Written Testimony of Eric Baxter[1]

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Subcommittee on Early Childhood, Elementary, and Secondary Education

Mahmoud v. Taylor
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Chairman Kiley, Ranking Member Bonamici, and distinguished Members of the Committee, I'm honored to be here today to offer testimony concerning the Supreme Court's landmark decision in *Mahmoud v. Taylor*, which recognized that the fundamental right of parents to direct the religious upbringing of their children is not surrendered at the doors of a public school. My name is Eric Baxter, and I am Vice President and Senior Counsel at the Becket Fund for Religious Liberty, a nonprofit, public-interest law firm dedicated to protecting religious liberty for people of all faiths. I served as the lead attorney in *Mahmoud* and argued before the Supreme Court on behalf of the parents of Montgomery County, Maryland.

I plan to organize my testimony into three sections: detailing the astonishing facts surrounding the litigation, outlining the Court's decision, and discussing its implications moving forward.

Facts of the Case

Montgomery County is the most religiously diverse county in America and has for years respected the beliefs of its residents by offering generous opt-outs to curriculum, instruction, and extracurricular activities that violate parents' and students' religious beliefs. As a long-time resident and parent of the county myself, I had success utilizing opt-outs throughout my own children's education. Yet, in November 2022, the Montgomery County School Board introduced a new series of "LGBTQ-inclusive" storybooks designed for children in pre-kindergarten through 5th grade. Explicitly chosen to "disrupt" "stereotypes," "cisnormativity," and "power hierarchies," these age-inappropriate books explore various aspects of sexual orientation and gender identity.

Pride Puppy, a picture book written for three and four-year-olds, describes a Pride parade and what a child might find there. It includes an interactive picture hunt for children to search for images of "underwear," "leather," "lip ring," "[drag] queen" and more. *My Rainbow* tells the story of an autistic boy who convinces his family to support his social gender transition using a rainbow wig. *Intersection Allies* invites children to ponder what it means to be "transgender" or "non-binary" and asserts that "[w]hen we are born, our gender is often decided for us based on our sex," "[b]ut at any point in our lives, we can choose to identify with one gender, multiple genders, or neither gender." *Born Ready* tells the story of a biological girl named Penelope who identifies as a boy, tells her mom that she "doesn't want tomorrow to come because tomorrow I'll look like you," and convinces her family to treat her as a boy because this issue is about "love" and doesn't need "to make sense." *Love, Violet* tells the story of a budding same-sex playground romance between two little girls who "blush hot" over their attractions. Other storybooks convey similar messages about the "right" way to approach sex and gender.

In addition to the books, the school board issued guidance on how to instruct children on the books' themes.[2] This guidance tells teachers to "'[d]isrupt the either/or thinking' of elementary students about biological sex," to explain to students that doctors "guess about our gender" at birth, and to provide real life examples of same sex relationships and non-gender conforming activities. For children who object to these ideas, teachers are directed to frame their disagreement as "hurtful."

Local parents were naturally outraged with the controversial content of the new curriculum and worried about its effects on their children's religious development. Even Montgomery County's own school principals' union objected to the storybook instruction. They warned that the books and teaching guidance "support the explicit teaching of gender and sexual identi[t]y," state as "fact" things that "[s]ome would not agree are facts," invite "shaming comment[s]" toward students who disagree, and were "dismissive of religious beliefs."[3]

Still, Montogomery County insisted on implementing its curriculum. For most of the 2022-2023 school year, parents across the county utilized existing opt-out procedures to shield their children from the controversial content. Up through March of that school year, the school board repeatedly affirmed its opt-out policy in public statements. But in a dramatic reversal, after its final affirmation, the next day the Board issued a new policy saying it would no longer allow parents to opt their children out of the storybook instruction and would not even notify them when the books were being read.

This extreme action sparked a series of protests, with nearly *one thousand* parents appearing at Board meetings to object to the withdrawal of opt-outs. School board members compared the religiously and racially diverse parents (mostly of the Ethiopian orthodox and Muslim faiths) "racists" and "xenophobes," accused students of "parroting" their parents' "dogma," and refused to amend the Board's new policy.

With no other choice, the parents of Montgomery County took their school board to federal district court, where my team at the Becket Fund and I argued for their First Amendment constitutional rights. For two years, we battled through district and appellate courts simply to restore the parents' notice and opt-out rights, without seeking removal of the books themselves from the schools. The district court judge ruled that once parents place their children in the public schools, they have no further say in what their children are taught. The Fourth Circuit court of appeals affirmed, suggesting that the only available remedy was for parents to leave the public school system altogether by homeschooling or putting their children in private schools (an impossibility for most families). Following these losses, we petitioned the Supreme

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[2] Brief for Petitioners at 11-12, *Mahmoud v. Taylor*, 606 U.S. 522 (2025) (No. 24-297).

