Mahmoud v. Taylor

*Cynthia Crawford**

Introduction

Mahmoud v. Taylor breathed new life into constitutional protections for parents who want to withdraw their children from public school instruction that infringes their religious exercise. Relying on *Wisconsin v. Yoder*[1] and *West Virginia Board of Education v. Barnette*,[2] the Court held that the Free Exercise Clause and the rights of parents to direct the religious upbringing of their children required granting the parents' request that their grade school children be excused from instruction regarding newly introduced books comprising LGBTQ+ issues or characters while litigation is pending. *Mahmoud* held that the interest recognized in *Yoder* is an exception to the rule from *Employment Division, Department of Human Resources of Oregon v. Smith*.[3] *Smith* held that government is generally free to place incidental burdens on religious exercise so long as it does so pursuant to a "neutral policy that is generally applicable" and provides protection for parents' right to direct the religious instruction of their children.

The clarification of the relationship between *Yoder* and *Smith* may open the door to resolving conflicts between state efforts to impose or restrict the availability of otherwise generally available publicly funded education for parents who have religiously motivated constraints on the type of instruction they seek for their children.

* Senior policy counsel, Americans for Prosperity Foundation.

1 406 U.S. 205, 221, 236 (1972).

2 319 U.S. 624 (1943).

3 494 U.S. 872, 878–79 (1990).

I. Background

A. The Question Presented

"Do public schools burden parents' religious exercise when they compel elementary school children to participate in instruction on gender and sexuality against their parents' religious convictions and without notice or opportunity to opt out?"

B. The Positions of the Parties

The plaintiff parents framed *Mahmoud* as a Free Exercise case in which denying parents the ability to remove their children from public school instruction that promoted viewpoints offensive to the parents' religious beliefs imposed an unconstitutional burden on their Free Exercise rights.[4] Accordingly, they argued that when a public school implements a course of study or materials that burden parents' sincerely held religious beliefs, parents must be given notice and the opportunity to opt out of such instruction for their children.[5] This argument relies on *Wisconsin v. Yoder*, which held that the state's interest in its school system was inadequate to override parents' rights to educate their children in accordance with their religious beliefs.

The government, by contrast, argued that coercion was the proper standard—although it actually argued for a coercion-plus-effectiveness standard, in which the Free Exercise Clause would not be violated unless the children were required to participate in the lessons and the mandated participation was effective in changing their religious views or behavior.[6] In support, the government relied largely on precedent relating to parental challenges to curriculum, in which the remedy sought was a change to the curriculum and not, like *Yoder*, the ability to withdraw children without penalty.

C. The Facts

For the 2022–2023 school year, as part of its "commitment to providing a culturally responsive curriculum that promotes equity,

[4] Brief for Petitioners at 24, Mahmoud v. Taylor, No. 24-297 (U.S. 2025).

[5] *Id.*

[6] Brief in Opposition at 12, Mahmoud v. Taylor, No. 24-297 (U.S. 2025).

respect, and civility,"[7] Montgomery County Public Schools (MCPS) introduced into its pre-kindergarten through 12th grade language arts curriculum storybooks that feature lesbian, gay, bisexual, transgender, and queer characters.[8] At the time the curriculum was implemented, parents were told they would be notified when the storybooks were used, allowed to opt-out their children from the material, and provided a substitute text by the teacher.[9] That process was confirmed by the Montgomery County Board of Education (Board) in a press statement in March 2023.[10] The process was reversed, however, for the 2023–2024 school year.[11] The basis for the reversal was the large number of requests to opt-out from lessons involving those storybooks,[12] which "gave rise to three related concerns: high student absenteeism, the infeasibility of administering opt-outs across classrooms and schools, and the risk of exposing students who believe the storybooks represent them and their families to social stigma and isolation."[13] Thus, the unpopularity of the program led to reversal of the ability to opt-out, notwithstanding the opt-out's consistency with the Board's "Guidelines for Respecting Religious Diversity."[14] Opt-outs remained available for the sex education unit of state-mandated health classes as well as any other instruction that violated the parents' religious beliefs.[15]

The conflict in viewpoint regarding the new storybooks is not surprising given the multiplicity of backgrounds represented within the MCPS. Montgomery County, Maryland, is the state's most populous county and the "most religiously diverse county" in the nation.[16] It is

[7] *Id.* at 4.

[8] *Id.*

[9] Brief for Petitioners, *supra* note 4, at 1, 14.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 6–7.

[13] Petitioners' App. at 96a–99a, 606a-608a, Mahmoud v. Taylor, No. 24-297 (U.S. 2025).

[14] Mahmoud v. Taylor, No. 24-297, slip op. at 14 (U.S. June 27, 2025).

[15] Brief for Petitioners, *supra* note 4, at 1, 15.

