No. 24-297

In the Supreme Court of the United States

TAMER MAHMOUD, ET AL.,
Petitioners,
v.
THOMAS W. TAYLOR, ET AL.,
Respondents.

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

BRIEF FOR AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States by preventing executive overreach, ensuring due process and equal protection for every American citizen, and encouraging understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.[*]

America First Legal has a substantial interest in this case. It represents Matthew Foldi and Bethany Mandel, two journalists who tried to cover the curriculum changes implemented here by the Board of Education for Montgomery County. A few months after the Board added LGBT readings to the elementary curriculum in Montgomery County schools, it suddenly removed the right of parents to have notice and opt out of those readings. Unsurprisingly, this "became a hot button issue," and "the next few months" saw public discussion at and outside of Board meetings. *Foldi* v. *Bd. of Educ. for Montgomery Cnty.*, No. 8:23-CV-3089-PX, 2024 WL 4213379, at *1–2 (D. Md. Sept. 17, 2024). For instance, at one meeting, "a female Muslim student attested to her discomfort with being made to read LGBTQIA+ books that ran contrary to her religious beliefs, to

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[*] Pursuant to Rule 37.2, *amicus* provided timely notice of its intention to file this brief. In accord with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

which" a Board member said "she 'felt kind of sorry' for the student, and opined about whether the student was 'parroting [the] dogma' of her parents." *Id.* at *2.

When Foldi and Mandel sought to attend the next meeting—and even though Foldi "identified himself as a member of the press"—they were turned away because they had not "signed up in advance to speak at the meeting" and were not "invited guests." *Ibid.* Around the same time, Mandel was blocked from an X account run by school staff, "@MCPS-StaffPRIDE," on which staff "engage in online discourse about LGBTQIA+ related issues"—and that was connected to the school system's official website. *Id.* at *2–3. Foldi and Mandel sued, and the district court recently denied the Board's motion to dismiss as to Mandel's First Amendment claim based on being blocked from the @MCPS_StaffPRIDE X account. *Id.* at *11.

SUMMARY OF THE ARGUMENT

Many courts, including this one, have long deferred to public school curriculum choices on the ground that these schools "inculcat[e] fundamental values necessary to the maintenance of a democratic political system." *Ambach* v. *Norwick*, 441 U.S. 68, 77 (1979). The opinion below, and the line of circuit cases it followed, likewise emphasized the government's leeway "to conduct its own internal affairs" via "curriculum choices." App. 40a (cleaned up). What underlies this deferential approach is the assumption that curriculum choices necessarily influence students' "values," *Ambach*, 441 U.S. at 77, and schools can "establish and apply their curriculum in such a way as to transmit community values." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 864 (1982) (plurality op.) (internal quotation mark omitted).

Yet even as the Fourth Circuit echoed this deferential approach, it departed from its underlying assumption. Specifically, the court doubted whether the mandatory readings would "pressure students to change their views." App. 43a. According to the court, there is no evidence that the curriculum "coerces children into changing" their views. App. 44a.

This brief makes two points in support of certiorari. First, education about sexuality and gender identity has no historical roots and lacks any connection to "inculcating fundamental values necessary to the maintenance of a democratic political system." *Ambach*, 441 U.S. at 77. These types of education sprang up in the last 50 years, and they are riven with contested ideological and scientific assumptions. As

important as they are to many people, sexuality and gender identity have nothing to do with fundamental democratic values. Deference to curriculum choices on these topics—including elevating the burden to show a free exercise infringement based on a perceived need for deference to communities—is thus improper.

Second, the decision below disregards the assumption underpinning deference to traditional curricular choices—that school curriculum molds students' values. Whether one characterizes this as "inculcation" or "indoctrination," the point is inescapable: public schooling could only matter to instilling fundamental values *if it affects students' values*. The theme of the decision below is that "merely being exposed" is not enough. App. 43a. But especially in the context of elementary schooling and *especially* with sexuality education, "being exposed" is precisely what is supposed to affect students' values. No matter what "sorts of conversations" might happen afterward, *ibid.*, the very act of authority figures reading books promoting certain values to impressionable children in a room of their peers is significant.

