No. 24-297

In the Supreme Court of the United States

TAMER MAHMOUD, ET AL., PETITIONERS
v.
THOMAS W. TAYLOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR *AMICI CURIAE* AASA, THE SCHOOL SUPERINTENDENTS ASSOCIATION, THE CONSORTIUM OF STATE SCHOOL BOARDS ASSOCIATIONS, THE COUNCIL OF THE GREAT CITY SCHOOLS, AND THE NATIONAL SCHOOL ATTORNEYS ASSOCIATION IN SUPPORT OF NEITHER PARTY

STEVEN L. MAYER
ARNOLD & PORTER
KAYE SCHOLER LLP
Three Embarcadero Center
10th Floor
San Francisco, CA 94111
(415) 471-3100

JOHN A. FREEDMAN
Counsel of Record
JENNIFER CHANG
SARAH H. JOFFE
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-5000
john.freedman@arnoldporter.com

LEORA EINLEGER
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000

TABLE OF CONTENTS

Page

Interests of *Amici Curiae* 1

Introduction and Summary of Argument 2

Argument 4

I. JURISDICTIONS THAT PROVIDE OPT OUT RIGHTS HAVE BEEN AND SHOULD CONTINUE TO BE ALLOWED TO DO SO CONSISTENT WITH STATE AND LOCAL AUTHORTIES' CURRICULAR PREROGATIVES AND WITHOUT INTERRUPTION OF INSTRUCTION 4

A. Courts have consistently and properly recognized that States have broad discretion to control conduct and curriculum in their public schools. 4

B. States that have provided notice and opt out rights for parents typically balance honoring parents' opt out rights and allowing teachers, schools, and school boards to use their professional judgment for student instruction. 10

C. Mandating notice and opt out rights without demonstrating coercive effect risks drastically increasing burden on schools 14

II. LOWERING THE STANDARD NECESSARY TO ESTABLISH A FREE EXERCISE CLAIM COULD HAVE WIDESPREAD AND UNDESIRABLE IMPLICATIONS 16

Conclusion 23

TABLE OF AUTHORITIES

Cases Page(s)

Altman v. Bedford Cent. Sch. Dist.,
245 F.3d 49 (2d Cir. 2001) 17

Bethel Sch. Dist. No. 403 v. Fraser,
478 U.S. 675 (1986) 20

Bowen v. Fair,
476 U.S. 693 (1986) 3

Brown v. Hot, Sexy & Safer Prods, Inc.,
68 F.3d 525 (1st Cir. 1995) 9

Brown v. Hot, Sexy & Safer Prods, Inc.,
516 U.S. 1159 (1996) 9

Brown v. Woodland Joint Unified Sch. Dist.,
27 F.3d 1373 (9th Cir. 1994) 18

Cal. Parents for Equalization of Educ. Materials v. Torlakson,
267 F. Supp. 3d 1218 (N.D. Cal. 2017) 17

Cal. Parents for Equalization of Educ. Materials v. Torlakson,
973 F.3d 1010 (9th Cir. 2020) 17

Carson v. Makin,
596 U.S. 767 (2022) 19

Epperson v. Arkansas,
393 U.S. 97 (1968) 3, 4, 7, 15

Fleischfresser v. Dirs. of Sch. Dist. 200,
15 F.3d 680 (7th Cir. 1994) 9, 18

Jones v. Boulder Valley Sch. Dist. RE-2,
No. 20-cv-03399, 2021 WL 5264188
(D. Colo. Oct. 4, 2021) 21

Lyng v. Nw. Indian Cemetery Protective Ass'n,
485 U.S. 439 (1988) 8

Cases—Continued Page(s)

People ex rel. McCollum v. Bd. of Educ.,
333 U.S. 203 (1948) 16

McCreary Cnty. v. ACLU of Ky.,
545 U.S. 844 (2005) 3

Mozert v. Hawkins Cty. Bd. of Educ.,
827 F.2d 1058 (6th Cir. 1987) 5, 9, 17, 18, 20

Mozert v. Hawkins Cty. Bd. of Educ.,
484 U.S. 1066 (1988) 5

Parker v. Hurley,
514 F.3d 87 (1st Cir. 2008) 9, 20

Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary,
268 U.S. 510 (1925) 9, 19, 20

Plyler v. Doe,
457 U. S. 202 (1982) 19

Sabra v. Maricopa Cnty. Cmty. Coll. Dist.,
479 F. Supp. 3d 808 (D. Ariz. 2020) 17

Sch. Dist. of Abington Tp., Pa. v. Schempp,
374 U.S. 203 (1963) 8

Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.,
450 U.S. 707 (1981) 8

Tinker v. Des Moines Indep. Cmty. Sch. Dist.,
393 U.S. 503 (1969) 4, 7

Statutes and Regulations

20 U.S.C. § 1232a 7

20 U.S.C. § 1232h 11

105 Ill. Comp. Stat. 5/27-21 6

Ala. Code § 16-41-6 13

Alaska Stat. § 14.30.355(b)(7) 11

Alaska Stat. § 14.30.356(b)(6) 11

Statutes and Regulations—Continued Page(s)

