No. 25-77

IN THE

Supreme Court of the United States

STEPHEN FOOTE, individually and as guardian and next friend of B.F. and G.F., Minors, *et al.*,

Petitioners,

v.

LUDLOW SCHOOL COMMITTEE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICUS CURIAE* GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

TIMOTHY SANDEFUR
ADAM SHELTON*
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
**Counsel of Record*

Counsel for Amicus Curiae Goldwater Institute

120589

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Petitioners Stephen Foote and Marissa Silvestri repeatedly directed their public middle school not to interfere with the upbringing and mental healthcare plan for B.F., their eleven-year-old daughter. But over their objections, school officials followed district protocol and secretly facilitated B.F.'s social gender transition anyway. The school treated B.F. as though she were nonbinary, authorized her to use opposite-sex facilities, conducted regular private counseling sessions, and participated in her gender transition. That led B.F. to question the suitability of her parents' care plan—all without her parents' knowledge. After discovering the school's actions, Petitioners demanded that officials stop. But the school doubled down, claiming parental knowledge and involvement compromises their daughter's safety.

The First Circuit affirmed dismissal of Petitioners' parental-right claims because Respondents' secret transition of their daughter (1) took place in a public school, where parental rights are supposedly diminished, particularly over curricular and administrative matters, (2) was purportedly not "coercive" or "restraining" and therefore consistent with the minor child's choice, which superseded the parents' rights, and (3) did not involve her mental health. That decision deepened entrenched splits over the scope of parental rights.

The question presented is:

Whether a public school violates parents' constitutional rights when, without parental knowledge or consent, the school encourages a student to transition to a new "gender" or participates in that process.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Cited Authorities

Page

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute ("Goldwater") is a public policy foundation devoted to individual freedom and limited government. Through its Scharf-Norton Center for Constitutional Litigation, Goldwater litigates and files amicus briefs when it or its clients' objectives are implicated.

One of Goldwater's main objectives is enforcing constitutional protections for the right of parents to control the education and upbringing of their children. In 2022, Goldwater initiated a project devoted to public school transparency, which, among other things, engages in policy research and analysis about the threats to parents' rights—especially the lack of transparency in public schools—and hosts instructional meetings across the country to explain to parents how to obtain information about the materials being taught in public school classrooms. Goldwater has also appeared in courts across the country representing parents in cases involving this right, *see*, *e.g.*, *National Education Ass'n of Rhode Island v. Solas*, PC21-05116 (Providence Super. Ct., filed Aug. 2, 2021) (pending); *Fairfax County School Board v. Tisler*, No. 2021-13491 (Fairfax Cnty. Cir. Ct. Dec. 15, 2021); *Lavigne v. Great Salt Bay Community School Board*, No. 24-1509, 2025 WL 2103993 (1st Cir. July 28, 2025), and as an amicus curiae, *see*, *e.g.*, *McElhaney v.*

1. Pursuant to Rule 37, counsel for amicus affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than amicus, its members, or counsel, made any monetary contribution to its preparation or submission. All parties received notice of amicus' intention to file at least ten days before the due date.

Williams, No. 22-5903, 2022 WL 17995423 (6th Cir. Dec. 21, 2022); *LittleJohn v. School Board of Leon County*, No. 23-10385-HH, 2023 WL 4196902 (11th Cir. May 30, 2023). Goldwater also appeared as an amicus in this case in the court below.

Goldwater scholars have also published extensive research on how public schools have attempted to limit the rights of parents in the educational context. *See*, *e.g.*, Matt Beienburg, *De-Escalating the Curriculum Wars: A Proposal for Academic Transparency in K-12 Education*, Goldwater Institute (Jan. 14, 2020).[2]

Goldwater believes its policy expertise and litigation experience will assist this Court in its consideration of this petition.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

Parents have a fundamental right to control and direct the education and upbringing of their children. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925). This is the oldest right to be recognized as "fundamental," and is included within the Fourteenth Amendment's protection for "liberty." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This right is a "counterpart of the responsibilities [parents] have assumed." *Lehr v. Robertson*, 463 U.S. 248, 257 (1983). As parents have a "high duty" to prepare children for adulthood, including a child's future interpersonal relationships and civic responsibilities,

2. https://www.goldwaterinstitute.org/policy-report/curriculum-wars/.

they have a right not to be obstructed or interfered with when discharging those responsibilities. *Pierce*, 268 U.S. at 535. This Court has repeatedly upheld parental rights over states' attempts to interfere with their choices. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025).