[16] *Mahmoud*, slip op. at 2 (citing Aleja Hertzler-McCain, *Montgomery County, Maryland, Was Most Religiously Diverse US County in 2023*, Relig. News Serv. (Aug. 30, 2024), https://religionnews.com/2024/08/30/montgomery-county-maryland-was-most-religiously-diverse-u-s-county-in-2023/).

home to a mix of Christian denominations and ranks in the top five in the nation in per-capita population of Jews, Muslims, Hindus, and Buddhists, as well as having one of the largest Ethiopian communities in the country.[17] Maryland law requires resident children ages 5 to 18 to attend a public school, private school, or home school.[18] Parents who fail to ensure their children attend can be fined, required to perform community service, or imprisoned.[19]

Maryland statutory law recognizes and provides for parents to opt-out their children from instruction in human sexuality; it places the burden on the school system to facilitate opt-outs and provide "appropriate alternative learning activities and/or assessments in health education" and the "opportunity for parents/guardians to view instructional materials to be used in the teaching of family life and human sexuality objectives."[20] This practice is consistent with 37 other states, as well as 4 states that require a parental opt-in before children receive such instruction and 6 states that have a combination of opt-in and opt-out rights.[21] It is also not unusual for public schools to require an additional degree of consent from parents to deviate from expected practices. Montgomery County, for example, requires express authority from parents before children may be taken to other locations outside the typical school premises by

[17] *Id.* (citing Pub. Relig. Rsch. Inst., 2023 PRRI Census of American Religion: County-Level Data on Religious Identity and Diversity 19, 28, 42–49 (Aug. 29, 2024); Rosanne Skirble, *Silver Spring Is the Epicenter of a Thriving Ethiopian Diaspora*, Montgomery Mag. (Oct. 19, 2022), https://www.montgomerymag.com/silver-spring-is-the-epicenter-of-a-thriving-ethiopian-diaspora/).

[18] *Id.* at 2–3 (citing Md. Code Ann., Educ. § 7-301(a-1)(1) (2025); § 7-301(a)(3)).

[19] *Id.*; Md. Code Ann. Educ. § 7-301(e).

[20] Md. Code Regs. 13A.04.18.01(e) ("Student Opt-Out: (i) The local school system shall establish policies, guidelines, and/or procedures for student opt-out regarding instruction related to family life and human sexuality objectives; (ii) For students opting out of family life and human sexuality instruction, each school shall establish a procedure for providing a student with appropriate alternative learning activities and/or assessments in health education; (iii) Each school shall make arrangements to permit students opting out of the objectives related to family life and human sexuality to receive instruction concerning menstruation; (iv) The local school system shall provide an opportunity for parents/guardians to view instructional materials to be used in the teaching of family life and human sexuality objectives.").

[21] Brief for Petitioners, *supra* note 4, at 6–7, 6 n.3 (collecting citations to state codes).

school personnel, including for field trips,[22] and before medication may be administered to a child.[23] There are thus multiple circumstances in which express parental authority is required and honored.

In response to the Board's reversal of the ability to opt-out, more than 1,100 parents signed a petition asking the Board to restore notice and opt-out rights.[24] Hundreds of people, "largely . . . Muslim and Ethiopian Orthodox parents" claimed that the schools were violating their First Amendment religious rights.[25] Some members of the Board responded by accusing the parents of "hate" and comparing them to "white supremacists" and "xenophobes."[26] The manner in which the books were to be used and the guidance provided by MCPS to teachers on how to use the storybooks in the classroom were subject to conflicting interpretations. On the one hand, proposed responses to student questions focused on "tolerance, empathy, and respect for different views."[27] On the other hand, guidance directed teachers to "disrupt the either/or thinking of students" and to characterize disagreement with nonbinary gender views as "hurtful."[28]

[22] Off. Sch. Support & Improvement, *Parent/Guardian Approval for Trips MCPS Transportation Is Provided*, Montgomery Cnty. Pub. Schs. (July 2018), https://ww2.montgomeryschoolsmd.org/departments/forms/pdf/555-6.pdf; Off. Sch. Support & Improvement, *Parent/Guardian Approval for Trips MCPS Transportation is NOT Provided*, Montgomery Cnty. Pub. Schs. (July 2018), https://ww2.montgomeryschoolsmd.org/departments/forms/pdf/560-31.pdf; Off. Sch. Support & Improvement, *Parent/Guardian Approval MCPS Virtual Field Trip/Program Addendum*, Montgomery Cnty. Pub. Schs. (Nov. 2020), https://ww2.montgomeryschoolsmd.org/departments/forms/pdf/210-7.pdf; Off. Sch. Support & Improvement, *Approval for Extended Day, Out-of-Area, and Overnight Field Trips*, Montgomery Cnty. Pub. Schs. (Sept. 2019), https://ww2.montgomeryschoolsmd.org/departments/forms/pdf/210-4.pdf.

[23] *Authorization to Administer Prescribed Medication*, Montgomery Cnty. Pub. Schs. & Montgomery Cnty. Dep't Health & Hum. Servs. (Feb. 2019), https://www.montgomeryschoolsmd.org/siteassets/schools/elementary-schools/a-c/burningtreees/uploadedfiles/authorization-to-administer-prescribed-medication.pdf.

[24] Brief for Petitioners, *supra* note 4, at 14.

[25] *Id.* at 15.

[26] *Id.*

[27] Brief in Opposition, *supra* note 7, at 6.

[28] Brief for Petitioners, *supra* note 4, at 13 (cleaned up).

