“Protecting the Primacy of Parental Religious Liberty Rights: a Post-Mahmoud Analysis”

Testimony Before

House Committee on Education and Workforce

Subcommittee on

Early Childhood, Elementary, and Secondary Education

Chairman Kevin Kiley

United States House of Representatives

February 10, 2026

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Statement for the Record

Chairman Kiley, Ranking Member Bonamici, and distinguished Members of the subcommittee:

Good morning. My name is Sarah Parshall Perry, and I am Vice President and Senior Legal Fellow at Defending Education. As a legal scholar, a policy analyst, and a mother, the issue we're here today to discuss is near to my heart, and I commend the Committee for holding a hearing on such an important topic.

Mahmoud v. Taylor[1] wasn't simply an extraordinary case because of its well-reasoned holding and sound, originalist jurisprudence; it was extraordinary insofar as the Petitioner's challenges were necessary in the first place. That their years-long effort to opt their children out of questionable curriculum pursuant to their free exercise rights required the Supreme Court's deliberation at all is a grave condemnation of the state of American education writ large.

By a vote of six to three, the Supreme Court correctly decided in *Mahmoud* that the Montgomery County School Board's elimination of both notification and parental opt-out for certain LGBTQ themed instructional materials was an impermissible burden on the religious freedom of a multi-faith group of parents, and that they were entitled to injunctive relief during the pendency of the litigation.

The Court's holding was uncontroversial. But as might have been expected, the Supreme Court's opinion in *Mahmoud* elicited feverish condemnations from progressive commentators. Slate insisted that the "Supreme Court ruled some Americans have a constitutional right to insist on theocracy."[2] School Library Journal called the ruling "devastating."[3] Vox charged that the "Supreme Court just imposed a 'Don't Say Gay' regime on every public school in America."[4]

These mischaracterizations are indicative of the cultural maelstrom surrounding the operation of—and parental involvement in—modern American public education, where

[1] *Mahmoud v. Taylor*, 606 U.S. 522 (2025).
[2] Heidi Li Feldman, *Supreme Court Rules Some Americans Have a Constitutional Right to Insist on Theocracy,* SLATE, https://slate.com/news-and-politics/2025/06/supreme-court-rules-constitutional-right-theocracy.html?pay=1770154251617&support_journalism=please, June 30, 2025.
[3] Kara Yorio, "In 'Devastating' Decision, Supreme Court Rules In Favor of Parents in Mahmoud v. Taylor, SCHL LIB. JOURNAL, https://www.schoollibraryjournal.com/story/In-Devastating-Decision-Supreme-Court-Rules-Favor-Parents-Mahmoud-Taylor, June 27, 2025.
[4] Ian Millhiser, "The Supreme Court just imposed a 'Don't Say Gay' regime on every public school in America," VOX, https://www.vox.com/scotus/417974/supreme-court-dont-say-gay-mahmoud-taylor-schools, June 27, 2025.

the heat of battle is most intensely felt at the intersection of parental rights, religious liberty, and gender orthodoxy.[5]

In 1972, the Supreme Court in *Wisconsin v. Yoder*[6]ruled that parents' interest in the free exercise of religion under the First Amendment outweighed the State's interest in compelling school attendance beyond the eighth grade. The *Mahmoud* majority, in an opinion penned by Justice Alito, criticized the Fourth Circuit Court of Appeals' impossibly narrow construing of *Wisconsin v. Yoder* when it assessed the parents' claims and considered how far their religious parental rights extended. The lower court's view was that nothing short of government compulsion to renounce or abandon one's religious faith would amount to a burden on a parent's right to raise their child in accordance with the traditions of their religion.

The Supreme Court sharply disagreed. Alito wrote that the Court had never confined *Yoder* to its facts, and there was no reason to conclude that the decision was "sui generis" or "tailored to [its] specific evidence."[7] And because the board's policies substantially interfered with the parents' ability to guide the religious development of their children, the appellate court had significantly erred.

The books and classroom instruction at issue were no pedestrian exercises in tolerance and diversity; rather, they were designed explicitly to "disrupt" the thinking of children between four and 11 years old on issues of sex and gender and directly geared at changing their perspectives on issues that, as recently as a decade or two ago, would have been beyond debate.

