NO. 24-297

IN THE

Supreme Court of the United States

TAMER MAHMOUD, ET AL.,

Petitioners,

v.

THOMAS W. TAYLOR, ET AL.,

Respondents.

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

BRIEF OF TAMMY FOURNIER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[*]

Amicus curiae is Tammy Fournier, a Wisconsin mother. When Tammy and her husband first learned that their daughter, then 12 years old, had begun to struggle with anxiety and depression and to question her gender, they immediately researched how best to help her. Based on that research, the Fourniers decided it would harm their daughter to treat her as a boy—in particular, to refer to her with a masculine name and male pronouns. So they instructed her school district to refer to her by her given name and female pronouns only.

The district refused, insisting that school staff use a male name and pronouns to address their daughter. Tammy and her husband were forced to withdraw their daughter from the district. Under their care, their daughter soon decided she would no longer ask others to refer to her as a boy and has dramatically improved. And a Wisconsin court concluded that the school district had violated the Fourniers' fundamental rights as parents. *T.F.* v. *Kettle Moraine Sch. Dist.*, No. 2021CV1650, 2023 WL 6544917, at *5–8 (Wis. Cir. Ct. Oct. 3, 2023).

Tammy still worries. Her daughter's new school district has a policy like the former school's policy. So do many other districts. And those policies often *prohibit* disclosing the school's decisions to a minor student's parents absent the student's consent.

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[*] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and her counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Tammy's concerns about those secret-social-transition policies led her to file this brief supporting petitioners' parental-rights claims here. Reasoning like that of the court below threatens the rights of other parents in situations like Tammy's. She respectfully asks the Court to reverse.

SUMMARY OF THE ARGUMENT

History and tradition presume that parents—not the government—make decisions about their children's education. Montgomery County's actions are inconsistent with that presumption. It has mandated uniform views about sexuality and gender. But such a mandate has no historical analogue. And this Court has said that homogenizing children isn't a legitimate educational goal. So Montgomery County cannot require parents to allow their children to be indoctrinated about sexuality and gender as a condition of obtaining a state-subsidized education. That coerces parents like petitioners to choose between a government benefit and their religious exercise. Montgomery County cannot put petitioners to that choice.

Montgomery County's actions echo the actions of school districts that are socially transitioning students without parental consent or notice. Such transitions show the lengths to which schools will go to impose conformity about sexuality and gender and violate parents' fundamental rights. The decision below should be reversed.

ARGUMENT

I. Our Nation's history and tradition presume parents make decisions for their children.

Whether under the First or Fourteenth Amendment, the Constitution protects parents from bureaucrats who would override their childrearing decisions. Justices of this Court have described that protection in terms of a "decisional framework"—that is, who makes decisions on behalf of children. *Troxel* v. *Granville*, 530 U.S. 57, 69 (2000) (opinion of O'Connor, J.); *see id.* at 72–73 (recognizing "the fundamental right of parents to make child rearing decisions"); *id.* at 80 (Thomas, J., concurring in the judgment) (agreeing and arguing the state "lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties").

Parents have primary—and ultimate—decision-making authority for their own children. *E.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972) (emphasizing the "primary role of the parents"); *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected … broad parental authority over minor children."). But stating that the Constitution protects parents' right to make decisions on behalf of their children is only step one.

To determine that right's scope, the touchstone is history.[1] The Court asks whether the specific liberty

[1] History guides this analysis "regardless of whether we look to the [Fourteenth] Amendment's Due Process Clause or its Privileges or Immunities Clause." *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 240 n.22 (2022).

claimed is, "objectively, deeply rooted in this Nation's history and tradition." *Washington* v. *Glucksberg*, 521 U.S. 702, 720–21 (1997) (cleaned up). The decision below acknowledged the petitioners' fundamental right to make decisions for their children, particularly regarding their education and religious upbringing. Pet.App.46a n.17. But it offered no "careful analysis of the history of the right at issue." *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 238 (2022).

Our Nation's history and tradition presume parents make decisions on behalf of their children about their upbringing, education, and healthcare. That presumption rests on twin truths: that children lack the "maturity, experience, and capacity for judgment required," and "that natural bonds of affection lead parents to act in the best interests of their children." *Parham*, 442 U.S. at 602.

Common-law history is particularly instructive. *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). In both England and the United States, parents' decision-making authority has centuries-old roots. 1 William Blackstone, *Commentaries on the Laws of England* 434–47 (1765), https://perma.cc/8JZ6-S8DL (describing the rights of parents at common law in England); 2 James Kent, *Commentaries on American Law* 159–79 (1st ed. 1827), http://bit.ly/3FmbH1a (same, in the United States).

Blackstone wrote primarily of the *duties* parents owe their children. Any power or right that parents hold to make decisions for their children "is derived from … their duty." 1 Blackstone, *supra*, at 440. Stated differently, the law grants a parent the right to make decisions for a child, "partly to enable the

parent more effectually to perform his duty." *Ibid.* For example, at common law, minors needed parental consent to marry to protect them from "the snares of artful and designing persons." *Id.* at 441. Because the government expects parents to protect their children, it empowers them to make decisions—especially significant ones—on their children's behalf.

Expounding our common law, Chancellor Kent echoed Blackstone's dialectical understanding of parental duties and rights. Children's "wants and weaknesses … render it necessary that some person maintains them." 2 Kent, *supra*, at 159. Because parents are "the most fit and proper" for the task, the law gives them a duty of "maintaining and educating" children. *Ibid.* And "[a]s they are bound to maintain and educate their children, the law has given them a right to such authority" to make decisions about their children's maintenance and education. *Id.* at 169.

