To Allow Opt Outs or Not to Allow Opt Outs, That is the Question

By Paul Engel

May 13, 2025

- Who controls your children’s education?
- Can schools hide what they are teaching the children?
- Are opt-outs optional or mandatory?

The question of if and when parents should be allowed to opt their children out of certain activities and curriculum in public schools has been raging for quite a while. With our society’s rapidly changing standards, the need for parents to oversee and control the upbringing of their children has become even more important. Yet the Montgomery County School Board decided that in one area of instruction, story time, parents of children as young as three-years old would not be allowed to opt their children out of religiously objectionable material. Did the School Board violate the First Amendment or maybe another one?

Background

The length of oral arguments, at two and a half hours, should give you an idea of the importance both the attorneys and the justices placed on this case. Because of the amount of content covered during these arguments, this will be a long article.

We start with the question brought to the court.

Respondent Montgomery County Board of Education requires elementary school teachers to read their students storybooks celebrating gender transitions, Pride parades, and same-sex playground romance. The storybooks were chosen to disrupt "cisnormativity" and "either/or thinking" among students. The Board's own principals objected that the curriculum was "not appropriate for the intended age group," presented gender ideology as "fact," "sham[ed]" students with contrary opinions, and was "dismissive of religious beliefs." The Board initially allowed parents to opt their kids out—but then reversed course, saying that no opt-outs would be permitted and that parents would not even be notified when the storybooks were read.

There are two points we need to keep in mind before we proceed. First, it is the right of parents to control the upbringing of their children. That includes both their academic and religious training. Second, while aschools have some limited power In Loco Parentis or "in place of the parents" when the students are in school, that power does not supersede parent's rights to oversee the training of their children.

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Petitioners filed suit, not challenging the curriculum, but arguing that compelling their elementary-age children to participate in instruction contrary to their parents' religious convictions violated the Free Exercise Clause.

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Notice, the parents are not trying to change the school curriculum, but only to be allowed to exercise their right to determine what is appropriate for the religious education of their child. Personally, I would have used a different

argument, for several reasons, but I will get into that later.

Ultimately, the question before the court is:

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?

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ORAL ARGUMENT OF ERIC S. BAXTER ON BEHALF OF THE PETITIONERS

As always, arguments start with the attorney for the petitioner.

1. BAXTER: Mr. Chief Justice, and may it please the Court:

Parents everywhere care about how their young children are taught sexuality and gender identity. That's why nearly every public school in the country that provides sexuality education requires parental consent first. But Montgomery County is an extreme outlier, insisting that every elementary school student must be instructed that, among other controversial matters, doctors guessed at their sex when they were born and that anyone who disagrees is hurtful and unfair.

Forcing Petitioners to submit their children to such instruction violates their religious beliefs and directly interferes with their ability to direct the religious upbringing of their children.

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One of the points that will be brought up is that some parents objected to the curriculum for other than religious reasons. This is one of the reasons I would have argued differently.

The Board claims this straightforward burden analysis will invite chaos. But schools nationwide have long applied expansive opt-out policies without significant difficulty, including the Board itself, which stills allows opt-outs for choir students who object to singing religious songs or students who object to certain storybooks, such as one that portrays an image of the Prophet Muhammad. Exempting students for some religious reasons but not others cannot be squared with the First Amendment.

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This is the common, and I believe flawed, First Amendment jurisprudence currently enforced by our federal courts. This cannot be a First Amendment issue since Congress did not pass this as a law. That does not mean this isn't a freedom of religion case, just that it does not come from the First Amendment.

The decision of the Montgomery Board of Education to stop allowing opt-outs has had a significant impact on many families.

The Board does not dispute that under its theory, it could compel instruction using pornography and parents would have no rights. The First Amendment demands more. Parents, not school boards, should have the final say on such religious matters.

I welcome the Court's questions.

Tamer Mahmoud, et al. v. Thomas W. Taylor, et al., – Oral Arguments

Before we get into those questions, I'd like to look at the other arguments.

SARAH M. HARRIS, ESQ. as amicus curiae, supporting the Petitioners

Next up is Sarah Harris, Principal Deputy Solicitor General for the United States, arguing in support of the petitioners.