II. The State of the Law

The important element in analyzing *Mahmoud* is clarifying what was at stake and what was not. The issue was whether the schools could deny parents the ability to opt-out their children from lessons that burdened their religion.[29] The issue was not whether the schools could include the storybooks in the schools' book collections, nor whether the schools could include lessons based on the storybooks in their curriculum. It was also not about asking the Court to manage MCPS's curriculum choices, but rather who decides—the parents or the schools—what a child's religious instruction should be.

Accordingly, the case was governed by *Wisconsin v. Yoder* and *West Virginia Board of Education v. Barnette*. In *Yoder*, "Amish parents . . . wished to withdraw their children from conventional schooling after the eighth grade, in direct contravention of a Wisconsin law requiring children to attend school until the age of 16." In *Yoder*, "[the Court] recognized that parents have a right 'to direct the religious upbringing of their children,' and that this right can be infringed by laws that pose 'a very real threat of undermining' the religious beliefs and practices that parents wish to instill in their children."[30] Similarly, in *Barnette*, the Court "considered a resolution adopted by the West Virginia State Board of Education that required students 'to participate in the salute honoring the Nation represented by the flag.'"[31] "A group of plaintiffs sued to prevent the enforcement of this policy against Jehovah's Witnesses who considered the flag to be a 'graven image' and refused to salute it."[32] The challengers asserted that the policy was, among other things, "an unconstitutional denial of religious freedom."[33] The Court agreed that the mandatory salute policy could not be squared with the First Amendment.[34]

Interestingly, the forms of compulsion used in *Yoder* and *Barnette* were opposites—although both approaches were represented in *Mahmoud*.

[29] Plaintiffs sought "a preliminary and permanent injunction 'prohibiting the School Board from forcing [their] children and other students—over the objection of their parents—to read, listen to, or discuss' the storybooks." *Mahmoud*, slip op. at 14.

[30] *Mahmoud*, slip op. at 14–15 (quoting *Yoder*, 406 U.S. at 218, 233).

[31] *Id.* at 19 (citing *Barnette*, 319 U.S. at 626).

[32] *Id.* (internal quotation marks omitted).

[33] *Id.* (citing *Barnette*, 319 U.S. at 630).

[34] *Id.*

In *Yoder*, the compulsory attendance law was used to threaten parents to make their children attend school.[35] In *Barnette*, the Board threatened exclusion from school for failing to comply.[36] Both approaches are relevant here because MCPS made keeping children out of the instruction an unexcused absence, thus invoking the power of the state to make children attend school, while simultaneously announcing that if parents didn't want their children to participate in the instruction they would have to take their children out of school.[37] Compulsion and exclusion.

Recently, in *Espinoza v. Montana Department of Revenue*, the Court reiterated that it has "long recognized the rights of parents to direct 'the religious upbringing' of their children."[38] However, the bulk of legal development regarding parents' right to educate their children was a series of cases from the first half of the 20th century that relied on an array of constitutional rights.

Some relied on the Fifth and Fourteenth Amendments' due process protection against deprivation of liberty. In *Meyer v. Nebraska*, for example, the issue was whether a Nebraska law that prohibited the teaching of students, who had not completed eighth grade, in any modern language other than English, "unreasonably infringe[d] the liberty guaranteed . . . by the Fourteenth Amendment."[39] The plaintiff was a teacher who taught parochial school in the German language and had been convicted under the challenged statute.[40] The Court, while acknowledging that the exact forms of liberty protected by the Fourteenth Amendment have not been defined, provided an assortment of example freedoms that "without doubt" it includes, such as "freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish

[35] *Yoder*, 406 U.S. at 218.

[36] *Mahmoud*, slip op. at 19 (citing *Barnette*, 319 U.S. at 629) ("If students failed to comply, they faced expulsion and could not be readmitted until they yielded to the State's command.").

[37] *Id.* at 8 (citing Petitioners' App., *supra* note 13, at 640a) ("Parents always have the choice to keep their student(s) home while using these texts; however, it will not be an excused absence.").

[38] *Id.* at 17 (citing Espinoza v. Mont. Dept. of Rev., 591 U.S. 464, 486 (2020)).

[39] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[40] *Id.* at 396–97.

a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[41] While acknowledging the interest of the government in encouraging education and fostering "a homogeneous people with American ideals," that interest was not enough to overcome the liberty interests of the parents, children, and teacher.[42]

Farrington v. Tokushige[43] presented a similar issue when Hawaii attempted to regulate "foreign language schools" to such a degree that it threatened to squeeze them out of existence.[44] Like in *Meyer*, the plaintiffs were educators whose services were subject to the regulations. But instead of prohibiting the schools altogether, the state burdened them with regulations requiring annual permits, payment of headcount-based fees, disclosure of student lists, and permits for all teachers—which were prohibited unless the applicant was "possessed of the ideals of democracy, knowledge of American history and institutions, and [knew] how to read, write, and speak the English language" and signed a pledge to "direct the minds and studies of pupils in such schools as will tend to make them good and loyal American citizens."[45]

The Supreme Court found constitutional violations because the law gave "affirmative direction concerning the intimate and essential details of such schools, intrust[ed] their control to public officers, and den[ied] both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and text-books."[46] Moreover, "[e]nforcement of the act probably would [have] destroy[ed] most, if not all, of them; and, certainly, it would [have] deprive[d] parents of fair opportunity to procure for their children instruction which they think important."[47]

[41] *Id.* at 399 (collecting cases).

