilingual Learner courses, and state-mandated exemptions from sexual education classes), the Court rejected the state's argument that providing exemptions would be "infeasible or unworkable."[13]

The opinion also addressed a smattering of additional arguments presented by the government, rejecting each in turn.

Montgomery County argued that its actions were legally protected "internal affairs" of the state and not subject to litigation, to which the Court responded that the state's curriculum policies inherently "implicate[] direct, coercive interactions between the State and its young residents."[14]

The County also argued that the curriculum merely *exposed*, not coerced, children to contrary beliefs. Pointing to the normative elements of the curriculum, the Court disagreed with this analysis, saying the state's actions went "far beyond mere 'exposure,'"[15] and that regardless, the question at hand under governing precedent was whether "the educational requirement or curriculum at issue would 'substantially interfere[e] with the religious development' of the child or pose 'a very real threat of undermining' the religious beliefs and practices the parent wishes to instill in the child"[16] Neither of these turns on an "exposure" standard plucked out of thin air.

The Court outright rejected claims from friend-of-the-court briefs arguing that parents unhappy with their children's instruction should simply place their children in private schools or homeschool them. Besides finding this let-them-eat-cake

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[10] *Id.* at 564-65.

[11] *Id.* at 566.

[12] *Id.* at 567.

[13] *Id.*

[14] *Id.* at 557.

[15] *Id.* at 556.

[16] *Id.*

approach unattainable and unreasonable for the average American family, the Court reaffirmed that "public education is a public benefit, and the government cannot 'condition' its 'availability' on parents' willingness to accept a burden on their religious exercise."[17]

The Court also issued some forward-looking judgements in its opinion. To school boards, the Court warned that a public school "cannot escape its obligation to honor parents' free exercise rights by deliberately designing its curriculum to make parental opt outs more cumbersome."[18] And it also rejected the spreading legal belief that *Yoder* was somehow limited to its facts, explicitly treating the case like "any other precedent" that "cannot be breezily dismissed"—reiterating that it "embodies a principle of general applicability" and provides "robust protection for religious liberty."[19]

Taken as a whole, the decision in *Mahmoud v. Taylor* was a resounding victory that not only vindicated the parents of Montgomery County but preserved and expanded religious liberty protections for parents nationwide. By rejecting several common legal arguments used by states to justify religious discrimination, the Court made the jurisprudence surrounding parental rights in education that much clearer.

Mahmoud Implications

The Supreme Court's decision naturally has short- and long-term consequences. The aftermath of the decision has seen a wave of legislative and regulatory actions across the country as states try to reconcile their existing school policies with the Court's directions. But there are also signs of longer-term changes in First Amendment jurisprudence, school choice policy, and other educational disputes between parents and schools. I will briefly pass by each topic and conclude with considerations for Congress and the Education and Workforce Committee.

Short Term

Most immediately affected by *Mahmoud* was Montgomery County itself, which entered settlement deliberations after the decision to remedy its unconstitutional practices. States have responded to the decision with varying levels of compliance. New Jersey, a state with preexisting parental opt-out rights, released guidance that recognized *Mahmoud's* holdings and announced new regulations that require school boards to create publicly available procedures for parents to submit opt out forms and to make all approved curriculum publicly available.[20] California, meanwhile,

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[17] *Id.* at 561.

[18] *Id.* at 567.

[19] *Id.* at 558.

[20] Memorandum from Samantha Price, Assistant Comm'r, Div. of Legal & External Servs., N.J. Dep't of Educ., and Jorden Schiff, Assistant Comm'r, Div. of Teaching & Learning Servs., N.J. Dep't of Educ.,

attempted to minimize the scope and strength of *Mahmoud* and gave vast discretion to local educational agencies to determine when and how a *Mahmoud* "notice and opt out process" is required.[21, 22] And Seattle Public Schools, the largest school district in the state of Washington, has gone even further by explicitly issuing policies that ban parental opt outs from "LGBTQ inclusive instruction." Nevertheless, *Mahmoud's* standards are binding nationally and courts will be obligated to enforce the Court's ruling in every state when parental rights claims are raised.

Long Term

The longer-term implications of the case are still to be seen. It is refreshing and important that the Court recognized parental religious authority as having a "special character" not contingent upon a showing of government discrimination (i.e., a lack of neutrality or general applicability) under *Employment Division v. Smith*. That conclusion illustrates both the continued erosion of *Smith*'s precedential value and the Court's development of distinct rules for different associations engaged in religious direction (as in the "church autonomy" context). In identifying these distinct authorities on religious duties (religious organizations and parents), the Court could be reinforcing an important insight: religious duties transcend state power, because they are directed by authorities that don't exist by virtue of a state permission slip. If the Court builds upon these insights, the Constitution's commitment to limited government could be fortified, and the law on religious liberty can better reflect its ancient roots.

Congress certainly has its own role in shaping the national dialogue over this issue. In its opinion, the Court cited the brief that Members of Congress submitted in the case, noting Montgomery County's widespread use of individualized education plans. Indeed, the Members brief noted multiple federal laws that reinforce the individualized tailoring of education and a transparent relationship between parents and their schools—including the Protection of Pupil Rights Amendment, the Elementary and Secondary Education Act of 1965, and the Family Education Rights and Privacy Act, among others. Continued parental transparency and tailoring of education to a child's needs can occur by educating parents of their rights over their children's education and promoting legislative and regulatory policies that make it easier for American families to access the funding and educational opportunities they need, both in and out of the public school system.

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to Local Educational Agency Leads, *Guidance Regarding Parental Opt-Outs Based on Religious Objections* (Nov. 5, 2025), https://perma.cc/8HXE-KA9C.

[21] Cal. Dep't of Educ., *Supreme Court Decision in* Mahmoud v. Taylor (Aug. 6, 2025), https://perma.cc/6LLS-UVJP.

[22] N.Y. Dep't of Educ., *Statement from New York State Education Leaders on Supreme Court Decision in* Mahmoud v. Taylor (July 28, 2025), https://perma.cc/38RC-6V84.

This Committee can also communicate with the Treasury Department as it prepares its regulating guidance for the federal school choice tax credit passed in this Congress. It is imperative that religious families and schools are eligible for equal access to educational opportunities, so that parents who choose alternative education opportunities outside of public schools don't have to compromise their faith. If the government is going to create a new benefit, it cannot constitutionally discriminate against religious schools or families in the distribution of that program.

I thank the Committee for its time and allowing me to testify. I look forward to your questions.

Chairman KILEY. Thank you very much. I will recognize Mr. Daugherty for your testimony.

STATEMENT OF DONALD DAUGHERTY, SENIOR LITIGATION COUNSEL, DEFENSE OF FREEDOM INSTITUTE, RIVER HILLS, WISCONSIN

Mr. DAUGHERTY. Chairman Kiley and Ranking Member Bonamici, thank you for the opportunity to testify today. My name is Don Daugherty, and I am Senior Litigation Counsel for the Defense of Freedom Institute. In my time, I am going to focus on the implications of *Mahmoud v. Taylor*. Going forward, parents of faith will be able to use Mahmoud to push back against overreach by public schools, and the case should lead to more curriculum transparency.

For example, now in Montgomery County, each semester students receive refrigerator magnets detailing the upcoming curriculum, including books to be read so that their parents can decide whether they want to opt out or not. Also, in another case in late December in Massachusetts, a Federal Court there relied on Mahmoud to enjoin Lexington Public Schools when the schools refused to allow parents to opt their 5-year-old out of LGBTQ themed books that violated the family's Christian faith. That is just a very recent case.

At the same time, Mahmoud is not a license for parents to micromanage the curriculum, and Courts will need to define more clearly what this free exercise parental right encompasses. Some parents in Mahmoud objected to the storybook series on purely secular grounds, and the Supreme Court has recognized that under the due process clause of the 14th amendment that is a part from the free exercise clause of the First Amendment, parents have a substantive right to direct the upbringing and education of their children generally, not just in matters of religion.

Guidance from the Federal Courts will be needed on this issue as well going forward. Finally, a mystery surrounding Mahmoud is what critical principle was the Montgomery County Board of Education trying to vindicate by defending its no optout policy all the way to the Supreme Court. Many people wondered about this.

In addition to Montgomery County families, many Montgomery County principals and teachers in public schools questioned the use of the storybook series. Before the case was decided, the Washington Post and the New York Times criticized the board's decision to force parents to go to Court and the board expended considerable taxpayer dollars fighting those parents when they could have easily reached, I believe, an out of Court settlement.

During oral argument at the Supreme Court, Justice Kavanaugh, who pointed out that he is a lifelong resident of Montgomery County, he stated that he was a bit mystified how it came to this, noting that Maryland was founded on religious liberty in expressing surprise that the board had decided that this is the hill we are going to die on.

Justice Alito similarly asked the board's attorney "What's the big deal about allowing parents to opt their children out?" Even Justice Alena Kagan, who ultimately dissented, said she suspected that there were a lot of nonreligious parents who were not all that thrilled about this. Although no one can read the board's minds as to what they hoped to achieve through this case, at the least,

Mahmoud did reveal how disconnected some public schools have become from the families that they serve.

The First Amendment and the Bill of Rights generally exists to protect individual rights from a tyranny of the majority. As public schools more and more encroach on aspects of a children's upbringing beyond the core curriculum, the importance of constitutional bulwarks only increases. In Mahmoud, the Supreme Court wisely reinforced the free exercise bulwark. At the same time, parents cannot allow themselves to be treated like a captive audience by their elected representatives. Mahmoud shows that parents can and must take back their children's public schools and that the First Amendment is one way that to assist them in doing so. Thank you.

[The prepared statement of Mr. Daugherty follows:]

Testimony Before the U.S. House Committee on Education and Workforce Subcommittee on Early Childhood, Elementary, and Secondary Education Hearing on "Defending Faith and Families Against Government Overreach: *Mahmoud v. Taylor*"

Donald A. Daugherty, Jr.
Senior Litigation Counsel
Defense of Freedom Institute for Policy Studies
February 10, 2026

Chairman Kiley and Ranking Member Bonamici, thank you for the opportunity to testify today on the implications of *Mahmoud v. Taylor*, 606 U.S. 522 (2025), a case decided by the United States Supreme Court last June. My name is Don Daugherty, and I serve as Senior Litigation Counsel for the Defense of Freedom Institute (DFI). I have been a litigator for thirty-six years, spending my first three decades in private practice, and the last six years with public interest firms. While both in private practice and since, I have regularly represented parties in lawsuits, administrative proceedings, and other disputes involving issues of education reform and First Amendment rights.

Mahmoud involved a challenge under the Free Exercise Clause of the First Amendment. Specifically, the issue was whether the policy of the Montgomery County, Maryland Board of Education (the "Board") of introducing "LGBTQ+-inclusive" storybooks into the pre-K, kindergarten, and elementary school English & Language Arts curriculum, without notifying parents or allowing them to opt their children out of participating in the storybook series, violated the parents' free exercise right to direct the religious upbringing of their children.

The storybook series depicted Pride parades, gender transitioning, preferred pronouns, nonbinary identification, a drag queen, playground same-sex romance, and other controversial topics centered on sexuality and gender identity. The controversy was not a byproduct of otherwise innocent children's stories: it was the point. Instructional materials provided to teachers with the series stated that the books were designed to "disrupt" children from "either/or thinking" about the sexes. If a child suggested it's "weird" to say a girl can become a boy, the materials instructed the teacher to respond that this comment is "hurtful," and that when each of us is born, "people make a guess about our gender."

When the Board first introduced the series for the 2022-23 school year, Montgomery County public schools notified parents and allowed them to excuse their children from lessons involving these books. However, a few months into the school year, the Board

rescinded this option for the following school year. The Board was evasive about its reasons for doing so, but primarily cited administrative difficulties caused by numerous parents choosing to opt their children out.

When the Board announced it was rescinding the opt out option, there was tremendous parental pushback. However, at public meetings in May 2023 to discuss the matter, Board members were dismissive of parents' concerns. For example, one board member said that it would be an impossible disruption if teachers had to "send out notices so white supremacists could opt out of civil-rights contents," implicitly equating religious families with racists. One Board member even waved off a student who told the Board that the storybook series was "unsettling" because it contradicted the student's religious beliefs, stating she felt "kind of sorry" for the student and speculating that the girl was merely "parroting dogma."

Parents and students weren't the only ones alarmed by inclusion of the storybook series. After a group of parents sued the school district over the series in Maryland federal district court, defendants produced a November 2022 memorandum from principals and teachers (the "November 2022 Memo") showing that they shared the parents' misgivings about the series. For example, teachers and principals worried that responses suggested by the school administration to children's questions about the storybooks may be "dismissive of religious beliefs," or foster "shaming comment[s] to a child." In addition, the November 2022 Memo indicates that the administration's suggested responses about gender being "a guess" "based on our body parts" that is "[s]ometimes . . . right and sometimes . . . wrong" are "[s]tated as a fact," even though "[s]ome would not agree this [i]s a fact."

After the Maryland district court and the Fourth Circuit Court of Appeals denied the parents' request for a preliminary injunction that would have allowed them to opt their children out of lessons involving these books, the Supreme Court agreed to hear the parents' appeal.

At the Supreme Court, DFI filed an amicus curiae brief on behalf of ten current and former educators who, collectively, had 166 total years of experience as superintendents, administrators and teachers in K-12 public school systems in ten states across the country. These amici had specific and unique expertise with "notice and opt-out" processes like those the Board initially provided, as well as otherwise making academic accommodations for students whose parents prefer for religious or other personal reasons that they not participate in portions of the standard curriculum.

DFI's amicus brief focused on the governmental interest that the Board relied on to justify rescinding the right of parents to receive notice and to opt their children out of the storybook series. Again, the governmental interests asserted by the Board for



compelling schoolchildren to read these books, starting in pre-kindergarten, boiled down largely to bureaucratic considerations, which do not justify restrictions on activity protected by the First Amendment. Based on their considerable experience, DFI's clients very much doubted whether there was any unusually onerous administrative burden in the first place.

Reversing the lower courts, six justices concluded that the plaintiff-parents were entitled to a preliminary injunction, finding that the Board's policy substantially interfered with the religious development of their children and imposed a burden on religious exercise similar to that struck down in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, the Supreme Court exempted Amish families from Wisconsin's compulsory education statute beyond eighth grade, holding that the government burdens the religious exercise of parents when it requires them to submit their children to instruction that poses "a very real threat of undermining" the beliefs and practices that the parents wish to instill. In *Mahmoud*, the Court similarly found that the challenged government action "'substantially interferes with the religious development'" of the parents' children. Quoting *Yoder*, the *Mahmoud* Court stated that "[s]uch instruction 'carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent.'"

In his majority opinion, Justice Alito rejected the Board's contention that *Yoder* was a narrow holding with little application to the facts in Montgomery County. Applying strict scrutiny, the most rigorous form of judicial review of the constitutionality of government action, the Court found that on the preliminary injunction record, the Board's policy did not appear narrowly tailored to serve a compelling interest, as it allowed opt-outs in various other contexts, undermining its claim that the no-opt-out policy was necessary. The Court ordered the Board to notify parents in advance whenever the books or similar materials were to be used and to allow children to be excused from such instruction.

Going forward, the *Mahmoud* decision can be a useful tool for parents of faith to push back against overreach by public schools. For example, the right to opt out on religious grounds means nothing without the right to be given advance notice of classroom learning materials and activities; this should lead to more transparency about the curriculum, requiring that schools let parents know exactly what their children are being taught. In Montgomery County specifically, since *Mahmoud*, each semester students now receive a refrigerator magnet detailing the upcoming curriculum, including topics as well as books to be read that semester; parents can then, as appropriate, opt their children out of portions that conflict with their sincerely-held religious beliefs and obtain an alternative assignment. At the same time, *Mahmoud* is not a license for parents to micromanage the curriculum and, inevitably, courts will need to define more clearly what this Free Exercise parental right encompasses and what it doesn't.

Furthermore, separate from the Free Exercise Clause, the Supreme Court has recognized that under the 14th Amendment, parents have a Substantive Due Process right "to direct the upbringing and education" of their children generally, and not just in matters of religion. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). Some parents who objected to the storybook series had no religious faith, and claimed that they objected on purely secular grounds. Although, arguably, such parents may not be covered by *Mahmoud*, as a practical matter, it seems unlikely that Montgomery County would force the children of these non-religious parents to participate in the storybook series if they object. But guidance and clarity from the federal courts will be needed on this issue as well.

Finally, a mystery surrounding *Mahmoud* is how did this dispute even come to pass in the first place? That is, what critical principle was the Board trying to vindicate by litigating all the way to the Supreme Court? The plaintiff-parents, of course, wanted to affirm their fundamental right to raise their children in their chosen religious tradition and faith, and to inculcate those religious values in their children. But what did the Board hope to achieve?

Many people wondered about this. Before the Supreme Court decided the case, several liberal commentators had questioned the Board's decision to defend its no-opt-out policy so aggressively and all the way to the nation's highest court, expending considerable taxpayer dollars, instead of seeking some kind of out-of-court resolution with the parents. For example, a Washington Post editorial published in April of 2025 was entitled, "Montgomery County's unneeded Supreme Court fight." Opinion, *Montgomery County's Unneeded Supreme Court Fight*, Washington Post, April 23, 2025, https://www.washingtonpost.com/opinions/2025/04/23/supreme-court-montgomery-county-mahmoud-taylor/ . Similarly, a New York Times opinion piece published at the same time and written by a resident of Montgomery County, was entitled, "My School District Could Have Avoided This Supreme Court Case." *See* Megan Stack, *My School District Could Have Avoided This Supreme Court Case,* N.Y. TIMES, Apr. 18 2025, https://www.nytimes.com/2025/04/18/opinion/lgbtq-books-supreme-court.html. Both pieces chastised the Board for its intransigence.

During oral argument, several justices indicated that they, too, were puzzled that the Board fought so hard to deny parents to right to opt their children out of these lessons. For example, Justice Kavanaugh — who pointed out that he is a lifelong resident of Montgomery County — stated that he was "a bit mystified how it came to this," noting that "Maryland was founded on religious liberty" and expressing surprise that the Board had decided that "this is the hill we're going to die on." Justice Alito similarly asked the Board's attorney, "[w]hat's the big deal" about allowing parents to opt their children out? Even Justice Kagan said she suspected there were "a lot of non-religious parents who weren't all that thrilled about this." (Unfortunately, however, she



ultimately sided with the rest of the liberal bloc.). By the end of the argument, it seemed clear that a strong majority of the Court was inclined to rule in the parents' favor, and this proved to be true when the written decision was issued last June.

Although no one can read the minds of the Board members as to what they actually hoped to achieve with the case, at the least, *Mahmoud* revealed how disconnected some public schools have become from the families they serve. As the educators who were DFI's clients pointed out in our amicus brief, allowing parents to opt their children out of a portion of a school curriculum is quite common in public education. This holds true for Montgomery County. *See, e.g.,* Montgomery County, MD Public Schools, A*nnual Notice for Directory Information and Student Privacy*, https://ww2.montgomeryschoolsmd.org/departments/forms/pdf/281-13.pdf (last visited Mar. 9, 2025).

The Board's intransigence is also noteworthy given that the opt-out requested by the plaintiff-parents was quite modest. The parents didn't challenge the curriculum itself or the mere presence of the books on classroom shelves or in the library. They did not seek to micromanage the curriculum in any way. But the Board wouldn't even give the parents the modest accommodation they sought.

Even the administrative burden on school staff that the Board complained was caused by the opt out process was largely self-inflicted. That large number of parents want to protect their children from controversial reading materials, creating more work for school staff, simply shows that the Board should never have tried to make the material part of the curriculum in the first place.

The First Amendment, and the Bill of Rights generally, exist to protect certain individual rights from a tyranny of the majority. As public schools increasingly encroach on aspects of a child's upbringing that are beyond the core curriculum of reading, writing, and mathematics, and that were previously left to parents, the importance of constitutional bulwarks like the First Amendment only increases. In *Mahmoud*, the Supreme Court wisely reinforced the Free Exercise bulwark.

At the same time, the voters of Montgomery County, as well as voters for school boards anywhere in the country, cannot allow themselves to be treated as if they are a captive audience. Some insight into the Board's mindset may come from the meaning of the term "woke" itself. The term is sometimes used to describe people who would rather silence their critics than listen to, or engage with, them. This obviously is not a good quality for elected representatives to possess, but it seems to be part of the explanation here. Voters should not accept it.

Teaching children the tolerance and respect for others that is required in a pluralistic, civil society like ours is different from indoctrinating them with novel ideologies that

run directly counter to their families' sincerely-held religious beliefs. *Mahmoud* shows that parents can and must speak up and take back their children's public schools, and that the First Amendment can assist them in doing so.

Thank you.

Chairman KILEY. Thanks very much. I will next recognize Dr. Rothschild for your testimony.

STATEMENT OF DR. ZALMAN ROTHSCHILD, ASSISTANT PROFESSOR OF LAW, YESHIVA UNIVERSITY, CARDOZO SCHOOL OF LAW, NEW YORK, NEW YORK

Mr. ROTHSCHILD. Chairman Kiley, Ranking Member Bonamici, members of the Committee, my name is Zalman Rothschild. I am an Assistant Professor of Law at Cardozo School of Law. I am also

an ordained rabbi and have a Ph.D. in Jewish Studies. Thank you for the opportunity to testify today.

This hearing concerns an issue that has generated intense public attention. In *Mahmoud v. Taylor*, the Supreme Court held that religious parents have a constitutional right to remove their children from public school instruction that conflicts with the religious values they seek to instill. The decision has been celebrated by many religious liberty advocates and by broader parental rights movements as it is being celebrated this very morning.

That celebration is misplaced. To understand why, it is necessary to situate Mahmoud within a longer constitutional tradition, one that has governed for nearly a century. That tradition did not deny the importance of parental authority or religious liberty, but it recognized the need for limiting principles. Mahmoud departs from that tradition even as it presents itself as continuing it.

I want to highlight just two decisions from that tradition: Barnett, decided in 1943, and Yoder, decided in 1972. Both are often invoked as victories for parental and religious rights in education. Both were far more limited.

In Barnett, the Court held that public schools could not compel Jehovah's Witness children or any children to salute the flag and recite the pledge of allegiance. Barnett drew a line between compelled affirmation and mere instruction. Schools could teach contested ideas. They just could not require students to profess them.

Second, the Court went out of its way to clarify that quote. "The issue, as we see it, does not turn on one's possession of particular religious views or the sincerity with which they are held." Religion supplied the plaintiff's motive, but the constitutional violation was compelled speech, not religious burden.

This distinction mattered immensely, because the injury was compelled speech, the remedy was to invalidate the policy across the board. Barnett did not create a system of individualized opt-outs.

Yoder was also limited. It exempted Amish parents from compulsory high school attendance, but only because enforcement threatened a cohesive religious community's very survival.

The Court stressed the collective nature of the risk. Compulsory schooling carried "a very real threat of undermining the Amish community and religious practice as they exist today." The best reading of Yoder is that it reflected a pluralistic compromise. It protected a community's mechanism of cultural and religious transmission, while still expressing concern about children's later ability to exit that community. It was not a general endorsement of parental opt-outs from public school instruction.

For 80 years, courts uniformly applied these distinctions. Parents could choose either public or private education. Students could not be compelled to affirm beliefs. Religious communities could—in rare circumstances involving threats to their survival—obtain narrow exemptions from high school compulsory education laws. Parents had no general right to opt out of public-school curriculum simply because it conflicted with their values.

This consensus, it should be noted, was not invented by progressive courts. It emerged from decisions often associated with constitutional conservatism.

Parental rights and religious liberty are part of America's constitutional history and for good reason. That tradition also embodies hard earned judgments about how those values must coexist with others, including child welfare, public education, and public health. Barnett and Yoder represent the best of our constitutional tradition, a careful balance among parental liberty, State authority, and children's welfare. They reflect wisdom about how to sustain religious pluralism without eviscerating public institutions.

Mahmoud upends that settlement while pretending to preserve it. The celebration of Mahmoud by religious liberty and parental rights advocates may prove short lived once the decision's logic is deployed by parents across the ideological spectrum, and once states lose the ability to ensure that all children receive basic education, health care, and protection.

There is a reason the constitutional consensus held for nearly a century. The Court seems to now be dismantling it without fully grappling with the wisdom it embodied or the problems its destruction may create. This deserves more careful consideration than it has received. Thank you. I look forward to your questions.

[The prepared statement of Mr. Rothschild follows:]

TESTIMONY OF:

Zalman Rothschild
Horn Family Distinguished Research Scholar in Law and Religion
Assistant Professor of Law
Benjamin N. Cardozo School of Law, Yeshiva University

BEFORE THE:

House Subcommittee on Early Childhood, Elementary, and Secondary Education of the House Committee on Education and Workforce

HEARING ON:

"Defending Faith and Families Against Government Overreach: *Mahmoud v. Taylor*"

February 10, 2026

2175 Rayburn House Office Building
Washington, DC

Chairman Kiley, Ranking Member Bonamici, and Members of the Committee:

Thank you for the opportunity to testify on the Supreme Court's recent decision in *Mahmoud v. Taylor*,[1] and its implications for parental rights and religious liberty.

This hearing concerns an issue that has generated intense public attention. In *Mahmoud*, the Supreme Court held that religious parents have a constitutional right to remove their children from public-school instruction that conflicts with the religious values they seek to instill. The decision has been celebrated by many religious liberty advocates and by broader parental-rights movements.

That celebration is misplaced.

To understand why, it is necessary to situate *Mahmoud* within a longer constitutional tradition, one that governed for nearly a century. That tradition did not deny the importance of parental authority or religious liberty. But it recognized the need for limiting principles. *Mahmoud* departs from that tradition, even as it presents itself as continuing it.

The starting point is *Pierce v. Society of Sisters* (1925), in which the Supreme Court held that private schools have a right to operate, giving parents a choice between public and private education.[2] But this was hardly a grand statement about parental sovereignty. "The child is not the mere creature of the State," the Court stated.[3] But neither, the Court was equally clear, is the child the mere creature of her parents. The state retained authority to require that all children receive education and to define what that education must include.[4] Parents could choose where their children were educated, but not whether to educate them or what qualified as adequate education.

The next major decisions were *West Virginia Board of Education v. Barnette* (1943) and *Wisconsin v. Yoder* (1972).[5] Both are often invoked today—as they were in *Mahmoud*—as victories for parental or religious rights in education. Both were far more limited.

Barnette is perhaps the First Amendment's most celebrated decision. It held that public schools could not compel Jehovah's Witness children—or any children—to salute the flag and recite the Pledge of Allegiance. But Justice Jackson's opinion made two crucial distinctions that controlled First Amendment jurisprudence for over eight decades.

First, *Barnette* drew a line between compelled affirmation and mere instruction. The state *could* "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire

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[1] Mahmoud v. Taylor, 606 U.S. 522 (2025).
[2] Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925).
[3] *Id.* at 535.
[4] *Id.* at 534 ("No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.").
[5] W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Wisconsin v. Yoder, 406 U.S. 205 (1972).

patriotism and love of country."[6] What it could not do was compel students "to declare a belief."[7] Schools could teach contested ideas; they just could not require students to profess them.

Second, Justice Jackson resolved the case under the Free Speech Clause, not the Free Exercise Clause. That was deliberate. The Court went out of its way to clarify that "the issue as we see it [does not] turn on one's possession of particular religious views or the sincerity with which they are held."[8] Religion supplied the plaintiffs' motive, but the constitutional violation was compelled speech, not religious burden. This distinction mattered immensely. Because the injury was compelled speech, the remedy was to invalidate the policy across the board.[9] *Barnette* did not create a system of individualized opt-outs. Indeed, Justice Jackson took pains not to frame the case around free exercise exemptions precisely because that would invite opt-out claims.[10]

Yoder was also narrow. It exempted Amish parents from compulsory high school attendance, but only because enforcement threatened a cohesive religious community's survival. The Court emphasized that what was at stake was "a highly successful social unit within our society,"[11] with a long history "as an identifiable religious sect"[12] and "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[13] The Court stressed the collective nature of the risk: Compulsory schooling carried "a very real threat of undermining the Amish community and religious practice as they exist today."[14] The decision protected an insular community's distinctive mechanism of transmitting its way of life when enforcement of the law threatened the community's very survival.

The best reading of *Yoder* is that it reflected a pluralist compromise. It protected a community's mechanism of cultural and religious transmission, while still expressing concern

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[6] *Barnette*, 319 U.S. 624, 631 (1943).
[7] *Id.*
[8] *Id.* at 634. As John Hart Ely explained, "the presence or absence of religious objections on the part of the complainants was entirely beside the point." *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L. J. 1205, 1322 n.363 (1970).
[9] *Barnette*, 319 U.S. at 635–36 (presenting the relevant question as whether the "power exists in the State to impose the flag salute discipline upon school children in general[,]" and answering that it does not). *See also* Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 280–81 (2000) (according to Justice Jackson, "the state was powerless to impose the requirement on anyone, whether that person objected to the flag salute or not").
[10] *Barnette*, 319 U.S. at 635–36 (distinguishing *Gobitis* by reframing the issue as compelled expression rather than religious exercise).
[11] *Id.* at 222.
[12] *Id.* at 235.
[13] *Id.* at 216.
[14] *Id.*

about children's later ability to exit that community.[15] It was not a general endorsement of parental opt-outs from public-school instruction.[16]

For eighty years, courts uniformly applied these distinctions. Parents could choose either public or private education. Students could not be compelled to affirm beliefs. And religious communities could, in rare circumstances involving threats to their survival, obtain narrow exemptions from high school compulsory education laws. But parents had no general right to opt-out of public-school curriculum simply because it conflicted with their values.[17] This consensus, it should be noted, was not invented by progressive courts. It emerged from decisions often associated with constitutional conservatism.[18]

My point is that this longstanding American constitutional settlement existed for a reason. The Supreme Court and lower courts were right to worry about the boundlessness of a parental right—religious or otherwise—that would constitutionalize parental preferences. Once a constitutional opt-out right exists, it is difficult to contain. If parents can remove children from instruction because it conflicts with their religious formation, why can't they refuse vaccination mandates for the same reason? And why not medical treatment requirements, child labor laws, and compulsory education itself?

That concern is not merely hypothetical.

Just months after deciding *Mahmoud*, the Supreme Court signaled how far its logic extends. In *Miller v. McDonald* (2025), the Court vacated a Second Circuit decision upholding New York's school vaccination requirements—and remanded for reconsideration "in light of *Mahmoud v. Taylor*."[19]

New York eliminated its religious exemption for school vaccinations following the worst measles outbreak in the United States in nearly three decades.[20] Close to a thousand cases were

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[15] *See* Zalman Rothschild, *The Right to Exit Religion*, 113 GEO. L.J. 1459, 1478 ("[W]hile Chief Justice Burger [in *Yoder*] underscored the value of preserving the distinctiveness of insular communities and stressed the inherently contextual nature of education, his opinion—and still more clearly those of Justices White and Douglas—also emphasized the importance of ensuring that the children of such communities are not rendered incapable of exiting them.").

[16] Critically, *Yoder* distinguished itself from *Prince v. Massachusetts*, decided just months after *Barnette*. 321 U.S. 158 (1944). In *Prince*, the Court upheld a child-labor law against a Jehovah's Witness guardian, observing that the state's authority over children's welfare "reaches beyond the scope of its authority over adults." *Id.* at 170. The Court emphasized that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease." *Id.* at 166–67. *Yoder* itself noted that its holding did not extend to cases where "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated." *Yoder*, 406 U.S. at 230.