[3] *Id.* at 13.

Court to hear the case. In December 2024, review was granted, and the Court heard oral argument early in 2025.

The Supreme Court's Decision

In a 6-3 decision, the Supreme Court sided with our parent clients, recognizing the normative nature and coercive execution of the curriculum as a substantial burden on the free exercise of religion. Justice Samuel Alito wrote the Court's opinion, joined by Chief Justice Roberts and Justices Thomas, Barrett, Kavanaugh, and Gorsuch. Justice Thomas also wrote a concurring opinion, and Justice Sotomayor issued a dissent joined by Justices Kagan and Jackson.

The legal question of the case centered on whether the parents merited a preliminary injunction restoring their notice and opt-out rights while the litigation proceeded. In its primary holding, the Supreme Court found that Montgomery County was unconstitutionally requiring parents to submit their children to instruction that "substantially interfere[d] with" and posed "a very real threat of undermining" the religious beliefs and practices of the parents in directing the religious development of their children. Thus, the parents were entitled to a preliminary injunction, and the case was remanded to the lower courts for settlement discussions.

To reach this conclusion, the Court detailed how the curriculum and denial of opt-outs presented a constitutionally impermissible substantial burden on parents' religious exercise. The Court relied heavily on *Wisconsin v. Yoder*, a 1972 case that upheld what it called the "enduring American tradition" of parental religious direction—specifically in that case, the right of Amish families to withdraw their children from public school after the eighth grade. In *Mahmoud*, the Court found that the burden in this case is of the exact same character as the burden in *Yoder*.[4] Further, it held that the books in question were "unmistakably normative,"[5] "present 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,"[6] and "impose upon children a set of values and beliefs that are 'hostile' to their parents' religious beliefs."[7] The nature of the books and instruction "exert upon children a psychological 'pressure to conform.'" [8] Taken together, the Court found the state's actions represented an "objective danger to the free exercise of religion."[9] Unlike for many other free exercise claims, such burdens do not require a further showing of government discrimination—that is, a showing that the challenged policy is not

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4 *Id.* at 565.

5 *Id.* at 550.

6 *Id.* at 553.

7 *Id.* at 553-54.

8 *Id.* at 554.

9 *Id.*

either "generally applicable" or "neutral." Instead, the Court held that burdens on parental religious exercise "bypass[] those issues" under *Yoder* given the "special character" of such burdens.[10] So the Court proceeded directly to strict scrutiny—the most exacting test known to constitutional law.

Applying that demanding test, the Court found that, while some religious burdens may be justified by compelling state interests, Maryland's stated interest in "maintaining a school environment that is safe and conducive to learning for all students"[11] was inadequate. Pointing out the robust "system of exceptions"[12] that exists in Maryland for curriculum opt outs in a wide variety of contexts (including Individualized Education Plans, Emergent Multilingual Learner courses, and state-mandated exemptions from sexual education classes), the Court rejected the state's argument that providing exemptions would be "infeasible or unworkable."[13]

The opinion also addressed a smattering of additional arguments presented by the government, rejecting each in turn.

Montgomery County argued that its actions were legally protected "internal affairs" of the state and not subject to litigation, to which the Court responded that the state's curriculum policies inherently "implicate[] direct, coercive interactions between the State and its young residents."[14]

The County also argued that the curriculum merely *exposed*, not coerced, children to contrary beliefs. Pointing to the normative elements of the curriculum, the Court disagreed with this analysis, saying the state's actions went "far beyond mere 'exposure,'"[15] and that regardless, the question at hand under governing precedent was whether "the educational requirement or curriculum at issue would 'substantially interfere[e] with the religious development' of the child or pose 'a very real threat of undermining' the religious beliefs and practices the parent wishes to instill in the child"[16] Neither of these turns on an "exposure" standard plucked out of thin air.

The Court outright rejected claims from friend-of-the-court briefs arguing that parents unhappy with their children's instruction should simply place their children in private schools or homeschool them. Besides finding this let-them-eat-cake

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[10] *Id.* at 564-65.

[11] *Id.* at 566.

[12] *Id.* at 567.

[13] *Id.*

[14] *Id.* at 557.

[15] *Id.* at 556.