[42] *Id.* at 396–97, 399–400.

[43] *Id.* at 291.

[44] 273 U.S. 284 (1927).

[45] *Id.* at 291–94.

[46] *Id.* at 298.

[47] *Id.*

Similarly, in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, plaintiff, the Society of Sisters, was a provider of primary and high schools, junior colleges, and orphanages for children between the ages of 8 and 16.[48] When Oregon passed a law requiring children to attend public school, the compelled withdrawal of children from parochial schools threatened the schools' existence.[49] The Society of Sisters challenged the law asserting three constitutional violations: (1) the "right of parents to choose schools where their children will receive appropriate mental and religious training"; (2) "the right of the child to influence the parents' choice of a school"; and (3) "the right of schools and teachers therein to engage in a useful business or profession."[50] Hill Military Academy, a private for-profit provider of elementary, college preparatory, and military training school for boys between the ages of 5 and 21 years also challenged the law under the Fourteenth Amendment claiming deprivation of property without due process.[51] The Court resolved the case by holding that "the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[52] Further, the Court rejected "any general power of the state to standardize its children by forcing them to accept instruction from public teachers only," holding 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."[53]

Caselaw following *Yoder* was mixed. One analyst suggested that the "*Yoder* Court's ambiguous messaging about the robustness of parenting rights is reflected in the later caselaw."[54] Another predicted, "Whatever side wins in *Mahmoud*, it won't win because of *Yoder*."[55]

[48] Pierce v. Soc'y of Sisters, 268 U.S. 510, 532 (1925).

[49] *Id.* at 531.

[50] *Id.* at 532.

[51] *Id.* at 532–33.

[52] *Id.* at 534–35.

[53] *Id.* at 535.

[54] Mark Strasser, Yoder*'s Legacy*, 47 Hofstra L. Rev. 1335, 1349 (2020).

[55] Chad Flanders, *Is* Yoder v. Wisconsin *Limited to Its Facts?*, 16 ConLawNOW 23, 23 (2024-2025).

A. State Policy Has Long Supported Parental Control over Instruction that Implicates Religion and Human Sexuality

Despite those mixed reviews, the Court's reliance on *Yoder* should come as no surprise: integral to *Mahmoud* is commonplace parental control over exposure to instruction in human sexuality or other topics that may have religious overtones. This concern is not new; it has been central to parents' efforts to uphold their authority over their children while navigating exposure to public schools that may have different goals. The atmospherics were thus on par with *Yoder*, in which the Amish parents simply sought to maintain the existing way of life of their community. In each case, the parents were not demanding exotic relief for an obscure dispute but rather to maintain the boundaries of the delegation of authority they had made to the school regarding their children's instruction.

Among the variety of topics over which delegation of parental authority is presumed to be limited, subject to withdrawal, or required to be explicit, the teaching of human sexuality is widespread.[56] As described in Part I, Maryland statutory law recognizes and provides for parents to opt-out of such instruction for their children and places the burden on the school system to facilitate opt-outs and provide "appropriate alternative learning activities and/or assessments in health education" and the "opportunity for parents/guardians to view instructional materials to be used in the teaching of family life and human sexuality objectives."[57] Other states have similar provisions covering a variety of topics in addition to religion and sexuality, including rights of conscience and controversial

[56] *See* Brief for Petitioners, *supra* note 4, at 6–7, 6 n.5 (collecting state laws).

[57] Md. Code Regs. 13A.04.18.01(e) ("Student Opt-Out: (i) The local school system shall establish policies, guidelines, and/or procedures for student opt-out regarding instruction related to family life and human sexuality objectives; (ii) For students opting out of family life and human sexuality instruction, each school shall establish a procedure for providing a student with appropriate alternative learning activities and/or assessments in health education; (iii) Each school shall make arrangements to permit students opting out of the objectives related to family life and human sexuality to receive instruction concerning menstruation; (iv) The local school system shall provide an opportunity for parents/guardians to view instructional materials to be used in the teaching of family life and human sexuality objectives.").

issues.[58] And federal law even provides notice and opt-out options for any surveys that concern political affiliations, psychological problems, sex, self-incriminating behavior, privileged relationships (lawyers, physicians, and ministers), religious beliefs, or income, without the prior written consent of the parent.[59]

B. Attempts to Use the Courts to Control Curriculum Have Been Largely Unsuccessful

Plaintiffs were explicit that the remedy they sought was the ability to opt out of material they found objectionable—not to have that material excluded from the curriculum.[60] The limited relief sought distinguishes this case from numerous cases in which plaintiffs challenged school curricula seeking to have certain material excluded and were unsuccessful.

