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***Mahmoud v. Taylor*: Cause or Effect of Disruptions in the Public Schools?**

Richard B. Katskee & Ira C. Lupu*

*Mahmoud v. Taylor*¹ represents a startling departure from the Supreme Court's historic pattern of recognizing rights within public schools while maintaining respect for the schools' mission and authority. Beginning with *West Virginia Board of Education v. Barnette*,² and continuing through and beyond the School Prayer Cases of the early 1960s,³ the Supreme Court has treated public schools as a significant locus of constitutional rights.⁴ The Court has done so, however, with a sharp eye toward necessary limitations, lest concerns for the rights overwhelm the administration of our nation's system of public education. In *Barnette*, the Court recognized that the public schools could teach

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¹ 606 U.S. 522 (2025).

² 319 U.S. 624 (1943) (freedom of speech under the First Amendment protects students against being compelled to salute the American flag).

³ *Engel v. Vitale*, 370 U.S. 421 (1962); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

⁴ For later decisions addressing freedom of speech by students in public schools, see *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) (freedom of speech of students in public school), *Goss v. Lopez*, 419 U.S. 565 (1975) (procedural safeguards in cases of suspensions from school), and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (searches and seizures of student property at school).

the value of patriotism, even if they could not demand recitation of the Pledge of Allegiance.⁵ In *School District of Abington Township v. Schempp*,⁶ the Court took pains to emphasize that the schools could teach about religion, including the study of the Bible as literature, even though they were prohibited from sponsoring worship or devotional readings.⁷

Mahmoud ignores this practice of principled reconciliation of the interests at play. The case involved a challenge by a group of parents to the inclusion of books that include LGBTQ+ characters in the English Language Arts curriculum for grades K–5 in the public schools of Montgomery County, Maryland. In holding that the Free Exercise Clause requires the Montgomery County Public Schools to give parents notice and the opportunity to opt their children out of readings to which the parents object on religious grounds, the Supreme Court has for the first time recognized a right that will significantly disrupt the schools’ educational programs.

Mahmoud stretches, to a remarkable extent, the Court’s 1972 decision in *Wisconsin v. Yoder*,⁸ which held that the Free Exercise Clause requires a state to exempt members of the Amish community from compulsory-education laws once their children reach the age of 14. The analytical focus in *Yoder* was not the stand-alone rights of each of the parents. Instead, the Court’s opinion carefully emphasized the character and lengthy history of the Amish community. In the decades since then, American courts have seen *Yoder* in that light and applied it narrowly.⁹

⁵ 319 U.S. at 631.

⁶ 374 U.S. 203 (1963).

⁷ *Id.* at 225 (“[T]he Bible is worthy of study [in public schools] for its literary and historic qualities.”).

⁸ 406 U.S. 205 (1972).

⁹ For an analysis of *Yoder* as a decision about communal or associational rights, see B. Jessie Hill, *Discrimination, Wisconsin v. Yoder, and the Freedom of Association*, 60 ST. LOUIS UNIV. L.J. 695, 701–02 (2016).

Mahmoud suddenly revolutionized its significance. The case is thus the latest in an explosive series of free-exercise decisions that have altered the constitutional landscape in ways that ten years ago would have been unthinkable.¹⁰

In what follows, we explain the constitutional dynamics that produced *Mahmoud*, the case’s substantive dimensions, and the ways that the Court’s decision is likely to demand radical changes in both planning and administration of curricula for the nation’s public schools.

Part I provides the doctrinal and historical backdrops to *Mahmoud*, which reflect the acute tension between a once-narrow understanding of *Wisconsin v. Yoder* and the post-*Obergefell* constitutional backlash against equality for LGBTQ+ people.

Part II addresses the substance of the *Mahmoud* opinion. In proclaiming a right of parents to insulate their children from teaching that “substantially interfere[s] with the[ir] religious development” or “threat[ens]” their “religious upbringing”¹¹ or the “religious beliefs and practices that the parents wish to instill,”¹² the Court invites curricular challenges and opt-out demands across a broad range of subjects, not just sex and gender. Most but not all the challenges will come from the right and be aimed at progressive developments in public education. Moreover,

¹⁰ These decisions include *Carson v. Makin*, 596 U.S. 767 (2022), *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), *Tandon v. Newsom*, 593 U.S. 61 (2021), *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), *Kennedy v. Bremerton School District*, 586 U.S. 1130 (2019), *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018). See generally Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *Reestablishing Religion*, 92 U. CHI. L. REV. 199 (2025); Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763 (2023).

¹¹ *Mahmoud v. Taylor*, 606 U.S. 522, 556, 568 (2025).

¹² *Id.* at 565.

despite the relative youth of the children in *Mahmoud* itself, the decision’s principles of parental authority cannot be confined by the age of the students. *Mahmoud* will instead affect school operations from kindergarten through high-school graduation. It may also, perhaps counterintuitively, buttress some claims that once were considered the province of the Establishment Clause, though any effects on that score are uncertain.

Part III builds on these substantive insights to explore various ways that *Mahmoud* may affect the content of public schools’ curricula. The principle vehicle for analysis is a new Regulation that the Montgomery County Public Schools (“MCPS”) have adopted post-*Mahmoud* on “Curriculum Transparency and Requests to be Excused from Instruction.”¹³ As the MCPS Regulation reveals, school districts are now under immense pressure to design and implement protocols for parents to receive notice and opt their children out of readings to which the parents object on religious grounds. These policies will disrupt the process of public education,¹⁴ and will in some cases alter its content considerably. In the wake of *Mahmoud*, education for life in a pluralistic democracy will suffer.

I. THE CONSTITUTIONAL BACKDROP TO *MAHMOUD V. TAYLOR*

A. The Rhetorical Strength and Tiny Ambit of *Yoder*

The status of *Yoder* in the law of religious freedom has long been a conundrum. In the decision’s immediate wake, *Yoder* was

¹³ Montgomery Cnty. Pub. Sch., Curriculum Transparency and Requests to Be Excused from Instruction (July 2024), <https://ww2.montgomeryschoolsmd.org/departments/policy/pdf/ifd-ra.pdf>.

¹⁴ Writing immediately after the decision in *Mahmoud*, Professor Michael Dorf of the Cornell Law School warned that “the opt out that the decision gives to parents [will be] a practical nightmare for school districts.” Michael Dorf, *Justice Alito’s Opinion in Mahmoud v. Taylor is Dangerously and Disingenuously Dishonest*, <https://www.dorfonlaw.org/2025/06/justice-alitos-opinion-in-mahmoud-v.html>.

the standout citation for the proposition that religious adherents are entitled to a constitutional exemption from general laws unless the state can show that denial of the exemption is necessary to accomplish “interests of the highest order.”¹⁵ That standard was so tilted against government, however, that courts endlessly worked around it.¹⁶ In contexts other than the public schools, the Supreme Court itself refused time and again to apply the *Yoder* standard.¹⁷ And in cases involving claims of right to educate children at home, lower courts typically distinguished *Yoder* by emphasizing its communitarian character, the age of the children, or both.¹⁸ In early commentary on *Mahmoud*, therefore, several approving voices mentioned that the decision had rescued *Yoder* from the doctrinal dustbin.¹⁹

¹⁵ *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

¹⁶ A highly respected account of this phenomenon appears in James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1413–1417 (1992); *see also* *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 622–25 (9th Cir. 1988) (Noonan, J., dissenting).

¹⁷ For a succinct account of these developments, *see* Ira C. Lupu, *Hobby Lobby and The Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 48–53 (2015).

¹⁸ *See, e.g.*, *Johnson v. Charles City Sch. Cmty. Bd. of Educ.*, 368 N.W.2d 74, 83–84 (Iowa 1985) (ruling that students may be released from public school to attend religious instruction off-campus); *see generally* Ira C. Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U. L. REV. 971 (1987). For examination of a context in which *Yoder*’s communitarian concerns apply, *see* Zalman Rothschild, *Free Exercise’s Outer Boundary: The Case of Hasidic Education*, 119 COLUM. L. REV. FORUM 200 (2019).

¹⁹ *See, e.g.*, Asma Uddin, *When Inclusion Becomes Compulsion: Mahmoud v. Taylor, Pluralism, and Public Education*, <https://www.scotusblog.com/2025/07/when-inclusion-becomes-compulsion-mahmoud-v-taylor-pluralism-and-public-education/> (“In *Mahmoud*, the Court used *Yoder* not as a relic but as a living precedent.”); Mark Movsesian & John McGinnis, *Legal Spirits 068: Religion at the Court: October*

In pre-*Mahmoud* cases in which parents sought opt-outs from particular assignments, lower courts repeatedly held that exposure alone to ideas that compete with parents' religious convictions did not burden the parents' or students' exercise of religion. Accordingly, this kind of exposure did not trigger the *Yoder* standard. The germinal decision was *Mozert v. Hawkins County Board of Education*,²⁰ which involved an effort by fundamentalist Christian parents to have the public schools excuse their children from readings that touched on “seventeen categories” of instruction to which the parents objected, including evolution, secular humanism, “futuristic supernaturalism,” pacifism, magic[,] and false views of death.”²¹

Then, in 1990, the Supreme Court's controversial decision in *Employment Division v. Smith*²² explicitly placed *Yoder* in a discrete category of cases in which the Free Exercise Clause operated in conjunction with other constitutional protections. For cases involving the Free Exercise Clause alone, *Smith* repudiated the religion-protective standard for which advocates had cited *Yoder* over the previous 18 years. After *Smith*, the Supreme Court and lower courts no longer had to write around *Yoder*. Instead, Justice Scalia's opinion for the Court in *Smith* bracketed and preserved *Yoder* as a decision involving “hybrid rights”—a combination of a right of parental control over a child's

Term Recap, <https://lawandreligionforum.org/2025/07/08/legal-spirits-068-religion-at-the-court-october-term-2024-recap> (at 14:24–14:34: before *Mahmoud*, “*Yoder* had been a doctrinal outlier”).