1. HARRIS: Mr. Chief Justice, and may it please the Court:

When the government forces people to choose between violating sincerely held religious beliefs or foregoing a public benefit, that burdens religious exercise.

[Tamer Mahmoud, et al. v. Thomas W. Taylor, et al., – Oral Arguments]

You'll find that this idea of "burden" is a recurring theme, especially during questions. The First Amendment prohibits Congress from passing a law that prohibits the free exercise of religion, but how far can Congress go before it prohibits? The Merriam-Webster Online Dictionary defines burden as to load or oppress. By adding an extra burden to the exercise of religion, the courts have maintained that is sufficient to trigger the First Amendment's prohibition.

Here, Montgomery County offers a free public education to parents only if their children use books featuring same-sex relationships and transgender issues. That burdens parents of multiple faiths whose religious duty is to shield their young children from such content.

Public schools routinely accommodate those burdens with opt-outs, which respect families of many faiths and backgrounds. Several states allow opt-outs from any learning material on religious grounds. Montgomery County allows many other opt-outs, just not here.

I welcome the Court's questions.

[Tamer Mahmoud, et al. v. Thomas W. Taylor, et al., – Oral Arguments]

Montgomery County offers "free" public education. Actually, since these public schools are funded largely by local taxes,

Montgomery County offers education paid for primarily by the residents of the county. As such, that makes it a "public benefit." By denying said benefit to people based on their religious beliefs, the county is burdening these families by requiring either that they compromise their faith or go somewhere else at their own expense. Also, since Montgomery County seems to be the only county in the state, possibly the nation, that refuses to offer opt-outs for this kind of instruction, and since the county allows opt-outs for other religious reasons, this seems to be a targeted attempt at indoctrination.

As you might expect, the Montgomery County Board of Education does not agree.

ORAL ARGUMENT OF ALAN E. SCHOENFELD ON BEHALF OF THE RESPONDENTS

Representing Thomas Taylor, Superintendent of the Montgomery County Board of Education, along with the other respondents, is Alan Schoenfeld.

1. SCHOENFELD: Mr. Chief Justice, and may it please the Court:

Every day in public elementary school classrooms across the country, children are taught ideas that conflict with their family's religious beliefs. Children encounter real and fictional women who forego motherhood and work outside the home. Children read books valorizing our nation's veterans who fought in violent wars. And children in Montgomery County read books introducing them to LGBT characters. Each of these things is deeply offensive to some people of faith, but learning about them is not a legally cognizable burden on free exercise.

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Funny, I don't know many religions that prohibit being a mother or working outside the home. I do know people who prefer these things, and of course it is a tenant of Roman Catholic doctrine to encourage natural motherhood, but does that give the state the authority to say children must be taught these things? The question isn't can the state teach these things, but can the state force these things to be taught and that they are right and good? Is this force a burden on a parent's free exercise of religion?

Adopting Petitioners' view of the case would conscript courts into playing the role of school board, a task for which this Court has recognized they are ill suited. And a constitutional requirement to provide opt-outs from anything someone finds religiously offensive would mean public schools must find alternative classrooms, supervision for young students, and substitute lessons each time a potentially offensive topic arises. That is not what the Constitution requires, particularly given the special characteristics of the school environment.

[Tamer Mahmoud, et al. v. Thomas W. Taylor, et al., – Oral Arguments]

Actually, that is exactly what the Constitution of the United States requires of Congress. Public schools already find alternative classrooms, supervision, and lessons for other religious objects, so why would story time be such a burden to the Montgomery County Schools?

Contrary to what Mr. Schoenfeld has said, the burden would be on the schools not the courts. A simple, you must accommodate the religious beliefs of both students and parents, does not engage the courts unless the schools refuse to do so.

This Court has made clear that exposure to offensive ideas does not burden free exercise, and it has held that the government is not required to do its daily work in ways that

make it easier for parents to raise their children in the faith.

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This idea of exposure vs instruction took up a lot of time during questioning. So much so that I have an entire section on it.

