No. 23-1890

In the United States Court of Appeals for the Fourth Circuit

TAMER MAHMOUD; ENAS BARAKAT; JEFF ROMAN; SVITLANA ROMAN; CHRIS PERSAK; MELISSA PERSAK, *in their individual capacities and ex rel. their minor children*; KIDS FIRST, *an unincorporated association*,
Plaintiffs - Appellants,
v.
MONICA B. MCKNIGHT; SHEBRA EVANS; LYNNE HARRIS; GRACE RIVERA-OVEN; KARLA SILVESTRE; REBECCA SMONDROWSKI; BRENDA WOLFE; JULIE YANG; THE MONTGOMERY COUNTY BOARD OF EDUCATION,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Maryland Greenbelt Division, No. 8:23-cv-01380-DLB

BRIEF OF AMICI CURIAE ADVANCING AMERICAN FREEDOM, INC.; PAUL TELLER; ALASKA FAMILY COUNCIL; AMERICAN FAMILY ASSOCIATION ACTION; AMERICAN VALUES; CATHOLIC VOTE; CENTER FOR POLITICAL RENEWAL; CHRISTIAN LAW ASSOCIATION; CHRISTIANS ENGAGED; EAGLE FORUM; FRONTLINE POLICY COUNCIL; IDAHO FAMILY POLICY CENTER; INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS; TIM JONES, MISSOURI CENTER-RIGHT COALITION; MINNESOTA FAMILY COUNCIL; MOMS FOR LIBERTY; NATIONAL ASSOCIATION OF PARENTS (D/B/A "PARENTSUSA"); NEW JERSEY FAMILY FOUNDATION; NEW MEXICO FAMILY ACTION MOVEMENT; SETTING THINGS RIGHT; THE FAMILY FOUNDATION; AND THE JUSTICE FOUNDATION IN SUPPORT OF APPELLANTS AND REVERSAL

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The amici curiae Advancing American Freedom, Inc., Alaska Family Council, American Family Association Action, American Values, Catholic Vote, Center for Political Renewal, Christian Law Association, Christians Engaged, Eagle Forum, Frontline Policy Council, Idaho Family Policy Center, International Conference of Evangelical Chaplain Endorsers, Missouri Center-Right Coalition, Minnesota Family Council, Moms for Liberty, National Association of Parents (d/b/a "ParentsUSA"), New Jersey Family Foundation, New Mexico Family Action Movement, Setting Things Right, The Family Foundation, and The Justice Foundation are nonprofit corporations. They do not issue stock, and are neither owned by nor are the owners of any other corporate entity, in part or in whole. They have no parent companies, subsidiaries, affiliates, or members that have issued shares or debt securities to the public. The corporations are operated by volunteer boards of directors.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Advancing American Freedom, Inc., ("AAF") states under FRAP 29(a)(4)(E) that no counsel for a party other than AAF authored this brief in whole or in part, and no counsel or party other than AAF made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief. FRAP 29(a)(2).

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including freedom of speech and the free exercise of religious belief. AAF believes that a person's freedom of speech and the free exercise of a person's faith are among the most fundamental of individual rights and must be secured, and that parental rights have been established beyond debate as an enduring American tradition.[1]

Paul Teller is the father of both a current high school student in a Montgomery County public school and of a graduate of Montgomery County Public Schools, both of whom spent many years in that school system. Mr. Teller is a current resident of Montgomery County and is deeply concerned by the school board's policy, which

[1] All parties received timely notice and have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than *Amicus Curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

violates the fundamental right of parents to raise their children in accordance with their own values and, in so doing, undermines the vitality of society's most basic unit, the family.

Amici Alaska Family Council; American Family Association Action; American Values; Catholic Vote; Center for Political Renewal; Christian Law Association; Christians Engaged; Eagle Forum; Frontline Policy Council; Idaho Family Policy Center; International Conference of Evangelical Chaplain Endorsers; Tim Jones, Missouri Center-Right Coalition; Minnesota Family Council; Moms for Liberty; National Association of Parents (d/b/a "ParentsUSA"); New Jersey Family Foundation; New Mexico Family Action Movement; Setting Things Right; The Family Foundation; and The Justice Foundation believe that parents have a fundamental right to raise their children according to their own values and the primary responsibility for educating their children and that schools should adopt policies and procedures to respect those principles.

