

PARENTS AT THE SCHOOLHOUSE GATE*

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*Parental rights challenges to public school curricula and policies are at an inflection point. For several decades, such challenges usually involved claims sounding in parents' substantive due process right to direct the upbringing of their children, the Free Exercise Clause, or both. But those claims usually failed, with courts reasoning that parental prerogatives were already protected by the fact that parents did not have to send their children to public school in the first place. That consensus, however, has now been upended. In June of 2025, the Supreme Court ruled in *Mahmoud v. Taylor* that the Free Exercise Clause entitled parents to opt their children out of elementary school lessons conveying messages about sexual orientation and gender identity that conflicted with their own religious views.*

*The Mahmoud decision will profoundly reshape the balance of power between parents, students, and schools. But as significant as that development is, another parallel development is occurring—one that is equally significant. The parental concerns underlying cases like *Mahmoud v. Taylor* are also starting to be framed more assertively: as claims sounding in their children's free speech rights. In such cases, the parents are not defensively seeking "opt outs" for their own children. Rather, they are seeking to affirmatively influence the messages being sent at school for other students to hear. And the goal is for their children to be the conduits of those messages. That strategy is exemplified by a pair of recent circuit court cases, one of which was reheard en banc in 2025—with the parents emerging victorious. That success, combined with the parents' victory in *Mahmoud*, is likely to fuel even more cases.*

This Article unpacks and analyzes this new free speech strategy. It shows how these new speech cases have the potential to reshape not only the parent/school balance of power, but also student speech doctrine itself. Although these challenges are emphasizing viewpoint discrimination, that is actually not the dispositive issue. Rather, the real question is how to balance the two potentially competing principles at the heart of the student speech framework: protecting student expression and protecting students from harm. The Article suggests that

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the best way to do so is to maintain a sharp distinction between speech that is personally-directed toward other students and speech that is not, giving schools far greater room to restrict the former than the latter.

The Article also situates both species of parental rights cases—the opt-out cases and the free speech cases—in the broader cultural moment. In the post-COVID era, public schools have become ground zero for culture wars about some of today’s most hot-button issues. New groups that explicitly present themselves as representing parents’ interests are entering educational policy debates and bringing lawsuits. Numerous states are passing laws regarding the topics of classroom instruction; here, too, the rhetoric of parental rights is coming into play. And, although the “parents’ rights” label is currently associated with conservative political leanings, there is no monopoly on that terminology. Parents with differing political views may start also claiming the parents’ rights mantle for themselves. In the coming years, school districts are likely to face continuing conflict from both within and without. They will have to decide which initiatives they want to prioritize, where they want to step back, and how to arrive at the most functional working relationship—ideally, a partnership—between school districts and the multiplicity of families whom they serve.

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INTRODUCTION

Parental rights challenges to public school curricula and policies are at an inflection point. For decades, public school parents who sought to opt their children out of certain parts of the school day—on grounds that those lessons or activities conflicted with their own religious or moral views—had scant legal recourse. This was true whether the parents brought claims sounding in their substantive due process right to direct the upbringing of their children, the Free Exercise Clause, or both.¹ Circuit courts consistently held that parental prerogatives were already protected by the fact that parents did not have to send their children to public school in the first place.² That lower court consensus, however, has now been upended. On June 27, 2025, in *Mahmoud v. Taylor*,³ the Supreme Court ruled in favor of a group of Maryland public school parents who sought notice and opt-out rights whenever a “storybook” series about sexual orientation and gender identity would be used in their children’s elementary school classrooms.⁴ “A government cannot condition the benefit of free public education on parents’ acceptance” of instruction posing “a very real threat of undermining the religious beliefs and practices that the parents wish to instill,” Justice Alito stated in his majority opinion.⁵ The *Mahmoud* Court thus granted the parents a preliminary injunction on their free exercise claim.

The *Mahmoud* decision will profoundly reshape the balance of power between parents, students, and public schools. As significant as that development is, though, another parallel development is occurring—one that may become equally significant. The parental concerns underlying cases like *Mahmoud* are also starting to be framed more assertively: as claims sounding in their children’s free speech rights under *Tinker v. Des Moines Independent Community School District*.⁶ In cases like these, the parents are not defensively seeking to “opt out” their own children from what they view as harmful messaging embedded in parts of the school day. Rather, the parents are seeking to *counter* that messaging. And the goal is for their children—through their pronoun usage, the words on their clothing, and/or the comments they make—to be the counter messengers.

1. See, e.g., *Parker v. Hurley*, 514 F.3d 87, 102–03, 106 (1st Cir. 2008); *Fields v. Palmdale*, 427 F.3d 1197, 1200 (9th Cir. 2005); *Leebaert v. Harrington*, 332 F.3d 134, 139 (2d Cir. 2003); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995); *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1070 (6th Cir. 1987).

2. See, e.g., *Parker*, 514 F.3d at 102; *Fields*, 427 F.3d at 1207; *Leebaert*, 332 F.3d at 141; *Brown*, 68 F.3d at 533; *Mozert*, 827 F.2d at 1067.

3. 145 S. Ct. 2332 (2025).

4. See *id.* at 2363–64.

5. *Id.* at 2342 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)) (internal quotation marks omitted).

6. 393 U.S. 503 (1969).

A pair of recent, high-profile circuit court decisions exemplifies this new speech-based strategy. In November of 2025, the Sixth Circuit issued an en banc decision after rehearing the case of *Parents Defending Education v. Olentangy Local School District Board of Education*,⁷ which involved a challenge to a school district’s anti-discrimination policies on gender identity.⁸ These policies prohibited students from intentionally using “non-preferred pronouns” for fellow students.⁹ The plaintiff—Parents Defending Education, which described itself in the complaint as a “nationwide, grassroots membership organization whose members are primarily parents of school-aged children”¹⁰—alleged that this rule violated other students’ free speech rights.¹¹ Parents Defending Education, which later changed its name to Defending Education, filed four declarations from school district parents who said that their children had been raised to believe that biological sex was immutable and wanted to convey that view to their peers by only using “biologically accurate pronouns”¹² whenever they spoke to or about their peers. The initial three-judge Sixth Circuit panel ruled in the school district’s favor.¹³ But the circuit then agreed to rehear the case en banc,¹⁴ and ultimately reversed.¹⁵

Olentangy bears significant similarities to the June 2024 First Circuit case of *L.M. v. Town of Middleborough*.¹⁶ There, a student wore to school a t-shirt that stated, “There Are Only Two Genders,” but the superintendent told the student and his father that the shirt violated school policies.¹⁷ The student then filed suit, by and through his father and stepmother. After losing his case at the First Circuit, the student sought Supreme Court review, with the support of numerous amici.¹⁸ In May 2025, the Supreme Court declined to grant certiorari, over the objections of Justices Thomas and Alito, with the latter authoring an 8-page dissent asserting that the First Circuit got it wrong and the Court should have taken the case.¹⁹

7. *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, No. 23-3630 (6th Cir. Nov. 6, 2025) (en banc).

8. *Defending Educ. v. Olentangy*, slip op. at 3.

9. *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 109 F.4th 453, 459 (6th Cir. 2024).

10. *Defending Educ. v. Olentangy*, slip op. at 4.

11. *Parents Defending Educ.*, 109 F.4th at 459.

12. *Id.* at 460.

13. *See id.* at 474.

14. 120 F.4th 536 (6th Cir. 2024) (order granting reh’g en banc).

15. *Defending Educ. v. Olentangy*, slip op. at 35.

16. 103 F.4th 854 (1st Cir. 2024), *cert. denied*, 145 S. Ct. 1489 (2025).

17. *Id.* at 861–62.

18. Petition for Writ of Certiorari, *L.M. v. Town of Middleborough*, 145 S. Ct. 1489 (2025) (No. 24-410); Brief for Parents Defending Education as Amicus Curiae in Support of Petitioner, *L.M.*, 145 S. Ct. 1489 (No. 24-410), 2024 WL 4800276.

19. *L.M. v. Town of Middleborough*, 145 S. Ct. 1489 (2025) (Alito, J., dissenting).

In both cases, the crux of the plaintiffs' challenge was that their school districts were committing viewpoint discrimination. Essentially, plaintiffs asserted that through policies and curricula, the school districts were propounding a certain view of gender and then censoring contrary student views.²⁰ This framing presses on a tension that has never been fully resolved: the permissibility of viewpoint-based restrictions on student speech. That is a question cutting across the various topics of student speech and the contexts in which it can occur, from t-shirts to classroom and recess interactions to school newspapers. By teeing up this issue, these new speech-based parental rights cases have the potential to reshape not only the parent/school balance of power, but also student speech doctrine itself.

This Article unpacks and analyzes this new free speech strategy and situates it in the broader cultural moment. As Mary Ziegler, Maxine Eichner, and Naomi Cahn recently observed, "The topic of parental rights suddenly seems to be everywhere in U.S. law and politics."²¹ Indeed, in the post-COVID era, public schools have become ground zero for culture wars about some of today's most hot-button issues, from gender identity to sex education to critical race theory to parents' rights themselves. The group Moms for Liberty, for instance, was founded in 2021 to oppose COVID-19 related school closures and mask mandates.²² But the group quickly broadened its agenda to include removing certain books from school libraries, opposing critical race theory and "gender ideology," and strengthening parental rights.²³ Defending Education was also founded in 2021 and has been bringing numerous lawsuits since then, including *Olentangy*.²⁴ Upon its founding, Defending Education articulated its agenda as "restor[ing] . . . a healthy, non-political education for our kids," which

20. See *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 109 F.4th 453, 460–61, 469 (6th Cir. 2024) ("[Parents Defending Education] contends that because the District permits the use of preferred pronouns to refer to transgender students, but prohibits the use of non-preferred pronouns, it has imposed a viewpoint-specific ban on some divisive pronouns and not others."); *L.M.*, 109 F.4th at 883 ("L.M. contends that he wore the Shirt to respond to Middleborough's asserted views on gender.").

21. Mary Ziegler, Maxine Eichner & Naomi Cahn, *Retrenchment by Division: The New Politics of Parental Rights*, 123 MICH. L. REV. 669, 672 (2025).

22. Denise Royal, Carlos Suarez & Ray Sanchez, *Moms for Liberty Faces New Challenges and Growing Pushback Over Its Conservative Education Agenda*, CNN (Feb. 3, 2024, at 09:48 ET), <https://www.cnn.com/2024/02/03/us/moms-for-liberty-scandal-opposition/index.html> [<https://perma.cc/3X3C-3NRG>].

23. See *id.*; see also Kim Hermann, *Rolling Back Gender Ideology Must Be a Priority for the New Congress*, MOMS FOR LIBERTY (Nov. 19, 2024, at 23:50 ET), <https://portal.momsforliberty.org/news/rolling-back-gender-ideology-must-be-a-priority-for-the-new-congress/> [<https://perma.cc/4AE7-94ZL>].

24. See *Defending Education*, INFLUENCEWATCH, <https://www.influencewatch.org/non-profit/parents-defending-education/> [<https://perma.cc/CQW5-BQY2>]; *Parents Defending Education v. Olentangy School District Board of Education et al.*, DEFENDING EDUC. (May 11, 2023), <https://defendinged.org/newsroom/?types-filter=lawsuits> [<https://perma.cc/5M6B-HM76>].

it defined as reducing schools' "ideologically driven curricul[a] with a concerning and often divisive emphasis on students' group identities: race, ethnicity, religion, sexual orientation and gender."²⁵ It asked people to "join together and stop this madness in our schools."²⁶

Both the opt-out and the free speech species of "parents' rights" cases are now playing out against the backdrop of legislative change in numerous states regarding the topics of classroom instruction. Here, too, the rhetoric of parental rights has increasingly come into play. In 2022, for instance, Florida passed a law prohibiting classroom instruction on sexual orientation and gender identity in kindergarten through third grade, and requiring such instruction to be "developmentally appropriate" in fourth through twelfth grades.²⁷ Critics nicknamed it the "Don't Say Gay" bill.²⁸ Its official name, though, was the "Parental Rights in Education" bill.²⁹ The statute was later expanded to prohibit instruction on sexual orientation and gender identity through the eighth grade.³⁰ Right now, the parental rights framing in regard to schools is mostly occurring around issues of gender identity. But the legal questions that it raises go beyond any single topic.³¹

The Article proceeds in four parts. Section I looks at the opt-out cases resting on the Due Process and Free Exercise clauses. While these cases are continuing in their own right, and are indeed likely to increase in *Mahmoud's* aftermath, they are also precursors to the new wave of free speech cases. This section discusses why the previous opt-out cases were unsuccessful in the circuit courts, as well as the sharp U-turn on opt-out cases recently taken by the Supreme Court in *Mahmoud*.

Section II turns to the emerging strategy of invoking the Free Speech Clause as an additional way of pursuing many of the same parental objections to school policies. The core concerns of the parents in the opt-out cases are similar to those underlying these new free speech cases. In both lines of cases, at least so far, the parents have generally described themselves as having traditional, religiously motivated views that make them uncomfortable with the

25. *Who We Are*, DEFENDING EDUC. (Apr. 26, 2022), <https://web.archive.org/web/20220426195459/https://defendinged.org/about/> [<https://perma.cc/5CHE-4FNB>].

26. *Id.*

27. FLA. STAT. ANN. § 1001.42 (2022).

28. See, e.g., Dana Goldstein, *Opponents Call It the 'Don't Say Gay' Bill. Here's What It Says*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/us/dont-say-gay-bill-florida.html> [<https://perma.cc/5NJC-XQ89> (dark archive)]; Rebecca Flynn, Note, *First and Fourteenth Amendment Issues with Florida's 'Don't Say Gay' Bill*, 74 WASH. U. J.L. & POL'Y 219, 220 (2024).

29. See, e.g., Goldstein, *supra* note 28; Flynn, *supra* note 28, at 220.

30. FLA. STAT. ANN. § 1001.42 (2025).

31. Cf. Caroline Mala Corbin, *The Pledge of Allegiance and Compelled Speech Revisited: Requiring Parental Consent*, 97 IND. L.J. 967, 969 (2022) (discussing the parental rights framing around laws in Florida and Texas that require written parental permission for children to abstain from reciting the Pledge of Allegiance).

way their public schools are presenting certain topics, especially those related to sex and gender. But the “asks” of the parents in the two lines of cases are different. In the opt-out cases like *Mahmoud*, the parents do not want their children to have a seat at the table when these topics come up at school. They want their children out of the room altogether. In the free speech cases, by contrast, the parents want their children sitting right at the table, influencing the messages that their peers are receiving when they go to school. This section analyzes the free speech framing and the rise of groups advancing it. It also analogizes to other lines of cases in which free exercise concerns have been successfully reframed as free speech claims, such as the shift in emphasis from the Free Exercise Clause to the Free Speech Clause in the Supreme Court cases of *Lamb’s Chapel v. Center Moriches Union Free School District*³² and *303 Creative LLC v. Elenis*.³³ In this new school speech context, too, there is some potential for success—particularly because these challenges are teeing up the tough student speech viewpoint-discrimination questions that the Supreme Court has long ducked.

Section III explains why this is so, analyzing the viewpoint-discrimination issue presented by cases like *Olentangy* and *L.M.* It shows how these cases pinpoint the precise question that has been lurking for decades: how to handle student speech that is commenting on a political, social, or religious issue in a way that may be deeply upsetting to some members of the student body. This section sketches out what that approach should look like, teasing out the most important principles from the Supreme Court’s student speech framework, and arguing that both *Olentangy* and *L.M.* came out the wrong way.