Alaska Stat. § 256.11(6)(a) 11
Ariz. Rev. Stat. Ann. § 15-102 13
Ark. Code Ann. § 6-16-1006 12
Ark. Code Ann. § 6-16-1006(d)(1)(A) 22
Ark. Code Ann. § 6-16-1006(d)(1)(B) 22
Cal. Educ. Code § 51204.5 6
Cal. Educ. Code § 51240 11
Cal. Educ. Code § 51937 11
Colo. Rev. Stat. § 22-1-104.3 6
Conn. Gen. Stat. § 10-16e 11
Conn. Gen. Stat. § 10-19(b) 11
Fla. Stat. § 1001.42(8) 12
Ga. Code. Ann. § 20-2-143(d) 10
Idaho Code § 33-1611 11
La. Stat. § 17:281(D) 11
Mass. Gen. Laws ch. 71, § 32A 11
Me. Rev. Stat. tit. 22, § 1911 11
Mich. Comp. Laws § 380.1170(3) 11
Mich. Comp. Laws § 380.1507(4) 11
Minn. Stat. § 120B.20 14
Mo. Rev. Stat. § 170.015(5) 11
Mont. Code Ann. § 20-7-120(6) 12
Mont. Code Ann. § 20-7-120(2) 14
N.C. Gen. Stat. § 115C-81.30(b) 11
N.H. Rev. Stat. Ann. § 186:11(IX-c) 13, 14, 22
N.J. Rev. Stat. § 18A:35-4:36 6
N.J. Rev. Stat. § 18A:35-4.7 10
Nev. Rev. Stat. § 389.525 6

Statutes and Regulations—Continued Page(s)
Okla. Stat. tit. 25, § 2003 11
Or. Rev. Stat. § 329.045 6
R.I. Gen. Laws § 16-22-17(c) 11
R.I. Gen. Laws § 16-22-18(c) 11
R.I. Gen. Laws § 16-22-24(b) 11
S.C. Code. § 59-32-50 11
Tenn. Code Ann. § 49-6-1308(b)(1) 13
Tenn. Code Ann. § 49-6-1308(c)(1) 22
Tenn. Code Ann. § 49-6-1308(c)(2) 22
Va. Code. § 22.1-207.2 11
Vt. Stat. tit. 16, § 134 11
W. Va. Code § 18-2-9(c) 11
Wash. Rev. Code. § 28A.230.070(4) 11
Wash. Rev. Code. § 28A.345.130 6
Wis. Stat. § 118.019(3) 11
Wis. Stat. § 118.019(4) 11
Wyo. Stat. Ann. § 21-3-135 13
D.C. Mun. Regs. subtit. 5, § E2305.5 11
Md. Code Regs. § 13A.04.18.01(D)(2)(e)(i) 11

Other Authorities

District of Columbia Office of the State Superintendent of Education, Washington, DC K-12 Social Studies Standards (2023) 6
GLSEN, Inclusive Curricular Standards Policies, https://maps.glsen.org/inclusive-curricular-standards-policies/ 5, 6
Kriha Boucek, *Can Parents Opt Out of Public-School Curriculum Requirements?* (2021) 13

Other Authorities—Continued Page(s)

Massachusetts Department of Elementary and Secondary Education, History and Social Science Framework (2018) 6

Parents Defending Education, Opting Out, https://defendinged.org/resources/opting-out/ 12

SIECUS, *Sex Ed State Law and Policy Chart* (July 2022) 5

Vermont State Board of Education, Rule Series 2000 - Education Quality Standards (Apr. 2024) 6

Victor Skinner, *MD school cancels Halloween after some students opt out,* EAG News (Oct. 31, 2016) 19

Why Don't Jehovah's Witnesses Celebrate Birthdays?, Jehovah's Witnesses, JW.org, https://www.jw.org/en/jehovahs-witnesses/faq/birthdays/ 18

INTERESTS OF *AMICI CURIAE*[1]

This brief is submitted on behalf of organizations that represent U.S. public schools districts, their state school board associations, their attorneys, and their administrators. These entities (i) support the primacy of local and state educational officials over curriculum content and educational instruction in the classroom, and (ii) recognize that any right to "opt out" of classroom instruction must be carefully calibrated and limited to minimize the disruptive impact on classroom instruction.

AASA, The School Superintendents Association ("AASA") represents 10,000 school district leaders and advocates. AASA advocates for equitable access for all students to the highest quality public education, and develops and supports school system leaders. AASA members set the pace for academic achievement and serve as the CEOs of school systems. The AASA helps shape policy, oversee its implementation, and represents school districts to the public at large.

The Consortium of State School Boards Associations ("COSSBA") is a non-partisan, national alliance of 25 state school board associations. COSSBA is currently comprised of 25 state associations that serve over 6,700 school boards comprised of 42,000 members who work in service to nearly 24 million students. COSSBA is dedicated to sharing resources and information to support, promote and strengthen state school boards associations as they serve their local school districts and board members.

---

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation of or submission of this brief. No one other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

The Council of the Great City Schools (the "Council"), founded in 1956 and incorporated in 1961, is a coalition of 78 of the nation's largest urban public-school systems and is the only national organization exclusively representing the needs of the largest urban public-school districts in the United States. The Council's member districts have a combined enrollment of over 7.8 million students. Headquartered in Washington, D.C., the Council promotes urban education through research, instruction, management, technology, legislation, communications, and other special projects.