And everyone knows this. That's why Montgomery schools said that opt-outs would "undermin[e] [the school system's] educational mission." App. 16a. That's why the district court recognized that the point of these readings is to "influence" children. App. 133a. And that's why the Board could claim below to pass strict scrutiny. Not because these books are being used to diagram sentences, but because they impart values. Those values being instilled contradict many parents' religious beliefs, so the schools' mandatory imposition of these readings burdens parents' rights.

REASONS FOR GRANTING THE WRIT

I. Sexuality and gender identity education have no historical pedigree.

The Fourth Circuit, like other circuits that have rejected similar challenges, expressed hesitation about interfering with public school curriculum choices. According to the court below, "[i]t is not our station to determine the pedagogical or childhood-development value of the Storybooks or the related topics." App. 41a. This deferential approach shaded the court's analysis. Whatever deference must be given to traditional curriculum choices is misplaced when it comes to education about sexuality and gender identity. These types of education have no historical roots or connection with the fundamental democratic values that this Court's precedents emphasize.

To begin, characterizing *any* deference to public school administrators' curriculum choices as constitutionally necessary is ahistorical. "[M]ass compulsory state-controlled education itself" was "far from the consciousness" of "the constitutional framers." R. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 Yale L. & Pol'y Rev. 169, 212 (1996); see *Mahanoy Area Sch. Dist.* v. *B.L.*, 594 U.S. 180, 203 n.14 (2021) (Alito, J., concurring) ("At the time of the adoption of the First Amendment, public education was virtually unknown . . . ."). Thus, "[u]ntil the middle of the nineteenth century, the duty to educate one's child remained firmly placed with the child's parents." M. Katz, *A History of Compulsory Education Laws* 14 (1976).

To the extent any deference to compulsory school curriculum choices is warranted, that deference should be circumscribed by at least two historical principles.

First, the "curriculum" in early American schools "seldom extended beyond the elementary subjects." *Id.* at 13. States' historically rooted interests in exotic subjects are thus minimal. As this Court has explained, though early Americans like Thomas Jefferson "recognized that education was essential to the welfare and liberty of the people," "he envisaged that a basic education in the 'three R's' would sufficiently meet the interests of the State." *Wisconsin* v. *Yoder*, 406 U.S. 205, 226 n.14 (1972). As students age, more instruction is appropriate, but again, the relevant subjects are historically narrow. For instance, this Court has said that "the State may require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country." *W. Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 631 (1943) (internal quotation marks omitted). If "public education in our Nation is committed to the control of state and local authorities," *Epperson* v. *State of Ark.*, 393 U.S. 97, 104 (1968), that could only be true of traditional school subjects that are necessary to engage in "the performance of our most basic public responsibilities" as citizens and perhaps "prepar[e] . . . for later professional training." *Brown* v. *Bd. of Ed. of Topeka*, 347 U.S. 483, 493 (1954).

Second, any deference to compulsory school curriculum choices should be cabined by the scope of

parents' delegation of their rights over their children's education. This Court has characterized "school authorities [as] acting *in loco parentis*," *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 684 (1986), drawing on Blackstone's description:

> A parent "*may* . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, *as may be necessary to answer the purposes for which he is employed*."

Vernonia Sch. Dist. 47J v. *Acton*, 515 U.S. 646, 655 (1995) (emphases added) (quoting 1 W. Blackstone, *Commentaries on the Laws of England* 441 (1769)).

"If *in loco parentis* is transplanted from Blackstone's England to the 21st century United States, what it amounts to is simply a doctrine of inferred parental consent to a public school's exercise of a degree of authority that is commensurate with the task that the parents ask the school to perform." *Mahanoy*, 594 U.S. at 200 (Alito, J., concurring). Thus, this Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials" should not be read as an unlimited license for public school officials to impose ideological instruction in newfound subject areas—especially when parents object. *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 273 (1988).