INTRODUCTION AND SUMMARY OF ARGUMENT

When parents send their children to school, they expect them to learn to read and write, to do math and science, to learn about history and art. They do not expect school administrators and teachers with an agenda to undermine their children's basic understanding of reality. In this case, parents of diverse religious backgrounds sued to protect their elementary school-aged children from indoctrination into a

hyper-sexualized worldview. *Mahmoud v. McKnight*, 23-1380, 2023 U.S. Dist. LEXIS 150057, at *9-10 (D. Md. Aug. 24, 2023).

In 1983, the National Commission of Excellence in Education released a report called *A Nation at Risk: The Imperative of Educational Reform*.[2] As Russell Kirk observed a decade later, "a great deal of talk about education, and scribbling about it, have occurred. As for any evidences of general improvement, however – why, one does not discover them easily." Russell Kirk, *The Politics of Prudence* 240 (1993). Indeed, even as early as 1983, it seemed that "Our society and its educational institutions" had "lost sight of the basic purposes of schooling…" *A Nation At Risk* 5 (1983).

In October 2022, the Montgomery County School Board (the "Board") announced the approval of over 22 LGBTQ texts for use in kindergarten through fifth grade in Montgomery County Public Schools (MCPS). *Mahmoud*, 2023 U.S. Dist. LEXIS 150057, at *5. MCPS is required by law to provide "comprehensive health education" which includes sex education. *Id*. at *7. State law also requires school systems to provide parents and guardians with the opportunity "to view instructional materials to be used in the teaching of family life and human sexuality objectives," and to opt their children out of that instruction. *Id*. However, the Board

[2] National Commission on Excellence in Education, *A Nation at Risk*, (1983), https://www.reaganfoundation.org/media/130020/a-nation-at-risk-report.pdf.

contends that the books in question are part of the English curriculum and thus are not subject to this opt-out provision. *Id*.

Although the Board says there is no planned curriculum on gender identity, after reading these books, teachers will facilitate "think aloud" moments where students can think of ways to implement the stories they are reading into their personal lives. *Id*. at *24. Teachers were given canned responses to use when fielding students' questions. For example, if a student is confused about the concept of transgenderism after a reading, the teacher is prompted to tell students the following series of lies: "When we're born, people make a guess about our gender . . . When someone's [*sic*] transgender, they guessed wrong . . . Our body parts do not decide our gender . . . When someone tells us what our gender is, we believe them." *Id*. at *25-27. Further, the Board notes that no one is required to agree with the ideas taught and parents may keep their children home from school while these texts are used in the classroom—but that choice will result in an unexcused absence. *Id*. at 23.

After initially saying that parents would be able to opt their children out of reading these books, the policy was revised to remove both parental notice and parental ability to opt children out of engaging with any instructional materials other than "Family Life and Human Sexuality Unit of Instruction." *Id*. at *29-30. Throughout this process, parents raised concerns at several public meetings with the

School Board. *Id*. at *32. When it was clear that parents would not be allowed to protect their children, the parents in this case sued.

The Board's and schools' denial of parents' efforts to protect their children from fashionable sexual brainwashing of children is inconsistent with the fundamental, constitutionally recognized right of parents to direct the upbringing of their children and the right of parents to freely exercise their religious beliefs.

ARGUMENT

The question in this case is whether school administrators' preference to impose curricular materials intended to promote sexual diversity can outweigh the fundamental rights of parents to direct the upbringing of their children and their Free Exercise right to inculcate in their children their religious values. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)) ("[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, "prepare [them] for additional obligations.") (alteration in original). This balancing depends on whether "there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Id*. at 214. In balancing the

concerns and interests in this case, there are three considerations: the parental rights at stake, the interest of the state in promoting sexual diversity to kids between five and twelve years old, and the significance of the request and its impact on the state's ability to effect its claimed interest.

The Supreme Court has moved away from the balancing test as determinative in these cases. *Holt v. Hobbs*, 574 U.S. 352, 357 (2015). Thus, while not dispositive, *Yoder* has not been overturned and sheds significant light on the fundamental inquiry in this case. In light of these considerations, this Court should grant appellants request for a preliminary injunction. That injunction should ensure that all parents in Montgomery County can opt out of the school board members' political campaign. Respect for the rights of some parents demands respect for the rights of all.

I. The Rights of Parents to Direct the Upbringing of their Children and to the Free Exercise of Their Religion in the Raising of Their Children are Fundamental.

A. The actions of the Board and MCPS in this case flout the fundamental right of parents to direct the upbringing, education, and care of their children.