The National School Attorneys Association ("NSAA") is a non-profit membership organization of attorneys who advocate on behalf of elementary and secondary public-school districts across the United States. NSAA's approximately 900 members across the United States regularly advise public school districts on constitutional issues affecting their operations.

INTRODUCTION AND SUMMARY OF ARGUMENT

The parties, understandably, focus on the facts of this case. *See*, *e.g.*, Pet. Br. 9-19; Br. in Opp. 1-7. But this case is presented to the Court on an undeveloped and untested, preliminary injunction record. *Amici* urge the Court to consider the complexity of the legal issues presented by this case. There are great risks presented by asking the Court to potentially adopt new rules for evaluating Free Exercise claims or constitutionalizing notice and opt out requirements. Whatever rule the Court promulgates in this case will apply far beyond the circumstances of this dispute.

This Court should be mindful that while many states and localities provide instruction on sex education, jurisdictions vary widely in their approaches to instruction about sex education, including topics related to sexual orientation. Petitioners oversimplify national

trends when they suggest there is any sort of "national consensus respecting parental control over instruction on gender." Pet. Br. 6. Petitioners mischaracterize how opt out provisions function and the extent of parental control in most jurisdictions when they state that it is a "nationwide tradition" that "parents have the final say" on curricular materials. Pet. Br. 6-9. And Petitioners likewise significantly understate the administrative burden on school districts, administrators, and teachers associated with administering opt out programs, and provide an inaccurate depiction of the contours of such programs and how they operate. Pet. Br. 6-9, 49. Similarly, *Amici* believe Respondents' suggestion that it is "irrelevant" to questions of burden whether there is a "national consensus" regarding sex education instruction misses the complexity of the issue. Br. in Opp. 25.

In their question presented, Petitioners frame this case as one concerning "instruction on gender," but there is nothing in their Free Exercise argument that could constrain any precedent set by this case to just that topic. Schools, like courts, must treat all religious claims equally, no matter how unusual they appear to the uninitiated. *See, e.g., Bowen v. Fair*, 476 U.S. 693, 712 (1986) (noting "the diversity of beliefs in our pluralistic society"). *See generally McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (the Establishment Clause "mandates governmental neutrality between religion and religion, and between religion and nonreligion"). The Court should be exceedingly careful in modifying long-established rules for evaluating Free Exercise claims that school districts have grown accustomed to and relied upon in accommodating the competing needs of parents, children, teachers and schools in a wide variety of circumstances, including those that cannot be precisely foreseen. In other words, the principles that apply to kindergarten parents

seeking to prevent their child from being exposed to Pride Puppy will also apply to the parents of a high-school or middle-school student who wish to prevent their ninth grader from being exposed to evolution or their sixth-grader being exposed to any pictures of girls who are not wearing a hijab.

These principles—which should be undisputed—counsel caution in changing long-established rules. And any revisions to the rules this Court adopts should recognize the importance of deference to the decisions of local school officials, faced with the likelihood of a bewildering variety of Free Exercise claims.

ARGUMENT

I. JURISDICTIONS THAT PROVIDE OPT OUT RIGHTS HAVE BEEN AND SHOULD CONTINUE TO BE ALLOWED TO DO SO CONSISTENT WITH STATE AND LOCAL AUTHORTIES' CURRICULAR PREROGATIVES AND WITHOUT INTERRUPTION OF INSTRUCTION

A. Courts have consistently and properly recognized that States have broad discretion to control conduct and curriculum in their public schools.

Public schools around the country have long operated with the understanding, and expectation, that local and state authorities have the ability to regulate the conduct and curriculum within schools. As this Court has repeatedly recognized, in a wide array of contexts, "[b]y and large, public education in our Nation is committed to the control of state and local authorities." *See Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."). As Chief Judge Danny Boggs

observed, this "Court has almost never interfered with the prerogative of school boards to set curricula, based on free exercise claims." *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1079 (6th Cir. 1987) (Boggs, J., concurring), *cert. denied*, 484 U.S. 1066 (1988).

Consistent with this principle, almost all states mandate, as part of their curricula, that standard public school curricula include sex education. But the content of that education can vary widely, reflecting diverse views as to content and emphasis that reflect decisions made by state and local education policymakers. For instance, thirty states require schools to emphasize the importance of abstinence during sex education.[2] Sixteen states provide abstinence-only sex education, while nineteen states require instruction on contraception.[3]

The patchwork of state and local laws regulating sex education similarly reflects varied beliefs and values around the country with regard to discussion of sexual orientation: some states mandate and other states prohibit curricula from including sexual orientation. Specifically, 11 states (Alabama, Arkansas, Florida, Indiana, Iowa, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, and Texas) have enacted laws prohibiting instruction regarding sexual orientation or gender identity.[4] In contrast, seven states (California, Colorado, Illinois, Nevada, New Jersey, Oregon, and Washington) have passed laws that set academic content standards for locally created academic curriculum to include instruction on the history and contributions of

---

[2] SIECUS, *Sex Ed State Law and Policy Chart* 3 (July 2022).

[3] *Id.* at 17-19.