At common law, parents had "both the responsibility and the authority to guide their children's development and make important decisions on their behalf." Eric A. DeGroff, *Parental Rights & Public School Curricula: Revisiting* Mozert *after 20 Years*, 38 J.L. & Educ. 83, 108 (2009). This common-law parental right included a right to make educational decisions. *Id.* at 110–12 & n.178. And that right persisted even as public schooling became the norm. *Id.* at 113.

Our *entire society* presupposes that parents—not the state—act on behalf of children. *Troxel*, 530 U.S. at 66 (opinion of O'Connor, J.). No right is more "essential to our Nation's scheme of ordered liberty" than parents' right to make decisions for their children. *Dobbs*, 597 U.S. at 237–38 (cleaned up).

II. The Court should bar efforts to mandate uniform beliefs about sexuality and gender as a condition to obtain a public education.

A. Public-school indoctrination of children about sexuality and gender has no basis in our history and tradition.

Blackstone's vision of parents contracting with tutors to educate their children has given way to near-universal public education and compulsory education laws. But from the outset, public schools were meant to *support* parents—not *displace* them. When public education began to take root in the states, parents remained primarily responsible for educating their children. And public schools did not initially provide any sex education—let alone sexuality- and gender-related lessons like Montgomery County's.

Chancellor Kent died in 1847, just before the modern public-school movement launched in earnest. See Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent & the Revolution in Books in the Early Republic*, 60 Ala. L. Rev. 377, 388 (2009). But later editions of his *Commentaries* already included an extensive treatment of the burgeoning state-funded education system in the United States. 2 James Kent, *Commentaries on American Law* *195–203 (5th ed. 1844), https://bit.ly/3FbwIfi. Kent folded his discussion of public schooling into his chapter on parents and children. *Ibid.* He viewed public schooling as a partnership between parents and the state, not as a fundamental reorganization of the relationship between parents, children, and the state. *Id.* at *201–02.

Under this view, the state regulated education "to assist parents [to] fulfill their duties"—"not to undermine parental authority." Joseph K. Griffith II, *"Long Recognized at Common Law":* Meyer *and* Pierce*'s Nineteenth- and Twentieth-Century Precedent on Parental Educational Rights and Civic Education*, 53 Perspectives on Pol. Sci. 1, 5 (2024). Thus, "[f]rom the mid-nineteenth to early twentieth century, America's legal regime combined compulsory education laws with rigorous protection for parents inside and outside of the public schools." Joseph K. Griffith II, *Is the Right of Parents to Direct Their Children's Education "Deeply Rooted" in Our "History and Tradition"?*, 28 Tex. Rev. L. & Pol. 795, 805 (2024).

As a common-law matter, "state courts upheld the general authority to maintain the order of the classroom." *Id.* at 806. But they "protect[ed] the right of parents to opt-out their children from studying certain curricula." *Ibid.* Those courts honored parental objections to diverse subjects, from geography to dancing.[2]

Despite protecting parents' opt-out rights, those courts don't mention sex education, which is understandable. "Before 1900, there was virtually no school-based sex education"—let alone the sort of sexuality and gender lessons Montgomery County

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[2] *E.g.*, *Hardwick* v. *Board of Sch. Trs.*, 205 P. 49, 52, 54 (Cal. Dist. Ct. App. 1921) (dancing); *State* v. *Ferguson*, 144 N.W. 1039, 1040, 1044 (Neb. 1914) (domestic science); *School Bd. Dist. No. 18* v. *Thompson*, 103 P. 578, 582 (Okla. 1909) (singing); *State* v. *School Dist. No. 1*, 48 N.W. 393, 394–95 (Neb. 1891) (grammar); *Trustees of Schs.* v. *People ex rel. Van Allen*, 87 Ill. 303, 308–09 (1877) (grammar); *Rulison* v. *Post*, 79 Ill. 567, 571 (1875) (bookkeeping); *Morrow* v. *Wood*, 35 Wis. 59, 65–66 (1874) (geography).

mandates. Valerie J. Huber & Michael W. Firmin, *A History of Sex Education in the United States Since 1900*, 23 Int'l J. Educ. Reform 25, 44 (2014). Until well into the 20th century, "the home was the place where discussions of sex took place." *Id.* at 25. "[M]ost believed" sex education was "the role of the parent." *Id.* at 25–26. Only in the Progressive Era did a movement begin to promote sex education in school. *Ibid.*

Even then, sex education bore little resemblance to Montgomery County's program. At first, it "concerned itself solely with avoiding sexually transmitted disease." *Id.* at 27. The superintendent of Chicago's schools (who happened to be John Dewey's colleague at the University of Chicago) proposed an early experiment with a sex-education program. *Id.* at 31. But "[m]ost parents did not yet support open sex education," controversy quickly erupted, and the superintendent soon resigned. *Id.* at 32.

So sex-education advocates learned to hide their work from parents. Implementing similar programs a decade later, they "warned schools that the surest way to raise opposition to the program was to call a program 'sex education.'" *Id.* at 35. They promoted euphemisms like lessons about "a phase of character formation." *Ibid.* (cleaned up). While sex education became more common during the 1920s, "few parents were aware of the matter." *Ibid.*

The next frontier came with the advent of oral contraception and the 1960s sexual revolution, when schools were "increasingly seen as arenas for social activism." *Id.* at 30; Brooke D'Amore Bradley, *Sex Education After* Dobbs*: A Case for Comprehensive Sex*

Education, 39 Berkeley J. Gender L. & Just. 121, 126 (2024). Even then, it was nothing like Montgomery County's sexuality and gender instruction; instead, "an emphasis on birth control" became "a hot topic." Huber & Firmin, 23 Int'l J. Educ. Reform at 39, 42.