Finally, Section IV steps back to consider both the opt-out and free speech lines of “parents’ rights” cases together. Both lines reflect that parents—at least, some parents—are taking an increasingly active, hands-on approach in seeking to influence the sociocultural messages that their children are receiving in public schools. At the same time, although the “parents’ rights” label is currently associated with conservative political leanings, there is no monopoly on that terminology, and parents with differing political views may start invoking it as well.³⁴ In the coming years, school districts are likely to face continuing conflict from both within and without. They will have to decide which initiatives they want to prioritize, where they want to step back, and how to arrive at the most functional working relationship—ideally, a partnership—between school districts and the multiplicity of families whom they serve.

32. 508 U.S. 384 (1993).

33. See 143 S. Ct. 2298, 2310–11 (2023); *Lamb’s Chapel*, 508 U.S. at 392–95.

34. Ziegler et al., *supra* note 21, at 726 (“Parents opposed to the current crop of parental rights laws can themselves point out the deficiencies of the laws and make clear that they ignore the rights of many other parents . . .”).

I. SETTING THE STAGE: PARENTS, SCHOOLS, AND THE BATTLE FOR CONTROL

Control over children's education has long been a constitutional battleground. The first major substantive due process case involving parental rights—*Meyer v. Nebraska*,³⁵ in 1923—arose specifically in the education context.³⁶ Nebraska had prohibited schools and educators from teaching foreign languages to children before eighth grade and was prosecuting a German language teacher in a parochial school.³⁷ In striking down the Nebraska law, the Supreme Court held that the Due Process Clause protected parents' rights "to establish a home and bring up children," which included having control over their children's education.³⁸ Two years later, in *Pierce v. Society of Sisters*,³⁹ the Supreme Court held that this same principle—"the liberty of parents and guardians to direct the upbringing and education of children under their control"—meant that states could not require public school attendance.⁴⁰

Until *Mahmoud*, the case law had settled into a relatively stable holding pattern: compulsory education laws were permissible,⁴¹ but it was up to parents to choose where and how their children would be educated. That choice, in turn, largely marked the endpoint of constitutional protection for parents' educational decision-making.

A. Parents' Pursuit of "Opt-Out" Rights

The pre-*Mahmoud* judicial consensus emerged from repeated attempts by parents to opt their children out of certain aspects of the public school curriculum. One of the earliest and most influential parental "opt-out" cases was *Mozert v. Hawkins County Board of Education*,⁴² a 1987 case involving seven families who vehemently opposed the reading textbook series adopted by their public school district.⁴³ The parents described themselves as born-again Christians who did not want their children exposed to some of the ideas in the

35. 262 U.S. 390 (1923).

36. *See id.* at 399–401.

37. *Id.* at 396–97.

38. *See id.* at 399–400.

39. 268 U.S. 510 (1925).

40. *Id.* at 534–35.

41. The one exception was *Wisconsin v. Yoder*, which held that a group of Old Order Amish parents were entitled to an exception from Wisconsin's compulsory education law, which required parents to send their children to public or private school until the children were sixteen years old. 406 U.S. 205, 234–36 (1972). The parents successfully argued that the Free Exercise Clause entitled them to an exception from this requirement, on grounds that the Amish religion objected to any sort of formal education beyond the eighth grade, and that education beyond that would "ultimately result in the destruction of the Old Order Amish church community." *See id.* at 211–12.

42. 827 F.2d 1058 (6th Cir. 1987).

43. *See id.* at 1060–61.

textbooks, including those about gender roles and pacifism.⁴⁴ They asked the district to let their children leave the classroom during reading period and work from an older textbook series.⁴⁵ When the school district refused, the parents sued on their children's behalf, alleging that the district was violating their children's free exercise rights by forcing them "to read school books which teach or inculcate values in violation of their religious beliefs and convictions."⁴⁶ The Sixth Circuit, however, ruled in favor of the school district.⁴⁷ It reasoned that *exposing* students to contrary ideas did not rise to the level of burdening their free exercise of religion.⁴⁸ Had the school district required the students to affirm or deny religious beliefs, the court suggested, it would be a different story.⁴⁹ But mere exposure was not constitutionally problematic.⁵⁰

Mozert involved only a free exercise challenge, but in several cases following *Mozert*, objecting parents turned to the Due Process Clause for an additional line of argument. Unlike *Mozert*'s broad-based objection to the reading curriculum, these cases zeroed in on sex and health-related education. In the 1995 case of *Brown v. Hot, Sexy & Safer Productions, Inc.*,⁵¹ for example, parents alleged that a Massachusetts high school had violated their right to direct the upbringing of their children by requiring them to attend an AIDS and sex education assembly that included very explicit discussions.⁵² Similarly, in the 2003 case of *Leebaert v. Harrington*,⁵³ parents alleged that a Connecticut middle school was violating their parental due process rights by requiring their son to attend health class.⁵⁴ In both cases, the parents coupled their due process claims with free exercise objections, stating that the school curricula were inconsistent with their traditional religious values.⁵⁵

But these arguments proved unavailing. The parents' free exercise arguments, brought on behalf of their children, themselves, or both, stood on even shakier ground than those of the plaintiffs in *Mozert*, given the Supreme Court's intervening 1990 decision in *Employment Division v. Smith*.⁵⁶ There, the

44. *Id.* at 1061–62.

45. *Id.* at 1060.

46. *Id.* at 1060–61.

47. *Id.* at 1070.

48. *Id.* at 1063–66.

49. *See id.* at 1065.

50. *See id.*

51. 68 F.3d 525 (1st Cir. 1995).

52. *See id.* at 529–30.

53. 332 F.3d 134 (2d Cir. 2003).

54. *See id.* at 137.

55. *See Brown*, 68 F.3d at 530, 538 (involving parents' claim that a mandatory AIDS-education assembly violated their parental and religious rights by exposing their children to material contrary to their moral beliefs); *Leebaert*, 332 F.3d at 139 (involving parents' claim that that mandatory health class attendance violated their religious and moral beliefs).

56. *See* 494 U.S. 872, 882 (1990).

Court held that neutral laws of general applicability did not violate the Free Exercise Clause, regardless of whether they imposed a religious burden on some.⁵⁷ That narrow interpretation obviously weakened the parents' free exercise claims. Meanwhile, the parents' due process arguments relating to child-rearing decisions were rejected on grounds that they did not have to send their children to public school in the first place. "We think it is fundamentally different for the state to say to a parent, 'You can't teach your child German or send him to a parochial school,' than for the parent to say to the state, 'You can't teach my child subjects that are morally offensive to me,'" the First Circuit reasoned in *Brown*.⁵⁸ "If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter."⁵⁹ The Second Circuit in *Leebaert* agreed.⁶⁰

Nor did courts accept the "hybrid rights" argument that the *combination* of due process and free exercise interests presented by the parents elevated the level of scrutiny that should apply to their claims. This argument stemmed from the Supreme Court's observation, when ruling against the plaintiffs in *Smith*, that the plaintiffs were not presenting a "hybrid" situation, but rather a "free exercise claim unconnected with any communicative activity or parental right."⁶¹ In making this observation, the *Smith* Court was distinguishing the instant situation from a list of earlier cases, including the 1972 case of *Wisconsin v. Yoder*,⁶² in which a group of Amish parents successfully obtained an exemption for their teenage children from Wisconsin's compulsory education law, on grounds that formal education for fifteen- and sixteen- year-olds was fundamentally at odds with the Amish religion.⁶³ The objecting parents in the opt-out cases asserted that since they *were* making a hybrid argument that intertwined free exercise with parental rights, strict scrutiny should apply to their challenge, even if each claim did not warrant strict scrutiny on its own.⁶⁴ But the courts were unconvinced. The *Leebaert* court explained that it could think of "no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated."⁶⁵

57. *Id.* at 877–79.

58. *Brown*, 68 F.3d at 533–34.

59. *Id.* at 534.

60. *See Leebaert*, 332 F.3d at 140–41.

61. *Smith*, 494 U.S. at 882.

62. 406 U.S. 205 (1972).

63. *See id.* at 210–12; *see also supra* note 41 (describing the parents' arguments and the Court's holdings in more detail).

64. *See Brown*, 68 F.3d at 539; *Leebaert*, 332 F.3d at 143–44.

65. *Leebaert*, 332 F.3d at 144.

In the following years, the circuit courts continued to rule against parents bringing these sorts of constitutional opt-out claims, whether the parents framed them in terms of due process, free exercise, or both. The Ninth Circuit even explicitly stated, in the 2006 case of *Fields v. Palmdale School District*,⁶⁶ that “the *Meyer-Pierce* right does not extend beyond the threshold of the school door.”⁶⁷ Other circuits theoretically left the door ever so slightly ajar for parents pursuing opt-out claims—but no more than that. In the 2008 case of *Parker v. Hurley*,⁶⁸ the First Circuit analyzed due process and free exercise claims brought by two sets of parents who wanted to opt their kindergarten and second-grade children out of classroom activities where books about same-sex marriage were read.⁶⁹ Once again, the parents framed their objections in religious and moral terms, describing themselves as traditionalists who believed that homosexuality was against “God’s law.”⁷⁰ They added that their children were so young and impressionable that mere *exposure* to the idea of same-sex marriage was inherently indoctrinating.⁷¹ By this point, Massachusetts (like many other states) had adopted a statute allowing parents to opt their children out of formal sex education.⁷² But the reading of these books in the regular elementary classroom did not fit within the statutory scope.⁷³ That left the Constitution as the only possible basis for relief—and it once again proved unavailing. The First Circuit did suggest that if a school district crossed the line from “exposure” to “extreme indoctrination,” that might violate the Constitution.⁷⁴ But it found that the facts did not rise to that level, because there was no allegation of a “formalized curriculum requiring students to read many books affirming gay marriage.”⁷⁵

Most recently, in 2024, the Fourth Circuit reached a similar conclusion in *Mahmoud v. McKnight*—the case that would ultimately become known as the

66. 427 F.3d 1197 (9th Cir. 2005).

67. *Id.* at 1204, 1207 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

68. 514 F.3d 87 (1st Cir. 2008).

69. *See id.* at 90–94.

70. *See id.* at 92.

71. *See id.* at 93–94.

72. *Id.* at 92 (citing MASS. GEN. LAWS ch. 71, § 32A). For a listing of current state policies regarding opt-out rights for sex education, see Mollie Fairbanks & Ian Lague, *State Laws and Policies: Sex Education and HIV Education*, GUTTMACHER INST. (Sep. 16, 2025), <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education> [<https://perma.cc/H5VG-L87Z>] (detailing policies in Table 2: Parental Involvement Requirements for Sex and HIV Education). *See also, e.g.*, Olivia Luongo, Kaitlyn Willoughby, Lauren Krauskopf, Serena Dineshkumar, Alison Hagani, Sela Carrington, Lindsay Sergi & Sydney Brinker, *Sex Education in Schools*, 25 GEO. J. GENDER & L. 973, 982–84 (2024).

73. *Parker*, 514 F.3d at 91–92.

74. *Id.* at 105–06.

75. *Id.* at 106.

Supreme Court case of *Mahmoud v. Taylor*.⁷⁶ Here, the Montgomery County Public Schools (Maryland's largest public school district) announced the approval of a group of "LGBTQ-Inclusive Books" for use in its English Language Arts curriculum for elementary school students.⁷⁷ These books, collectively called the "Storybooks," were being used to teach reading skills, and often featured "homosexual, transgender, and non-binary characters in various situations."⁷⁸ For example, the books *Prince & Knight* and *Uncle Bobby's Wedding* featured weddings between two men, and the book *Born Ready: The True Story of a Boy Named Penelope* focused on a transgender boy.⁷⁹ The school district also provided teachers and administrators with materials to "support" them in answering student questions about the Storybooks.⁸⁰ For example, the guidance suggested that if a student asked what it meant to be transgender, the teacher could explain: "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 and sometimes they're wrong . . ."⁸¹ Initially, the school board stated that it would provide parents with notice and the opportunity to opt their children out of having their children read the Storybooks, in which case the teacher would find a substitute text.⁸² However, the board then reversed its opt-out policy without explanation, later stating that it was not feasible and might stigmatize "individuals whose circumstances were reflected in the Storybooks."⁸³ A group of parents then sued. They alleged that the Storybooks conflicted with their religiously based "ideological views of family life and sexuality," and asserted that the Free Exercise Clause, especially in combination with their parental due process interests, entitled them to an opt-out policy.⁸⁴

Like the First Circuit in *Parker*, though, the Fourth Circuit rejected their claim. It held that there would be a constitutional problem only if parents or their children were being coerced to "believe or act contrary to their religious views."⁸⁵ Citing cases back to *Mozert*, the *Mahmoud* Court reasoned that exposure alone did not rise to a constitutional violation, at least not without more specific factual evidence.⁸⁶ At this early stage in the case, the Fourth Circuit concluded, relief was not warranted.⁸⁷

76. *Mahmoud v. McKnight*, 102 F.4th 191 (4th Cir. 2024), *cert. granted sub nom.*, *Mahmoud v. Taylor*, 145 S. Ct. 1123 (2025) (mem), *rev'd and remanded*, *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025).

77. *Mahmoud v. McKnight*, 102 F.4th at 197.

78. *Id.* at 198.

79. *Mahmoud v. Taylor*, 145 S. Ct. at 2344.

80. *Mahmoud v. McKnight*, 102 F.4th at 198–99.

81. *Id.* at 199.

82. *Id.* at 199–200.

83. *Id.* at 200.

84. *Id.* at 201 (internal marks omitted).

85. *See id.* at 208.

86. *Id.* at 210.

87. *Id.*

Given the previous string of lower court cases, the Fourth Circuit's *Mahmoud* decision was entirely unsurprising. It was just the latest in a series of opinions that had been remarkably consistent, in terms of both facts and law. As illustrated above, the plaintiffs in these sorts of cases typically described themselves as conservative, traditional parents with religiously based objections to the public school curricula in question. And their objections were generally always about some aspect of sex and gender-related instruction, whether the specific topic was feminism, AIDS, safe sex, sexual orientation, or gender identity. The circuit courts, meanwhile, repeatedly rejected those arguments on grounds that parents' educational decision-making rights were protected by their ability to choose a different school instead.⁸⁸ Rather than focusing on whether those parents could afford other educational options, the courts focused on a different policy concern: the burden that constitutionally required opt-outs for a potentially large number of parents would impose on the effective functioning of public school districts.⁸⁹ Moreover, while at least some circuits left open the possibility that "extreme indoctrination" by a school district could cross the line into violating families' due process and free exercise interests,⁹⁰ they never explained what that might mean.

But once the Supreme Court granted certiorari in *Mahmoud*, change seemed likely. There was no circuit split to resolve. On the contrary, as Montgomery County Public School officials pointed out when opposing cert, there was a "decades-old consensus."⁹¹ Thus, the grant indicated that at least some justices were uneasy with that consensus, at least as applied to this case.

Sure enough, that uneasiness was laid bare in the Court's 6-3 *Mahmoud* decision.⁹² Justice Alito's majority opinion barely acknowledged the long line of circuit cases described above. Instead, it focused largely on the Storybooks themselves, quoting from them at length and describing them as "clearly designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected."⁹³ The opinion asserted that the Storybooks' discussion of gender identity and depiction of transgender children "present as a settled matter a hotly contested view of sex

88. Notably, in the Fourth Circuit's *Mahmoud* decision, the dissent did highlight this issue, asking: "[W]hat if a parent cannot afford private school or is unable to homeschool due to work?" *Id.* at 223 (Quattlebaum, J., dissenting).

89. *See, e.g.,* *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533–34 (1st Cir. 1995).

90. *See* *Parker v. Hurley*, 514 F.3d 87, 105–06 (1st Cir. 2008).