[4] *See* GLSEN, Inclusive Curricular Standards Policies, https://maps.glsen.org/inclusive-curricular-standards-policies/ (last visited Mar. 7, 2025).

lesbian, gay, bisexual, and transgender individuals.[5] The state education agencies of two states (Massachusetts and Vermont) and the District of Columbia have adopted curricular standards recognizing that "[t]eaching how the concepts of freedom, equality, the rule of law, and human rights have influenced the United States necessarily involves discussions of … gender, gender identity, sexual orientation, and other characteristics."[6] Some states require that sex education include perspectives of individuals with differing sexual orientation—within this group, some of these states (e.g., California) mandate such education, while others (e.g., Illinois) allow local education agencies to choose whether to provide such education.[7] And three states (Maryland, Delaware, and Connecticut) have policies that encourage locally adopted curriculum to include the history and perspective of people from differing sexual orientation.[8] Other states do not set policy on a statewide basis.

While this discussion has focused on variation in sex education curriculum, the same variation is found in other components of public school K-12 instruction, properly

---

[5] *See* N.J. Rev. Stat. § 18A:35-4:36; Nev. Rev. Stat. § 389.525; Colo. Rev. Stat. § 22-1-104.3; Cal. Educ. Code § 51204.5; 105 Ill. Comp. Stat. 5/27-21; Or. Rev. Stat. § 329.045; Wash. Rev. Code. § 28A.345.130.

[6] District of Columbia Office of the State Superintendent of Education, Washington, DC K-12 Social Studies Standards (2023), https://osse.dc.gov/sites/default/files/dc/sites/osse/page_content/attachments/Adopted%20Standards%20%28July%202023%29.pdf. *See also* Massachusetts Department of Elementary and Secondary Education, History and Social Science Framework 13 (2018), https://www.doe.mass.edu/frameworks/hss/2018-12.pdf.; Vermont State Board of Education, Rule Series 2000 – Education Quality Standards, at 2120.1 (Apr. 2024).

[7] *See* GLSEN, Inclusive Curricular Standards Policies (last visited Mar. 2, 2025).

[8] *Id.*

reflecting the decisions made by state and local policymakers who can best decide what their communities' children should be taught. This Court has warned that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint." *Epperson*, 393 U.S. at 104.[9] This is in part because when determining the content of curriculum, district and state administrators must consider many competing interests. In particular, in exercising their discretion, public school leaders have the difficult task of balancing the interests of its diverse population of students and parents, as well as the interests of classroom instructors and principals and other in-school administrators who are charged with educating America's youth in a dynamically changing, pluralistic society. As this Court has noted, neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506.

However the Court decides this case, *Amici* believe that it is important for the Court to continue to recognize the primacy of state and local districts to establish curriculum for their communities' students.

i. This Court has made clear that a Free Exercise Claim requires more than mere exposure to an idea.

---

[9] Congress has similarly forbidden the federal government from interfering in state and local control of curriculum. *See* 20 U.S.C. § 1232a ("No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system ….").

Following this Court's precedents, courts examining Free Exercise claims regarding curricular content have required a plaintiff to make a threshold showing that there is a coercive effect that substantially burdens the student's or parents' practice of their religion; only once such a burden has been established is the district required to justify the challenged practice under the appropriate level of scrutiny. *See, e.g., Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 450 (1988) (stating that indirect and direct coercion on the free exercise of religion are subject to scrutiny under the First Amendment). This Court's precedents establish clear benchmarks for actions that are coercive. For instance, the state may not compel students to participate in religious exercises or act contrary to their faith. *See Sch. Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963). Nor may the state indirectly burden students' right to free exercise by "condition[ing] receipt of an important benefit upon conduct proscribed by a religious faith, or [by denying] such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.,* 450 U.S. 707, 708 (1981).

The high "coercion" threshold to establish a Free Exercise claim and these clear benchmarks are consistent with the ability of public schools to choose curricular and educational materials, set educational objectives, and regulate conduct within the school. Public schools have never been required to ensure that their curricula are free of content that parents or students *may* find offensive—nor would it be feasible for education systems to structure their curriculum to that end. Nor have public schools ever been required to ensure that students will not be exposed to materials that students or parents may find objectionable.

The consistent position of appellate courts to maintain the high threshold of "coercion" preserves the long-recognized authority of local administrators. These courts have properly rejected the notion that the "mere exposure" to ideas that may contradict or challenge certain religious beliefs fall well short of "coercion" and do not meet the standard to establish a Free Exercise violation. *See, e.g., Brown v. Hot, Sexy & Safer Prods, Inc.*, 68 F.3d 525, 534 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996) ("If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools."). *See also Parker v. Hurley*, 514 F.3d 87, 106 (1st Cir. 2008) (holding that "[p]ublic schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas"); *Mozert*, 827 F.2d at 1070 (holding that required attendance in reading classes or reading assigned materials—without additional evidence that students were required to affirm or deny a religious belief, perform or not perform a religious exercise or practice—did not place an unconstitutional burden on students' free exercise of religion); *Fleischfresser v. Dirs. of Sch. Dist.* 200, 15 F.3d 680, 690 (7th Cir. 1994) (finding that a school's supplemental reading program must be evaluated in its entirety, that the purpose of the program was to "build and enhance students' reading skills," and that "the government's interest in providing a well-rounded

education would be critically impeded by accommodation of the parents' wishes").