From its Progressive Era conception, the movement to add ever more sex-education content to the public-school curriculum has been plagued by controversy. See *id.* at 44. Only in the last few decades has the movement turned toward the "free expression of nearly all sexual behaviors among young people." *Id.* at 45.

Consistent with the traditional partnership between parents and schools, most states that require some sort of sex education also provide a statutory or regulatory parental opt-out. According to the Guttmacher Institute, only one state that requires sex education does not allow parents to opt out. Guttmacher Inst., *Sex Education and HIV Education* (Nov. 27, 2024), https://perma.cc/P6FH-CY8G (identifying Alabama as lacking an opt). But see Ala. Code § 16-41-6 (providing religious opt-out). Even Maryland allows parents to opt out of "instruction on family life and human sexuality." Pet.App.70a n.4 (Quattlebaum, J., dissenting).

Montgomery County's sexualized instruction has no historical analogue. And its refusal to allow parents to opt their children out of it is inconsistent with American tradition.

B. Public schools cannot impose conformity on students for conformity's sake.

Adrift from any historical moorings, Montgomery County's sexualization of children runs aground this Court's early schoolhouse precedents. In those decisions, the Court made clear that states must not use education regulation "to foster a homogenous people." *Meyer*, 262 U.S. at 402. Because Montgomery County has attempted "to standardize its children by forcing them to accept instruction" promoting the County's views on sexuality and gender, it has exceeded the Constitution's limits on its authority. *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

1. Attempts to use education policy to mandate uniformity led to this Court's first education decisions.

The history of states' using educational policy "to coerce uniformity of sentiment" is well known. *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 640 (1943). "For at least a century, from roughly the mid-nineteenth century to the mid-twentieth, myriad nativists, educators, and other theological liberals sought to homogenize children in public schools in accord with theologically liberal and often overtly nativist ideals." Philip Hamburger, *Education is Speech: Parental Free Speech in Education*, 101 Tex. L. Rev. 415, 457 (2022).

Justice Alito documented one chapter of this history in *Espinoza* v. *Montana Department of Revenue*, 591 U.S. 464 (2020). He described how proponents of public schooling did not hide that they wished "to 'Americanize' the incoming Catholic

immigrants." *Id.* at 503 (Alito, J., concurring). This forced Catholics and other religious minorities to create private, religious schools. *Id.* at 504–05. But because of "virulent prejudice against immigrants, particularly Catholic immigrants," *id.* at 498, nativist forces saw private "Catholic education" as "a particular concern," *id.* at 499. As part of a multi-decade effort to mobilize that prejudice, "most States" adopted laws targeting Catholic education. *Ibid.*

Nativist sentiment took aim at new targets in the early-20th century. Ellwood P. Cubberley of Stanford University—the "preeminent education scholar" of the era and a eugenicist—"identified the assimilation of immigrants as a dominant schooling challenge of the time." Justin Driver, *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind* 44 (2018); Claire Wang, *Stanford's history with eugenics*, The Stanford Daily, Dec. 7, 2016, https://perma.cc/F393-YXHA. Cubberly "identified ethnic enclaves as posing an existential threat to American identity." Driver, *supra*, at 44.

This led Cubberley and others to praise public education's homogenizing effect. As one 1904 commentator put it: "Our American school is like a great paper mill, into which are cast rags of all kinds and colors, but which lose their special identity and come out white paper, having a common identity." Hamburger, 101 Tex. L. Rev. at 457 (quoting Bernard Fresenborg, *"Thirty Years in Hell" or "From Darkness to Light"* 211 (1904)).

This idealization of conformity culminated in state legislation that flattened the diversity of educational options. For example, in 1919, "Nebraska

enacted a law that prohibited teachers in all schools—public, private, and parochial—from instructing students in languages other than English before they reached the ninth grade." Driver, *supra*, at 42.

Similarly, a few years later, "[t]he newly revived Ku Klux Klan sponsored" an Oregon ballot initiative "that effectively abolished private and parochial schools." *Id.* at 50. The Klan "believed that nonpublic educational environments—particularly Catholic schools—sheltered their pupils from encountering students whose ancestors had lived on these shores for generations, and prevented them from absorbing the nation's fundamental values." *Ibid.* Attending "religious schools … could not be allowed, because the immigrant children might then grow up with the same un-American religions as their parents." Stephen L. Carter, *Parents, Religion & Schools: Reflections on* Pierce*, 70 Years Later*, 27 Seton Hall L. Rev. 1194, 1200 (1997). Oregon voters approved the initiative in 1922. Driver, *supra*, at 51.

Such actions enjoyed broad support. Commending Nebraska's foreign-language ban, *The Washington Post* "bemoaned that immigrants 'have made us a polyglot nation.'" *Id.* at 43 (quoting *A Help to Americanization*, The Wash. Post, Dec. 28, 1919, at 4). And *The Portland Telegram* backed Oregon's ballot initiative: "We, the majority, have decided what is necessary. … The public schools please us. Why not make them please the other fellow? Why not march him up to the school of our choice and say to him, in effect: 'There, take that, it's good for you.'" *Id.* at 51 (quoting *He That Soweth Sparingly*, The Portland Telegram, Oct. 26, 1922, at 1) (omission in Driver).