But Parents cannot exercise their right—and duty—to oversee the education and upbringing of their children if school officials conceal information from them. A policy whereby school officials keep information from parents inhibits their ability to make meaningful and responsible choices. Such a policy is even more problematic in situations where, as here, concealment is a blanket policy. That is, the decision to hide information from these parents was not an aberration, nor an oversight, nor even the result of reasoned decision making based on the circumstances of this specific situation. Instead, it was in accordance with an across-the-board policy that prohibits school officials from telling parents that their child is asserting a gender identity different from the child's biological sex, absent the child's explicit consent. The policy therefore requires not just silence, but active concealment: school officials must take affirmative steps to hide this information from parents.

That is unacceptable. This Court has recently made clear that parents do not shed their rights at the schoolyard gate, *see Mahmoud*, 145 S. Ct. at 2350, and even a school's decision about what to teach and how to teach are subject to some parental limitations. *Id.* at 2358. Even more, then, a school's decision to conceal crucial information places it in a position to "strip away the critical right of parents to guide" their children's upbringing. *Id.*

The First Circuit's decision cabining parental rights is not an isolated one. Courts across the country are rejecting the constitutional right of parents to make decisions about their children's education and upbringing once they choose to send their children to public schools. *See Littlejohn v. School Board of Leon Cnty.*, 132 F.4th 1232, 1235 (11th Cir. 2025) (holding that a school did not violate parents' constitutionally protected rights in creating a gender identity "student support plan" without involving the parents); *Hartzell v. Marana Unified Sch. Dist.*, 130 F.4th 722, 744 (9th Cir. 2025)[3] (holding that a parent's right to direct the education and upbringing of their children is at least "substantially diminished" once a parent chooses to send their child to a public school). Only this Court can rectify the shortcomings in the decision below and reestablish "parental rights" as a broad constitutional right that means more than simply choosing whether to send a child to a public or private school.

3. A petition for certiorari has been filed in *Hartzell* (No. 25-143). Both that case and this one were decided before this Court's decision in *Mahmoud*, and because both decisions were predicated on the view that a parent's rights end at the schoolyard gate—a position *Mahmoud* expressly rejects—**this Court should consider granting both that petition and this one, vacating, and remanding for reconsideration in light of *Mahmoud***.

ARGUMENT

I. Parents' right to control and direct the education and upbringing of their children encompasses more than just the decision to send their children to public schools.

The parental right to control and direct their children's education and upbringing is a "fundamental" right. *Troxel*, 530 U.S. at 65. Important as it is, however, its contours are still little appreciated by lower courts. While it's clear that a state cannot outright *ban* private schools, or forbid the teaching of foreign languages, without running afoul of the Fourteenth Amendment's protections of parental rights, lower courts have failed to develop a consistent theory regarding the broader implications of this right. This has led to a longstanding and entrenched circuit split. The Ninth Circuit, for example, recently held that "the *Meyer-Pierce* right does not apply" after a parent has chosen to send the child to a public school. *Hartzell*, 130 F.4th at 744. That is because, "'once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished.'" *Id.* (quoting *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005).

The Second, Fifth, and Tenth Circuits have reached similar conclusions about the "limited" nature of the right articulated in *Meyer* and *Pierce*. *See Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003) ("*Meyer*, *Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be

taught."); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001) (holding that a school uniform policy did not violate parental rights); *Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998) (holding that a school district policy against part-time enrollment for home school students did not violate parental rights).

According to this theory, a parent has the right not to make decisions about a child's upbringing and education but only to make *one singular decision* about the child's upbringing and education. Once the parent decides to send the child to a public school, the parent has no say over the school's internal policies.

The Third Circuit has come out differently. It has adopted a "parent-primacy" approach, specifically rejecting the Ninth Circuit's *Fields* decision in *C.N. v. Ridgewood Board of Education*, 430 F.3d 159, 185 n.26 (3d Cir. 2005). The Third Circuit has held, that "'[i]t is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights.'" *Gruenke v. Seip*, 225 F.3d 290, 307 (3d Cir. 2000) (citation omitted). Under this approach, public school officials may run afoul of the parent's rights based on a sliding scale that "var[ies] depending on the significance of the subject at issue, and the threshold for finding a conflict will not be as high when the school district's actions 'strike at the heart of parental decision-making authority on matters of the greatest importance.'" *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 934 (3d Cir. 2011) (*quoting C.N.*, 430 F.3d at 184).