[17] *See, e.g.*, Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1063, 1067 (6th Cir. 1987); Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 534 (1st Cir. 1995); Parker v. Hurley, 514 F.3d 87, 102–03 (1st Cir. 2008).

[18] For example, *Pierce v. Society of Sisters* was decided by Justice McReynolds, 268 U.S. 510 (1925); *Board of Education v. Barnette* by Justice Jackson, 319 U.S. 624 (1943); *Wisconsin v. Yoder* by Justice Burger, 406 U.S. 205 (1972); and *Employment Division v. Smith* by Justice Scalia, 494 U.S. 872 (1990).

[19] Miller v. McDonald, No. 25-133, 2025 WL 3506969 (U.S. Dec. 8, 2025).

[20] Madeleine Patel et al., *National Update on Measles Cases and Outbreaks—United States, January 1–October 1, 2019*, 68 MORBIDITY & MORTALITY WKLY. REP. 893 (2019) ("During January 1–October 1, 2019, a total of 1,249

confirmed in New York alone, concentrated in communities where vaccination rates had fallen dangerously low.[21] Dozens were hospitalized.[22] Twenty were admitted to intensive care.[23] The outbreak threatened the nation's measles elimination status.[24] The state legislature responded by repealing its religious exemption—the primary driver of declining vaccination rates.

Beginning with *Jacobson v. Massachusetts* in 1905, vaccination mandates were treated as a paradigmatic exercise of state power over which religious objections had no constitutional purchase.[25] For over a century, every court to consider a free exercise challenge to a vaccine mandate rejected it.[26] Does *Mahmoud* now mean the Constitution is in fact a "suicide pact"[27] and states cannot enforce laws designed to keep children—and society around them—safe?

And what about compulsory education itself?

Consider my own community. I grew up in a Hasidic community in Brooklyn where schools provide virtually no secular education—no math, no science, no English literacy beyond the most rudimentary level.[28] The results are measurable: recent data show that poverty rates in Hasidic communities in New York are 70%.[29] While many factors contribute to poverty, educational deprivation plays a significant role, leaving community members unable to access the broader economy.[30]

If *Mahmoud*'s logic extends to compulsory education itself—and the remand in *Miller* suggests it might—what happens when Hasidic parents claim a constitutional right to refuse

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measles cases and 22 measles outbreaks were reported in the United States. This represents the most U.S. cases reported in a single year since 1992[.]").

[21] Sharon Otterman, *New York Confronts Its Worst Measles Outbreak in Decades*, N.Y. TIMES (Jan. 17, 2019), https://www.nytimes.com/2019/01/17/nyregion/measles-outbreak-jews-nyc.html ("[H]ealth officials discovered that some religious schools, or yeshivas, in ultra-Orthodox communities in Rockland County had vaccination rates as low as 60 percent, far below the state average of 92.5 percent.").

[22] *See* Jane R Zucker *et al.*, *Consequences of Undervaccination — Measles Outbreak, New York City, 2018–2019*, 382 NEW ENG. J. MED. 1009, 1012 (2020) (of the 649 confirmed cases, "49 patients (7.6%) . . . were hospitalized").

[23] *Id.* at 1009 (among the hospitalized, "20 (40.8%) were admitted to an intensive care unit").

[24] *Id.* ("Measles was declared eliminated in the United States in 2000.").

[25] 197 U.S. 11 (1905).

[26] *See* Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J.F. 1098, 1108–09 (2022).

[27] Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

[28] *See* Rothschild, *The Right to Exit Religion*, *supra* note 15, at 1483–84.

[29] *See* UJA-FEDERATION OF N.Y., 2023 COMMUNITY STUDY, POPULATION HIGHLIGHTS: NONDENOMINATIONAL JEWS (2023) ("70% of Hasidic households . . . [are] poor or near poor"; 50% are poor and the remainder are near poor). This marks an increase in the poverty rate for Hasidic households since 2011. *See* UJA-FEDERATION OF N.Y., JEWISH COMMUNITY STUDY OF NEW YORK: 2011 COMPREHENSIVE REPORT 220 (2012) ("Hasidim have high rates of poverty: 43% are poor and another 16% are near poor, with poverty defined as having a household income below 150% of the federal poverty guideline, and near poverty defined as having a household income below 250% of the guideline."); *id.* at 83 (". . . for a three-person household, such as a married couple with a child, $27,465 or less qualifies as poor"); *id.* at 86 ("Examples of near-poor households: a (non-senior) single-person household earning between $16,742 and $27,903; a family of three, such as a single mother with two children, earning between $27,465 and $45,775[.]").

[30] *See* U.S. BUREAU OF LAB. STAT., EDUCATION PAYS, 2024 (2025), https://www.bls.gov/careeroutlook/2025/data-on-display/education-pays.htm ("As workers' educational attainment rises, their unemployment rates decrease and earnings increase.").

basic mathematics or English for their children? If the principle is that the state may not "substantially interfere" with parents' religious child-rearing, it is hard to see where it stops.

Finally, it is worth mentioning that religious claims are not the exclusive province of social conservatives. If the principle is that the state may not substantially interfere with parents' efforts to raise children in their faith, that principle must be available across ideological lines.

What happens when progressive religious parents claim, on religious grounds, that their child must be addressed with preferred pronouns? That their teenager's reproductive choices, including access to abortion in states where it is otherwise prohibited, must be respected as a matter of religious freedom? Would the same principle apply when religious parents challenge Ten Commandments displays now being mandated in some state classrooms?[31]

If the doctrine is truly about parental authority over children's religious formation, it cannot be confined to objections from the right. The Court's decision in *Mahmoud* suggests it has not thought through these implications—or perhaps does not care to.

Parental rights and religious liberty are part of America's constitutional history, and for good reason. But that tradition also embodies hard-earned judgments about how those values must coexist with others, including child welfare, public education, and public health. *Pierce*, *Barnette*, and *Yoder* represent the best of our constitutional tradition: a careful balance among parental liberty, state authority, and children's welfare. They reflect wisdom about how to sustain religious pluralism without eviscerating public institutions.

Mahmoud upends that settlement while pretending to preserve it. The celebration of *Mahmoud* by religious liberty and parental rights advocates may prove short-lived once the decision's logic is deployed by parents across the ideological spectrum, and once states lose the ability to ensure that all children receive basic education, healthcare, and protection.

There is a reason the constitutional consensus held for nearly a century. The Court seems to now be dismantling it without fully grappling with the wisdom it embodied or the problems its destruction may create. This deserves more careful consideration than it has received.

Thank you. I look forward to your questions.

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[31] *See* Stinson v. Fayetteville Sch. Dist. No. 1, 798 F. Supp. 3d 931, 939 (W.D. Ark. 2025) ("Plaintiffs seek a permanent injunction of the enforcement of Act 573 and a judicial declaration that mandating the display of the Ten Commandments in every public elementary- and secondary-school classroom and library in Arkansas violates the Establishment Clause and Free Exercise Clause of the First Amendment to the United States Constitution."). *See also* Roake v. Brumley, 756 F.Supp.3d 93 (M.D. La. 2024), *aff'd* 141 F.4th 614 (5th Cir. 2025); Nathan v. Alamo Heights Indep. Sch. Dist., No. SA-25-CV-00756-FB, 795 F.Supp.3d 910 (W.D. Tex. 2025); Ringer v. Comal Ind. Sch. Dist., No. SA-25-CV-1181-OLG, 2025 WL 3227708 (W.D. Tex. Nov. 18, 2025); Ashby v. Schertz-Cibolo-Universal City Ind. Sch. Dist., No. 25-CV-01613 (W.D. Tex. filed Dec. 2, 2025) (class action).

Chairman KILEY. Thank you very much. I will last recognize Ms. Parshall Perry for your testimony.

STATEMENT OF SARAH PARSHALL PERRY, VICE PRESIDENT AND LEGAL FELLOW, DEFENDING EDUCATION, ARLINGTON, VIRGINIA

Ms. PARSHALL PERRY. Chairman Kiley, Ranking Member Bonamici and distinguished members of the Subcommittee, good morning. As a legal scholar, a policy analyst and a mother, the issue we are here today to discuss is near to my heart and I commend the Committee for holding this hearing.

Mahmoud was not simply an extraordinary case because of its well-reasoned holding and sound jurisprudence. It was extraordinary insofar as the petitioner's challenges were necessary at all, that their yearslong efforts to opt their children out of questionable material pursuant to their free exercise rights even required the Supreme Court's deliberation is a grave condemnation on the State of American education writ large.

Rather than orienting public classrooms toward the urgent task of reversing the Nation's flagging NAPE scores, indicating that only 22 percent of our high school seniors are numerate and only 35 percent are literate, most schools seem content instead to educate for activism, social Justice and queer propaganda.

Consider a few of our unearthed examples. In Lexington, Massachusetts, kindergarten students are subjected to DEI curriculum that includes instruction on changing their bodies to fit their gender identity. In South Burlington, Vermont, the elementary school curriculum directs students to become active antiracists with resources from the groups reading is resistance and woke kindergarten. In Los Angeles, California, they offer a queer all year school calendar, providing teachers and students with new LGBTQ resources every month like Reading the Rainbow, a guide to literacy through a queer lens. Wauwatosa, Wisconsin Public Schools have instituted sex ed curriculum that teaches children as young as five about gender identity, and eliminates the word

"Men" and "women" from the kindergarten lexicon.

In Seattle, Washington, teachers are instructed to hide students' gender identity from their parents, making it more than 1,200 school districts now that we have identified with similar deceptive policies. Post Mahmoud, it also refuses to allow optouts from queer themed curriculum for religious parents and has solicited supplies for a community health locker project, including chest binders, nipple guards and tuck friendly underwear.

Our organization has tracked thousands of incidents like these. They evidence the astonishing misconception under which many American schools operate that the child is the mere creature of the State. The Supreme Court, however, has held precisely the opposite more than 100 years ago in *Pierce v. Society of Sisters*, when it struck down Oregon's compulsory public education law.

20 years later, it reinforced Pierce in *Prince v. Massachusetts*, holding that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State cannot supply or hinder. Again in *Wisconsin v. Yoder*, the Court hued closely to precedent, deter-

mining that a parent's interest in the free exercise of religion outweighed the state's interest in compelling school attendance beyond eighth grade.

Mahmoud was the capstone in the Court's parental rights and religious liberty canon, reinforcing the pre-political, natural and ancient right of a parent to direct their child's upbringing. The statist notion that children belong to all of us, that schools not to parents know better, is both intractable and persistent. Despite Mahmoud's unequivocal edict then, the battle for parental primacy is only just beginning. Thank you, and I welcome your questions.

[The prepared statement of Ms. Parshall Perry follows:]

"Protecting the Primacy of Parental Religious Liberty Rights:

a Post-Mahmoud Analysis"

Testimony Before

House Committee on Education and Workforce

Subcommittee on

Early Childhood, Elementary, and Secondary Education

Chairman Kevin Kiley

United States House of Representatives

February 10, 2026

Sarah Parshall Perry

Vice President and Legal Fellow, Defending Education

Statement for the Record

Chairman Kiley, Ranking Member Bonamici, and distinguished Members of the subcommittee:

Good morning. My name is Sarah Parshall Perry, and I am Vice President and Senior Legal Fellow at Defending Education. As a legal scholar, a policy analyst, and a mother, the issue we're here today to discuss is near to my heart, and I commend the Committee for holding a hearing on such an important topic.

Mahmoud v. Taylor[1] wasn't simply an extraordinary case because of its well-reasoned holding and sound, originalist jurisprudence; it was extraordinary insofar as the Petitioner's challenges were necessary in the first place. That their years-long effort to opt their children out of questionable curriculum pursuant to their free exercise rights required the Supreme Court's deliberation at all is a grave condemnation of the state of American education writ large.

By a vote of six to three, the Supreme Court correctly decided in *Mahmoud* that the Montgomery County School Board's elimination of both notification and parental opt-out for certain LGBTQ themed instructional materials was an impermissible burden on the religious freedom of a multi-faith group of parents, and that they were entitled to injunctive relief during the pendency of the litigation.

The Court's holding was uncontroversial. But as might have been expected, the Supreme Court's opinion in *Mahmoud* elicited feverish condemnations from progressive commentators. Slate insisted that the "Supreme Court ruled some Americans have a constitutional right to insist on theocracy."[2] School Library Journal called the ruling "devastating."[3] Vox charged that the "Supreme Court just imposed a 'Don't Say Gay' regime on every public school in America."[4]

These mischaracterizations are indicative of the cultural maelstrom surrounding the operation of—and parental involvement in—modern American public education, where

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[1] *Mahmoud v. Taylor*, 606 U.S. 522 (2025).
[2] Heidi Li Feldman, *Supreme Court Rules Some Americans Have a Constitutional Right to Insist on Theocracy,* SLATE, https://slate.com/news-and-politics/2025/06/supreme-court-rules-constitutional-right-theocracy.html?pay=1770154251617&support_journalism=please, June 30, 2025.
[3] Kara Yorio, "In 'Devastating' Decision, Supreme Court Rules In Favor of Parents in Mahmoud v. Taylor, SCHL LIB. JOURNAL, https://www.schoollibraryjournal.com/story/In-Devastating-Decision-Supreme-Court-Rules-Favor-Parents-Mahmoud-Taylor, June 27, 2025.
[4] Ian Millhiser, "The Supreme Court just imposed a 'Don't Say Gay' regime on every public school in America," VOX, https://www.vox.com/scotus/417974/supreme-court-dont-say-gay-mahmoud-taylor-schools, June 27, 2025.

the heat of battle is most intensely felt at the intersection of parental rights, religious liberty, and gender orthodoxy.[5]

In 1972, the Supreme Court in *Wisconsin v. Yoder*[6]ruled that parents' interest in the free exercise of religion under the First Amendment outweighed the State's interest in compelling school attendance beyond the eighth grade. The *Mahmoud* majority, in an opinion penned by Justice Alito, criticized the Fourth Circuit Court of Appeals' impossibly narrow construing of *Wisconsin v. Yoder* when it assessed the parents' claims and considered how far their religious parental rights extended. The lower court's view was that nothing short of government compulsion to renounce or abandon one's religious faith would amount to a burden on a parent's right to raise their child in accordance with the traditions of their religion.

The Supreme Court sharply disagreed. Alito wrote that the Court had never confined *Yoder* to its facts, and there was no reason to conclude that the decision was "sui generis" or "tailored to [its] specific evidence."[7] And because the board's policies substantially interfered with the parents' ability to guide the religious development of their children, the appellate court had significantly erred.

The books and classroom instruction at issue were no pedestrian exercises in tolerance and diversity; rather, they were designed explicitly to "disrupt" the thinking of children between four and 11 years old on issues of sex and gender and directly geared at changing their perspectives on issues that, as recently as a decade or two ago, would have been beyond debate.

Alito identified these curricular characteristics, writing that the books at issue were "unmistakably normative"[8] and that the board had even encouraged teachers to accuse

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[5] So contentious is the notion of "parental rights," that in October 2021, U.S. Attorney General Merrick Garland released a memorandum calling on federal agencies to work with states on "strategies for addressing threats against school administrators, board members, teachers, and staff" in response to the increasing number of parents protesting the inclusion of, among other things, sexually graphic material in public schools. See *Memorandum for Director*, FEDERAL BUREAU OF INVESTIGATIONS, Dir. of the Exec. Office for U.S. Att'ys, Assistant Att'y Gen. of the Crim. Div., and U.S. Att'ys (Oct. 4, 2021), https://www.justice.gov/ag/file/1170061-0/dl?inline=. That year, a group of parents based in Michigan and Virginia filed a lawsuit against the Department of Justice over the memo, arguing that the intention of the guidance was to censor parents—especially those espousing conservative views. The appeal reached the U.S. Supreme Court, but the Court declined to hear the case on October 7, 2024. See also John Fritze, *Supreme Court Won't Hear Case from Parents Fighting Justice Department Memo on School Board Threats*, CNN (Oct. 7, 2024), https://www.msn.com/en-us/news/ other/supreme-court-won-t-hear-case-from-parents-fighting-justice-department-memo-on-school-board-threats/ar-AA1rPQnF?ocid=BingNewsSerp.

[6] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[7] *Mahmoud*, 606 U.S. at 557-558.

[8] *Id.* at 550.

children of being "hurtful" when they expressed an alternative view. That, Alito wrote, was the kind of "objective danger to the free exercise of religion that the First Amendment was designed to prevent."[9]

During oral arguments, on questioning from the justices about why the originally offered opt-out right had been revoked without explanation, Montgomery County School District's attorney Alan Schoenfeld answered that opt-outs were not administrable due to the sheer number of parents who had exercised that option. When Alito asked why the LGBTQ themed curriculum couldn't simply be presented during health class, where opt-out rights already existed, Schoenfeld argued that there was "no constitutional obligation" on the school's part to do so.[10]

An increasingly frustrated Alito then pressed Schoenfeld on the line between "exposure" and "coercion." He noted that the material "expresses the idea—subtlety—that this is a good thing," asking Schoenfeld why the Montgomery County Board of Education was running away from "what they clearly wanted to say"—that it had a very definite view on LGBTQ themes.[11] Schoenfeld responded that the message that "these things ought to be normalized and treated with respect" was merely incidental to the curriculum itself.[12]

The "normalization" of which Schoenfeld spoke, the "respect" urged by the Board for lifestyles, beliefs, and choices that are antithetical to most faith traditions, is precisely why the *Mahmoud* parents sought an opt-out from the start. Re-programming efforts camouflaged as the insistence on "tolerance" and "respect" for LGBTQ themes, policies, and choices are the detritus of the Supreme Court's ruling in *Obergefell v. Hodges*[13] that divined a constitutional right to same-sex marriage in the same illiberal and confounding way that the Court had divined a constitutional right to abortion in *Roe v. Wade*.

Issued nearly 10 years to the day before the Mahmoud decision, the *Obergefell* ruling assuaged Americans with the promise that they would still be able to live by their "decent and honorable beliefs" on the nature of marriage.[14] In his *Obergefell* majority opinion, Justice Kennedy promised that "those who adhere to religious doctrines, may

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[9] *Id.* at 546.
[10] HERITAGE REPORTING COMPANY, Oral Argument Official Transcript, *Mahmoud v. Taylor*, 24-297_2035.pdf (April 22, 2025).
[11] Id.
[12] Id.
[13] *Obergefell v. Hodges*, 576 U.S. 644 (2015).
[14] *Id.* at 672.

continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."[15]

Alito, in his prescient *Obergefell* dissent, decried the decision in part for its anticipated impact on the religiously faithful:

> *It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women... The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.*[16]

Indeed, those implications were exploited, leading to a flurry of Supreme Court controversies in the years post-*Obergefell*. In cases like *303 Creative v. Elenis*,[17] *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[18] and *Fulton v. City of Philadelphia*,[19] the battle between sexual orthodoxy and religious liberty engaged the nation's attention. And it did little to resolve the debate over whether the two worldviews could coexist peacefully in a pluralistic society without igniting future challenges to healthcare, employment, or education policies that would inevitably come to prominence. Ten years later, Alito's concerns proved true for parents in Montgomery County who wanted to exercise their right to shield their children from instruction at odds with the traditions of their faith.

In her Mahmoud dissent, Justice Sotomayor and her liberal colleagues did not see the opt-out requests as benign, characterizing the parents' position as wanting to insulate children from "every lesson plan or story time that might implicate a parents' religious beliefs."[20] She argued that to fail constitutional muster, the board's policies would have to coerce the children or parents "to give up or violate their religious beliefs," adding that "[m]anaging opt outs will impose [great] administrative burdens," and that exposure to "worldly influence" was required in the name of tolerance.[21]

In a common refrain from the ranks of liberal pedagogues, Sotomayor argued that the Court's holding "threatens the very essence of public education" because it "strikes at the core premise of public schools: that children may come together to learn not the

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[15] *Id.* at 679.
[16] *Id.* at 741 (Alito, J. dissenting).
[17] *303 Creative v. Elenis*, 600 U.S. 570 (2023).
[18] *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n.*, 584 U.S. 617 (2018).
[19] *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021).
[20] *Mahmoud*, 606 U.S. 593 (Sotomayor, J. dissenting).
[21] *Id.* at 604 (Sotomayor, J. dissenting).

teachings of a particular faith, but a range of concepts and views that reflect our entire society."[22]

But parents who send their children to public schools need not endure any instruction that falls short of direct compulsion or coercion and attempt to counteract that teaching at home. As Alito wrote, "the Free Exercise Clause is not so feeble." Indeed, even if the instruction amounted to nothing more than mere "exposure" to objectionable ideas—as the dissent characterized it—whether or not a curriculum or school requirement is characterized as "exposure" is not the touchstone for determining whether a violation of a parent's religious liberty rights exists, nor has it ever been. Justice Sotomayor and her fellow dissenters, together with many contemporary public educators, fail to appreciate the enduring nature of religion—and, as Justice Alito wrote, the Constitution's respect for it. As in *Yoder*, the Mahmoud Court determined that a compelled curriculum focused on contemporary society—no matter how useful—could still impermissibly contravene the religious tenets and practices of parent and child.

In our age, a disturbing number of schools have chosen not to attend to the urgent task of reversing the nation's flagging NAEP scores, which indicate only 22% of high school seniors are numerate, and only 35% are literate.[23] Instead, they have inclined themselves toward educating for activism or social justice, revising history, perpetuating an oppressed-oppressor matrix, or advancing queer propaganda.

Consider but a few examples:

1. Massachusetts: In Lexington Public Schools, Kindergarten students are subjected to DEI curriculum that includes instruction on changing one's body to fit one's gender identity.[24]

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[22] ID. at 629 (Sotomayor, J. dissenting).
[23] Ryan King, *US test scores hit damning new lows in math, reading since COVID school closures, 'nation's report card' shows*, NEW YORK POST, https://nypost.com/2025/09/09/us-news/us-test-scores-hit-new-low-in-math-reading-post-covid-nations-report-card-shows/, September 9, 2025. See also, "How did Students Perform in 2024?", THE NATION'S REPORT CARD, https://www.nationsreportcard.gov/.
[24] DEFENDING EDUCATION, *Kindergarten DEI Curriculum at Massachusetts school district features links to resources about 'Changing Bodies to Match Gender Identity' and political picture books*, https://defendinged.org/incidents/kindergarten-dei-curriculum-at-massachusetts-school-district-features-links-to-resources-about-changing-bodies-to-match-gender-identity-and-political-picture-books/ (Oct. 28, 2025).

2. Vermont: In South Burlington elementary school, the curriculum directs students to become "active anti-racists" with resources from 'Reading is Resistance' and 'Woke Kindergarten'.[25]

3. California: Los Angeles Unified School District promotes a "Queer All School Year" calendar to provide teachers and students with new LGBTQ resources every month, like "reading the rainbow" – a guide to literacy through a queer lens, and a gender triangle education guide.[26]

4. Wisconsin: Wauwatosa public schools have instituted a sex ed curriculum that teaches children as young as FIVE about gender identity, while eliminating the words "men" and "women" from the kindergarten lexicon.[27]

5. Washington: Seattle Public Schools instructs teachers to hide a school student's gender identity from that student's parents, making SPS one of the more than 1,200 school districts we've identified with similar policies of deception. SPS also refuses to honor parental opt-out requests from queer-themed curriculum, even post-Mahmoud, and has solicited supplies for a community health locker project for transitioning students that include chest binders, nipple guards and tuck-friendly underwear.[28]

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[25] DEFENDING EDUCATION, *South Burlington elementary school curriculum aims to inspire students to become "active anti-racists" with resources from 'Reading is Resistance' and 'Woke Kindergarten'. District staff required to participate in "white privilege" activity*, https://defendinged.org/incidents/south-burlington-elementary-school-curriculum-aims-to-inspire-students-to-become-active-anti-racists-with-resources-from-reading-is-resistance-and-woke-kindergarten-district-staff-require/ (June 8, 2022).

[26] DEFENDING EDUCATION, *Los Angeles Unified School District promotes "Queer All School Year" calendar to provide teachers and students with new LGBTQ resources every month*, https://defendinged.org/incidents/los-angeles-unified-school-district-promotes-queer-all-school-year-calendar-to-provide-teachers-and-students-with-new-lgbtq-resources-every-month/ (JUNE 30, 2022).

[27] DEFENDING EDUCATION, *Wauwatosa School District approves new sexual education curriculum that teaches children as young as kindergarten about gender identity and transgender issues; lessons avoid the words "men" and "women,"* https://defendinged.org/incidents/wauwatosa-school-district-approves-new-sexual-education-curriculum-that-teaches-children-as-young-as-kindergarten-about-gender-identity-and-transgender-issues-lessons-avoid-the-words-men-and-wo/ (Sept. 5, 2022).

[28] DEFENDING EDUCATION, *Seattle Public Schools utilize K-5 gender lessons that teach kindergartners about transitioning and pronouns,* https://defendinged.org/incidents/seattle-public-schools-utilize-k-5-gender-lessons-that-teach-kindergartners-about-transitioning-and-pronouns/ (April 21, 2022). See also, DEFENDING EDUCATION, *Seattle Public Schools requested "gender-affirming supplies" such as chest binders, Transtape, nipple guards, and tucking underwear from Seattle Children's Hospital for the district's "Community Health Lockers,* https://defendinged.org/incidents/seattle-public-schools-requested-from-seattle-childrens-hospital-gender-affirming-supplies-such-as-chest-binders-transtape-nipple-guards-and-tucking-underwear-for-district/ (Oct. 6, 2025); Brett Davis, *Defending Ed targets Seattle schools with federal privacy complaint over gender policies,* THE CENTER SQUARE, https://www.thecentersquare.com/washington/article_19975bc9-d3bf-4fe7-8a34-f5a3922bc561.html (Jan. 23, 2026).

Our organization has tracked thousands of incidents like these.[29] They evidence the astonishing misconception under which many American schools seem to be operating: That the child is the "mere creature of the state." For generations, however, the Supreme Court has determined precisely the opposite.[30]

The Court has long interpreted the right of parents to direct the religious upbringing and education of their children as a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment. In *Pierce v. Society of Sisters*,[31] the Court unanimously invalidated an Oregon statute that required all children between the ages of eight and sixteen to attend public schools, ruling that the law unreasonably interfered with parents' liberty to choose private or parochial education for their children. Justice McReynolds wrote that "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," and that "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."

This holding established that parents possess the authority to select schools that align with their religious beliefs and values, while still permitting reasonable state regulation of education. The principle was extended in *Yoder*,[32] where the Court exempted Amish parents from compulsory high-school attendance laws, holding that the Free Exercise Clause shielded their right to direct their children's religious formation and vocational training in accordance with Amish beliefs, as the state's interest in universal education could not override this parental liberty in the face of a sincere religious burden.

The Supreme Court's parental rights jurisprudence has never wavered in its consistent recognition that parental rights are pre-political, ancient, and fundamental.

The parental right is **pre-political** because it arises from the natural parent-child relationship itself—rooted in biology, moral duty, and the family's role as the primary unit of society—rather than being granted or created by the state. The state's obligation, by contrast, is merely to recognize and protect what already exists independently of political authority.

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[29] See, DEFENDING EDUCATION, *IndoctriNation Map*, https://defendinged.org/map/ (last updated Jan. 30, 2026).
[30] See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).
[31] *Id.*, at 534–535.
[32] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

The parental right is **ancient**, tracing back through centuries of common-law traditions (as reflected in Blackstone and earlier natural-law thinkers) and historical understandings of familial autonomy that long predate the Constitution.[33]

And the parental right is **fundamental** because the Supreme Court has consistently treated it as a core liberty interest entitled to stringent protection, one that limits the state's power to supplant parents in matters of moral, religious, and educational formation. As such, any substantial state interference triggers demanding constitutional scrutiny, reflecting the enduring recognition that parents bear the primary responsibility—and possess the corresponding authority—to shape their children's character and destiny.

Mahmoud was the capstone in the Court's parental rights and religious liberty canon. But the statist notion that schools, not parents, know best, is both intractable & persistent.

Evolving cultural norms now permit children to be seen as "community property," a perspective advanced publicly in 2013 during a controversial MSNBC interview with political scientist Melissa Harris-Perry, who noted: "[W]e have to break through our kind of private idea that kids belong to their parents or kids belong to their families and recognize that kids belong to whole communities."[34] In 2022, President Joe Biden echoed this sentiment, remarking at a "Teacher of the Year" ceremony that minor students are "all our children."[35]

A 2024 law review article went further, arguing that the "new parents rights" movement has resulted in unrestricted parental authority over a child's education and that these rights *allow parents to "indoctrinate" their children* with anti-egalitarian views that harm democracy. The author suggests that parental rights advocates should recognize the *collective role of the parent, educator, and state in a child's education* and embrace their shared decision-making authority to promote and defend the public good.[36] The

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[33] The Supreme Court itself has acknowledged, "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—*is perhaps the oldest of the fundamental liberty interests recognized by this Court*." *Troxel v. Granville*, 530 U.S. 57, 65 (2000)(emphasis added).

[34] MSNBC Ad: Kids Don't Belong to Their Parents, Kids Belong to Communities, REALCLEAR POLITICS (Apr. 8, 2013), https://www.realclearpolitics.com/video/2013/04/08/msnbc_ad_kids_dont_belong_to_their_parents_its_collective_responsibility.html.

[35] Alec Schemmel, "They're All Our Children": Biden Emboldens Teachers Amid Debate About Parental Rights, NAT'L DESK (updated Apr. 28, 2022, 3:27 PM), https://thenationaldesk.com/news/americas-news-now/theyre-all-our-children-biden-emboldens-teachers-amid-debate-about-parental-rights.

[36] See Kristine L. Bowman, *The New Parents' Rights Movement, Education, and Equality*, 91 U. CHI L. REV. 399 (2024)(emphasis added).

author continues that "*although prioritizing parents as decision-makers fosters viewpoint diversity in the short term by enabling families to more easily pass along their worldviews to their children, it also feeds polarization* because the state's interests in creating a shared civic identity, incorporating a range of worldviews, and creating citizens that perpetuate democracy, are not part of decisions about children's education (or if they are, it is coincidental that parents share these interests)."[37] She concludes that she is "concerned…[that] parents' rights supplant the rights of the state, professional educators, and arguably students."[38]

These are positions ahistorical, contrary to the natural order, and wholly ignorant of the Supreme Court's edits on the primacy of the parental right. Despite Mahmoud's unambiguous dictates, then, the battle for parental primacy has in many ways only just begun.

[37] *Id.* at 400 (emphasis added).
[38] *Id.* at 433.

Chairman KILEY. Thank you very much to all of our witnesses. Under Committee Rule 9, we will now question, question the witnesses under the 5-minute rule and I will first recognize the Chairman of the full Committee, Mr. Walberg for 5 minutes.

Mr. WALBERG. Thank you for your kindness on that, Mr. Chairman. Thank you to the witnesses for being here. As a parent who gave life to three children and as a grandparent who saw my kids

give life to seven grandchildren, I appreciate the fact that we are talking about this issue because frankly it involves a very survival of the family itself and the primacy of parental responsibility, let alone rights.