This history shows that "the law—especially the compulsory education law—was intended to" make minority religions "disappear" by "a variety of discriminations." Carter, 27 Seton Hall L. Rev. at 1196. From their inception, the projects "of denying public money to religious schools" and "discouraging private religious education[] were born not of constitutional principle but of religious bigotry." *Id.* at 1199.

For too many early proponents of public education, religious homogeneity was not an unintended side-effect of compulsory education—it was the whole point. They hoped "to strangle the free mind at its source," at least insofar as minority religions were concerned. *Barnette*, 319 U.S. at 637.

2. In its early education decisions, this Court repeatedly rejected efforts to homogenize minority students.

Eventually, this Court intervened "to strike down legislative attempts to assimilate various minorities by regulating nonpublic schools." Driver, *supra*, at 30. The decisions about nonpublic schools led *Barnette* to expand their protections to the public schools.

a. The Court first protected parents of children in nonpublic schools.

The Court first confronted Nebraska's ban on foreign-language instruction. The Nebraska Supreme Court had affirmed Robert Meyer's conviction on assimilationist grounds: if "the children of foreigners" could "be taught from early childhood the language of the country of their parents," then "they must always think in that language." *Meyer* v. *State*, 187 N.W. 100,

102 (Neb. 1922). To "permit[] foreigners … to rear and educate their children in the language of their native land" would "naturally inculcate in them the ideas and sentiments foreign to the best interests of this country." *Ibid.* It made no difference to that court that Meyer's instruction took place at a parochial school for religious reasons. *Id.* at 101–02.

This Court rejected that rationale as illegitimate. It acknowledged the legislative desire "to foster a homogenous people with American ideals prepared readily to understand current discussions of civic matters." *Meyer*, 262 U.S. at 402. But it compared Nebraska's law to Plato's suggestion that "children are to be common, and no parent is to know his own child," or to the Spartan practice of "assembl[ing] the males at seven into barracks." *Id.* at 401–02.

Such efforts spring from "ideas touching the relation between individual and state" that are "wholly different from those upon which our institutions rest." *Id.* at 402. Because the Nebraska statute too closely resembled such efforts to impose conformity on children, the Court reversed Meyer's conviction. *Id.* at 402–03.

Two years later, the Court amplified the pro-educational-diversity commitment animating *Meyer*. In *Pierce* v. *Society of Sisters*, it considered the Oregon ballot initiative that had practically outlawed all non-public education. 268 U.S. at 530–31. Rejecting that initiative, the Court reiterated its rule against compelled conformity: "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." *Id.* at 535. The state has no more power to standardize children by outlawing private school than by outlawing foreign-language instruction.

The Court next considered a Hawaii statute imposing onerous regulations on the "163 foreign language schools in the territory." *Farrington* v. *Tokushige*, 273 U.S. 284, 290 (1927). Hawaii argued "that it imposed mere *regulations* upon the foreign-language schools," as opposed to Nebraska's "outright *prohibitions*." Driver, *supra*, at 58; *Tokushige*, 273 U.S. at 290.

But Hawaii had the same homogenizing impulse. It aimed to regulate the foreign-language schools so "that the Americanism of the pupils may be promoted." *Tokushige*, 273 U.S. at 293 (quoting *Farrington* v. *Tokushige*, 11 F.2d 710, 711 (9th Cir. 1926)). And it required teachers at the foreign-language schools to pledge to "direct the minds and studies of pupils … to make them good and loyal American citizens." *Id.* at 293–94 (quoting 11 F.2d at 711).

The Court saw through Hawaii's effort to minimize its attempts at homogenization. It noted that "[e]nforcement of the act probably would destroy most, if not all, of" the foreign-language schools. *Id.* at 298; Driver, *supra*, at 58 ("[T]he measure's more candid supporters conceded [that] it sought less to adjust the language schools than to eliminate them."). The act would unlawfully "deprive parents of fair opportunity to procure for their children instruction which they think important." *Tokushige*, 273 U.S. at 298. "The Japanese parent has the right to direct the education of his own child without unreasonable

restrictions; the Constitution protects him as well as those who speak another tongue." *Ibid.*

b. The Court soon protected parents of public-school students, too.

Professor Driver has called *Pierce* "a nationally significant judicial intervention that defended minority rights, protected parental authority, and imposed a meaningful limitation on the states' ability to control education." Driver, *supra*, at 56. That description applies equally to *Meyer* and *Tokushige*. But all three decisions considered the rights of minority parents with children in *nonpublic* schools.

The Court extended these constitutional principles to public schools in *Barnette*. Walter Barnette and the other plaintiffs were parents of "children attending the public schools of West Virginia." *Barnette* v. *W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 252 (S.D. W. Va. 1942). They brought the lawsuit "in behalf of themselves and their children" to defend their "religious liberty." *Ibid.* So although *Barnette* is most remembered for defending students' rights, the Court also defended *parents'* rights, including "the right to differ as to things that touch the heart of the existing order." 319 U.S. at 642.

Barnette's sweeping rejection of assimilationism in American education progresses naturally from *Meyer*, *Pierce*, and *Tokushige*. As in those decisions, it condemned "officially disciplined uniformity." *Id.* at 637. And it protected the "freedom to be intellectually and spiritually diverse or even contrary." *Id.* at 641.