91. Brief in Opposition at 1, *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025) (No. 24-297), 2024 WL 5201982. In emphasizing this point, the respondents were explicitly countering the petitioners' attempt to claim that a circuit split existed because a 1980 Eighth Circuit case could be seen as pointing the other way. Petition for Writ of Certiorari at 2, *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025) (No. 24-297), 2024 WL 4227215.

92. *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025).

93. *See id.* at 2353–54.

and gender that sharply conflicts with the religious beliefs that the parents wish to instill in their children.”⁹⁴ This, according to the majority, amounted to a burden of the “exact same character” as the burden faced by the Amish parents in *Yoder*.⁹⁵ Strikingly, the Court concluded that it did not even need to engage with *Smith*—the Court’s leading free exercise precedent, decided 18 years after *Yoder*. “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,” the majority concluded, granting the parents a preliminary injunction that would secure their opt-out rights going forward.⁹⁶

Mahmoud’s broad holding raises many questions. Are public school parents now entitled to opt their children out of *any* part of the school day that conflicts with their individual religious beliefs, or is this ruling really about curricula related to “hotly contested view[s] of sex and gender,” as in *Mahmoud* itself? If (unlike *Mahmoud*) the lesson or activity is not conveying any sort of normative stance, but simply exposing students to a topic or issue that the parents feel their child is not ready for, does that yield a different result? To what extent does the answer change when the case involves not young children—whom the *Mahmoud* majority highlighted as particularly susceptible to messaging from school authority figures—but middle-schoolers or high-schoolers? What if the parents’ objections are not religiously based, such that their only challenge sounds in the substantive due process right to direct the upbringing of their children? This similarly went unaddressed because, although the *Mahmoud* parents initially brought a substantive due process claim in addition to their free exercise claim,⁹⁷ they ended up only focusing on the latter.

On all of these fronts, the opinion provided little guidance to the lower courts, who are now likely to face many more opt-out cases in the future. Meanwhile, a parallel strategy for vindicating these sorts of parental concerns about school curricula or policies has also been taking greater shape: a free speech path.

B. *Early Seeds Toward a Speech Path*

Opt-out claims were long the main vehicle for parents with some sort of religiously based counterpoint or dissent to public school curricula and policies. But they were not the sole approach. Occasionally, families pursued a challenge stemming from the Free Speech Clause. The clearest example is the 2005 Second Circuit case of *Peck v. Baldwinsville Central School District*,⁹⁸ which arose

94. *Id.* at 2354.

95. *Id.* at 2349, 2361.

96. *Id.* at 2361, 2363–64.

97. *Mahmoud v. McKnight*, 688 F. Supp. 3d 265, 287, 302–03 (D. Md. 2023).

98. 426 F.3d 617 (2d Cir. 2005).

from a kindergarten class's environmental unit.⁹⁹ The class spent two months learning about "simple ways to save the environment," which culminated in an assignment for each student to create a poster showing what they had learned.¹⁰⁰ According to the mother of kindergartener Antonio Peck, when the two of them discussed the assignment, he told her that the only way to save the world was through Jesus.¹⁰¹ She then provided Antonio with art materials and magazines to create his poster, and he chose pictures and cut them out.¹⁰² She helped him arrange the pictures on the posterboard, and he dictated phrases for her to write down.¹⁰³ The finished poster depicted a robed Jesus figure, two children on a rock bearing the word "Savior," and the Ten Commandments, along with phrases like "the only way to save our world," "prayer changes things," and "Jesus loves children."¹⁰⁴

When Antonio brought the Jesus-themed poster in, the school was concerned about displaying it.¹⁰⁵ The principal suggested to Antonio's mother that Antonio create a new poster with "a little bit of religious content and more showing the recycling, kids throwing trash, [or] kids holding hands . . ." ¹⁰⁶ Antonio and his mother then created a new poster together, the left half of which showed Jesus and the right half of which showed recycling images and children holding hands.¹⁰⁷ The school then displayed the poster at the assembly but with the left half folded under.¹⁰⁸

Antonio's parents sued on his behalf, alleging that the school had violated his free speech rights by censoring part of the poster.¹⁰⁹ They argued that the school had restricted the poster because it offered a religious viewpoint on the question of how to save the environment, thereby committing viewpoint discrimination.¹¹⁰ This line of argument implicated the open question of whether *Hazelwood School District v. Kuhlmeier*¹¹¹—the Supreme Court case governing school restrictions on school-sponsored student speech—allowed viewpoint discrimination at all.¹¹² Ultimately, the Second Circuit remanded the

99. *Id.* at 620.

100. *Id.* at 620–21.

101. *Id.* at 621.

102. *Id.*

103. *Id.* at 621–22.

104. *Id.* at 622.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 620, 624.

110. *Id.* at 624, 630–31.

111. 484 U.S. 260 (1988).

112. *Id.* at 262. As discussed *infra*, the most straightforward interpretation of *Hazelwood* is that it *does* allow viewpoint-based restrictions on school-sponsored student speech. However, as I have written

case for further factual development regarding the school district's motivations.¹¹³ Thus, while not a complete victory for the Peck family, this was a better outcome than the complete defeats faced by the families in the opt-out cases. Eventually, the case was dismissed for lack of standing and never received a full decision on the merits.¹¹⁴

A somewhat similar issue was raised in *Harper v. Poway*,¹¹⁵ a highly publicized Ninth Circuit case that was decided in the following year, 2006.¹¹⁶ There, in response to a high school's Day of Silence sponsored by the Gay-Straight Alliance, sixteen-year-old student Chase Harper wore a t-shirt to school that stated "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED" on the front, and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" on the back.¹¹⁷ School officials told him that he could not go to class unless he removed or covered the shirt.¹¹⁸ Notably, the assistant principal tried to convince Chase to do so by telling him that he understood where Chase was coming from: he knew Chase's father personally, had attended the weekly Bible study session that Chase's father led, and shared the family's Christian faith.¹¹⁹ But Chase still refused to accede to the school officials' request.¹²⁰

Shortly thereafter, Chase's parents filed a lawsuit against the school district on his behalf, claiming that the district had violated Chase's free speech rights.¹²¹ Here, the Supreme Court's case governing school restrictions on independent student speech—*Tinker v. Des Moines*—was the applicable precedent, since Chase's speech was in no way school-sponsored (unlike Antonio's poster, which was going to be displayed at a school assembly as part of a classroom event). The Ninth Circuit agreed that viewpoint discrimination had occurred, but split 2-1 over whether *Tinker* allowed it on these facts.¹²² As discussed further in Section III, *Tinker* allows schools to restrict independent student speech only when it threatens to cause a material disruption or invade the rights of other students.¹²³ The majority concluded that the t-shirt invaded other students' rights by potentially harming them on the basis of their sexual

elsewhere, an expansion of *Hazelwood* into areas beyond student speech ended up causing confusion on this topic, yielding a circuit split. See Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 63–67 (2008).

113. *Peck*, 426 F.3d at 633.

114. *Peck v. Baldwinsville Cent. Sch. Dist.*, 351 F. App'x 477, 479 (2d Cir. 2009) (summary order).

115. 445 F.3d 1166 (9th Cir. 2006).

116. *Id.* at 1167.

117. *Id.* at 1171–72.

118. *See id.* at 1172.

119. *Id.* at 1173.

120. *Id.*

121. *Id.*

122. *Id.* at 1192; *id.* at 1193 (Kozinski, J., dissenting).

123. *See infra* Section III.A.

orientation.¹²⁴ The dissent, however, thought that the school district had committed impermissible viewpoint discrimination, and that *Tinker*'s invasion-of-rights prong only applied to independently tortious speech.¹²⁵ The case ultimately went up to the Supreme Court, which vacated the decision but did not provide any substantive analysis.¹²⁶ Instead, the Court simply ordered the case to be dismissed as moot, given the district court's ruling in the interim that the case had become moot because Chase had graduated.¹²⁷

Both the *Peck* and *Harper* decisions thus left the plaintiffs with ambiguous outcomes, somewhere between victory and defeat. And, while the plaintiffs were technically the students, it is clear that their parents were very much part of the team. This is particularly true in *Peck*, where the mother facilitated the creation of the kindergarten poster by providing the religious pictures and then writing the religious phrases.¹²⁸ *Harper* involved a high-schooler who obviously had more independence.¹²⁹ Even so, there was a clear philosophical alignment between father and son, given the vice-principal's statement that he understood the student's views precisely because he attended the weekly Bible study led by the student's father.¹³⁰

Of course, in all student speech cases, the parents or guardians end up being the ones pursuing litigation on their children's behalf in court. In many of them, though, the sequence of events strongly suggests that the parents were not involved in or aware of their children's speech ahead of time. For example, the Supreme Court's most recent student speech cases involved students who were punished for posting "[f]uck school fuck softball fuck cheer fuck everything" on Snapchat¹³¹ and for displaying a fourteen-foot banner that said "BONG HiTS 4 JESUS."¹³² There is no reason to think that the parents were on board with those messages or those ways of expressing them. By contrast, the student speech in *Peck* and *Harper* was a direct reflection of the parents' religious and ideological views. Moreover, the speech specifically conveyed those parents' challenges to school curricula or policies themselves (as opposed to, for instance, familial views about the Vietnam War, as in *Tinker v. Des Moines Independent Community School District*).¹³³

124. *Harper*, 445 F.3d at 1177–83.

125. *Id.* at 1196–99 (Kozinski, J., dissenting).

126. *Harper v. Poway*, 549 U.S. 1262, 1262 (2007).

127. *Id.*

128. *See Peck ex rel. Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 621–22 (2d Cir. 2005).

129. *Cf. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171–73 (9th Cir. 2006) (involving a high school student who acted on his own initiative, with no indication of parental involvement in creating or displaying the message).

130. *See id.* at 1173.

131. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2043 (2021); *see infra* Section III.A.

132. *Morse v. Frederick*, 551 U.S. 393, 397 (2007); *see infra* Section III.A.

133. 393 U.S. 503, 504 (1969). For a full discussion of *Tinker*, *see infra* Section III.A.

That said, there is no reason to think that *Peck* and *Harper* were part of a broader, comprehensive strategy to challenge the messages being sent by school districts. Rather, each seems to have developed organically, as a family-based response to a particular school district's actions. By contrast, the new development—to which this Article now turns—is that student speech claims are becoming an institutionally-backed litigation strategy for parents to challenge school curricula or policies, sometimes before those policies are even applied against a particular student.

II. THE NEW STRATEGY: FREE SPEECH-BASED CHALLENGES

Think back to the 2020–2021 school year. Many school districts were completely remote as a result of the COVID-19 pandemic. Others reopened, but with various limitations, such as hybrid models, mask mandates, and quarantine protocols. It was a time that the worlds of home and school became increasingly overlapping, in multiple ways.

On the one hand, schools extended into the homes—literally and figuratively—more than ever before. Remote education meant that teachers gained visibility into the physical spaces of students' homes, as they taught classes to students who were logged in from home. Some schools even imposed dress codes for what students wore at home while they logged into class.¹³⁴ Reopening did not necessarily mean a return to clear boundaries between home and school, either. Some schools that reopened for in-person instruction, for instance, attempted to police the out-of-school activities of students and their families, at times even requiring students to attend school remotely if they had attended outside social gatherings.¹³⁵ Some other school districts, including those in New York City and in Cambridge, Massachusetts, tried to influence COVID-19 vaccination decisions by not allowing their students to participate in extracurricular activities unless they had received the vaccine.¹³⁶ Relatedly, most school districts imposed mask mandates as a condition of in-person school

134. See, e.g., Ashley Austrew, *School's Dress Code for Distance Learning Has Many Parents Rolling Their Eyes*, CARE.COM, <https://www.care.com/c/school-distance-learning-dress-code/> [https://perma.cc/A2SA-5F43] (last updated May 19, 2021); Mary Retta, *Schools Are Enforcing Dress Codes During Online Classes*, TEEN VOGUE (Aug. 20, 2020), <https://www.teenvogue.com/story/schools-zoom-dress-code/> [https://perma.cc/6DWJ-AW94].

135. See, e.g., David Propper, *COVID-19: Fox Lane HS Students Who Attended Weekend Gatherings Forced Into Remote Learning*, ROCKLAND/WESTCHESTER J. NEWS (Sep. 28, 2020, at 21:35 ET), <https://www.lohud.com/story/news/coronavirus/2020/09/28/fox-lane-hs-students-who-attended-large-gatherings-forced-into-remote-learning/3568976001/> [https://perma.cc/QLJ7-RFX4 (staff-uploaded, dark archive)].

136. See Emily Gold Waldman, *Just Extracurriculars?*, 108 MINN. L. REV. 795, 800–01, 853–54 (2023) (describing the policies and quoting then-Mayor Bill de Blasio's explanation that “[i]f a family doesn't think it's important enough to get their child vaccinated for this, they won't participate”).

attendance.¹³⁷ Some parents viewed this as an encroachment of their own parental decision-making prerogatives, and numerous “Unmask the Kids” and “Unmask Our Kids” groups were formed.¹³⁸

Meanwhile, parents were gaining more visibility into the schools as well. In particular, remote education meant that parents were often in the same rooms as their children while they attended school. This was especially true in the early months of the pandemic, when it was very common for both students and parents to be working from home. Intentionally or not, parents frequently overheard parts of what their children were learning—and then formed their own opinions about it, as discussed further below.¹³⁹

This increased contact between home and school led to more friction, which was only exacerbated by the broad social unrest that played out over the course of 2020 and beyond. It was a ripe environment for the blossoming of new organizations that framed themselves as advocates for parents’ rights. And, indeed, multiple such organizations came onto the scene in 2021.

A. *The Rise of New “Parents’ Rights”-Centered Entities*

In January 2021, two Florida mothers who had just finished their school board terms came together to found Moms for Liberty, whose chapters then quickly spread throughout the United States. In an interview with ABC later that year, the women—Tina Descovich and Tiffany Justice—described the organization as “a united group of parents across the country who are working to defend our parental rights at all levels of government.”¹⁴⁰ The group started

137. See, e.g., Jinghong Cai, *Vaccines, Face Masks, and the New School Year: 50 States at a Glance*, NAT’L SCH. BDS. ASS’N (Sep. 8, 2021), <https://www.nsba.org/Perspectives/2021/vaccines-masks-new-school-year/> [<https://perma.cc/E785-42YN> (staff-uploaded, dark archive)] (stating that of the 120 largest school districts in the country, seventy-seven percent had mask mandate policies for the fall of the 2021–2022 school year); Anya Kamenetz, *After 2 Years, Growing Calls To Take Masks Off Children in School*, NPR (Jan. 28, 2022, at 06:00 ET), <https://www.npr.org/2022/01/28/1075842341/growing-calls-to-take-masks-off-children-in-school/> [<https://perma.cc/K83P-LJSL>] (stating that as of the article’s date in late January of 2022, approximately two-thirds of the nation’s large school districts were still requiring masks).

138. See, e.g., Pat Eaton-Robb, *Mask Guidance Divides Parents Heading into New School Year*, ASSOCIATED PRESS (July 31, 2021, at 12:08 ET), <https://apnews.com/article/joe-biden-health-education-coronavirus-pandemic-coronavirus-vaccine-5b6e9410b28a0e5eb76154fad431e26d> [<https://perma.cc/939B-FYPX>]; Don Stacom, *Connecticut School Boards, Superintendents Brace for Heated Debate Over Local Mask Rules*, HARTFORD COURANT, <https://www.courant.com/2022/02/13/connecticut-school-boards-superintendents-brace-for-heated-debate-over-local-mask-rules/> [<https://perma.cc/A8ED-K5DG> (staff-uploaded, dark archive)] (last updated Feb. 13, 2022, at 08:00 ET).