It is easy to understand the motivation behind the Ninth Circuit's no-rights rule: parents cannot have a "heckler's veto" over every detail of the management of public schools. That would be impracticable and would conflict with the state's legitimate interest in educating children—a right that in at least some cases stands in tension with the rights of parents (as this Court recognized in *Yoder,* 406 U.S. at 233). Yet as *Yoder* also recognized—and as *Mahmoud* re-affirmed—there is a point at which the state's interest fails to overcome the parents' fundamental rights. In other words, the right to oversee a child's education and upbringing cannot be a "one-time" thing, that ends as soon as the parent chooses to send the child to a public school.

The Third Circuit's precedents are thus more in line with the precedents of this Court regarding parental rights. In *Mahmoud*, *supra*, this Court held that "[g]overnment schools, like all government institutions, may not place unconstitutional burdens on religious exercise," 145 S. Ct. at 2350, and that "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." *Id.* at 2351. Parents, it said, have the right to send their children to a public school if they choose, *and also* the right not to be "interfer[ed] with" in their efforts to oversee their children's upbringing and education "in a public-school setting." *Id. Mahmoud* expressly rejected the idea that parental rights cease with the selection of a school. Many parents, the Court observed, have no real choice in the matter "[d]ue to financial and other constraints." *Id.* For these parents, the fundamental right to direct the education of their children

would be rendered hollow if the government were free to ignore their rights once the school bell rings.

The logic of *Mahmoud* is transferable to this situation. A school district cannot cut parents completely out of decisions about how and when to recognize a child's asserted gender identity by simply keeping the facts from parents—as a matter of policy—and then excuse its actions on the theory that the parent's only constitutional right was to select where a child goes to school.

Consider the First Circuit's reasoning in *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008). That case—which *Mahmoud* seriously undermines—held that parents have no right under *Meyer* and *Pierce* to prior notification from a public school when it plans to teach lessons regarding homosexuality to children (so that parents can opt their children out of such lessons) because if "[t]he right of parents 'to direct the religious upbringing of their children' is distinct from (although related to) any right their children might have regarding the content of their school curriculum." *Id.* at 103 (citation omitted). In other words, if the parents don't like how the public school operates, they can choose a different school.

But that theory breaks down entirely when a school *purposely withholds information* from parents—information on which the parent would surely rely in making the decision regarding whether to send the child to a public school. Courts have often recognized that the government acts unconstitutionally when it keeps information from people in such a way that makes it

impossible for them to exercise their rights. *See, e.g., Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 967 (9th Cir. 2014) (where ordinance made it effectively impossible to obtain bullets, plaintiffs could sue for violation of Second Amendment rights); *Stein v. Thomas*, 672 F. App'x 565, 568 (6th Cir. 2016) (plaintiffs had standing to sue where statute imposed waiting period on election recounts, which made it impossible to exercise state law recount rights). So, too, when a school keeps information from parents in such a way as to effectively neuter their right to choose the best educational options for their children, the school cannot excuse its behavior by saying that the only right *Meyer* and *Pierce* guarantee is the very choice the school has rendered ineffectual.

The question of the scope and limits of parental rights is increasingly relevant today as schools appear to be more willing than ever to limit parental rights to simply deciding where to send a child to school. Many schools have taken to actively banning parents for campus. For example, a mother in Indiana was sent a no trespass letter in May 2024 after she recorded a meeting with a school principal about her daughter. *See* Charron, *Indiana Mom Sues School District After it Banned Her for Recording a Meeting*, Indianapolis Star (August 13, 2025).[4] In September 2024, a school district in New Hampshire banned two parents from school property after they wore pink wrist bands to a girls' soccer game to protest the inclusion of a transgender girl on the other team. *See Fellers v. Kelley*, No. 24-cv-311-SM-AJ, 2025 WL 1098271 (D.N.H. Apr. 14, 2025). In 2021, a school district in

4. https://www.indystar.com/story/news/local/2025/08/13/indiana-mom-sues-school-district-first-amendment-after-banned-recording-meeting/85611507007/.