Neither historical nor *in loco parentis* justifications apply to modern notions of sexuality and gender

identity education. Those types of education are irrelevant to citizens' public responsibilities—indeed, our democratic republic was the envy of the world long before those subjects even existed. That for centuries Americans have been taught to "function effectively in their day-to-day life" *without* sexuality and gender education "is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship" without these types of instruction. *Yoder*, 406 U.S. at 225. And these types of instruction are irrelevant to professional training. Rather, sexuality and gender identity education are personal, subjective, value-laden, and inherently ideological.

The recency of their arrival in American (or any) schools confirms that sexuality and gender identity education cannot claim to be longstanding norms of schools. "Before the turn of the twentieth century, education involving sex and human sexuality was limited to 'social hygiene.'"[1] "Such education included information about venereal diseases, physical growth, and human reproduction."[2] "It was not until 1912, when the International Congress of Hygiene recommended a broader study of the topic, that the term 'sex education' was adopted."[3]

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[1] M. Fucci, *Educating Our Future: An Analysis of Sex Education in the Classroom*, 2000 B.Y.U. Educ. & L.J. 91, 91–92 (2000).
[2] *Id.* at 92.
[3] *Ibid.*

Public schools, however, did not "beg[i]n implementing sexuality education [until] the 1970s."[4] It emerged then "because unintended pregnancy and sexually transmitted diseases among adolescents became 'better measured and publicized.'"[5] "In recent decades, sex education programs have deviated from their original purposes of educating children on human development, reproduction, and diseases," instead focusing on topics like "the correct way to use condoms and how to reduce the risk of becoming pregnant."[6] The shift to discussing sexualities is even more recent.

Gender identity education is, of course, newer still. After all, "[t]he concept of 'gender identity' did not [even] enter the English lexicon until the 1960s." *Gore* v. *Lee*, 107 F.4th 548, 562 (CA6 2024). Only in the past decade has this type of education emerged in any significant way.

Neither of these subjects—sexuality or gender identity—is connected to good citizenship or professional training. And both are laden with ideological assumptions and values. So while this Court in the past has been careful to defer to school curriculum to ensure that the schools "retain the

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[4] K. Rufo, *Public Policy vs. Parent Policy: States Battle over Whether Public Schools Can Provide Condoms to Minors Without Parental Consent*, 13 N.Y.L. Sch. J. Hum. Rts. 589, 591–92 (1997).

[5] *Id.* at 592 n.15 (quoting *School-Based Programs to Reduce Sexual Risk Behaviors: A Review of Effectiveness* 340, U.S. Dep't of Health & Human Services, Public Health Reports (May 1994)).

[6] Fucci, *supra* note 1, at 110.

authority to refuse to" "associate the school with any position other than neutrality on matters of political controversy," *Hazelwood*, 484 U.S. at 272, sexuality and gender identity education *require* the school to take such positions. They are historical anomalies without connection to citizenship, and they contradict the notion that "[f]ree public education . . . will not be partisan or enemy of any class, creed, party, or faction." *Barnette*, 319 U.S. at 637.

Last, sexuality and gender education are often—as here—imposed *against* the wishes of parents, not with their approval. "[P]arents who enroll their children in a public school" cannot "reasonably be understood to have delegated to the school the authority to" impose these types of instruction. *Mahanoy*, 594 U.S. at 203 (Alito, J., concurring). As Blackstone emphasized, *in loco parentis* says that a parent "*may*" delegate certain authority. 1 Blackstone, *supra*, at 441 (emphasis added). Letting schools broaden their own authority by "defin[ing] their educational missions as including the inculcation of whatever political and social views are held by" their administrators contradicts *in loco parentis*. *Morse* v. *Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring, joined by Kennedy, J.)

All this means that judicial deference is unwarranted when it comes to school administrators' sexuality and gender identity education choices.