Amici believe maintaining the high threshold to establish a Free Exercise claim is important both to preserve the authority of local and school administrators to set curriculum and select instructional materials, as well as to promote orderly instruction in the classroom.

B. States that have provided notice and opt out rights for parents typically balance honoring parents' opt out rights and allowing teachers, schools, and school boards to use their professional judgment for student instruction.

While many states or local systems allow, to some extent, parents the right to remove children from instruction without penalty, Petitioners' discussion of this subject significantly oversimplifies and mischaracterizes the extent, scope, and availability of these opt out rights.

States and local school districts have regulated in this area for decades—addressing community norms and parent concerns with rulemaking and due process. And while states approach parent opt out rights differently, a closer examination of the state statutes cited by Petitioners illuminate a commonality: most states limit parent opt out rights to specified courses or subjects. And in most cases to a single subject: sex education.

In other words, Petitioners oversimplify the parental opt out rights provided by state statutes, neglecting to recognize that these opt out rights are limited in scope.[10]

---

[10] *See e.g.*, N.J. Rev. Stat. § 18A:35-4.7 ("Any child whose parent or guardian presents to the school principal a signed statement that any part of the instructions in health, family life education or sex education is in conflict with his conscience, or sincerely held moral or religious beliefs shall be excused from that portion of the course ...."); Ga. Code. Ann. § 20-2-143(d) ("Any parent ... to whom [a course of study in sex education and AIDS prevention] is to be

Most states that allow parents to opt students out of instruction limit that opt out to a course or single curricular unit covering sexual activity and reproduction.

Petitioners also fail to recognize that opt out rights are carefully calibrated and are typically limited in ways that respect the need for teachers, schools, and school boards to use their professional judgment for student instruction as well as to conduct student instruction without interruption.[11] The majority of states that limit

---

taught shall have the right to elect, in writing, that such child not receive such course of study."); Mo. Rev. Stat. § 170.015(5) ("A school district or charter school shall notify the parent … of … The parent's right to remove the student from any part of the district's or school's human sexuality instruction."); S.C. Code. § 59-32-50 ("A public school principal, upon receipt of a statement signed by a student's parent or legal guardian stating that participation by the student in the health education program conflicts with the family's beliefs, shall exempt that student from any portion or all of the units on reproductive health, family life, and pregnancy prevention where any conflicts occur."); Va. Code. § 22.1-207.2 ("Parents and guardians also have the right to excuse their child from all or part of family life education instruction."). *See also* Conn. Gen. Stat. § 10-16e; Conn. Gen. Stat. § 10-19(b); Idaho Code § 33-1611; La. Stat. § 17:281(D); Mass. Gen. Laws ch. 71, § 32A; Md. Code Regs. § 13A.04.18.01(D)(2)(e)(i); Me. Rev. Stat. tit. 22, § 1911; Cal. Educ. Code § 51937 & Cal. Educ. Code § 51240; Alaska Stat. § 14.30.355(b)(7); Alaska Stat. § 14.30.356(b)(6); § 256.11(6)(a); N.C. Gen. Stat. § 115C-81.30(b); Mich. Comp. Laws § 380.1507(4); Mich. Comp. Laws § 380.1170(3); Okla. Stat. tit. 25, § 2003; R.I. Gen. Laws §§ 16-22-17(c), 16-22-18(c), 16-22-24(b); Vt. Stat. tit. 16, § 134; Wash. Rev. Code. § 28A.230.070(4); Wis. Stat. §§ 118.019(3) and (4); W. Va. Code § 18-2-9(c); D.C. Mun. Regs. subtit. 5, § E2305.5.

[11] While Congress has also provided that parents have notice and opt out rights under Protection of Pupil Rights Amendment, 20 U.S.C. § 1232h, consistent with the above observations, these rights are limited to carefully defined components of the education program – specifically, it is limited to allowing children to opt out of surveys that might touch on topics, including political beliefs, mental or psychological problems of the student or student's family,

notice and opt out rights to sex education necessarily preclude parents from receiving notice or having the ability to opt their children out of other aspects of the curriculum, even for material that contains sexual content. In other words, while many states allow a parent to opt their child out of a human sexuality unit of their health class, most states do not permit parents to opt their children out of reading *To Kill a Mockingbird*, *I Know Why the Caged Bird Sings*, *The Diary of Anne Frank*, or *The Kite Runner*. And this distinction between opting out of a class or a class segment and opting out of a particular text is a critical one, which Petitioners do not acknowledge.

Imposing a constitutionally-mandated notice and opt out requirement to all aspects of a school's curriculum, under the auspices of the Free Exercise clause, would greatly magnify the burden faced by most school districts, in-school administrators, and teachers, which have grown accustomed to only permitting parents to opt out of sex education.

Petitioners also significantly overstate the extent that states have permitted parental opt out rights related to sexual orientation curricula, characterizing it as "a nationwide tradition." Pet. Br. 9. As discussed above, states and local districts have taken different approaches on whether curriculum should include topics related to sexual orientation and gender, with many remaining silent. Comparatively, very few states allow parents to opt out of curricula specifically about sexual orientation and gender. Four states—Arkansas,[12] Florida,[13] Montana,[14]

---

sex behavior or attitudes. *See* Parents Defending Education, Opting Out, https://defendinged.org/resources/opting-out/.