In a long line of U.S. Supreme Court cases, the Court has found a parental rights doctrine rooted in the First and Fourteenth Amendments of the U.S. Constitution. *See, e.g.*, *Meyers v. Nebraska*, 262 U.S. 390, 399 (1923) ("While this court has not attempted to define with exactness the [due process] liberty . . . Without doubt, it denotes . . . the right of the individual to . . . marry, establish a home and bring up

children."); *Pierce*, 268 U.S. at 534-35 (finding that the act challenged in that case, "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.").

Similarly, for nearly a century, the Supreme Court has repeatedly affirmed the rights and responsibilities inherent in parenthood. *See Pierce*, 268 U.S. at 535 ("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 . . . The child is not the mere creature of the State."); *Meyer*, 262 U.S. at 400 ("It is the natural duty of the parent to give his children education suitable to their station in life."); *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us 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 can neither supply nor hinder.") *Yoder*, 406 US at 232 (declaring that parental rights have been "established beyond debate as an enduring American tradition."); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) ("The liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'") These parental rights, more fundamental than government power, have been long-

recognized and demand on the part of public educators a high regard for the will of parents.

B. The Board's and MCPS's removal of the parental opt-out in this case violates the Free Exercise Clause of the First Amendment.

The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. The courts have a duty to safeguard religious freedom because "[a]ny political constitution develops out of a moral order; and every moral order has been derived from religious beliefs." Russell Kirk, *The Conservative Constitution* 174 (1990). And it is the family, the most basic societal institution, where religious beliefs are most often passed on to the next generation. Indeed, "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977). The parental right to raise children includes the right to teach them to live according to a particular religion's teachings. *See Yoder*, 406 U.S. at 233 ("[T]he Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children."). As the Supreme Court observed in *Obergefell v. Hodges*, 576 U.S. 644, 679 (2015), "[t]he First Amendment ensures that religious organizations and persons are given proper

protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." Given the significant harm to constitutional interests in this case, the parents deserve to have their claims heard without having to worry that their fundamental rights will be violated in the meantime. For that reason, the district court's denial of plaintiffs' motion for preliminary injunction should be reversed.

II. The School's Claimed Interest in Promoting Sexual Diversity to Elementary School-Aged Children Does Not Come Close to Outweighing the Parental Rights at Stake in this Case.

The Board's and MCPS's goal in this case is to inculcate an appreciation of gender and sexual diversity among students between the ages of five and twelve. *See Mahmoud*, 2023 U.S. Dist. LEXIS 150057, at *39-40. Even assuming that goal is legitimate, the question is whether that interest outweighs the rights of parents. It does not.

As described above, both the general right of directing the upbringing of one's children and the Free Exercise rights of parents are fundamental, with the former enjoying at least a century of Supreme Court recognition. On the other hand, the interest of public schools in the inculcation of values related to sexuality and gender identity is recent, and the forms of that indoctrination at issue in this case are entirely novel.

The Board's interest here is significantly less compelling than that of the state in *Yoder*. There, Wisconsin's interest was in universal high school education, an

interest the significance of which few would deny. *See Yoder*, 406 U.S. at 214. Here, the novel interest of the Board is of at most debatable benefit to students and to society. Students, especially elementary-aged students, are impressionable and may well be harmed by the unprecedented pedagogical approach represented by the philosophy behind the books adopted by the Board. In such uncertain areas, it is particularly important that parents be able to opt their children out of being the guineapigs for fashionable but unproven ideas.

Further, in *Yoder*, the request of the Amish parents was to remove their children entirely from the education system before high school. *Yoder*, 406 U.S. at 207-08. That intervention against the state's interest was significant, and yet it was granted. *Id*. at 236. Here, the request is miniscule in comparison. The parents in this case only request the ability to opt their children out of a narrow range of materials explicitly designed to push a worldview contrary to the religious beliefs of many Montgomery County parents.

In *Yoder*, the Court recognized that a high school education was "contrary to Amish beliefs." *Id*. at 211. The parents here make a related assertion regarding the addition of LGBTQ books to the elementary curriculum, but with a much more modest request for relief than that granted by the Court in *Yoder*. When school officials decide to propagandize from the lectern, parents have a right to object and

to exempt their children from that instruction. Such a modest request to protect such fundamental rights should be granted.

CONCLUSION

This Court should reverse the district court and enter a preliminary injunction in favor of the plaintiffs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains **2,501** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Office 365.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Office Word in 14-point Times New Roman.

Dated: October 17, 2023

/s/ J. Marc Wheat
J. Marc Wheat

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2023, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ J. Marc Wheat
J. Marc Wheat