139. See *infra* note 140 and accompanying text.

140. Katie LaGrone, *Founders of Controversial Moms for Liberty Group Set Record Straight on Who They Are and Who They’re Not*, ABC NEWS: TAMPA BAY 28, <https://www.abcactionnews.com/news/local-news/i-team-investigates/founders-of-controversial-moms-for-liberty-group-set-record-straight-on-who-they-are-and-who-theyre-not> [<https://perma.cc/9NFQ-YTVK>] (last updated Dec. 3, 2021, at 23:33 ET).

out with a focus on COVID-19 mask mandates but quickly expanded beyond that. “I think COVID policies has [sic] exposed the problem to parents and it has driven people to us,” Descovich said.¹⁴¹ Today, Moms for Liberty’s website lists its current issues as “Books,” “Sex Ed,” “SEL,” “CRT,” “Data Collection,” “Gender Ideology,” “School Choice,” and “Restorative Justice.”¹⁴² For each, Moms for Liberty’s political position would clearly be characterized as conservative in today’s political climate, and the group is often described as “conservative,” “right-wing,” or even “far-right.”¹⁴³ Its chapters have led campaigns to have numerous books removed from school libraries.¹⁴⁴ As the Brookings Institution explains, Moms for Liberty has particularly focused on local school board elections, working to endorse and elect “school board candidates who share M4L’s right-wing vision of ‘parental rights’ in education and advocate for policies to bring that vision into U.S. schools.”¹⁴⁵

Also founded in 2021 was Parents Defending Education, whose legal efforts are particularly relevant to this Article.¹⁴⁶ Here, too, the origin story is linked to COVID-19. The group’s founder, Nicole Neily, later explained that she first thought about starting the group when she read a *Wall Street Journal* article in the fall of 2020 about the COVID reopening plan of the Evanston/Skokie School District 65, a large public school district just north of Chicago.¹⁴⁷ The article quoted the superintendent as saying, during a public

141. *Id.*

142. *Resources for Parents*, MOMS FOR LIBERTY, <https://portal.momsforliberty.org/resources/> [<https://perma.cc/3SSF-JVSN>].

143. *See, e.g.*, Ali Swenson, *Far-Right Group Moms for Liberty Reports More than \$2 Million in Revenue in 2022*, PBS (Nov. 17, 2023, at 16:27 ET), <https://www.pbs.org/newshour/education/far-right-group-moms-for-liberty-reports-more-than-2-million-in-revenue-in-2022> [<https://perma.cc/BH5G-3XAZ> (staff-uploaded archive)]; Sana Sinha, Nicolas Zerbino, Jon Valant & Rachel M. Perera, *Moms for Liberty: Where Are They, and Are They Winning?*, BROOKINGS INST. (Oct. 10, 2023), <https://www.brookings.edu/articles/moms-for-liberty-where-are-they-and-are-they-winning/> [<https://perma.cc/FSR9-8VMG>].

144. *See, e.g.*, Douglas Soule, *Florida Picks Moms for Liberty Members for Group to Advise Librarians on Book Removals*, TALLAHASSEE DEMOCRAT, <https://www.tallahassee.com/story/news/politics/2024/03/15/florida-book-bans-moms-for-liberty-members-create-librarian-training/72969966007/> [<https://perma.cc/3FMJ-UT9Z>] (last updated Mar. 15, 2024, at 10:11 ET); Lynn Hatter, *A Florida School District Removed 5 Books After Moms for Liberty Raised Concern. More Could Follow*, WUSF (July 12, 2023, at 18:07 ET), <https://www.wusf.org/education/2023-07-12/florida-school-district-removed-5-books-after-moms-for-liberty-raised-concern-more-could-follow> [<https://perma.cc/4DLV-2K5B>].

145. Rachel M. Perera, Jon Valant, Nicolas Zerbino & Brock Schultz, *How Did School Board Candidates Endorsed by Moms for Liberty Perform in 2023?*, BROOKINGS INST. (Mar. 2, 2024), <https://www.brookings.edu/articles/how-did-school-board-candidates-endorsed-by-moms-for-liberty-perform-in-2023/> [<https://perma.cc/3MKJ-5Q6H>].

146. Press Release, Parents Defending Educ., Parents Defending Education Goes to College as Defending Education (Apr. 9, 2025), <https://defendinged.org/press-releases/parents-defending-education-goes-to-college-as-defending-education/> [<https://perma.cc/3X4P-RG3W>].

147. Nathan Harden, *Parents on a Mission: How One Activist Group Aims To Reclaim American Schools*, REAL CLEAR EDUC. (June 5, 2024), <https://www.realcleareducation.com/articles/2024/06/05/>

Zoom meeting, that the district would give students from marginalized groups first priority for in-person learning, with all other students being taught remotely.¹⁴⁸ “I remember screaming out loud when I read the article because this plan was not only immoral—it was unconstitutional,” Neily said.¹⁴⁹ “I decided to form a new organization made up of parents that would be dedicated to protecting K-12 schools through litigation and other means.”¹⁵⁰ Soon after, she launched Parents Defending Education, later reflecting:

For decades, parents have been accustomed to dropping their children at the schoolhouse gates, assuming that their children would receive a solid education. But during COVID, families got a window into what their children were learning (or not learning) when Zoom school was in their living rooms.¹⁵¹

According to Neily, the “tips” (complaints) that parents submitted to Parents Defending Education evolved over time. In 2021, nearly all of them were about race-related issues; in 2022 and 2023, most were about gender identity-related issues; and after October 7, 2023, many allegations of anti-Semitism started coming in.¹⁵² On its website, Parents Defending Education featured an “IndoctriNation Map” (with the tag line that “There are problems everywhere . . . but there are also people fighting back”) with search terms including “affinity groups,” “antisemitism,” “consulting,” “critical race theory & equity,” “ethnic studies,” “free speech,” “immigration,” “indoctrination,” “parent rights,” “sex and gender,” “social emotional learning,” “surveys,” “teacher training,” and “teachers’ union.”¹⁵³ In 2025, Parents Defending Education changed its name to Defending Education to reflect its expansion into the university sector as well.¹⁵⁴

parents_on_a_mission_how_one_activist_group_aims_to_reclaim_american_schools_1036200.html [https://perma.cc/H6EV-6HUQ]. The article to which Neily was referring is Douglas Belkin and Lee Hawkins, *Can School Be ‘Antiracist’? A New Superintendent in Evanston, Ill., Has a Plan*, WALL ST. J. (Oct. 6, 2020), <https://www.wsj.com/articles/can-school-be-antiracist-a-new-superintendent-in-evanston-ill-has-a-plan-11601982001> [https://perma.cc/PE7S-8K62 (staff-uploaded, dark archive)].

148. Belkin & Hawkins, *supra* note 147. The superintendent said that this policy was “about equity for Black and brown students, for special education students, [and] for our LGTBQ students.” *Id.*

149. Harden, *supra* note 147.

150. *Id.*

151. *Id.*

152. *Id.*

153. *IndoctriNation Map*, DEFENDING EDUC., <https://defendinged.org/map/> [https://perma.cc/X6WE-GCY4].

154. Press Release, Parents Defending Education Goes to College as Defending Education, *supra* note 146.

Moms for Liberty, Defending Education, and other “parents’ rights” groups have generated intense political controversy in the past few years.¹⁵⁵ In June of 2023, the Southern Poverty Law Center (SPLC) classified them as “extremist groups,”¹⁵⁶ a label with which the groups vehemently disagreed.¹⁵⁷ The House Republicans then quickly filed a resolution condemning the SPLC for that designation, stating that “it is not extreme or hateful to believe that parents, not the government, should have the final say in their children’s education.”¹⁵⁸

The groups have also turned to the courts to pursue their policy goals. Both groups, for example, filed lawsuits (along with others) to enjoin Title IX regulations promulgated in 2024 by the Biden administration.¹⁵⁹ Most significant, for purposes of this Article, is one particular type of litigation that Defending Education has begun pursuing. As the next section shows, Defending Education’s litigation docket indicates a strategy of invoking the Free Speech Clause as an additional way of asserting parental interests.

B. *The Free Speech Packaging of Parental Rights Claims*

In the past few years, Defending Education has served as plaintiff or amicus in several cases showing how parental concerns about school policies can be presented through the vehicle of student speech claims. These cases, while

155. See, e.g., Libby Stanford, *Parents’ Rights Groups Have Mobilized. What Does It Mean for Students?* EDUCATIONWEEK (Aug. 31, 2023), <https://www.edweek.org/leadership/parents-rights-groups-have-mobilized-what-does-it-mean-for-students/2023/08?> [https://perma.cc/83VR-XW5Q]; Kiara Alfonseca and Mary Kekatos, *Debate Over ‘Parental Rights’ Is the Latest Fight in the Education Culture Wars*, ABC NEWS (Sep. 14, 2023, at 05:09 ET), <https://abcnews.go.com/US/debate-parental-rights-latest-fight-education-culture-wars/story?id=103024033&> [https://perma.cc/5S5B-9VHY].

156. *Assault on Inclusive Education and How We’re Fighting Back*, S. POVERTY L. CTR. (June 6, 2023), <https://www.splcenter.org/resources/reports/assault-inclusive-education/> [https://perma.cc/TG5Y-7P62].

157. Janae Bowens, *Parents Rights Groups Outraged After Landing on Southern Poverty Law Center’s Hate Report*, CBS AUS., <https://cbsaustin.com/news/nation-world/outrage-erupts-as-conservative-parents-rights-groups-land-on-southern-poverty-law-centers-hate-report-parents-defending-education-moms-for-liberty-moms-for-america-extremist-label> [https://perma.cc/KTV8-BLCM] (last updated June 16, 2023, at 18:11 ET).

158. Pushing Back Against the Labeling of Attempts by Parents to Ensure School Curriculum and Sports are Age and Sex Appropriate as Extreme, H.R. Res. 518, 118th Cong. (2023); Elizabeth Troutman, *House Republicans File Resolution Condemning SPLC for ‘Disgusting’ Targeting of Parental Rights Groups*, FOX NEWS (June 16, 2023, at 13:59 ET), <https://www.foxnews.com/politics/house-republicans-file-resolution-condemning-splc-targeting-parental-rights-groups> [https://perma.cc/W988-MQ4G].

159. See Complaint at 1, *Alabama v. Cardona*, No. 7:24-cv-00533-GMB (N.D. Ala. Apr. 29, 2024), https://defendinged.org/wp-content/uploads/2024/04/1_-_Complaint.pdf [https://perma.cc/NRF9-LUAL]; Complaint for Declaratory and Injunctive Relief at 1–2, *Kansas v. U.S. Dep’t of Educ.*, 739 F. Supp. 3d 902 (D. Kan. 2024), https://www.momsforliberty.org/my_content/uploads/2024/05/20240514-Complaint-Doc.-1.pdf [https://perma.cc/2Z]E-Z74Y].

still not fully resolved, may well provide a blueprint for other like-minded parents and organizations.

A high-profile example is *Defending Education v. Olentangy*, which the Sixth Circuit reheard *en banc* on March 19, 2025,¹⁶⁰ and decided on November 6, 2025.¹⁶¹ There, Defending Education sued the Olentangy School District (the fourth-largest school district in Ohio¹⁶²), bringing a pre-enforcement challenge to several of its policies.¹⁶³ It brought the suit to represent the interests of four anonymous Olentangy parents (denoted as Parents A, B, C, and D) and their school-aged children.¹⁶⁴ The complaint described the parents as holding traditional, religiously-based views. For example, the parents were generally described as believing that biological sex is immutable, that “there is a difference between gender dysphoria and a child’s confusion about their gender,” and that these are “sensitive issues that should be left to families to discuss and resolve, not to schools.”¹⁶⁵ The parents’ views, according to the complaint, stemmed from their religious beliefs.¹⁶⁶

The complaint then went on to allege that the children of Parents A through D shared these views and wanted to express them at school, but were inhibited by the school district’s “speech codes.”¹⁶⁷ These so-called speech codes included (1) the district’s anti-harassment policy, which prohibited “insulting” or “dehumanizing speech” that had the “effect of substantially interfering with a student’s educational performance,” and (2) the District’s Code of Conduct, which prohibited “discriminatory language” that was “derogatory towards an individual or group” as to characteristics including “transgender identity.”¹⁶⁸ In particular, the students sought to express the view that biological sex was immutable and that “sex does not change based on someone’s internal

160. *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 109 F.4th 453 (6th Cir. 2024), *reh’g en banc granted, vacated*, 120 F.4th 536, 537 (6th Cir. 2024) (mem.); Docket Report, #244, *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, No. 20-03630 (Mar. 19, 2025).

161. *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, No. 23-3630 (6th Cir. Nov. 6, 2025).

162. *Community*, OLENTANGY SCHS., <https://www.olentangy.k12.oh.us/about/quality-profile/community> [<https://perma.cc/7P4C-NU29>].

163. Verified Complaint ¶¶ 2–7, *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, No. 2:23-cv-01595 (May 11, 2023), <https://www.nbc4i.com/wp-content/uploads/sites/18/2023/05/Parents-Defeding-Education-vs.-Olentangy-Local-School-District.pdf> [<https://perma.cc/KCL7-5U4E>].

164. *Id.* ¶ 15. The Complaint stated that Parents A-D and the children of Parents A, B, and D were members of Parents Defending Education; it is not clear what the omission of Parent C’s child(ren) signified. *Id.*

165. For Parents A, B, and D, almost identical wording was used, with the one exception that Parent D’s Christian faith was specifically mentioned. *See id.* ¶¶ 71, 91, 129. For Parent C, the wording changed slightly but was substantively the same. *See id.* ¶¶ 113–14.

166. *Id.* ¶ 7.

167. *Id.* ¶ 2.

168. *Id.* ¶¶ 2–5.

feelings.”¹⁶⁹ Moreover, they wanted to only use pronouns that were “consistent with a classmate’s biological sex.”¹⁷⁰ The complaint did not point to any discipline that had been administered under the policies so far. Rather, it alleged that the children were self-censoring (and using “preferred pronouns” against their will) for fear of punishment under the policies, along with fear of harming their college admission chances and being subjected to “reputational harm and personal attacks from other students and members of the Olentangy community.”¹⁷¹ The complaint also alleged that the parents themselves were experiencing their *own* emotional and psychological harm as a result of the situation.¹⁷²

Defending Education sought a preliminary injunction against the challenged policies. It initially lost at the district and circuit court levels. In a 2-1 split, the Sixth Circuit ruled that the pronoun policy—in requiring the use of “preferred pronouns” and prohibiting the use of “non-preferred pronouns”—did not amount to unconstitutional viewpoint discrimination.¹⁷³ However, on November 6, 2025, Defending Education won: the Sixth Circuit issued a 10-7 en banc decision enjoining the school district’s policy.¹⁷⁴ The en banc rehearing generated not only a majority and dissent, but also four separate concurrences.¹⁷⁵ As discussed further in Section III below, the decision’s main focus was whether the pronoun policy was a form of viewpoint discrimination and, if so, whether that violated the Supreme Court’s student speech framework.

Defending Education also filed a very similar case against the Croton-Harmon School District in Westchester County, New York, in June of 2024.¹⁷⁶ That case was quickly dismissed because the Second Circuit does not recognize associational standing on behalf of anonymous plaintiffs, nor does it permit associations to bring Section 1983 claims on behalf of their members.¹⁷⁷ However, that may well not be the end of the matter. Not only is Parents

169. *Id.* ¶ 7.

170. *Id.* ¶¶ 76, 96, 116, 133.

171. *Id.* ¶¶ 78–86, 98–108, 116–24, 136–46.

172. *Id.* ¶¶ 88, 110, 126, 148.

173. *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 109 F.4th 453, 468–70 (2024).