The books at issue here, five among hundreds in the curriculum, are meant to foster mutual respect in a pluralistic school community. MCPS makes explicitly clear that students do not need to accept, agree with, or affirm anything they read or anything about their classmates' beliefs or lives. The lesson is that students should treat their peers with respect.

I welcome the Court's questions.

Tamer Mahmoud, et al. v. Thomas W. Taylor, et al., – Oral Arguments

Again, it is not the quantity of objectionable material that is the problem, but the forcing of students to consume it.

Exposure vs Instruction

As I mentioned above, the question of exposure vs instruction was a central topic during questioning. Let's look at some of the highlights.

JUSTICE THOMAS: Could you spend a minute or two to explain how the – why the record shows that the children are more than merely exposed to the – these sorts of things in the storybooks? …

1. BAXTER: No. We know that the – the teachers are required to use the books. When the books were first introduced in August of 2022, the Board suggested they be used five

> times before the end of the year. That's in the – that's at 273a in the cert appendix. One of the schools, the Sherwood School, in June, for Pride Month, said that they were going to read one book each day to celebrate Pride Month. The Board's own testimony through Superintendent Hazel said that the books must be used as part of the instruction and that, at 650 – 642 in the appendix, that discussion will ensue.

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It was not as if these books were in the school library or on the classroom bookshelves and available to the students. The Board not only suggested they be used multiple times is one school year, but one school made a point of reading them to celebrate Pride Month. That's the celebration of deviant sexual behavior, including parades and other events consisting of people in lewd dress often engaging in suggestive if not pornographic activities. Why did the Board want this as mandatory instruction?

That was the entire point of withdrawing the opt-outs and removing even notifying parents. They're not even allowed to know. The Board said in that statement it was so that every student would be taught from the inclusivity storybooks. And also, the district court transcript at 63 has counsel's admission that there have – some of the books have to be used and it can be more.

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The obvious point was not merely to expose children as young as 3 to 4 years old to these ideas, but to instruct them to both celebrate and normalize them.

Justice Sotomayor and Mr. Baxter got into quite an exchange about the topic of exposure vs coercion.

JUSTICE SOTOMAYOR: Let's go back. Is it generally that the mere exposure – haven't we made very clear that the mere exposure to things that you object to is not coercion?

1. BAXTER: It would really depend on the individual religious beliefs. Here, for example, our Catholic clients –

JUSTICE SOTOMAYOR: So what you're saying is that the exposure of children to the fact that two people are getting married is coercion? That two people of the same sex are getting married is coercion?

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Justice Sotomayor sounds more like a prosecuting attorney on cross-examination than a justice of the Supreme Court. Of course, she was not the only one to interrupt Mr. Baxter, but you should get the flavor of this line of questioning. She also seems to ignore the fact that looking at pictures was not all that was included in this curriculum.

JUSTICE SOTOMAYOR: For reality's sake, you see interfaith couples all the time walking around. You see interracial couples walking – walking around. You see women on this Court in positions of work outside the home.

1. BAXTER: And no one here is raising a – a burden in that situation. We're far beyond that where our indoctrination –

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The point that both Justice Sotomayor and Mr. Baxter seem to miss is that there is a difference between exposure to something as you go about your business, and being compelled by law and policy to expose your children to it. Furthermore,

as we'll see, this was not mere exposure, but indoctrination since the teachers were encouraged to both make these books part of the instruction and to correct those who disagree with their message. Take for example this interchange between Justice Barret and Mr. Schoenfeld for the respondents.

this is an instruction to the teacher, "If a student observes that a girl can only like boys because she's a girl, the Board suggested that the teacher disrupt the student's either/or thinking by saying something like: Actually, people of any gender can like whoever they like."

You know, or, on the transgender issue, "When we're born, people make a guess about our gender and label us boy or girl based on our body parts. Sometimes they're right; sometimes they're wrong. When someone's transgender, they guess wrong. When someone's cisgender, they guessed right."

So, you know, it's kind of along those things, which seem to be more about influence, right, and shaping of ideas and less about communicating respect because it's less about communicating respect for those, you know, who are transgender, who are gay, and more about how to think about sexuality.

What is your take on that and how we think about this, whether this really is just about exposure and civility and learning to function in a multicultural and diverse society and how much of it is about influence or, as Petitioners would say, indoctrination?