School boards are generally empowered to determine what the curriculum will be, and that authority has been upheld by courts across the country against challenges from parents and teachers. In *Boring v. Buncombe County Board of Education*, the Fourth Circuit held, "We agree with Plato and Burke and Justice Frankfurter that the school, not the teacher, has the right to fix the curriculum."[61]

"Any discussion of the constitutionality of a state's decision to reject a textbook for its public schools must begin with the recognition that the states enjoy broad discretionary powers in the field of public education. Central among these discretionary powers is the authority to establish public school curricula which accomplishes the states' educational objectives."[62]

[58] *See* Brief for Amici Curiae Def. of Freedom Inst. for Pol'y Stud. et al. in Support of Petitioners at 15–16, Mahmoud v. Taylor, No. 24-297 (U.S. 2025) (collecting state statutes); Brief for Protect Our Kids (Cal.) et al. as Amici Curiae in Support of Petitioners at 7–11, Mahmoud v. Taylor, No. 24-297 (U.S. 2025) (table summarizing 47 states and the District of Columbia that provide parental opt-outs or opt-ins).

[59] 20 U.S.C. § 1232(h).

[60] Brief for Petitioners, *supra* note 4, at 1 ("Petitioners filed suit not challenging the curriculum . . . ."); Mahmoud v. Taylor, 102 F.4th 191, 201 (4th Cir. 2024) ("The Parents do not challenge the Board's adoption of the Storybooks or seek to ban their use in Montgomery County Public Schools.").

[61] Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 370 (4th Cir. 1998).

[62] Chiras v. Miller, 432 F.3d 606, 611 (5th Cir. 2005) (citing Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982); Ambach v. Norwick, 441 U.S. 68, 76–77 (1979)).

Likewise, in *Fleischfresser v. Directors of School District 200*, the court denied an injunction to prevent the school from using a supplemental reading program to which the parents objected. The court emphasized "the broad discretion vested in the school board to select its public school curriculum."[63] The Eighth Circuit agreed, holding that "[t]he public schools are not required to delete from the curriculum all materials that may offend any religious sensibility."[64] And, the Ninth Circuit rebuffed an attempt to exclude *Huckleberry Finn* and *A Rose for Emily* from the curriculum based on accusations that the works are "racist in whole or in part."[65]

But even though parents have limited power to exclude material from a school curriculum, any perceived violation of rights from the inclusion or use of material in instruction may be cured by providing the ability to opt-out the children from the perceived violation. In *Florey v. Sioux Falls School District*, for example, the school board recognized that, while not required to eliminate activities that may conflict with the individual beliefs of some students and their parents, "forcing any person to participate in an activity that offends his religious or nonreligious beliefs will generally contravene the Free Exercise Clause, even without an Establishment Clause violation."[66] The school board, however "recognized that problem and expressly provided that students may be excused from activities authorized by the rules if they so choose."[67] The court accordingly upheld the school's programming.[68]

III. The Holding

Against this background, Justice Samuel Alito, writing for a 6–3 majority, delivered the opinion in *Mahmoud* holding: "A government burdens the religious exercise of parents when it requires them to submit their children to instruction that poses 'a very real threat of

[63] Fleischfresser v. Dirs. of Sch. Dist. 200, 15 F.3d 680, 688 (7th Cir. 1994).

[64] Florey v. Sioux Falls Sch. Dist., 619 F.2d 1311, 1318 (8th Cir. 1980).

[65] Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1027–28 (9th Cir. 1998); *see also* Cal. Parents for the Equalization of Educ. Materials v. Torlakson, 267 F. Supp. 3d 1218, 1222 (N.D. Cal. 2017), *aff'd*, 973 F.3d 1010 (9th Cir. 2020) (rejecting attempt to modify school curriculum to more accurately portray the Hindu religion in California public schools under an assortment of constitutional theories).

[66] *Florey*, 619 F.2d at 1318–19 (citing *Yoder*, 406 U.S. at 218).

[67] *Id.* at 1319.

[68] *Id.*

undermining' the religious beliefs and practices that the parents wish to instill. . . . And a government cannot condition the benefit of free public education on parents' acceptance of such instruction."[69] The Court thus held that Petitioners should receive preliminary relief and remanded with instruction that while this lawsuit proceeds, the Board should be ordered to notify the 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.[70]

Although the challenged policy had two elements—withholding notice and forbidding opt-outs—the opinion treated them together, relying largely on *Yoder* and *Barnette.* Regarding *Yoder,* the Court rejected the lower courts' narrow reading of *Yoder* as "*sui generis*" and "inexorably linked to the Amish community's unique religious beliefs and practices."[71] The Court put a final nail in the coffin on attempts to interpret *Yoder* as applying only if the parents are Amish, stating, "We have never confined *Yoder* to its facts. To the contrary, we have treated it like any other precedent. We have at times relied on it as a statement of general principles. . . . And we have distinguished it when appropriate."[72] "*Yoder* is an important precedent of this Court, and it cannot be breezily dismissed as a special exception granted to one particular religious minority."[73]

It is fair to say that after *Mahmoud*, *Yoder* is not only alive and well but provides robust support for parents' free exercise rights in analogous circumstances. The Court did recognize, however, that any such inquiry is fact-specific, explaining, "As our decision in *Yoder* reflects, the question whether a law 'substantially interfer[es] with the religious development' of a child will always be fact-intensive.[74] It will depend on the specific religious beliefs and practices asserted, as well as the specific nature of the educational requirement or curricular feature at issue."[75] The facts the Court found relevant here

[69] *Mahmoud*, slip op. at 1–2 (quoting *Yoder*, 406 U.S. at 218).

[70] *Id.* at 41.