174. *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, No. 23-3630 (6th Cir. Nov. 6, 2025) (en banc).

175. *See id.*

176. Verified Complaint at 1, *Parents Defending Educ. v. Croton-Harmon Union Free Sch. Dist.*, No. 7:24-cv-04485 (S.D.N.Y. June 12, 2024), https://defendinged.org/wp-content/uploads/2024/06/1_Complaint.pdf [<https://perma.cc/UF5M-7ACT>].

177. Petition for Rehearing/Rehearing En Banc, on Behalf of Appellant Parents Defending Education at 8, *Parents Defending Educ. v. Croton-Harmon Sch. Dist.*, No. 24-1900, Dkt. No. 48 (2d Cir. May 6, 2025); *see also* Petition for Panel Rehearing and Rehearing En Banc at 3, *Parents Defending Educ. v. Croton Harmon Sch. Dist.*, No. 24-1900 (2d Cir. May 6, 2015), https://defendinged.org/wp-content/uploads/2025/05/Parents-Defending-Education-v.-Croton-Harmon-Union-Free-School-District-ET-AL_Redacted.pdf [<https://perma.cc/QUS3-5XWT>] (noting that Parents Defending Education’s lawsuit under § 1983 was dismissed because it referred to its member only by pseudonyms).

Defending Education seeking en banc review of the Second Circuit's associational standing precedents,¹⁷⁸ but the individual parents also remain entirely free to bring the case. Other such complaints in other circuits seem likely to follow as well, from both Defending Education and other parents (either as groups or individuals).

A close variation on *Olentangy* and *Croton-Harmon* was presented by another circuit court case on which Defending Education (then still Parents Defending Education) served as an amicus: the 2024 First Circuit case of *L.M. v. Town of Middleborough*.¹⁷⁹ There, a middle school had a dress code with similar provisions to the Olentangy Local School District's policies: it stated that students' clothing "must not state, imply, or depict hate speech or imagery that targets groups based on . . . gender identity."¹⁸⁰ A seventh-grade boy, L.M., wanted to express his belief, similar to the beliefs of Olentangy families A-D, that there were only two biological sexes and only two genders.¹⁸¹ He wore a t-shirt to school that said "There Are Only Two Genders," and the school asked him to remove it.¹⁸² When he refused, the school asked his father to pick him up.¹⁸³ L.M.'s father supported his decision not to remove the t-shirt, later emailing the school to ask what the problem was, since "nothing about [the] shirt . . . was directed to any particular person," and the shirt "simply stated [a view] on a subject that has become a political hot topic . . . that is being discussed . . . all across our country."¹⁸⁴ The superintendent responded that the t-shirt violated the dress code by "target[ing] students of a protected class; namely in the area of gender identity."¹⁸⁵ The family then engaged counsel.¹⁸⁶

Ultimately, L.M.'s case ended up in court, with L.M.'s father and stepmother as the plaintiffs suing on his behalf, and with numerous amici (including Parents Defending Education) in support. The First Circuit ruled in favor of the school district, explaining that it would defer to the school district's determination that the shirt would materially disrupt the learning environment "because of its negative psychological impact on transgender and gender nonconforming students at NMS."¹⁸⁷ The family then sought Supreme Court

178. *Parents Defending Education Files Petition for Initial Hearing En Banc in Croton-Harmon Union Free School District Lawsuit*, DEFENDING EDUC. (July 17, 2024), <https://defendinged.org/lawsuits/parents-defending-education-files-petition-for-initial-hearing-en-banc-in-croton-harmon-union-free-school-district-lawsuit/> [<https://perma.cc/A3AW-RRH6>].

179. 103 F.4th 854 (1st Cir. 2024).

180. *Id.* at 861.

181. *Id.*

182. *Id.* at 861–62.

183. *Id.* at 862.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 880–82.

review, again with numerous amici in support.¹⁸⁸ The Court ultimately declined to hear the case. Notably, however, both Justices Thomas and Alito dissented to urge that the case be heard.¹⁸⁹

The Supreme Court's *Mahmoud* decision in the parents' favor does not mean that these speech cases will disappear. After all, in opt-out cases like *Mahmoud*, the goal is arguably less ambitious. Rather than trying to change the school curricula, the parents there are pursuing litigation to shield their own children from being exposed to them. In the free speech cases, by contrast, the parents are directly challenging the school curricula and policies in order to make space for students to express dissenting views to their peers. Indeed, these parents want their children to be speaking up "repeatedly." The speech-based strategy thus both dovetails with and exceeds the goals of the opt-out cases, by pressuring schools to either allow contrary views on issues like gender identity or retreat from the discussion entirely. And, if anything, *Mahmoud* may make parents even more bullish on this speech-based strategy, as well. Notably, one of the *Olentangy* concurrences even cited *Mahmoud* for support in striking down the pronoun policy, characterizing *Mahmoud* as "ma[king] clear . . . that school administrators cannot recast their educational mission in order to suppress parental and student views on matters of public concern."¹⁹⁰

C. *Déjà Vu?*

The reframing of parental rights interests into free speech cases strikes a familiar chord. It is reminiscent of two previous turns to free speech doctrine by conservative religious groups. Both of these repackagings ended up being very successful.

The first free speech reframing involved the "equal access" cases that began in the late twentieth-century.¹⁹¹ These cases arose from situations where religious groups sought access to public educational institutions (both universities and K-12 school districts) but were denied because of Establishment Clause concerns.¹⁹² During the late 1970s, conservative Christian organizations began to explore the strategy of challenging these denials as violations of the

188. See *No. 24-410, L.M. v. Town of Middleborough*, U.S. SUP. CT.: DKT SEARCH, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24-410.html> [<https://perma.cc/WF7S-MY8K>].

189. *Id.*

190. *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, No. 23-3630, slip op. at 78–79 (6th Cir. Nov. 6, 2025) (en banc) (Bush, J., concurring).

191. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 263 (1981); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 384–85 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 98–100 (2001).

192. *Widmar*, 454 U.S. at 263; *Lamb's Chapel*, 508 U.S. at 384–85; *Good News Club*, 533 U.S. at 98–100.

Free Speech Clause.¹⁹³ As several scholars have written, the free speech path was not an immediately obvious or appealing strategy for conservative Christian organizations to pursue.¹⁹⁴ It meant framing religious activity as just another form of speech, rather than singling it out as special and different.¹⁹⁵ That conflicted with these groups' cultural message.¹⁹⁶ Legally, however, it represented the best chance of success, because it was the pathway to invoking the robust body of free speech case law disfavoring content and viewpoint discrimination.¹⁹⁷

And the strategy quickly bore fruit. In the 1981 case of *Widmar v. Vincent*,¹⁹⁸ the Supreme Court ruled in favor of an evangelical student group seeking to hold regular meetings for prayer and Bible study at the campus facilities of the University of Missouri, Kansas City.¹⁹⁹ The University had denied the group's requests due to a regulation that prohibited the use of its facilities for religious worship or teaching.²⁰⁰ The group sued, with guidance from the Christian Legal Society (CLS),²⁰¹ and ultimately prevailed before the Supreme Court. Indeed, the victory was overwhelming: the Court ruled 8-1 that this was impermissible content-based speech discrimination.²⁰² "Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech," the Court explained.²⁰³ "Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral."²⁰⁴

That victory confirmed the strength of the free speech strategy and set a clear course for the future. As Kate Redburn explains, "[a]fter *Widmar*, CLS focused on free speech litigation for equal access to public schools, which became a cottage industry in the growing movement. Over the next twenty years, cause lawyers of the New Christian Right argued equal access cases thirty-six times and won on twenty-four occasions."²⁰⁵ A key victory, coming about a decade after *Widmar*, was *Lamb's Chapel v. Center Moriches Union Free*

193. See Kate Redburn, *The Equal Right To Exclude: Religious Speech and the Road to 303 Creative LLC v. Elenis*, 112 CALIF. L. REV. 1879, 1893–905 (2024); Lisa Shaw Roy, *The Evangelical Footprint*, 2011 MICH. STATE L. REV. 1235, 1240–50 (2011).

194. Redburn, *supra* note 193, at 1901–03; Roy, *supra* note 193, at 1247–49.

195. Redburn, *supra* note 193, at 1902; Roy, *supra* note 193, at 1248–49.

196. Redburn, *supra* note 193, at 1901–03; Roy, *supra* note 193, at 1247–48.

197. Redburn, *supra* note 193, at 1901–03; Roy, *supra* note 193, at 1249–50.

198. 454 U.S. 263 (1981).

199. *Id.* at 266–67.

200. *Id.* at 265.

201. Redburn, *supra* note 193, at 1903–05; Roy, *supra* note 193, at 1252.

202. *Widmar*, 454 U.S. at 276–77.

203. *Id.* at 277.

204. *Id.*

205. Redburn, *supra* note 193, at 1905.

School District.²⁰⁶ There, a school district had adopted a policy permitting access to school premises for “social, civic, or recreational uses” but denied the application of the Lamb’s Chapel church to show a religious film there, on grounds that the film fell outside the scope of specified activities.²⁰⁷ The district argued that it was merely enforcing a content-based restriction that was consistent with the limited public forum that it had created.²⁰⁸ But Lamb’s Chapel, represented by the American Center for Law and Justice (another conservative Christian organization²⁰⁹), countered that this was not just content-based discrimination, but viewpoint-based discrimination, which is impermissible even within limited public forums.²¹⁰ It argued that the film simply offered a religious viewpoint on topics within the forum’s scope: it was a “family oriented movie—from a Christian perspective.”²¹¹ This time, the victory was unanimous: by a vote of 9-0, the Court ruled for Lamb’s Chapel.²¹² Lisa Shaw Roy observes that “the shift from content to viewpoint discrimination in *Lamb’s Chapel* was pivotal for religious speakers and religion in general, and for evangelical Christianity in particular.”²¹³ Indeed, in future years, similar Supreme Court victories were achieved, such as *Good News Club v. Milford*,²¹⁴ where a school district was found to have committed impermissible viewpoint-discrimination by not letting a Bible club meet with students in the school cafeteria at the end of the school day.²¹⁵

The second free speech repackaging occurred in the context of anti-discrimination law regarding public accommodations. As Redburn writes, “[i]n the 1990s, free speech lawyers for the New Christian Right exported the religious speech strategy out of public forums and into public accommodations.”²¹⁶ This migration played out in the 1995 case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,²¹⁷ where organizers of the St. Patrick’s Day Parade in Boston denied the application of the Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB) to march in the parade under its own banner.²¹⁸ GLIB brought an anti-discrimination lawsuit under the Massachusetts public accommodations statute (which prohibited

206. 508 U.S. 384 (1993).

207. *Id.* at 387–89.

208. Brief for Respondents at 5–6, *Lamb’s Chapel*, 508 U.S. 384 (No. 91-2024).

209. See *About the American Center for Law and Justice*, AM. CTR. FOR L. & JUST., <https://aclj.org/our-mission/about-aclj> [<https://perma.cc/4WYP-SFQT>].

210. Petition for Writ of Certiorari at 17–19, *Lamb’s Chapel*, 508 U.S. 384 (No. 91-2024).

211. *Id.* at 18, 6a.

212. *Lamb’s Chapel*, 508 U.S. at 397.

213. Roy, *supra* note 193, at 1264.

214. 533 U.S. 98 (2001).

215. *Id.* at 112.

216. Redburn, *supra* note 193, at 1906.

217. 515 U.S. 557 (1995).

218. *Id.* at 561.

discrimination on the basis of sexual orientation), and the case ultimately reached the Supreme Court.²¹⁹ Another conservative Christian organization, Alliance Defending Freedom, helped fund the parade organizers' appellate litigation.²²⁰ That investment paid off: the Court unanimously ruled in favor of the parade organizers, on grounds that the parade constituted their own expression and that requiring them to admit a "contingent expressing a message not of the private organizers' own choosing" would violate the First Amendment's prohibition against compelled speech.²²¹ The Court continued with this compelled speech rationale in the 2000 case of *Boy Scouts of America v. Dale*.²²²

This strategy came to full fruition in 2023, when the Supreme Court issued its decision in *303 Creative LLC v. Elenis*,²²³ extending the above reasoning to the commercial sector. The Court ruled that a website designer could not be required under the Colorado Anti-Discrimination Act to create wedding websites for same-sex couples.²²⁴ Citing *Hurley* and *Dale*, the Court reasoned that this too would violate the compelled speech doctrine, by forcing the designer to provide speech that she did not wish to provide.²²⁵ "Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance," the Court concluded.²²⁶ "Of course, abiding the Constitution's commitment to the freedom of speech means all of us will encounter ideas we consider 'unattractive,' 'misguided, or even hurtful.' But tolerance, not coercion, is our Nation's answer."²²⁷

The parallels between cases like *Olentangy* and the two earlier free speech repackagings are striking. Like the first wave of repackaged free speech cases, the defendants are once again public educational institutions. And like the second wave of repackaged cases, a "compelled speech" argument is once again part of the mix. (Not surprisingly, in the original *Olentangy* decision that ruled for the school district, the dissent cited *303 Creative* and *Hurley* when arguing that the school district's pronoun policy amounted to compelled speech).²²⁸ Another common feature cutting across all three repackagings is the heavy

219. *Id.* at 561–66.

220. Redburn, *supra* note 193, at 1909, 1922–26.

221. *Hurley*, 515 U.S. at 566.

222. 530 U.S. 640, 661 (2000) (holding that the Boy Scouts of America ("BSA") was an expressive association that could not be forced under New Jersey's public accommodations law to include gay scout leaders, because this would force the BSA to express a message with which it disagreed).

223. 143 S. Ct. 2298 (2023).

224. *Id.* at 2321–22.

225. *Id.* at 2313.

226. *Id.* at 2321.

227. *Id.* at 2321–22.

228. *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 109 F.4th 453, 484 (6th Cir. 2024) (Batchelder, J., dissenting), *reh'g en banc granted, vacated*, 120 F.4th 536 (6th Cir. 2024) (mem.).

involvement of conservative legal organizations, like the Christian Legal Society, the American Center for Law and Justice, the Alliance Defending Freedom, and Defending Education. Alliance Defending Freedom is representing the student in *L.M.*, and Defending Education was the plaintiff in *Olentangy* as well as an amicus in *L.M.* These cases were not pursued as one-offs, but with a bigger picture in mind.

Indeed, this new wave is just getting started and should not be discounted. As Section III explains, this wave is poised to tee up some of the trickiest and longest-simmering questions in the student speech framework.

III. THE VIEWPOINT DISCRIMINATION DILEMMA

A. *The Unresolved Tension Within Supreme Court's Student Speech Framework*

A bedrock principle of free speech doctrine is that viewpoint-based restrictions are usually impermissible. Indeed, that was the rationale for the Supreme Court's unanimous decision in *Lamb's Chapel*, as well as several of the other equal access cases.²²⁹ But the Supreme Court's approach to student speech is not as simple. The Court has decided five student speech cases since 1969, when it first held in *Tinker v. Des Moines Independent Community School District* that students' free speech rights did not stop at the schoolhouse gate.²³⁰ Each of those cases involved distinct fact patterns that generated their own specific standard. The resulting student speech framework is thus a collection of five different tests for courts to work with, depending on which precedent is most applicable. Not one of those tests outright prohibits viewpoint discrimination.

First, in *Tinker*, the Supreme Court was faced with a school district's rule against wearing black armbands to school to protest the Vietnam War.²³¹ This was core political speech by students, and the Court was understandably concerned about restrictions on it. After confirming that students did have free speech rights in school, the Court held that the armband ban violated those rights.²³² In explaining why, the Court articulated what has become known as the *Tinker* test. The Court stated that the armbands were not likely to cause a material disruption at school nor did they invade the rights of others.²³³ Thus, they could not be restricted. On the other hand, student speech that *did* meet one of those two prongs could be restricted.²³⁴ But the Court never said what qualified as a material or substantial disruption. Could a major disruption of one other student's education be enough, or did it have to be a widespread

229. See *supra* Section II.C.

230. 393 U.S. 503, 506 (1969).