²⁰ 827 F.2d 1058 (6th Cir. 1987).

²¹ *Id.* at 1062. For a significant commentary on the *Mozert* litigation, see Nomi Stolzenberg, “*He Drew a Circle That Shut Me Out*”: Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 581 (1993).

²² 494 U.S. 872 (1990).

upbringing and a right of religious freedom.²³ Unsurprisingly, hybrid rights turned out to be a jurisprudential dead end.²⁴

Smith thus left *Yoder* stranded on its own, rather tiny free-exercise island. Before *Mahmoud*, the category of cases presenting a cognizable burden on religious liberty in public schools was hardly bigger than *Yoder* itself. As an engine of adjudication, *Yoder* remained stalled for half a century.²⁵

Despite *Yoder*'s failure to produce a meaningful body of law at any level of the judicial system, its invocation of a strict standard for religious freedom remained an icon for supporters of broad free-exercise rights. When the drafters of the Religious Freedom Restoration Act²⁶ sought to respond to *Smith* with a statutory override, *Yoder* represented a convenient symbol of free-exercise vigor. The first declared purpose of RFRA is to “restore the compelling interest test as set forth in *Sherbert v. Verner* and

²³ *Id.* at 881-882 (analyzing *Yoder* as a case about free exercise coupled with parents' rights to control the education of their children).

²⁴ *See, e.g.,* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in the judgment) (“If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.”); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990) (“How can claimants be entitled to greater relief under a ‘hybrid’ claim than they could attain under either of the components of the hybrid? One suspects that the notion of ‘hybrid’ claims was created for the sole purpose of distinguishing *Yoder* in [*Smith*].”).

²⁵ For a comparable analysis, see Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *The Structure of Religious Preference*, 139 HARV. L. REV. 211, 231–32 (2025).

²⁶ 42 U.S.C. § 2000bb.

Wisconsin v. Yoder and to guarantee its application in all cases where free exercise of religion is substantially burdened.”²⁷

Ultimately, however, the Supreme Court limited RFRA to applications of federal law.²⁸ Thus, even after RFRA reached full flower in *Burwell v. Hobby Lobby Stores*,²⁹ the public schools and their curricula, policies, and administration remained outside its ambit. As a symbol, *Yoder* stood astride RFRA. As an operative element in the law, it never advanced beyond protecting the Amish community.

More recently, in cases involving state and local law, the Justices have been engaged in an ongoing fight over the boundaries of the *Smith* standard. *Smith* applies only when laws are “generally applicable,” and departures from general applicability, however trivial or illusory, have lately been viewed as discrimination against religion that triggers a virulent form of strict review.³⁰ In *Mahmoud*, however, this move played no role. Instead, *Yoder* provided all the legal grounding that the plaintiffs needed to argue in favor of notice and opt-out rights for religiously objectionable materials or instruction.³¹

²⁷ *Id.* § 2000bb(b)(1). *Sherbert v. Verner*, 374 U.S. 398 (1963), involved a constitutionally mandated extension of what counted in an unemployment-compensation scheme as “good cause” to refuse “available suitable work.” *Id.* at 400–401. It is thus conceptually distinct from the exemption in *Yoder*.

²⁸ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

²⁹ 573 U.S. 682 (2014).

³⁰ *See, e.g., Tandon v. Newsom*, 593 U.S. 61 (2021); *Fulton v. City of Phila.*, 593 U.S. 522 (2021).

³¹ The Court in *Mahmoud* thus brushed aside the hybrid-rights theory, *see supra* note 23. Justice Alito wrote for the majority: “We need not consider whether the case before us qualifies as such a ‘hybrid rights’ case. . . . Rather, it is sufficient to note that the burden imposed here is of the exact same character as that in *Yoder*.” *Mahmoud v. Taylor*, 606 U.S. 522, 565 n.14 (2025).

As the district court carefully delineated in *Mahmoud*,³² *Mozert*³³ had for thirty-five years been the template for a whole host of decisions on similar sorts of claims.³⁴ *Yoder* simply did not extend to these kinds of parental demands. Allowing removal of Amish fourteen-, fifteen-, and sixteen-year-olds from school to protect the character of an old (and to the Justices, quaint) religious community was not analogous to exercising cafeteria-style choices of reading assignments in elementary school.

Thus, on the eve of the oral argument in the Supreme Court in *Mahmoud*, *Yoder* had long been a relic, an outlier, an object in the road to steer around rather than a signpost to follow. There was no circuit split on the role of *Yoder* in free-exercise challenges to curricula, which uniformly failed. With the law that well settled, it would require something massive to get the Supreme Court to pay attention and transform *Yoder* into a broad constitutional shield from assignments that parents deem a threat to their religious beliefs.

B. The Ongoing Backlash Against *Obergefell*

The forces that supercharged *Yoder* are not hard to locate. *Obergefell v. Hodges*,³⁵ in which the Supreme Court held that the Equal Protection and Due Process Clauses protect same-sex couples' right to marry, has become a lightning rod for constitutional change driven by opposition to the rights and interests of LGBTQ+ people.³⁶

³² *Mahmoud v. McKnight*, 688 F. Supp. 3d 265 (D. Md. 2023).

³³ 827 F.2d 1058 (6th Cir. 1987).

³⁴ For the district court's careful unpacking of the controlling effect of *Mozert* and its progeny, see *Mahmoud*, 688 F. Supp. 3d at 290–295.

³⁵ 576 U.S. 644 (2015).

³⁶ Writing on the eve of *Obergefell*, Douglas Laycock (Professor of Law, University of Texas School of Law at time of writing) analyzed effects of the culture wars over matters of sexuality and reproduction on the law

The *Obergefell* opinion acknowledged that some religious communities preach that same-sex intimacy, including marriage, should not be condoned, and that these groups are free to teach those principles.³⁷ The promise of respect for dissenters has, however, gone far beyond governmental acknowledgment of religious norms that depart from the law's recognition of same-sex unions. After *Obergefell*, the Supreme Court quickly began to validate religiously motivated noncompliance with laws demanding equal treatment for same-sex couples. This trend began in 2018 with *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,³⁸ in which the Court held that a state administrative board had not acted with the requisite neutrality toward a bakery that refused to prepare a customized wedding cake for a same-sex couple. Although the Court stopped short of declaring a constitutional right to religious exemptions from nondiscrimination laws, the decision revealed a highly unusual sensitivity toward opponents of same-sex unions.³⁹ Never before

of religious liberty. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839 (2014).

³⁷ *Obergefell*, 576 U.S. at 679-80. The *Obergefell* opinion acknowledges, however, that while some people's objections have religious roots, that provenance does not and cannot justify laws or public policies that deny equal protection to same-sex couples. *Id.* at 672.

³⁸ 584 U.S. 617 (2018).

³⁹ For astute criticism of the *Masterpiece Cakeshop* opinion, see Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018). The LGBTQ+-friendly decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), holding that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 encompasses discrimination based on sexual orientation and gender identity, was rooted in statutory textualism, not constitutional values. Even then, Justice Gorsuch's opinion for the Court nodded affirmatively toward the possibility of religious exemptions. *Id.* at 681-82.

had civil-rights violators been accorded this kind of constitutional solicitude.⁴⁰

The Court’s receptiveness to religious objections in *Masterpiece Cakeshop* set the stage for a more robust recognition of religious exemptions in later cases concerning antidiscrimination law.

In the Spring of 2021, the Court held in *Fulton v. City of Philadelphia*⁴¹ that Catholic Social Services was exempt from state and local laws forbidding discrimination against same-sex couples in the administration of Philadelphia’s foster-care system. As in *Masterpiece Cakeshop*, the Court employed unprecedented tactics in free-exercise adjudication, this time triggering strict scrutiny based on only the potential for discrimination against religion, which the Court located in the existence of official discretion that had never been exercised.⁴²

The new majority’s overwhelming sympathy for religious opposition to same-sex marriage then led to yet another victory for those social forces. In 2023, the Court held in *303 Creative LLC v. Elenis*⁴³ that the compelled-speech doctrine protected a designer of customized wedding websites from liability under civil-rights laws for refusing to work with same-sex couples

⁴⁰ Earlier treatment of those sorts of arguments had been dismissive. *See, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (describing free-exercise defense to claim of racial discrimination in public accommodations as “patently frivolous”).

⁴¹ 593 U.S. 522 (2021).

⁴² *Id.* at 534-538. The result in *Fulton* can be partially explained as an effort to block Justice Alito’s attempt to have the Court overrule *Employment Division v. Smith*. For a thorough account of how six Justices combined to thwart Justice Alito’s misguided efforts, *see* Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on Fulton v. City of Philadelphia*, AM. CONST. SOC’Y SUP. CT. REV., 5th ed., 221–56 (2021).

⁴³ 600 U.S. 570 (2023).

planning their weddings. As Justice Sotomayor’s dissent cogently argued, the majority’s concern for those who oppose marriage of same-sex couples on religious grounds yet again swamped the state interest in nondiscriminatory treatment of LGBTQ+ people.⁴⁴

The trend is unmistakable. *Masterpiece Cakeshop*, *Fulton*, and *303 Creative* involved no divisions among the lower courts and likely would have received no notice from the Supreme Court without their common element—religious opposition to same-sex intimacy.⁴⁵

II. THE *MAHMOUD* DECISION AND ITS DOCTRINAL IMPLICATIONS

The grant of certiorari in *Mahmoud* fit the pattern perfectly. The circuit courts had been in complete agreement that *Yoder* did not protect parents against reading assignments that conflicted with their religious beliefs. The decisions of the district court and court of appeals in *Mahmoud*, though thorough and detailed, were mundane applications of the consistent free-exercise jurisprudence of the half-century since *Yoder*. What attracted the Supreme Court’s intervention was the Montgomery County School Board’s decision to include LGBTQ+ characters in the district’s curriculum. Had the dispute been provoked by books about magic, as in *Mozert*, it likely would have been just another in the previously unbroken line of decisions that treat *Yoder* as *sui generis*.