[16] *Id.*

approach unattainable and unreasonable for the average American family, the Court reaffirmed that "public education is a public benefit, and the government cannot 'condition' its 'availability' on parents' willingness to accept a burden on their religious exercise."[17]

The Court also issued some forward-looking judgements in its opinion. To school boards, the Court warned that a public school "cannot escape its obligation to honor parents' free exercise rights by deliberately designing its curriculum to make parental opt outs more cumbersome."[18] And it also rejected the spreading legal belief that *Yoder* was somehow limited to its facts, explicitly treating the case like "any other precedent" that "cannot be breezily dismissed"—reiterating that it "embodies a principle of general applicability" and provides "robust protection for religious liberty."[19]

Taken as a whole, the decision in *Mahmoud v. Taylor* was a resounding victory that not only vindicated the parents of Montgomery County but preserved and expanded religious liberty protections for parents nationwide. By rejecting several common legal arguments used by states to justify religious discrimination, the Court made the jurisprudence surrounding parental rights in education that much clearer.

Mahmoud Implications

The Supreme Court's decision naturally has short- and long-term consequences. The aftermath of the decision has seen a wave of legislative and regulatory actions across the country as states try to reconcile their existing school policies with the Court's directions. But there are also signs of longer-term changes in First Amendment jurisprudence, school choice policy, and other educational disputes between parents and schools. I will briefly pass by each topic and conclude with considerations for Congress and the Education and Workforce Committee.

Short Term

Most immediately affected by *Mahmoud* was Montgomery County itself, which entered settlement deliberations after the decision to remedy its unconstitutional practices. States have responded to the decision with varying levels of compliance. New Jersey, a state with preexisting parental opt-out rights, released guidance that recognized *Mahmoud's* holdings and announced new regulations that require school boards to create publicly available procedures for parents to submit opt out forms and to make all approved curriculum publicly available.[20] California, meanwhile,

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[17] *Id.* at 561.

[18] *Id.* at 567.

[19] *Id.* at 558.

[20] Memorandum from Samantha Price, Assistant Comm'r, Div. of Legal & External Servs., N.J. Dep't of Educ., and Jorden Schiff, Assistant Comm'r, Div. of Teaching & Learning Servs., N.J. Dep't of Educ.,

attempted to minimize the scope and strength of *Mahmoud* and gave vast discretion to local educational agencies to determine when and how a *Mahmoud* "notice and opt out process" is required.[21, 22] And Seattle Public Schools, the largest school district in the state of Washington, has gone even further by explicitly issuing policies that ban parental opt outs from "LGBTQ inclusive instruction." Nevertheless, *Mahmoud's* standards are binding nationally and courts will be obligated to enforce the Court's ruling in every state when parental rights claims are raised.

Long Term

The longer-term implications of the case are still to be seen. It is refreshing and important that the Court recognized parental religious authority as having a "special character" not contingent upon a showing of government discrimination (i.e., a lack of neutrality or general applicability) under *Employment Division v. Smith*. That conclusion illustrates both the continued erosion of *Smith*'s precedential value and the Court's development of distinct rules for different associations engaged in religious direction (as in the "church autonomy" context). In identifying these distinct authorities on religious duties (religious organizations and parents), the Court could be reinforcing an important insight: religious duties transcend state power, because they are directed by authorities that don't exist by virtue of a state permission slip. If the Court builds upon these insights, the Constitution's commitment to limited government could be fortified, and the law on religious liberty can better reflect its ancient roots.

Congress certainly has its own role in shaping the national dialogue over this issue. In its opinion, the Court cited the brief that Members of Congress submitted in the case, noting Montgomery County's widespread use of individualized education plans. Indeed, the Members brief noted multiple federal laws that reinforce the individualized tailoring of education and a transparent relationship between parents and their schools—including the Protection of Pupil Rights Amendment, the Elementary and Secondary Education Act of 1965, and the Family Education Rights and Privacy Act, among others. Continued parental transparency and tailoring of education to a child's needs can occur by educating parents of their rights over their children's education and promoting legislative and regulatory policies that make it easier for American families to access the funding and educational opportunities they need, both in and out of the public school system.

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to Local Educational Agency Leads, *Guidance Regarding Parental Opt-Outs Based on Religious Objections* (Nov. 5, 2025), https://perma.cc/8HXE-KA9C.

[21] Cal. Dep't of Educ., *Supreme Court Decision in* Mahmoud v. Taylor (Aug. 6, 2025), https://perma.cc/6LLS-UVJP.

[22] N.Y. Dep't of Educ., *Statement from New York State Education Leaders on Supreme Court Decision in* Mahmoud v. Taylor (July 28, 2025), https://perma.cc/38RC-6V84.

This Committee can also communicate with the Treasury Department as it prepares its regulating guidance for the federal school choice tax credit passed in this Congress. It is imperative that religious families and schools are eligible for equal access to educational opportunities, so that parents who choose alternative education opportunities outside of public schools don't have to compromise their faith. If the government is going to create a new benefit, it cannot constitutionally discriminate against religious schools or families in the distribution of that program.

I thank the Committee for its time and allowing me to testify. I look forward to your questions.