231. *Id.* at 504.

232. *Id.* at 506–11.

233. *Id.* at 514.

234. *Id.* at 513.

disruption of the entire school? Nor did the Court provide any guidance about what it meant by an “invasion of rights.” Could *that* be the pathway to addressing the disruption of another student’s education, or did it just apply to independently tortious actions like defamation or illegal discrimination? The *Tinker* facts did not present those questions, which were all left unarticulated and unanswered.

Nearly twenty years later, the Supreme Court heard another student speech case, *Bethel School District No. 403 v. Fraser*,²³⁵ which presented very different facts. A high-school senior nominated his friend for student government president, making a speech at a school assembly that included an elaborate dirty joke (saying that the student was “firm,” would “take an issue and nail it to the wall,” and would go to “the climax”).²³⁶ Unlike *Tinker*, no substantive political view was being expressed, beyond the idea that people should vote for his friend. The school punished him with a three-day suspension, and he sued.²³⁷ At the Ninth Circuit, he won under the *Tinker* test.²³⁸ But the Supreme Court majority declined to apply *Tinker* at all, citing the “marked distinction between the political ‘message’ of the armbands in *Tinker* and the sexual content of respondent’s speech in this case.”²³⁹ Instead, the Supreme Court articulated and applied a new test, stating that it was permissible to sanction the student for his “offensively lewd and indecent speech.”²⁴⁰

The following year, the Supreme Court heard its third student speech case, *Hazelwood School District v. Kuhlmeier*.²⁴¹ This case presented yet another context: the school newspaper. The principal had removed two pages of the high school newspaper, which was produced by students in the Journalism II class.²⁴² Those pages contained one article that discussed the pregnancies of several students at the school and another article that discussed several students’ experiences with their parents’ divorces.²⁴³ The students sued and won at the Eighth Circuit (which applied *Tinker*), but lost at the Supreme Court.²⁴⁴ Here, the Court articulated a third test, hinging on the school-sponsored context of the newspaper: “[W]hether the First Amendment requires a school to tolerate particular student speech—the question we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively

235. 478 U.S. 675 (1986).

236. *Id.* at 677–78; *id.* at 687 (Brennan, J., concurring).

237. *Id.* at 678–79 (majority opinion).

238. *Id.* at 679–80.

239. *Id.* at 680.

240. *Id.* at 685–86.

241. 484 U.S. 260 (1988).

242. *Id.* at 262–64.

243. *Id.* at 263.

244. *Id.* at 265–66.

to promote particular student speech.”²⁴⁵ It held that for school-sponsored speech (i.e., speech that might be attributable to the school or at least be seen as bearing its imprimatur) school restrictions need only be “reasonably related to legitimate pedagogical concerns.”²⁴⁶

Nearly twenty years went by before the Supreme Court heard its fourth student speech case, *Morse v. Frederick*.²⁴⁷ Here, a student unfurled a ten-foot banner stating “BONG HiTS 4 JESUS” while the school community stood outside to watch the Olympic torch relay pass by its campus during the school day.²⁴⁸ The student claimed that the banner was just a nonsense message and that his goal was to attract the attention of television cameras.²⁴⁹ When the principal demanded that he take the banner down, he refused; she suspended him, and he sued.²⁵⁰ Once again, the student won below under *Tinker*, only to have the Supreme Court articulate a new test.²⁵¹ This time, the Court held that schools could restrict speech that is “reasonably viewed as promoting illegal drug use.”²⁵²

Finally, in 2021, the Supreme Court decided its first case involving digital speech that originated off campus: *Mahanoy Area School District v. B.L.*²⁵³ In that case, a junior varsity cheerleader who was frustrated about her placements on the cheerleading and softball teams expressed her feelings on Snapchat, posting “[f]uck school fuck softball fuck cheer fuck everything” along with a photo of her and a friend with their middle fingers raised.²⁵⁴ The cheerleading coaches found out about the post, and suspended her from the team for a year.²⁵⁵ She sued and won at every level, including the Supreme Court.²⁵⁶ The *Mahanoy* Court said that while it was not going to set forth a broad rule governing schools’ authority to restrict students’ off-campus speech, it would identify three principles suggesting that schools should generally have limited authority here: (1) schools did not have an *in loco parentis* role with respect to off-campus speech; (2) if schools could regulate off-campus as well as on-campus speech, student speech would be under 24/7 school oversight; and (3) the schools themselves had “an interest in protecting a student’s unpopular expression,

245. *Id.* at 270–71.

246. *Id.* at 273.

247. 551 U.S. 393 (2007).

248. *Id.* at 397–98.

249. *Id.* at 401.

250. *Id.* at 396.

251. *See id.* at 399, 403.

252. *Id.* at 403.

253. 141 S. Ct. 2038, 2043 (2021).

254. *Id.*

255. *Id.*

256. *Id.* at 2042–43, 2048.

especially when the expression takes place off campus,” because “America’s public schools are the nurseries of democracy.”²⁵⁷

The framework emerging from these five cases can be summarized as follows. When it comes to on-campus student speech, the “universe” can be split into independent student speech (*i.e.*, speech that students are expressing on their own, by wearing t-shirts that express messages, making verbal comments, and the like) and school-sponsored student speech (*i.e.*, speech that is being conveyed in the newspaper, yearbook, in school plays, on murals in the school, and the like). Speech in the first category can be restricted if it is likely to cause substantial disruption or invade other students’ rights; speech in the second category can be restricted for any legitimate pedagogical reason. Then, there are two carve-outs that schools can presumptively restrict: plainly offensive or lewd speech; and speech that can be reasonably interpreted as promoting illegal drug use. Finally, there is a higher bar for school restrictions on students’ off-campus speech, but the Supreme Court has (unfortunately) not specified yet exactly what that test is.

Nowhere does the student speech framework make viewpoint-based restrictions on student speech impermissible. None of the five cases said that. In fact, several of them pointed in the opposite direction. *Morse*, for instance, adopted an explicitly viewpoint-based standard. It held that students’ pro-drug speech could be prohibited at school, notwithstanding the prevalence of anti-drug messages throughout schools.²⁵⁸ Similarly, *Hazelwood*’s list of permissible bases for school restrictions on school-sponsored student speech included “refus[ing] to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order.’”²⁵⁹ Here, too, the clear indication was that schools could commit viewpoint discrimination: they could refuse to publish newspaper articles that praised drinking, drug use, or other “uncivilized” activities, even while publishing articles that *opposed* those things.²⁶⁰ Even *Tinker*, the most protective standard for in-school speech, did not make viewpoint discrimination the dividing line for which restrictions were permissible. Rather, it rested its standard on the *effects* of the speech at issue. In particular, the Court pointed out that the school had allowed students to wear other political symbols (including the Iron Cross) while prohibiting this particular symbol (the black armband)—and then said that the “prohibition of

257. *Id.* at 2045–46.

258. *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

259. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

260. See also Alexander Tsesis, *Categorizing Student Speech*, 102 MINN. L. REV. 1147, 1194 (2018) (observing that “[i]n *Fraser*, *Hazelwood*, and *Morse*, the Court granted schools authority to regulate content of student speech without a rigorous framework against discretionary viewpoint discrimination”).

expression of one particular opinion” was unconstitutional “*without evidence* that it is necessary to avoid material and substantial interference with schoolwork or discipline.”²⁶¹ Thus, the Court implied that if there *were* such evidence, the differential treatment would be constitutional. John Taylor has convincingly explained that *Tinker* is best understood as prohibiting a subset of viewpoint-based restrictions (i.e., those based solely on disagreement with the student speaker’s message), while allowing student speech restrictions that merely have viewpoint-discriminatory effects.²⁶²

To be sure, some scholars and courts have asserted that viewpoint-based restrictions on student speech are flatly impermissible under the Supreme Court’s student speech precedents.²⁶³ But that is at odds with the individual cases themselves, as well as the larger framework that they collectively create.

Indeed, there are two potentially competing principles running throughout the student speech framework. The first principle is that even though viewpoint-based restrictions are not off the table, students’ political speech should receive particular solicitude. That message certainly came through in *Tinker*, which heavily emphasized the political meaning of the black armbands.²⁶⁴ Likewise, in justifying its ruling for the school district, the *Fraser* Court began by emphasizing the student speech at issue was *not* political.²⁶⁵ The *Morse* majority similarly highlighted that “not even Frederick [the student plaintiff] argues that the banner conveys any sort of political or religious message.”²⁶⁶ Justice Alito’s concurrence in *Morse*—which provided the crucial fifth vote for the outcome—went even further, emphasizing that the outcome “provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on

261. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510–11 (1969) (emphasis added).

262. John E. Taylor, *Tinker and Viewpoint Discrimination*, 77 UMKC L. REV. 569, 569 (2009); see also Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 231 (2013) (“[T]he presumption against viewpoint discrimination has never been as strong inside the schoolhouse gates as it has been outside of them.”); Robert Post, *Theorizing Student Expression: A Constitutional Account of Student Speech Rights*, 76 STAN. L. REV. 1643, 1652 (2024) (“[T]he ordinary First Amendment standards to which courts and commentators appeal as a baseline do not apply to schools.”).

263. See, e.g., *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 632–33 (2d Cir. 2005) (assuming that *Hazelwood* did not allow viewpoint-based restrictions, on grounds that it had not explicitly said that it did); *Castorina v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 541–42 (6th Cir. 2001) (suggesting that under *Tinker*, a school district could not prohibit shirts featuring the Confederate Flag unless it also prohibited shirts depicting Malcolm X, but not fully reaching the question of how differential effects might influence that analysis); R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND. L. REV. 355, 408 (describing the Supreme Court’s student speech cases as all having been decided “consistent with standard free speech doctrine”).

264. *Tinker*, 393 U.S. at 510–11.

265. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 678–80 (1986).

266. *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

issues such as ‘the wisdom of the war on drugs.’²⁶⁷ Also notable is the *Mahanoy* Court’s observation that it was especially wary of school restrictions on off-campus speech because of the need to preserve space for a “student’s unpopular expression” and protect a free exchange of ideas.²⁶⁸

The second principle is that school districts should have some room to restrict student speech that may be harmful to other students. That protective theme comes through in all five cases. *Tinker*’s two prongs center around the need to protect students while they are at school. *Fraser* invoked the idea of protecting students from offensive or lewd speech that might be upsetting to them,²⁶⁹ and *Hazelwood* expressed similar concerns about shielding students from messages that they were not mature enough to hear.²⁷⁰ *Morse* likewise framed its rationale in terms of protecting students from encouragement to use drugs, with Justice Alito’s concurrence noting that “schools can be places of special danger” and that “[s]tudents may be compelled on a daily basis to spend time at close quarters with other students who may do them harm.”²⁷¹ Even *Mahanoy*, which largely conveyed a “hands-off” sentiment regarding students’ off-campus speech, stated such speech might call for regulation when it involves “serious or severe bullying or harassment targeting particular individuals.”²⁷²

These two principles—solicitude for students’ political expression and protection of other students from harm—do not always come into tension. Indeed, in the Supreme Court’s student speech cases so far, they have not. *Tinker* involved speech that was political and not potentially harmful to other students.²⁷³ *Morse* involved the reverse: the banner did not convey any political message, and had the potential to harm students (at least in the majority’s mind) by encouraging them to try drugs.²⁷⁴ None of the five Supreme Court cases has addressed the situation where the two principles collide most acutely: a student’s expression of a political/social view that may be deeply hurtful to at least some other students but is not likely to cause widespread disruption (such as a riot in the school). That, of course, is the precise student speech issue teed up by *Olentangy* and *L.M.*, and the other similar cases that are likely to come.

B. Lower Courts’ Attempts To Resolve the Tension

Olentangy and *L.M.* are not the first cases to present the situation where a student’s political expression may be deeply hurtful to other students. It has

267. *Id.* at 422 (Alito, J., concurring).

268. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).

269. *Fraser*, 478 U.S. at 683–84.

270. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

271. *Morse*, 551 U.S. at 424–25 (Alito, J., concurring).

272. *Mahanoy*, 114 S. Ct. at 2045.

273. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

274. *Morse*, 551 U.S. at 397, 402–03.

been coming up intermittently in the lower courts for the past few decades. The closest early antecedent to *Olentangy* and *L.M.* is the 2006 case of *Harper v. Poway*, discussed in Section I.B, in which Chase Harper wore his “BE ASHAMED” t-shirt to school after the school’s Day of Silence.²⁷⁵ There, the Ninth Circuit majority adopted a broad interpretation of *Tinker*’s invasion-of-rights prong that no other circuit has signed on to: that it protects public school students “who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation,” but only when those remarks are directed at students’ “minority status.”²⁷⁶ This approach prompted the dissent to ask:

In defining what is a minority—and hence protected—do we look to the national community, the state, the locality or the school? In a school that has 60 percent black students and 40 percent white students, will the school be able to ban T-shirts with anti-black racist messages but not those with anti-white racist messages, or vice versa?²⁷⁷

Indeed, the *Harper* majority was arguably interpreting *Tinker*’s invasion-of-rights prong to authorize multiple layers of viewpoint discrimination.

Other courts have steered clear of *Tinker*’s invasion-of-rights prong entirely, instead letting the material-disruption prong do all of the work. In several cases involving student attire with the Confederate flag, for instance, circuit courts have relied on the material-disruption prong to uphold school restrictions. And, in *Nuxoll ex rel. Nuxoll v. Indian Prairie School District # 204*,²⁷⁸ the Seventh Circuit was faced with facts closer to those in *Harper* (and ultimately *L.M.*). In response to his school’s Day of Silence, a student wore a shirt stating “Be Happy, Not Gay.”²⁷⁹ The Seventh Circuit held that *Tinker*’s invasion-of-rights prong did not justify restricting the shirt, because people have no legal right to “prevent criticism of their beliefs or for that matter their way of life.”²⁸⁰ The court further held that the material-disruption prong was not satisfied, because the shirt was “only tepidly negative.”²⁸¹ The Seventh Circuit did suggest, however, that the material-disruption prong would allow public schools to restrict student speech that was demeaning enough to lead to “a decline in [other] students’ test scores, an upsurge in truancy, or other symptoms of a sick school.”²⁸²

275. See *supra* notes 115–27 and accompanying text.

276. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1177–78, 1183 (9th Cir. 2006).

277. *Id.* at 1201 (Kozinski, J., dissenting).

278. 523 F.3d 668 (7th Cir. 2008).

279. *Id.* at 670.

280. *Id.* at 672.

281. *Id.* at 676.

282. *Id.* at 674.