II. Montgomery schools' sexuality and gender identity curriculum indoctrinates students.

Even as the Fourth Circuit took a deferential approach to public school curriculum choices, it departed from the assumption underlying that

approach: that "[w]hen [the government] acts as an educator, at least at the elementary and secondary school level, [it] is engaged in inculcating social values and knowledge in relatively impressionable young people." *Pico*, 457 U.S. at 909 (Rehnquist, J., dissenting). Justice Brennan recognized the same point: "the public educator nurtures students' social and moral development by transmitting to them an official dogma of 'community values.'" *Hazelwood*, 484 U.S. at 278 (dissenting op.).

Though the court below erred in thinking that it needed to defer to sexuality and gender identity curriculum choices, it also erred in downplaying the reality that education—especially of young children and on fraught personal topics like sexuality and gender—necessarily indoctrinates students. That is the point. Understanding that point confirms the burden on parents' religious rights when schools try to instill their own values in children about sexuality and gender identity in place of their parents' beliefs.

Below, the Fourth Circuit acted as if there were some open evidentiary question about whether the books "are being used in a coercive manner." App. 43a. For their part, the schools sought to have it both ways. On one hand, they argued that the mandatory readings "are literacy tools" that merely "impart critical reading skills." CA4 Br. 1–2. They gestured toward various disclaimers and red herrings, like that the books have "Curricular Connections": "I will be able to answer questions about characters. I will be able to share what I know about why authors tell stories." App. 522a; see App. 520a ("There are no planned explicit lessons related to gender and

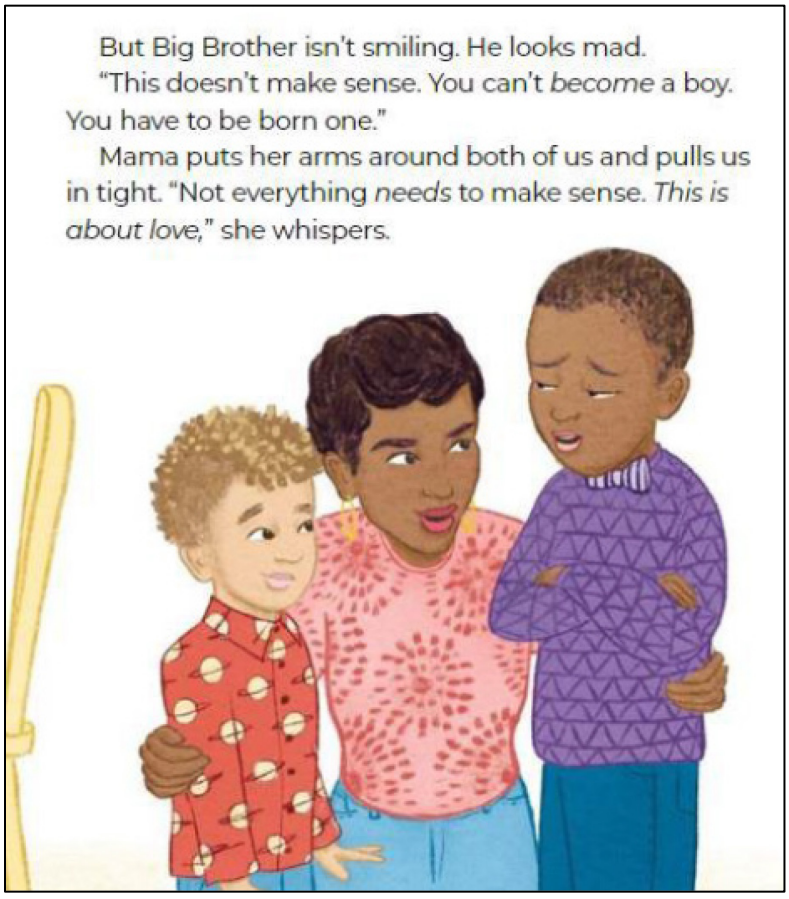
sexuality[.]"). This is a common refrain from schools caught red-handed imposing their ideological values on captive students: we were simply using these books to teach reading comprehension.