The public-school context heightened the Court's concerns about attempts to enforce official orthodoxy.

Id. at 640. "Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing." *Id.* at 641. So "[f]ree public education" must "not be partisan or enemy of any class, creed, party, or faction." *Id.* at 637. Otherwise, "each party or denomination must seek to control, or failing that, to weaken the influence of the educational system." *Ibid.*

Barnette predicted that efforts to "pressure" public-school students "toward unity" would incite "bitter" conflicts about "whose unity it shall be." *Id.* at 641. To ward off such conflicts, the Court here should reaffirm its commitment to the "freedom to differ," especially when a public school seeks to sexualize young students contrary to their religious parents' wishes. *Id.* at 642.

C. Montgomery County cannot coerce parents to accede to indoctrination as a condition of a public education.

Montgomery County may argue that parents are free to maintain their religious beliefs about sexuality and gender. But if they want a free, public education, parents must allow the County to try to change their children's beliefs on those topics. That is "a mere shadow of freedom." *Barnette*, 319 U.S. at 642. Conditioning government benefits on forsaking religious exercise burdens religion as much as a ban.

1. State-subsidized public education is a valuable benefit on which most families depend.

As a practical matter, for most families, "attendance is not optional" in public schools. *Barnette*, 319 U.S. at 632. Between 1852 and 1918, every state passed a law compelling school attendance. *Ingraham* v. *Wright*, 430 U.S. 651, 660 n.14 (1977); Griffith, 28 Tex. Rev. L. & Pol. at 805. Because of *Pierce*, "[p]arents are not *required* to enroll their children in a public school." *Mahanoy Area Sch. Dist.* v. *B.L.*, 594 U.S. 180, 199 (2021) (Alito, J., concurring) (emphasis added). "They can select a private school" or they can homeschool. *Ibid.* But "[m]ost parents, realistically, have no choice but to send their children to a public school." *Morse* v. *Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring).

Data confirms this. While precise figures fluctuate a bit each year, in recent decades, over 85% of American students attended public school, with less than 10% attending private school and 3% or less being homeschooled. U.S. Dep't of Educ., Nat'l Ctr. for Educ. Stat., *Digest of Education Statistics Table 206.20* (Dec. 2021), https://perma.cc/SVV7-VZJU. Yet even those lopsided percentages disguise the full scale of U.S. public education. "[O]n any given weekday, during school hours, at least one-sixth of the U.S. population can be found in a public school—making it easily the single largest governmental entity that Americans encounter for sustained periods on a near-daily basis." Driver, *supra*, at 9.

Why is that? "[T]he combination of mandatory education and subsidized state education gives any

but the most affluent parents little choice but to place their children in government educational institutions." Hamburger, 101 Tex. L. Rev. at 429. Consider the costs of a nonpublic education. In the 2020–2021 school year, the average private-school tuition was $14,570, adjusted for inflation. U.S. Dep't of Educ., Nat'l Ctr. for Educ. Stat., *Digest of Education Statistics Table 205.50* (Oct. 2023), https://perma.cc/679U-E3GB (reporting tuition "in constant 2022–23 dollars").

Homeschooling comes with its own costs, too. It requires the financial wherewithal to purchase curricular materials, along with large investments of parental time. See *Mahanoy*, 594 U.S. at 199 n.12 (Alito, J., concurring) (citing state law that "require[d] a minimum of 180 days of instruction per year" for homeschooling).

Other features of our public-education system, like its taxpayer-funded structure, compound the costs of opting out. Justice Frankfurter recognized this in his *Barnette* dissent: "All citizens are taxed for the support of public schools," regardless of whether their children attend. 319 U.S. at 660. "Parents who are dissatisfied with the public schools thus carry a double educational burden." *Ibid.*

Justice Frankfurter drew the wrong conclusion from that double burden. Because the Court had blessed it, he thought the Court should also bless West Virginia's burden on the Barnettes and others like them. See *ibid.* Instead, the double burden on parents who object to public-school indoctrination should lead the Court to protect parents now from officials' attempts to sexualize public-school students.

2. This Court has consistently rebuffed conditions on government benefits that exclude religious Americans.

The decision below rejected petitioners' claims partly because of their constitutional right to non-public educational alternatives. Pet.App.46a–47a & n.17 (citing *Pierce*, 268 U.S. at 534–35). Not only do such alternatives remain practically elusive for most families, those alternatives don't solve petitioners' problem. When a public school so burdens families' religious exercise that they feel compelled to leave, it doesn't lessen that burden to promise them the *freedom* to leave. That just reframes their burden as a privilege.

In petitioners' situation, "the opt-out is a penalty—if not on their bank account, then at least on their time." Hamburger, 101 Tex. L. Rev. at 430. That's why the Court in *Barnette* did not excuse the constitutional violation by pointing out that families could homeschool instead.

Because the states "both mandate education and offer state education free of charge," a decision to "pay for private schooling … is not merely voluntary." *Id.* at 428. It is "an expense imposed on parents to escape compelled state education." *Ibid.* As a result of that expense, "states require impecunious parents to accede to state education for their children." *Ibid.*

The decision below saw the situation differently. Pet.App.46a–48a. It viewed the matter simply as one of "increased costs as a consequence of [petitioners'] deciding to exercise their religious faith in a particular way." *Id.* at 47a. But "[w]hen the government chooses to offer scholarships, unemployment

benefits, or other affirmative assistance to its citizens, those benefits necessarily affect the 'baseline against which burdens on religion are measured.'" *Espinoza*, 591 U.S. at 512 (Gorsuch, J., concurring) (quoting *Locke* v. *Davey*, 540 U.S. 712, 726 (2004) (Scalia, J., dissenting)). And the decision below proceeded from an incorrect baseline.