Not one school board member gave life to my three kids. In a time when we are about to see a rapid increase of lawsuits coming from transgendered young people, who have finally seen they were lied to, I'm hoping that Montgomery County Schools will receive significant lawsuits in the process. We need to remember as well that parents cannot opt out of paying local public school taxes. That is the difference Mr. Rothschild that we are talking about here. They cannot opt out of paying for something that they disagree with strongly.

Though they can leave the schools, they still pay the taxes. Mr. Baxter, thank you for your work at the Supreme Court to defend parents. You were doing the Lord's work, truly the designer's work. It has been over 6 months since Mahmoud was decided. Have states been adjusting their policies to align with, the Court's decision in Mahmoud? Or are states looking for ways to work around the Court's decision?

Mr. BAXTER. I think it is important to remember that school boards across the country have long had optout policies, including Montgomery County itself. It was only when this particular curriculum was introduced that the board withdrew the optouts. When Mr. Rothschild asked where will this all go? Well really this was an extreme outlier situation where and there are other schools doing this, pushing an extreme ideology and then trying to block the parents.

We are simply asking to maintain the status quo in Mahmoud, to allow parents to continue to make these decisions, especially on issues of gender and sexuality, where all 50 states require some kind of parental consent. There are some states that are continuing to buck the rule from the Court.

Mr. WALBERG. We will have to be watching that carefully. Thank you. Mr. Daugherty, Christian parents have drawn a lot of attention in this case. It was not just Christians who objected to what the Montgomery County Public Schools did. Can you talk about why parents from other faiths found the school system's policy so concerning?

Mr. DAUGHTERTY. As a practicing Catholic, I know that tradition best and I understand how it violates, you know, that tradition. Certainly as, as Mr. Baxter knows, his clients included Muslims, Eastern Orthodox. I think there were some Jewish parents involved. All the Abrahamic religions were represented, and I think, you know, just you look to, you know, scripture and things like that, that show that these types of lessons that were being taught by this storybook series violate that.

Again, as we talked about, some parents who were completely secular, not religious, they too objected, thinking that, you know, my child and this started like with PreK and then kindergarten up K to 5, fifth grade I should say, that no children should be exposed to this kind of stuff at that young age. The notion that the school board was trying to do so offended a lot of people religious and even non-religious.

Mr. WALBERG. Yes. They could see it went against science and even common sense. Ms. Parshall Perry, you mentioned in your testimony and I quote, that "Parental rights are pre-political, ancient and fundamentalist." I agree fully. Can you explain more what that means and how these three pillars are essential to preventing government tyranny?

Ms. PARSHALL PERRY. Absolutely. These are connections that are rooted in biology, the very nature of the parent-child relationships, which predates not only government but the Constitution itself. In fact, some of the earliest writings that we see are from the 13th century in Thomas Aquinas's Summa Theological, in which he wrote about the nature of the parent-child relationship and how it is fundamental.

It is that basic building block of all civilized societies, and it is something on which the Supreme Court first weighed in in 1923 in *Meyer v. Nebraska*, recognizing that this was a right that simply had to be found somewhere in the Constitution, because we knew it had always existed from time immemorial.

Mr. WALBERG. We lose our country if these fundamental principles are broken down, starting with the family and the parents in controlling their children for the best interests of our country. Thank you so much. I yield back, Mr. Chairman.

Chairman KILEY. I will now recognize the Ranking Member of the Full Committee, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Rothschild, is there anything in the Mahmoud decision that would allow a parent or group of parents to veto information given to other children other than their own?

Mr. ROTHSCHILD. Part of the problem with the decision in Mahmoud is how confusing it is. On the one hand, it presents itself as very narrow, an interpretation that was echoed by Mr. Baxter, and the Court goes on and on for about ten pages explaining how indoctrinating these picture books were, suggesting that that would be the limiting principle.

Then, somewhat cryptically, Justice Alito adds a paragraph at the very end saying, in any event, it does not matter. Essentially everything that I just said does not matter, and the only question is: does this interfere with the parents' ability to instill within their child their religious values or their religious beliefs? There is no end point to that.

Mr. SCOTT. Well, but they can opt their own children out. Can they veto the material being shown and presented to other children?

Mr. ROTHSCHILD. Ostensibly not, because the decision is framed around opt-outs specifically.

Mr. SCOTT. Okay. Now to opt out, do you have to have a legitimate claim of religious liberty, or can you opt out for values or opinions? Like "I don't want climate change presented" or not for religious purposes, but "I just don't think LGBTQ material ought to be presented. It's just age inappropriate." Do you have to have a legitimate claim of religious liberty?

Mr. ROTHSCHILD. Mahmoud is a religious liberty case, yes.

Mr. SCOTT. You just cannot opt out on opinion?

Mr. ROTHSCHILD. Right.

Mr. SCOTT. Alito had some other information in there about a threat to religion. It can be contrary to your religion. Does it have to be a threat to your religion?

Mr. ROTHSCHILD. Well, that language of a threat comes from Yoder, where the threat that the Court is articulating in Yoder is a threat to the survival of this distinctive religious community, the Amish community in Wisconsin. It somehow gets transported to opt-outs in public schools, even though Yoder is talking about opting out of compulsory education laws for 2 years, the ages of 14 to 16, under very specific circumstances.

The language of threat now is used in Mahmoud to suggest that so long as anything in the curriculum threatens the parents' ability to instill the parents' religious values in their children, that threat is constitutionally protected.

Mr. SCOTT. Okay. Is there any consideration being given in this decision to the harm that may be inflicted on other children when they see some of their classmates opting out—all of a sudden, it puts a different view on the material they may be given. Has any consideration been given to the effect of all these opt-outs on the other children?

Mr. ROTHSCHILD. The Court gives no consideration to that. It just dismisses it out of hand. One of the arguments that the board made was that there is inherent value to teaching inclusivity to children, and you can infer from that that it very much undermines the message of inclusivity when a group of students, you know, stand up and walk out.

It is like a walkout essentially, from that particular teaching. The Supreme Court was just extremely dismissive about that particular interest that the State had articulated.

Mr. SCOTT. Finally, if you have a complaint about this, what agency in the Federal Government would you seek guidance from? Would it be the Office of Civil Rights in the Department of Education?

Mr. ROTHSCHILD. I would assume so.

Mr. SCOTT. Are you aware of what is happening to that agency?

Mr. ROTHSCHILD. Somewhat.

Mr. SCOTT. Just being dismantled along with the rest of the Department?

Mr. ROTHSCHILD. Yes.

Mr. SCOTT. Thank you, Mr. Chairman. I yield back.

Chairman KILEY. I will recognize myself for 5 minutes. Dr. Rothschild, thank you for being here to testify today. I just want to get some clarity on your position. I mean you disagree with the Mahmoud decision clearly, right?

Mr. ROTHSCHILD. Yes.

Chairman KILEY. Nevertheless, it is the law of the land now. What is the what do you want the takeaway to be from your testimony today? What action would ideally you want to follow from it, given that Mahmoud is the law?

Mr. ROTHSCHILD. Well, to the extent that Congress is contemplating any legislation in the aftermath of Mahmoud, which itself would, I mean somewhat be unconstitutional unless it is authorized by the Supreme Court, in other words, unless the Supreme Court has interpreted that into the Constitution itself, but to the extent

that Congress is contemplating going further than that, my point is, is that Mahmoud should be celebrated less than it seems to be celebrated.

Chairman KILEY. I see. You kind of paint this picture of how Mahmoud has unsettled this, you know, settled body of law on this particular issue. It is true that even prior to Mahmoud, schools across districts across the country do allow opt-outs, right?

Mr. ROTHSCHILD. The key there is that it is the districts that allow the opt-outs.

Chairman KILEY. Right. The existence of opt-outs is not inherently destabilizing in some sense, is it?

Mr. ROTHSCHILD. Absolutely not. What is destabilizing is constitutionalizing opt-outs.

Chairman KILEY. Do you think opt-outs are appropriate in some circumstances?

Mr. ROTHSCHILD. Sure.

Chairman KILEY. Okay. You think that there is no constitutional basis for that?

Mr. ROTHSCHILD. There is no broad general constitutional basis for that. It should be a local decision made by the districts themselves.

Chairman KILEY. I see. For the parents in Montgomery County who had very strong objections to this content, what was their recourse in your view of the law?

Mr. ROTHSCHILD. They may not have had recourse; democracy would be their recourse.

Chairman KILEY. Democracy would be the recourse, okay. You do not think there are circumstances in which there might be rights that individuals hold, irrespective of what, you know, the overriding policy of their jurisdiction is?

Mr. ROTHSCHILD. Well, the question is not: are there rights? The question is: is this the right?

Chairman KILEY. Yes. I mean I think that you just made an important concession, which is that you would leave parents without a recourse no matter how vile, no matter how, you know, discriminatory the curriculum that presented in their classroom is. I think that is a serious problem, and I think that you paint this decision as somehow some sort of rupture in jurisprudence or destabilizing. Actually, I think what is different now is the type of content that is coming into the classrooms, and the fact that districts are refusing to provide optouts for that content. Mr. Baxter, do you think that is an appropriate characterization?

Mr. BAXTER. Yes. It is important to remember that American democracy is tempered by the Bill of Rights, which protects the rights of individuals to live consistent with their religious beliefs, their own speech. Every, you know, I had spoke to a Washington Post reporter who had a similar view to Dr. Rothschild, but he wanted to object his children on issues that were concerning to him.

Every parent has their own optouts, and it is important to realize that Mahmoud protects the rights of all parents.

Chairman KILEY. Yes. It is interesting. I thought he might say that the recourse is to go to private school, which is in fact, what, you know, various briefs and the lawyers for the county argued.

There is a problem with that as a legitimate recourse for folks as well, right?

Mr. BAXTER. Right. Most parents cannot realistically afford to send their children to private school or to homeschool them, as was the case of most of our clients.

Chairman KILEY. Yes. It is ironic because, you know, there is this often opposition to school choice that exists among, you know, certain segments of the education establishment. When it comes to those who have the means to enroll their child and to exercise that choice, they are all for it. Do you agree, Mr. Daugherty?

Mr. DAUGHERTY. Yes, no. I mean the notion that you have to choose between either raising your children in your faith or going to a public school, to me that that is an unconstitutional kind of choice. The notion that just well, people can easily send their children to private schools, I should say or homeschool them, to some extent that to me is reminiscent of, you know, let them eat cake.

I mean for example, just because, you know, you have these other ways of dealing with this, but those ways cost a lot of money, a lot of time, resources. To me, it is kind of almost let them eat cake kind of choice for parents who object to things like occurred in Montgomery County.

Chairman KILEY. Yes. What do you think, Ms. Parshall Perry, about this idea that we should just be satisfied with the idea that parents have no recourse no matter how, you know, vile or how controversial or how threatening to their fundamental values content in classrooms is?

Ms. PARSHALL PERRY. Well, that invokes the arguments that we heard in the colloquy with Justice Jackson during oral arguments in Mahmoud, when she herself talked about sending kids simply to private school. Private school is about 10 percent of American school kids. Nearly 90 percent of them go to public schools. It is a function of necessity for many parents. It was for my three children.

I have two sons who have disabilities, who specifically benefit from the civil rights laws, that are enforced through public education and will continue to be, regardless of the future of the Department of Education. They will be offloaded to other agencies per interagency agreement or congressional action. It is, I think, a false choice to say you must participate in a mandatory tax scheme, but you also have to give up your religious liberty rights.

Chairman KILEY. Thank you very much, and I actually appreciate your sort of honesty, Dr. Rothschild. I am just saying, there is no recourse rather than pretending that there is some recourse. I think that is an alarming thing for many parents who are concerned about what is going on in some of our schools.

With that, I will now recognize the Ranking Member for 5 minutes.

Ms. BONAMICI. Thank you, Chairman, and I want to followup on this conversation because I was here listening and Mr. Rothschild did not say there was no recourse. He said there was democracy. I remember years ago in Oregon, the school board had made the decision that the majority of the residents of the district did not support. They ran candidates and they changed the school board and they changed the decision. That is democracy. I do not want

to put words in Mr. Rothschild's mouth, but I do not want there to be a perception that there is no remedy, because there is.

Again Mr. Chairman, I wish we were here talking about the armed masked agents that are lurking outside of schools and the gun violence that students are experiencing. You know, we are here today because some people are claiming that their religious beliefs are threatened by some school lessons that may perhaps just acknowledge existence of gay people.

To me, it is concerning. I want students to learn critical thinking and know that their parents are involved in that, and I think that is really critical. We do have an expert here on the intersection of religious belief. I just want to ask you, Mr. Rothschild, how did your Hasidic background and your rabbinical training shape your experiences and influence your understanding about the debate concerning Mahmoud?

Mr. ROTHSCHILD. I grew up in a Hasidic community, which in many ways was a really beautiful upbringing, childhood, and education. It also is quite lacking, in particular with respect to basic secular education. It is no secret that the Hasidic community schools do not teach basics, including science, math, literacy.

Attending law school, I was particularly interested in understanding how it could be that society would allow so many children, over 100,000 of them in New York alone, to be deprived of what is considered a basic right for every child.

Ms. BONAMICI. Thank you. I appreciate that very much, and your insight and what you bring to the conversation. I want to talk a little bit about the limiting principles that you were discussing. I know Pierce because I am from Oregon. That was more than a century ago.

If you think about back in 1972 with the *Wisconsin v. Yoder*, where Yoder—where they addressed the free exercise of religion by the Amish and there was discussion about that today. Previous rulings had rejected the view that mere exposure to educational materials or ideas conflict with the students' or parents' religious beliefs and why that does not violate the free exercise clause.

How did Mahmoud change that? What are the limiting principles that we are going to need to be aware of?

Mr. ROTHSCHILD. On the one hand, Mahmoud seems to be suggesting there is a limiting principle, which is that it's fact dependent, case specific, that the courts would have to parse the curricula that is in dispute—in Mahmoud, it is picture books for three-to 5-year-olds, to determine whether that curricula is in any way indoctrinating. Like I said before, the Court also walks that back at the very end, just sort of sneaks that in there by saying that "in any event," those are the exact words, "none of this matters."

If none of this matters, the ostensible limiting principle, which itself is not all that much of a limiting principle, because indoctrination is not something that is objectively recognizable, one could argue that all of education is indoctrinating or none of it is indoctrinating. I do not know how anybody could really tell the difference.

Then the Court seems to walk it back by saying so long as there is an interference with the ability of parents to raise their children

according to their religious beliefs, that is constitutionally prohibited.

Ms. BONAMICI. If there has to be some sort of fact intensive analysis to determine if there is a threat and whether there is interference, how is that determined and by whom? Could a Christian Scientist say, "I don't want my child to learn anything about health or science" and opt out of that? I mean I just do not understand how this is going to work. Do you have any sense?

Mr. ROTHSCHILD. I do not have a sense of how this will work, but I could imagine a whole host of very problematic scenarios including, for example, say a teacher tries to teach the value of nondiscrimination against religion and specifies and says it is wrong to discriminate against Jews or against Muslims, and some parents have a problem with that because of their sincerely held religious beliefs because, you know, Chapter 16 of Mark says that those who are not baptized are condemned. I have no idea how in any sense this can be bounded.

Ms. BONAMICI. I share your concern and before concluding, Mr. Chairman, I want to note that we have heard in this Committee again and again about returning education to states. Here we are using this hearing as an attempt to dictate what can and cannot be taught in schools. We have heard countless times in the Committee that is not the Federal Government's role to interfere in local curriculum decisions.

We should not be using our time and resources to perpetuate a culture war that most American families do not want. I encourage my colleagues to select hearing topics that actually matter, like gun violence, trauma inflicted by ICE, and how dismantling the Department of Education affects schools and students. Mr. Chairman, I do ask unanimous consent to enter into the record a letter from Americans United for Separation of Church and State on Religion and Public Schools, as well as——

Chairman KILEY. Without objection.

Ms. BONAMICI. As well as a scholarly article by Richard Katskee and Ira Lupu called "Mahmoud v. Taylor: Cause or Effect of Disruptions in the Public Schools."

Chairman KILEY. Without objection.

[The letter and article of Ranking Member Bonamici follows:]

February 9, 2026

The Hon. Kevin Kiley
Chairman
Subcommittee on Early Childhood, Elementary, and Secondary Education
Committee on Education & Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

The Hon. Suzanne Bonamici
Ranking Member
Subcommittee on Early Childhood, Elementary, and Secondary Education
Committee on Education & Workforce
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Eddie Tabash, Esq.
Sam Weisman, Ph.D.

Dear Chairman Kiley and Ranking Member Bonamici:

Americans United for Separation of Church and State submits this letter for the hearing titled, "Defending Faith and Families Against Government Overreach: *Mahmoud v. Taylor*" to be held on February 10, 2026.

Founded in 1947, Americans United is a nonpartisan educational and advocacy organization dedicated to preserving the constitutional principle of church-state separation, which is the foundation of true religious freedom for all Americans. We fight to protect the right of individuals and religious communities to practice religion—or not—as they see fit without government interference, compulsion, support, or disparagement. We represent people of all faiths and none and have a network of more than 380,000 members and supporters across the country.

In our diverse society, America's public schools are a unifying factor among people of different religions and beliefs. One of the hallmarks of public education is that it is secular and accepts all students, regardless of what religion—if any—they follow. But Christian Nationalists and their extremist allies are working to erode the separation of church and state and impose their specific set of values on all Americans—especially in our public schools. When politicians and public schools promote religion or coerce students to participate in it, it weakens public schools and undermines students' and families' religious freedom.

Constitutional Protections for Religious Freedom in Public Schools

The First Amendment bars the government from promoting religion.[1] This "stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions,"

[1] *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *accord McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 875-76 (2005) (reaffirming, based on history of religious conflict in England and the American colonies, that "the government may not favor one religion over another, or religion over irreligion"). *See also Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n,* 605 U.S. 238, 247 (2025) ("The clearest command of the Establishment Clause is that government may not officially prefer one religious denomination over another.") (internal quotation marks omitted).

which "the Establishment Clause prohibits."[2] Thus, the government may not coerce anyone to participate in religion. Indeed, just three years ago, Justice Gorsuch explained that the government coercion of religion "was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."[3]

This guarantee is particularly important for public school students. The Supreme Court has long recognized "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[4] Because students are "impressionable, and their attendance is involuntary," courts must be "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."[5]

Students are especially vulnerable to the coercion (subtle or otherwise) and influence of their teachers and coaches. Teachers and coaches have tremendous authority over students, and vast power over students' experiences. They assign students' grades, decide whether they get playing time, write college recommendations, and can make or break their shot at an athletic scholarship. Students know that disappointing a teacher or coach, such as by refusing to join them in prayer, could jeopardize their school experience—or their future.

This tremendous potential for coercion has led the Supreme Court to repeatedly hold that public schools, school officials, and school employees are forbidden to sponsor, support, lead, initiate, participate in, arrange for, or encourage prayer involving students or otherwise to promote religion to students.[6] In *Lee v. Weisman*, for example, the Court held that a school violated the Establishment Clause's prohibition against religious coercion when a public school invited a clergy member to deliver prayers at a middle school graduation ceremony.[7] And in *Santa Fe Independent School District v. Doe*, the Court prohibited a public high school from offering student-led, student-initiated invocations at football games because "[t]hese invocations are authorized by a government policy and take place on government property at government-sponsored school-related events."[8]

The Constitution's prohibition against public school-sponsored religion is not limited to school-sponsored prayer. For example, nearly 80 years ago, in *McCollum v. Board of Education*, the Court invalidated a public school program that invited religious instructors to provide religious instruction

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[2] *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963).
[3] *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 537 (2022).
[4] *Lee v. Weisman*, 505 U.S. 577, 592 (1992).
[5] *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).
[6] *See, e.g.*, *Lee*, 505 U.S. at 587, 592 (principal prohibited from allowing clergy to give prayer at graduation); *Schempp*, 374 U.S. at 222-26 (school officials violated Establishment Clause by leading students in recitation of Bible verses and the Lord's Prayer at beginning of school day); *Engel v. Vitale*, 370 U.S. 421, 430-33 (1962) (school officials forbidden to lead students in classroom prayer at beginning of school day).
[7] 505 U.S. at 587.
[8] 530 U.S. 290, 302 (2000). Federal courts have repeatedly prohibited student-delivered prayers at school events. *See, e.g.*, *Borden v. Sch. Dist.*, 523 F.3d 153, 176-78 (3d Cir. 2008) (team meals); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983-84 (9th Cir. 2003) (graduation); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1102-04 (9th Cir. 2000) (graduation); *ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1479-80, 1487 (3d Cir. 1996) (en banc) (graduation); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279-80 (5th Cir. 1996) (assemblies, sporting events, and other school events); *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 761-62 (9th Cir. 1981) (assemblies); *Skarin v. Woodbine Cmty. Sch. Dist.*, 204 F.Supp.2d 1195, 1198 (S.D. Iowa 2002) (graduation).

in classrooms during the school day.[9] The Court explained that the Establishment Clause prohibits using a "tax-supported school system in aid of religious instruction."[10] The Court also struck down a law requiring public schools to post the Ten Commandments in every classroom, explaining its only effect would be to "induce schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments," which is barred by the Establishment Clause.[11] In order to protect against school sponsored religion, federal courts have also struck down displays of religious items[12] and distribution of religious texts[13] in schools.

The United States is home to more than 2,000 religious groups, traditions, denominations, and sects.[14] This diversity is one of our nation's greatest assets. That's why it is the government—and especially our public schools—may not promote religion.

Threats to Religious Freedom in the Public Education Setting from Policymakers

In the past few years, there has been an increase in threats to religious freedom in public schools through harmful state legislation and policies.

Religious Public Charter Schools
A hallmark of our public schools, including public charter schools, is that they are open to all students and do not teach religion or require students to pray.

Yet in 2023, the Oklahoma Statewide Virtual Charter School Board approved the nation's first religious public charter school, St. Isidore of Seville Catholic Virtual School. The school, which would have been controlled by the Catholic Archdiocese of Oklahoma City and the Diocese of Tulsa, demanded the right to receive taxpayer funding to operate as a public school while simultaneously operating "as a Catholic School," integrating religious teaching into every aspect of the school. St. Isidore's policies and practices would have discriminated against students, families, and employees on the basis of the school's religious beliefs.

The Constitution ensures that public schools do not teach religious curriculum. This protects the religious freedom of public school students, their families, and taxpayers by ensuring that public-school students are not forced into religious instruction and public funds are not used to pay for religious education. Public charter schools, just like any other public schools, must abide by the Constitution.

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[9] 333 U.S. 203 (1948).
[10] *Id.* at 204-05.
[11] *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam).
[12] *See, e.g., Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 965 (9th Cir. 2011), cert. denied, 566 U.S. 906 (2012) (public school teacher could not display religious posters on classroom bulletin board); *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 690 (4th Cir. 2007) (public school teacher could not display various religiously themed materials in classroom); *Roberts v. Madigan*, 921 F.2d 1047, 1057-58 (10th Cir. 1990) (public school teacher could not display Bible on desk during class).
[13] *See e.g., Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 279-81 (3d Cir. 2003) (upholding school officials' refusal to allow elementary school student to hand out pencils labeled "Jesus [Loves] The Little Children" and candy with religious messages attached during class hours); *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1167 (7th Cir. 1993) (enjoining Bible distributions in public school classrooms because "children are a captive audience" and "they are most assuredly not free to get up and leave").
[14] J. Gordon Melton, *Melton's Encyclopedia of American Religions* 1 (8th ed. 2009).

There were two separate lawsuits challenging the Charter School Board's action—one brought by faith leaders, public school parents, and public education advocates[15] and one brought by Republican Oklahoma Attorney General Gentner Drummond. The Oklahoma Supreme Court decisively ruled that St. Isidore violated the Oklahoma Constitution, state law, and the federal Establishment Clause, explaining that "St. Isidore's educational philosophy is to establish and operate the school as a Catholic school. Under both state and federal law, the State is not authorized to establish or fund St. Isidore."[16] In May 2025, the U.S. Supreme Court issued a *per curiam* opinion affirming the decision of the Oklahoma Supreme Court by an equally divided vote.[17]

Ten Commandments Displays

In recent years, state legislators across the country have introduced bills to post a version of the Ten Commandments—a religious text—in public schools. In 2025, Americans United tracked nearly 40 bills across 20 states. Many of these bills mandate a state-endorsed version of the text be displayed in every K-12 classroom in the state.

Displaying the Ten Commandments in public schools violates the religious freedom of public school students and their families, and violates the U.S. Constitution.[18] Doing so coerces students to read, reflect on, and obey a religious text.[19] Families should be able to trust that their public school will not impose religion on their children nor pressure them to adhere to a religious code—that's the safeguard provided by the Constitution.

Despite the avalanche of bills introduced, only Louisiana, Arkansas, and Texas have enacted legislation. These acts were immediately challenged in court by families who are Jewish, Baptist, Presbyterian, Unitarian Universalist, non-denominational Christian, interfaith, Hindu, humanist, agnostic, atheist, and nonreligious.[20] Whether they adhere to the Ten Commandments as part of their faith traditions or not, the families have acted to vindicate their religious freedom rights.

A unanimous Fifth Circuit panel and federal district courts in Arkansas and Texas declared all three laws "plainly unconstitutional."[21] Judge Timothy L. Brooks went even further in his opinion asking, "Why would Arkansas pass an obviously unconstitutional law? Most likely because the State is part of a coordinated strategy among several states to inject Christian religious doctrine into public-school classrooms."[22]

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[15] *OKPLAC, Inc. v. Statewide Virtual Charter Sch. Bd.*, No. CV-2023-1857 (D. Okla. Cty., filed Jul. 31, 2023). Americans United served as counsel in this case, along with the ACLU, Education Law Center, Freedom From Religion Foundation, and local counsel Benjamin H. Odom, John H. Sparks, Michael W. Ridgeway, and Lisa M. Mason of Odom & Sparks, and J. Douglas Mann.

[16] *Drummond v. Oklahoma Statewide Virtual Charter Sch. Bd.*, 558 P.3d 1 (2024).

[17] *Oklahoma Statewide Charter Sch. Bd. v. Drummond*, 605 U.S. 165 (2025).

[18] *Stone*, 449 U.S. at 41-42.

[19] *Id.* at 42.

[20] *See Roake v. Brumley*, 756 F.Supp.3d 93 (M.D. La. 2024), *aff'd* 141 F.4th 614 (5th Cir. 2025); *Nathan v. Alamo Heights Indep. Sch. Dist.*, 795 F.Supp.3d 910 (W.D. Tex. 2025); *Stinson v. Fayetteville Sch. Dist. No. 1*, 798 F.Supp.3d 931 (W.D. Ark. 2025); *Cribbs Ringer v. Comal Ind. Sch. Dist.*, No. 5:25-cv-01181-OLG, 2025 WL 3227708 (W.D. Tex. Nov. 18, 2025); *Ashby v. Schertz-Cibolo-Universal City Ind. Sch. Dist.*, No. 5:25-cv-01613 (W.D. Tex. filed on Dec. 2, 2025). Americans United represents these families along with the ACLU, state ACLU affiliates, the Freedom from Religion Foundation, and Simpson Thacher Bartlett LLP.

[21] *Roake*, 141 F.4th at 645; *see also Nathan*, 795 F.Supp.3d at 942; *Stinson*, 798 F.Supp.3d at 937.

[22] *Stinson*, 798 F.Supp.3d at 937.

Judge Brooks' rhetorical question makes clear that the real threat to religious liberty in public schools comes from efforts to use public schools to force religion on students.

Chaplains in Public Schools

Another way legislators have sought to promote religion in schools is by pushing laws to bring chaplains into public schools. Legislators disingenuously point to shortages of school counselors when championing the introduction of chaplains to public schools. But chaplains are clergy members who are trained to provide religious and spiritual care, not serve as replacements for qualified, licensed school counselors. Public schools are constitutionally prohibited from inviting religious leaders into schools to offer spiritual guidance and counseling.[23]

Nonetheless, Texas, Louisiana, and Florida have enacted school chaplain laws and, in 2025, twenty-four states introduced similar bills.

Chaplains themselves understand that they should not provide services in public schools. More than 300 chaplains signed an open letter explaining that these proposals "are harmful to our public schools and the students and families they serve."[24] They also write that as "trained chaplains, we strongly caution against the government assertion of authority for the spiritual development and formation of our public school children."[25]

Faith communities also oppose the idea of chaplains in public schools. Thirty-eight organizations that represent or serve religious denominations or are formally affiliated with religious communities explained that "proposals to place chaplains in our public schools are greatly flawed and threaten the well-being, education, and religious freedom of our students."[26] They recognize that having " a school chaplain of any faith would amount to government-sponsored religion and create an environment ripe for religious coercion and the indoctrination of students."[27]

Families can rely on clergy in their communities if and when they want religious counsel. Allowing chaplains—who aren't required to have any training—to provide critical services like mental health counseling will endanger students, waste educational resources, and create liability for public schools. Students need counselors, not chaplains.

Teacher- and School-Sponsored Prayer

Religious freedom promises that all of our children can attend public schools without being coerced by teachers or coaches to join in someone else's prayers.

That's why the Supreme Court has, for more than sixty years, repeatedly ruled that school-sponsored prayer is unconstitutional. No public school student should feel like they have to pray to play sports or get a part in the school play. And no student should ever be made to feel excluded—whether it's in the classroom or on the football field—because they don't share the same religious beliefs of their teachers or coaches.

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[23] *See McCollum*, 333 U.S. at 210-11.
[24] *Letter from 300+ Chaplains*, Baptist Joint Comm. for Religious Liberty (June 17, 2024).
[25] *Id.*
[26] *Faith Organizations' Open Letter Regarding Public School Chaplains*, Americans United (Mar. 6, 2024).
[27] *Id.*

The Court's 2022 decision in *Kennedy v. Bremerton School District* reaffirmed this vital constitutional safeguard, explaining that protecting against government coercion of religion was a key purpose of the First Amendment.[28] In *Kennedy*, the Supreme Court simply held that a public school had to allow a football coach to say a brief, quiet, private, and personal prayer. As the Court explained, the prayer was permissible because the coach "offered his prayers quietly while his students were otherwise occupied"[29] and during a time when "coaches were free to attend briefly to personal matters."[30] But prayer that is coercive—including where teachers pray with or in front of students—is still unconstitutional.

Yet, after *Kennedy* several state legislatures went well beyond the limits of that opinion. They introduced bills explicitly designed to permit teachers to pray in front of, with, or over students. Although the sponsors alleged these bills merely codified the *Kennedy* decision, they are blatant attempts to encourage teachers and other public school employees to pray in ways that violate the Constitution. In 2025, Texas enacted a law allowing schools to adopt a "period of prayer and reading of the Bible or other religious text" that would let teachers to pray with students.[31] In 2023, Idaho enacted a law that might have similar effects.[32]

These measures grossly misinterpret the *Kennedy* decision and therefore invite religious freedom violations and put schools at risk of litigation.[33]

Misinterpreting Student Religious Freedom Rights

The First Amendment not only protects students' rights to be free from religious coercion in public schools but also protects their rights to voluntarily pray and express religious viewpoints. Students may engage in prayer, so long as it is voluntary, student-initiated, student-led and does not coerce other students. They also have the right to read a religious text, including the Bible, whenever they have free time to read other texts.