At the same time, in its more candid district court briefing, the schools trumpeted that their reading choices were intended to "redress implicit biases," "promote[] equity," "[c]onfront and eliminate stereotypes," "normalize[] a fully inclusive environment," and "[r]educ[e] stigmatization." D. Ct. Dkt. 42, at 3, 26 (cleaned up). These goals are so important, the schools argued, that "allowing *any* student to opt out hinders [their] educational mission"—thus supposedly enabling the policy to pass strict scrutiny. *Id.* at 27 n.7; see also App. 513a ("We teach—implicitly and explicitly—about gender and sexuality identity all the time in school."); App. 498a ("[B]eing accepting is the goal."); App. 527a (noting "Impact of this Work").

By making these claims, even the schools recognize that an inherent purpose of education—especially at young ages—is to *instill* and *change* values. The decision below erred in glossing over the significance of mandatory instruction in instilling values. Courts are "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce* v. *New York*, 588 U.S. 752, 785 (2019). When a teacher reads "The Boy Who Cried Wolf" to kindergarteners, the point is not just to diagram sentences or test reading comprehension—to the extent such skills are still taught—but to teach a lesson about lying.

In the same way, everyone knows that the Montgomery Board picked *Born Ready: The True*

Story of a Boy Named Penelope rather than, say, *Johnny the Walrus*[7] because it wanted to send a certain message about gender identity. *Born Ready*, like most children's books, is not subtle:



App. 465a. The messages in the other books are also apparent:

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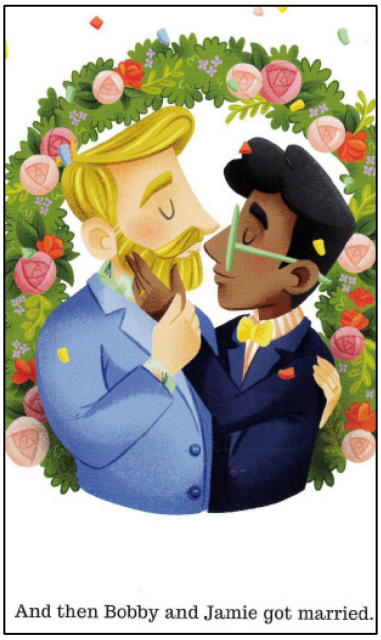
[7] M. Walsh, *Johnny the Walrus* (2022).

App. 265a (*Pride Puppy!*).



App. 303a (*Uncle Bobby's Wedding*).

App. 423a (*Prince and Knight*).

App. 323a (*Intersection Allies*).

The included "notes" for this last reading say that "[s]ex and gender" "are not the same." App. 350a. According to the notes, "[w]e would respect [a person's] choice of pronouns" by using whatever they desire, whether it be "gendered pronouns" or "non-binary pronouns"; "at any point in our lives, we can choose to

identify with one gender, multiple genders, or neither gender." *Ibid.*

As the First Circuit said in a similar case—even while rejecting the parents' free exercise claims—"[i]t is a fair inference that the[se] reading[s]" were "precisely *intended* to influence the listening children toward" a certain value. *Parker* v. *Hurley*, 514 F.3d 87, 106 (CA1 2008). "That was the point of why th[ese] book[s] w[ere] chosen and used." *Ibid.*

To suggest otherwise blinks reality. Below, the Board claimed that "use of the books involves no instruction on sexual orientation or gender identity per se." D. Ct. Dkt. 42, at 6. But even the district court understood that the books were intended to "influence" children—it just found this "influence" "permissible." App. 133a. The Fourth Circuit, meanwhile, would not concede even this much, insisting that the mandatory instruction involved *no* "direct or indirect pressure" and distinguishing between "*exposure*" and "coercive effect." App. 35a–36a.