Tennessee banned a father from attending his daughter's softball games for a week after he sent polite but firm text messages to the coach criticizing his decisions. *McElhaney v. Williams*, 81 F.4th 550 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 696 (2024). And in 2020, a school in Tucson, Arizona, banned a longtime parental advocate ostensibly because the parent and the school principal brushed arms at a school event. *Hartzell*, 130 F.4th at 728.

The problem of purposeful concealment of information also appears to be getting worse. In *John & Jane Parents 1 v. Montgomery County Board of Education*, 78 F.4th 622 (4th Cir. 2023), *cert. denied*, 144 S. Ct. 2560 (2024), the Fourth Circuit held that parents lacked standing to challenge the school district's "Parental Preclusion Policy," which withheld information about their children's psycho-sexual development from them, because this policy didn't "injure" them. *Id.* at 629-30. In *Lavigne, supra*, the First Circuit held that a school did not violate a parent's rights when school officials withheld from Lavigne that it was facilitating her child's social transition and that a social worker had given the child chest binders. 2025 WL 2103993, at *7. In *Littlejohn*, 132 F.4th at 1243-44, the Eleventh Circuit held that a school board's policy of withholding this information from parents didn't "shock the conscience."

Only this Court can clear up this problem—by explaining just how broadly the Constitution protects parental rights.

II. Public schools have a constitutional obligation to inform parents of the decisions they make and actions they take that directly affect a child's mental health or physical well-being—and they're routinely doing the opposite.

Respondents' "protocol" empowers, and even compels, school officials to effectively nullify parental rights by requiring the concealing of vital information. Parents simply *cannot* exercise their right to direct the upbringing of their children, or fulfill their "high duty" to do so, if public officials actively conceal information about the decisions they make and actions they take with respect to children on school grounds. As noted above, when the government withholds information in such a way as to render a constitutional right ineffectual, it violates that right. *See further Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 143 (3d Cir. 2004) (holding that an employer's failure to advise an employee about his statutory rights to family and medical leave "rendered him unable to exercise that right in a meaningful way," and consequently violated the statutory right.); *Lubke v. City of Arlington*, 455 F.3d 489, 493 (5th Cir. 2006) (explaining that where an employee was "never clearly informed" of what information was required to exercise his family leave rights, the employer had deprived him of any meaningful exercise of his statutory rights to leave).

This is particularly true of information that—as in this case—is so central to a child's wellbeing that any conscientious parent would consider it of the gravest significance. If a school is withholding such information, parents simply cannot make a meaningful decision about how to educate that child with regard to these matters,

or decide whether to seek alternative educational opportunities or environments for the child. Thus the withholding policy, in effect, nullifies the right that even the court below acknowledged to be fundamental.

"[P]arents have the fundamental liberty to choose how and in what manner to educate their children," *Zelman v. Simmons-Harris*, 536 U.S. 639, 680 n.5 (2002) (Thomas, J., concurring)—but a parent who, if made aware of the child's concerns about her gender, might seek (e.g.) a more appropriate educational environment, would be unable to act without that information.

Government actions that make the exercise of a constitutional right effectively impossible to exercise are simply a means of violating that right. *See Jackson,* 746 F.3d at 967 (where ordinance made it effectively impossible to obtain bullets, plaintiffs could sue for violation of Second Amendment rights); *Stein*, 672 F. App'x at 568 (plaintiffs had standing to sue where statute imposed waiting period on election recounts, which made it impossible to exercise state law recount rights). In other words, the concealment policy cuts to the core of the right identified in *Meyer* and *Pierce*: the right of parents to control their children's education.

Without this information, parents are inhibited by the government from determining what the best options are for their own kids. This is not just information the government has come into possession of; it is not mere gossip, like who is dating whom in homeroom—but information on which Respondent has taken affirmative actions in how it treats the student. Thus the government has prevented Petitioners from evaluating whether the

school they've chosen is doing its job. It has hindered Petitioners in learning about the state's treatment of their child. That means Petitioners' duty to discharge their "high duty" to promote and protect the best interests of their child—including perhaps seeking counseling or sending their child to a different school—is fatally undermined by Respondents' protocol of withholding and concealing necessary information. That implicates the *Meyer-Pierce* right.

CONCLUSION

For the reasons stated above, this Court should grant the petition.

Respectfully submitted,

Timothy Sandefur
Adam Shelton*
Scharf-Norton Center for
Constitutional Litigation at the
Goldwater Institute
500 East Coronado Road
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
**Counsel of Record*

Counsel for Amicus Curiae Goldwater Institute