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

IAN PRIOR
NICHOLAS BARRY
America First Legal Foundation
611 Pennsylvania Ave. SE #231
Washington, DC 20003
(202) 964-3721
ian.prior@aflegal.org

CHRISTOPHER MILLS
Counsel of Record
Spero Law LLC
557 East Bay St. #22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

Counsel for *Amicus Curiae*

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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 which" a Board member said "she 'felt kind of sorry'

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[*] 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.

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 sexuality and gender identity 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 three points in favor of reversal. 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, even when sex education arose, parental notice and opt-out rights have nearly always accompanied it. Maryland has followed this nationwide norm, requiring schools to provide notice and opt-outs for sex education. By prohibiting any notice and opt-outs for its sexuality and gender identity instruction, the Montgomery County Board of Education has disregarded a statutory mandate and widespread consensus—and the Constitution.

Third, the decision below disregards the assumption underpinning both deference to traditional curricular choices and parental opt-outs—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' religious rights.

ARGUMENT

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. But 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 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]

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] Discussing sexuality 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

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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.*
[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.

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 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. Sex education has always been accompanied by notice and opt-out rights.

Even less exotic forms of sex education have practically always included parental notice and opt-out rights. Yet even as the Montgomery schools embraced novel and highly fraught sexuality and gender identity education, they departed from this nationwide norm.

With sex education historically administered at the state and local level, "it is no wonder that . . . practices are so disparate."[7] But one practice has been consistent across the board: parental notice and opt-out provisions.

By "the late 1980s and early 1990s" there was "widespread implementation of school and community-based [sex education] programs."[8] At this point, "[t]he vast majority of school districts ha[d] a policy that allow[ed] parents to exclude their children from sexuality education classes by notifying the school ([i.e.,] an opt-out policy)."[9] The debate across the states was not about whether opt-out policies were good or bad; it was about whether states should go

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[7] K. Hall, et al., *The State of Sex Education in the United States*, 58 J. Adolesc. Health 595, 595 (2016).
[8] *Ibid.*
[9] R. Mayer, *1996–97 Trends in Opposition to Comprehensive Sexuality Education in Public Schools in the United States*, 25 SIECUS 20, 25 (1997).

even further and require parents to affirmatively opt their child *in* to sex education.[10] Notification and opt-out policies were so common, in fact, that when Massachusetts passed a statewide notification and opt-out requirement in 1996, some teachers were convinced it could only be an "attempt[] to censure controversial topics," since "most local school districts already implemented such policies."[11]

As sex education continued to expand, so too did parental involvement over the matter. At the start of the twenty-first century, 39 states required that some sex-related education be provided.[12] At the same time, "35 states guarantee[d] some parental discretion over whether their children w[ould] participate in this instruction."[13] 32 of them had opt-out policies.[14] Two states required parents to opt-in.[15] And one state, Arizona, had a mixture of both.[16] In "most states where parents [had] the option to withdraw their children" from sex education programming, they were allowed to do so "for any reason."[17] When states did not give parents blanket opt-out rights, at minimum,

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[10] See *ibid.* (reporting that "approximately 10 percent of community debates documented by SIECUS involved efforts to change to opt-in policies" without any mention of pushback to opt-out polices).
[11] *Id.* at 20.
[12] R. Gold & E. Nash, *State-Level Policies on Sexuality, STD Education*, 4 Guttmacher Report on Public Policy 4, 4 (2001).
[13] *Id.* at 4–5.
[14] *Id.* at 6.
[15] *Ibid.*
[16] *Ibid.*
[17] *Id.* at 5.

they would typically allow parents to withdraw their children "based on religious or moral beliefs."[18]

Fast forward a decade and the story is the same. In 2013, at least 39 states and the District of Columbia still allowed parents to opt out their children or otherwise gave parents some discretion over their child's sex education.[19] And that's just statewide policies. Local-level data show that notice and opt-out policies were almost universal. In a 2014 study, the CDC estimated that about 83% of schools notified parents before their children "receiv[ed] instruction on human sexuality topics."[20] And 88% of schools "allow[ed] parents . . . to exclude their children from receiving [such] instruction."[21] For elementary schools specifically, about 91% of schools were notifying parents and 89% were providing opt-outs.[22]

Today, every state permits some form of sexual education, and the laws of 47 states and the District of Columbia provide parents some discretion as to whether their child must undergo it. Pet. 6–7. The other three states—Delaware, North Dakota, and South Dakota—leave the issue to localities, which

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[18] *Ibid.*

[19] J. Schade, *Abstinence-Only Until Marriage and Abstinence Pledge Programs: A Policy Review for Stakeholders*, Georgia State University 37–43 (2013).