⁴⁴ *Id.* at 636–639 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting).

⁴⁵ For a stark example of this dynamic at work in the lower courts, see *Bates v. Pakseresht*, 146 F.4th 772 (9th Cir. 2025) (holding that Oregon violated the Free Speech and Free Exercise Clauses by requiring that applicants to adopt foster children respect the children’s sexual orientation and gender identity). The decisions in *Masterpiece Cakeshop* and *Fulton* played a significant role in the panel’s free-exercise analysis. *Bates*, 146 F.4th at 791–98.

Yet the language of the Supreme Court’s pronouncement in *Mahmoud* is expansive. On its face, the decision applies to anything in a public school’s program of instruction to which a parent objects on religious grounds.

A. The Controversy in Montgomery County and the Lower Courts

The Montgomery County School Board serves a large school district in a diverse community in the Maryland suburbs of the District of Columbia. The board believed that the district’s students should therefore learn about the experiences and perspectives of others in their community. And the board determined that the school district’s language-arts curriculum did not sufficiently serve that end because, among other gaps, it lacked books with LGBTQ+ characters.

The school district therefore undertook an elaborate, years-long process to identify and add new curricular materials. It appointed reading specialists and other experts, who recommended that the district adopt several storybooks with LGBTQ+ characters into the elementary-school curriculum. (The district had previously diagnosed the same problems and adopted similar solutions for materials with African-American and Asian-American characters.) The district did not specify how teachers should use the new storybooks. It did provide optional guidance to teachers, with suggested responses to questions that students might ask about the books or their themes.

The school district also initially allowed parents to exclude their children from the use of the new storybooks. A number of parents invoked that opt-out opportunity. Some parents offered religious objections, while others advanced the *nonreligious* objection that the storybooks were not age-appropriate for their children.⁴⁶

⁴⁶ *Mahmoud v. McKnight*, 688 F. Supp. 3d 265, 280 (D. Md. 2023).

The number of opt-outs quickly increased to an unmanageable number. The school district concluded, therefore, that managing the opt-outs and educating the excused students would require either altering the educational program substantially or implementing individually tailored educational programs for each opted-out student. Hence, the district announced that previously granted excusals would be honored for the rest of the school year, but no new ones would be allowed for that year, and none would be offered when the students returned to school the following fall.

The plaintiffs in *Mahmoud* were parents who objected on religious grounds to use of the storybooks in their elementary schoolers' classes. They filed suit, demanding notice and an opportunity to opt out whenever their children might be exposed to what the plaintiffs termed issues of "family life and human sexuality."⁴⁷ Beyond that, they asserted broad constitutional rights to receive notice and exclude their children from any exposure to "sensitive religious and ideological issues."⁴⁸

The district court denied the parents' request for a preliminary injunction. Citing ten decisions in earlier cases addressing free-exercise objections to particular lessons or topics of instruction, Judge Deborah Boardman wrote that "[e]very court that has addressed the question has concluded that the mere exposure in public school to ideas that contradict religious beliefs

⁴⁷ *Id.* at 273. They might instead have challenged the books through the school district's ordinary administrative processes but chose not to do so. Meanwhile, the school district did allow, and continues to allow, parents to exclude their students from the "Family Life and Human Sexuality Unit" in health class, which is the distinct part of the curriculum that provides sex education. *Id.* at 281. Though the *Mahmoud* parents employed that same label, the school district does not offer sex education in Grades K–5.

⁴⁸ See *Mahmoud v. McKnight*, 102 F.4th 191, 201 (4th Cir. 2024).

does not burden the religious exercise of students or parents.”⁴⁹ The court determined that the plaintiffs’ claims amounted to nothing more than exposure. Accordingly, the parents had not shown a legally cognizable burden on their religious exercise.

In reaching that conclusion, the district court rejected the plaintiffs’ invocation of *Yoder*, based in large part on the Supreme Court’s own explanation that its holding in *Yoder* “was inexorably linked to the Amish community’s religious beliefs and practices.”⁵⁰ The district court recognized that the Free Exercise Clause protects against “certain forms of governmental compulsion” but does not confer a right to make the public schools conform what they teach to parents’ preferred religious beliefs or practices.⁵¹

The Fourth Circuit affirmed. In an opinion by Judge Agee, the panel majority agreed that the plaintiffs needed to show that “the absence of an opt-out opportunity coerces them or their children to *believe* or *act* contrary to their religious views.”⁵² The *Mahmoud* parents had offered no evidence “about how any teacher or school employee has actually used any of the Storybooks in the Parents’ children’s classrooms, how often the Storybooks are actually being used, what any child has been taught in conjunction with their use, or what conversations have ensued about their themes.”⁵³ On this “threadbare” record, the Fourth Circuit concluded that the plaintiffs’ complaint that the school district

⁴⁹ *Mahmoud v. McKnight*, 688 F. Supp. 3d at 290. In the Supreme Court, Justice Alito mentioned none of those decisions. Justice Sotomayor identified several in dissent. *See Mahmoud v. Taylor*, 606 U.S. 522, 614 (2025) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting).

⁵⁰ *Mahmoud*, 688 F. Supp. 3d at 294 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972)).

⁵¹ *Id.* (quoting *Bowen v. Roy*, 476 U.S. 693, 700 (1986)).

⁵² *Mahmoud*, 102 F.4th 191, 208 (emphasis in original).

⁵³ *Id.*

“expose[d] their children to views that are at odds with their religious faith” did not establish the requisite religious coercion.⁵⁴

Yoder thus did not apply. Exposure alone to ideas that parents find religiously objectionable did not constitute a free-exercise violation.⁵⁵

B. *Mahmoud* in the Supreme Court

The rulings by the district court and the Fourth Circuit in *Mahmoud* were entirely in line with decades of squarely-on-point free-exercise precedent. Yet in the Supreme Court, none of that mattered in the slightest.

Justice Alito’s opinion for the majority adopted an expansive new substantive standard for a vague, undefined class of free-exercise claims. Recharacterizing *Yoder* as a grand doctrinal pronouncement untethered to the special circumstances of the Amish,⁵⁶ the Court declared broadly that “government burdens the religious exercise of parents when it requires them to submit their children to instruction that poses ‘a very real threat of undermining’ the religious beliefs and practices that the parents wish to instill.”⁵⁷

⁵⁴ *Id.* at 209–10. *But see id.* at 217–28 (Quattlebaum, J., dissenting).

⁵⁵ *Id.* at 211–12.

⁵⁶ *Mahmoud v. Taylor*, 606 U.S. 522, 558 (2025).

⁵⁷ *Id.* at 530 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)). In *Miller v. McDonald*, 130 F.4th 258 (2d Cir. 2025), the Second Circuit rejected a free-exercise challenge, brought by several private schools run by the Old Order Amish, to New York State’s repeal of a statutory religious exemption from the requirement that children receive specified vaccinations before starting school. The State had not repealed the medical exemption from the same requirement. The Second Circuit gave little credence to the argument that *Yoder* conferred special constitutional status on Amish education. *Id.* at 270–271. On December 8, 2025, the Supreme Court granted a petition for certiorari in *Miller* (No. 25-133), vacated the judgment, and remanded

The opinion thus squarely rejected the distinction between religious coercion and exposure to ideas that parents find religiously objectionable. Indeed, the Court straightforwardly declared that “[w]hether or not a requirement or curriculum could be characterized as ‘exposure’ is not the touchstone for determining whether [the constitutional] line is crossed.”⁵⁸ In so holding, the Court said not one word about how, for decades, exposure had in fact been the consistent touchstone throughout the federal courts.

The majority also conducted its own analysis of the storybooks and the school district’s optional guidance to teachers. It criticized the books for being “designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected.”⁵⁹

Justice Alito’s opinion for the Court excoriated one book (and the school district for selecting it), for example, for depicting the wedding of a same-sex couple as a happy occasion, when the plaintiffs wished “to present a different moral message.”⁶⁰ In the majority’s view, that presentation made the books “potentially coercive,”⁶¹ and therefore an “objective danger to the [parents’] free exercise of religion.”⁶² The majority also decried the guidance to teachers for “present[ing] as a settled matter a hotly contested view of sex and gender that sharply conflicts with the religious beliefs that the parents wish to instill in their children.”⁶³ In

the case for further consideration in light of *Mahmoud*. See https://www.supremecourt.gov/orders/courtorders/120825zor_i4ek.pdf.

⁵⁸ *Id.* at 556.

⁵⁹ *Id.* at 550.

⁶⁰ *Id.* at 552.

⁶¹ *Id.* at 554.

⁶² *Id.* at 555.

⁶³ *Id.* at 553. Justice Sotomayor’s dissent goes into detail about the majority’s misdescriptions of the storybooks and guidance to teachers. See *id.* at 594–98, 610–15 (Sotomayor, J., dissenting).

reaching those conclusions, the majority entirely ignored the lower courts' determinations that the plaintiffs had offered no evidence about the use or effect of either the books or the documents containing the school district's guidance to teachers.

At the most basic level, the majority's strong, insistent criticism that the books teach "values and beliefs" is just a recognition that the books teach *something*. Every curricular decision reflects educators' determinations about what matters and is worthwhile for children to learn. Those sorts of choices always and inevitably inform curricular design.

In setting a curriculum, as in all other things, government must not target religion for disfavor, disparagement, or maltreatment. But in the public schools, ensuring that students are never exposed, even incidentally, to anything that their parents regard as a threat to their religious beliefs is unrealistic to the point of incoherence.