At the same time, schools may maintain control of student expression in curricular activities[34] and are constitutionally required to prohibit certain types of religious expression that could result in coercion or disrupt the schools' education mission.[35] Schools also must prevent students from using the classroom and assignments to proselytize fellow students, even if the work meets the requirements of the assignment. There is a constitutionally significant difference between a student

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[28] *Kennedy*, 597 U.S. at 537.
[29] *Id.* at 513-14.
[30] *Id.* at 530.
[31] Tex. Educ. Code § 25.0823; *see also* Evie Blad, *What's Behind a Legislative Push for Prayer and Bible Study in Public Schools*, Ed Week (May 28, 2025).
[32] Idaho Code Ann. § 33-6601-03; *see also* Nik Nartowicz, *Dangerous School Prayer Bills Are Surfacing in State Legislatures*, Americans United (Apr. 4, 2023).
[33] On February 6, 2026, the Department of Education released "Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools." The guidance is misleading and dramatically misinterprets *Kennedy*, even claiming that teachers can pray with students, which has always been and remains unconstitutional.
[34] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-73 (1988).
[35] *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 279-81 (3d Cir. 2003); *see also Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 99 (3d Cir. 2009); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983-85 (9th Cir. 2003); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1101-04 (9th Cir. 2000); *Ingebretsen*, *v. Jackson Pub. Sch. Dist.*, 864 F.Supp. 1473, 1488 (S.D. Miss. 1994) ("If students are subjected to prayer in a 'captive audience' situation, the state, although not officially delivering the prayer, may be effectively coercing students who do not wish to hear or participate in a prayer to do so."), *aff'd* 88 F.3d 274 (5th Cir. 1996).

making a speech about Christianity's influence on world history versus speech asserting that all students must accept Jesus Christ in order to achieve salvation.

Under the guise of protecting public school students' religious expression, legislators have introduced bills, often called "Religious Viewpoint Antidiscrimination Acts" or "Student Religious Liberty Acts," that are designed to encourage students to pray and proselytize in public schools. Although they may correctly outline students' existing religious and free speech rights, these bills fail to include the necessary limits imposed by the Establishment Clause. Rather than creating stronger protections for students, they instead cause confusion and harm. School districts and teachers would face pressure to follow such a state law, but doing so could easily lead to unconstitutional student religious activities in public schools.

Teaching Religion, including the Bible, in Public Schools

Public schools may teach *about* religion, but they may not *teach* religion. To be sure, the Bible has considerable significance in Western literature, art, and history. But the Constitution requires that any lessons about religion or the Bible, including courses designed to focus specifically on the Bible, must be taught from a secular, non-devotional, noncoercive, and objective perspective that does not favor any religion.[36] Public schools cannot teach that the Bible is a true and literal historical record. Despite these clear constitutional requirements, public schools often fail, violating families' religious freedom.[37]

Yet state legislators and politicians continue to try to require public schools teach the Bible. For example, in 2024, then Oklahoma Superintendent of Public Instruction Ryan Walters issued a mandate that all the state's public schools incorporate the Bible into the curriculum in grades 5-12.[38] In 2025, Walters released a new set of academic standards for social studies that unconstitutionally present Bible stories as literal, historical facts; inaccurately proclaim the Bible and Christianity's influence on the founding of America and the country's laws; and favor Christianity over other faiths and beliefs.[39] Dozens of students, parents, public school teachers, and faith leaders have filed two lawsuits challenging Walters.[40]

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[36] *See, e.g.*, *Schempp*, 374 U.S. at 225; *Hall v. Bd. of Sch. Comm'rs*, 656 F.2d 999, 1002 (5th Cir. 1981); *Gibson v. Lee County Sch. Bd.*, 1 F.Supp.2d 1426, 1432 (M.D. Fla. 1998); *Herdahl v. Pontotoc County Sch. Dist.*, 933 F.Supp. 582, 592 (N.D. Miss. 1996); *Doe v. Human*, 725 F.Supp. 1503, 1508 (W.D. Ark. 1989), *aff'd mem.* 923 F.2d 857 (8th Cir. 1990); *Wiley v. Franklin*, 468 F.Supp. 133, 149-50 (E.D. Tenn. 1979).

[37] *See, e.g.*, *Doe v. Porter*, 370 F.3d 558, 562 (6th Cir. 2004) (prohibiting school district from offering a class "teach[ing] the Bible as religious truth"); *Hall*, 656 F.2d at 1002-03 (review of textbook "reveals a fundamentalist Christian approach to the study of the Bible devoid of any discussion of its literary qualities"); *Gibson*, 1 F.Supp.2d at 1434; *Herdahl*, 933 F.Supp. at 596-97 (prohibiting school district from offering classes teaching "the Bible not as a work of fiction, but as a historic record, i.e., as a record of what actually occurred in the past"); *Human*, 725 F.Supp. at 1506 (prohibiting school district from offering Bible classes that are "predominantly religious and devotional in nature"—even if other parts of the course are "predominantly secular"); *Crockett v. Sorenson*, 568 F.Supp. 1422 (W.D. Va. 1983).

[38] *See* *Memorandum from Ryan Walters State Superintendent of Public Instruction to Oklahoma Superintendents* (Jun. 27, 2024); *see also* Josh Wallace, *Ryan Walters: Bible Required to Be Taught in Oklahoma Classrooms*, KOCO News (Jun. 27, 2024).

[39] Murray Evans, *Controversial New Social Studies Academic Standards Are in Place in Oklahoma. Now What?*, The Oklahoman (Jul. 6, 2025).

[40] *Randall v. Fields*, 581 P.3d 109 (Okla. 2025); *Walke v. Fields*, No. MA-122592 (Okla. Nov. 24, 2025) (order dismissing lawsuit as moot because Walters' policies had been "resci[nded] and nullifi[ed].") Americans United was counsel in both cases, partnering in one or both with the Oklahoma Appleseed Center for Law & Justice, the American Civil Liberties Union, the American Civil Liberties Union of Oklahoma, and the Freedom From Religion Foundation.

The intent behind these efforts is not to teach about the Bible in an objective manner, but instead is to promote one specific type of Christianity. Supporters of these efforts often claim they need to put God "back" in public schools. Indeed, Walters said during an interview that the Supreme Court had "lo[st] their mind" by "driving God and prayer out of school," and his efforts will counter that, claiming that "[w]e're going to have prayer in school" and "[w]e're going to have the Bible in school in Oklahoma."[41]

Attempts to teach religion in public schools are not limited to the Bible. Despite long-standing Supreme Court precedent that teaching creationism is unconstitutional,[42] we continue to see efforts to replace the teaching of sound science with religious beliefs. In 2024, West Virginia enacted a law designed to pave the way for presentation in the classroom of a kind of creationism called "intelligent design." Like in West Virginia, these policies may not explicitly reference creationism, but often use euphemisms like "theory of how the universe came to exist," "scientific weaknesses," "full range of scientific views," and "evidence for and against," intended to misrepresent scientific knowledge and undermine students' education about evolution. That's why a federal court prohibited a school not only from referring to "intelligent design" creationism in science class, but also from "denigrating or disparaging the scientific theory of evolution."[43]

Release Time Programs
Some schools offer release time programs that allow public school students to leave school to receive religious instruction. The Supreme Court has ruled that these programs are constitutional—but only if there are important safeguards to ensure public schools do not get involved in religious instruction in any way.[44]

In recent years, legislators have introduced bills to *require* every school in their state to adopt a release time policy, regardless of the desire and capacity of the school, local board of education, and community. There have even been bills that would allow students to receive academic credit for attending religious classes.

Release time programs, particularly when offered for credit, create pressure for students to participate to fit in with their peers who attend. Students who belong to minority faiths that do not have institutions to offer religious courses and nonreligious students could feel ostracized by their classmates and teachers for not enrolling in a release time course.

How Public Schools Have Harmed the Religious Freedom of Students and Families

When schools promote religion or coerce students to engage in religious practices, children and their families—particularly those who are nonreligious or follow nonmajority faiths—face marginalization and harassment.[45]

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[41] Petition for Relief, *Randall*.
[42] *Edwards v. Aguillard*, 482 U.S. 578 (1987).
[43] *Kitzmiller v. Dover Area Sch. Dist.*, 400 F.Supp.2d 707, 721, 766 (M.D. Pa. 2005). Americans United served as co-counsel in this case.
[44] *Zorach v. Clauson*, 343 U.S. 306, 308-12 (1952) (classes must not take place on public school grounds, no public funds can be expended, and school officials cannot promote the program or coerce students).
[45] Around 75 percent of church-state separation violations reported to Americans United alone involve proselytizing to students, forcing them to pray, and other religious coercion in schools. *Praying for Common Sense: The Truth About Religion in Public Schools*, Americans United (Jan. 18, 2020).

Here are just a few examples of students' experiences:

- A Louisiana public school teacher proselytized and harassed a 6th grader who is Buddhist so badly that the student became physically sick every morning before school. The student was repeatedly mocked and disparaged because of his religious beliefs by his teacher, who coerced him into completing assignments and listening to lectures that promoted Christianity as truth, and at one point disparaged Buddhism as "stupid." When his parents attempted to resolve the issue, the superintendent told them that the solution was to either change the child's religion or transfer him to another school with "more Asians."[46]
- Native American students have faced numerous challenges to their religious freedom in public schools. School officials conducting routine lice checks cut the hair of two Lakota students in Nebraska, in violation of their Native American religious tradition and without the permission or consent of their parents.[47] This practice continued even after their parents raised concerns. A Texas public school suspended a 5-year-old boy because he wore his long hair in two braids, in accordance with his father's Native American religious tradition.[48]
- When an Ohio second grader did not attend a release time program, she was bullied, ostracized, and told she was going to hell by her classmates. She was called a "leftover" and had to report to study hall in the gym during the release time.[49]
- A South Carolina middle schooler, who is nonreligious, was forced to attend a middle school assembly that included a sermon, a performance by a Christian rapper, and a prayer with local church members where students were pressured to pledge themselves to Christ. He endured repeated bullying and punishment, even at the hands of his teachers and school administrators, for his beliefs. When he forgot to wear a belt as part of the school uniform, he had to copy an essay stating that he thanks God every day and would not forget his belt again. School officials told him and his family that their beliefs were wrong and that they should "get right with God" because they were not Christian.[50]
- In Florida, a school district spent a decade developing policies and practices encouraging school-sponsored prayer, proselytization of students, and school-sponsored religious services.[51] The handbook at one of the District's schools instructed teachers to "embrace every opportunity to inculcate, by precept and example, the practice of every Christian virtue."[52] Teachers and coaches regularly assigned students religiously oriented school work, led or invited students to lead pre-game prayers, preached to students using a bullhorn, and pressured students to join religious clubs.
- In another Louisiana case, parents and students challenged rampant violations of their religious freedoms, including faculty harassment of minority-religion and nonreligious students, forced memorization of prayer in class, and proselytization and encouragement of

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[46] *Lane v. Sabine Parish Sch. Bd.*, No. 5:14-cv-00100-EEF-KLH (W.D. La., filed Jan. 22, 2014) (order granting permanent injunction on Mar. 14, 2014). *See also* Scott Lane, *If You Want to Fit in at This Public School Just Become Christian*, ACLU (Jan. 22, 2014).
[47] *Johnson v. Cody-Kilgore Unified Sch. Dist.*, No. 4:21-cv-03103 (D. Neb., filed May 17, 2021) (consent decree filed on Oct. 4, 2023).
[48] *A.A. v. Needville Ind. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010).
[49] Megan Henry, *LifeWise Academy Draws Criticism from Some Ohio Parents, Support from Religious Organizations*, Ohio Cap. J. (Jan. 15, 2025).
[50] *Anderson v. Chesterfield Cnty. Sch. Dist.*, No. 4:11-cv-03300-RBH (D.S.C., filed Dec. 5, 2011) (order granting permanent injunction on Jan. 24, 2012). *See also* Jonathan Anderson, Second-Class Citizens in the Classroom: Promoting Religion in Public Schools Is Hurting Our Family, ACLU (Dec. 5, 2011).
[51] *Doe v. School Board for Santa Rosa County*, No. 3:08-cv-00361 (N.D. Fla., filed Aug. 27, 2008).
[52] Heather Weaver, *Fox Wildly Distorts ACLU Religious Liberty Case*, ACLU News (Aug. 19, 2019).

religious practice through school athletic programs. A teacher even told students they had to believe in Jesus to be "good people."[53]

- A head high school football coach prayed with his students, encouraged students to pray, invited local clergy to deliver religious messages to the team, hosted team dinners at local churches, used school social media to endorse religious student clubs, and attended religious club meetings to directly proselytize attending students. After he retired, the next head football coach engaged in almost the same behavior, taking it a step further by baptizing one of his players at a team meeting he held at a local church.[54]
- School officials too often host religious assemblies in elementary, middle, and high school with missionaries or clergy members to give them an opportunity to proselytize and pray with students. These assemblies have featured rappers, rock bands, weight lifters, martial artists, dazzling light shows, and more. Sometimes the assemblies are mandatory for students and sometimes students are threatened with in-school suspension if they don't attend. At the assemblies, students are pressured to pray, take devotional materials, attend local churches, and even join an altar call to the stage and be saved.[55]

Retaliation Against Students and Families Protecting their Religious Freedom Rights

Unfortunately, the fear of intimidation and physical harm is all too real for people who take action to protect their religious freedom. Students and families who challenged unconstitutional religious practices in their public schools have faced community backlash, direct hostility from local officials, and targeted acts of violence against them. This kind of retaliation not only undermines our constitutional rights, but also sends a chilling threat to anyone who might speak up against a violation of religious freedom.

Many of the following examples include graphic details of violence and threatened violence, references to the Holocaust, and abhorrent language. We include these details because we believe it is important to document the reality of what families and students who are not part of the majority faith experience when they seek to uphold their religious freedom rights.

Here are a few examples of what students and their families have faced:

- The Lane family, in Louisiana, faced severe harassment after challenging the prolific promotion of religion in their children's school. The family had to transfer one of their children to a different school 25 miles away, in an attempt to avoid the daily bullying and harassment the student faced because he was Buddhist. The children's mother received threatening calls and was accosted outside her home by three people wearing KKK-type hoods who called her a "f—ing n—r Asian-loving b—ch."[56]
- Students in New Jersey who complained about the high school football coach leading the team and other students in prayer during pre-game meals and before games were subjected to racist, antisemitic, misogynistic, and violent slurs. Jewish cheerleaders were

[53] *Does v. Bossier Parish Sch. Bd.*, No. 5:18-cv-00152 (W.D. La., filed Jul. 6, 2018); *see also* Liz Hayes, *Victory in Bossier: Americans United Secures Agreement to Protect Students' Religious Freedom in Louisiana School District*, Church & State Mag. (Feb. 15, 2019).
[54] *Praying for Common Sense*.
[55] *See, e.g., Praying for Common Sense*; *Anderson*, No. 4:11-cv-03300-RBH; complaints on file with Americans United.
[56] Heather Weaver, *Buddhist Student, Religious Liberty Prevail in Louisiana*, ACLU (Mar. 14, 2014) (obscenities and racial slur modified).

harassed and threatened. Fellow students sent anonymous antisemitic emails, wrote virulent chat room posts accusing these cheerleaders of lodging complaints, and made threats against the cheerleaders and any students who defended them. Comments included:

- "First they crucify Jesus, then they got [the coach] fired . . . Jews gotta learn to stop ruining everything cool."
- "The jew is wrong. [The coach] is right. Let us pray."
- "d**n jews . . . then you wonder why hitler did what he did back in the day."
- "MAYBE if [the coach] held a gun to the jjjjewwws head and was like b*tch get on ur knees and pray to jesus!! then that might be breaking the law . . . ehhh maybe not! . . . just suck it up if u don't fu*ing like whats going on in america then GO THE FU*K BACK TO YOUR COUNTRY AND STAY THERE AND PRAY . . ."
- "Heil Hitla!!! sieg heill."[57]

The cheerleaders also faced harassment and bullying—taunts, spitting, and items being thrown at them—from their fellow students at pep rallies and football games. They suffered severe stress and feared escalating attacks.[58]

- The Anderson family, from South Carolina, received hate comments online and were harassed at home after they challenged school-sponsored prayer, preaching, and religious activities in their school district.[59]
- Jessica Ahlquist required a police escort to and from school in Rhode Island after she challenged a prayer banner in her school.[60] Many in her community, including her state representative, publicly labeled her "an evil little thing."[61] She was sent a tweet that noted her home address was posted online, called her a "****ing worthless c***," and hoped she would get "curb stomped."[62] Months after she won her case, Ahlquist received a letter that said the police would not watch her forever, people knew where her father worked and what cars they owned, and "WE WILL GET YOU—LOOK OUT!" [63]
- Tammy Kitzmiller received a death threat that told her to "watch out for a bullet" after she challenged the unconstitutional teaching of creationism in her children's public school in Pennsylvania.[64] When Judge John E. Jones III ruled that the school had violated the Constitution, he received threats against him and his family, serious enough to warrant 24/7 U.S. Marshal protection.[65]
- After Louisiana families challenged the religion-infused practices of their public school, the school responded with a series of events and campaigns designed to further ostracize these students, including urging students to draw a blue line on their hands on a specific school day to show solidarity with the board—and, thereby, putting a clear target on any students not supporting school-sponsored religion.[66] Similarly, after Catholic and Latter Day

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[57] *Borden v. Sch. Dist.*, 523 F.3d 153, 184 (McKee, J., concurring) (obscenities as altered in source).
[58] Brief of Jo Ann Magistro & Alan Brodman at 10-12, *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022).
[59] Heather Weaver, *Don't B-SHOCked: Settlement Shows Public Schools Can't Proselytize*, ACLU (Jan. 24, 2012).
[60] Elisabeth Harrison, *R.I. Student Draws Ire Over School Prayer Challenge*, NPR (Feb. 14, 2012).
[61] *Jessica Ahlquist – Thomas Jefferson Youth Activist Award, Freedom From Religion Foundation*, Freedom From Religion Foundation (2012).
[62] Mark Schieldrop, *Ahlquist: Fight Over Mural, Despite Harassment, Threats, "Worth It,"* Patch (Jan. 12, 2012) (obscenities and epithets as altered in source).
[63] Mark Schieldrop, *Ahlquist Family Told to 'Get out of RI' in Threatening Letter*, Patch (Apr. 12, 2012).
[64] Ed Brayton, *Plaintiff Intimidation in Church/State Cases*, Talk To Action (Jan. 17, 2007).
[65] Michelle Simmons, *Independent From the Ground Up*, Dickinson (Nov. 5, 2014).
[66] *Victory In Bossier*.

Saints families challenged school-sponsored prayers at their Texas high school, "Administrat[ors], officials, counsellors, teachers, [and other] employees 'overtly or covertly [attempted] to ferret out the[ir] identities . . . by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping,'"[67]

- Lisa Herdahl, from Mississippi, received bomb threats and harassing phone calls after she challenged school prayer, eventually being driven to quit her job to stay home and protect her family.[68] She faced extreme ostracization, as nearly every house and business posted signs opposing her suit.[69] Herdahl's children were also bullied by their classmates, who called them "devil worshippers."[70]
- Joann Bell's home, in Oklahoma, was burned to the ground after she challenged school-sponsored prayers. She was also assaulted by a school employee who smashed her head against a car door multiple times, and school authorities celebrated the attack.[71] Her son's prize goats were "slashed and mutilated with a knife,"[72] and callers threatened to physically assault her children and rape her.[73]
- After Madalyn Murray O'Hair, from Maryland, challenged official prayer and Bible readings in public schools, her children were physically attacked. Her home was firebombed, and the fire department took a "particularly circuitous route" that took them forty minutes to respond.[74]
- Vashti McCollum, from Illinois received more than a thousand threats in the mail after she challenged a school program that offered religious instruction.[75] She was fired from her job and pelted with rotten produce, and the family cat was lynched.[76]

Conclusion

The Constitution protects the rights of students to attend public school without being pressured to participate in religious activities. Everything outlined above poses a real, ongoing threat to students' and families' religious freedom and full inclusion in their schools and communities. Many of these efforts, including religious charter schools, Ten Commandments displays, and school-sponsored prayer, violate the Constitution. Even those that could be constitutional in specific circumstances, such as teaching about the Bible and release time programs, are blatantly being pushed beyond their constitutional limits in order to unlawfully coerce students.

Using our public schools to promote a specific type of Christianity is also part of a broader attack on their role as a unifying, inclusive, and democratic force in our communities—and on public education more broadly. The same groups pushing the laws and policies outlined in these comments are also engaging in a dangerous campaign to undermine, defund, and replace public schools. They have created false controversies over books, curricula, and policies to sow distrust

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[67] *Santa Fe*, 168 F.3d 806, 809, n.1 (5th Cir. 1999), *aff'd* 530 U.S. 290.
[68] Gary Borg, *Judge Strikes Down School's Prayers*, Chi. Trib. (June 4, 1996).
[69] Nadine Strossen, *How Much God in the Public Schools*, 4 W. & Mary Bill Rts. J. 607, 614 (1995).
[70] Stephanie Saul, *A Lonely Battle in the Bible Belt: A Mother Fights to Halt Prayers at Miss. School*, Newsday (Mar. 13, 1995).
[71] Sandhya Bathija, *Hell in Little Axe: An Oklahoma Mom's Chilling Battle With Religious Bigotry*, Americans United (Nov. 25, 2008).
[72] *Id.*
[73] *See* Robert S. Alley, *Without a Prayer: Religious Expression in Public Schools* 107-8 (1996).
[74] Katie Koch, *Bypassing the Bible*, Harvard Gazette (Nov. 2, 2012).
[75] Vashti McCollum, *One Woman's Fight* 98 (rev. ed. 1961).
[76] Douglas Martin, *Vashti McCollum, 93, Who Brought Landmark Church-State Suit, Is Dead*, N.Y. Times (Aug. 26, 2006).

in our public schools, in order to push for radical changes to our education system, including the creation of universal private school vouchers and religious public charter schools. These efforts are all part of a plan to use the government to impose one narrow view of religion on all of our children and undermine the foundational principle of church-state separation.

Sadly, the harm of these efforts is not limited to threats to our Constitution, the law itself, or our public schools. These attacks on religious freedom ultimately harm children and families. When examining the real threats to religious freedom in public education, the Subcommittee must consider the ostracization, bullying, religious coercion, and even physical violence that students and families face when public schools are used as a platform to proselytize and promote a single set of religious beliefs—the very threats the First Amendment was designed to prevent. [77]

Sincerely,



Dena Sher
Associate Vice President, Public Policy

[77] The Founders, aware of the "anguish, hardship[,] bitter strife[,]" (*Engel*, 370 U.S., at 429) "turmoil, civil strife, and persecutions" caused by seeking "absolute political and religious supremacy," (*Everson v. Bd. of Educ.*, 330 U.S. 1, 8-9 (1947)) intended the First Amendment "to avoid that divisiveness based on religion that promotes social conflict." (*Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (quoting *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring)).



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Mahmoud v. Taylor: Cause or Effect of Disruptions in the Public Schools?

Richard B. Katskee & Ira C. Lupu

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Mahmoud v. Taylor: Cause or Effect of Disruptions in the Public Schools?

Richard B. Katskee & Ira C. Lupu*

Mahmoud v. Taylor[1] represents a startling departure from the Supreme Court's historic pattern of recognizing rights within public schools while maintaining respect for the schools' mission and authority. Beginning with *West Virginia Board of Education v. Barnette*,[2] and continuing through and beyond the School Prayer Cases of the early 1960s,[3] the Supreme Court has treated public schools as a significant locus of constitutional rights.[4] The Court has done so, however, with a sharp eye toward necessary limitations, lest concerns for the rights overwhelm the administration of our nation's system of public education. In *Barnette*, the Court recognized that the public schools could teach

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[1] 606 U.S. 522 (2025).

[2] 319 U.S. 624 (1943) (freedom of speech under the First Amendment protects students against being compelled to salute the American flag).

[3] Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

[4] For later decisions addressing freedom of speech by students in public schools, see *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) (freedom of speech of students in public school), *Goss v. Lopez*, 419 U.S. 565 (1975) (procedural safeguards in cases of suspensions from school), and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (searches and seizures of student property at school).

the value of patriotism, even if they could not demand recitation of the Pledge of Allegiance.[5] In *School District of Abington Township v. Schempp*,[6] the Court took pains to emphasize that the schools could teach about religion, including the study of the Bible as literature, even though they were prohibited from sponsoring worship or devotional readings.[7]

Mahmoud ignores this practice of principled reconciliation of the interests at play. The case involved a challenge by a group of parents to the inclusion of books that include LGBTQ+ characters in the English Language Arts curriculum for grades K–5 in the public schools of Montgomery County, Maryland. In holding that the Free Exercise Clause requires the Montgomery County Public Schools to give parents notice and the opportunity to opt their children out of readings to which the parents object on religious grounds, the Supreme Court has for the first time recognized a right that will significantly disrupt the schools' educational programs.

Mahmoud stretches, to a remarkable extent, the Court's 1972 decision in *Wisconsin v. Yoder*,[8] which held that the Free Exercise Clause requires a state to exempt members of the Amish community from compulsory-education laws once their children reach the age of 14. The analytical focus in *Yoder* was not the stand-alone rights of each of the parents. Instead, the Court's opinion carefully emphasized the character and lengthy history of the Amish community. In the decades since then, American courts have seen *Yoder* in that light and applied it narrowly.[9]

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[5] 319 U.S. at 631.

[6] 374 U.S. 203 (1963).

[7] *Id.* at 225 ("[T]he Bible is worthy of study [in public schools] for its literary and historic qualities.").

[8] 406 U.S. 205 (1972).

[9] For an analysis of *Yoder* as a decision about communal or associational rights, *see* B. Jessie Hill, *Discrimination,* Wisconsin v. Yoder*, and the Freedom of Association,* 60 ST. LOUIS UNIV. L.J. 695, 701–02 (2016).

Mahmoud suddenly revolutionized its significance. The case is thus the latest in an explosive series of free-exercise decisions that have altered the constitutional landscape in ways that ten years ago would have been unthinkable.[10]

In what follows, we explain the constitutional dynamics that produced *Mahmoud*, the case's substantive dimensions, and the ways that the Court's decision is likely to demand radical changes in both planning and administration of curricula for the nation's public schools.

Part I provides the doctrinal and historical backdrops to *Mahmoud*, which reflect the acute tension between a once-narrow understanding of *Wisconsin v. Yoder* and the post-*Obergefell* constitutional backlash against equality for LGBTQ+ people.

Part II addresses the substance of the *Mahmoud* opinion. In proclaiming a right of parents to insulate their children from teaching that "substantially interfere[s] with the[ir] religious development" or "threat[ens]" their "religious upbringing"[11] or the "religious beliefs and practices that the parents wish to instill,"[12] the Court invites curricular challenges and opt-out demands across a broad range of subjects, not just sex and gender. Most but not all the challenges will come from the right and be aimed at progressive developments in public education. Moreover,

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[10] These decisions include *Carson v. Makin*, 596 U.S. 767 (2022), *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), *Tandon v. Newsom*, 593 U.S. 61 (2021), *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), *Kennedy v. Bremerton School District*, 586 U.S. 1130 (2019), *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018). *See generally* Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *Reestablishing Religion*, 92 U. CHI. L. REV. 199 (2025); Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763 (2023).

[11] Mahmoud v. Taylor, 606 U.S. 522, 556, 568 (2025).

[12] *Id.* at 565.

despite the relative youth of the children in *Mahmoud* itself, the decision's principles of parental authority cannot be confined by the age of the students. *Mahmoud* will instead affect school operations from kindergarten through high-school graduation. It may also, perhaps counterintuitively, buttress some claims that once were considered the province of the Establishment Clause, though any effects on that score are uncertain.

Part III builds on these substantive insights to explore various ways that *Mahmoud* may affect the content of public schools' curricula. The principle vehicle for analysis is a new Regulation that the Montgomery County Public Schools ("MCPS") have adopted post-*Mahmoud* on "Curriculum Transparency and Requests to be Excused from Instruction."[13] As the MCPS Regulation reveals, school districts are now under immense pressure to design and implement protocols for parents to receive notice and opt their children out of readings to which the parents object on religious grounds. These policies will disrupt the process of public education,[14] and will in some cases alter its content considerably. In the wake of *Mahmoud*, education for life in a pluralistic democracy will suffer.

I. THE CONSTITUTIONAL BACKDROP TO *MAHMOUD V. TAYLOR*

A. The Rhetorical Strength and Tiny Ambit of *Yoder*

The status of *Yoder* in the law of religious freedom has long been a conundrum. In the decision's immediate wake, *Yoder* was

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[13] Montgomery Cnty. Pub. Sch., Curriculum Transparency and Requests to Be Excused from Instruction (July 2024), https://ww2.montgomeryschoolsmd.org/departments/policy/pdf/ifd-ra.pdf.

[14] Writing immediately after the decision in *Mahmoud*, Professor Michael Dorf of the Cornell Law School warned that "the opt out that the decision gives to parents [will be] a practical nightmare for school districts." Michael Dorf, *Justice Alito's Opinion in* Mahmoud v. Taylor *is Dangerously and Disingenuously Dishonest*, https://www.dorfonlaw.org/2025/06/justice-alitos-opinion-in-mahmoud-v.html.

the standout citation for the proposition that religious adherents are entitled to a constitutional exemption from general laws unless the state can show that denial of the exemption is necessary to accomplish "interests of the highest order."[15] That standard was so tilted against government, however, that courts endlessly worked around it.[16] In contexts other than the public schools, the Supreme Court itself refused time and again to apply the *Yoder* standard.[17] And in cases involving claims of right to educate children at home, lower courts typically distinguished *Yoder* by emphasizing its communitarian character, the age of the children, or both.[18] In early commentary on *Mahmoud*, therefore, several approving voices mentioned that the decision had rescued *Yoder* from the doctrinal dustbin.[19]

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[15] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[16] A highly respected account of this phenomenon appears in James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1413–1417 (1992); *see also* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 622–25 (9th Cir. 1988) (Noonan, J., dissenting).

[17] For a succinct account of these developments, *see* Ira C. Lupu, Hobby Lobby *and The Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 48–53 (2015).

[18] *See, e.g.*, Johnson v. Charles City Sch. Cmty. Bd. of Educ., 368 N.W.2d 74, 83-84 (Iowa 1985) (ruling that students may be released from public school to attend religious instruction off-campus); *see generally* Ira C. Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U. L. REV. 971 (1987). For examination of a context in which *Yoder's* communitarian concerns apply, *see* Zalman Rothschild, *Free Exercise's Outer Boundary: The Case of Hasidic Education*, 119 COLUM. L. REV. FORUM 200 (2019).