[12] Ark. Code Ann. § 6-16-1006.

[13] Fla. Stat. § 1001.42(8).

[14] Mont. Code Ann. § 20-7-120(6).

and New Hampshire[15]—permit parents to opt their children out of instruction related to sexual orientation or gender identity specifically—and two of these states (Florida and Arkansas) have laws that further prohibit instruction concerning sexual orientation. Three states—Arizona,[16] Tennessee,[17] and Wyoming[18]—have "opt-in" provisions, or require parents to elect to have their child receive such instruction.

While some states allow opt out beyond sex education, most that do so precisely define the scope. For instance, in Illinois, parents can opt out their children out of receiving instruction related to: sex education, family life, sexually transmitted diseases, sexual abuse, organ/tissue and blood donation, and animal dissection.[19]

States that allow opt out outside of carefully circumscribed subjects are rare. One such state, Texas, allows parents to opt their children out of material that they find "objectionable," without a requirement that the parent's objection be based on religion or morals. And New Hampshire requires school districts to adopt a policy with a provision requiring parents to "notify the school principal or designee in writing of the specific material to which they object and a provision requiring an alternative agreed upon by the school district and the parent, at the parent's expense, sufficient to enable the child to meet

---

[15] N.H. Rev. Stat. Ann. § 186:11(IX-c).

[16] Ariz. Rev. Stat. Ann. § 15-102.

[17] Tenn. Code Ann. § 49-6-1308(b)(1).

[18] Wyo. Stat. Ann. § 21-3-135.

[19] *See* Kriha Boucek, *Can Parents Opt Out of Public-School Curriculum Requirements?* (2021), https://krihaboucek.com/wp-content/uploads/2021/08/Opting-Out-of-Curriculum-Mandates.pdf. *See also* Ala. Code § 16-41-6 (allowing opt out for "the teaching of disease, its symptoms, development and treatment and the use of instructional aids and materials of such subjects").

state requirement in the particular subject area."[20] Minnesota has a similar policy to New Hampshire's, including requiring the parent to arrange alternative instruction to the school board at no cost to the school board.[21]

Another way of framing this point is that most states that allow opt out rights do so in a way that that can be administered centrally to reduce burden on teachers and principals and minimizes interruption on classroom instruction for other students, *i.e.*, it only covers one topic (sex education), notice is provided a certain set period of time before the instructional unit starts,[22] and parents must exercise the opt out in writing. Importantly, many of these programs operate at the instructional unit or course of study level—they are not extended to objecting to particular texts or materials.

Amici urge the Court to be mindful of these principles and cognizant of the increased burden on administrators, teachers, and other students if notice and opt out rights are to be broadened.

C. Mandating notice and opt out rights without demonstrating coercive effect risks drastically increasing burden on schools.

Amici are concerned that expanding notice and opt out requirements beyond the current parameters, risks forcing teachers and school administrators to notify parents of every topic or item a student might be exposed to in all areas of the classroom, or risk constitutional liability. In our pluralistic society, school administrators and teachers cannot predict whether a parent may object

---

[20] N.H. Rev. Stat. Ann. § 186:11(IX-c).

[21] Minn. St. § 120B.20.

[22] For instance, Montana requires that schools provide parents with notice "no less than 48 hours" prior to the use of instruction related to human sexuality. Mont. Code Ann. § 20-7-120(2).

to a particular text or discussion topic as running contrary to their religious beliefs. Given the multiplicity of our society's religious views, practically, this might require providing constitutional notice for all texts and discussion topics for every subject area: reading, writing, mathematics, science, history, engineering, arts, and physical education/health. An expansion of notification requirements may further require notice as to the contents of every book, word problem, game, slideshow, lecture, textbook and reading packet taught or available in the classroom. School administration and teachers may be forced to divert their already limited resources and time to ensure full compliance with this expansion of parental notification rights.

While states and localities are now free to choose to provide more extensive notification to suit their communities, it would be an extreme and overly broad burden to force all school districts in the country to do the same. *Amici* are concerned that mandating such a sweeping notice requirement would infringe on the rights of state and local governments to control their own education system and tailor their parental notification requirements to the needs and preferences of their community. *Epperson*, 393 U.S. at 104 ("By and large, public education in our Nation is committed to the control of state and local authorities.").

Similarly, states and local school boards have determined workable policies to permit parents to opt their children out of courses or discrete instruction regarding sexual education, but concluding that there is a constitutionally-mandated opt out right for any instruction or instructional material that parents may find objectionable would impose a significantly greater administrative burden. Teachers could be expected to provide alternatives to all texts, materials, or discussion topics within a given course. This would require teachers

to prepare alternative materials on all subjects in the classroom and have a chilling effect on all classroom instruction.

This would be a drastic expansion and departure from the majority of states which only provide notice and the opportunity to opt out of topics related to sex education. *See supra* Section I.B. Lowering the threshold parents must meet to bring a successful Free Exercise claim would then require teachers to keep a constant, watchful eye as to the content of all student activities to ensure students are only accessing material approved by their parents or guardians. If parents are permitted to opt their children out of any instruction, then the diverse, multicultural kaleidoscope that makes up the religious backgrounds of students in public schools inevitably creates a situation where multiple iterations of all lesson plans and the constant interruption of teachers seems all but certain.