"[P]ublic schooling is a government benefit subject to a condition" that parents "substitut[e] government educational speech for their own." Hamburger, 101 Tex. L. Rev. at 430–31. Parents have a "legal duty to educate [their] minor children," and the states provide "subsidized state education" to discharge that duty. *Id.* at 428–29. Yet "an offer of state-subsidized education is inevitably an offer of education on the condition that one attend a state school." *Id.* at 432 n.47. And a parent who places a child in a "government educational institution[]" necessarily submits that child "to government educational speech." *Id.* at 429. If that parent objects, her only option to "avoid government educational speech" is to "pay[] a hefty price." *Id.* at 430.

The relevant baseline, then, is a mandatory, state-subsidized education. Such an education is unquestionably a valuable benefit. See, *e.g.*, *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954) ("Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."). When the state-subsidized education burdens a parent's religious exercise, she must pay a triple price to avoid that burden: forgoing the subsidy, continuing to pay taxes so *other* families' children can be indoctrinated, and financing an alternative for her own children to be educated without

being sexualized. Thus, "the need to pay to escape government tutelage looks like a direct financial constraint or penalty on parents for not submitting their children to government educational speech in lieu of their own." Hamburger, 101 Tex. L. Rev. at 429. It's a tax on parents who don't want their children sexualized at school.

This Court's decisions make clear that the state may not force individuals "to choose between forgoing state aid or pursuing some aspect of their faith." *Espinoza*, 591 U.S. at 514 (Gorsuch, J., concurring). "The Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Carson* v. *Makin*, 596 U.S. 767, 778 (2022) (quoting *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)).

Like Trinity Lutheran Church, petitioners are "not claiming any entitlement to a subsidy." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 463 (2017). Instead, they "assert[] a right to participate in a government benefit program without having to disavow [their] religious" beliefs. *Ibid.* In *Trinity Lutheran*, the government benefit was a playground-resurfacing program. *Id.* at 454. Here, it is a state-subsidized education. Pet.App.183a–87a. The "economic pressure" to take that subsidy on whatever terms Montgomery County offers is "more than enough for a First Amendment violation." Hamburger, 101 Tex. L. Rev. at 433.

D. Montgomery County required petitioners to allow sexual indoctrination of their children as a condition of public education.

The "anti-Catholic views" of the past have ceded to efforts to "induc[e] students to question ideas of truth, merit, morals, sex differences, and so forth." Hamburger, 101 Tex. L. Rev. at 459. The extensive evidentiary record before the Court shows that Montgomery County hoped to standardize the beliefs of petitioners' children about sexuality and gender.

Montgomery County "promote[s] an ideologically one-sided view of issues that are religiously, socially, and scientifically controverted." Pet.App.177a. For example, one book, which the County intended for children as young as three or four, "encourage[s] unqualified support for pride parades." *Id.* at 175a. Another expressly aims "to 'validat[e]' same-sex marriage in the eyes of a small child." *Id.* at 178a (alteration in original). Still another "advocates that, to be 'safe,' bathrooms should be gender neutral." *Ibid.* Like sex education generally, compelling uniform beliefs about sexuality and gender identity falls far outside the historical boundaries of public education. See pp. 6–9, *supra*; *Vidal* v. *Elster*, 602 U.S. 286, 301 (2024) (considering the "history and tradition" of a government program to determine "the scope of the First Amendment"); *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 543 (2001) (considering the "accepted usage" of a "particular medium" to determine the constitutionality of speech restrictions).

Montgomery County knew that sexualizing very young children would confuse them. So it gave

teachers scripted responses to likely concerns. If a child said a book character "can only like boys because she's a girl," teachers were supposed to "[d]isrupt the either/or thinking by saying something like: actually, people of any gender can like whoever they like." Pet.App.629a; see *id.* at 633a. Or teachers should instruct children that "[o]ur body parts do not decide our gender." *Id.* at 630a–31a. The County intended to "standardize" the beliefs of petitioners' children about sexuality and gender, contrary to *Pierce*. 268 U.S. at 535.

School leadership also expected that parents (and their children) would conform their views to Montgomery County's sexual orthodoxy. One administrator chalked petitioners' objections up to "fears" that "she disagreed with … unequivocally." Pet.App.186a (cleaned up). In a public meeting, a board member responded to a parent's concerns by chiding that "ignorance and hate does exist in our community." *Id.* at 184a. In another meeting, that same board member compared decent and honorable religious beliefs to "telling [a] kid, 'Here's another reason to hate another person.'" *Id.* at 187a. The Board even "encourage[d] teachers to tell students that their religious and scientific perspectives"—learned from their parents—"are 'hurtful.'" *Id.* at 196a.

By condemning contrary viewpoints as rooted in fear or hatred, these statements show how Montgomery County has tried to "prescribe what shall be orthodox" regarding sexuality and gender. *Barnette*, 319 U.S. at 642. They equally show "clear and impermissible hostility" to petitioners' religious beliefs. *Masterpiece Cakeshop, Ltd.* v. *Colorado C.R. Comm'n*, 584 U.S. 617, 634 (2018).