[19] *See, e.g.*, Asma Uddin, *When Inclusion Becomes Compulsion:* Mahmoud v. Taylor*, Pluralism, and Public Education*, https://www.scotusblog.com/2025/07/when-inclusion-becomes-compulsion-mahmoud-v-taylor-pluralism-and-public-education/ ("In *Mahmoud*, the Court used *Yoder* not as a relic but as a living precedent."); Mark Movsesian & John McGinnis, *Legal Spirits 068: Religion at the Court: October*

In pre-*Mahmoud* cases in which parents sought opt-outs from particular assignments, lower courts repeatedly held that exposure alone to ideas that compete with parents' religious convictions did not burden the parents' or students' exercise of religion. Accordingly, this kind of exposure did not trigger the *Yoder* standard. The germinal decision was *Mozert v. Hawkins County Board of Education*,[20] which involved an effort by fundamentalist Christian parents to have the public schools excuse their children from readings that touched on "seventeen categories" of instruction to which the parents objected, including evolution, secular humanism, "'futuristic supernaturalism,' pacifism, magic[,] and false views of death."[21]

Then, in 1990, the Supreme Court's controversial decision in *Employment Division v. Smith*[22] explicitly placed *Yoder* in a discrete category of cases in which the Free Exercise Clause operated in conjunction with other constitutional protections. For cases involving the Free Exercise Clause alone, *Smith* repudiated the religion-protective standard for which advocates had cited *Yoder* over the previous 18 years. After *Smith*, the Supreme Court and lower courts no longer had to write around *Yoder*. Instead, Justice Scalia's opinion for the Court in *Smith* bracketed and preserved *Yoder* as a decision involving "hybrid rights"—a combination of a right of parental control over a child's

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Term Recap, https://lawandreligionforum.org/2025/07/08/legal-spirits-068-religion-at-the-court-october-term-2024-recap (at 14:24–14:34: before *Mahmoud*, "*Yoder* had been a doctrinal outlier").

[20] 827 F.2d 1058 (6th Cir. 1987).

[21] *Id.* at 1062. For a significant commentary on the *Mozert* litigation, *see* Nomi Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993).

[22] 494 U.S. 872 (1990).

upbringing and a right of religious freedom.[23] Unsurprisingly, hybrid rights turned out to be a jurisprudential dead end.[24]

Smith thus left *Yoder* stranded on its own, rather tiny free-exercise island. Before *Mahmoud*, the category of cases presenting a cognizable burden on religious liberty in public schools was hardly bigger than *Yoder* itself. As an engine of adjudication, *Yoder* remained stalled for half a century.[25]

Despite *Yoder*'s failure to produce a meaningful body of law at any level of the judicial system, its invocation of a strict standard for religious freedom remained an icon for supporters of broad free-exercise rights. When the drafters of the Religious Freedom Restoration Act[26] sought to respond to *Smith* with a statutory override, *Yoder* represented a convenient symbol of free-exercise vigor. The first declared purpose of RFRA is to "restore the compelling interest test as set forth in *Sherbert v. Verner* and

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[23] *Id.* at 881-882 (analyzing *Yoder* as a case about free exercise coupled with parents' rights to control the education of their children).

[24] *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in the judgment) ("If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule . . . . But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all."); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990) ("How can claimants be entitled to greater relief under a 'hybrid' claim than they could attain under either of the components of the hybrid? One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in [*Smith*].").

[25] For a comparable analysis, see Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *The Structure of Religious Preference*, 139 HARV. L. REV. 211, 231–32 (2025).

[26] 42 U.S.C. § 2000bb.

Wisconsin v. Yoder and to guarantee its application in all cases where free exercise of religion is substantially burdened."[27]

Ultimately, however, the Supreme Court limited RFRA to applications of federal law.[28] Thus, even after RFRA reached full flower in *Burwell v. Hobby Lobby Stores*,[29] the public schools and their curricula, policies, and administration remained outside its ambit. As a symbol, *Yoder* stood astride RFRA. As an operative element in the law, it never advanced beyond protecting the Amish community.

More recently, in cases involving state and local law, the Justices have been engaged in an ongoing fight over the boundaries of the *Smith* standard. *Smith* applies only when laws are "generally applicable," and departures from general applicability, however trivial or illusory, have lately been viewed as discrimination against religion that triggers a virulent form of strict review.[30] In *Mahmoud*, however, this move played no role. Instead, *Yoder* provided all the legal grounding that the plaintiffs needed to argue in favor of notice and opt-out rights for religiously objectionable materials or instruction.[31]

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[27] *Id.* § 2000bb(b)(1). Sherbert v. Verner, 374 U.S. 398 (1963), involved a constitutionally mandated extension of what counted in an unemployment-compensation scheme as "good cause" to refuse "available suitable work." *Id.* at 400–401. It is thus conceptually distinct from the exemption in *Yoder*.

[28] City of Boerne v. Flores, 521 U.S. 507 (1997).

[29] 573 U.S. 682 (2014).

[30] *See, e.g.*, Tandon v. Newsom, 593 U.S. 61 (2021); Fulton v. City of Phila., 593 U.S. 522 (2021).

[31] The Court in *Mahmoud* thus brushed aside the hybrid-rights theory, *see supra* note 23. Justice Alito wrote for the majority: "We need not consider whether the case before us qualifies as such a 'hybrid rights' case. . . . Rather, it is sufficient to note that the burden imposed here is of the exact same character as that in *Yoder*." Mahmoud v. Taylor, 606 U.S. 522, 565 n.14 (2025).

As the district court carefully delineated in *Mahmoud*,[32] *Mozert*[33] had for thirty-five years been the template for a whole host of decisions on similar sorts of claims.[34] *Yoder* simply did not extend to these kinds of parental demands. Allowing removal of Amish fourteen-, fifteen-, and sixteen-year-olds from school to protect the character of an old (and to the Justices, quaint) religious community was not analogous to exercising cafeteria-style choices of reading assignments in elementary school.

Thus, on the eve of the oral argument in the Supreme Court in *Mahmoud*, *Yoder* had long been a relic, an outlier, an object in the road to steer around rather than a signpost to follow. There was no circuit split on the role of *Yoder* in free-exercise challenges to curricula, which uniformly failed. With the law that well settled, it would require something massive to get the Supreme Court to pay attention and transform *Yoder* into a broad constitutional shield from assignments that parents deem a threat to their religious beliefs.

B. The Ongoing Backlash Against *Obergefell*

The forces that supercharged *Yoder* are not hard to locate. *Obergefell v. Hodges*,[35] in which the Supreme Court held that the Equal Protection and Due Process Clauses protect same-sex couples' right to marry, has become a lightning rod for constitutional change driven by opposition to the rights and interests of LGBTQ+ people.[36]

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[32] Mahmoud v. McKnight, 688 F. Supp. 3d 265 (D. Md. 2023).

[33] 827 F.2d 1058 (6th Cir. 1987).

[34] For the district court's careful unpacking of the controlling effect of *Mozert* and its progeny, *see Mahmoud*, 688 F. Supp. 3d at 290–295.

[35] 576 U.S. 644 (2015).

[36] Writing on the eve of *Obergefell*, Douglas Laycock (Professor of Law, University of Texas School of law at time of writing) analyzed effects of the culture wars over matters of sexuality and reproduction on the law

The *Obergefell* opinion acknowledged that some religious communities preach that same-sex intimacy, including marriage, should not be condoned, and that these groups are free to teach those principles.[37] The promise of respect for dissenters has, however, gone far beyond governmental acknowledgment of religious norms that depart from the law's recognition of same-sex unions. After *Obergefell*, the Supreme Court quickly began to validate religiously motivated noncompliance with laws demanding equal treatment for same-sex couples. This trend began in 2018 with *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[38] in which the Court held that a state administrative board had not acted with the requisite neutrality toward a bakery that refused to prepare a customized wedding cake for a same-sex couple. Although the Court stopped short of declaring a constitutional right to religious exemptions from nondiscrimination laws, the decision revealed a highly unusual sensitivity toward opponents of same-sex unions.[39] Never before

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of religious liberty. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839 (2014).

[37] *Obergefell*, 576 U.S. at 679-80. The *Obergefell* opinion acknowledges, however, that while some people's objections have religious roots, that provenance does not and cannot justify laws or public policies that deny equal protection to same-sex couples. *Id.* at 672.

[38] 584 U.S. 617 (2018).

[39] For astute criticism of the *Masterpiece Cakeshop* opinion, *see* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018). The LGBTQ+-friendly decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), holding that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 encompasses discrimination based on sexual orientation and gender identity, was rooted in statutory textualism, not constitutional values. Even then, Justice Gorsuch's opinion for the Court nodded affirmatively toward the possibility of religious exemptions. *Id.* at 681–82.

had civil-rights violators been accorded this kind of constitutional solicitude.[40]

The Court's receptiveness to religious objections in *Masterpiece Cakeshop* set the stage for a more robust recognition of religious exemptions in later cases concerning antidiscrimination law.

In the Spring of 2021, the Court held in *Fulton v. City of Philadelphia*[41] that Catholic Social Services was exempt from state and local laws forbidding discrimination against same-sex couples in the administration of Philadelphia's foster-care system. As in *Masterpiece Cakeshop*, the Court employed unprecedented tactics in free-exercise adjudication, this time triggering strict scrutiny based on only the potential for discrimination against religion, which the Court located in the existence of official discretion that had never been exercised.[42]

The new majority's overwhelming sympathy for religious opposition to same-sex marriage then led to yet another victory for those social forces. In 2023, the Court held in *303 Creative LLC v. Elenis*[43] that the compelled-speech doctrine protected a designer of customized wedding websites from liability under civil-rights laws for refusing to work with same-sex couples

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[40] Earlier treatment of those sorts of arguments had been dismissive. *See, e.g.*, Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (describing free-exercise defense to claim of racial discrimination in public accommodations as "patently frivolous").

[41] 593 U.S. 522 (2021).

[42] *Id.* at 534-538. The result in *Fulton* can be partially explained as an effort to block Justice Alito's attempt to have the Court overrule *Employment Division v. Smith*. For a thorough account of how six Justices combined to thwart Justice Alito's misguided efforts, *see* Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, AM. CONST. SOC'Y SUP. CT. REV., 5th ed., 221–56 (2021).

[43] 600 U.S. 570 (2023).

planning their weddings. As Justice Sotomayor's dissent cogently argued, the majority's concern for those who oppose marriage of same-sex couples on religious grounds yet again swamped the state interest in nondiscriminatory treatment of LGBTQ+ people.[44]

The trend is unmistakable. *Masterpiece Cakeshop*, *Fulton*, and *303 Creative* involved no divisions among the lower courts and likely would have received no notice from the Supreme Court without their common element—religious opposition to same-sex intimacy.[45]

II. THE *MAHMOUD* DECISION AND ITS DOCTRINAL IMPLICATIONS

The grant of certiorari in *Mahmoud* fit the pattern perfectly. The circuit courts had been in complete agreement that *Yoder* did not protect parents against reading assignments that conflicted with their religious beliefs. The decisions of the district court and court of appeals in *Mahmoud*, though thorough and detailed, were mundane applications of the consistent free-exercise jurisprudence of the half-century since *Yoder*. What attracted the Supreme Court's intervention was the Montgomery County School Board's decision to include LGBTQ+ characters in the district's curriculum. Had the dispute been provoked by books about magic, as in *Mozert*, it likely would have been just another in the previously unbroken line of decisions that treat *Yoder* as *sui generis*.

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[44] *Id.* at 636–639 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting).

[45] For a stark example of this dynamic at work in the lower courts, see *Bates v. Pakseresht*, 146 F.4th 772 (9th Cir. 2025) (holding that Oregon violated the Free Speech and Free Exercise Clauses by requiring that applicants to adopt foster children respect the children's sexual orientation and gender identity). The decisions in *Masterpiece Cakeshop* and *Fulton* played a significant role in the panel's free-exercise analysis. *Bates*, 146 F.4th at 791–98.

Yet the language of the Supreme Court's pronouncement in *Mahmoud* is expansive. On its face, the decision applies to anything in a public school's program of instruction to which a parent objects on religious grounds.

A. The Controversy in Montgomery County and the Lower Courts

The Montgomery County School Board serves a large school district in a diverse community in the Maryland suburbs of the District of Columbia. The board believed that the district's students should therefore learn about the experiences and perspectives of others in their community. And the board determined that the school district's language-arts curriculum did not sufficiently serve that end because, among other gaps, it lacked books with LGBTQ+ characters.

The school district therefore undertook an elaborate, years-long process to identify and add new curricular materials. It appointed reading specialists and other experts, who recommended that the district adopt several storybooks with LGBTQ+ characters into the elementary-school curriculum. (The district had previously diagnosed the same problems and adopted similar solutions for materials with African-American and Asian-American characters.) The district did not specify how teachers should use the new storybooks. It did provide optional guidance to teachers, with suggested responses to questions that students might ask about the books or their themes.

The school district also initially allowed parents to exclude their children from the use of the new storybooks. A number of parents invoked that opt-out opportunity. Some parents offered religious objections, while others advanced the *non*religious objection that the storybooks were not age-appropriate for their children.[46]

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[46] Mahmoud v. McKnight, 688 F. Supp. 3d 265, 280 (D. Md. 2023).

The number of opt-outs quickly increased to an unmanageable number. The school district concluded, therefore, that managing the opt-outs and educating the excused students would require either altering the educational program substantially or implementing individually tailored educational programs for each opted-out student. Hence, the district announced that previously granted excusals would be honored for the rest of the school year, but no new ones would be allowed for that year, and none would be offered when the students returned to school the following fall.

The plaintiffs in *Mahmoud* were parents who objected on religious grounds to use of the storybooks in their elementary schoolers' classes. They filed suit, demanding notice and an opportunity to opt out whenever their children might be exposed to what the plaintiffs termed issues of "family life and human sexuality."[47] Beyond that, they asserted broad constitutional rights to receive notice and exclude their children from any exposure to "sensitive religious and ideological issues."[48]

The district court denied the parents' request for a preliminary injunction. Citing ten decisions in earlier cases addressing free-exercise objections to particular lessons or topics of instruction, Judge Deborah Boardman wrote that "[e]very court that has addressed the question has concluded that the mere exposure in public school to ideas that contradict religious beliefs

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[47] *Id.* at 273. They might instead have challenged the books through the school district's ordinary administrative processes but chose not to do so. Meanwhile, the school district did allow, and continues to allow, parents to exclude their students from the "Family Life and Human Sexuality Unit" in health class, which is the distinct part of the curriculum that provides sex education. *Id.* at 281. Though the *Mahmoud* parents employed that same label, the school district does not offer sex education in Grades K–5.

[48] *See* Mahmoud v. McKnight, 102 F.4th 191, 201 (4th Cir. 2024).

does not burden the religious exercise of students or parents."[49] The court determined that the plaintiffs' claims amounted to nothing more than exposure. Accordingly, the parents had not shown a legally cognizable burden on their religious exercise.

In reaching that conclusion, the district court rejected the plaintiffs' invocation of *Yoder*, based in large part on the Supreme Court's own explanation that its holding in *Yoder* "was inexorably linked to the Amish community's religious beliefs and practices."[50] The district court recognized that the Free Exercise Clause protects against "certain forms of governmental compulsion" but does not confer a right to make the public schools conform what they teach to parents' preferred religious beliefs or practices.[51]

The Fourth Circuit affirmed. In an opinion by Judge Agee, the panel majority agreed that the plaintiffs needed to show that "the absence of an opt-out opportunity coerces them or their children to *believe* or *act* contrary to their religious views."[52] The *Mahmoud* parents had offered no evidence "about how any teacher or school employee has actually used any of the Storybooks in the Parents' children's classrooms, how often the Storybooks are actually being used, what any child has been taught in conjunction with their use, or what conversations have ensued about their themes."[53] On this "threadbare" record, the Fourth Circuit concluded that the plaintiffs' complaint that the school district

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[49] Mahmoud v. McKnight, 688 F. Supp. 3d at 290. In the Supreme Court, Justice Alito mentioned none of those decisions. Justice Sotomayor identified several in dissent. *See* Mahmoud v. Taylor, 606 U.S. 522, 614 (2025) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting).

[50] *Mahmoud*, 688 F. Supp. 3d at 294 (citing Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972)).

[51] *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 700 (1986)).

[52] *Mahmoud*, 102 F.4th 191, 208 (emphasis in original).

[53] *Id.*

"expose[d] their children to views that are at odds with their religious faith" did not establish the requisite religious coercion.[54]

Yoder thus did not apply. Exposure alone to ideas that parents find religiously objectionable did not constitute a free-exercise violation.[55]

B. *Mahmoud* in the Supreme Court

The rulings by the district court and the Fourth Circuit in *Mahmoud* were entirely in line with decades of squarely-on-point free-exercise precedent. Yet in the Supreme Court, none of that mattered in the slightest.

Justice Alito's opinion for the majority adopted an expansive new substantive standard for a vague, undefined class of free-exercise claims. Recharacterizing *Yoder* as a grand doctrinal pronouncement untethered to the special circumstances of the Amish,[56] the Court declared broadly that "government burdens the religious exercise of parents when it requires them to submit their children to instruction that poses 'a very real threat of undermining' the religious beliefs and practices that the parents wish to instill."[57]

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[54] *Id.* at 209–10. *But see id.* at 217–28 (Quattlebaum, J., dissenting).

[55] *Id.* at 211–12.

[56] Mahmoud v. Taylor, 606 U.S. 522, 558 (2025).

[57] *Id.* at 530 (quoting Wisconsin v. Yoder, 406 U.S. 205, 218 (1972)). In *Miller v. McDonald,* 130 F.4th 258 (2d Cir. 2025), the Second Circuit rejected a free-exercise challenge, brought by several private schools run by the Old Order Amish, to New York State's repeal of a statutory religious exemption from the requirement that children receive specified vaccinations before starting school. The State had not repealed the medical exemption from the same requirement. The Second Circuit gave little credence to the argument that *Yoder* conferred special constitutional status on Amish education. *Id.* at 270–271. On December 8, 2025, the Supreme Court granted a petition for certiorari in *Miller* (No. 25-133), vacated the judgment, and remanded

The opinion thus squarely rejected the distinction between religious coercion and exposure to ideas that parents find religiously objectionable. Indeed, the Court straightforwardly declared that "[w]hether or not a requirement or curriculum could be characterized as 'exposure' is not the touchstone for determining whether [the constitutional] line is crossed."[58] In so holding, the Court said not one word about how, for decades, exposure had in fact been the consistent touchstone throughout the federal courts.

The majority also conducted its own analysis of the storybooks and the school district's optional guidance to teachers. It criticized the books for being "designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected."[59]

Justice Alito's opinion for the Court excoriated one book (and the school district for selecting it), for example, for depicting the wedding of a same-sex couple as a happy occasion, when the plaintiffs wished "to present a different moral message."[60] In the majority's view, that presentation made the books "potentially coercive,"[61] and therefore an "objective danger to the [parents'] free exercise of religion."[62] The majority also decried the guidance to teachers for "present[ing] as a settled matter a hotly contested view of sex and gender that sharply conflicts with the religious beliefs that the parents wish to instill in their children."[63] In

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the case for further consideration in light of *Mahmoud*. *See* https://www.supremecourt.gov/orders/courtorders/120825zor_i4ek.pdf.

[58] *Id.* at 556.

[59] *Id.* at 550.

[60] *Id.* at 552.

[61] *Id.* at 554.

[62] *Id.* at 555.

[63] *Id.* at 553. Justice Sotomayor's dissent goes into detail about the majority's misdescriptions of the storybooks and guidance to teachers. *See id.* at 594–98, 610–15 (Sotomayor, J., dissenting).

reaching those conclusions, the majority entirely ignored the lower courts' determinations that the plaintiffs had offered no evidence about the use or effect of either the books or the documents containing the school district's guidance to teachers.

At the most basic level, the majority's strong, insistent criticism that the books teach "values and beliefs" is just a recognition that the books teach *something*. Every curricular decision reflects educators' determinations about what matters and is worthwhile for children to learn. Those sorts of choices always and inevitably inform curricular design.

In setting a curriculum, as in all other things, government must not target religion for disfavor, disparagement, or maltreatment. But in the public schools, ensuring that students are never exposed, even incidentally, to anything that their parents regard as a threat to their religious beliefs is unrealistic to the point of incoherence.

Storybooks, other instructional materials, and classroom discussions inevitably introduce implicit and often explicit views on sexual orientation and gender identity. That is what led the Montgomery County Public Schools to expand the language-arts curriculum in the first place. The *Mahmoud* plaintiffs objected, for example, to a book about a prince who falls in love with and marries a knight. But countless storybooks involve princes who fall in love with and marry princesses. The vast majority of storybooks that portray families include cisgender couples. In addition, when students refer to their own families in class discussions, art projects, or other assignments, many will inevitably talk about or show a mother and father. All of that reinforces the idea that heterosexual relationships and cisgender couples are normal—so normal that these arrangements do not invite comment and become reinforced by repetition.

Adding a same-sex couple in any of those contexts might, in the Court's words, disrupt a belief that cisgender relationships

are the only acceptable ones.[64] The preexisting curriculum promoted value judgments about sexual orientation and gender identity every bit as much as the newly introduced materials do, but those judgments are the ones that the plaintiffs and a majority of the Justices prefer. Maintaining the exclusivity of those views was the plaintiffs' aim.

The constitutional question should have been whether the plaintiffs have the right to insulate their children completely from a decision by the public schools about what social arrangements might qualify as ordinary or acceptable. Before *Mahmoud*, the Religion Clauses gave a straightforward answer to that question. The public schools were forbidden to compel religious conformity or disparage anyone's faith. But they remained appropriately free to decide on nonreligious grounds, as matters of educational policy, what their teachers communicate, and what students learn.[65] Parents who disliked those choices could counter the lessons at home and in their religious communities. Moreover, they could exercise their constitutional right to send their children to private school.[66] They could not, however, invoke the power of the courts to supplant educators' professional curricular judgments made on nonreligious grounds.[67] After *Mahmoud*, the tables have turned.

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[64] *Id.* at 529–30 (majority opinion).

[65] *See generally, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 106 (1968) ("There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.").

[66] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) (recognizing substantive-due-process right of parents to send their children to private, religious schools, while not doubting governmental authority to regulate schools and specify subjects and lessons "essential to good citizenship" that must be taught).

[67] *See, e.g.*, Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1067 (1987) ("The plaintiff parents can either send their children to church schools or private schools . . . or teach them at home. . . . Tennessee's

C. The Force and Reach of *Mahmoud*

The demand that schoolchildren be protected from exposure to anything that their parents deem a threat to the parents' religious views about sexual orientation or gender identity did not start with *Mahmoud*. The aim to limit what students see and experience animates more sweeping measures that affect all students, such as Florida's Don't Say Gay law.[68] Supporters of those policies are not, as they pretend, anti-indoctrination. Rather, they desire to indoctrinate all children, their own and everyone else's, into a view that the world is populated exclusively with cisgender people and opposite-sex couples. If one genuinely wanted to avoid indoctrinating students into a view about sexual orientation or gender identity, one would provide them with more perspectives, not fewer.

Neither do the plaintiffs' repeated invocations of the relative youth of their children meaningfully limit the scope of the Court's decision. The plaintiffs maintained that young children are impressionable and may regard teachers as authority figures to whom the children should listen.[69] Hence, the plaintiffs argued, there was overwhelming danger that the students might be corrupted by classroom exposure to ideas about sexual orientation and gender identity that the plaintiffs disfavor.[70] But nothing about their notice and opt-out demands, and nothing about the Court's holding, points to an age-specific standard that affords

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school attendance laws offer several options to those parents who want their children to have the benefit of an education which prepares for life in the modern world without being exposed to ideas which offend their religious beliefs.").

[68] Fla. Stat. § 1001.42. For an analysis of the litigation and settlement arising from the Florida law, see Ira C. Lupu, *The Centennial of* Meyer *and* Pierce*: Parents' Rights, Gender-Affirming Care, and Issues in Education*, 26 J. CONTEMP. L. ISSUES 147, 198–209 (2025).

[69] *E.g.*, Brief for Petitioner at 21, 32, Mahmoud v. Taylor, 606 U.S. 522, 541 (2025) (No. 24-297).

[70] *Id.* at 2, 16–18, 21.

greater rights to parents of elementary-school students than to parents of middle- or high-schoolers. Rather, the focus of the new free-exercise right on threats to parents' ability to instill their religious beliefs in their children may well function in precisely the opposite way.

The threat of drawing older students away from their parents' religious beliefs and practices is more real, substantial, and persistent.[71] Older students reflect and rely on their own experiences, particularly with peers, to come to their own conclusions.[72] Moreover, the influences on them are more worldly and come from many directions and sources, inside and outside of school.[73] Older students are thus more likely than younger children to experience enduring changes in their moral and religious beliefs if they are exposed to new ideas, new perspectives, and different ways of living.

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[71] Research on child development confirms this intuition. *See* Elizabeth Weiss Ozorak, *Social and Cognitive Influences on the Development of Religious Beliefs and Commitment in Adolescence*, 28 J. Scientific Study of Religion, 448, 455, 460 (1989) (finding that effect of parents' religious affiliation and commitment, though always significant, is weaker on older children, and that "middle adolescence," i.e., 9th to 11th grades, "is a period of readjustment," with rates of departures from parents' beliefs and practices peaking at age 14½).

[72] *See id.* 458 (finding that "connectedness to peers emerged as a unique and fairly effective predictor of changed faith," with effects increasing in later adolescence).

[73] *See* Jennifer B. Barrett et al., *Adolescent Religiosity and School Contexts*, 88 Soc. Sci. Quarterly, 1024, 1025 (2007) (summarizing research showing that "[i]ndividual preferences for religion are developed socially through interaction with friends, family, and larger society, and [that] adolescents may be particularly likely to experience changes in their religious beliefs and practices as parental restrictions decline and adolescents gain more control over their own behavior"); *id.* at 1026, 1034–35 (finding that adolescents pursue social status by conforming to religious practices to those of popular students at school).

Indeed, that was the logic of the complaint and the Supreme Court's holding in *Yoder* itself. Whatever formal instruction and socialization the Amish children received in elementary school did not trouble their parents overmuch.[74] While the Court noted that the Amish often "established their own elementary schools" to resemble "small local schools of the past,"[75] the danger that the Court treated as of constitutional dimension was allowing the students to experience "higher learning [that] tends to develop values [that the parents] reject as influences that alienate man from God."[76] The parents objected to public schooling only after the eighth grade, for it was their view, and the view of their expert witnesses, that teenagers were most susceptible to influences at school that might draw them away from the Amish faith and culture. The parents thus saw those older students' attendance at school as the real threat to the intergenerational survival of the parents' religious way of life.

If, as the Court in *Mahmoud* declared, *Yoder* recognized a constitutional right to avoid anything that threatens parents' transmission of their faith to their children, that right surely attaches to the parents of older children, like the successful *Yoder* plaintiffs themselves. Hence, there would appear to be no age line, short of the age of legal majority and emancipation, beyond which the new parental right gives way to the children's rights or the educational interests and administrative needs of the state embodied in the public schools.

In an effort to downplay the sea change that would result from adopting their position, the plaintiffs also insisted that their requests were limited to the "narrow[]" issue of instruction on "gender and sexuality," emphasizing that this issue necessarily

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[74] Wisconsin v. Yoder, 406 U.S. 205, 212 (1972).

[75] *Id.*

[76] *Id.* at 212.

implicates religious doctrine.[77] But the plaintiffs' contention that a ruling in their favor could be limited to this subject matter cannot withstand close analysis. The *Mahmoud* plaintiffs' demand and the logic of the Court's ruling surely cover a wide array of topics routinely covered in school. Nothing in the structure of their legal claims or in the logic or language of the Court's holding recognizes a subject-matter limitation. Rather, if the rule is that parents are entitled to opt out of whatever they believe threatens their ability to instill their religious beliefs in their children, then everything in the curriculum is up for grabs. No instruction in history, literature, art, or any scientific discipline is safe.[78]

In their most candid moments, the plaintiffs and their counsel effectively acknowledged as much. The reason why the particular topics of sexual orientation and gender identity should trigger heightened scrutiny, they argued, is that the plaintiffs "sincerely believe that subjecting their children to instruction contrary to their religious beliefs" threatens their religious standing.[79] Classic works and central concepts in any literature, social-studies, art, science, or even physical-education curriculum inevitably either reinforce or disrupt traditional norms of all sorts. So does any study of current events or social change.

History lessons, for example, necessarily speak to issues of civics, patriotism, economic priorities, immigration, the role of

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[77] Brief for Petitioner at 22, 29, 31–32, *Mahmoud*, 606 U.S. 522 (2025) (No. 24-297).

[78] *See* Schwartzman et al., *The Structure of Religious Preference*, *supra* note __, at 238 ("the Court has basically invited aggrieved parents to scrutinize every aspect of instruction in public schools"). As we explain further in Part III, *infra*, Montgomery County is, in light of *Mahmoud*, now extending rights of notice and excusal to all subjects in the core curriculum, and parents are exercising opt-outs from a variety of instructional materials.

[79] Brief for Petitioner at 28, *Mahmoud*, 606 U.S. 522 (2025) (No. 24-297).

women, the politics and practical consequences of race, and the place of religion (or religions) in society. That is so whether the lessons introduce those topics explicitly or implicitly, and whether they make value judgments intentionally, unintentionally, or merely incidentally. The lessons, therefore, necessarily reinforce or disrupt what the Supreme Court might term traditional views on America's place in the world, national security, economic and social policy, patriarchy, white supremacy, and other deep questions of values. They also make and expose schoolchildren to judgments about more modern understandings of these topics, whether the judgments being offered are positive or negative.

Substantial religious perspectives exist on every side of all these issues. If the possibility of parents' religious disagreement gives rise to constitutional notice and opt-out rights, that will be so for virtually everything in the curriculum. No matter what curricular choices a school district makes, there will likely be some parents in a religiously pluralistic community who disagree.

Moreover, the prevailing norms of free-exercise substance, pleading, and proof will make it all too easy to establish a *prima facie* case of a violation of parents' rights. Under decisions like *Thomas v. Review Board*[80] and *Burwell v. Hobby Lobby Stores, Inc.*,[81] government cannot readily dispute the content of claims that its actions have burdened religious liberty.

For reading assignments, the potential claims are legion. If, for example, a parent asserts that she believes in patriarchy and that an assignment normatively subverts her child's belief in that mode of social ordering, the school district will have great difficulty defending a denial of notice and opt-out rights. Successfully challenging parental sincerity will be nearly impossible. For parents' objections to readings that in any way show women challenging the authority of men, asserting

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[80] Thomas v. Review Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707 (1981).

[81] 573 U.S. 682 (2014).

authority over men, or even just having a valid place in the political or working world outside the home, the claim of subversion could not be defeated. These concerns are far from hypothetical. The plaintiff-parents in *Mozert*, for example, raised precisely these objections to standard elementary-school readers.[82]

This approach to burdens on religious freedom is thus far looser and more plaintiff-friendly than in conventional cases about religious coercion. Ordinarily, free-exercise claimants must show that government has imposed some objective detriment to their exercise of religion, by either punishing them or depriving them of a governmental benefit.[83] The *Mahmoud* principle demands neither. The so-called burden is atmospheric, residing in the environment of learning. When *Mahmoud* repudiated the long-standing idea that exposure alone is not a burden on parents' religious freedom, it opened the door to a limitless set of claims.

D. Will *Mahmoud* Rescue Establishment Clause Values?

Ironically, *Mahmoud* may turn out to be a check on the current rush to reintroduce school-sponsored prayer and reverential messages in public schools. Since the middle of the twentieth century, the Supreme Court has treated the Establishment Clause as the primary locus of the rights of public-school students to be free from religious indoctrination and compulsory religious exercises.[84] That clause has thus protected

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[82] *See* Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1062 (1987) (parent objected to passages that recognized women for "achievements outside their homes" as religiously objectionable "role reversal or role elimination").