II. LOWERING THE STANDARD NECESSARY TO ESTABLISH A FREE EXERCISE CLAIM COULD HAVE WIDESPREAD AND UNDESIRABLE IMPLICATIONS

As Justice Robert Jackson famously observed, if the Court were "to eliminate everything that is objectionable to any [religious group] or inconsistent with any of their doctrines, we will leave public schools in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits." *People ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring).

Amici are concerned that substantially lowering the standard necessary to establish a Free Exercise claim, such as permitting a claim predicated only on exposure to a concept to be viable, or determining that broad opt out rights that the Petitioners advocate are constitutionally mandated, would have the deleterious effect that Justice Jackson predicted. In addition to undermining the

administration of schools and order in the classroom, it could lead to students being opted-out of a wide range of experiences that are staples within schools, drastically altering the burdens placed on schools and teachers, as well as students' educational experiences.

Petitioners say the issue in this case relates to public schools teaching about gender, but nothing in the Free Exercise argument could logically constrain the precedent to apply just to that topic. Allowing mere exposure to give rise to parents' Free Exercise claims and mandating sweeping notice and opt out rights could radically change the substantive education that students receive, leaving significant gaps in students' learning. This is clear from a review of a sample of reported decisions from the lower courts evaluating Free Exercise claims. For example, parents could prevent their children from learning about any part of world history or current events that includes negative or unflattering details about their religion. *See, e.g., Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 479 F. Supp. 3d 808, 818 (D. Ariz. 2020) (objection to world politics class discussion of terrorism); *Cal. Parents for Equalization of Educ. Materials v. Torlakson*, 267 F. Supp. 3d 1218, 1227 (N.D. Cal. 2017), *aff'd*, 973 F.3d 1010 (9th Cir. 2020) (objection to what parents viewed as an anti-Hindu curriculum). Similarly, parents could object to their children receiving any education concerning comparative world religions or learning about other religions within world history. *See, e.g., Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49 (2d Cir. 2001). Moreover, biology classes could be forced to proceed without any reference to evolution. *See Mozert v. Hawkins Cnty. Bd. of Educ.,* 827 F.2d 1058 (6th Cir. 1987) (parents objecting on religious grounds to readers referencing evolution). Additionally, books that reference dinosaurs or supernatural topics like magic, wizards, or giants that make reading exciting for many students,

could be forced to be excluded from classrooms. *See Fleischfresser v. Dirs. of Sch. Dist. 200,* 15 F.3d 680, 683, 690 (7th Cir.1994) (objection to a series used to teach reading that focused on supernatural beings because parents claimed it fostered a belief in the "existence of superior beings exercising power over human beings" that was counter to their religious views); *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373 (9th Cir. 1994) (objection to a reading aid discussing witches); *Mozert*, 827 F.2d at 1062 (objection to readers referencing magic and "futuristic supernaturalism").

If a teacher presents themselves in a way that does not comport with a parent's religious principles, a broad opt out right could also allow parents to opt their children out of entire core subjects. For example, if a student's math teacher wears a cross necklace, hijab, or yarmulke, or dresses in a way that does not comport with the gender norms that a parent's religion espouses, the child could be forced to miss out on math class entirely to avoid exposure to the teacher's appearance, especially in schools without the resources to hire multiple teachers for each subject.

School birthday celebrations, a yearly highlight for many school children, could also become unworkable, as parents whose religion is opposed to birthdays could opt their children out of these classroom festivities.[23] Other celebrations could be made practically impossible as well: not only could teachers be barred from putting up decorations or teaching songs referencing holidays like Christmas, but even largely secular holidays that have religious origins like Halloween, Valentine's Day, or St. Patrick's Day could be forced to go unacknowledged in

[23] *See Why Don't Jehovah's Witnesses Celebrate Birthdays?, Jehovah's Witnesses*, JW.ORG, https://www.jw.org/en/jehovahs-witnesses/faq/birthdays/ (last visited Mar. 7, 2025) (explain Jehovah's Witnesses' religious opposition to birthday celebrations).

schools.[24] While some school districts, including the Respondent, may choose to allow parents to opt their children out of birthday and holiday celebrations or to cancel certain festivities due to religious objections, that choice is a far cry from constitutionally mandating that schools allow parents to prevent their children from being exposed to any reference to these holidays around the classroom. *See* Pet. Br. 6-7, 14.

It would be exceedingly difficult for teachers to deliver the important substantive material required for each school grade while also creating lessons devoid of anything a parent might find offensive to their religion. A broad constitutional opt out right for mere exposure to concepts or materials may lead to students missing significant portions of subjects that states have deemed critical, including Language Arts, Social Studies, and Science, among others. This could leave America's public school children with substantive gaps in their education. In doing so, a robust opt out right would undermine the role of public schools:

> [F]irst and foremost to provide a primarily civic education. We have said that, in doing so, they comprise 'a most vital civic institution for the preservation of a democratic system of government, and … the primary vehicle for transmitting the values on which our society rests.'