[20] Centers for Disease Control and Prevention, *School Health Policies and Practices Study* 15 (2014) (drawing from Table 1.11).

[21] *Id.*

[22] *Id.*

generally appear to follow opt-out policies that apply elsewhere.[23]

Maryland has always hewed close to the nationwide norm. Since the State first involved itself in the sex education sphere, parents have had a role in the process. As far back as 1981, "Maryland require[d] that parents can excuse their children [from sex education] upon written consent."[24] When the state expanded programming into elementary schools in 1987, requiring AIDS education for students as early as third grade, the legislature "ma[d]e it clear that local school systems must consult parents while drawing up their specific . . . programs."[25] In 2001, Maryland continued to allow parents to opt their children out of both "[s]exuality and STD [e]ducation."[26]

As sex education in Maryland became more formalized, opt-out and notification requirements remained available and prioritized. When the State codified its "Comprehensive Health Education Instructional Programs for Grades Prekindergarten–12" in 2010, it required "written notification . . . to

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[23] See, *e.g.*, K. Bultena, *House Panel Denies Mandating Parents Opt-In to Sex Education*, SDPB (Feb. 10, 2016), https://perma.cc/B9VA-PN29 (South Dakota "[s]chools already operate on policies that inform parents and allow them to keep their children out of sex ed teaching.").

[24] D. Kirby & P. Scales, *An Analysis of State Guidelines for Sex Education Instruction in Public Schools*, 30 Nat'l Council Family Relations 229, 232 n.4 (1981).

[25] T. Vesey, *Md. Panel Approves Education Program*, Washington Post (Oct. 6, 1987), https://archive.ph/joiIy.

[26] Gold & Nash, *supra* note 12, at 6.

parents/guardians announcing" the "Family Life and Human Sexuality" unit of study.[27] And children were to "be excused . . . upon written request from their parent/guardian."[28] When Maryland revised this program in 2019 to refer to "sexual orientation, gender identity, and gender expression," state notification and opt-out requirements remained.[29]

Historically, Montgomery County has gone above and beyond Maryland law and the national consensus. In addition to the state-mandated opt-out and notice requirements for sex education, the County has provided broad opt-out accommodations for religious adherents. For at least a decade, Montgomery County has instructed schools to "make reasonable and feasible adjustments . . . to accommodate requests from students, . . . or parents/guardians on behalf of their students, to be excluded from specific classroom discussions and activities that they believe would impose a substantial burden on their religious beliefs."[30] Its religious accommodations policy remained virtually unchanged through the County's 2022–2023 iteration. See App. 220a–221a.

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[27] Md. Code Regs. § 13A.04.18.01(F)(3)(a) and (4) (2010) (requiring that instruction, which shall "begin in or prior to fifth grade," come with notice and opt-out).

[28] *Id.* § 13A.04.18.01(F)(5)(a).

[29] Md. Code Regs. § 13A.04.18.01(D)(2)(a), (e)(i) and (iv) (2019) (mandating that "[e]ach school shall establish policies . . . for student opt-out," and "provide an opportunity for parents/guardians to view instructional materials to be used").

[30] *Guidelines for Respecting Religious Diversity*, at 7, Montgomery Cnty. Pub. Schs. (2015), https://perma.cc/979A-8H4C.

All told, where there has been sex education, there has been notice and opt out. Maryland has been no exception. And Montgomery County, if anything, has secured *added* protection for parents disinclined to subject their children to sexuality material.