Storybooks, other instructional materials, and classroom discussions inevitably introduce implicit and often explicit views on sexual orientation and gender identity. That is what led the Montgomery County Public Schools to expand the language-arts curriculum in the first place. The *Mahmoud* plaintiffs objected, for example, to a book about a prince who falls in love with and marries a knight. But countless storybooks involve princes who fall in love with and marry princesses. The vast majority of storybooks that portray families include cisgender couples. In addition, when students refer to their own families in class discussions, art projects, or other assignments, many will inevitably talk about or show a mother and father. All of that reinforces the idea that heterosexual relationships and cisgender couples are normal—so normal that these arrangements do not invite comment and become reinforced by repetition.

Adding a same-sex couple in any of those contexts might, in the Court's words, disrupt a belief that cisgender relationships

are the only acceptable ones.⁶⁴ The preexisting curriculum promoted value judgments about sexual orientation and gender identity every bit as much as the newly introduced materials do, but those judgments are the ones that the plaintiffs and a majority of the Justices prefer. Maintaining the exclusivity of those views was the plaintiffs' aim.

The constitutional question should have been whether the plaintiffs have the right to insulate their children completely from a decision by the public schools about what social arrangements might qualify as ordinary or acceptable. Before *Mahmoud*, the Religion Clauses gave a straightforward answer to that question. The public schools were forbidden to compel religious conformity or disparage anyone's faith. But they remained appropriately free to decide on nonreligious grounds, as matters of educational policy, what their teachers communicate, and what students learn.⁶⁵ Parents who disliked those choices could counter the lessons at home and in their religious communities. Moreover, they could exercise their constitutional right to send their children to private school.⁶⁶ They could not, however, invoke the power of the courts to supplant educators' professional curricular judgments made on nonreligious grounds.⁶⁷ After *Mahmoud*, the tables have turned.

⁶⁴ *Id.* at 529–30 (majority opinion).

⁶⁵ *See generally, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) (“There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.”).

⁶⁶ *See Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (recognizing substantive-due-process right of parents to send their children to private, religious schools, while not doubting governmental authority to regulate schools and specify subjects and lessons “essential to good citizenship” that must be taught).

⁶⁷ *See, e.g.*, *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1067 (1987) (“The plaintiff parents can either send their children to church schools or private schools . . . or teach them at home. . . . Tennessee’s

C. The Force and Reach of *Mahmoud*

The demand that schoolchildren be protected from exposure to anything that their parents deem a threat to the parents' religious views about sexual orientation or gender identity did not start with *Mahmoud*. The aim to limit what students see and experience animates more sweeping measures that affect all students, such as Florida's Don't Say Gay law.⁶⁸ Supporters of those policies are not, as they pretend, anti-indoctrination. Rather, they desire to indoctrinate all children, their own and everyone else's, into a view that the world is populated exclusively with cisgender people and opposite-sex couples. If one genuinely wanted to avoid indoctrinating students into a view about sexual orientation or gender identity, one would provide them with more perspectives, not fewer.

Neither do the plaintiffs' repeated invocations of the relative youth of their children meaningfully limit the scope of the Court's decision. The plaintiffs maintained that young children are impressionable and may regard teachers as authority figures to whom the children should listen.⁶⁹ Hence, the plaintiffs argued, there was overwhelming danger that the students might be corrupted by classroom exposure to ideas about sexual orientation and gender identity that the plaintiffs disfavor.⁷⁰ But nothing about their notice and opt-out demands, and nothing about the Court's holding, points to an age-specific standard that affords

school attendance laws offer several options to those parents who want their children to have the benefit of an education which prepares for life in the modern world without being exposed to ideas which offend their religious beliefs.”).

⁶⁸ Fla. Stat. § 1001.42. For an analysis of the litigation and settlement arising from the Florida law, see Ira C. Lupu, *The Centennial of Meyer and Pierce: Parents' Rights, Gender-Affirming Care, and Issues in Education*, 26 J. CONTEMP. L. ISSUES 147, 198–209 (2025).

⁶⁹ *E.g.*, Brief for Petitioner at 21, 32, *Mahmoud v. Taylor*, 606 U.S. 522, 541 (2025) (No. 24-297).

⁷⁰ *Id.* at 2, 16–18, 21.

greater rights to parents of elementary-school students than to parents of middle- or high-schoolers. Rather, the focus of the new free-exercise right on threats to parents' ability to instill their religious beliefs in their children may well function in precisely the opposite way.

The threat of drawing older students away from their parents' religious beliefs and practices is more real, substantial, and persistent.⁷¹ Older students reflect and rely on their own experiences, particularly with peers, to come to their own conclusions.⁷² Moreover, the influences on them are more worldly and come from many directions and sources, inside and outside of school.⁷³ Older students are thus more likely than younger children to experience enduring changes in their moral and religious beliefs if they are exposed to new ideas, new perspectives, and different ways of living.

⁷¹ Research on child development confirms this intuition. See Elizabeth Weiss Ozorak, *Social and Cognitive Influences on the Development of Religious Beliefs and Commitment in Adolescence*, 28 *J. Scientific Study of Religion*, 448, 455, 460 (1989) (finding that effect of parents' religious affiliation and commitment, though always significant, is weaker on older children, and that "middle adolescence," i.e., 9th to 11th grades, "is a period of readjustment," with rates of departures from parents' beliefs and practices peaking at age 14½).

⁷² See *id.* 458 (finding that "connectedness to peers emerged as a unique and fairly effective predictor of changed faith," with effects increasing in later adolescence).

⁷³ See Jennifer B. Barrett et al., *Adolescent Religiosity and School Contexts*, 88 *Soc. Sci. Quarterly*, 1024, 1025 (2007) (summarizing research showing that "[i]ndividual preferences for religion are developed socially through interaction with friends, family, and larger society, and [that] adolescents may be particularly likely to experience changes in their religious beliefs and practices as parental restrictions decline and adolescents gain more control over their own behavior"); *id.* at 1026, 1034–35 (finding that adolescents pursue social status by conforming to religious practices to those of popular students at school).

Indeed, that was the logic of the complaint and the Supreme Court's holding in *Yoder* itself. Whatever formal instruction and socialization the Amish children received in elementary school did not trouble their parents overmuch.⁷⁴ While the Court noted that the Amish often "established their own elementary schools" to resemble "small local schools of the past,"⁷⁵ the danger that the Court treated as of constitutional dimension was allowing the students to experience "higher learning [that] tends to develop values [that the parents] reject as influences that alienate man from God."⁷⁶ The parents objected to public schooling only after the eighth grade, for it was their view, and the view of their expert witnesses, that teenagers were most susceptible to influences at school that might draw them away from the Amish faith and culture. The parents thus saw those older students' attendance at school as the real threat to the intergenerational survival of the parents' religious way of life.

If, as the Court in *Mahmoud* declared, *Yoder* recognized a constitutional right to avoid anything that threatens parents' transmission of their faith to their children, that right surely attaches to the parents of older children, like the successful *Yoder* plaintiffs themselves. Hence, there would appear to be no age line, short of the age of legal majority and emancipation, beyond which the new parental right gives way to the children's rights or the educational interests and administrative needs of the state embodied in the public schools.

In an effort to downplay the sea change that would result from adopting their position, the plaintiffs also insisted that their requests were limited to the "narrow[]" issue of instruction on "gender and sexuality," emphasizing that this issue necessarily

⁷⁴ *Wisconsin v. Yoder*, 406 U.S. 205, 212 (1972).

⁷⁵ *Id.*

⁷⁶ *Id.* at 212.

implicates religious doctrine.⁷⁷ But the plaintiffs’ contention that a ruling in their favor could be limited to this subject matter cannot withstand close analysis. The *Mahmoud* plaintiffs’ demand and the logic of the Court’s ruling surely cover a wide array of topics routinely covered in school. Nothing in the structure of their legal claims or in the logic or language of the Court’s holding recognizes a subject-matter limitation. Rather, if the rule is that parents are entitled to opt out of whatever they believe threatens their ability to instill their religious beliefs in their children, then everything in the curriculum is up for grabs. No instruction in history, literature, art, or any scientific discipline is safe.⁷⁸

In their most candid moments, the plaintiffs and their counsel effectively acknowledged as much. The reason why the particular topics of sexual orientation and gender identity should trigger heightened scrutiny, they argued, is that the plaintiffs “sincerely believe that subjecting their children to instruction contrary to their religious beliefs” threatens their religious standing.⁷⁹ Classic works and central concepts in any literature, social-studies, art, science, or even physical-education curriculum inevitably either reinforce or disrupt traditional norms of all sorts. So does any study of current events or social change.

History lessons, for example, necessarily speak to issues of civics, patriotism, economic priorities, immigration, the role of

⁷⁷ Brief for Petitioner at 22, 29, 31–32, *Mahmoud*, 606 U.S. 522 (2025) (No. 24-297).

⁷⁸ See Schwartzman et al., *The Structure of Religious Preference*, *supra* note __, at 238 (“the Court has basically invited aggrieved parents to scrutinize every aspect of instruction in public schools”). As we explain further in Part III, *infra*, Montgomery County is, in light of *Mahmoud*, now extending rights of notice and excusal to all subjects in the core curriculum, and parents are exercising opt-outs from a variety of instructional materials.

⁷⁹ Brief for Petitioner at 28, *Mahmoud*, 606 U.S. 522 (2025) (No. 24-297).

women, the politics and practical consequences of race, and the place of religion (or religions) in society. That is so whether the lessons introduce those topics explicitly or implicitly, and whether they make value judgments intentionally, unintentionally, or merely incidentally. The lessons, therefore, necessarily reinforce or disrupt what the Supreme Court might term traditional views on America's place in the world, national security, economic and social policy, patriarchy, white supremacy, and other deep questions of values. They also make and expose schoolchildren to judgments about more modern understandings of these topics, whether the judgments being offered are positive or negative.

Substantial religious perspectives exist on every side of all these issues. If the possibility of parents' religious disagreement gives rise to constitutional notice and opt-out rights, that will be so for virtually everything in the curriculum. No matter what curricular choices a school district makes, there will likely be some parents in a religiously pluralistic community who disagree.