[71] *Id.* at 15 (citing Mahmoud v. Taylor, 688 F. Supp. 3d 265, 294, 301 (D. Md. 2024)).

[72] *Id.* at 29 (citations omitted).

[73] *Mahmoud*, slip op. at 29–30.

[74] *Yoder*, 406 U.S. at 218.

[75] *Mahmoud*, slip op. at 21.

included these: (1) like many books targeted at young children, the books were unmistakably normative;[76] (2) the students were young, roughly 5 to 11 years old;[77] (3) the Board "encourage[d] the teachers to correct the children and accuse them of being 'hurtful' when they express a degree of religious confusion";[78] (4) the parents only requested to opt-out of the instruction;[79] and (5) the Board allowed for opt-outs for nonreligious reasons or for religious reasons for other parts of the curriculum or schedule.[80]

In applying *Yoder* and *Barnette*, the Court rejected the government's argument that "coercion" is the proper standard and that a necessary element of coercion is whether the activity was successful in getting the students to abandon their religious tenets. Although the Court found a level of compulsion in *Barnette* that did not appear in *Yoder*, in neither case was the child required to adopt "any contrary convictions of their own and become unwilling converts."[81] The Court thus rejected the dissent's efforts to limit the Free Exercise Clause's guarantee to "nothing more than protection against compulsion or coercion to renounce or abandon one's religion," and it rebuffed the proposal that "[w]hether or not a requirement or curriculum could be characterized as 'exposure'" is "the touchstone for determining whether that line is crossed."[82]

The Court also relied on *Barnette* to reject the argument that parents could cure their own injury by simply withdrawing their children from public school and providing private or home schooling for them. That alleged defense is already foreclosed by *Barnette* because it conditions access to a public benefit on capitulating to the government's constitutional demands.[83] Like here, although the policy in *Barnette* did not clearly require students to "forego any contrary

[76] *Id.* at 22.

[77] *Id.* at 4, 26.

[78] *Id.* at 26.

[79] *Id.* at 14.

[80] *Id.* at 38.

[81] *Id.* at 19 (citing *Barnette*, 319 U.S. at 633).

[82] *Id.* at 28, 30.

[83] *Id.* at 19 (citing *Barnette*, 319 U.S. at 630–31) ("The effect of the State's policy, we observed, was to 'condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child.'").

convictions of their own and become unwilling converts," it nonetheless required a particular "affirmation of a belief and an attitude of mind."[84] "Public education is a public benefit, and the government cannot 'condition' its 'availability' on parents' willingness to accept a burden on their religious exercise."[85]

Moreover, as the Court pointed out, the claim that parents can simply walk away from the infringing demands is impractical, because "[d]ue to financial and other constraints, . . . many parents 'have no choice but to send their children to a public school.' As a result, the right of parents 'to direct the religious upbringing of their' children would be an empty promise if it did not follow those children into the public school classroom. We have thus recognized limits on the government's ability to interfere with a student's religious upbringing in a public school setting."[86] "Moreover, since education is compulsory in Maryland, . . . the parents are not being asked simply to forgo a public benefit. They have an obligation—enforceable by fine or imprisonment—to send their children to public school unless they find an adequate substitute. . . . And many parents cannot afford such a substitute."[87] Thus, "It is both insulting and legally unsound to tell parents that they must abstain from public education in order to raise their children in their religious faiths, when alternatives can be prohibitively expensive and they already contribute to financing the public schools."[88]

IV. What's *Smith* Got to Do with It?

Smith has long presented an obstacle to Free Exercise claims. But, as *Mahmoud* reiterated, *Yoder* presents a different legal framework from the sometimes troubling two-part test from *Smith* that may doom religious exercise claims. Under *Smith*, the government is generally free to place incidental burdens on religious exercise so long as it does so pursuant to a "neutral policy that is generally applicable."[89]

[84] *Id.*; *Barnette*, 319 U.S. at 633.

[85] *Mahmoud*, slip op. at 32–33 (citing Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 462 (2017)).

[86] *Id*. slip op. at 19 (quoting Morse v. Frederick, 551 U.S. 393, 424 (2007) (Alito, J., concurring)).

[87] *Id*. slip op. at 33 (citations omitted).

[88] *Id.* at 34.

[89] *Smith*, 494 U.S. at 878–79.

There is, however, an exception derived from *Yoder* that is applicable in cases like this one and bypasses *Smith* altogether.

The Court here relied on a *Yoder* exception, stating, "Here, the character of the burden requires us to proceed differently. When the burden imposed is of the same character as that imposed in *Yoder*, we need not ask whether the law at issue is neutral or generally applicable before proceeding to strict scrutiny. That much is clear from our decisions in *Yoder* and *Smith*."[90]

But what does it mean to say the "burden imposed is of the same character"? The basis for the *Yoder* exception in *Smith* was the Court's speculation that the hybrid rights at issue made the *Smith* rule inapplicable.[91] Here, the Court did not do a hybrid-rights analysis because "the burden imposed here is of the exact same character as that in *Yoder*," and thus strict scrutiny applies.[92] An assortment of elements may make the burden here the same as the burden in *Yoder*. For example, in both cases the defendants were public schools, the plaintiffs were parents who wanted to withdraw their children from instruction, and the Free Exercise infringement was instruction that contradicted the parents' religious beliefs. But are all of those elements necessary to invoke the *Yoder* exception? Would two elements, such as public school plus Free Exercise or public school plus refusal to allow opt-out, suffice? Or would *Smith* apply in those lesser scenarios? Leaving those questions for another day, here, the Court held that once *Yoder* applies, then strict scrutiny is the appropriate standard—and the program failed on two prongs.