[83] *See, e.g.*, Hobby Lobby, 573 U.S. at 710, 719–26.

[84] *See, e.g.*, Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (doctrinal religious instruction); Engel v. Vitale, 370 U.S. 421 (1962) (classroom prayer), Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (classroom prayer and Bible reading); Epperson v. Arkansas, 393 U.S. 97 (1968) (ban on teaching evolution as contrary to Biblical

all students and their families, whether of the majority faith, minority faiths, or nonbelievers, from religious coercion. In the public schools, Establishment Clause rulings have reinforced free-exercise values.

Recently, however, the Roberts Court—within public schools and otherwise—has elevated a vigorous, ahistorical conception of free exercise as the preeminent Religion Clause value, while undercutting Establishment Clause concerns.[85] Moreover, the Court has done so even at the expense of religious dissenters.[86] As a result, Establishment Clause principles that have protected religious freedom in the public schools are now in jeopardy.

With this constitutional blood in the water, some legislatures, state and local educational officials, and advocates are pushing to reintroduce religious observance in schools.[87] Legal challenges to

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account of creation); Stone v. Graham, 449 U.S. 39 (1980) (mandatory posting of Ten Commandments in classrooms); Edwards v. Aguillard, 482 U.S. 578 (1987) (requirement that creation science be taught alongside scientific theory of evolution); Lee v. Weisman, 505 U.S. 577 (1992) (graduation prayer); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (prayer over public-address system at high-school football games).

[85] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 586 U.S. 1130 (2019). See also the additional decisions and secondary literature cited in note 10, *supra*. These moves have eroded norms of equal protection as well as nonestablishment. *See* Richard B. Katskee, *Taking Liberties: The Supreme Court's New Hierarchy of Rights and Its Victims*, 127 W. VA. L. REV. 173, 195 (2024).

[86] *See* Kennedy v. Bremerton Sch. Dist., 586 U.S. 1130 (2019); Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29 (2019); Town of Greece v. Galloway, 572 U.S. 565 (2014). Professor Katskee was counsel for the respondents in both *Town of Greece* and *Kennedy*.

[87] Several states have passed legislation, described below, requiring public schools to display the Ten Commandments permanently in all classrooms. In addition, the Texas legislature recently passed several bills designed to support religious exercise for public-school students and employees. These bills are summarized in Howard Friedman, *Texas*

their actions that would traditionally have been straightforward victories under the Establishment Clause are now hotly disputed.

The leading example of this unsettling trend involves state laws requiring posting of the Ten Commandments in public-school classrooms. In 1980, the Supreme Court held in *Stone v. Graham*[88] that a statute requiring posting of the Ten Commandments in every public-school classroom in Kentucky violated the Establishment Clause.[89] *Stone* remains binding Supreme Court precedent.[90] Any requirement to post the Ten Commandments in public-school classrooms has for so long been a flagrant Establishment Clause violation that, until recently, only the most constitutionally reckless public officials would have tried such a thing.

The Supreme Court's systematic efforts to dismantle the Establishment Clause have now, however, encouraged Arkansas, Louisiana, and Texas to enact laws requiring that posters with a Protestant version of the Ten Commandments "materially identical to the displays challenged in *Stone*" be placed on the walls of all classrooms in those states.[91] The courts have thus far

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Passes 3 Bills Promoting Religion in Public Schools, RELIGION CLAUSE (May 30, 2025), https://religionclause.blogspot.com/2025/05/texas-passes-3-bills-promoting-religion.html [https://perma.cc/83A3-HYGW].

[88] 449 U.S. 39 (1980).

[89] *Id.* at 40 (illustrating that, at that time, the Court saw no need even to describe, much less to analyze, the plaintiffs' attendant free-exercise claim, but instead merely noted it in passing).

[90] *See, e.g.*, Roake v. Brumley, 141 F.4th 614, 647 (5th Cir. 2025); *id.* at 652–53 (Dennis, J., concurring). On October 6, 2025, the Fifth Circuit vacated the panel's judgment in *Roake* and ordered that the case be reheard en banc. *See* Roake v. Brumley, 154 F.4th 329 (5th Cir. 2025).

[91] *See Roake*, 141 F.4th at 643; Nathan v. Alamo Heights Indep. Sch. Dist., No. SA–25–cv–00756–FB, 2025 WL 2417589 (W.D. Tex. Aug. 20, 2025) ("The Texas and Louisiana statutes require the display of the same specific version of the Ten Commandments in public school classrooms."); Ringer v. Comal Indep. Sch. Dist., __ F. Supp. 3d __, 2025

properly applied *Stone* and related Establishment Clause jurisprudence to hold the statutes unconstitutional. Tellingly, however, the Fifth Circuit panel in the Louisiana case felt the need to engage in extensive analysis to explain why the Supreme Court's free-exercise decision in *Kennedy v. Bremerton School District* did not overrule *Stone*.[92] The district court in the Arkansas case followed suit.[93]

In lawsuits challenging these new measures, the plaintiff-parents in all three states quite understandably included free-exercise claims that would previously have been unnecessary distractions.[94] After the decision in *Mahmoud*, the district courts in the Texas and Arkansas cases took up and ruled in favor of the plaintiffs on their free-exercise claims.[95] The preliminary

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WL 3227708 (W.D. Tex., Nov. 18, 2025) ("The state statutes are remarkably similar. If anything, [Texas] mandates more intrusive displays of the Ten Commandments than those at issue in *Stone*."); Stinson v. Fayetteville Sch. Dist. No. 1, No. 5:25–CV–5127, 2025 WL 2231053 (W.D. Ark. Aug. 4, 2025) (Arkansas law "closely resembl[es]" the one enjoined in Louisiana).

[92] *See* Roake, 141 F.4th at 637, n.14 (holding, that as a free-exercise case, *Kennedy* does not change the law on standing in Establishment Clause cases); *id.* at 642 (same for the merits)*; see also* Ringer, 2025 WL 3227708, at *5–*6. For detailed analysis of why Establishment Clause norms remain substantially intact after *Kennedy v. Bremerton School District, see* Ira C. Lupu & Robert W. Tuttle, *The Ten Commandments in Louisiana Public Schools: A Study in the Survival of Establishment Clause Norms*, 100 CHI. KENT L. REV. 602, 621-630 (2025). For an encouraging sign in that direction, see *Arroyo-Castro v. Gasper*, 2025 U.S. Dist. LEXIS 215843, at *59–*70 (D. Conn. Nov. 3. 2025) (to avoid possible Establishment Clause liability, public school district may prohibit teacher from displaying one-foot-high crucifix on classroom wall during instructional time).

[93] Stinson, 2025 WL 2231053, at *11.

[94] Roake, 141 F.4th at 628; Stinson, 2025 WL 2231053, at *3; Nathan, 2025 WL 2417589, at *11.

[95] Stinson, 2025 WL 2231053, at *14–*15; Nathan, 2025 WL 2417589, at *52–53.

injunctions against enforcement of the display requirements in those states thus rest on both Religion Clauses.

Will *Mahmoud* now come to the rescue of imperiled Establishment Clause norms? The decision recognizes free-exercise rights for parents whose religious views are threatened by readings in school. School-sponsored religious messages would obviously present that hazard to some parents. In the ongoing Ten Commandments cases, for example, the postings compete with the parent-plaintiffs' views of the Decalogue.[96] The states will argue that the displays are passive, involving no recitation by students or instruction from teachers, and therefore do not burden free-exercise rights. This argument seems remarkably weak when the posters are on the wall of every classroom in every public school, all day long, in every grade from kindergarten through senior year of high school. The pervasiveness of the displays elevates them from exposure to state-promoted religious guidance, subverting any contrary religious perspective held by parents.[97]

But the remedy under *Mahmoud* for free-exercise violations is an opt-out, not the interdiction of the exercise required by Establishment Clause decisions like *Engel*, *Schempp*, and *Lee v. Weisman*. When a display is on the wall (or *every* wall) for all to see, opt-outs for objecting students are impossible. The only way

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[96] *See* Complaint ¶¶ 82–155, Roake, 141 F.4th 614 (No. 3:24-cv-00517), *available at* https://www.aclu.org/cases/rev-roake-v-brumley?document=Complaint; *see* Complaint ¶¶ 84–226, Nathan, 2025 WL 2417589 (No. 5:25-cv-00756), *available at* https://assets.aclu.org/live/uploads/2025/07/Texas-Ten-Commandments-Complaint-FILED.pdf.

[97] *See* Mahmoud v. Taylor, 606 U.S. 522, 620–21, n.11 (Sotomayor, J., dissenting). For free-exercise purposes, the pervasive presence of posters on the wall renders them readily distinguishable from books on a classroom shelf. As Justice Sotomayor's dissent explains, the mere presence of the books in a classroom would not be vulnerable to the ruling in *Mahmoud*.

to protect the religious freedom of dissenters is to remove the display entirely.

In a judicial climate in which once-settled Establishment Clause norms are vanishing, we can hardly be confident that this ironic twist on *Mahmoud* will prevail.[98] After all, the *Mahmoud* Court insists that its ruling does not require the complete removal of objectionable material.[99]

If the Religion Clauses do not forbid schools to mount permanent displays of overtly religious sentiments, consistency requires the same treatment for secular displays alleged to subvert religious beliefs. For example, the Montgomery County Public Schools (and other districts) might consider permanently putting Pride Flags or other LGBTQ+-friendly messages on classroom walls. How teachers might constitutionally answer questions from students about Pride Flags or Ten Commandments posters is a puzzle that we leave to others.

III. SCHOOL ADMINISTRATION IN THE SHADOW OF *MAHMOUD*

As Part II demonstrates, lower courts are highly unlikely to confine *Mahmoud* to cases with similar fact patterns. That method limited *Yoder* for a half-century, but the *Mahmoud* opinion declares that a broader *Yoder* principle has now been unleashed. The Court's explicit concern in *Mahmoud* is the protection of religious beliefs of parents with minor children in public schools. As explained in Part II, that concern cannot be

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[98] *See* Schwartzman et al., *The Structure of Religious Preference, supra* note __, at 236 ("It is possible the Court will treat the government's religious speech more deferentially than it treats the government's secular speech.").

[99] *Id.* at 568 ("Providing . . . an opportunity [to opt out] would give the parents no substantive control over the curriculum itself.").

bound by the age of the minors or the academic subject in which instruction occurs.[100]

New parental claims will no doubt appear as schools distribute each semester's reading lists. Moreover, the religious-liberty field is now crowded with groups like the Becket Fund, Alliance Defending Freedom, First Liberty Institute, and a rash of newly formed law-school clinics devoted primarily to free-exercise concerns.[101] There will be no shortage of parents inclined to object to assignments on many subjects, aimed at all ages, and no shortage of legal representation for them.[102] Any resulting lawsuits would be expensive for school districts, especially if facts are in dispute. Moreover, if school districts are unsuccessful in litigation, they are likely to face attorney-fee awards to the plaintiffs, as well as the costs of their own defense. Hence, it will frequently be far cheaper and less risky to capitulate than to fight *Mahmoud* claims.

With these concerns in mind, what should school districts do in response to the decision in *Mahmoud*? To what extent should

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[100] Nevertheless, the decision's reach is not boundless. *See* Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ., No. 23–3740, 2025 WL 2453836 (6th Cir. Aug. 26, 2025). Parents objected on free-exercise grounds to transgender girls' being permitted to use a communal girls' bathroom that the Does' daughter used. By a 2–1 vote, the panel held that *Mahmoud* does not apply to noncurricular decisions. This refusal to extend *Mahmoud* to all operations of a public school seems sound. If *Mahmoud* extends beyond the program of instruction, it would authorize opt-outs from, among other things, any interactions with teachers, school staff, or other students based on their race, sex, sexual orientation, or gender identity. Nothing in the opinion supports that broad reading.

[101] The law schools at Stanford, Harvard, Yale, Notre Dame, the University of Texas, Pepperdine, and the University of St. Thomas all now operate religious-liberty clinics.

[102] If *Mahmoud* opt-out rights were extended to all parents, not just religious ones, the frequency of these demands and legal claims would be even greater.

they anticipate parental claims and try to channel them into procedures for fair and efficient administrative treatment?

> School districts nationwide are undoubtedly scrambling to make sense of the new parental rights that the Supreme Court recognized in *Mahmoud*. With few data points currently available, we have investigated the immediate response from the defendant, Montgomery County Public Schools. The Court's opinion included this direction to the district court on remand:
>
> > [U]ntil all appellate review in this case is completed, the [MCPS] Board should be ordered to notify [the plaintiff-parents] . . . in advance whenever one of the books in question or any other similar book is to be used in any way and to allow them to have their children excused from that instruction.

Classes at MCPS opened for the Fall semester on August 26, 2025. As of that date, the remand in *Mahmoud* had not yet produced a responsive order from the federal district court in Maryland. Even when that order appears, the Supreme Court's mandate does not extend beyond the rights of the three couples who actually sued to receive notice and opt-out opportunities with respect to books with LGBTQ+ characters in their children's elementary-school classes.[103]

Yet as the school year commenced, MCPS announced a new set of policies to govern religion-based opt-out claims by parents and guardians. The three-page MCPS Regulation, issued August

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[103] The *Mahmoud* precedent applies nationwide, but the Supreme Court's decision last Term barring universal injunctions reinforces that the district court's order must be limited to the plaintiffs. *See* Trump v. CASA, Inc., 606 U.S. 831, 841–47 (2025). *Mahmoud* was not a class action, so the injunction will run in favor of the named plaintiffs only.

21, 2025, is entitled "Curriculum Transparency and Requests to Be Excused from Instruction."[104]

What is immediately striking about the MCPS Regulation is its breadth. It includes all curricular matters and subjects, including Language Arts, Social Studies, Mathematics, and Science, in grades K–12.[105] In other words, its coverage extends far beyond the factual context of *Mahmoud*, the parents' demands in the litigation, or the Supreme Court's directive for a preliminary injunction. The Regulation requires timely notice to parents and guardians of all reading assignments, the opportunity to review the instructional materials, and the possibility of having their children excused and provided with alternative instruction.[106]

The Regulation opens with a declaration of the purposes to permit parents to (1) review curricular materials, (2) identify "specific core instructional materials that substantially interfere with a sincerely held religious belief," (3) "request that their child be excused from any portion of instruction involving that material," and (4) ensure the provision of alternative materials

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[104] Montgomery Cnty. Pub. Sch. Regul. IFD-RA § I (2024). *See generally Request to Be Excused from Instructional Material,* MONTGOMERY CNTY. PUB. SCH. (Aug. 2025), https://ww2.montgomeryschoolsmd.org/departments/forms/pdf/281-26.pdf (providing a form to accompany the MCPS Regulation, designated as "Request to be Excused form Instructional Material," for parents to fill out and submit to the school district's Division of Student Conduct and Appeals). The 2025–2026 MCPS Guidelines for Respecting Religious Diversity echo this new regulation with respect to core curricular materials, but the reference awkwardly remains under a heading that references excusal from noncurricular activities. https://www.montgomeryschoolsmd.org/siteassets/district/students/rights/religiousdiversity/religious-diversity-guidelines-2025-2026-secured.pdf, at p.4.

[105] *See* Montgomery Cnty. Pub. Sch. Regul. IFD-RA § III (A) (2024).

[106] *Id.* §§ IV-V.

"in a non-punitive manner" for any student whose parents' request has been approved.[107]

Section II of the MCPS Regulation offers a guiding philosophy. The school district reaffirms its commitments to respect all students and to ensure that the "lives, experiences, and cultures" of students be reflected in classroom materials.[108] The MCPS Regulation also reaffirms the rights of students to "express their religious or nonreligious beliefs and practices free from discrimination."[109] For the first time, however, the school district acknowledges "that students and families may seek to refrain from participation in specific portions of instruction that substantially interfere with their sincerely held religious beliefs."[110]

What follows the Regulation's introductory sections are specifications for notice and review with respect to curricular materials,[111] and the substantive standards by which the school district will evaluate requests to be excused from instruction.[112] The notice requirements begin with a commitment that the district will provide to parents electronically, before each marking period, a comprehensive list of core instructional materials to be

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[107] MCPS Regulation § I.

[108] *Id.* § II. To the best of our knowledge, MCPS has not eliminated from the Language Arts curriculum for grades K–5 any of the books that were on the approved list as of the date of the Supreme Court's decision in *Mahmoud*.

[109] *Id.*

[110] *Id.*

[111] The regulation applies to "core instructional materials," defined as "text(s) or textbook(s) that are directly aligned with MCPS curriculum that have been designated by the [school district] for use as a primary and supplemental source of instruction in core curriculum areas." *Id.* § III.D.

[112] *See id.* § IV (G).

used.[113] Parents will have the opportunity to review those materials on request to a "school-based administrator."[114] These administrators are then required to make the materials available for inspection within seven school days after receiving the request.[115]

The burden to review materials for objectionable content rests with the parents. The school district is not going to do the work of searching out, for example, all references to certain themes or subjects. It is reasonable to expect, therefore, that political groups will help with this kind of screening, which may in turn lead to a strikingly broad set of objections.

The operative section on "Requests to be Excused from Specific Core Instructional Materials" authorizes parents to "submit requests to have their child excused from instruction involving core instructional materials that substantially interfere with a sincerely held religious belief."[116] These requests must be

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[113] *Id.* § IV. The Regulation uses the term "marking periods" to refer to quarters of the academic year. Each of the four marking periods is approximately ten weeks long. *See* https://www.montgomery.k12.nc.us/calendar.

[114] MCPS Regulation § V.

[115] *Id.*

[116] *Id.* § VI.A. The reference to "specific materials" seems designed to exclude blanket requests for exclusion from all instruction on particular subjects—*e.g.*, all instruction pertaining to sexual orientation or gender identity, or all instruction relating to the scientific theory of evolution. For discussion of that sort of request, see Thomas Peele, *California Schools Brace for Fallout from U.S. Supreme Court Decision on Religious Rights*, ED SOURCE, Aug. 25, 2025, https://edsource.org/2025/alternatives-public-school-education/739199?amp=1. In *Alan L. v. Lexington Public Schools*, 2025 U.S. Dist. LEXIS 267350 (D. Ma., Dec. 30, 2025), the court entered a preliminary injunction requiring notice and opt-out rights for books that include LGBTQ+ themes for a parent of a child in kindergarten. The complaint more broadly referenced "content that focuses on diversity, equity, and inclusion including issues of race, gender, and sexuality, taught from a secular world view," *id.* at

made within the first ten days of the marking period.[117] The form on which the requests are to be made will go to a centralized authority, the school district's Division of Student Conduct and Appeals, rather than to personnel at the school that the student attends.[118]

The excusal form asks parents "to determine whether the use of specific core instructional materials substantially interferes with their sincerely held religious beliefs."[119] It requires the parents to list books or chapters from which they want their children excused.[120] In a striking omission, the form does not ask for any specification of religious belief or recital of the quality or quantity of the interference with that belief. Thus, the school district will not review the religious content or sincerity of claims. The only grounds for denial of requests are, as explained below, extrinsic to the religious claims being made.

Requests are then to be reviewed by the school district's Division of Student Conduct and Appeals, which, as the name

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*5 & n.3, but the opinion and preliminary injunction address only content involving LGBTQ+ characters or themes. The order requires notice and opt-out rights with respect to ten identified books used in the curriculum, *id.* at *35–*38. The order also requires notice and the opportunity to opt out of "Other LGBTQ+ Educational Materials," defined as materials that might be used in the kindergarten curriculum that "depict or describe LGBTQ+ characters, relationships, or activities, or LGBTQ+ political or social advocacy." *Id.* The order sets forth protocols for opt-outs and possible adjudication of the applicability of *Mahmoud* to each of these "Other LGBTQ+ Educational Materials."

[117] *Id.* MCPS Regulation § VI.C. Families that are new to Montgomery County are given 30 days to make opt-out requests.

[118] *See id.* § IV (D).

[119] The form, designated MCPS Form 281-26 (August 2025), is titled "Request to be Excused from Instructional Material." It is available at https://ww2.montgomeryschoolsmd.org/departments/forms/pdf/281-26.pdf.

[120] *See id.*

suggests, normally handles appeals from school-level decisions on student discipline.[121] Parents are promised a decision within ten school days after submission.[122] The MCPS Regulation thus contemplates the possibility of a decision coming more than three weeks into a ten-week marking period—ten calendar days from the beginning of the marking period to submit the request, plus ten school days for the response.

The precision and mechanical qualities of the submission process contrast sharply with the discretion that appears in some of the MCPS Regulation's listed grounds for denial, and even more in the description of what approval entails beyond the excusal itself. The MCPS Regulation specifies but does not explain four categories of permissible denials: (1) excusals from the entirety of a course required for graduation; (2) excusals from "instructional standards, objectives, and content required by law" (3) excusals that would fundamentally alter the required curriculum; and (4) incomplete requests.[123]

Categories one and four—complete excusal from a required course and incomplete requests—are straightforward enough. Category two seems designed to block efforts to use opt-outs to force the district or a teacher to redesign learning goals and measures of achievement.[124]

The most significant category of denials is category three, excusals that would "fundamentally alter the required

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[121] *See* Montgomery Cnty. Pub. Sch., Division of Student Conduct and Appeals, https://www.montgomeryschoolsmd.org/departments/appeals/.

[122] MCPS Regulation § VI.D. The MCPS Regulation does not specify what happens if the district fails to meet this deadline.

[123] *Id.* § VI.G(1)–(4).

[124] The denial category of "content required by law," unless further explained, leaves open the constitutionally dubious move of trying to avoid *Mahmoud*-type claims by making certain reading assignments legally obligatory.

curriculum."[125] Because the school district does not provide commentary accompanying any of the categories, we can make only educated guesses about the district's concern for fundamental alteration of the curriculum.

It seems reasonable to assume that this concern applies primarily to courses in science and social studies rather than language arts. In a typical English course, the teacher chooses for intensive study a set of books that demonstrate a variety of literary forms (*e.g.*, novel, short story, poetry) and genres (*e.g.*, science fiction, fantasy, realism, historical fiction). An opt-out from one book leaves open the possibility of assigning a different book from the same category. Though substitute books may yield slightly different lessons, and the substitution process may prove administratively disruptive, neither will necessarily compromise pedagogical objectives.

In contrast, an opt-out from assigned readings in science or social studies may substantively alter the content of the course, and perhaps the entire program of instruction in the subject across multiple grades. Consider opt-outs from material on the evolution of species in biology, or on the age of our planet in Earth and Space Science. The study of evolution is essential to exploring the nature of life today as well as to understanding the way that living things have changed and diversified over billions of years. Likewise, Earth's history and the processes that have shaped it cannot be understood without recognizing that the Earth is billions rather than thousands of years old. Lessons on evolution or the age of the Earth may well conflict with some parents' sincere religious beliefs.[126] Removing these lessons, however, will

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[125] Montgomery Cnty. Pub. Sch. Regul. IFD-RA § VI (G)(3) (2024).

[126] The conflict between creationist religious beliefs and the teaching of evolution in the public schools has occupied American courts for a century. The summer of 2025 marked the 100th anniversary of the famous trial of John Scopes for violating Tennessee's Butler Act, which prohibited teaching the scientific theory of evolution, or "any theory that denies the story of the Divine Creation of man as taught in the

have profoundly negative consequences for learning objectives throughout the science curriculum.

The same is true for material on race and slavery in American history, government, economics, and other social-studies courses. What students learn in each of these fields is profoundly shaped by the treatment in the curriculum of slavery and race relations. On these topics, we can easily imagine opt-out requests from the left as well as from the right.[127]

The pro-parent tilt in *Mahmoud* is sufficiently extreme that it is difficult to predict the outcome of free-exercise litigation if parents challenge a denial of opt-out rights in a case involving science or social studies. Defending a denial in court will thus require substantial resources and constitutional fortitude on the part of school administrators and elected school-board members, who might find it simpler (though not simple), or at least safer, to accommodate objectors.

The decision whether to fight a court battle will also be affected by the administrative and pedagogical costs of

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Bible . . . ." 49 TENN. CODE ANN. § 1922 (repealed 1967); *see* https://www.newyorker.com/magazine/takes/paige-williams-on-marquis-james-preview-of-the-scopes-monkey-trial. The prominent federal constitutional decisions include *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Edwards v. Aguillard*, 482 U.S. 578 (1987); and *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa. 2005) (holding that public school violated Establishment Clause by teaching intelligent-design creationism). Professor Katskee was counsel for the plaintiffs in *Kitzmiller*.

[127] Consider, for example, the recent amendment to Florida's state social-studies standards requiring instruction on "how slaves developed skills which [sic] . . . could be applied for their personal benefit." Florida's State Academic Standards—Social Studies SS.68.AA.2.3 (2023), https://www.fldoe.org/core/fileparse.php/20653/urlt/6-4.pdf. Many parents in Florida surely object, on religious grounds as well as on secular ones, to lessons teaching that slavery produced any beneficial effects. At the same time, some parents may share the Florida legislature's objection to teaching that slavery was unqualifiedly evil.

accommodation. In this regard, we note that the MCPS Regulation addresses in much less detail what occurs if a request to be excused from instructional materials is approved. Here are the two pertinent provisions, in full:

> E. If the request is approved, the student's principal and teachers will be notified and the school will consult with the [district's] Division of Teaching and Learning to identify suitable alternative text(s), textbook(s) and/or assignment(s).
>
> F. Students who are excused from instruction under this regulation may be afforded the opportunity for other academic work during the period of time in which the student would otherwise be participating in the instruction the student is excused from.[128]

Notably, it is only after the district approves an excusal request that the classroom teacher and school principal are formally notified of the parents' request. Parents or the student may, of course, provide this more local notification themselves at any point, but they are also free to remain anonymous and silent at their own school up to the point when the opt-out is granted. Accordingly, a teacher may not learn about a request until several weeks into the marking period. By that time, the teacher may already be using the challenged material, and the lessons for the marking period may be set.

At this point, the disruptions attendant on approved excusals will show up with a vengeance. Students will be excused from class or parts of class. Where they will go is left unspecified. But if they remain in school, they will have to go *somewhere* outside their regular classroom, and they will need supervision. Moreover, if alternative work is to be assigned, the teacher or other school- or district-level personnel will have to select the

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[128] Montgomery Cnty. Pub. Sch. Regul. IFD-RA § VI (E)–(F) (2024).

alternative lessons and instructional materials. Someone will have to evaluate the student's work and integrate that evaluation with other evaluations for students in the class.[129] Similarly, tests for the class will have to be written with an eye to the opt-outs. Either material that any student is excused from will have to be excluded from all testing, or opt-out students will have to be given different tests from the rest of the class.

Consider as well a situation in which one parent objects on religious grounds to exposing her child to some instructional material, but the child's other parent objects to excusal from the lesson. This sort of disagreement about children's upbringing is a commonplace in divorce and child-custody proceedings, especially (but not only) when the parents are of different faiths. Deciding between competing parental demands is difficult enough for family courts, which have the legal authority to resolve those disputes. School officials have neither the authority nor the institutional competence to adjudicate these issues.

In late October, 2025, we learned of a response to a Maryland Public Information Act request, dated September 18, 2025, seeking data on curriculum opt-out requests in MCPS during the first marking period.[130] The Response shows that forty-three families filed requests. The forty-three families (some with more than one child) submitted a total of fifty-eight opt-out forms—

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[129] In the *Mahmoud* litigation, the most thorough account of the disruptions that will likely attend an opt-out regime appears in the Brief for Amici Curiae American Association of School Superintendents et al. in Support of Neither Party, Mahmoud v. Taylor, 145 S. Ct. 2332 (2025) (No. 24-297), https://www.supremecourt.gov/DocketPDF/24/24-297/351706/20250310181805441_24-297--Mahmoud%20Amicus%20Brief%20AASA%2003-09%20rtf.pdf.

[130] The document is available here: https://www.documentcloud.org/documents/26182132-fy26-70-responsive-document/. All the data in this and the following two paragraphs are derived from the response to that request.

forty-six in twenty different elementary schools, ten in six different middle schools, and two in one high school.

The Response lists 85 books as among the "Most Common" listed on the opt-out-request forms, and defines "most common" as appearing on five or more forms. Hence, the forty-three first movers in Montgomery County filed forms containing at least 425 (5 x 85) opt-out requests, an average of almost ten per family and perhaps greater.

The Response designates the most common themes for listed books in elementary schools as "LGBTQ+, Culture/Diversity, and Inclusion," and in middle schools as "LGBTQ+ and Social Justice." The list of Most Common Books reinforces the notion that opt-outs are not limited to LGBTQ+ themes. Approximately three-quarters of the books on that list appear to touch on LGBTQ themes, though at times only obliquely. The remainder (20 to 25 books) fall into various thematic categories, the most common of which is racial and ethnic diversity.[131]

For example, a common book for opt-out requests from the high-school curriculum, *All American Boys*,[132] is a young-adult novel about the connection of two teenagers, one black and one white, to an incident of police brutality. MCPS's Public Information Act Response does not identify any religious objection to the book; and as noted above, parents need not explain their objections. The list of most common books for opt-out requests also includes *Charged: Prosecution and Mass*

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[131] In *Alan L. v. Lexington Public Schools*, 2025 U.S. Dist. LEXIS 267350 (D. Ma., Dec. 30, 2025), described in note ___ *supra*, the complaint also included objections to teaching about race, but the court did not address those in its preliminary injunction. *Id.* at *5 n.3; *see also* Ibanez v. Albemarle Cnty. Sch. Bd., 897 S.E.2d 300, 323-326 (Va. Ct. App. 2024) (rejecting federal and state constitutional claims by parents attempting to veto or opt out of anti-racism curriculum).

[132] JASON REYNOLDS & BRENDAN KIELY, ALL AMERICAN BOYS, https://www.allamericanboysnovel.com.

Incarceration, and such noteworthy titles as *Aladdin and the Wonderful Lamp*, *Alice's Adventures in Wonderland*, and *The Tempest*.

We filed our own Public Information Act request with MCPS for the second marking period, which began in early November. In a response dated December 1, we learned that sixteen families filed opt-out requests during that period.[133] The total number of forms filed was twenty-four, including seventeen in elementary schools, five in middle schools, and two in high schools. Twenty-nine books were listed as "Most Common," which means that sixteen families filed forms that included more than 145 requests, an average of about nine per family and perhaps more. The Response also discloses that one or more families opted out of eighty books.

In the second marking period, the most common themes for objection in elementary school remained "LGBTQ+, Culture/Diversity, and Inclusion." Of the twenty-nine most commonly listed books, twenty-seven were repeats from the list for the first marking period, including all the books involved in the *Mahmoud* litigation. A few books appear as new in the second marking period. In middle school, parents filed opt-out requests from *The Iliad, the Odyssey, and other Greek Stories*,[134] which may perhaps have drawn objections to references to Greek Gods. In high school, one or two parents sought opt-outs from a book

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[133] Maryland Public Information Request, Curriculum Opt Out Responses, Responsive Document FY 26-176 (on file with the authors and the First Amendment Law Review). The information in this and the following paragraph comes from that Response.

[134] This work is contained in a full set of curricular materials, available here: https://www.coreknowledge.org/free-resource/ckla-unit-4-the-iliad-and-the-odyssey-and-other-greek-stories/.

entitled *The Magic Fish*,[135] a graphic novel about a boy coming out as gay in his Vietnamese immigrant family.