1. SCHOENFELD: Certainly. I think what you quoted, Your Honor, are suggested responses or proposed responses for age-appropriate ways to respond to questions that may arise in response to these texts or otherwise.

The same response about disrupt the either/or thinking is given when someone says dresses are for girls, boys can't paint their nails, those are boy toys. These are simply ways

of contextualizing the information that's being learned and to give students the predicates for being able to respect each other.

The school – the – the express directive from the school is you don't need to understand your peers, you don't need to agree with them, you don't need to affirm with them, but you do need to treat them with respect.

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Except the expressed message directive from the school is that one side is right and the other is wrong. The instruction isn't, "There are people who believe this, and we should treat them the way we want to be treated." Rather it's promoting these agendas by claiming they are right and opposition is, by definition, wrong. To a young child, this is the equivalent of telling them their parents are wrong. How can that not be indoctrination?

Then Justice Alito got into the questioning.

JUSTICE ALITO: Yeah, the book has – the book has a clear message, and a lot of people think it's a good message, and maybe it is a good message, but it's a message that a lot of people who hold on to traditional religious beliefs don't agree with.

I don't think anybody can read that and say, well, this is just telling children that there are occasions when men marry other men, that Uncle Bobby gets married to his boyfriend, Jamie, and everybody's happy and everything is – you know, it portrays this – everyone accepts this except for the little girl, Chloe, who has reservations about it. But her mother corrects her: No, you shouldn't have any reservations about this. …

JUSTICE ALITO: It has a clear moral message. And it may be a

good message. It's just a message that a lot of religious people disagree with.

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Yes, these books have clear moral messages. And contrary to what is being argued by Mr. Schoenfeld, this is not a case of mere exposure, but coercion and indoctrination into the messages these books promote.

Justice Jackson tried to come up with an analogy that would fit her understanding of the situation.

I'm just trying to find an analogous public – benefit outside of the school context and ask you whether your position is that it substantially burdens the rights of religious parents if there are advertisements on a public bus that say things that they don't want their children exposed to.

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I think a better analogy to what the schools are doing would be to consider how the parent instructs the child to deal with the advertising. A parent could teach their children to simply turn their gaze away from such advertisements while the school is effectively saying, "No, you must look, because it is right."

Justice Gorsuch brought up another point.

JUSTICE GORSUCH: Yeah. Okay. And your – you've included these in the English language curriculum rather than the human sexuality curriculum to influence students, is that fair? That's what the district court found. Do you agree with that?

1. SCHOENFELD: I think, to the extent the district court found that it was to influence, it was to influence them towards civility, the natural consequence of being

exposed to –

JUSTICE GORSUCH: Whatever, but to influence them.

1. SCHOENFELD: In the manner that I just mentioned, yes.

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Yes, even the attorney for the Board admits this curriculum is to influence the children. However, as we've already seen, it is not toward civility but acceptance.

Are Opt-Outs Unworkable?

The Montgomery County Board of Education claims that they stopped offering opt-outs for this curriculum because they found it administratively unworkable.

JUSTICE THOMAS: Couldn't you solve those differences simply by restoring the opt-out?

1. SCHOENFELD: Your Honor, I – I think, in this case, the record makes clear that the school district did try to honor the opt-out, and at some point, it became infeasible. Certainly, there are circumstances where the right decision a school board might make in view of the particular needs of a community is to offer the opt-out. It's a different question from whether it's constitutionally required.

[Tamer Mahmoud, et al. v. Thomas W. Taylor, et al., – Oral Arguments]

But during Chief Justice Roberts questioning of Mr. Baxter, administration of the opt-outs didn't seem to be as big a deal as Mr. Schoenfeld would later state.

CHIEF JUSTICE ROBERTS: The school board alleges that the opt-out system became unworkable. Is that a – is that a factor we should take into account in deciding whether it could be

required?

1. BAXTER: Certainly, there –

CHIEF JUSTICE ROBERTS: Does it have to be required?

1. BAXTER: – there could be situations where it could be unworkable. The Board never raised that until after this litigation commenced. When they announced the withdrawal, they said it was because every student needed to read the inclusivity books. When they produced documents in response to an open records request, there was no mention of it not being workable.