Carson v. Makin, 596 U.S. 767, 800 (2022) (quoting *Plyler v. Doe*, 457 U. S. 202, 221 (1982)). *See also Pierce v. Soc'y*

---

[24] *See, e.g.,* Victor Skinner, *MD school cancels Halloween after some students opt out*, EAG NEWS (Oct. 31, 2016), https://www.eagnews.org/2016/10/md-school-cancels-halloween-after-some-students-opt-out/ (school cancelling Halloween festivities due to religious objections despite broad community opposition to the cancellation).

of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534 1070 (1925) ("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 … certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."). And a broad opt out would undermine the goal of a civic education which includes "tolerance of divergent political and religious views." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). Tolerance of divergent political and religious views is a civil concern, not a religious one. Indeed, civil tolerance "does not require a person to accept any other religion as the equal of the one to which that person adheres. It merely requires a recognition that in a pluralistic society we must 'live and let live.'" *Mozert*, 827 F.2d at 1069. Students who are opted out would miss this important civic lesson.

Moreover, determining that a broad opt out right is constitutionally mandated could also prevent teachers from being able to adequately respond to common classroom situations or prepare their students to be respectful to classmates and others. Teachers could be prevented from reading books referencing the existence of divorced or same-sex parents to children whose parents' religions do not condone those family structures. Moreover, teachers could be required to prevent children from even being exposed to the existence of these types of families, including through discussions of the family structures of their classmates. *See, e.g., Parker v. Hurley*, 514 F.3d 87, 105-06 (1st Cir. 2008) (parents' and children's free exercise rights were not violated by schools exposing children to materials designed to promote tolerance of gay and lesbian couples because the mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the

parent from instructing the child differently" and "[t]here is no free exercise right to be free from any reference in public elementary schools to the existence of families in which the parents are of different gender combinations."). Such restrictions could also make it impossible to teach the values of tolerance and respect that are central to helping students develop into citizens within a pluralistic society, as well as employees capable of respecting and working productively with colleagues from wide-ranging backgrounds.

Furthermore, *Amici* note that lowering the threshold to "exposure" to establish a Free Exercise claim would be impractical, since children themselves frequently raise questions about topics that other families may find objectionable, such as the existence of divorce or same sex relationships. How is a teacher or a school administrator presented with a parent's religious objection to exposing their child to concepts of same sex relationships to respond to a question about that topic? Are they required to censor themselves by not responding? Should they remove opted-out students from the classroom, ostracizing them and risking a claim that the child has been discriminated against on the basis of their religion?

In addition to preventing teachers from productively addressing such questions, such a requirement that children be shielded from even conversation topics raised by other children to which their parents object would be an impossible logistical burden, as students are bound to pose such questions without prior warning. *See*, *e.g.*, *Jones v. Boulder Valley Sch. Dist. RE-2*, No. 20-cv-03399, 2021 WL 5264188, at *12 (D. Colo. Oct. 4, 2021) (such a requirement would be "unworkable"). Indeed, recognizing the impracticability of such a broad opt out right, some of the states that permit parents to opt their children out of instruction concerning LGBTQ+ topics still permit children to be exposed to mentions of a

person's status in the classroom, either in context or in response to a student question. *See*, *e.g.*, Ark. Code Ann. §§ 6-16-1006(d)(1)(A), (B) (no parental notification before a teacher "(A) [r]esponds to questions posed by public school students during class regarding sex education, sexual orientation, or gender identity as it related to a topic of instruction; or (B) [r]efers to the sexual orientation or gender identity of a historical person, group, or public figure when such information provides necessary context in relation to a topic of instruction"); N.H. Rev. Stat. Ann. § 186:11(IX-c) ("The policy shall also acknowledge that no notice is required if a school employee is responding to a question from a student during class."); Tenn. Code Ann. §§ 49-6-1308(c)(1), (2) (does not require schools to notify a student's parent when "[r]esponding to a question from a student during class regarding sexual orientation or gender identity as it relates to any topic of instruction;" or "[r]eferring to the sexual orientation or gender identity of any historic person, group, or public figure, where the referral provides necessary context in relation to a topic of instruction").

In deciding this case, *Amici* urge the Court to be mindful of the teachers, administrators, and other students who would bear the brunt of disruptive objections if this Court were to open the floodgates to more expansive exposure-based Free Exercise claims or recognize more expansive notice or opt out rights.

* * * * *

CONCLUSION

There are great risks presented by asking the Court to adopt new rules for evaluating Free Exercise claims or constitutionalizing notice and opt out requirements based on an undeveloped and untested preliminary injunction record. *Amici* ask that the Court exercise caution in changing long-established rules that establish a high threshold to maintain a Free Exercise claim. *Amici* also ask the Court to continue to recognize the primacy of state and local districts to establish curriculum and select instructional materials for their communities' students, and to be mindful of the potential increased burden on administrators, teachers, and other students if notice and opt out rights are constitutionalized or broadened.

Respectfully submitted.

STEVEN L. MAYER
ARNOLD & PORTER
KAYE SCHOLER LLP
Three Embarcadero Center
10th Floor
San Francisco, CA 94111
(415) 471-3100

JOHN A. FREEDMAN
Counsel of Record
JENNIFER CHANG
SARAH H. JOFFE
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-5000
john.freedman@arnoldporter.com

LEORA EINLEGER
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000

MARCH 2025