Yet the Board now shrugs at decades of tradition and consensus. Inserting sexual orientation and gender identity into its elementary curriculum already put Montgomery County on the fringe.[31] Denying parents *any* notice or opt-out rights on top of that pushes it beyond the pale. Even where states and localities have provided notice and opt-out on narrower grounds, they, at minimum, preserve religious accommodations.[32] And that's all Petitioners

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[31] See *LGBTQ Curricular Laws*, Movement Advancement Project, https://perma.cc/4M32-SJRN (25 states do not have an LGTBQ curricular requirement, 9 states have full or partial prohibitions on LGBTQ issues in school curricula, only 8 states have some sort of explicit LGTBQ curricular standard, and another 8 states that permit it require notice and opt-out). In just the last three years, 9 states have imposed age and content limits on sexual orientation and gender identity instruction—primarily prohibiting it in elementary schools. See Ark. Code § 6-16-157(c) (2023); Ala. Code § 16-40A-5 (2022); Fla. Stat. § 1001.42(8)(c)(3) (2022); Ky. Rev. Stat. § 158.1415(1)(d) (2023); Ind. Code § 20-30-17-2 (2023); Iowa Code § 279.80 (2023); La. Stat. § 17-412 (2024); N.C. Gen. Stat. § 115C-76.55 (2023); Ohio Rev. Code § 3313.473(B)(1)(a)(E) (effective April 9, 2025).

[32] For example, of the 9 states that expressly permit parental opt-outs across the entire curriculum, 6 require religion or morality to be the reason a parent withdraws their child. See Ariz. Rev. Stat. § 15-102-(A)(4); Okla. Stat. tit. 25, § 2002(a)(2)-(4); Or. Dep't of Educ. Admin. R. 581-021-0009; 22 Pa. Code § 4.4(d)(3); Tex. Educ. Code § 26.010(a); Utah Code § 53G-10-205; see also *supra* note 18 and accompanying text.

seek. But in Montgomery County, no notice, no opt-outs—no matter the circumstances. See App. 185a.

In sum, since sex education emerged, it has always been accompanied by notice and opt-out rights. This was true even when the topics weren't as controversial. Now, the Board's mandatory curriculum pushes the bounds of standard sex education, moving to matters of sexuality and gender identity. Yet it has outright prohibited parents from knowing about or opting their children out of this material, defying a decades-long, nationwide consensus across even less ideological topics.

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

Parental notice and opt-out is crucial for the same reason that the Board's prohibition of it raises constitutional concerns: schooling is necessarily indoctrinative. This Court's jurisprudence has long recognized that reality. Indeed, it is this same reality that animates the deference courts have given schools on traditional curriculum choices. Yet even as the Fourth Circuit below 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 on fraught personal topics like sexuality and gender—necessarily indoctrinates students. 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. If this is "mere exposure" (App. 39a), why deny parents notice?

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[.]"). They insisted that they were not flouting any tradition or disregarding the statewide opt-out requirement because parental awareness and discretion are reserved for the "Family Life and Human Sexuality Unit." See App. 185a. And, we are now told, "[t]he storybooks are used only as part of the language-arts curriculum." BIO 22. This is a common

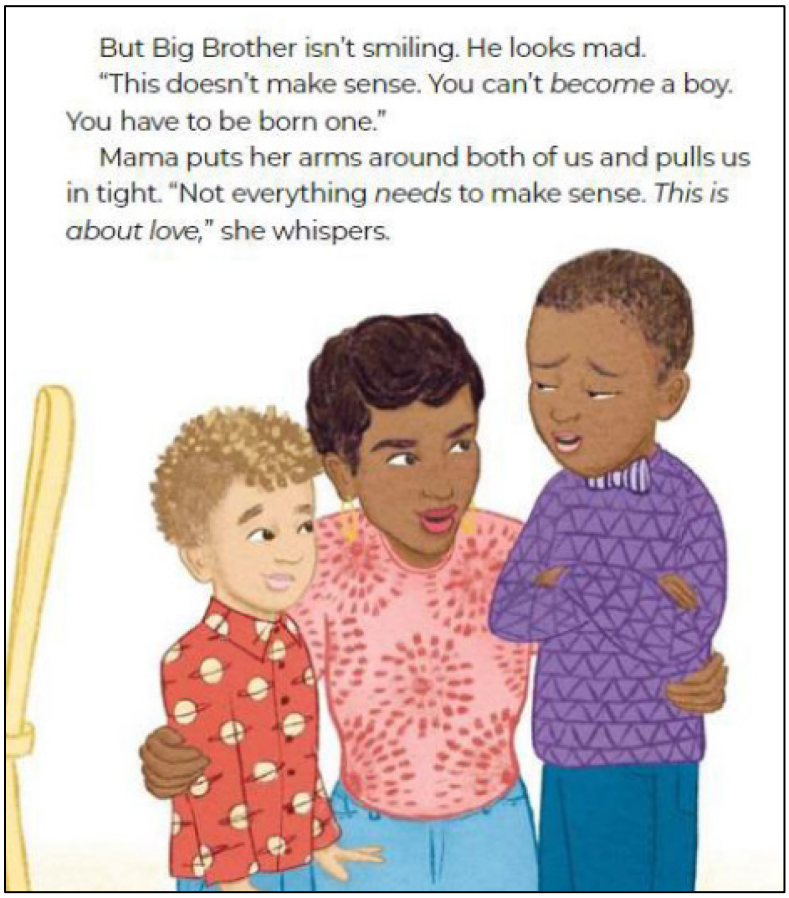
refrain from schools caught red-handed imposing their ideological values on captive students: we were simply using these books to teach reading comprehension.

