Showdown over "Inclusive" Storybooks in Maryland Elementary Schools Heads to Supreme Court

Do parents have the right to opt their children out of instruction covering gender transition, pride parades, and same-sex romance?

By JOSHUA DUNN

If you wanted to design a case to encourage the Supreme Court's conservative majority to keep expanding its application of the Free Exercise Clause, you could hardly do better than *Mahmoud v. Taylor.* This case began in 2023 when the Montgomery County School Board in Maryland rescinded a policy that parents could opt their elementary school children out of instruction in the school district's mandated "inclusive" storybooks, which introduced students as young as kindergarten to gender transition, pride parades, and same-sex romance. In response, over 1,100 religious parents, including Muslims, Jews, and Christians, signed a petition asking the board to reinstate the policy. When the school board refused to relent—even though the district provided similar state-mandated opt-outs for sex-ed instruction in health classes, including in high school—the parents sued, requesting an injunction forbidding the school district from implementing the policy while the case was being litigated. The parents lost

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Parents rally outside the U.S. District Court in Montgomery County, Maryland, during oral argument in Mahmoud v. Taylor *in 2023. The plaintiffs lost their suit against the school board to reinstate the district's opt-out policy from storybooks that contain mature content.*

in federal district court and before a Fourth Circuit panel, but in January the Supreme Court agreed to hear the case.

The facts don't look promising for the school district. When the parents asked for the opt-out to be reinstated, school board members said the parents were promoting hate and likened them to "white supremacists" and "xenophobes." At the very least, these uncharitable comparisons indicate more than a little anti-religious animus, which the Supreme Court has repeatedly said public officials must avoid. As well, Maryland statutes require schools to "establish policies, guidelines, and/or procedures for student opt-out regarding instruction related to family life and human sexuality objectives."

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The content of the books, however, might be the most serious problem for the district. One book, *Pride Puppy*, directs three- and four-year-olds to search for various objects in illustrations of a pride parade, including leather, a lip ring, underwear, and drag kings and queens. Another, *Intersection Allies,* intended for grades K–5, has children explore the meaning of *transgender* and their preferred pronouns along with telling them to "rewrite the norms." Similar content is included in *Jacob's Room to Choose*, which encourages elementary school children to celebrate gender-neutral bathrooms.

Even the district elementary-school principals objected to these books, with their union chair writing in a memo to central office staff that it was "problematic to portray elementary school age children falling in love with other children, regardless of sexual preferences." They also said the books encouraged "shaming" dissenting students and were "dismissive of religious beliefs."

While many parents, regardless of their religious beliefs, would oppose these books simply because of their premature sexualization of children, whether homosexual or heterosexual, the plaintiff parents' strongest claim falls under the Constitution's Free Exercise Clause. The court has consistently buttressed free exercise rights over the last 14 years. The issues in this case also overlap with the court's reasoning in *Trinity Lutheran v. Comer*, *Espinoza v. Montana*, and *Carson v. Makin*, which held that religious individuals and students could not be excluded from "otherwise available benefits" because of their religious status or religious beliefs. *Carson*, in fact, held that religious schools had to be included in Maine's voucher program. Justice Stephen Breyer predicted in his dissent that the majority's reasoning would eventually compel the court to require states to approve religious charter schools (an issue the court is also taking up this term in *St. Isidore of Seville Catholic Virtual School v. Drummond*) and even vouchers, asking if "the State must pay parents for the religious equivalent of the secular benefit provided."

Oral argument in April did not go well for the district. In the lower courts, the school board had argued that if parents object to the curriculum they can send their children to private school. Maryland, however, does not provide financial support for parents seeking a private-school education that aligns with their religious beliefs. Justice Samuel Alito noted that schooling is compulsory; parents who object to their children being exposed to parts of the curriculum must pay taxes to support public schooling, and most can't afford to send their children to private school. After asking the school board's attorney what he would say to the objections of religious parents, Alito said, "Your answer is: 'It's just too bad.'" He also pointed out that "the state cannot say . . . that you're going to be disqualified from benefits because of your religious beliefs," hinting that the board's policy might be an instance of such disqualification. Other justices seized on the religious animus that seemed to motivate the board and the fact that the board allowed opt-outs for things like Halloween and Valentine's Day. Those other opt-outs, Justice Neil Gorsuch noted, made the school district's claim that it was not discriminating on the basis of religion difficult to believe.

The court will certainly not mandate vouchers. In fact, it will likely just accept the request for an injunction while the case is argued. The case could nevertheless push the court further toward accepting the logic articulated by Breyer. For those who share Breyer's concerns, such a shift by the court would mean the school board made an enormous blunder in refusing to reinstate the opt-out policy, since anyone with the capacity to read and count votes can see the direction the court has been headed: toward increasing free exercise protections.

Should the court move in that direction, some will naturally ask what the limiting principle might be in situations where parents object to other subjects—the teaching of evolution, for instance—on religious grounds. The court's progressive bloc of Justices Elena Kagan, Sonia Sotomayor, and Ketanji Jackson consistently pressed that issue at oral argument. That concern is unlikely to move the majority on the court since the question could just as easily be applied to the school board. What is the limiting principle to its position that schools can require curriculum to "create a fully inclusive environment" when parents remain free "to teach their religious beliefs at home"? Instead, the concern points to the intractability of some of these disputes, which seems to be part of the reason for the court expanding free exercise protections.

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