Moreover, the prevailing norms of free-exercise substance, pleading, and proof will make it all too easy to establish a *prima facie* case of a violation of parents' rights. Under decisions like *Thomas v. Review Board*⁸⁰ and *Burwell v. Hobby Lobby Stores, Inc.*,⁸¹ government cannot readily dispute the content of claims that its actions have burdened religious liberty.

For reading assignments, the potential claims are legion. If, for example, a parent asserts that she believes in patriarchy and that an assignment normatively subverts her child's belief in that mode of social ordering, the school district will have great difficulty defending a denial of notice and opt-out rights. Successfully challenging parental sincerity will be nearly impossible. For parents' objections to readings that in any way show women challenging the authority of men, asserting

⁸⁰ *Thomas v. Review Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981).

⁸¹ 573 U.S. 682 (2014).

authority over men, or even just having a valid place in the political or working world outside the home, the claim of subversion could not be defeated. These concerns are far from hypothetical. The plaintiff-parents in *Mozert*, for example, raised precisely these objections to standard elementary-school readers.⁸²

This approach to burdens on religious freedom is thus far looser and more plaintiff-friendly than in conventional cases about religious coercion. Ordinarily, free-exercise claimants must show that government has imposed some objective detriment to their exercise of religion, by either punishing them or depriving them of a governmental benefit.⁸³ The *Mahmoud* principle demands neither. The so-called burden is atmospheric, residing in the environment of learning. When *Mahmoud* repudiated the long-standing idea that exposure alone is not a burden on parents' religious freedom, it opened the door to a limitless set of claims.

D. Will *Mahmoud* Rescue Establishment Clause Values?

Ironically, *Mahmoud* may turn out to be a check on the current rush to reintroduce school-sponsored prayer and reverential messages in public schools. Since the middle of the twentieth century, the Supreme Court has treated the Establishment Clause as the primary locus of the rights of public-school students to be free from religious indoctrination and compulsory religious exercises.⁸⁴ That clause has thus protected

⁸² See *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1062 (1987) (parent objected to passages that recognized women for “achievements outside their homes” as religiously objectionable “role reversal or role elimination”).

⁸³ See, e.g., *Hobby Lobby*, 573 U.S. at 710, 719–26.

⁸⁴ See, e.g., *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (doctrinal religious instruction); *Engel v. Vitale*, 370 U.S. 421 (1962) (classroom prayer), *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (classroom prayer and Bible reading); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (ban on teaching evolution as contrary to Biblical

all students and their families, whether of the majority faith, minority faiths, or nonbelievers, from religious coercion. In the public schools, Establishment Clause rulings have reinforced free-exercise values.

Recently, however, the Roberts Court—within public schools and otherwise—has elevated a vigorous, ahistorical conception of free exercise as the preeminent Religion Clause value, while undercutting Establishment Clause concerns.⁸⁵ Moreover, the Court has done so even at the expense of religious dissenters.⁸⁶ As a result, Establishment Clause principles that have protected religious freedom in the public schools are now in jeopardy.

With this constitutional blood in the water, some legislatures, state and local educational officials, and advocates are pushing to reintroduce religious observance in schools.⁸⁷ Legal challenges to

account of creation); *Stone v. Graham*, 449 U.S. 39 (1980) (mandatory posting of Ten Commandments in classrooms); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (requirement that creation science be taught alongside scientific theory of evolution); *Lee v. Weisman*, 505 U.S. 577 (1992) (graduation prayer); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (prayer over public-address system at high-school football games).

⁸⁵ See, e.g., *Kennedy v. Bremerton Sch. Dist.*, 586 U.S. 1130 (2019). See also the additional decisions and secondary literature cited in note 10, *supra*. These moves have eroded norms of equal protection as well as nonestablishment. See Richard B. Katskee, *Taking Liberties: The Supreme Court's New Hierarchy of Rights and Its Victims*, 127 W. VA. L. REV. 173, 195 (2024).

⁸⁶ See *Kennedy v. Bremerton Sch. Dist.*, 586 U.S. 1130 (2019); *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29 (2019); *Town of Greece v. Galloway*, 572 U.S. 565 (2014). Professor Katskee was counsel for the respondents in both *Town of Greece* and *Kennedy*.

⁸⁷ Several states have passed legislation, described below, requiring public schools to display the Ten Commandments permanently in all classrooms. In addition, the Texas legislature recently passed several bills designed to support religious exercise for public-school students and employees. These bills are summarized in Howard Friedman, *Texas*

their actions that would traditionally have been straightforward victories under the Establishment Clause are now hotly disputed.

The leading example of this unsettling trend involves state laws requiring posting of the Ten Commandments in public-school classrooms. In 1980, the Supreme Court held in *Stone v. Graham*⁸⁸ that a statute requiring posting of the Ten Commandments in every public-school classroom in Kentucky violated the Establishment Clause.⁸⁹ *Stone* remains binding Supreme Court precedent.⁹⁰ Any requirement to post the Ten Commandments in public-school classrooms has for so long been a flagrant Establishment Clause violation that, until recently, only the most constitutionally reckless public officials would have tried such a thing.

The Supreme Court’s systematic efforts to dismantle the Establishment Clause have now, however, encouraged Arkansas, Louisiana, and Texas to enact laws requiring that posters with a Protestant version of the Ten Commandments “materially identical to the displays challenged in *Stone*” be placed on the walls of all classrooms in those states.⁹¹ The courts have thus far

Passes 3 Bills Promoting Religion in Public Schools, RELIGION CLAUSE (May 30, 2025), <https://religionclause.blogspot.com/2025/05/texas-passes-3-bills-promoting-religion.html> [<https://perma.cc/83A3-HYGW>].

⁸⁸ 449 U.S. 39 (1980).

⁸⁹ *Id.* at 40 (illustrating that, at that time, the Court saw no need even to describe, much less to analyze, the plaintiffs’ attendant free-exercise claim, but instead merely noted it in passing).

⁹⁰ *See, e.g.*, *Roake v. Brumley*, 141 F.4th 614, 647 (5th Cir. 2025); *id.* at 652–53 (Dennis, J., concurring). On October 6, 2025, the Fifth Circuit vacated the panel’s judgment in *Roake* and ordered that the case be reheard en banc. *See Roake v. Brumley*, 154 F.4th 329 (5th Cir. 2025).

⁹¹ *See Roake*, 141 F.4th at 643; *Nathan v. Alamo Heights Indep. Sch. Dist.*, No. SA–25–cv–00756–FB, 2025 WL 2417589 (W.D. Tex. Aug. 20, 2025) (“The Texas and Louisiana statutes require the display of the same specific version of the Ten Commandments in public school classrooms.”); *Ringer v. Comal Indep. Sch. Dist.*, __ F. Supp. 3d __, 2025

properly applied *Stone* and related Establishment Clause jurisprudence to hold the statutes unconstitutional. Tellingly, however, the Fifth Circuit panel in the Louisiana case felt the need to engage in extensive analysis to explain why the Supreme Court’s free-exercise decision in *Kennedy v. Bremerton School District* did not overrule *Stone*.⁹² The district court in the Arkansas case followed suit.⁹³

In lawsuits challenging these new measures, the plaintiff-parents in all three states quite understandably included free-exercise claims that would previously have been unnecessary distractions.⁹⁴ After the decision in *Mahmoud*, the district courts in the Texas and Arkansas cases took up and ruled in favor of the plaintiffs on their free-exercise claims.⁹⁵ The preliminary

WL 3227708 (W.D. Tex., Nov. 18, 2025) (“The state statutes are remarkably similar. If anything, [Texas] mandates more intrusive displays of the Ten Commandments than those at issue in *Stone*.”); *Stinson v. Fayetteville Sch. Dist. No. 1*, No. 5:25–CV–5127, 2025 WL 2231053 (W.D. Ark. Aug. 4, 2025) (Arkansas law “closely resembl[es]” the one enjoined in Louisiana).

⁹² See Roake, 141 F.4th at 637, n.14 (holding, that as a free-exercise case, *Kennedy* does not change the law on standing in Establishment Clause cases); *id.* at 642 (same for the merits); see also Ringer, 2025 WL 3227708, at *5–*6. For detailed analysis of why Establishment Clause norms remain substantially intact after *Kennedy v. Bremerton School District*, see Ira C. Lupu & Robert W. Tuttle, *The Ten Commandments in Louisiana Public Schools: A Study in the Survival of Establishment Clause Norms*, 100 CHI. KENT L. REV. 602, 621-630 (2025). For an encouraging sign in that direction, see *Arroyo-Castro v. Gasper*, 2025 U.S. Dist. LEXIS 215843, at *59–*70 (D. Conn. Nov. 3, 2025) (to avoid possible Establishment Clause liability, public school district may prohibit teacher from displaying one-foot-high crucifix on classroom wall during instructional time).

⁹³ *Stinson*, 2025 WL 2231053, at *11.

⁹⁴ Roake, 141 F.4th at 628; *Stinson*, 2025 WL 2231053, at *3; Nathan, 2025 WL 2417589, at *11.

⁹⁵ *Stinson*, 2025 WL 2231053, at *14–*15; Nathan, 2025 WL 2417589, at *52–53.

injunctions against enforcement of the display requirements in those states thus rest on both Religion Clauses.