At the same time, in its more candid district court briefing, the Board trumpeted that its 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,

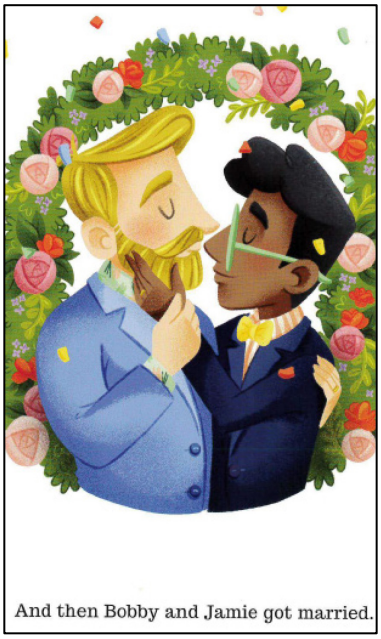
Johnny the Walrus[33] because it wanted to send a certain message about gender identity. *Born Ready*, like most children's books, is not subtle (App. 465a):



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

The messages in the other books are also apparent:

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.*

These storybooks are specifically characterized as "LGBTQ-Inclusive Books" that "as a whole express their authors' views on sexual orientation and gender identity." App. 10a. Pressing those views on young students is why they are used. 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.*

Calling this mandatory instruction "language arts" cannot change that it is sexuality and gender identity education—or that it is indoctrinative. 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. Below, the Board *embraced* the reality that students "may come away from public school

instruction with a new perspective not easily contravened by their parents." JA 46. This Court's jurisprudence recognizes that, too. 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.[34]

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

> [S]exual diversity public school curriculum[] "whether for kindergartners or older children, 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."[35]

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."[36]

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[34] Salomone, *supra*, at 216–17.

[35] 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).

[36] *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).

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. As elementary students express their confusion about these subjects (because they are *elementary* students), they will be informed that "people of any gender can like whoever they like" and that "[o]ur body parts do not decide our gender[,] . . . [that] comes from our inside." App. 12a–13a; see App. 620a. 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 comment is hurtful; we shouldn't use negative words to talk about peoples' identities." App. 619a.

Whether one agrees or not, this language imparts a particular value about gender identity. Tellingly, these 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.

The value-laden nature of the storybook curriculum does not change based on what the Board calls it or how it was ultimately authorized. That this is characterized "language arts" does not make it so. And that "the storybooks were not approved for the sex education curriculum, which has its own approval process," BIO 22, does not make the storybooks any less sexuality and gender identity education that influences children. It just means the Board seemingly

violated its own internal processes in addition to Maryland's opt-out requirement, the national opt-out consensus, and the Free Exercise Clause. Cf. App. 70a n.4 (Quattlebaum, J., dissenting) ("I see nothing . . . that would permit the board to avoid the requirement to permit opt-outs for family life and human sexuality just by adding instruction in that area to other classes."). Notice and opt-out provisions are necessary for controversial, value-laden material because schooling is necessarily indoctrinative. And what is indoctrinative—what needs opting out of—is the objectionable *substance* of a curriculum, not its title or how it was approved.