Alito identified these curricular characteristics, writing that the books at issue were "unmistakably normative"[8] and that the board had even encouraged teachers to accuse

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[5] So contentious is the notion of "parental rights," that in October 2021, U.S. Attorney General Merrick Garland released a memorandum calling on federal agencies to work with states on "strategies for addressing threats against school administrators, board members, teachers, and staff" in response to the increasing number of parents protesting the inclusion of, among other things, sexually graphic material in public schools. See *Memorandum for Director*, FEDERAL BUREAU OF INVESTIGATIONS, Dir. of the Exec. Office for U.S. Att'ys, Assistant Att'y Gen. of the Crim. Div., and U.S. Att'ys (Oct. 4, 2021), https://www.justice.gov/ag/file/1170061-0/dl?inline=. That year, a group of parents based in Michigan and Virginia filed a lawsuit against the Department of Justice over the memo, arguing that the intention of the guidance was to censor parents—especially those espousing conservative views. The appeal reached the U.S. Supreme Court, but the Court declined to hear the case on October 7, 2024. See also John Fritze, *Supreme Court Won't Hear Case from Parents Fighting Justice Department Memo on School Board Threats*, CNN (Oct. 7, 2024), https://www.msn.com/en-us/news/ other/supreme-court-won-t-hear-case-from-parents-fighting-justice-department-memo-on-school-board-threats/ar-AA1rPQnF?ocid=BingNewsSerp.

[6] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[7] *Mahmoud*, 606 U.S. at 557-558.

[8] *Id.* at 550.

children of being "hurtful" when they expressed an alternative view. That, Alito wrote, was the kind of "objective danger to the free exercise of religion that the First Amendment was designed to prevent."[9]

During oral arguments, on questioning from the justices about why the originally offered opt-out right had been revoked without explanation, Montgomery County School District's attorney Alan Schoenfeld answered that opt-outs were not administrable due to the sheer number of parents who had exercised that option. When Alito asked why the LGBTQ themed curriculum couldn't simply be presented during health class, where opt-out rights already existed, Schoenfeld argued that there was "no constitutional obligation" on the school's part to do so.[10]

An increasingly frustrated Alito then pressed Schoenfeld on the line between "exposure" and "coercion." He noted that the material "expresses the idea—subtlety—that this is a good thing," asking Schoenfeld why the Montgomery County Board of Education was running away from "what they clearly wanted to say"—that it had a very definite view on LGBTQ themes.[11] Schoenfeld responded that the message that "these things ought to be normalized and treated with respect" was merely incidental to the curriculum itself.[12]

The "normalization" of which Schoenfeld spoke, the "respect" urged by the Board for lifestyles, beliefs, and choices that are antithetical to most faith traditions, is precisely why the *Mahmoud* parents sought an opt-out from the start. Re-programming efforts camouflaged as the insistence on "tolerance" and "respect" for LGBTQ themes, policies, and choices are the detritus of the Supreme Court's ruling in *Obergefell v. Hodges*[13] that divined a constitutional right to same-sex marriage in the same illiberal and confounding way that the Court had divined a constitutional right to abortion in *Roe v. Wade*.

Issued nearly 10 years to the day before the Mahmoud decision, the *Obergefell* ruling assuaged Americans with the promise that they would still be able to live by their "decent and honorable beliefs" on the nature of marriage.[14] In his *Obergefell* majority opinion, Justice Kennedy promised that "those who adhere to religious doctrines, may

[9] *Id.* at 546.
[10] HERITAGE REPORTING COMPANY, Oral Argument Official Transcript, *Mahmoud v. Taylor*, 24-297_2035.pdf (April 22, 2025).
[11] Id.
[12] Id.
[13] *Obergefell v. Hodges,* 576 U.S. 644 (2015).
[14] *Id.* at 672.

continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."[15]

Alito, in his prescient *Obergefell* dissent, decried the decision in part for its anticipated impact on the religiously faithful:

> *It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women… The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.*[16]

Indeed, those implications were exploited, leading to a flurry of Supreme Court controversies in the years post-*Obergefell*. In cases like *303 Creative v. Elenis*,[17] *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[18] and *Fulton v. City of Philadelphia*,[19] the battle between sexual orthodoxy and religious liberty engaged the nation's attention. And it did little to resolve the debate over whether the two worldviews could coexist peacefully in a pluralistic society without igniting future challenges to healthcare, employment, or education policies that would inevitably come to prominence. Ten years later, Alito's concerns proved true for parents in Montgomery County who wanted to exercise their right to shield their children from instruction at odds with the traditions of their faith.