When parents met with the superintendents – this is at the – in the Hisham Garti declaration at JA 44 – the reason given there was inclusivity. There was no mention of administrability until we get to – until the litigation's been filed, and even then, all the Board was able to come up with was the argument that in – in one instance in one school, there were dozens of students who opted out, where, if the average school size in Montgomery County is 700 students across at least a dozen classrooms, you're talking maybe one student per classroom. That hardly compares with the one in eight students who are opted out for individual education programs, students – 15 percent of students in Montgomery County who are taking English for speakers of a second language, the Board's own opt-outs that are required from the same instruction, required by state law to be opted out when the – when the same books are read in health class.

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If the administration of these opt-outs is so onerous, why was it not mentioned when their cancelation was announced, in the documents produced, or even when meeting with the parents? Could it be that there's more to this administrative problem than meets the eye? Justice Thomas dug into this a little

deeper.

JUSTICE THOMAS: You – in – in, I think, chatting with Justice Kavanaugh, you mentioned that the opt-out was unworkable because there were so many students who opted out. What did you mean by that?

1. SCHOENFELD: So the – the record is limited on this point, but the Hazel declaration talks about the fact that principals reported to the School Board that there was high absenteeism and gave the example of one school where dozens of students were opting out.

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Again, the problem the Board saw that led them to cancel these opt-outs is the number of students opting out. Which I think points us to another question. Why are there are so many opt-outs of this curriculum? Could it be that this curriculum was so offensive to so many people that the only way for the Board to teach this nonsense was for them to force it down the student's throats? That is not teaching respect and kindness for others, but totalitarian conformity to the government's views.

Age Appropriate

Justice Alito and Mr. Baxter had an interesting discussion about age appropriateness.

What are the ages of the children who are involved here?

1. BAXTER: These books were approved for pre-K, which in Montgomery County can start as early as 3 if they're going to turn 4 that fall.

JUSTICE ALITO: And it goes up to what?

6. BAXTER: The – the books that we've all talked about go

through grade 6.

JUSTICE ALITO: All right. So you're talking about children maybe in the age of 5 to 11 or 4 to 11. Now would you agree that at a certain age – at that – at a certain age, students are capable of understanding this point, which probably is not a point that can be understood by a four- or five-year old, and that is that my teacher, who is generally telling me that certain things are right and that certain things are wrong, isn't necessarily going to be correct on everything? It is possible for me to disagree with him or her on certain subjects? Would you agree that there comes a point when a student is able to make that distinction?

1. BAXTER: That's right. And many of our clients' objections would be diminished as their children got older. But, here, we're in a situation where Montgomery County's own principals objected that these books were inappropriate for the age, that they were dismissive of religion and shaming toward children who disagree. The Board itself withdrew two of the books for what it said were content concerns because it finally agreed that what parents and petition – and its own principals were saying was accurate.

[Tamer Mahmoud, et al. v. Thomas W. Taylor, et al., – Oral Arguments]

Most of us would agree that there are topics that are not appropriate for children as young as three or four years of age. But who determines what those are? More importantly, how granular is that decision? Because while we are dealing with classrooms of children, each and every one of them mature at different rates. If it's appropriate for 50% of a class is that good enough? Should the teacher be the one determining what is appropriate for a child of a certain age? Should the Board? And what about the 50% of students who are not prepared to deal with a certain subject? Should they be harmed because

the Board wants this education promoted?

Speaking of this education, why is the Board of Education working so hard to force children to learn about these subjects?

JUSTICE ALITO: Yeah. And one final factor that may distinguish this particular case from some of the others that you have been asked to express a view about, and you did touch on this, is the fact that it concerns sex and – and gender and that the – the Maryland legislature itself has recognized these subjects raise special concerns and has provided for an opt-out from the health classes where these matters are discussed.

1. BAXTER: That's right. And, currently, from – in Montgomery County, you can opt out from the very same instruction during health class, but then you're required to stay during – during story time.

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Isn't that interesting? You can opt out of instruction during health class, but when the exact same subject comes up in story time the Board says no.