Opt-out provisions in all their variations reflect this sentiment. At least nine states now allow parents to opt out of various forms of objectional instruction across all curricula—not just "sex education."[37] In the last four years, another four states have allowed parents to opt their child out of any sexual orientation or gender identity instruction—regardless of the

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[37] See Ariz. Rev. Stat. § 15-102-(A)(4); Haw. Dep't of Educ., Bd. of Educ. Policy 101-13; Haw. Dep't of Educ. Reg. No. 2210.1, https://perma.cc/6QAT-B6EL; K. Hayashi, Superintendent, Haw. Dep't of Educ., *Annual Memorandum: Notice on Board of Education Policy 101-13 Controversial Issues* (June 2023), in Opening of the School Year Packet for School Year 2023–2024, Haw. Dep't of Educ. 61 (June 2023), https://perma.cc/T6DS-XSWP; Minn. Stat. § 120B.20; Neb. Rev. Stat. §§ 79-531, 79-532(1)(a)–(c); Okla. Stat. tit. 25, § 2002(a)(2)-(4); Or. Dep't of Educ. Admin. R. 581-021-0009; 22 Pa. Code § 4.4(d)(3); Tex. Educ. Code § 26.010(a); Utah Code § 53G-10-205.

subject area in which it is taught.[38] Many of the largest school districts in their respective states provide parental opt-out for controversial content—whether or not the school calls it "language arts."[39] And Maryland (like most states) requires local schools to provide student opt-out procedures regarding "*instruction related to*"—not classes entitled—"family life and human sexuality objectives."[40] Parents wish to protect their children from certain course content, not course labels, a concept evident on the face of many opt-out provisions themselves.

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[38] See Ark. Code § 6-16-1006(c) (2021); Mont. Code § 20-7-120 (2021); Ohio Rev. Code § 3313.473(B)(1)(b), F(5) (effective April 9, 2025); Tenn. Code § 49-6-1308 (2023).

[39] See, *e.g.*, *Policy in Practice: Parental/Community Review of Curriculum and Instruction Materials*, in Anoka-Hennepin Schools School Handbook 2024-25, at 47, Anoka-Hennepin Sch. Dist., https://perma.cc/FL2F-M4MR (allowing parents in Minnesota's largest school district to require, regardless of the subject area, "that specific instructional resources be excluded or restricted for their children"); *Religious Exemption Opt-Out CUR-P007*, Salem-Keizer Sch. Dist. (Aug. 22, 2022), https://perma.cc/LP8K-L99C (similar policy in Oregon's second largest school district); *Review of Instructional Material by Parents/Guardians and Students—Board Policy 105.1*, North Penn Sch. Dist. (Jan. 16, 2020), https://perma.cc/JG42-5TVC (Pennsylvania's eighth largest school district); *How Can My Child Be Excused from Studying Materials that Are Offensive to Me?*, Greenville Cnty. Schs., https://perma.cc/LQ5T-BP3T (South Carolina's largest school district); *Controversial Materials—Board Policy 4.801*, Sumner Cnty. Sch. Bd., https://perma.cc/D9R3-YZBX (Tennessee's eighth largest school district); Selection & Adoption of Instructional Materials—Policy No. 6161, at 14, Alpine Sch. Dist. (Sept. 24, 2024), https://perma.cc/U359-7BBE (Utah's largest school district).

[40] Md. Code Regs. § 13A.04.18.01(D)(2)(e)(i) (emphasis added).

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. Labeling sexuality instruction "language arts" doesn't change that—or eliminate the 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. The Montgomery schools have violated parents' free exercise rights by imposing mandatory indoctrination on their children about controversial sexuality and gender identity issues contrary to their religious beliefs.

CONCLUSION

The Court should reverse.

Respectfully submitted,

IAN PRIOR
NICHOLAS BARRY
America First Legal Foundation
611 Pennsylvania Ave. SE #231
Washington, DC 20003
(202) 964-3721
ian.prior@aflegal.org

CHRISTOPHER MILLS
Counsel of Record
Spero Law LLC
557 East Bay St. #22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

Counsel for *Amicus Curiae*

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