In her Mahmoud dissent, Justice Sotomayor and her liberal colleagues did not see the opt-out requests as benign, characterizing the parents' position as wanting to insulate children from "every lesson plan or story time that might implicate a parents' religious beliefs."[20] She argued that to fail constitutional muster, the board's policies would have to coerce the children or parents "to give up or violate their religious beliefs," adding that "[m]anaging opt outs will impose [great] administrative burdens," and that exposure to "worldly influence" was required in the name of tolerance.[21]

In a common refrain from the ranks of liberal pedagogues, Sotomayor argued that the Court's holding "threatens the very essence of public education" because it "strikes at the core premise of public schools: that children may come together to learn not the

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[15] *Id.* at 679.
[16] *Id.* at 741 (Alito, J. dissenting).
[17] *303 Creative v. Elenis,* 600 U.S. 570 (2023).
[18] *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n.,* 584 U.S. 617 (2018).
[19] *Fulton v. City of Philadelphia,* 593 U.S. 522 (2021).
[20] *Mahmoud*, 606 U.S. 593 (Sotomayor, J. dissenting).
[21] *Id.* at 604 (Sotomayor, J. dissenting).

teachings of a particular faith, but a range of concepts and views that reflect our entire society."[22]

But parents who send their children to public schools need not endure any instruction that falls short of direct compulsion or coercion and attempt to counteract that teaching at home. As Alito wrote, "the Free Exercise Clause is not so feeble." Indeed, even if the instruction amounted to nothing more than mere "exposure" to objectionable ideas—as the dissent characterized it—whether or not a curriculum or school requirement is characterized as "exposure" is not the touchstone for determining whether a violation of a parent's religious liberty rights exists, nor has it ever been. Justice Sotomayor and her fellow dissenters, together with many contemporary public educators, fail to appreciate the enduring nature of religion—and, as Justice Alito wrote, the Constitution's respect for it. As in *Yode*r, the Mahmoud Court determined that a compelled curriculum focused on contemporary society—no matter how useful—could still impermissibly contravene the religious tenets and practices of parent and child.

In our age, a disturbing number of schools have chosen not to attend to the urgent task of reversing the nation's flagging NAEP scores, which indicate only 22% of high school seniors are numerate, and only 35% are literate.[23] Instead, they have inclined themselves toward educating for activism or social justice, revising history, perpetuating an oppressed-oppressor matrix, or advancing queer propaganda.

Consider but a few examples:

1. Massachusetts: In Lexington Public Schools, Kindergarten students are subjected to DEI curriculum that includes instruction on changing one's body to fit one's gender identity.[24]

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[22] ID. at 629 (Sotomayor, J. dissenting).
[23] Ryan King, *US test scores hit damning new lows in math, reading since COVID school closures, 'nation's report card' shows*, NEW YORK POST, https://nypost.com/2025/09/09/us-news/us-test-scores-hit-new-low-in-math-reading-post-covid-nations-report-card-shows/, September 9, 2025. See also, "How did Students Perform in 2024?", THE NATION'S REPORT CARD, https://www.nationsreportcard.gov/.
[24] DEFENDING EDUCATION, *Kindergarten DEI Curriculum at Massachusetts school district features links to resources about 'Changing Bodies to Match Gender Identity' and political picture books*, https://defendinged.org/incidents/kindergarten-dei-curriculum-at-massachusetts-school-district-features-links-to-resources-about-changing-bodies-to-match-gender-identity-and-political-picture-books/ (Oct. 28, 2025).