The "series of events leading to" the denial of petitioners' opt-out requests strengthens the inference of hostility. *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 540 (1993). Montgomery County initially assured petitioners that they and other parents could opt their children out of the objected-to instruction. Pet.App.184a. Only after petitioners voiced their religious objections did it renege on that assurance. *Id.* at 185a–87a. Combined with the "official expressions of hostility to religion in some" of the School Board's comments, the decision to stop allowing petitioners to opt out is evidence of hostility to their religious beliefs. *Masterpiece*, 584 U.S. at 639.

Montgomery County excuses its refusal to accommodate petitioners' objections by claiming an interest in "ensur[ing] a classroom environment that is safe and conducive to learning for all students." Pet.App.607a. But petitioners are "member[s] of the community too." *Trinity Lutheran*, 582 U.S. at 463. And they have all attested to the conflict between their religious beliefs and Montgomery County's efforts—lacking any basis in the history and tradition of American education—to instill contrary beliefs in their children. *E.g.*, Pet.App.532a–33a, 540a–41a, 544a–45a, 626a–27a, 644a–45a.

Petitioners have the "right to participate in" public education "without having to disavow [their] religious" beliefs. *Trinity Lutheran*, 582 U.S. at 463. Montgomery County's "decision to exclude [them] for purposes of this public program must withstand the strictest scrutiny." *Ibid.* This right does not require the school to scrap its desired lessons on sexuality and gender. But it does require the County to allow

parents to opt out when the school pushes sexual orthodoxy that is far outside the reasonable bounds of a traditional public education.

* * *

One closing note on the practical impact of the decision below and others like it. Cf. Pet.App.39a–40a (discussing other decisions refusing to honor parental objections). By denying important protections for religious parents of public-school children, such decisions signal that those families are not welcome in public schools. And religious families have not missed this signal. Decisions like these have "surely accelerated the trend toward homeschooling in recent years." Driver, *supra*, at 401; see *id.* at 400–10 (attributing part of homeschooling's sharp rise in recent decades to the federal courts' refusal to honor opt-out requests).

It is hardly a victory that these families have "turned to religious schools, at considerable expense, or have undertaken the burden of homeschooling." *Espinoza*, 591 U.S. at 508 (Alito, J., concurring). All it means is that the courts have so utterly failed to protect religious families from overbearing public schools that they now view public schooling as unavailable.

III. Public schools' attempts to indoctrinate children about sexuality and gender are broad and varied, including secret social transition efforts.

Many American school districts "conceal from parents, by misdirection and substitution, accurate information about their child's use of a new name,

gender, or pronouns." *Mirabelli* v. *Olson*, 691 F. Supp. 3d 1197, 1215 (S.D. Cal. 2023). Using different names or pronouns to treat a child as the opposite sex—often part of a so-called "social transition"—has significant, adverse mental-health implications. See *id.* at 1207–09 (summarizing evidence).

Whether to socially transition a child falls within parents' "'high duty' to recognize symptoms of illness and to seek and follow medical advice" on behalf of their children. *Parham*, 442 U.S. at 602. But parents can't fulfill that duty when schools deny them information about their children's healthcare. Nor can parents oversee "the inculcation of moral standards" and "religious beliefs" without accurate information about their children's moral and religious questions—including questions about sexuality and gender. *Yoder*, 406 U.S. at 233.

When schools secretly transition minor students, they flout parents' ability to make crucial healthcare and educational decisions about "sexual orientation and gender identity," which "are sensitive political topics." *Janus* v. *American Fed'n of State, Cnty., & Mun. Emps.*, 585 U.S. 878, 913–14 (2018). Tragically, secret-transition litigation has proliferated around the Nation. The Court should ensure its decision here protects the many parents challenging the secret transition of their children.

A. Secret-transition cases are the apex of public schools' attempt to impose their sexual orthodoxy on children.

Transitioning minors without parental notice or consent—sometimes over parents' express instruc-

tions—risks "standardiz[ing]" the beliefs of "children" about sexuality and gender at least as seriously as the County's practices here. *Pierce*, 268 U.S. at 535.

Consider *amicus curiae* Tammy Fournier. In many ways, Tammy was fortunate. She and her husband discovered their daughter's struggles about her body before her school did. *Kettle Moraine*, 2023 WL 6544917, at *1. So the school *couldn't* keep any information from them. Yet the school told Tammy it would socially transition her daughter "even over parental objections." *Ibid.* That's a clear rejection of *Barnette*'s "freedom to differ." 319 U.S. at 642. And the Wisconsin trial court ruled that it infringed Tammy's "fundamental liberty interest" as a parent. *Kettle Moraine*, 2023 WL 6544917, at *6.

Other parents have been less fortunate. They've discovered, after the fact, a decision by their child's school to treat the child—often a preteen girl—as the opposite sex. For example, a mother in upstate New York sued her daughter's former school district alleging that it had concealed from her its actions treating her 12-year-old daughter as a boy. Compl. ¶¶ 89–111, *Vitsaxaki* v. *Skaneateles Cent. Sch. Dist.*, No. 5:24-CV-00155 (N.D.N.Y. Jan. 31, 2024), ECF No. 1. The district repeatedly deceived the mother by reassuring her that it had perceived no changes to her daughter's well-being while it simultaneously transitioned the girl to a male identity. *Ibid.*

Similarly, two Michigan parents sued a school district for concealing that it was treating their 13-year-old daughter as a boy. Compl. ¶¶ 114–36, *Mead* v. *Rockford Pub. Sch. Dist.*, No. 1:23-CV-01313 (W.D. Mich. Dec. 18, 2023), ECF No. 1. Indeed, the school's

neuropsychologist altered records to hide evidence from the parents. *Id.* ¶¶ 170–73.