Will *Mahmoud* now come to the rescue of imperiled Establishment Clause norms? The decision recognizes free-exercise rights for parents whose religious views are threatened by readings in school. School-sponsored religious messages would obviously present that hazard to some parents. In the ongoing Ten Commandments cases, for example, the postings compete with the parent-plaintiffs' views of the Decalogue.⁹⁶ The states will argue that the displays are passive, involving no recitation by students or instruction from teachers, and therefore do not burden free-exercise rights. This argument seems remarkably weak when the posters are on the wall of every classroom in every public school, all day long, in every grade from kindergarten through senior year of high school. The pervasiveness of the displays elevates them from exposure to state-promoted religious guidance, subverting any contrary religious perspective held by parents.⁹⁷

But the remedy under *Mahmoud* for free-exercise violations is an opt-out, not the interdiction of the exercise required by Establishment Clause decisions like *Engel*, *Schempp*, and *Lee v. Weisman*. When a display is on the wall (or every wall) for all to see, opt-outs for objecting students are impossible. The only way

⁹⁶ See Complaint ¶¶ 82–155, Roake, 141 F.4th 614 (No. 3:24-cv-00517), available at <https://www.aclu.org/cases/rev-roake-v-brumley?document=Complaint>; see Complaint ¶¶ 84–226, Nathan, 2025 WL 2417589 (No. 5:25-cv-00756), available at <https://assets.aclu.org/live/uploads/2025/07/Texas-Ten-Commandments-Complaint-FILED.pdf>.

⁹⁷ See *Mahmoud v. Taylor*, 606 U.S. 522, 620–21, n.11 (Sotomayor, J., dissenting). For free-exercise purposes, the pervasive presence of posters on the wall renders them readily distinguishable from books on a classroom shelf. As Justice Sotomayor's dissent explains, the mere presence of the books in a classroom would not be vulnerable to the ruling in *Mahmoud*.

to protect the religious freedom of dissenters is to remove the display entirely.

In a judicial climate in which once-settled Establishment Clause norms are vanishing, we can hardly be confident that this ironic twist on *Mahmoud* will prevail.⁹⁸ After all, the *Mahmoud* Court insists that its ruling does not require the complete removal of objectionable material.⁹⁹

If the Religion Clauses do not forbid schools to mount permanent displays of overtly religious sentiments, consistency requires the same treatment for secular displays alleged to subvert religious beliefs. For example, the Montgomery County Public Schools (and other districts) might consider permanently putting Pride Flags or other LGBTQ+-friendly messages on classroom walls. How teachers might constitutionally answer questions from students about Pride Flags or Ten Commandments posters is a puzzle that we leave to others.

III. SCHOOL ADMINISTRATION IN THE SHADOW OF *MAHMOUD*

As Part II demonstrates, lower courts are highly unlikely to confine *Mahmoud* to cases with similar fact patterns. That method limited *Yoder* for a half-century, but the *Mahmoud* opinion declares that a broader *Yoder* principle has now been unleashed. The Court's explicit concern in *Mahmoud* is the protection of religious beliefs of parents with minor children in public schools. As explained in Part II, that concern cannot be

⁹⁸ See Schwartzman et al., *The Structure of Religious Preference*, *supra* note __, at 236 (“It is possible the Court will treat the government’s religious speech more deferentially than it treats the government’s secular speech.”).

⁹⁹ *Id.* at 568 (“Providing . . . an opportunity [to opt out] would give the parents no substantive control over the curriculum itself.”).

bound by the age of the minors or the academic subject in which instruction occurs.¹⁰⁰

New parental claims will no doubt appear as schools distribute each semester's reading lists. Moreover, the religious-liberty field is now crowded with groups like the Becket Fund, Alliance Defending Freedom, First Liberty Institute, and a rash of newly formed law-school clinics devoted primarily to free-exercise concerns.¹⁰¹ There will be no shortage of parents inclined to object to assignments on many subjects, aimed at all ages, and no shortage of legal representation for them.¹⁰² Any resulting lawsuits would be expensive for school districts, especially if facts are in dispute. Moreover, if school districts are unsuccessful in litigation, they are likely to face attorney-fee awards to the plaintiffs, as well as the costs of their own defense. Hence, it will frequently be far cheaper and less risky to capitulate than to fight *Mahmoud* claims.

With these concerns in mind, what should school districts do in response to the decision in *Mahmoud*? To what extent should

¹⁰⁰ Nevertheless, the decision's reach is not boundless. See *Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ.*, No. 23–3740, 2025 WL 2453836 (6th Cir. Aug. 26, 2025). Parents objected on free-exercise grounds to transgender girls' being permitted to use a communal girls' bathroom that the Does' daughter used. By a 2–1 vote, the panel held that *Mahmoud* does not apply to noncurricular decisions. This refusal to extend *Mahmoud* to all operations of a public school seems sound. If *Mahmoud* extends beyond the program of instruction, it would authorize opt-outs from, among other things, any interactions with teachers, school staff, or other students based on their race, sex, sexual orientation, or gender identity. Nothing in the opinion supports that broad reading.

¹⁰¹ The law schools at Stanford, Harvard, Yale, Notre Dame, the University of Texas, Pepperdine, and the University of St. Thomas all now operate religious-liberty clinics.

¹⁰² If *Mahmoud* opt-out rights were extended to all parents, not just religious ones, the frequency of these demands and legal claims would be even greater.

they anticipate parental claims and try to channel them into procedures for fair and efficient administrative treatment?

School districts nationwide are undoubtedly scrambling to make sense of the new parental rights that the Supreme Court recognized in *Mahmoud*. With few data points currently available, we have investigated the immediate response from the defendant, Montgomery County Public Schools. The Court's opinion included this direction to the district court on remand:

[U]ntil all appellate review in this case is completed, the [MCPS] Board should be ordered to notify [the plaintiff-parents] . . . in advance whenever one of the books in question or any other similar book is to be used in any way and to allow them to have their children excused from that instruction.

Classes at MCPS opened for the Fall semester on August 26, 2025. As of that date, the remand in *Mahmoud* had not yet produced a responsive order from the federal district court in Maryland. Even when that order appears, the Supreme Court's mandate does not extend beyond the rights of the three couples who actually sued to receive notice and opt-out opportunities with respect to books with LGBTQ+ characters in their children's elementary-school classes.¹⁰³

Yet as the school year commenced, MCPS announced a new set of policies to govern religion-based opt-out claims by parents and guardians. The three-page MCPS Regulation, issued August

¹⁰³ The *Mahmoud* precedent applies nationwide, but the Supreme Court's decision last Term barring universal injunctions reinforces that the district court's order must be limited to the plaintiffs. See *Trump v. CASA, Inc.*, 606 U.S. 831, 841–47 (2025). *Mahmoud* was not a class action, so the injunction will run in favor of the named plaintiffs only.

21, 2025, is entitled “Curriculum Transparency and Requests to Be Excused from Instruction.”¹⁰⁴

What is immediately striking about the MCPS Regulation is its breadth. It includes all curricular matters and subjects, including Language Arts, Social Studies, Mathematics, and Science, in grades K–12.¹⁰⁵ In other words, its coverage extends far beyond the factual context of *Mahmoud*, the parents’ demands in the litigation, or the Supreme Court’s directive for a preliminary injunction. The Regulation requires timely notice to parents and guardians of all reading assignments, the opportunity to review the instructional materials, and the possibility of having their children excused and provided with alternative instruction.¹⁰⁶

The Regulation opens with a declaration of the purposes to permit parents to (1) review curricular materials, (2) identify “specific core instructional materials that substantially interfere with a sincerely held religious belief,” (3) “request that their child be excused from any portion of instruction involving that material,” and (4) ensure the provision of alternative materials

¹⁰⁴ Montgomery Cnty. Pub. Sch. Regul. IFD-RA § I (2024). *See generally Request to Be Excused from Instructional Material*, MONTGOMERY CNTY. PUB. SCH. (Aug. 2025), <https://ww2.montgomeryschoolsmd.org/departments/forms/pdf/281-26.pdf> (providing a form to accompany the MCPS Regulation, designated as “Request to be Excused from Instructional Material,” for parents to fill out and submit to the school district’s Division of Student Conduct and Appeals). The 2025–2026 MCPS Guidelines for Respecting Religious Diversity echo this new regulation with respect to core curricular materials, but the reference awkwardly remains under a heading that references excusal from noncurricular activities. <https://www.montgomeryschoolsmd.org/siteassets/district/students/rights/religiousdiversity/religious-diversity-guidelines-2025-2026-secured.pdf>, at p.4.

¹⁰⁵ *See* Montgomery Cnty. Pub. Sch. Regul. IFD-RA § III (A) (2024).

¹⁰⁶ *Id.* §§ IV-V.

“in a non-punitive manner” for any student whose parents’ request has been approved.¹⁰⁷

Section II of the MCPS Regulation offers a guiding philosophy. The school district reaffirms its commitments to respect all students and to ensure that the “lives, experiences, and cultures” of students be reflected in classroom materials.¹⁰⁸ The MCPS Regulation also reaffirms the rights of students to “express their religious or nonreligious beliefs and practices free from discrimination.”¹⁰⁹ For the first time, however, the school district acknowledges “that students and families may seek to refrain from participation in specific portions of instruction that substantially interfere with their sincerely held religious beliefs.”¹¹⁰

What follows the Regulation’s introductory sections are specifications for notice and review with respect to curricular materials,¹¹¹ and the substantive standards by which the school district will evaluate requests to be excused from instruction.¹¹² The notice requirements begin with a commitment that the district will provide to parents electronically, before each marking period, a comprehensive list of core instructional materials to be

¹⁰⁷ MCPS Regulation § I.

¹⁰⁸ *Id.* § II. To the best of our knowledge, MCPS has not eliminated from the Language Arts curriculum for grades K–5 any of the books that were on the approved list as of the date of the Supreme Court’s decision in *Mahmoud*.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ The regulation applies to “core instructional materials,” defined as “text(s) or textbook(s) that are directly aligned with MCPS curriculum that have been designated by the [school district] for use as a primary and supplemental source of instruction in core curriculum areas.” *Id.* § III.D.