2. Vermont: In South Burlington elementary school, the curriculum directs students to become "active anti-racists" with resources from 'Reading is Resistance' and 'Woke Kindergarten'.[25]

3. California: Los Angeles Unified School District promotes a "Queer All School Year" calendar to provide teachers and students with new LGBTQ resources every month, like "reading the rainbow" – a guide to literacy through a queer lens, and a gender triangle education guide.[26]

4. Wisconsin: Wauwatosa public schools have instituted a sex ed curriculum that teaches children as young as FIVE about gender identity, while eliminating the words "men" and "women" from the kindergarten lexicon.[27]

5. Washington: Seattle Public Schools instructs teachers to hide a school student's gender identity from that student's parents, making SPS one of the more than 1,200 school districts we've identified with similar policies of deception. SPS also refuses to honor parental opt-out requests from queer-themed curriculum, even post-Mahmoud, and has solicited supplies for a community health locker project for transitioning students that include chest binders, nipple guards and tuck-friendly underwear.[28]

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[25] DEFENDING EDUCATION, *South Burlington elementary school curriculum aims to inspire students to become "active anti-racists" with resources from 'Reading is Resistance' and 'Woke Kindergarten'. District staff required to participate in "white privilege" activity*, https://defendinged.org/incidents/south-burlington-elementary-school-curriculum-aims-to-inspire-students-to-become-active-anti-racists-with-resources-from-reading-is-resistance-and-woke-kindergarten-district-staff-require/ (June 8, 2022).

[26] DEFENDING EDUCATION, *Los Angeles Unified School District promotes "Queer All School Year" calendar to provide teachers and students with new LGBTQ resources every month*, https://defendinged.org/incidents/los-angeles-unified-school-district-promotes-queer-all-school-year-calendar-to-provide-teachers-and-students-with-new-lgbtq-resources-every-month/ (JUNE 30, 2022).

[27] DEFENDING EDUCATION, *Wauwatosa School District approves new sexual education curriculum that teaches children as young as kindergarten about gender identity and transgender issues; lessons avoid the words "men" and "women,"* https://defendinged.org/incidents/wauwatosa-school-district-approves-new-sexual-education-curriculum-that-teaches-children-as-young-as-kindergarten-about-gender-identity-and-transgender-issues-lessons-avoid-the-words-men-and-wo/ (Sept. 5, 2022).

[28] DEFENDING EDUCATION, *Seattle Public Schools utilize K-5 gender lessons that teach kindergartners about transitioning and pronouns,* https://defendinged.org/incidents/seattle-public-schools-utilize-k-5-gender-lessons-that-teach-kindergartners-about-transitioning-and-pronouns/ (April 21, 2022). See also, DEFENDING EDUCATION, *Seattle Public Schools requested "gender-affirming supplies" such as chest binders, Transtape, nipple guards, and tucking underwear from Seattle Children's Hospital for the district's "Community Health Lockers,* https://defendinged.org/incidents/seattle-public-schools-requested-from-seattle-childrens-hospital-gender-affirming-supplies-such-as-chest-binders-transtape-nipple-guards-and-tucking-underwear-for-district/ (Oct. 6, 2025); Brett Davis, *Defending Ed targets Seattle schools with federal privacy complaint over gender policies,* THE CENTER SQUARE, https://www.thecentersquare.com/washington/article_19975bc9-d3bf-4fe7-8a34-f5a3922bc561.html (Jan. 23, 2026).

Our organization has tracked thousands of incidents like these.[29] They evidence the astonishing misconception under which many American schools seem to be operating: That the child is the "mere creature of the state." For generations, however, the Supreme Court has determined precisely the opposite.[30]

The Court has long interpreted the right of parents to direct the religious upbringing and education of their children as a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment. In *Pierce v. Society of Sisters*,[31] the Court unanimously invalidated an Oregon statute that required all children between the ages of eight and sixteen to attend public schools, ruling that the law unreasonably interfered with parents' liberty to choose private or parochial education for their children. Justice McReynolds wrote that "the fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only," and that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

This holding established that parents possess the authority to select schools that align with their religious beliefs and values, while still permitting reasonable state regulation of education. The principle was extended in *Yoder*,[32] where the Court exempted Amish parents from compulsory high-school attendance laws, holding that the Free Exercise Clause shielded their right to direct their children's religious formation and vocational training in accordance with Amish beliefs, as the state's interest in universal education could not override this parental liberty in the face of a sincere religious burden.