Especially in an elementary school setting, that is not a plausible understanding of mandatory in-class teaching, especially of readings with obvious value preferences. See, *e.g.*, *Bethel*, 478 U.S. at 683 ("The inculcation of [certain] values is truly the work of the schools." (cleaned up)); *ibid.* ("Inescapably, like parents, [teachers] are role models."); *Edwards* v. *Aguillard*, 482 U.S. 578, 584 (1987) (emphasizing the "coercive power" of public schools "because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure"); *Lee* v. *Weisman*, 505 U.S. 577, 593–94 (1992) (holding that a

brief prayer impermissibly "places public pressure, as well as peer pressure, on" *high school* students "to enforce orthodoxy"); *Pico*, 457 U.S. at 879 (Blackmun, J., concurring) (public schools "inevitably . . . inculcate ways of thought and outlooks"); *James* v. *Bd. of Ed. of Cent. Dist. No. 1 of Towns of Addison*, 461 F.2d 566, 573 (CA2 1972) ("[A] principal function of all elementary and secondary education is indoctrinative—whether it be to teach the ABC's or multiplication tables or to transmit the basic values of the community.").

Many academic commentators have echoed the point. As one explained:

> Schooling is inherently indoctrinative. Both the formal and informal curriculum, established by those in authority in accordance with their own views or those of the majority in the community, are value-laden—from the textbooks selected, to the methods of teaching, to extra-curricular offerings. School officials may believe that students are developing critical thinking skills in order to form their own conclusions. However, the curriculum may in fact lead students to certain school/teacher-directed conclusions.[8]

Another applied the point to highly contentious gender and sexuality issues:

> [S]exual diversity public school curriculum[] "whether for kindergartners or older children,

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[8] Salomone, *supra*, at 216–17.

> is not education about biology but indoctrination in values that go against the traditional values that children learn in their families and in their communities. Obviously, the earlier this indoctrination begins, the better its chances of overriding traditional values. The question is not how urgently children in kindergarten need to be taught about sex or gay families but how important it is for indoctrinators to get an early start."[9]

The commentator notes that "gay writer Daniel Villarreal" candidly rejected the notion that this type of education imparts no values: "[L]et's face it—that's a lie. We want educators to teach future generations of children to accept queer sexuality. In fact, our very future depends on it."[10]

One need not go beyond the Board's books themselves to find pressure for students to alter the beliefs that their parents are seeking to instill in them. But the books' accompanying materials confirm that the main goal is not reading comprehension but indoctrination. If a student says something like "He can't be a boy if he was born a girl. What body parts do they have?", teachers are told to say, "That

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[9] L. Wardle, *The Impacts on Education of Legalizing Same-Sex Marriage and Lessons from Abortion Jurisprudence*, 2011 B.Y.U. Educ. & L.J. 593, 613 (2011) (brackets omitted) (quoting T. Sowell, *High Ideals and No Principles*, Nat'l Rev. Online (Oct. 8, 2008), https://perma.cc/H65B-UBKQ).

[10] *Id.* at 605 (quoting D. Villarreal, *Can We Please Just Start Admitting that We Do Actually Want to Indoctrinate Kids*, Queerty (May 12, 2011), https://perma.cc/PWV3-EF84).

comment is hurtful; we shouldn't use negative words to talk about peoples' identities." App. 619a. The suggested response continues: "When we're born, people make a guess about our gender and label us boy or girl based on our body parts. Sometimes they're right and sometimes they're wrong. Our body parts do not decide our gender." App. 620a.

Whether one agrees or not, this language imparts a particular value about gender identity. Tellingly, the responses have nothing to do with reading comprehension, language skills, or grammar. Objecting students are not told, for instance, that they misunderstood the stories. Instead, the responses are about values—telling objecting students that they have the *wrong* values.

In sum, the court below found it meaningful to say that "this case presents only an objection to their children's public school curriculum." App. 49a. Yes—and curriculum inherently tries to instill certain values, especially in elementary students. When those values contradict parents' religious beliefs on highly personal matters of sexuality and gender identity, the inherent indoctrinative aspect of school curriculum raises a significant constitutional problem.

* * *

None of this is to argue that the judiciary is always the right forum for curriculum disputes. Of course it is not. But when curriculum—especially ahistorical, ideological curriculum—butts up against the Constitution, courts should not shrink from vindicating individual rights. Not only does that approach contradict the reason for deference—the

inculcation of values in impressionable children—but it also applies a deferential approach where it does not belong. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638; see also *Meyer* v. *Nebraska*, 262 U.S. 390, 401 (1923) ("That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected.").

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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