¹¹² *See id.* § IV (G).

used.¹¹³ Parents will have the opportunity to review those materials on request to a “school-based administrator.”¹¹⁴ These administrators are then required to make the materials available for inspection within seven school days after receiving the request.¹¹⁵

The burden to review materials for objectionable content rests with the parents. The school district is not going to do the work of searching out, for example, all references to certain themes or subjects. It is reasonable to expect, therefore, that political groups will help with this kind of screening, which may in turn lead to a strikingly broad set of objections.

The operative section on “Requests to be Excused from Specific Core Instructional Materials” authorizes parents to “submit requests to have their child excused from instruction involving core instructional materials that substantially interfere with a sincerely held religious belief.”¹¹⁶ These requests must be

¹¹³ *Id.* § IV. The Regulation uses the term “marking periods” to refer to quarters of the academic year. Each of the four marking periods is approximately ten weeks long. See <https://www.montgomery.k12.nc.us/calendar>.

¹¹⁴ MCPS Regulation § V.

¹¹⁵ *Id.*

¹¹⁶ *Id.* § VI.A. The reference to “specific materials” seems designed to exclude blanket requests for exclusion from all instruction on particular subjects—*e.g.*, all instruction pertaining to sexual orientation or gender identity, or all instruction relating to the scientific theory of evolution. For discussion of that sort of request, see Thomas Peele, *California Schools Brace for Fallout from U.S. Supreme Court Decision on Religious Rights*, ED SOURCE, Aug. 25, 2025, <https://edsource.org/2025/alternatives-public-school-education/739199?amp=1>. In *Alan L. v. Lexington Public Schools*, 2025 U.S. Dist. LEXIS 267350 (D. Ma., Dec. 30, 2025), the court entered a preliminary injunction requiring notice and opt-out rights for books that include LGBTQ+ themes for a parent of a child in kindergarten. The complaint more broadly referenced “content that focuses on diversity, equity, and inclusion including issues of race, gender, and sexuality, taught from a secular world view,” *id.* at

made within the first ten days of the marking period.¹¹⁷ The form on which the requests are to be made will go to a centralized authority, the school district’s Division of Student Conduct and Appeals, rather than to personnel at the school that the student attends.¹¹⁸

The excusal form asks parents “to determine whether the use of specific core instructional materials substantially interferes with their sincerely held religious beliefs.”¹¹⁹ It requires the parents to list books or chapters from which they want their children excused.¹²⁰ In a striking omission, the form does not ask for any specification of religious belief or recital of the quality or quantity of the interference with that belief. Thus, the school district will not review the religious content or sincerity of claims. The only grounds for denial of requests are, as explained below, extrinsic to the religious claims being made.

Requests are then to be reviewed by the school district’s Division of Student Conduct and Appeals, which, as the name

*5 & n.3, but the opinion and preliminary injunction address only content involving LGBTQ+ characters or themes. The order requires notice and opt-out rights with respect to ten identified books used in the curriculum, *id.* at *35–*38. The order also requires notice and the opportunity to opt out of “Other LGBTQ+ Educational Materials,” defined as materials that might be used in the kindergarten curriculum that “depict or describe LGBTQ+ characters, relationships, or activities, or LGBTQ+ political or social advocacy.” *Id.* The order sets forth protocols for opt-outs and possible adjudication of the applicability of *Mahmoud* to each of these “Other LGBTQ+ Educational Materials.”

¹¹⁷ *Id.* MCPS Regulation § VI.C. Families that are new to Montgomery County are given 30 days to make opt-out requests.

¹¹⁸ *See id.* § IV (D).

¹¹⁹ The form, designated MCPS Form 281-26 (August 2025), is titled “Request to be Excused from Instructional Material.” It is available at <https://ww2.montgomeryschoolsmd.org/departments/forms/pdf/281-26.pdf>.

¹²⁰ *See id.*

suggests, normally handles appeals from school-level decisions on student discipline.¹²¹ Parents are promised a decision within ten school days after submission.¹²² The MCPS Regulation thus contemplates the possibility of a decision coming more than three weeks into a ten-week marking period—ten calendar days from the beginning of the marking period to submit the request, plus ten school days for the response.

The precision and mechanical qualities of the submission process contrast sharply with the discretion that appears in some of the MCPS Regulation’s listed grounds for denial, and even more in the description of what approval entails beyond the excusal itself. The MCPS Regulation specifies but does not explain four categories of permissible denials: (1) excusals from the entirety of a course required for graduation; (2) excusals from “instructional standards, objectives, and content required by law” (3) excusals that would fundamentally alter the required curriculum; and (4) incomplete requests.¹²³

Categories one and four—complete excusal from a required course and incomplete requests—are straightforward enough. Category two seems designed to block efforts to use opt-outs to force the district or a teacher to redesign learning goals and measures of achievement.¹²⁴

The most significant category of denials is category three, excusals that would “fundamentally alter the required

¹²¹ See Montgomery Cnty. Pub. Sch., Division of Student Conduct and Appeals, <https://www.montgomeryschoolsmd.org/departments/appeals/>.

¹²² MCPS Regulation § VI.D. The MCPS Regulation does not specify what happens if the district fails to meet this deadline.

¹²³ *Id.* § VI.G(1)–(4).

¹²⁴ The denial category of “content required by law,” unless further explained, leaves open the constitutionally dubious move of trying to avoid *Mahmoud*-type claims by making certain reading assignments legally obligatory.

curriculum.”¹²⁵ Because the school district does not provide commentary accompanying any of the categories, we can make only educated guesses about the district’s concern for fundamental alteration of the curriculum.

It seems reasonable to assume that this concern applies primarily to courses in science and social studies rather than language arts. In a typical English course, the teacher chooses for intensive study a set of books that demonstrate a variety of literary forms (*e.g.*, novel, short story, poetry) and genres (*e.g.*, science fiction, fantasy, realism, historical fiction). An opt-out from one book leaves open the possibility of assigning a different book from the same category. Though substitute books may yield slightly different lessons, and the substitution process may prove administratively disruptive, neither will necessarily compromise pedagogical objectives.

In contrast, an opt-out from assigned readings in science or social studies may substantively alter the content of the course, and perhaps the entire program of instruction in the subject across multiple grades. Consider opt-outs from material on the evolution of species in biology, or on the age of our planet in Earth and Space Science. The study of evolution is essential to exploring the nature of life today as well as to understanding the way that living things have changed and diversified over billions of years. Likewise, Earth’s history and the processes that have shaped it cannot be understood without recognizing that the Earth is billions rather than thousands of years old. Lessons on evolution or the age of the Earth may well conflict with some parents’ sincere religious beliefs.¹²⁶ Removing these lessons, however, will

¹²⁵ Montgomery Cnty. Pub. Sch. Regul. IFD-RA § VI (G)(3) (2024).

¹²⁶ The conflict between creationist religious beliefs and the teaching of evolution in the public schools has occupied American courts for a century. The summer of 2025 marked the 100th anniversary of the famous trial of John Scopes for violating Tennessee’s Butler Act, which prohibited teaching the scientific theory of evolution, or “any theory that denies the story of the Divine Creation of man as taught in the

have profoundly negative consequences for learning objectives throughout the science curriculum.

The same is true for material on race and slavery in American history, government, economics, and other social-studies courses. What students learn in each of these fields is profoundly shaped by the treatment in the curriculum of slavery and race relations. On these topics, we can easily imagine opt-out requests from the left as well as from the right.¹²⁷

The pro-parent tilt in *Mahmoud* is sufficiently extreme that it is difficult to predict the outcome of free-exercise litigation if parents challenge a denial of opt-out rights in a case involving science or social studies. Defending a denial in court will thus require substantial resources and constitutional fortitude on the part of school administrators and elected school-board members, who might find it simpler (though not simple), or at least safer, to accommodate objectors.

The decision whether to fight a court battle will also be affected by the administrative and pedagogical costs of

Bible . . .” 49 TENN. CODE ANN. § 1922 (repealed 1967); see <https://www.newyorker.com/magazine/takes/paige-williams-on-marquis-james-ss-preview-of-the-scopes-monkey-trial>. The prominent federal constitutional decisions include *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Edwards v. Aguillard*, 482 U.S. 578 (1987); and *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa. 2005) (holding that public school violated Establishment Clause by teaching intelligent-design creationism). Professor Katskee was counsel for the plaintiffs in *Kitzmiller*.

¹²⁷ Consider, for example, the recent amendment to Florida’s state social-studies standards requiring instruction on “how slaves developed skills which [sic] . . . could be applied for their personal benefit.” Florida’s State Academic Standards—Social Studies SS.68.AA.2.3 (2023), <https://www.fldoe.org/core/fileparse.php/20653/urlt/6-4.pdf>. Many parents in Florida surely object, on religious grounds as well as on secular ones, to lessons teaching that slavery produced any beneficial effects. At the same time, some parents may share the Florida legislature’s objection to teaching that slavery was unqualifiedly evil.

accommodation. In this regard, we note that the MCPS Regulation addresses in much less detail what occurs if a request to be excused from instructional materials is approved. Here are the two pertinent provisions, in full:

E. If the request is approved, the student's principal and teachers will be notified and the school will consult with the [district's] Division of Teaching and Learning to identify suitable alternative text(s), textbook(s) and/or assignment(s).

F. Students who are excused from instruction under this regulation may be afforded the opportunity for other academic work during the period of time in which the student would otherwise be participating in the instruction the student is excused from.¹²⁸

Notably, it is only after the district approves an excusal request that the classroom teacher and school principal are formally notified of the parents' request. Parents or the student may, of course, provide this more local notification themselves at any point, but they are also free to remain anonymous and silent at their own school up to the point when the opt-out is granted. Accordingly, a teacher may not learn about a request until several weeks into the marking period. By that time, the teacher may already be using the challenged material, and the lessons for the marking period may be set.