In *Olentangy* and *L.M.*, the Sixth and First Circuits similarly relied on the material-disruption prong rather than the invasion-of-rights prong.²⁸³ Moreover, both courts reasoned that some personally demeaning speech can be so hurtful that it is likely to disrupt the educational experience, even without an immediate widespread disruption like a riot.²⁸⁴ The Sixth Circuit en banc opinion agreed, for instance, that “schools may bar abusive ‘invective’ that targets ‘specific’ students—whether transgender students, religious students, female students, Hispanic students, or any others.”²⁸⁵ However, the courts diverged as to whether the particular speech in question—respectively, the “There Are Only Two Genders” shirt in *L.M.* and the unwelcome pronouns in *Olentangy*—crossed the threshold of being personally hurtful enough to be materially disruptive. The First Circuit thought that *L.M.*’s shirt was more than “tepidly negative,” because, although it was not targeting a specific student, it was denying the self-conceptions of certain middle-school students, thus potentially poisoning the school atmosphere.²⁸⁶ By contrast, the en banc Sixth Circuit asserted that the “use of biological pronouns alone” was not “analogous to . . . abusive invective,” largely because of the student speakers’ intent.²⁸⁷ The majority emphasized that these students “want to use biological pronouns not because they seek to ridicule others but because they want to speak what they view as the truth (and cannot ‘affirm’ a view with which they disagree on a pressing matter of public concern).”²⁸⁸ It acknowledged (as had some of Defending Education’s members) that transgender or nonbinary students “might view the use of biological pronouns as ‘insulting,’ ‘humiliating,’ ‘dehumanizing,’ ‘derogatory,’ and ‘unwanted,’” but stated that this did not satisfy the material disruption standard for prohibiting speech on this “important matter of public policy.”²⁸⁹

Questions about viewpoint discrimination were central to the *Olentangy* and *L.M.* decisions, as well as critiques of them. Indeed, the core debate between the *Olentangy* en banc majority and dissent was over whether the pronoun policy amounted to viewpoint discrimination. The *Olentangy* en banc majority began by framing the case in those terms, stating that the school district was prohibiting “speech (biological pronouns) that expresses a message on a matter of pressing public concern” while requiring “other speech (preferred pronouns) that expresses a competing view.”²⁹⁰ The *Olentangy* dissent, however,

283. *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, No. 23-3630, slip op. at 17–20 (6th Cir. Nov. 6, 2025) (en banc); *L.M. v. Town of Middleborough*, 103 F.4th 854, 873 (1st Cir. 2024).

284. See *Defending Educ. v. Olentangy*, slip op. at 29; *L.M.*, 103 F.4th at 873–74.

285. *Defending Educ. v. Olentangy*, slip op. at 29.

286. *L.M.*, 103 F.4th at 881–82.

287. *Defending Educ. v. Olentangy*, slip op. at 29.

288. *Id.* at 29–30.

289. *Id.* at 31.

290. *Id.* at 3.

disagreed that viewpoint discrimination was afoot.²⁹¹ It pointed out that the school district never adopted “a position on whether gender-based or sex-based pronouns are accurate,” but simply required all students to use their classmates’ preferred pronouns, regardless of why their classmates had chosen those pronouns.²⁹² Viewpoint discrimination was also the frame for Defending Education’s *L.M.* Supreme Court amicus brief, which asserted that in prohibiting the “There Are Only Two Genders” t-shirt, the First Circuit had wrongly allowed viewpoint-based restrictions and watered down *Tinker*.²⁹³ And, in his dissent from the *L.M.* cert denial, Justice Alito fully embraced that position, arguing that the Court should have taken the case to “reaffirm the bedrock principle that a school may not engage in viewpoint discrimination when it regulates student speech.”²⁹⁴

As discussed above, though, that is an overly simplistic account of the Supreme Court’s precedents in this area. As the next section explains, the only way to think through these conflicts is to do a fact-specific balancing of *both* of the core principles at the heart of the student speech framework: protecting student expression (especially when it has a political component) and protecting other students from harm.

C. *A Path Toward Resolution?*

In the past, cases like those discussed above were relatively few and far between. But the intertwining of the student speech and parental rights arguments, combined with the current political climate, portend a significant growth in volume. This will likely force a broader judicial reckoning of how public schools should navigate the tension between protecting student expression and protecting other students from harm. Right now, gender identity is at the fulcrum of that tension, but other issues will undoubtedly emerge in the future.

There are no perfect answers here, only various trade-offs. But the overall student speech framework does provide useful guidance. First, courts should recognize that debating whether policies and restrictions like the ones in *L.M.* and *Olentangy* amount to viewpoint discrimination is somewhat beside the point. The *Olentangy* majority is arguably correct that the school district’s policy is conveying the message “that individuals can have genders that differ from their sex or at least that our society should refer to individuals using preferred pronouns to be courteous.”²⁹⁵ Likewise, it is fair to say that the district is

291. *Id.* at 101–04 (Stranch, J., dissenting).

292. *See id.* at 103.

293. Brief for Parents Defending Education as Amicus Curiae in Support of Petitioner at 3–4, *L.M. v. Town of Middleborough*, 145 S. Ct. 1489 (2025).

294. *L.M.*, 145 S. Ct. at 1492 (Alito, J., dissenting from denial of cert.).

295. *Defending Educ. v. Olentangy*, No. 23-3630, slip op. at 26.

disfavoring the contrary message that “it is perfectly appropriate to refer to others using biological pronouns,” even when those people have specified other pronouns for themselves.²⁹⁶ In that technical sense, the policy does reflect a form of viewpoint discrimination. But that alone is not the dispositive inquiry. If it were, then cases like *Hazelwood* and *Morse* would have come out the other way.

Indeed, the *Olentangy* en banc majority barely considered the other key principle: protecting other students from harm. In particular, it did not sufficiently grapple with the fact that the pronoun policy did not restrict the expression of generalized political views, but rather the way individual students were referred to and addressed.²⁹⁷ And, although two of the concurrences suggested that the case was mainly about pronouns²⁹⁸ and grammar,²⁹⁹ it obviously went beyond that. What if, for instance, a student not only wanted to be referred to by a different pronoun, but also by a different name? Could the children of Parents A-D refuse to use that name and keep referring to the student by the former name, in order to express their viewpoint that it was not possible to change genders? The majority did not delve into these specifics, but schools within the Sixth Circuit will now have to wrestle with them.

Even more troublingly, the majority did not engage with the likely emotional fall-out of its decision on the students it would affect. It acknowledged that even some of Defending Education’s own members admitted that the use of unwelcome pronouns might be humiliating and dehumanizing for the students in question, but then fell back on the generality that schools cannot prohibit speech based only on “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”³⁰⁰ The minimization—within the very same paragraph—from “dehumanizing” to “unpleasant” was striking. A separate concurrence, by Judge Kethledge, agreed with the majority but closed with a “hortatory” final point in which he implored the now-victorious students to “forbear from making an example of the eighth grader sitting next to them—if not as a matter of law,

296. *Id.*

297. As Caroline Mala Corbin has argued in the related context of how *teachers* address students, “school rules on pronoun use do not regulate classroom discussions on the topic of gender identity, transgender rights, or related social and political issues. They regulate how teachers call on students” Caroline Mala Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, 1 J. FREE SPEECH L. 615, 666 (2022).

298. *See Defending Educ. v. Olentangy*, No. 23-3630, slip op. at 46 (Thapar & Nalbandian, JJ., concurring) (stating that “pronouns matter” and that “[t]he battle of the pronouns is a matter of serious political and social concern”).

299. *See id.* at 58 (Bush, J., concurring) (stating “this case is about a government attempt to alter traditional grammar”).

300. *See id.* at 31 (majority opinion) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

then of grace.”³⁰¹ But this plea failed to recognize that *Tinker*, in creating a customized speech standard for schools, built in some flexibility for school districts to *require* that grace of eighth graders.

Similarly, the *Olentangy* majority failed to think through the broader mayhem that its decision may unleash. Under its reasoning, can other students now start referring to their peers (including the children of Parents A-D) with they/them pronouns, in order to express their own rejection of the gender binary? If, to use the majority’s language, they are doing so without “‘ill will’ toward anyone,”³⁰² it would seem that they can. The dissent offered a related hypothetical about a student who incorrectly believes that another student is transgender and thus starts using a different pronoun for that student.³⁰³ After labeling that hypothetical as “creative” and “somewhat fanciful,” the majority suggested that prohibiting that pronoun, too, would amount to impermissible viewpoint discrimination.³⁰⁴ This sort of free-for-all, in which students each get to decide how they want to address their fellow students while they are all on campus together, very clearly has the potential to disrupt the educational environment. If schools want to adopt policies to prevent that, they should be able to do so.

Any argument that schools’ pronoun policies amount to unconstitutional “compelled speech” is similarly beside the point. Judge Batchelder, who dissented from the original *Olentangy* decision and wrote a separate concurrence in the en banc rehearing, cited the seminal case of *West Virginia State Board of Education v. Barnette*³⁰⁵ for the principle that schools cannot compel speech.³⁰⁶ But *Barnette* involved compelling students to express a generalized political sentiment (the Pledge of Allegiance), when those students wanted to remain silent. It had nothing to do with how students affirmatively addressed or referred to each other when they voluntarily chose to speak. The more recent compelled speech cases of *303 Creative*³⁰⁷ and *Hurley*³⁰⁸ are also inapposite. They did not arise in schools, where the speaker and the recipient of the speech may well come into contact every single day. Indeed, recall Justice Alito’s observation in his *Morse* concurrence that at schools, students are “compelled on a daily basis to spend time at close quarters with other students.”³⁰⁹ In *303 Creative*, once the website designer said that she was not willing to make

301. *Id.* at 44–45 (Kethledge, J., concurring).

302. *See id.* at 31 (majority opinion).

303. *See id.* at 102 (Stranch, J., dissenting).

304. *See id.* at 27–28 (majority opinion).

305. 319 U.S. 624 (1943).

306. *Olentangy*, 109 F.4th at 482 (citing *Barnette*, 319 U.S. at 642); *see also Defending Educ. v. Olentangy*, slip op. at 36 (Batchelder, J., concurring).

307. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023).

308. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995).

309. *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring).

wedding websites for same-sex couples, same-sex couples could steer clear of engaging her services. But students do not have the option to stay away from the other students in their classes. Nor can they plug their ears every time those students refer to them during classroom discussions. That regular, unavoidable contact between students at school is a big reason why the schools need their own student speech framework and why protection of other students is built into it.

That said, the other key principle—protection of political expression—also needs attention. Here, the *L.M.* decision fell somewhat short. The First Circuit repeatedly emphasized that it was deferring to school authorities’ determinations about what would be substantially disruptive. It concluded the opinion by saying that the question was not whether “There Are Only Two Genders” t-shirts should have been banned, but “who should decide whether to bar them—educators or federal judges.”³¹⁰ This echoed the court’s earlier observation that it was going to defer to school administrators about whether the t-shirt conveyed a demeaning message.³¹¹ In making this observation, the court analogized to the *Morse* Court’s deference to the principal’s conclusion that the “Bong Hits 4 Jesus” phrase promoted drug use.³¹² But there was an important difference between *L.M.*’s t-shirt and the “Bong Hits” banner. In *Morse*, the student had expressly stated that he was *not* trying to convey a political message.³¹³ Thus, the principle of protecting political expression was not a significant factor in the case. By contrast, *L.M.* specifically wore his shirt to convey a political message that countered the message being expressed by the school.³¹⁴ It is ironic that the First Circuit cited *Morse* for support, even though *Morse*’s concurrence (which provided the deciding votes) specifically stated that the opinion should not be seen as supporting restrictions on speech that commented on any political or social issue.³¹⁵

Taken together, *Olentangy* and *L.M.* send a deeply conflicting—and illogical—message. The notion that a student cannot wear a shirt stating “There Are Only Two Genders,” but *can* address individual classmates with unwelcome pronouns and names, gets it entirely backwards. Although the cases do not involve identical facts, it is fair to say that the divergent outcomes reflect the beginning of a circuit split. It is true that, as the *Olentangy* majority noted, a student is free not to wear a shirt with any message at all, while students cannot

310. *L.M. v. Town of Middleborough*, 103 F.4th 854, 886 (1st Cir. 2024), *cert. denied*, 145 S. Ct. 1489 (2025).

311. *Id.* at 880.

312. *Id.* at 879 (citing *Morse*, 551 U.S. at 401).

313. *Morse*, 551 U.S. at 403.

314. *L.M.*, 103 F.4th at 861 (“*L.M.* wore the shirt both to express his own views, *which he understood to be contrary to those NMS espouses on the subject*, and to convey his belief that his views are not ‘inherently hateful.’” (emphasis added)).

315. *Morse*, 551 U.S. at 422 (Alito, J., concurring).

completely avoid any use of names or pronouns.³¹⁶ That said, intentionally addressing a fellow classmate with an unwelcome pronoun is a much more aggressive move than expressing a general opinion about gender. If schools cannot even regulate the former message, it is hard to see how they can regulate the latter one.

Reversing the outcomes of the two cases, however, would be internally consistent. Moreover, it would align with the Supreme Court's overall student speech framework. It makes sense to give school districts more room to restrict student speech that is directed toward, or targeted at, other specific and identifiable students.³¹⁷ That includes how students address each other, even though pronoun and name choices may implicate political viewpoints. It is hard to imagine a functional educational environment in which every student gets to decide what to call every other student while at school. And it also makes sense to say that when a student's political speech is *not* directed to a particular student, the bar for restricting it is much higher. Indeed, the *L.M.* court's framing—that the question is whether the expression is so demeaning about an identity characteristic that it will poison the educational atmosphere³¹⁸ and have a “serious negative impact”³¹⁹ on other students—was right on point. But “poison” is, appropriately, a high standard. Without much more specific evidence of how an individual student's statement that “there are only two genders” is poisoning the educational environment for other students (to the point where they cannot attend school or take tests), a school should not be able to restrict it, even if the speech is upsetting to certain other students. Especially when schools are discussing gender identity, schools need to tolerate some degree of debate about these issues, which are indisputably topics of major political debate right now.³²⁰ As Erika Wilson has observed, one key role of public schools is to serve “as a citizen training ground, educating citizens so that they can actively participate in the American democracy.”³²¹ That education

316. *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, No. 23-3630, slip op. at 30 (6th Cir. Nov. 6, 2025) (en banc).

317. I have emphasized the importance of this distinction in my previous work on student speech. See, e.g., Emily Gold Waldman, *A Post-Morse Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 469 (2008). Eugene Volokh has also focused on this distinction in the context of workplace harassment. See, e.g., Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1868 (1992).

318. *L.M.*, 103 F.4th at 873–74 (citing *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 674, 676 (7th Cir. 2008)).

319. *Id.* at 882.

320. It is beyond the scope of this Article to opine on the legality and enforceability of the various aspects of the Executive Order entitled “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government,” issued by President Trump on January 20, 2025. Proclamation No. 14168, 90 Fed. Reg. 19 (Jan. 30, 2025). But it does underscore the current level of political debate surrounding the “there are only two genders” statement.

321. Erika K. Wilson, *The New White Flight*, 14 DUKE J. CONST. L. & PUB. POL'Y 233, 282 (2019).

includes engaging with one another about—or at least being exposed to their takes on—the controversial issues of the day.

IV. THE EVER-EVOLVING BALANCE OF POWER IN SCHOOLS

The opt-out cases like *Mahmoud* and the free speech cases like *Olentangy* each raise their own doctrinal questions and implicate different strands of law. But they are united by a shared concern: the idea that the public schools are overstepping their bounds and intruding into areas that should be left for the home. The concern applies to both which topics schools discuss and how those discussions are managed. And that is a genuinely complex issue. The topics of school instruction and discussion often implicate contested political, social, and cultural issues on which individual school board members, school administrators, teachers, parents, and students may hold deeply conflicting views. Education about sex-related issues is a part of this, but it also goes to questions as basic as how American History is taught—and, of course, how students refer to one another. Recognizing a sphere of parental opt-out rights, while helpful in some bounded situations, will not dispose of these issues. They are inescapable in K-12 public education.