The Supreme Court's parental rights jurisprudence has never wavered in its consistent recognition that parental rights are pre-political, ancient, and fundamental.

The parental right is **pre-political** because it arises from the natural parent-child relationship itself—rooted in biology, moral duty, and the family's role as the primary unit of society—rather than being granted or created by the state. The state's obligation, by contrast, is merely to recognize and protect what already exists independently of political authority.

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[29] See, DEFENDING EDUCATION, *IndoctriNation Map*, https://defendinged.org/map/ (last updated Jan. 30, 2026).
[30] See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).
[31] *Id.*, at 534–535.
[32] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

The parental right is **ancient**, tracing back through centuries of common-law traditions (as reflected in Blackstone and earlier natural-law thinkers) and historical understandings of familial autonomy that long predate the Constitution.[33]

And the parental right is **fundamental** because the Supreme Court has consistently treated it as a core liberty interest entitled to stringent protection, one that limits the state's power to supplant parents in matters of moral, religious, and educational formation. As such, any substantial state interference triggers demanding constitutional scrutiny, reflecting the enduring recognition that parents bear the primary responsibility—and possess the corresponding authority—to shape their children's character and destiny.

Mahmoud was the capstone in the Court's parental rights and religious liberty canon. But the statist notion that schools, not parents, know best, is both intractable & persistent.

Evolving cultural norms now permit children to be seen as "community property," a perspective advanced publicly in 2013 during a controversial MSNBC interview with political scientist Melissa Harris-Perry, who noted: "[W]e have to break through our kind of private idea that kids belong to their parents or kids belong to their families and recognize that kids belong to whole communities."[34] In 2022, President Joe Biden echoed this sentiment, remarking at a "Teacher of the Year" ceremony that minor students are "all our children."[35]

A 2024 law review article went further, arguing that the "new parents rights" movement has resulted in unrestricted parental authority over a child's education and that these rights *allow parents to "indoctrinate" their children* with anti-egalitarian views that harm democracy. The author suggests that parental rights advocates should recognize the *collective role of the parent, educator, and state in a child's education* and embrace their shared decision-making authority to promote and defend the public good.[36] The

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[33] The Supreme Court itself has acknowledged, "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—*is perhaps the oldest of the fundamental liberty interests recognized by this Court*." *Troxel v. Granville*, 530 U.S. 57, 65 (2000)(emphasis added).

[34] MSNBC Ad: Kids Don't Belong to Their Parents, Kids Belong to Communities, REALCLEAR POLITICS (Apr. 8, 2013), https://www.realclearpolitics.com/video/2013/04/08/msnbc_ad_kids_dont_belong_to_their_parents_its_collective_responsibility.html.

[35] Alec Schemmel, "They're All Our Children": Biden Emboldens Teachers Amid Debate About Parental Rights, NAT'L DESK (updated Apr. 28, 2022, 3:27 PM), https://thenationaldesk.com/news/americas-news-now/theyre-all-our-children-biden-emboldens-teachers-amid-debate-about-parental-rights.

[36] See Kristine L. Bowman, *The New Parents' Rights Movement, Education, and Equality*, 91 U. CHI L. REV. 399 (2024)(emphasis added).

author continues that "*although prioritizing parents as decision-makers fosters viewpoint diversity in the short term by enabling families to more easily pass along their worldviews to their children, it also feeds polarization* because the state's interests in creating a shared civic identity, incorporating a range of worldviews, and creating citizens that perpetuate democracy, are not part of decisions about children's education (or if they are, it is coincidental that parents share these interests)."[37] She concludes that she is "concerned…[that] parents' rights supplant the rights of the state, professional educators, and arguably students."[38]

These are positions ahistorical, contrary to the natural order, and wholly ignorant of the Supreme Court's edits on the primacy of the parental right. Despite Mahmoud's unambiguous dictates, then, the battle for parental primacy has in many ways only just begun.

[37] *Id.* at 400 (emphasis added).
[38] *Id.* at 433.