Neither of those cases has yet resulted in a merits determination. But in other cases, courts have used reasoning similar to the decision below to judicially approve secret social-transition policies. Here, for example, the Fourth Circuit reasoned petitioners' claims were unlikely to succeed because they had shown insufficient coercion by Montgomery County. Pet.App.29a–31a. Reasoning in that same vein, the district court in *Doe* v. *Delaware Valley Regional High School Board of Education* recently refused to preliminarily enjoin a school district from secretly transitioning the plaintiff's daughter. No. 3:24-CV-00107, 2024 WL 5006711, at *12–15 (D.N.J. Nov. 27, 2024), appeal filed, No. 24-3278 (3d Cir. Dec. 6, 2024).

Less than a month ago, the First Circuit also affirmed the dismissal of a secret-transition case, in part because it thought the school had not coerced the plaintiffs in a constitutionally meaningful way. *Foote* v. *Ludlow Sch. Comm.*, 128 F.4th 336, 352–54 (1st Cir. 2025). The First Circuit relied on much of the same precedent that drove the decision below. Compare *id.* at 351–53, with, *e.g.*, Pet.App.35a–36a, 39a–40a.

The Court should use this case not only to protect children from sexualized books and instruction *but also* to protect them from secret transitions.

B. Secret transitions exclude parents from healthcare decisions about their own children.

Because parental rights are ultimately about *who* makes decisions on behalf of children, the state infringes those rights when it overrides a parental decision, makes a decision on behalf of a particular child that falls within her parents' purview, or attempts to "transfer the power to make [a] decision from the parents to some agency or officer of the state." *Parham*, 442 U.S. at 603. To take one example, a state actor infringes parents' fundamental rights when it takes blood samples from children and stores them "indefinitely for further use by the state or third parties … without informed parental consent." *Kanuszewski* v. *Michigan Dep't of Health & Hum. Servs.*, 927 F.3d 396, 420 (6th Cir. 2019).

Other examples from the courts of appeals illustrate how schools, in particular, can violate parental rights. In *Gruenke* v. *Seip*, the Third Circuit held that a swim coach, though receiving qualified immunity, violated the rights of a girl's parents by not notifying them before forcing her to undergo a pregnancy test. 225 F.3d 290, 306–07 (3d Cir. 2000). His "failure to notify" the parents "obstruct[ed]" their "parental right to choose the proper method of resolution." *Id.* at 306. And in *Arnold* v. *Board of Education*, the Eleventh Circuit recognized a parental-rights violation where school employees allegedly coerced a minor student to obtain an abortion and then tried to hide it from her parents. 880 F.2d 305, 308–09 (11th Cir. 1989).

It makes no difference that in secret-transition cases the student has usually "requested the use of an

alternative name and pronouns." *Foote*, 128 F.4th at 355. Parents have the right to say "no" to that request because it can lead to debilitating life-altering medical interventions. And neither "state officials nor federal courts are equipped to review such parental decisions." *Parham*, 442 U.S. at 604. The state violates parental rights by circumventing parents' gatekeeping role, which prevents them from withholding consent to healthcare they think will harm their children. Cf. *Bonner* v. *Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941) (collecting cases and noting "the general rule … that the consent of the parent is necessary for an operation on a child").

Secret transitions raise a related constitutional problem. The core parental right is the authority to make decisions on behalf of a minor child. Melissa Moschella, *Defending the Fundamental Rights of Parents: A Response to Recent Attacks*, 37 Notre Dame J.L. Ethics & Pub. Pol'y 397, 402 (2023) ("Parental rights are essentially a recognition of parents' authority to make decisions on behalf of or affecting their children, even when others (including state authorities) may disagree with those decisions."); Martin Guggenheim, *The (Not So) New Law of the Child*, 127 Yale L.J. Forum 942, 947 (2018) (describing parental rights as answering the question of who has "ultimate decision-making authority" for a child). Mere notice of a child's actions or desires is not enough. Indeed, "[t]he common law historically has given recognition to the right of parents, not merely to be notified of their children's actions, but to speak and act on their behalf." *Hodgson* v. *Minnesota*, 497 U.S. 417, 483 (1990) (Kennedy, J., concurring and dissenting).

Still, notice is essential because parents require reliable information from public schools to make good decisions. Any other rule would nullify *Meyer* and *Pierce*. A school could simply conceal controversial details from parents—whether about sexuality and gender or something more mundane, like declining academic performance. If Robert Meyer had refused to teach German to Raymond Parpart but concealed his refusal from the boy's parents, they would have assumed their son was learning German. And that would have denied them their fundamental rights just as surely as Nebraska's foreign-language ban.

When parents are notified that their children are struggling with their gender, parents will at least have the option to remove their children from public school—albeit at a hefty price. But with the crucial information hidden from them, they would have no reason to pursue that option.

* * *

American history and tradition establish parents as the primary decisionmakers for children. When schools deny parents information necessary to make decisions, they frustrate parents' fundamental rights no less than when they expressly prohibit a particular decision. Ensuring parents have reliable information about their children serves pluralism by ensuring diverse families can make good decisions rooted in their religious and ethical commitments. Schools violate parents' rights when they deny the information necessary to make decisions on behalf of their children on "matters of the greatest importance," like religion, sexuality, and gender. *C.N.* v. *Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005).

CONCLUSION

This Court should reverse.

Respectfully submitted,

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