At this point, the disruptions attendant on approved excusals will show up with a vengeance. Students will be excused from class or parts of class. Where they will go is left unspecified. But if they remain in school, they will have to go *somewhere* outside their regular classroom, and they will need supervision. Moreover, if alternative work is to be assigned, the teacher or other school- or district-level personnel will have to select the

¹²⁸ Montgomery Cnty. Pub. Sch. Regul. IFD-RA § VI (E)–(F) (2024).

alternative lessons and instructional materials. Someone will have to evaluate the student's work and integrate that evaluation with other evaluations for students in the class.¹²⁹ Similarly, tests for the class will have to be written with an eye to the opt-outs. Either material that any student is excused from will have to be excluded from all testing, or opt-out students will have to be given different tests from the rest of the class.

Consider as well a situation in which one parent objects on religious grounds to exposing her child to some instructional material, but the child's other parent objects to excusal from the lesson. This sort of disagreement about children's upbringing is a commonplace in divorce and child-custody proceedings, especially (but not only) when the parents are of different faiths. Deciding between competing parental demands is difficult enough for family courts, which have the legal authority to resolve those disputes. School officials have neither the authority nor the institutional competence to adjudicate these issues.

In late October, 2025, we learned of a response to a Maryland Public Information Act request, dated September 18, 2025, seeking data on curriculum opt-out requests in MCPS during the first marking period.¹³⁰ The Response shows that forty-three families filed requests. The forty-three families (some with more than one child) submitted a total of fifty-eight opt-out forms—

¹²⁹ In the *Mahmoud* litigation, the most thorough account of the disruptions that will likely attend an opt-out regime appears in the Brief for Amici Curiae American Association of School Superintendents et al. in Support of Neither Party, *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025) (No. 24-297), https://www.supremecourt.gov/DocketPDF/24/24-297/351706/20250310181805441_24-297--Mahmoud%20Amicus%20Brief%20AASA%2003-09%20rtf.pdf.

¹³⁰ The document is available here: <https://www.documentcloud.org/documents/26182132-fy26-70-responsive-document/>. All the data in this and the following two paragraphs are derived from the response to that request.

forty-six in twenty different elementary schools, ten in six different middle schools, and two in one high school.

The Response lists 85 books as among the “Most Common” listed on the opt-out-request forms, and defines “most common” as appearing on five or more forms. Hence, the forty-three first movers in Montgomery County filed forms containing at least 425 (5 x 85) opt-out requests, an average of almost ten per family and perhaps greater.

The Response designates the most common themes for listed books in elementary schools as “LGBTQ+, Culture/Diversity, and Inclusion,” and in middle schools as “LGBTQ+ and Social Justice.” The list of Most Common Books reinforces the notion that opt-outs are not limited to LGBTQ+ themes. Approximately three-quarters of the books on that list appear to touch on LGBTQ themes, though at times only obliquely. The remainder (20 to 25 books) fall into various thematic categories, the most common of which is racial and ethnic diversity.¹³¹

For example, a common book for opt-out requests from the high-school curriculum, *All American Boys*,¹³² is a young-adult novel about the connection of two teenagers, one black and one white, to an incident of police brutality. MCPS’s Public Information Act Response does not identify any religious objection to the book; and as noted above, parents need not explain their objections. The list of most common books for opt-out requests also includes *Charged: Prosecution and Mass*

¹³¹ In *Alan L. v. Lexington Public Schools*, 2025 U.S. Dist. LEXIS 267350 (D. Ma., Dec. 30, 2025), described in note ___ *supra*, the complaint also included objections to teaching about race, but the court did not address those in its preliminary injunction. *Id.* at *5 n.3; *see also* *Ibanez v. Albemarle Cnty. Sch. Bd.*, 897 S.E.2d 300, 323-326 (Va. Ct. App. 2024) (rejecting federal and state constitutional claims by parents attempting to veto or opt out of anti-racism curriculum).

¹³² JASON REYNOLDS & BRENDAN KIELY, *ALL AMERICAN BOYS*, <https://www.allamericanboysnovel.com>.

Incarceration, and such noteworthy titles as *Aladdin and the Wonderful Lamp*, *Alice’s Adventures in Wonderland*, and *The Tempest*.

We filed our own Public Information Act request with MCPS for the second marking period, which began in early November. In a response dated December 1, we learned that sixteen families filed opt-out requests during that period.¹³³ The total number of forms filed was twenty-four, including seventeen in elementary schools, five in middle schools, and two in high schools. Twenty-nine books were listed as “Most Common,” which means that sixteen families filed forms that included more than 145 requests, an average of about nine per family and perhaps more. The Response also discloses that one or more families opted out of eighty books.

In the second marking period, the most common themes for objection in elementary school remained “LGBTQ+, Culture/Diversity, and Inclusion.” Of the twenty-nine most commonly listed books, twenty-seven were repeats from the list for the first marking period, including all the books involved in the *Mahmoud* litigation. A few books appear as new in the second marking period. In middle school, parents filed opt-out requests from *The Iliad, the Odyssey, and other Greek Stories*,¹³⁴ which may perhaps have drawn objections to references to Greek Gods. In high school, one or two parents sought opt-outs from a book

¹³³ Maryland Public Information Request, Curriculum Opt Out Responses, Responsive Document FY 26-176 (on file with the authors and the First Amendment Law Review). The information in this and the following paragraph comes from that Response.

¹³⁴ This work is contained in a full set of curricular materials, available here: <https://www.coreknowledge.org/free-resource/ckla-unit-4-the-iliad-and-the-odyssey-and-other-greek-stories/>.

entitled *The Magic Fish*,¹³⁵ a graphic novel about a boy coming out as gay in his Vietnamese immigrant family.

These results are early and sparse. It is far too soon to know whether the patterns might change, or whether the result of opt-out requests (in Montgomery County or elsewhere) might be the abandonment of certain books or lessons, contrary to Justice Alito's assertion that the *Mahmoud* litigation was not designed to control the curriculum and would not have that effect.¹³⁶ At some critical juncture, the scarcity of classroom space, teachers and other supervisors, and resources to acquire specialized instructional materials for individual students will mean that objectors will effectively wield a heckler's veto over portions of the curriculum.¹³⁷

The concerns identified in this Part focus on MCPS, because that district is the defendant in *Mahmoud*. MCPS created the new Regulation and accompanying notice form in the shadow of the Supreme Court's decision. But in student age and curricular subject matter, the MCPS Regulation goes far beyond the Supreme Court's mandate.

The school district's regulatory action seems prudent in its broad outlines as a response to the radical provocation of *Mahmoud*. Nevertheless, we cannot know at this point how well

¹³⁵ Trung Le Nguyen, *The Magic Fish*, Random House, 2020, <https://www.penguinrandomhouse.com/books/602718/the-magic-fish-by-trung-le-nguyen/#:~:text=A%20beautifully%20illustrated%20story%20by,have%20our%20own%20happy%20endings>.

¹³⁶ *Mahmoud*, 606 U.S. at 568.

¹³⁷ In litigation over curriculum, parents frequently seek vetoes and opt-outs as alternative remedies. See Ira C. Lupu, *The Centennial of Meyer and Pierce*, *supra* note __, at 198–215. Justice Alito suggests in *Mahmoud* that bundling the objectionable lessons into fewer class sessions might make opt-outs more efficient to administer. 606 U.S. at 567. That strategy may also make the lessons less effective, however, by reducing their pervasiveness over the school year.

the MCPS policies will match those chosen by the more than 10,000 school districts throughout the United States.¹³⁸ Nor can we predict the exact quality and quantity of disruptions that will follow the policy responses to *Mahmoud* in all those districts. Some districts may allow many fewer excuses and choose to fight demands for them. Some may proactively strike from the curriculum anything that they think might potentially offend anyone, leaving only scraps from which to fashion a curriculum. Some may act on assumptions that favor the majority faith, or the most litigious religious groups, over other religions and their adherents. In short, differences in demographics and in the wealth and political will of school districts may lead to differences in policy, administration, and the character of readings that might provoke opt-out requests.

Despite these possible differences, it is apparent that *Mahmoud* has handed a weapon to groups that want to purge school reading lists of materials that they dislike, even though the groups lack the numbers or political clout to win battles over curriculum and instructional materials through ordinary processes of school reform. *Mahmoud* transfers power away from school boards, which are democratically controlled, to individual parents, lawyers, and ultimately judges. In the name of the free exercise of religion, what look like pleas for accommodation may become engines of transformation. As we noted at the outset of this paper, the Supreme Court has never before intruded so radically on the process of public education and its governance.¹³⁹

Mahmoud may also cut much deeper, undermining the long-standing purposes of the public schools. Public education is designed to be a shared experience that teaches and gives students the opportunity to practice the shared values necessary

¹³⁸ *Mahmoud*, 606 U. S. at 616 (Sotomayor, J., dissenting, citing Brief for Amici Curiae American Association of School Superintendents et al. in Support of Neither Party, representing 10,000 school districts).

¹³⁹ See *supra* notes 2–7 and accompanying text.

to live together in a politically and socially diverse, religiously pluralistic society. At their best, public schools respect differences while providing common vocabularies, understandings, and frames of reference. The educational system brings students together not to deprive them of the right to choose their own beliefs and paths in the world, but to allow them to chart their own course while also living alongside and in relative harmony with those who make different choices.

Once upon a time, the Supreme Court recognized that public education should “inculcate fundamental values necessary to the maintenance of a democratic political system”¹⁴⁰ A key aim, as the Court underscored, is to “prepare pupils for citizenship” by “inculcat[ing] the habits and manners of civility as values . . . indispensable to the practice of self-government in the community and the nation.”¹⁴¹ Achieving that aim requires advancing the “fundamental values” of “tolerance of divergent political and religious views” and respectful discourse with those with whom one disagrees.¹⁴² If parents are now entitled to send their children to public school but insulate them from influences that differ from the parents’ views, these critical lessons will be lost.

¹⁴⁰ *Ambach v. Norwick*, 441 U.S. 68, 77 (1979).

¹⁴¹ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting CHARLES A. BEARD & MARY RITTER BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

¹⁴² *Id.*