Mr. Baxter pointed out an interesting incongruity in the Board's argument.

And then also a question about when sex ed starts. The Board's and the – the state's mandated regulation is in the record. It's at pages 62 through 83 of the Joint Appendix. There, you start in pre-K with instruction that parents can – or families can come in all different forms with all different kinds of parents, different kinds of gender identities and expressions. The same things that are being taught through the school – schoolbooks, you can opt out when it comes up during health class but not during story time, which – in which there's no instruction about how to use these – these books to develop

characters, a narrative arc, or anything else that you would expect in an English class.

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The question of the age appropriateness of starting sex ed in pre-K is one thing. Hiding it in so-called English curriculum is something else.

Go Somewhere Else

Justice Jackson made an interesting point, but not the one I think she intended.

In that situation, I guess I'm struggling to see how it burdens a parent's religious exercise if the school teaches something that the parent disagrees with. You have a choice. You don't have to send your kid to that school. You can put them in another situation. You can home-school them.

How is it a burden on the parent if they have the option to send their kid elsewhere?

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Talk about living in an ivory tower. Justice Jackson acts as if sending your child to a private school or home-schooling them is a simple matter. Apparently she doesn't realize what's involved in either of those choices.

1. BAXTER: Well, Your Honor, the world we live in in this case is that most parents don't have that option. They have two working parents. They can't afford to send to private school.

JUSTICE JACKSON: Yes, as a matter of practicality, absolutely.

1. BAXTER: And that's the reality for our parents.

JUSTICE JACKSON: I understand. But, in so many other constitutional doctrines, we don't focus on whether people actually can afford to protect their rights.

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What's odd to me is that nowhere else is the right to protect your religious freedom from government infringement based on whether or not you can afford to do so. This court has repeatedly stated that you cannot be deprived of a public benefit because of your religious beliefs. But according to Justice Jackson, public school is different?

And what I guess I'm worried about is a world in which, when there is an option to send your kid somewhere else, it seems to me that these parents would be dictating what this school does in the way that you say our cases say they can't do, right?

[Tamer Mahmoud, et al. v. Thomas W. Taylor, et al., – Oral Arguments]

Tell me, Justice Jackson, will the parents who have left Montgomery County schools because of their opt-out police be reimbursed for the taxes they've already paid to support that school? It's not merely whether they can afford other options; they have been taxed under threat of fines and jail to pay for these schools.

Justice Alito got into a similar discussion with Mr. Schoenfeld.

So you have a case where some of the plaintiffs are devout Muslims. They say: We have a solemn religious obligation to raise our children as Muslims, and that involves certain moral principles that we want to instill in our children, and the school is teaching our children moral principles that are in conflict with ours.

And we pay taxes to support the public schools, but we don't have enough money to send our children to private schools. And one of us can't stay home and provide home-schooling. So we just want to be able to take our children out of the part of the instruction that we find objectionable.

And what's your response to that? Your response to that is just: Well, it's too bad, all right? This is the public school and the public school can teach what the public school wants. And you don't like that. Well, you can take your – you can send your – your children to private schools.

1. SCHOENFELD: There's no indifference to the religious beliefs of the Petitioners in this case. The school did what it could to accommodate those views. There are simply circumstances in which what the Petitioner or what any plaintiff recognizes that a burden on their religious belief is not a legally cognizable one given legal and practical justifications.

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Except the Board never mentioned the administration of the opt-out until the law suit, and the main complaint regarding administering the opt-out is the number of people opting out. Does that sound like respect for the parent's religious beliefs? Not to Justice Alito.

JUSTICE ALITO: Well, it's nice that you say that they respect the parents' religious beliefs, but, basically, your answer is it's just too bad.

…

JUSTICE ALITO: You've got to send your school – your children to school. You can't afford to send them to any place except a public school, unlike, you know, most of the lawyers who argue cases here, they can send their children to – to private

schools, and they think that that's the way most of the world is. But it's not. It's just too bad.

1. SCHOENFELD: My answer is that public schools are democratically controlled for a reason. The School Board here is democratically elected. The entire process of adopting this curriculum is open and transparent. These books are on review for 30 days before they're even made part of the curriculum. There is then a multi-level appeal process. There is plenty of opportunity for parental insight.