These results are early and sparse. It is far too soon to know whether the patterns might change, or whether the result of opt-out requests (in Montgomery County or elsewhere) might be the abandonment of certain books or lessons, contrary to Justice Alito's assertion that the *Mahmoud* litigation was not designed to control the curriculum and would not have that effect.[136] At some critical juncture, the scarcity of classroom space, teachers and other supervisors, and resources to acquire specialized instructional materials for individual students will mean that objectors will effectively wield a heckler's veto over portions of the curriculum.[137]

The concerns identified in this Part focus on MCPS, because that district is the defendant in *Mahmoud*. MCPS created the new Regulation and accompanying notice form in the shadow of the Supreme Court's decision. But in student age and curricular subject matter, the MCPS Regulation goes far beyond the Supreme Court's mandate.

The school district's regulatory action seems prudent in its broad outlines as a response to the radical provocation of *Mahmoud*. Nevertheless, we cannot know at this point how well

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[135] Trung Le Nguyen, The Magic Fish, Random House, 2020, https://www.penguinrandomhouse.com/books/602718/the-magic-fish-by-trung-le-nguyen/#:~:text=A%20beautifully%20illustrated%20story%20by,have%20our%20own%20happy%20endings.

[136] *Mahmoud,* 606 U.S. at 568.

[137] In litigation over curriculum, parents frequently seek vetoes and opt-outs as alternative remedies. *See* Ira C. Lupu, *The Centennial of* Meyer *and* Pierce, *supra* note __, at 198–215. Justice Alito suggests in *Mahmoud* that bundling the objectionable lessons into fewer class sessions might make opt-outs more efficient to administer. 606 U.S. at 567. That strategy may also make the lessons less effective, however, by reducing their pervasiveness over the school year.

the MCPS policies will match those chosen by the more than 10,000 school districts throughout the United States.[138] Nor can we predict the exact quality and quantity of disruptions that will follow the policy responses to *Mahmoud* in all those districts. Some districts may allow many fewer excuses and choose to fight demands for them. Some may proactively strike from the curriculum anything that they think might potentially offend anyone, leaving only scraps from which to fashion a curriculum. Some may act on assumptions that favor the majority faith, or the most litigious religious groups, over other religions and their adherents. In short, differences in demographics and in the wealth and political will of school districts may lead to differences in policy, administration, and the character of readings that might provoke opt-out requests.

Despite these possible differences, it is apparent that *Mahmoud* has handed a weapon to groups that want to purge school reading lists of materials that they dislike, even though the groups lack the numbers or political clout to win battles over curriculum and instructional materials through ordinary processes of school reform. *Mahmoud* transfers power away from school boards, which are democratically controlled, to individual parents, lawyers, and ultimately judges. In the name of the free exercise of religion, what look like pleas for accommodation may become engines of transformation. As we noted at the outset of this paper, the Supreme Court has never before intruded so radically on the process of public education and its governance.[139]

Mahmoud may also cut much deeper, undermining the long-standing purposes of the public schools. Public education is designed to be a shared experience that teaches and gives students the opportunity to practice the shared values necessary

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[138] *Mahmoud*, 606 U. S. at 616 (Sotomayor, J., dissenting, citing Brief for Amici Curiae American Association of School Superintendents et al. in Support of Neither Party, representing 10,000 school districts).

[139] See *supra* notes 2–7 and accompanying text.

to live together in a politically and socially diverse, religiously pluralistic society. At their best, public schools respect differences while providing common vocabularies, understandings, and frames of reference. The educational system brings students together not to deprive them of the right to choose their own beliefs and paths in the world, but to allow them to chart their own course while also living alongside and in relative harmony with those who make different choices.

Once upon a time, the Supreme Court recognized that public education should "inculcate fundamental values necessary to the maintenance of a democratic political system . . . ."[140] A key aim, as the Court underscored, is to "prepare pupils for citizenship" by "inculcat[ing] the habits and manners of civility as values . . . indispensable to the practice of self-government in the community and the nation."[141] Achieving that aim requires advancing the "fundamental values" of "tolerance of divergent political and religious views" and respectful discourse with those with whom one disagrees.[142] If parents are now entitled to send their children to public school but insulate them from influences that differ from the parents' views, these critical lessons will be lost.

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[140] Ambach v. Norwick, 441 U.S. 68, 77 (1979).

[141] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting CHARLES A. BEARD & MARY RITTER BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

[142] *Id.*

Chairman KILEY. I now recognize Mr. Owens of Utah for 5 minutes.

Mr. OWENS. Thank you. Thank you so much. As a dad of six kids and 18 grands, this makes my blood boil. I am not—I cannot understand how we are sitting here talking how strangers should raise my kids. Now if you want to know how this opt-out is going to look, we have got it. It is called choice. You are going to see the mass opt-outing of programs like this, three and 4 year-old kids being taught this sexual smut, and we are sitting here as adults thinking it is okay.

I will say this just to summarize before I get into my questions. We are seeing adults, grown people that have the power of having little children in their class that they cannot escape. They are captured, hiding from the parents the curriculum that they are going to teach no matter what the parents think or do not think.

By the way, that is the way the Communism and Socialism work if you want to know how that looks. It is not hypothetical. Then hiding behind unions so they will not get fired. I say two things about these kind of people. They are bullies and they are cowards, and I do not want them anywhere close to my kids. I will be choosing opt-out, and my parents, my kids will be choosing and my grandkids will be choosing opt-outs whenever we have a situation like this.

I tell you what is going to happen. The free market is going to show itself in a big way. Schools and districts like this will go out of business. We will not fund this anymore and parents will not show up anymore. Schools out there that are doing the right thing, teaching our kids how to read, write, think, communicate, articulate, debate and succeed will prosper. We will not have to worry about going through this democracy mess that takes forever, as our kids being indoctrinated.

Boy, I just cannot believe we are having this conversation with grown people. I just—I do not get it. I just do not get it anyway. No, I do get it. Anyway, Mr. Daugherty, you mentioned that some parents objected to inappropriate teachings that had no religious faith. Well, I am glad that the Court protected the rights of these religious parents, but I am concerned about the school boards that they still force non-religious parents to have their kids indoctrinated.

Your written testimony quoted that Justice Kagan mentioned there are probably a lot of nonreligious people who are not really thrilled about this either. How do you think courts will look at protecting rights of the nonreligious parents?

Mr. DAUGHERTY. Well, as I think Ms. Perry, noted, there is a case called Pierce that says that among other things—well, it says that parents have parental rights under the 14th Amendment, substantive due process clause, and it says critically "Children are not mere creatures of the State."

That is very important. Children are they belong to their parents who have a duty to love them and raise them. That is really where first—the first line of child development begins. The notion that now that educational bureaucracies distrust parents and exclude them from decisions, that has gotten, I am afraid, too far out of hand in this country. A case like Mahmoud is a case when they push back.

I do—I must disagree. I think there are limiting principles. I do not think this is going to be hard to deal with. As I mentioned in my testimony, in Montgomery County now, these issues are addressed by simple refrigerator magnets. Each semester, each student gets a refrigerator magnet that says what is going to be taught, the books they are going to be taught. If they are, if those are lessons violate sincerely held religious beliefs of parents, parents can opt out. I do not think this is any kind of difficult, you know, onerous problem for schools to deal with.

If anything, I think schools, public schools, public teacher unions overreached. They got perhaps a little ideologically arrogant and this is a good way of pushing back on that.

Mr. OWENS. I think you said something, I just want to make a point. It is called arrogance. The district argument was that parents' free exercise was not a burden because they could remain free to enroll their children other private schools. That is pure arrogance. Well, guess what? It is coming. School choice can allow them to go to private, public, charter, homeschool, parochial. You are going to see a remarkable opt out, and I am sorry about that.

Real quickly, Mr. Baxter, many opposed to the lawsuit against the district belief that these parents should have engaged in the democratic process to make their voices heard, rather than resorting to suing the school districts. Can you explain why the democratic process here is the wrong remedy?

Mr. BAXTER. Parents who do engage in the democratic process were called bigots, racist and xenophobes. This was a very diverse group of Americans of all religious and political stripes, who just simply wanted to protect their children's education. That is really what the first amendment is for, is to make sure that religious liberty of individual families is protected.

Mr. OWENS. My advice for these folks who think this way, keep it up. You are going to find yourself out of a business, out of a job, because we are opting out of this mess for sure. Thank you so much. Appreciate it, and I yield back.

Chairman KILEY. Representative Adams of North Carolina is recognized.

Ms. ADAMS. Thank you, Mr. Chairman, and thank you to our witnesses for being here. The Supreme Court's decision in *Mahmoud v. Taylor* was narrow, but the conversation surrounding it has not been. There is a real risk that this ruling is used to blur a longstanding constitutional line between protecting families from compelled belief and undermining the basic function of public education.

Public schools do not exist to affirm any one world view. They exist to prepare students to live in a diverse, pluralistic society. That necessarily includes exposure to ideas that students and families may not agree with. My questions today are about limits, about guardrails, and about making sure that we do not turn a narrow ruling into a broad mandate that destabilizes classrooms across the country.

Let me turn to our witnesses. Mr. Rothschild, the Supreme Court has consistently distinguished between compelled speech or forced affirmation of belief on the one hand, and the ordinary work of

public education, including civics education that exposes students to differing ideas, differing ideas, excuse me, over time.

In Mahmoud, did the Court meaningfully engage with that distinction? Going forward, how should courts understand the difference between unconstitutional coercion and the slow, noncoercive process of educating students in a democratic society?

Mr. ROTHSCHILD. That last line of yours, I believe, is from Barnett, cited in 1943 by Justice Jackson, which was considered the quintessential statement on this very distinction that you are raising, between your right to send your children to private school and that if your child is to attend a public school, that within public schools there are some limits.

To go back to a question that Mr. Kiley was asking me before, I think there are limits and Barnett, for example, represents some of them. Lower courts since 1943 unanimously held to that distinction as well. Mahmoud disrupts it.

Ms. ADAMS. Okay. Do you see a risk that Mahmoud could be misinterpreted to treat mere exposure to ideas as constitutionally suspect, even when no student is required to affirm or adopt those ideas?

Mr. ROTHSCHILD. I think it definitely will be interpreted that way, yes.

Ms. ADAMS. While Mahmoud was framed as a narrow ruling, it raises broader questions about who gets to decide what is fundamentally necessary to teach children. What concerns you about courts or Congress stepping too far into curriculum decisions traditionally made by educators and local communities, and would a Federal opt-out law risk replacing professional education, educational judgment, with litigation-driven oversight?

Mr. ROTHSCHILD. Much better than I can ever articulate this, let me just quote to you Justice Jackson, the author of Barnett, in his concurrence in McCollum in 1948. He said "If we are to eliminate everything that is objectionable to any of these warring sex or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant lawsuits." Now, maybe that is the point.

Ms. ADAMS. Maybe so. In your view, which institutions are best suited to set these boundaries in a way that protects religious liberty without eroding the mission of public education, local school boards, educators, states, or Federal lawmakers? Which one of those?

Mr. ROTHSCHILD. I mean it has long been recognized that if there is any area where democracy is terrain, it is with respect to local government. There is nothing perhaps more local than boards of education in educational districts. Again, to quote from *Brown v. Board of Education*, "education is perhaps the most important function of State and local governments."

Ms. ADAMS. Thank you, sir. I agree. Mr. Chairman, I yield back.

Chairman KILEY. Pursuant to the previous order, the Chair declares the Committee in recess. Subject to the call of the Chair, we will plan to reconvene promptly in 5 minutes. Thank you. The Committee now stands in recess.

[Recess.]

Chairman KILEY. The Committee is back in order. Representative Miller of Illinois is recognized.

Ms. MILLER. Thank you, Mr. Chairman. Parents have the God given right to raise their children, especially when it comes to educating them in accordance with their faith. This fundamental freedom includes the right to know what their children are being taught in school. These foundational rights are reinforced by Federal legislation through the Family Educational Rights and Privacy Act (FERPA), and the protection of Pupil Rights Amendment (PPRA).

The bottom line, parental consent is integral to our educational framework. Schools cannot conceal student information from a parent. Schools must recognize this reality, but it comes as no surprise that Democrats want to take away parental rights and education. When parents voice concerns about what their children were being taught during the pandemic, Joe Biden's Department of Justice labeled them as domestic terrorists. Last year, parents in Montgomery County, Maryland, scored a monumental victory when the Supreme Court reaffirmed what we already knew to be true. Parents control their children's education.

However, many school districts continue to circumvent the Supreme Court's ruling, including my home State of Illinois. For example, Chicago Public Schools featured sex education curriculum beginning in kindergarten. In the first grade, there were lessons on how to define gender identity. In second grade students were taught the concept of gender stereotypes and how to advocate for change.

In fourth grade, the district curriculum utilized a gender snow person to help students explore the concepts of gender identity, sexual orientation, sex assigned at birth and gender expression. By fifth grade, there was an introduction to puberty blockers and students were forced to read gender unicorn, learning about sexual orientation and other concepts like gender role stereotypes and gender expression. Students were even expected to define terms like cisgender, nonbinary, and transgender.

Last year's victory in the Mahmoud case means it is time for these schools to fall in line. My first question is to Mr. Baxter. In your written testimony, you mentioned the role of Congress in protecting parental rights in education, particularly through FERPA and PPRA. Do these laws, as written, sufficiently protect parental rights or are further protections needed?

Mr. BAXTER. They are often ignored by many school districts, and even the Supreme Court's ruling is being ignored by many school districts. I think Congress's attention to this issue and using its funding mechanisms can be an effective way to protect the rights of parents.

Ms. MILLER. Thank you. What about when schools manipulate FERPA and call it educational outreach, when they send student data to left wing voter registration organizations?

Mr. BAXTER. It is a little bit out of my expertise. I am here to testify on the religious liberty aspects, but hopefully under all of these laws, schools will ensure that all students are treated equally regardless of their religion or irreligion. All students deserve an equal opportunity to be educated.

Ms. MILLER. Yes, and to have their privacy respected, and we are on that. My next question is to Ms. Parshall Perry. In your written testimony, you mentioned Justice Kennedy's attempt to assuage concerns of religious freedom violations in light of the Supreme Court's Obergefell ruling. Could you please explain how this ruling was an affront to religious freedom and has set off a domino effect of violations, including the Mahmoud case.

Ms. PARSHALL PERRY. Yes. In fact, Justice Alito himself in his excoriating dissent to the Obergefell decision in 2015, actually responded to Justice Kennedy's majority opinion and said "This is going to be utilized to stamp out every vestige of religious dissent." In fact, his words proved to be true. In fact, the Mahmoud decision was made necessary because of individual decisions like the Obergefell decision.

Now we can talk about whether or not it is bad jurisprudence, which I think it is. It divined a constitutional right to same-sex marriage from the same shadowy ether of the 14th Amendment that the Court did in *Roe v. Wade*, and that has been subsequently overturned. Then we can talk about it as a policy prescriptive matter.

I think the fallout is something we cannot ignore. In fact, as we have seen sort of cultural institutions be overtaken by progressive orthodoxy, we find parents, good, noble, honest parents who simply want their children educated in the crosshairs of a culture war they did not start.

Ms. MILLER. That is what we want too. Thank you, and I yield back.

Chairman KILEY. Representative Lee of Pennsylvania is recognized.

Ms. LEE. Thank you, Mr. Chair. It would seem that the issue is not that parents have a right to raise their children. I think the issue is that a certain parent doesn't have a right to raise somebody else's child. You do not get to determine for other children what religious beliefs they get to be exposed to in their schools.

It just feels to me that Republicans and conservatives are always feigning outrage about the wrong things. For instance, right now as we are attempting to make it harder for children to receive a holistic education, American children are falling behind by every metric on the global scale. While kids are behind in reading, conservatives are busy trying to make sure they cannot read a story about a little girl who adores her uncle who is getting married. That is the most recent outrage.

Reading is a crucial part of how children learn about themselves, and how much they have in common with others is how they learn about the world. Not only do kids deserve to see themselves reflected in books and the curriculum, they perform better when they do. The reality is, is that this is just another right-wing attempt couched in parents' rights to shield children from getting a real education.

Everything this administration and the right-wing movement does is a blatant attempt to make us less educated, more narrow-minded, and easier to control. This has a massive impact on our ability to function as a society, let alone to compete internationally. Right now, we are not a country that people are taking seriously.

Today, it is about exploiting religious exemptions to shield children from the reality of queer people existing. Other times it is been trying to shield children from the reality of black history lessons and how black history is American history or indigenous studies or various languages as we have seen through the outrage of Bad Bunny performing at the Olympics. It is always centered in bigotry and xenophobia. It is suffocating our country.

Mr. Rothschild, First Amendment doctrine has shifted dramatically in the last few years due to President Trump's appointments to the Supreme Court. Do you expect we will continue seeing religious freedom weaponized to justify censorship in schools? How do you believe this will impact education, excuse me, public education in our country?

Mr. ROTHSCHILD. Thank you for the question. Religious liberty jurisprudence has expanded drastically under Trump, under Trump's administration and his appointments to the Supreme Court. For example, during the pandemic, the Supreme Court interpreted the meaning of religious discrimination under the Free Exercise Clause in exceptionally expansive ways, such that basically any law that doesn't provide an exemption for religion is discrimination against religion.

Most recently, it is Mahmoud, where the focus is not on religious discrimination, although there is vestiges of that in Justice Alito's opinion too, where he frames the lack of opt-outs and the teaching or the reading rather of these picture books as hostility, as explicit hostility toward religion. Essentially anything can be framed as discrimination against religion. Technically speaking, Mahmoud is a religious liberty case, not a religious discrimination case.

Ms. LEE. Conservatives are also hoping that cases like *Mahmoud v. Taylor* will cause already under-resourced public schools to preemptively censor curriculums to avoid costly lawsuits from a vocal minority. We are already seeing this happen, right? A Rand study found that teachers are preemptively whitewashing curricula following the manufactured moral panic against critical race theory.

In Justice Alito's ruling in *Mahmoud v. Taylor*, he said, "Not allowing parents to opt out imposes a hostile environment," as you mentioned. Do you believe that this ruling could also create a hostile environment for LGBTQ+ children or other marginalized children in the same vein?

Mr. ROTHSCHILD. Yes, I mean I could I just imagine, and this was argued in Mahmoud, that if you allow for opt-outs, it is not only about the administrability of the opt-outs. One of the concerns that the board had in Mahmoud was the influx of requests for opt-outs, once these children books were introduced into the curriculum.

It is not just administrability, it's also the messaging that is sent when children are allowed to walk out of the classroom as soon as teachings about inclusivity of other children is implemented.

Ms. LEE. Thank you. Conservatives are exploiting religious freedom to suppress other constitutional rights like the separation of church and State or equal protection. Our duty to religious freedom does not absolve us as a duty to protect marginalized groups from environments that condemn our existence. I want to end with the important point that despite this administration's best efforts, in-

clusive educational materials are still legal in this country. I welcome a hearing about the decision in *American Federation of Teachers et al. v. U.S. Department of Education et al.*, that struck down the Department's guidance against diversity, equity, inclusion, and accessibility. I stand with all the educators, students, and families navigating the bigotry and the xenophobia of this administration.

We are working to ensure that children feel included and accepted and safe and have the opportunity to become educated global citizens. I yield back.

Chairman KILEY. Representative Harris of North Carolina is recognized.

Mr. HARRIS. Thank you, Mr. Chairman, and thank you to all of you that are serving on this panel today and for your testimoneys. I found myself, just overwhelmed at times in reading their testimoneys and to see how all of this played out there in Montgomery County.

I want to just talk for a moment that one of the things that overwhelmed me was just kind of the attack or the villainization of parents that seemed to be working, from the board's perspective. Mr. Daugherty, your testimony mentioned that MCPS was incredibly hostile to parents who had legitimate religious concerns about the curriculum.

In fact, you quoted one board member who suggested that if the parents were right, the board would have to "Send out notices so white supremacists could opt out of civil rights contents." I find that absurd, and the board should be ashamed of themselves of comparing Muslims and Christians to white supremacists. Mr. Daugherty, I just want to ask you if you could take a moment just to give us your perspective about that comparison.

Mr. DAUGHERTY. Yes. I mean again, as I said earlier, I think one of the things Mahmoud revealed is how disconnected public schools are from the students and the families that they serve. The notion that Jewish families, Muslim families, Christian families, Ethiopian Orthodox are white supremacists or can be, even be equated to white supremacists, right?

That is insulting as anything. I mean making that kind of extreme analysis or analogy just shows how out of touch they were. You know again, I think this is a problem in Montgomery County. Hopefully it has been resolved after they lost this lawsuit. You know, the notion that this storybook series was necessary to, I think they said disrupt heteronormative thinking and which, you know, it seems to be something that I do not know why kindergartners need to be able to have that sort of thinking disrupted in order to learn to read and write and do mathematics.

Yes. It really was kind of scary how the school board chose this is the hill they were going to die on. Luckily, they lost. It revealed a lot about what their, what their priorities are, and it is certainly not serving the families that are in their county.

Mr. HARRIS. Thank you, sir. Ms. Parshall Perry, there has been a lot of conversation today about inappropriate content in this hearing. I think many people really do not realize how deeply inappropriate it was. In fact, some of the left have characterized these teachings too often as lessons in mere tolerance or lessons in just

mere understanding, and I think that is horrifically misleading. Would you take a moment just to share how inappropriate was this content?

Ms. PARSHALL PERRY. This centered on five LGBTQ themed storybooks for children as young as three and up. Again, we need to view this from the perspective of the diminished capacity of minors. This was very distinctly designed to change perspectives. In the colloquy with Alan Schoenfeld, who was the attorney for MCPS and Justice Alito, he said "Why don't you just come out and say exactly what you want to say? You're trying to change minds. You have a distinct perspective on these things you were trying to institute in minor's minds."

Two of the storybooks, not only "Uncle Bobby's Wedding," but "Pride Puppy" addressed nonbinary individuals, drag queens and pride parades. These are individuals who do not have a concept of their own identity as it relates to whether or not they want to be a fireperson or a fairy when they grow up. What we are dealing with is a designed attempt to change minds on perspectives.

I would hearken back to what Congresswoman Lee said earlier, which is there are a number of very primary considerations in American education. Our biggest threat is the fact our children cannot read or do arithmetic, and there is a reason Harvard now offers a remedial math class. If we divest this kind of curriculum from public education, our children will succeed.

Mr. HARRIS. Thank you, ma'am. Real quickly in the last 40 seconds, Mr. Daugherty you mentioned in your written testimony about parents asking for optouts, and that was mentioned brought up earlier. It is fairly common across the country for schools to allow parents to opt out so the Maryland parents really were not asking for a radical new policy.

Can you talk for the last 20 seconds about the kinds of teachings parents can often opt out from both at MCPS and in general?

Mr. DAUGHERTY. 47 of 50 states allow parents, by statutory right, to opt out of classes on human sexuality, family life, including Maryland. Now in Maryland, just showing you frankly the disingenuousness of the board here, they did not classify this storybook series as human sexuality, because that would have meant the parents had the statutory right to opt out. Instead, they said it was part of English and Language Arts, which to me seemed silly.

I mean again, I think most of the people in this room were able to learn to read and write and do math without having their heteronormative normative things disrupted. I think it was slippery, evasive, and disingenuous not to say this is a human sexuality part of the curriculum, in which case there would have been a statutory right under Maryland law and most other states for the parents to opt out.

Mr. HARRIS. Thank you, sir. Mr. Chairman, I yield back.

Chairman KILEY. Representative Hayes of Connecticut is recognized.

Ms. HAYES. Thank you, and thank you to our witnesses for being here. I am having a really hard time following along with this hearing, because terms like school board and district are being used in the abstract.

Where I am from, the school board is composed of local members of the community who are elected to serve on these boards. In the State of Connecticut, we have our curriculum framework comes from the State, which says these are the topics that have to be taught. Then at the local level, curriculum committees, local curriculum committees, decide how will we teach those. In my district, a local curriculum committee—I should probably add that I am not talking about this in a hypothetical way; I taught in my school district, was the head of many curriculum committees, was the Connecticut Teacher of the Year, was the National Teacher of the Year.

I looked back at my notes to see how the last eight curriculum committees I served on were composed, and they were subject matter teachers, technology coordinators, special education teachers, administrators, parent representatives always on these curriculum committees, students and community members who decided not only what the curriculum would entail, but how it would be taught.

One step further, as a teacher, every week I had to turn in my actual lesson plans of what I was going to do Monday through Friday in my class. Those lesson plans were posted on Parents Square. Parents had the ability to view them, and we always, always, always had an opt-out policy. I actually believe that parents should have the ability to opt their children out of a lesson that they feel is offensive, or I am sorry, not offensive but goes against their religious beliefs.

I also, however, am a mother who had all of my children formerly and currently went through a public school system. I think that I am a good, noble, honest parent, and I want my children to learn lessons about kindness and inclusivity, and do not object to queer subject matter. I think that the rights of those parents, parents like me, should also be respected to have their children learn about their neighbors and people in their community.

While I agree that math and reading are very important, I also—and let me just say this, I want my children not only to learn about those things, but then come home and us have conversations about what this looks like in our community, because they will be living alongside people who they may not agree with, who have different lifestyles, who make different choices than them. I am as equally concerned about them learning reading and algebra as I am about producing conscientious good adults who are not racist or xenophobic or homophobic or bullies in their community. As a parent, I want my child exposed to all of the information so that they can make the most informed decision.

I guess my question is Mr. Rothschild, I am going to come to you, is Congress the body that is best suited to make these curriculum decisions? Every Committee, every hearing, every conversation, every quote, every statement that comes out of the other side is about these things should be made locally. Now we are here today saying that a local board of education, made up of local representatives, local curriculum, that chooses their curriculum materials, that people can challenge if they do not like the decisions that come out of this board, they can elect new people to the board and change it.

Now we are saying that those people still should not be able to make decisions on behalf of the children in their community? Mr. Rothschild, should that be something that Congress does?

Mr. ROTHSCHILD. Again, I think the Supreme Court worded it a lot better than I could ever word it. In *Milliken v. Bradley*, this is what the Supreme Court had to say: "No single tradition in public education is more deeply rooted than local control over the operation of schools . . . local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'" That is a quote from a previous Supreme Court decision, within the Supreme Court decision.

Ms. HAYES. I just want to say, I mean I have members of my own family who identify as gay. I have people in the community who I look up to who identify as gay. I want my children to know that those individuals are not an abomination. Those individuals are not indoctrination to care about people being able to live their life in the way that they choose. Again, the fact that this Committee is doing this, you know——

I am a teacher. I also represent Newtown Sandy Hook. We have yet to have one hearing on school shootings. If you want to protect children from the things that help them thrive in school, I would suggest that we start with that. I yield back.

Chairman KILEY. Representative Messmer of Indiana is recognized.

Mr. MESSMER. Thank you, Mr. Chairman, and thank you to our witnesses for joining us here today. Mr. Baxter, you mentioned in your testimony the congressional amicus brief that was submitted to the Supreme Court, in *Mahmoud v. Taylor*.

I joined my colleagues in both chambers in signing under this brief, which challenged policies that compel students to participate in instruction that may conflict with their religious values and infringe on their First Amendment protections. Can you explain how this brief impacted the final decision made by the Court?

Mr. BAXTER. Thank you, Mr. Messmer and all who joined the brief. It was a critical brief cited by the Court, showing that there are—in the public schools today, there are children being opted in and out of the classroom all the time for learning English as a Second Language, for individualized education plans, and it is no additional burden to respect the few parents who have religious objections that want to opt their children out of, of 1 hour of curriculum.

Mr. MESSMER. Thank you. I was pleased that the Supreme Court decided to let parents make important decisions about what their children are exposed to in public schools, especially when involves ideology that violates their family's religious beliefs.

Mr. Daugherty, for any school district watching this hearing, what advice would you give them on how to protect parental rights and religious liberty in the wake of Mahmoud?

Mr. DAUGHERTY. Well certainly, again already Montgomery County has figured out how to deal with it with the refrigerator magnets that they get every semester, telling parents what is going to be taught in the following semester.

I think transparency and curriculum is going to be key going forward. The ability to opt your children out of certain lesson plans that you object to or that conflict with your religious beliefs, that means nothing unless you know when that is going to be coming. You have notice. I think through use of web-based tools and even refrigerator magnets, I think that schools can and will and must be more vigilant about letting parents know exactly what their kids are going to be taught, so that they can then exercise their opt out right.

Obviously Montgomery County, having lost this lawsuit, I think that shows an incentive that you don't want to be on the wrong side of that decision going forward.

Mr. MESSMER. Thank you. Ms. Parshall Perry, many people think that children are merely creatures of the State. Many commentators are outraged by the Mahmoud decision and argue that school boards should have absolute control over what their children learn. Can you explain why that world view is so dangerous?

Ms. PARSHALL PERRY. It is not only dangerous, it is judicially inaccurate. In fact, the Supreme Court held precisely the opposite in *Pierce v. Society of Sisters* in 1925. We have year after year of Supreme Court jurisprudence reinforcing, underlining the importance and the fundamental nature of the parental right.

What we have seen over and over again in school districts across the country is a sort of misapprehension, a miscomprehension of the fact that these children are in very temporary roles underneath the school leadership. The school operates in a tutelary custodial capacity for a very brief period of a few hours per day, only to instruct, not to indoctrinate and then those children go back home where they are under the care and primary authority of their parents.

In fact, as recently as 2012, the Supreme Court has written about the diminished capacity of minors, indicating precisely that parents act in the best interest of their children because minors lack the appropriate intelligence, emotional maturity or understanding of the world around them to be able to make some of these important decisions.

That is why the Mahmoud decision was necessary in the first place, because many of these children, three, four, five, were too young to know what the concepts were that they were actually being taught.

Mr. MESSMER. Thank you. Mr. Chairman, I yield back the remainder of my time.

Chairman KILEY. Representative Mannion of New York is recognized.

Mr. MANNION. Thank you, Mr. Chair. Today we are not only discussing a flawed Supreme Court decision, but also a much larger agenda. My colleagues on the other side continue to mischaracterize what is happening in our classrooms, and I believe it is a major disservice to our students and teachers to put them at the center of these cruel culture wars.

The statements made by my Republican colleagues in this Committee make it clear that they view Mahmoud case as just the beginning, opening the door for more sweeping opt-outs from school curricula. As a former teacher, I can tell you where I stand and

what I have always fought for. Like my colleagues, I believe it is critical for parents to be involved in their children's education, and they are.

Parents have more access to teachers, school boards, administrators than ever before with online curricula, emails, livestream school board meetings, and beyond. That was my experience. Parents should be involved. How public education has improved is to make sure that that access continues to increase, and I believe that it will.

I have made that case before in this Committee, including to Secretary McMahon, that parents have more access and more visibility in their students' education than in the past, and that is a good thing. I do not believe we should go down the slippery slope of having parents opt their kids out of any topic they do not agree with or object to.

Our public schools reflect our communities and the diversity of people and ideas within them. All curricula should be age appropriate, and parents have access to administrators and teachers. Whenever I, in the 30 years in my classroom, saw other teachers that may have put things into the lessons that were not appropriate, that was addressed immediately and often preemptively as teachers, as my colleague Representative Hayes said, have to hand in their lesson plans and syllabi ahead of time. We cannot hide our kids from the world around them or prevent them from engaging with different ideas or different people. I also believe that our teachers in schools, administrators, know their students well and should be trusted, and should continue to be accessible, that they do have our students' best interests at heart.