First the Court acknowledged that the Board has a "compelling interest in having an undisrupted school session conducive to the students' learning."[93] But that interest is undermined when the Board allows opt-outs for reasons other than for religious exercise.[94] Likewise, the Board's "asserted interest in protecting students from 'social stigma and isolation'" is undermined by shifting stigma to another group of students.[95] In addition, the requisite link between the government's

[90] *Mahmoud*, slip op. at 36.

[91] *Smith*, 494 U.S. at 881.

[92] *Mahmoud*, slip op. at 36 n.14.

[93] *Id.* (citing Grayned v. City of Rockford, 408 U.S. 104, 119 (1972)).

[94] *Id.* (citing Fulton v. City of Philadelphia, 593 U.S. 522, 542 (2021)).

[95] *Id.* at 39.

interest and its proposed course of action breaks down when, as here, it relies on self-inflicted challenges, such as how it structures its curriculum and school schedule, to justify its infringing policies.

V. Justice Thomas's Concurrence

In his concurrence, Justice Clarence Thomas highlighted some themes that may be relevant to future cases, such as the inadequacy of conformity-driven rationales to overcome the individual rights of the students, the inappropriateness of efforts by the state to position itself as the savior of the child, and the impropriety of creative efforts by the government to create burdens on itself to pump up its "compelling interest."

The "conformity-driven rationale" refers to an approach in which schools argue that they have a compelling interest in driving uniformity among school children. But the Court has rejected that approach before.[96] The shortcomings of the related "savior" approach were identified in *Yoder*, in which "the Court observed that if a State were 'empowered, as *parens patriae*, to "save" a child' from the supposed 'ignorance' of his religious upbringing, then 'the State will in large measure influence, if not determine, the religious future of the child.'"[97] "Such an arrangement would upend the 'enduring American tradition' of parents occupying the 'primary role . . . in the upbringing of their children'—a role that includes the 'inculcation of . . . religious beliefs.'"[98]

These approaches are not new. As Justice Thomas pointed out, "The arguments that Oregon pressed in defense of its compulsory-education law [in *Pierce*] make clear that the State sought ideological conformity among its citizens, and viewed immigrants and their religious schools as standing in the way."[99] "The State even asserted an interest in 'a greater equality' to justify its attempt at state-enforced uniformity."[100]

The second approach relates to the apparently deliberate practice of dispersing controversial material within curriculum to make

[96] *Mahmoud*, slip op. at 6 (Thomas, J., concurring) (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

[97] *Id.* (citing *Yoder*, 406 U.S. at 222, 232).

[98] *Id.*

[99] *Id.* (citing *Pierce*, 268 U.S. at 526).

[100] *Id.* (citing *Pierce*, 268 U.S. at 526).

opting-out logistically challenging.[101] The moral hazard of reducing First Amendment protections wherever the government may creatively introduce complexity is clear. Thus, "[i]nsofar as schools or boards attempt to employ their curricula to interfere with religious exercise, courts should carefully police such 'ingenious defiance of the Constitution' no less than they do in other contexts."[102]

VI. The Dissent

The dissent asserted that the "ruling threatens the very essence of public education" by focusing largely on issues that were not before the Court, such as whether parents may use the courts to impose changes on curricula.[103] The well-established precedent that demands for changes to curriculum are unlikely to prevail highlights the dichotomy between remedies that require freedom from state demands versus remedies that demand the state to perform specific acts.

VII. What's Next

A variety of doctrinal issues that are not addressed in *Mahmoud* are logical next steps in determining the boundaries between parents rights to guide the education of their children and efforts of public schools to use their curriculum to influence the opinions of students on potentially provocative topics.

[101] *Id.* at 12 ("But these alleged logistical challenges are attributable to the Board's deliberate decision to 'weave' the storybooks into its broader curriculum.").

[102] *Id.* (citing South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966)).

[103] *Id.* at 2 (Sotomayor, J., dissenting) (claiming that "[t]he Court's ruling, in effect, thus hands a subset of parents the right to veto curricular choices long left to locally elected school boards."); *id.* at 14 (flipping the burden of the First Amendment to require limits on the limits that are applied to government by arguing that the majority "imposes no meaningful limits on the types of school decisions subject to strict scrutiny"); *id.* at 24 (conflating one child calling another child a sinner with a school instructing children on whether behavior is a sin: "If a student calls a classmate a 'sinner' for not wearing a head covering or coming out as gay, how can a teacher respond without 'undermining' that child's religious beliefs?"); *id.* at 27 ("At present, States and localities across the Nation have adopted a patchwork of different policies governing school material related to gender and sexuality and parental opt-out rights."); *id.* at 28 (subjugating minority constitutional rights to the democratic process by claiming the majority "subverts Maryland's functioning democratic process, whistling past decades of precedent that recognizes the primacy and importance of local decision making in this area of law.").