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Except neither the United States, nor the State of Maryland are democracies, they are constitutional republics. And this is a perfect example of why we are not a democracy. Democracies allow the majority to overrule the rights of the minority. Simply because a majority of the people of Montgomery County chose board members who wish to promote a sexual agenda on children as young as three years old does not deprive their parents of the right to public benefits without compromising their religious beliefs.

As Mr. Baxter pointed out in his rebuttal, this was hardly a democratic process.

This was not a democratic process. Withdrawing these overnight, comparing parents to xenophobes and white supremacists, this can't be part of the – of the democratic process.

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Under Maryland law, parents are compelled to send their children to public schools unless they ask for an exemption. And now, when everyone else, religious or otherwise, is

allowed to benefit from these schools, Justice Jackson and the Montgomery County Board of Education wants to bar the door just as George Wallace did with the University of Alabama in 1963, simply because their religion does not promote this sexualization of children. How can that not be a burden on the free exercise of religion?

Actions of the Board

Another concern that Mr. Baxter brought up was how the board treated the reactions of the parents.

JUSTICE KAVANAUGH: But then complaints were raised, right?

1. BAXTER: That's right. Hundreds of parents complained. These were mostly – according to news articles, mostly families from Muslim faith and Ethiopian Orthodox who were objecting.

When they – when they spoke to the Board, the Board accused them of using their religious beliefs as another reason to hate, accused a young Muslim girl of parroting her parents' dogma, and then accused the parents of aligning with racist xenophobes and white supremacists.

And so, again, there's no question in this case that there is a burden, that it was imposed with animosity, and that it's discriminating against our clients because of their religious beliefs.

[Tamer Mahmoud, et al. v. Thomas W. Taylor, et al., – Oral Arguments]

Could it be that the board was less concerned about the administration of these opt-outs than the religious nature of them? After all, claiming that a young girl's parents are racist xenophobes and white supremacists because they object to their daughter being sexualized at a young age seems to be a deflection. The parents weren't complaining about the race

of their characters in the books, but the lessons they were teaching their daughter.

Justice Gorsuch got Mr. Schoenfeld to admit the Board's bias against religion.

JUSTICE GORSUCH: So you take the view that even if you have a non-neutral policy, and even if it was motivated by hostility toward religion, and even though the parents claim a burden, you still have to somehow meet an additional objective substantial burden test?

1. SCHOENFELD: Correct.

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Conclusion

As I stated at the outset, I would not have argued this as a First Amendment, or even a freedom of religion case. As Justice Thomas found out during his questioning of Mr. Schoenfeld:

JUSTICE THOMAS: Was that because they found the materials objectionable or – for religious reasons or what?

1. SCHOENFELD: So there are two different paragraphs of her declaration that speak to this fact.

In that paragraph, it doesn't specify. Elsewhere in the declaration it makes clear that many of the opt-out requests were not religious in nature and parents objected, for example, to the age-appropriateness of materials, have nothing to do with religious prohibitions.

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There are apparently many parents, and even school principals,

who object to this curriculum for non-religious reasons. Should their concerns be ignored?

To me, this is a parents' rights issue. The Montgomery County Board of Education is depriving these parents of the liberty to raise their children as they see fit, violating the Due Process clauses of both the Fifth and Fourteenth Amendments. Arguing this as a Due Process case, rather than a Freedom of Religion case, would have eliminated all of the questions of sincerity as well as the concerns about entailing the courts in religious issues.

Yet there's another issue to consider. It should be obvious that it is illegal for government, in the form of public schools, to force instruction upon students that violates the religious beliefs of their parents. But when a school sees a large number of opt-outs, it should be a sign that there is a problem with that curriculum. Perhaps that signal should be used by the schools to pull the curriculum? As Mr. Baxter said in his rebuttal.

And it somewhat flips the Bill of Rights on its head if we're worried more about extreme examples that don't happen to protect the government from the parents as opposed to parent – protecting the parents' fundamental rights to direct the religious upbringing of their children.

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I try not to predict what the court will do. I can only hope they will protect the parent's fundamental right to direct the upbringing of their children.

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