Despite claiming to talk about local control and education and caring about that, this administration has made multiple attempts to target specific content and place new politically motivated demands on our schools. They have also weaponized funding, which is hurting all students. Just because a State may be represented by a Democrat or a Republican does not mean that all of those students or parents or teachers are Democrats or Republicans.

Unfortunately, weaponizing and canceling grants is hurting our students, hurting our schools, increasing class sizes, and disrupting budgets. Our schools should always be inclusive places, and religious beliefs should always be respected. I worry about the political and legal attempts to broaden the scope of the Mahmoud ruling, and the implications of far-reaching opt-out policies.

Mr. Rothschild, my question is for you. Is mere exposure to educational content that parents might find religiously objectionable enough to trigger an opt-out under Mahmoud?

Mr. ROTHSCHILD. Possibly, yes.

Mr. MANNION. A followup question. From the ruling of Mahmoud, do you believe that parents have the ability to opt out of a high school unit on evolution?

Mr. ROTHSCHILD. Possibly yes as well.

Mr. MANNION. Do you agree that a parent should be able to opt their child out of evolution as a unit?

Mr. ROTHSCHILD. Not as a constitutional right, no.

Mr. MANNION. Ms. Parshall Perry, do you believe that parents have should be able to opt out of a unit on evolution?

Ms. PARSHALL PERRY. The Supreme Court's already addressed the issue and actually said there is no opt out right for particular scientific perspectives, and in fact in the wake of the Civil Rights Act enactment and desegregation efforts, both of those periods of time in American history, the Supreme Court routinely struck down so called religious objections to, for example, desegregation laws.

They know when they can smell a rat. They have done so for many, many years and they will continue to do so now. These were very honest religious objections to inappropriate material. The Court will continue to apply that interpretation going forward.

Mr. MANNION. Understood. It sounds as though your answer is that evolution would not be able to be opted out of because it is accepted science, and therefore a religious objection toward it would not be permissible.

Ms. PARSHALL PERRY. It is a scientific perspective, absolutely. It is generally included in scientific classes for which there is no constitutional or statutory opt out right. There may be religious objections. Those can be raised individually, but the Supreme Court has already addressed the question of evolution in public education.

Mr. MANNION. Thank you. I yield back.

Chairman KILEY. Representative Rulli of Ohio is recognized.

Mr. RULLI. Well, thank you Chairman. Nobody knows their child better than a parent. Not a teacher; it is the parent. Parents have a God given right to know what their children are being taught in schools.

In Ohio, we protect that, right. Parents can review any material that includes in specifically sexual content, and excuse that child in Ohio from that being taught. Being a school board member for many years, when I heard about the violation of parents' rights in Maryland and that being stripped away by the parent, it just totally made me sick.

These schools force children to view, and here is the key words here; here is the sweet spot, sexually explicit material of children under the age of 18 and threaten them with legal action against a parent who would fight back, who would even question it. In this particular subject, we have Muslims America, Christian, and Jewish America uniting for transparency in our school districts.

None of us want sexual content for minors being taught in the school. That is unacceptable. The question would roll out to Mr. Daugherty. You said there were 47 states. Can you elaborate on the three states that chose to take away the optout option for the parents? Some of these school districts have been threatening, and here is another key word for you, truancy against the child and the parent for opting out on their kids being taught sexual content for being under the age of 18.

I do not know what kind of upside down world we are living in, where it is okay to teach sexual orientated material to kids under 18. Mr. Daugherty, a two-part question. The first one going to those three states, and then another one for all of us on the board, including my honorable friends on the other side of the aisle. Is there some guardrails that Congress could actually do to make a better system so we could teach all material but not material that is illegal for minors?

Mr. DAUGHERTY. Sure. Unfortunately, I have not, I did my research many months ago, so I cannot recall the three states that do not. I think but even those states, I think informally it is recognized that if you really want to your children not to participate in certain things that are highly controversial, offend your religious beliefs, I think that is commonly recognized.

Again, it was recognized in Maryland, but they said "Well, this isn't about human sexuality. It's about learning to read." You have to read "Pride Puppy" in order to read, which seems to be a bit of a stretch here. With regard to what Congress can do, I mean Congress, there is obviously discussion right now about the Department of Education. What is going to be happening with regard to that?

Department of Creation is a creature of Congress. Congress created it back in 1979, and what will happen with it going forward remains to be seen. Specific guardrails. I think, you know again, I think the United States Constitution, the Bill of Rights here is a tremendous guardrail, and you know, does not waiver.

I think it was one that the parents were able to, to take advantage of. I would say also too that parents and voters do need to be careful about who is on their school board sometimes. It is my understanding, Mr. Baxter may know better, but some of the board members who stood up for this principle back when the case was started are no longer on the school board.

You know, I have not really given any thought specifically to what the Federal Government can do about this.

Mr. RULLI. Does anyone else have a comment on that?

Ms. PARSHALL PERRY. I can weigh in. We heard earlier about whether or not the Office of Civil Rights was the appropriate venue to be able to actually bring these challenges to. It is not. Having served as senior counsel in the U.S. Department of Education, in the Office for Civil Rights, I can say specifically they enforce and apply civil rights law, not constitutional law. These parents exhausted every administrative level of opportunity closest to where these actual decisions were being made.

They were routinely struck down. The Montgomery County Public School system stonewalled them at every attempt. The Federal courts were their final recourse. The Department of Education does not have any authority whatsoever when it comes to the First Amendment.

Mr. RULLI. Any suggestions to Congress?

Ms. PARSHALL PERRY. We have current existing spending clause laws like the Elementary and Secondary Education Act, that might provide a vehicle to be able to legislate in such a way that decisions like this do not come up again through the Federal court system. Obviously, the Constitution conceives of specific enumerated rights for this chamber, and one of those is spending clause legislation.

There is quite a number of it that has actually been passed through these chambers, that might provide an opportunity to say "We are going to enforce the parental right as we've done with FERPA, as we've done with PPRA." Those are suitable mechanisms, I think, going forward.

Mr. RULLI. Well, thank you all for your time, and with that, I yield my time back to the Chair.

Chairman KILEY. Representative Grijalva of Arizona is recognized.

Ms. GRIJALVA. Thank you, Mr. Chairman. Before coming to Congress, I served 20 years on a school governing board in southern Arizona, one of the largest, most diverse districts in the State. I worked directly with parents, teachers, and students every single day.

I know firsthand how critical parent engagement is to student success, but I also learned something else just as important. Public schools exist to serve all students. They are not vehicles for political agendas, nor are they spaces where perspectives can be erased simply because they make some uncomfortable.

The Supreme Court's decision *Mahmoud v. Taylor* was narrow. It does not give politicians permission to micromanage classrooms, override professional educators, or turn public schools into the latest front in a culture war. Framing this Federal overreach as consistent with returning education to the states is plainly contradictory to the majority's own stated agenda. Federal Government overreach is the opposite of local control.

At the same time, we cannot ignore the broader context. Instead of investing in students and strengthening public education, some are pushing to dismantle the Department of Education and privatize our own public school system. These efforts do not empower families. They exacerbate existing inequalities, weaken accountability, and put our most vulnerable students in greater risk of being left behind.

Our responsibility is clear. We must ensure students learn in safe, welcoming, well-funded schools, where curiosity is encouraged, facts are taught honestly, educators are respected, and every child has a real opportunity to succeed. This——

My question will be to Mr. Rothschild. Is there a limiting principle in Mahmoud? Are we on a slippery slope, where schools will find themselves overwhelmed with opt-outs, that the curriculum will be erased to the lowest common denominator as to what is taught?

Mr. ROTHSCHILD. I think that that concern that you have voiced is a legitimate one, and is one that was articulated by none other than Justice Alito in 2021, where in a concurrence in Mahanoy, which involves social media and free speech for children, for students, he said the following. He said: "Parents are not required to enroll their children in a public school. They can select a private school . . . and they may also be able to educate their children at home." By enrolling a child in a public school, he went on to say, the parents have impliedly consented to delegating some of their parental authority to the public school.

Ms. GRIJALVA. Thank you. What are the failures of the Mahmoud decision, in your opinion? What did the majority opinion get wrong?

Mr. ROTHSCHILD. Well, the majority opinion essentially rewrote previous precedents, claiming that it was just applying them. It restructured the way religious liberty works even in prior eras, which the Supreme Court has claimed it is simply resurrecting.

Religious liberty has classically meant that if an individual has an opposition to doing or not doing something that is required of them by the government, they can invoke the Free Exercise Clause.

Here, the right, as it is framed by Justice Alito in Mahmoud, is a right to unfettered control over the moral shaping of your child, even when you have opted to send your child to a public school.

Ms. GRIJALVA. What I think is really interesting is that every school district has their own governing board that is duly elected. Those decisions should be made by those that are elected from that community. My concern, and one that I have, you know, pondered quite a few times while I have been in this room, is that the Republican Party, from what I understand, is the party that wants things to go back to the local level. Then when it is something that is an inconvenient truth, we tend to stick our nose in and try to rewrite Federal.

I want us to continue to support our duly locally elected school districts to make decisions about school curriculum. Every single curriculum that is taught in our public schools is open in Arizona to anyone who wants to, and they have the option to opt out, and we should continue to push those kind of initiatives. Thank you, and I yield back.

Chairman KILEY. Thank you very much. I will now recognize the Ranking Member for a closing statement.

Ms. BONAMICI. Thank you very much, Mr. Chairman, and thank you to the witnesses for the testimony today. You know, this Subcommittee is responsible for and should be comprehensively addressing the real issues affecting K–12 schools and protecting our children's future.

Instead of addressing the actual dangers to students, my colleagues on the other side of the aisle have chosen to turn classrooms into the epicenter of a culture war. I noted Mr. Daugherty just said that it is his understanding that the Montgomery County, Maryland, school board members are not there anymore. Well, you know what happened yesterday in Montgomery County? A 16 year-old student was shot in his school. You cannot solve that with a refrigerator magnet.

The Supreme Court decision in *Mahmoud v. Taylor* has opened yet another avenue for Republicans to attack public education to the detriment of students and families. No one is arguing that parents should not be involved in their children's education. On the contrary, we recognize that family involvement is critical to a child's development and educational success.

By turning what is taught in the classroom into a political issue and improperly a Federal issue, Republicans are using our children's future as a weapon to deepen partisan divides and threaten the foundations of our public education system. My Democratic colleagues and I will not support politicizing education.

We will continue to work with students, with parents, with educators, and with communities until every student receives an accurate, high-quality, age-appropriate education in a safe, well-funded environment without fear of gun violence or masked Federal agents breaking down the classrooms, education that engages them and inspires them and leads them to be creative, tolerant, critical thinkers who are compassionate members of their community and our country. I yield back the balance of my time.

Chairman KILEY. Thank you very much. Thank you to all of our witnesses. I think a major takeaway for me from this hearing is

that the position of the opposition here is that there is no recourse for parents. That is an exact quote from their chosen witness, which I find to be very troubling. This idea that, you know, kids as young as kindergarten could be exposed to the most graphic content and the parents have no recourse.

They are not allowed to pull their child out even for a day, that a school could inculcate values that are wholly incompatible with the religious upbringing that the parent has chosen for the child. There is no recourse. They cannot let them sit out even a day of class. I think that the opinion of the Supreme Court in Mahmoud simply affirms common sense foundational principles in this country.

This is not about controlling curriculum at the Federal level. When a parent opts out, the curriculum stays the same. The other students who choose to participate and their families can be exposed to whatever curriculum is chosen at the local level. It certainly is not about undermining local control either. I believe very strongly in local control when it comes to education.

At the same time, there are basic constitutional rules of the road that all institutions must abide by. What the Supreme Court has recognized is that religious liberty is one of them, and the right of parents to direct their upbringing of children is intricately bound up in that.

I think this is a very important decision, and this Committee will be assuring that it is honored so that the rights of parents are respected throughout the country. Without objection, there being no further business, the Committee stands adjourned.

[Whereupon, at 12 p.m., the hearing was adjourned.]

[Additional submissions from Ranking Member Bonamici follows:]

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Subcommittee Chair
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Washington, DC 20515

The Honorable Suzanne Bonamici
Subcommittee Ranking Member
U.S. House of Representatives
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Re: February 10, 2026 Hearing Before the Subcommittee on Early Childhood, Elementary, and Secondary Education

Dear Chair Kiley, Ranking Member Bonamici, and Members of the Subcommittee on Early Childhood, Elementary, and Secondary Education:

The National Women's Law Center, along with the undersigned 14 civil rights organizations, submit this letter to reaffirm that the U.S. Supreme Court's holding in *Mahmoud v. Taylor* is limited in scope and should not be weaponized against students, families, and public schools as a cudgel against inclusive learning. As organizations committed to ensuring the safety and wellbeing of all students, we recognize that inclusive learning environments require constructive engagement between students, families, educators, and school staff. Attempts to insert ideological priorities into public education—including misapplying *Mahmoud v. Taylor* to other contexts beyond the scope of its holding—will only erode trust between the various stakeholders that is foundational to student success and achievement. It is crucial that this Subcommittee instead focus the federal government's attention on promoting safe and inclusive learning opportunities for all students and protecting the right of every student to learn free from a hostile educational environment.

While some groups attempt to extract broad impact from the U.S. Supreme Court's decision in *Mahmoud v. Taylor*, the ruling and its impact are quite limited. In its simplest terms, the Court held that a group of Montgomery County Public School parents were entitled to opt their elementary school-aged children out of classroom instruction presenting certain viewpoints regarding LGBTQI+ topics in a manner the Court deemed coercive, thereby burdening their parents' free exercise of religion.[1] **However, central to the Court's reasoning was a key limiting principle: the proposition that Free Exercise Clause challenges are fact intensive.**[2] The Court did *not* create a constitutional right for parents to dictate school curriculum or insert their religious views into classroom instruction or other school policies, such as those addressing access to school activities or facilities. Instead, the Court evaluated specific facts such as the compulsory presentation of the books, the students' younger age, and the school district's instructions to educators on how they should navigate lessons related to the LGBTQI+-themed books.[3]

Accordingly, multiple federal appellate courts have since declined to extend *Mahmoud* beyond its fact-specific context. In August 2025, the U.S. Court of Appeals for the Sixth Circuit rejected an argument by parents that a school district's trans-inclusive bathroom policy was similarly burdensome to their religious freedoms as in *Mahmoud*.[4] In January 2026, the U.S. Court of Appeals for the Ninth Circuit

[1] *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2363–64 (2025).
[2] *Id.* at 2353.
[3] *Id.* at 2353, 2355–56.
[4] *Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ.*, No. 23-3740, 2025 WL 2453836, *7, n.3 (6th Cir. 2025).

likewise rejected that a group of parents could use *Mahmoud* to challenge a law prohibiting affirmative disclosure of students' gender identities to their parents without their consent.[5] Both agreed that bathroom access and forced outing policies are neither instructional nor compulsory, but "general, operational polic[ies]" that did not present the same burden on religious exercise as the books at issue in *Mahmoud*.[6] Both circuit courts said *Mahmoud* is "a narrow decision" that "focuses on" "curricular requirements."[7] As a result, they recognized that *Mahmoud* was limited to its specific context and does not stand for the broad proposition that schools are required to permit parental opt outs of any and all school policies that happen to conflict with a parent's religious beliefs.[8]

Furthermore, inclusive instruction and learning environments are not at odds with free religious exercise and the two coexist despite cynical efforts to pit them against each other.[9] The efforts to stir up tension between the two also misrepresents what parents actually expect out of public education. Since the *Mahmoud* decision, data from the Montgomery County School District indicates that only 43 families—that's 0.03% of the district's 160,000 students—requested opt outs in the first month of the school year.[10] This reflects the broader trend that parents and the American people are generally against censorship and attacks on inclusive school policies that make students feel unwelcome in the classroom. A 2023 national poll shows that 62% of K-12 parents say they oppose lawmakers implementing book bans or restricting what subjects teachers and students discuss in the classroom.[11] The same poll also shows that three-quarters of K-12 parents say they trust their child's teacher to make decisions about curriculum, with strong majorities across party lines, including 84% of Democrats, 67% of Republicans, and 74% of independents.[12] Additional polling shows that an overwhelming majority of Americans surveyed—98%—consider initiatives that make students feel welcome at school to be important.[13] Moreover, with 56% of K-12 parents saying their local community has seen recent teacher shortages,[14] it

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[5] *Mirabelli v. Bonta*, No. 25-8056, 2026 WL 44874 *3 (9th Cir. 2026).
[6] *Doe*, 2025 WL 2453836 at 7, n.3; *Mirabelli*, 2026 WL 44874 at *3. In recognizing *Mahmoud*'s limited holding, both courts underscored the absence of compulsory requirements, which has been a key feature of school policies the Supreme Court has historically deemed burdensome to religious exercise. *Doe 1* (the trans-inclusive bathroom policy did not impose a burden "of the [ ] same character" as the curricular requirement in *Mahmoud*, "which required elementary school students to attend classes where certain LGBTQ+-inclusive storybooks . . . were taught," because the bathroom policy "was neither compulsory nor instructional" and "did not require students to use the communal restrooms"); *Mirabelli* (the policy prohibiting forced outing of students "appl[ies] only when a *student* makes the voluntary decision to share their gender nonconformity with the school," thus it does not "impose a similar . . . burden[] on free exercise as the policies in *Mahmoud*"). (emphasis in original).
[7] *Mirabelli*, 2026 WL 44874 at *3 (citing *Doe No.1 v. Bethel*, No. 23-3740, 2025 WL 2453836 at *7 n.3).
[8] *Id.*
[9] Multiple faith groups submitted amicus briefs before the Supreme Court rendered its decision in *Mahmoud* that rejected the notion that respecting religious exercise and inclusivity in the classroom—specifically, exposure to LGBTQI+ characters in books—were in tension and emphasized that inclusivity indeed aligns with religious values. *See, e.g.*, Brief of Muslim Organizations as Amici Curiae in Support of Respondents, *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025); Brief of Montgomery County Faith Leaders as Amici Curiae in Support of Respondents, *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025).
[10] Erin Reed, *Only 0.03% Opt Out of LGBTQ+ Education in Maryland After SCOTUS Gives Them a Right To*, Erin in the Morning (Oct. 6, 2025), https://www.erininthemorning.com/p/only-003-opt-out-of-lgbtq-education.
[11] Ipsos, *Poll: Americans trust teachers* (June 2, 2023), https://www.ipsos.com/en-us/americans-trust-teachers-some-still-want-parents-be-primary-voices-whats-taught
[12] *Id.*
[13] PDK Poll, *The 57th Annual PDK Poll*, https://pdkpoll.org/2025-poll-results/ (last visited Feb. 8, 2025).
[14] Ipsos, *supra* note 12.

is crucial that lawmakers cease politicized attacks on school spaces and instead focus on supporting educators and investing in student success.

This Subcommittee's priority must be strengthening educational opportunities and safety for all students, and we are prepared to work alongside this Subcommittee to uplift policies that will ensure this result. However, weaponizing the Supreme Court's holding in *Mahmoud v. Taylor* to elevate the ideological interests of a vocal minority needlessly pits students, families, educators, and school staff against each other and distracts from this goal by making schools less safe while making it harder for educators to do their jobs. If you have questions about the substance of this letter, please reach out to Brian Dittmeier (bdittmeier@nwlc.org) or Hunter Iannucci (hiannucci@nwlc.org).

Signed by,
National Women's Law Center

Joined by:
AFT
American Atheists
American Humanist Association
Clearinghouse on Women's Issues
Family Equality
Feminist Majority
Freedom From Religion Foundation
GLSEN
Human Rights Campaign
IDRA
Interfaith Alliance
Jewish Council for Public Affairs
National Center for Youth Law
Southeast Asia Resource Action Center (SEARAC)

[Additional submissions from Representative Owens follows:]



SUTHERLAND INSTITUTE STATEMENT FOR THE RECORD

William C. Duncan, JD
Constitutional Law & Religious Freedom Fellow
Sutherland Institute
Salt Lake City, Utah

"Defending Faith and Families Against Government Overreach"

House Education and Workforce Committee
Early Childhood, Elementary, and Secondary Education Subcommittee
February 10, 2026

Chairman Kiley and members of the Committee, thank you for the opportunity to submit these written comments. I am William C. Duncan, the Constitutional Law & Religious Freedom Fellow for the Sutherland Institute in Salt Lake City, Utah. My written testimony will emphasize the critical importance of protecting parental rights in the context of public education. Our involvement as amicus curiae in *Mahmoud v. Taylor* highlights a growing national concern: the erosion of the fundamental right of parents to direct the religious and moral upbringing of their children. As this Committee reviews federal protections for parental rights, we urge a focus on ensuring that school districts cannot unilaterally strip parents of notice and opt-out rights regarding sensitive curricular materials.

The Sutherland Institute is a Utah nonprofit, nonpartisan public policy organization with a mission to promote the constitutional values of faith, family, and freedom. We promote the constitutional right of free exercise of religion and work to explain the individual and societal benefits that come from the involvement of people of faith and religious organizations in our communities.

The issue addressed in this statement—whether parents may direct how their children are taught sensitive subjects in public schools—implicates foundational principles of religious liberty and parental rights. Clarification and protection of these principles benefits *all* Americans, whether or not they participate in or adhere to any particular faith.

INTRODUCTION

The laws of nearly every State require public schools to accommodate parents' right to determine how their children are taught about sensitive topics. These laws typically require advance notice of instruction, an opportunity for parents to review



instructional materials, and a mechanism allowing parents to excuse their children from such instruction. Many States go even further in protecting parental authority.

This widespread legal recognition demonstrates both the significance of parental rights and the practical feasibility of accommodating them. When parents are denied these accommodations, their religious exercise is substantially burdened. The near-universal adoption of these protections across the States confirms that such accommodations are neither onerous nor disruptive to public education.

Legal accommodations of religious exercise should be encouraged and preserved. They reduce conflict, prevent litigation, and provide assurance to people of faith that their constitutional rights will be respected.

BACKGROUND AND CONSTITUTIONAL FRAMEWORK

The First Amendment's protection of religious freedom reflects a longstanding understanding that certain essential qualities of ordered liberty cannot be transmitted directly by the government. Structural limits on government power, and protections for mediating institutions such as the family and religious communities, safeguard that transmission process.

Parents, like the Amish families recognized by the Supreme Court in *Wisconsin v. Yoder*, are engaged in what has been described as a "soul-making competition with government," where parental beliefs and state educational objectives both seek the loyalty and formation of children.[1] When parents are denied the ability to direct their children's exposure to sensitive matters—particularly those implicating deeply held religious convictions—the burden on religious exercise is profound.

STATE LAW CONSENSUS ON PARENTAL RIGHTS

State law provides a stark illustration of the enduring American tradition recognizing the primary role of parents in the upbringing of their children. All but three States and the District of Columbia provide some legal mechanism allowing parents to exempt their children from instruction related to sexual subjects.

The typical elements of these laws include:

1. A requirement that parents receive notice of the instruction;
2. A requirement that parents be allowed to review instructional materials; and



3. A requirement that parents be allowed to exempt their children from the instruction, either through an opt-out or opt-in mechanism.

Twenty-seven States and the District of Columbia include all three elements, most using an opt-out framework.[2] Other States provide partial protections, and several require affirmative parental consent before instruction may occur.[3] A number of States explicitly recognize that these accommodations exist to protect parents' religious beliefs.[4]

Taken together, this legislative landscape demonstrates an extraordinarily broad consensus: parents' rights to direct their children's education on sensitive and controversial topics—particularly those involving sexuality—should be accommodated.

IMPLICATIONS FOR RELIGIOUS EXERCISE

When public school systems abandon policies that allow parents to direct how their children are taught about sensitive subjects, they deny accommodations that are available to nearly all other American parents. This denial represents a substantial burden on religious exercise.

Administrative concerns such as absenteeism or logistical complexity cannot justify this burden. States across the nation have determined that such accommodations are workable and appropriate. If these accommodations were truly unmanageable, it is difficult to explain why nearly every State has voluntarily imposed them through legislation or regulation.

Moreover, accommodating parental rights does not undermine educational goals. To the contrary, it models tolerance and respect by demonstrating how differing viewpoints can coexist within a pluralistic society.

THE IMPORTANCE OF PRESERVING RELIGIOUS ACCOMMODATIONS

Statutory accommodations of religious exercise should be promoted rather than diluted. They help prevent litigation, reduce costs to public institutions, and provide assurance to people of faith that their rights are secure.

When accommodations are initially recognized and then withdrawn without any change in governing law, that security is eroded. Such reversals risk signaling that protections achieved through the democratic process cannot be relied upon, with consequences extending far beyond any single dispute.

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CONCLUSION

The near-universal recognition of parental rights in state law underscores the importance and feasibility of accommodating parents' religious exercise in public education. Denying these accommodations imposes a heavy and unnecessary burden on families of faith.

For these reasons, the Sutherland Institute urges the Committee to recognize, protect, and encourage legal accommodations that respect parental authority and religious liberty in public schools, and to defend faith and families against government overreach.

Thank you for the opportunity to submit this written statement.

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[1] Richard W. Garnett, *The Story of Henry Adams' Soul: Education and the Expression of Associations* 85 Minn. L. Rev. 1841, 1847 (2001).

[2] Ala. Code §§ 16-40A-5, 16-41-6; Alaska Stat. §§ 14.30.355(b)(7), 14.30.356(b)(6); Ark. Code § 6-16-1006(c); Colo. Rev. Stat. §§ 22-25-104(6)(d), 22-1-128(3)(a), (4) and (5); Fla. Stat. §§ 1001.42(8)(c)(3), 1002.20(3)(d), 1003.42(5); Haw. Dep't of Educ., Bd. of Educ. Policy 103-5; Haw. Dep't of Educ., Bd. of Educ. Policy 101-13; Keith T. Hayashi, Superintendent, Haw. Dep't of Educ., Annual Memorandum: Notice on Board of Education Policy 101-13 Controversial Issues (June 23, 2023), in Opening of the School Year Packet for School Year 2023- 2024, Haw. Dep't of Educ. 61 (June 2023), https://perma.cc/T6DSXSWP; Ind. Code § 2030-5-17(c), (d); Idaho Code § 33-1611; 105 Ill. Comp. Stat. 5/27-9.1a(d); Mass. Gen. Laws ch. 71, § 32A; Md. Code Regs. §§ 13A.04.18.01(D)(2)(e)(i) and (iii); Mich. Comp. Laws § 380.1507(4); Minn. Stat. § 120B.20; Mo. Stat. § 170.015(5)(2); Mont. Code § 20-7-120; N.C. Gen. Stat. § 115C-81.30(b); Neb. Rev. Stat. § 79-532(3); N.H. Rev. Stat. § 186:11(IX-c); Okla. Stat. tit. 70, § 11-103.3(C); Or. Rev. Stat. § 336.465(1)(b); Or. Dep't of Educ. Admin. R. 581-022-2050(5); Or. Dep't of Educ. Admin. R. 581-021-0009; 22 Pa. Code §§ 4.29(c), 4.4(d)(3); S.C. Code. § 59-32-50; Tenn. Code §§ 49-6-1305, 49-6-1307, 49-6-1308; Tex. Educ. Code § 28.004(i) and (i-2); Utah Code §§ 53E-9-203(3), 53G-10-205, 53G-10-403; Wash. Rev. Code. § 28A.230.070(4); Wis. Stat. §§ 118.019(3) and (4); D.C. Mun. Regs. subtit. 5, § E2305.5.

[3] Cal. Educ. Code § 51937; R.I. Gen. Laws §§ 16-22-17(c), 16-2218(c), 16-22-24(b); Va. Code. § 22.1-207.2; W. Va. Code § 18-2-9(c); Conn. Gen. Stat. § 10-16e; Ga. Code § 20-2143(d); Iowa Code § 256.11(6)(a); Kan. Admin. Regs. § 91-31-35; La. Stat. §§ 17:281(D), 17:412; Me. Rev. Stat. tit. 22, § 1911; N.J. Stat. § 18A:35-4.7; N.M. Code R. § 6.29.6.11; N.Y. Comp. Codes R. & Regs. tit. 8, § 135.3; Ohio Rev. Code § 3313.60(A)(5)(c), (d) and (f); Vt. Stat. tit. 16, § 134.

[4] Ala. Code § 16-41-6; Kan. Admin Regs. § 91-31-35(a)(6); N.H. Rev. Stat. § 186.11(IX-b); N.J. Stat. § 18A:35-4.7; Or. Dep't of Educ. Admin. R. 581-021-0009; Pa. Code § 4.29(c); Tex. Educ. Code § 26.010(a); Utah Code § 53G-10-205(2)(a); Vt. Stat. art. 16, § 134.

[Questions and responses submitted for the record by Mr. ******* follows:]

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February 25, 2026

Dr. Zalman Rothschild, PhD, J.D.
Assistant Professor of Law
Yeshiva University, Cardozo School of Law
55 5th Avenue, Room 940
New York, NY 10003

Dear Dr. Rothschild:

Thank you again for testifying at the February 10, 2026, House Committee on Education and Workforce Subcommittee on Early Childhood, Elementary, and Secondary Education hearing titled "Defending Faith and Families Against Government Overreach: Mahmoud v. Taylor." Enclosed is an additional question submitted by a Subcommittee Member following the hearing. Please provide a written response no later than March 18, 2026, for inclusion in the hearing record. Your response should be sent to Charlie Hatcher (charlie.hatcher@mail.house.gov) of the Committee staff; he can also be contacted at (202) 360-2765.

We appreciate your contribution to the work of the Committee.

Sincerely,

Kevin Kiley
Chairman
Subcommittee on Early Childhood, Elementary, and Secondary Education

Representative Suzanne Bonamici (D-OR)

1. In a question posed to you about what recourse the parents in the Mahmoud case had following the school board decision to not allow opt-outs to curricular materials to which the parents had a religious objection, you stated, "they may not have had recourse; democracy would be their recourse." Please clarify what you meant by that.

Zalman Rothschild
Assistant Professor of Law
Horn Family Distinguished Research Scholar in Law and Religion
Benjamin N. Cardozo School of Law
Yeshiva University

March 18, 2026

Dear Chairman Kiley, Ranking Member Bonamici, and Members of the House Subcommittee on Early Childhood, Elementary, and Secondary Education:

I was asked to clarify a statement I made regarding the parents in *Mahmoud v. Taylor*. When asked what recourse those parents had following the school board's decision not to allow opt-outs, I stated: "they may not have had recourse; democracy would be their recourse." By "democracy," I meant the recourse that parents have traditionally had in general disputes over public school curricula: participation in local democratic governance. Public education in the United States has been governed through locally elected school boards since the early nineteenth century, and curricular disagreements have historically been navigated through that process—by electing and replacing the officials who set educational policy. Parents who object to what is being taught in public schools can advocate before their school board, support candidates who share their priorities, and, ultimately, vote out board members whose decisions they oppose.

Montgomery County itself illustrates the point. In the 2024 school board elections—held while the *Mahmoud v. Taylor* litigation was ongoing—all three incumbents up for reelection were defeated. The democratic process produced accountability. That is the sense in which I referred to democracy as the parents' recourse.

Thank you,
Zalman Rothschild

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