The majority opinion relied largely on *Yoder*, which involved two rights: Free Exercise and the right of parents to direct the education of their children. This so-called "hybrid rights" precedent leaves open the issue to whether one or the other of those rights would be sufficient to require the government to allow parents to opt-out their children from certain topics. The reasoning here, as well as the abundance of Free Exercise precedent, make it likely that Free Exercise alone would be sufficient. But whether nonreligious matters—even matters of conscience—would prevail seems less likely.

A second question turns on whether an argument similar to the one made here could rely on a different clause of the First Amendment, either as one of two hybrid rights or on a stand-alone basis, such as arguing for Free Speech or Freedom of Association to shield children from topics that parents do not want presented to their children. Under the doctrine that the right to speak includes the right not to speak and the right not to listen (likewise for association), it does not seem a stretch to imagine that other clauses may provide an approach to securing nonreligious opt-out programs.

Another question is whether other topical areas may drive parental interest in opting their children out of instruction—with or without a religious element. For example, in Maryland, as well as in the majority of other states, public schools provide opt-out or opt-in programs for instruction regarding human sexuality.[104] These programs have been implemented via the political process, not via constitutional litigation. So for nonreligious parents, or for parents who choose not to rely on religion to support their choices, it is an open question whether instruction on human sexuality could be made mandatory as a condition of attending public school. But the prevalence of this form of opt-out illustrates that, for some topics, parental choice is generally expected and respected. And, there is some precedent for the notion that courts may be open to arguments regarding parental choice for topics other than sex.[105]

[104] Md. Code Regs., *supra* note 58.

[105] *See, e.g.*, *Torlakson*, 267 F. Supp. 3d at 1224 (quoting Fields v. Palmdale Sch. Dist., 427 F.3d 1197 (9th Cir. 2005), *amended by* 447 F.3d 1187 (9th Cir. 2006)) ("[T]here is no constitutional reason to distinguish [concerns regarding sex education] from any of the countless moral, religious, or philosophical objections that parents might have to other decisions of the School District.").

Regarding live litigation, other educational freedom cases in the pipeline may be affected by *Mahmoud*. For example, various cases pending in Maine and Vermont challenge the states' exclusion of religious schools from their state tuition programs by invoking state law prohibitions against participants discriminating on the basis of religion. The potential effect of *Mahmoud* on those cases would work as follows. First, under *Carson v. Makin*, if a state is required to provide tuition funding for a group of students under state law, it may not exclude otherwise qualified religious schools from the list of schools at which students may use their tuition dollars on the basis that the schools are religious actors. Following *Carson*, some states have taken another bite at the apple by invoking state law that prohibits discrimination on the basis of gender identity to exclude religious schools that would not agree to adopt the state's viewpoint on gender-based issues. The effect of *Mahmoud* on these cases remains to be seen. But it seems plausible that if a public school must allow a parent to opt-out a child from gender-based instruction where there is a religious conflict—and likewise cannot condition receipt of the benefit of publicly funded education on accepting the government's viewpoint, then the state cannot condition receipt of the benefit of publicly funded education on parents sending their children to only those schools that present gender-based issues from the state's favored viewpoint. Requiring parents to forgo the entire publicly funded educational benefit would seem to be more severe than the proposal that parents could be required to forgo attendance at a particular school that was rejected here.

Relevant to such an approach would be the extent to which "acceptable" schools teach such issues from a normative perspective that aligns with the state's preferred viewpoint. The likelihood that this factor would weigh in favor of the parents seems high where the state has deliberately determined which schools may participate on the very normative basis that's in dispute.

Similarly, for states that have compulsory education laws, forcing parents to choose between their religious views and complying with state law would tend to favor parents as extending well beyond the authority of the government to conduct its own affairs.

Longer term doctrinal issues may include whether a curriculum may be so burdensome to religion that a parent must be allowed to opt-out of having their children attend the public school altogether

without forfeiting the benefit of a publicly funded education. Remedies in such circumstances could be broad, including allowing the child to transfer to an otherwise inaccessible public school with a different curriculum or allowing the child to take the funding to another educational source.

Or, for states that have state constitutions with Blaine Amendments (prohibiting the use of public funds for sectarian schools) or broader amendments that prohibit the use of public funds for any private educational entity, if the conflict between the school program and the First Amendment becomes irreconcilably severe, state constitutions may need to yield to a remedy that would cure the federal constitutional injury.

Finally, what is left of *Smith* when it comes to material taught in public schools? Does it retain vigor wherever there is no hybrid Free Exercise/parental rights issue in play? Or has it been narrowed to the extent that schools simply cannot infringe a religious viewpoint even if the pedagogy is neutral and generally applicable?

Conclusion

Mahmoud presents an affirmation that parental rights to guide the religious upbringing of their children are not narrow rights that apply only where the religious community requires total, or near-total, withdrawal from the public schooling system. Rather, they extend to discrete conflicts within the public school from which the parents seek to have their children excused. This case did not raise issues regarding control of public school curriculum. But its holding may extend to other types of educational choice disputes where the state's position relies on *Smith* to either impose instruction that conflicts with the parents' religious exercise or to force parents to forgo a public benefit if they will not conform to the state's preferred viewpoint.