A. *Easier and Harder Questions*

Some of the rhetoric in support of the “parents’ rights” cases is inconsistent, even arguably hypocritical. This is particularly true in the context of the free speech arguments. Defending Education, the plaintiff in *Olentangy*, says on its website that it wants to restore a “non-political education for our kids” while simultaneously promoting certain political views that it implies the schools should convey. For example, it suggests that parents should ask their schools: “Do you teach students that biological sex is binary?”³²² The implication is that if schools respond with an unqualified “yes,” they are non-political, but if they say anything else, they have become political. Another example can be found in the list on Defending Education’s website of potential American History curricula for parents to suggest. It criticizes the 1619 Project and proposes other curricula, such as the one from Hillsdale College, whose philosophy is to offer “an American Classical Education.”³²³ Again, Defending Education would likely argue that the curricula that it opposes are political,

322. *Questions To Ask Your School About Gender Ideology and Gender Policy*, DEFENDING EDUC.: RES., <https://defendinged.org/resources/questions-to-ask-your-school-about-gender-ideology-and-gender-policy/> [https://perma.cc/LV3K-EHCX].

323. *Curriculum Alternatives*, DEFENDING EDUC.: RES., <https://defendinged.org/resources/curriculum-choices/> [https://perma.cc/T9KV-TNST].

while the ones that it recommends are not.³²⁴ But that, itself, is a political view. There is nothing wrong with that; a debate about how to teach American History is healthy. But framing one side of the debate as the non-political default is overly simplistic.

A similar dissonance comes through in the *Olentangy* complaint's description of Parents A–D and their children. This is true not only in the disjunct between the simultaneous assertions that (1) any discussion of gender should be removed from schools³²⁵ and (2) the students want to “repeatedly” share, at school, their own views about gender being immutable.³²⁶ It is also true in terms of the requests that the students are making. According to the complaint, “Parent A’s child [wants] to use the pronouns that are consistent with Parent A’s child’s classmates’ biological sex repeatedly and at all times.”³²⁷ It adds:

Parent A’s child “understands that their speech will be considered ‘insulting,’ ‘humiliating,’ ‘dehumanizing,’ ‘derogatory,’ and ‘unwanted’ to those who want to go by different pronouns. But Parent A’s child has no ill will against these students. Parent A’s child just wants to express their deeply held views.”³²⁸

The complaint then states that the fear of discipline is forcing the child to self-censor and expresses concern that such discipline will “harm Parent A’s child’s college admission chances and Parent A’s child’s extracurricular opportunities” as well as subject the child “to reputational harm and personal attacks from other students and members of the *Olentangy* community.”³²⁹

This phrasing fails to recognize that, even if the official disciplinary sanctions are removed such that the children of Parents A–D (and others) become free to use the pronouns that they want to use for their peers throughout the school day, they *still* may experience reputational consequences. If a student repeatedly expresses speech that other students consider humiliating and dehumanizing, there are likely to be social consequences, even without a formal punishment. The complaint’s focus on the freedom of Parent A–D’s children to express their own views loses sight of the fact that other students will be equally

324. *Id.* (“Below are some options that you might consider presenting to your school as alternative curriculum or programming—widely considered to be more comprehensive and less divisive than what many schools have adopted.”).

325. Verified Complaint, *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, *supra* note 163, ¶ 71 (“Parent A believes that issues of gender are sensitive issues that should be left to families to discuss and resolve, not to schools.”).

326. *Id.* ¶ 75 (“When issues involving gender identity arise in class or in school-sponsored activities, Parent A’s child wants to speak about these topics and wants to repeatedly state their belief that biological sex is immutable.”).

327. *Id.* ¶ 76.

328. *Id.*

329. *Id.* ¶¶ 84, 86.

entitled to freely express their views in response. Similarly, if a student is repeatedly uttering speech that is taken by others as dehumanizing, that may get mentioned by the school personnel who write the student's college recommendation letters. Those personnel are going to form their own opinions, too. If the complaining families solely seek the removal of formal discipline, that is understandable. But the complaint apparently assumes that if the disciplinary consequences are removed, it will become socially uncontroversial for students A–D to repeatedly declare that “biological sex is immutable” and use unwelcome pronouns for some of their peers. That seems unrealistic.

Moreover, like questions about how to teach American History, the pronoun issue cannot be solved by simply making schools “non-political” or letting students “opt out.” Schools must teach American History in some form. And students must be able to refer to each other over the course of the school day. These issues cannot be resolved in a way that everyone agrees is non-political.

Indeed, the larger “parents’ rights” rhetoric in today’s culture often seems to assume that parents generally share the same views. But parents come from all political backgrounds and have very different stances on which topics schools should teach and how they should do so. For example, one survey by UCLA’s Williams Institute about Florida’s 2022 Parental Rights in Education Law, which prohibits any instruction about sexual orientation or gender identity before fourth grade, found that in a group of 106 Florida parents, 48% agreed or strongly agreed with it, 37% disagreed or strongly disagreed with it, and 14% were neutral.³³⁰ This lack of unanimity is consistent with Amy Gutmann’s observation nearly forty years ago, in her landmark work *Democratic Education*, that:

Sex is difficult to discuss under the best of circumstances, but we do not even agree what the best circumstances are. Conservatives typically claim that only parents should teach (only their own) children about sex, while liberals argue that schools have as much authority to teach students sexual responsibility as they do civic responsibility.³³¹

Interestingly, when the same parents were asked whether they agreed with the 2023 expansion of the law—which not only extended the prohibition on instruction to older grades, but also prohibited school employees from using students’ specified pronouns if those pronouns did not match the sex on their

330. ABBIE E. GOLDBERG, WILLIAMS INST., UCLA SCH. OF L., PERSPECTIVES OF FLORIDA PARENTS ON HB 1157, THE PARENTAL RIGHTS IN EDUCATION ACT 1, 9 fig. 1 (2023), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Dont-Say-Gay-Perspectives-Aug-2023.pdf> [<https://perma.cc/3NAR-HW2J>]. To be sure, 106 parents is a small sample size, so it is unclear how generalizable these results are.

331. AMY GUTTMANN, *DEMOCRATIC EDUCATION* 107 (1987).

birth certificates—those numbers shifted.³³² Only 42% agreed or strongly agreed with the expansion, 46% disagreed or strongly disagreed with it, and 11% were neutral.³³³

Even though the “parents’ rights” framing suggests more unanimity than exists, concerns about school overreach deserve real attention. That unease is the through-line from the opt-out cases to the repackaged free speech cases, and it is not just a fringe issue. The results of the Williams Institute study showed division about Florida’s Parental Rights in Education Act—but it did show that 48% of the surveyed parents supported the original 2022 version of it.³³⁴ What is particularly interesting is the line-drawing that parents did between the 2022 Act and the 2023 expansion, with numerous parents flipping between support for the first and opposition for the second.³³⁵ Many parents have nuanced opinions about these questions, depending on the details of exactly what is being taught and communicated by the schools, how that is being done, and the ages of the students in question. Those views should be taken into account, and some degree of accommodation for them—when possible—is warranted.

Indeed, the notion that the parental decision-making right stopped at the schoolhouse door was always too simplistic. The opinion that expressed that view most starkly—the Ninth Circuit case of *Fields v. Palmdale School District*³³⁶—was particularly disturbing in light of its facts. That case did not even involve a curricular policy choice, but a one-off situation that clearly went awry. An elementary school sent a letter seeking parental consent for the administration of a survey to first, third, and fifth graders to “establish a community baseline measure of children’s exposure to early trauma (for example, violence).”³³⁷ The letter never told parents that the survey would be asking these young children sexual questions, including how frequently they experienced things like “thinking about touching other people’s private parts” and “not trusting people because they might want sex.”³³⁸ When the children came home and told their parents about the survey’s questions, the parents filed suit, alleging that they never would have consented had they known about the survey’s actual contents, and that their due process rights to direct their children’s upbringing had been “robbed.”³³⁹ Even so, the Ninth Circuit was unsympathetic, stating that “it was only because the parents had selected the school they did that their children were asked the questions to which the parents

332. GOLDBERG, *supra* note 330, at 4, 9 fig. 1.

333. *Id.* at 9 fig. 1.

334. *See supra* note 330 and accompanying text.

335. *See supra* note 330 and accompanying text.

336. 427 F.3d 1197 (9th Cir. 2005).

337. *Id.* at 1200 & n.1.

338. *See id.* at 1200 n.1, 1201 & n.3.

339. *Id.* at 1202.

objected.³⁴⁰ The lack of awareness that not all parents are equally able to choose something other than the local public school is striking.

That particular fact pattern was extreme. But the general notion that parents' decision-making rights are sufficiently protected by the fact that they are not required to send their children to public school at all was a problematic theme running throughout the opt-out decisions. First, it was unrealistic: as the Supreme Court noted in *Mahmoud*, "[t]he provision of education is an expensive endeavor," and many parents cannot afford to pay private school tuition or leave their jobs to home-school their children.³⁴¹ Moreover, it expressed a troublingly sanguine attitude about families whose discomfort pushed them out of the public schools, which, as Justice Breyer put it in *Mahanoy*, are supposed to be "nurseries of democracy."³⁴² In that sense, the reckoning that is coming from the Supreme Court's *Mahmoud* decision is overdue. Indeed, the dismissive attitude toward the opt-out cases may have helped fuel the shift to more aggressive approaches, such as the free speech litigation strategy.

B. *Moving Toward Partnership*

Once these sorts of school policy disputes—whether framed as parental opt-out claims sounding in due process or free exercise rights, as student free speech claims, or some combination thereof—reach the courthouse, there is little opportunity for compromise. One party is going to win, and one party is going to lose. Moreover, when a student wins a free speech claim, the stakes are particularly high. That victory does not mean the student will be opting *out*; it means that the student's message will be coming *in*. The more that school districts and families can work things out in a collaborative matter, the better.

Often, the time to do that is in the initial policymaking stages. This Article has already discussed the best approach for free speech cases like *Olentangy* and *L.M.*, in terms of giving schools significant room to regulate how students address each other while on campus, but much narrower room to regulate students' expression of political views that are not targeted at specific other students. Indeed, allowing students to convey messages like the one on L.M.'s t-shirt while simultaneously prohibiting them from using unwelcome pronouns for each other may help lower the pressure somewhat, and it furthers both of the principles underlying the Supreme Court's student speech framework. Policies that prohibit speech that has "the effect of substantially interfering with another student's education[]," or speech that is so "severe, persistent, or

340. *Id.* at 1207.

341. *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2359–60 (2025).

342. Amy Gutmann's theory of the role of public education in a democracy similarly led her to conclude, back in 1987, that "mandating sex education would be unwise were it to lead conservative parents to flee the public schools." GUTMANN, *supra* note 331, at 110.

pervasive that it creates an intimidating, threatening or abusive educational environment” meet that standard.³⁴³ Indeed, such policies accord with public schools’ obligations, under Title VI³⁴⁴ and IX,³⁴⁵ to protect students from such speech, at least when it relates to a protected characteristic under those statutes. But they need to be interpreted and applied in ways that are consistent with the high threshold they set.

The opt-out cases also sometimes provide opportunities for compromise and accommodation of different student (and family) views. It is notable that in *Mahmoud*, the Montgomery County School District first created a parental notice and opt-out policy in connection with the Storybooks at issue—only to reverse itself without even providing an explanation to the parents.³⁴⁶ That was at odds with Montgomery County’s own 2022–2023 Guidelines for Respecting Religious Diversity, which encouraged schools to try to accommodate parental concerns.³⁴⁷ The school district had already figured out a way to accommodate opt-out requests for the numerous religious (and secular) requests by parents to opt their children out.³⁴⁸ In abandoning its own approach, and not even providing parents with an explanation of why, the school district evinced a troubling disregard for parental concerns. Not all opt-out requests are going to be feasible. But *Mahmoud* may usefully spur school-parent discussions of how best to effectuate them.

Beyond sex- and gender-related topics, one potentially broader issue on the “parents’ rights” horizon is the growing debate about Social-Emotional Learning (“SEL”) in schools. The Collaborative for Academic, Social, and Emotional Learning (“CASEL”), a founder and leader of the SEL movement, defines it as follows:

SEL is the process through which all young people and adults acquire and apply the knowledge, skills, and attitudes to develop healthy identities, manage emotions and achieve personal and collective goals, feel and show empathy for others, establish and maintain supportive relationships, and make responsible and caring decisions.³⁴⁹

343. This language is drawn from the Anti-Harassment Policy and the Code of Conduct in *Olentangy*. See *Parents Defending Educ. v. Olentangy Lo. Sch. Dist.*, 109 F.4th 453, 459–60 (6th Cir. 2024), *reh’g en banc granted, vacated*, 120 F.4th 536 (6th Cir. 2024) (mem.).

344. 42 U.S.C. §§ 2000d–2000d-7.

345. 20 U.S.C. § 1681(a).

346. *Mahmoud v. McKnight*, 102 F.4th 191, 199–200 (4th Cir. 2024).

347. *Id.*

348. See *id.* at 200.

349. *Fundamentals of SEL*, CASEL, <https://casel.org/fundamentals-of-sel/> [<https://perma.cc/SCA3-33GG>].

CASEL and the term “social and emotional learning” were “born” in 1994, according to CASEL’s website.³⁵⁰ Since then, SEL has become extremely influential in public school education. According to CASEL, 27 states have now adopted “K-12 SEL competencies” for their public schools.³⁵¹ The New York State Education Department, for instance, has provided SEL benchmarks for New York State public schools since 2018.³⁵² The Department’s “at a glance” two-page document, entitled “Social Emotional Learning: Essential for New York,” highlights the idea of linking SEL to “Academic Instruction” through both “[f]ree-standing lessons that teach SEL competencies” and “[e]mbedding SEL in academics across subject areas.”³⁵³

But SEL is becoming increasingly contested. In 2022, NPR described SEL as the “latest lightning rod in the battles over what gets taught in schools nationwide,”³⁵⁴ and that is even truer today. In part, this stems from CASEL’s 2020 update of its framework to incorporate a focus on equity,³⁵⁵ prompting some in the “parents’ rights” movement to criticize SEL as political. Defending Education, for instance, writes that SEL “has changed over time. Originally, the goal of SEL was to promote morally neutral soft skills such as self-awareness, self-management, empathy, and goal setting. In 2020, everything changed with the shift to ‘Transformative SEL.’”³⁵⁶ Moms For Liberty’s booklet about SEL is titled “Don’t Be Fooled by the Title,” and warns parents that the SEL skills are being delivered “through an ‘equity lens’ aka the viewpoint of someone who believes America is systematically racist & oppressive.”³⁵⁷ Apart from politics, though, other questions about SEL are now being raised. A May 6, 2024, article from the *New York Times*, entitled “Are We Talking Too Much

350. *Our History*, CASEL: ABOUT CASEL, <https://casel.org/about-us/our-history/> [<https://perma.cc/DFC6-DNBN>].

351. *SEL Policy at the State Level*, CASEL: SYSTEMATIC IMPLEMENTATION, <https://casel.org/systemic-implementation/sel-policy-at-the-state-level/> [<https://perma.cc/AFK4-KDFQ>].

352. *NY Social Emotional Learning Benchmarks—Equity Revisions*, N.Y. STATE EDUC. DEP’T (Nov. 2022), <https://www.nysed.gov/sites/default/files/programs/student-support-services/sel-benchmarks.pdf> [<https://perma.cc/BF5L-JUNB>].

353. *Social Emotional Learning: Essential for New York*, N.Y. STATE EDUC. DEP’T, <https://www.nysed.gov/sites/default/files/sel-for-ny-at-a-glance.pdf> [<https://perma.cc/DX2X-NDE7>].

354. Meg Anderson, *How Social-Emotional Learning Became a Front Line in the Battle Against CRT*, NPR: EDUC. (Sep. 26, 2022, at 05:01 ET), <https://www.npr.org/2022/09/26/1124082878/how-social-emotional-learning-became-a-front-line-in-the-battle-against-crt> [<https://perma.cc/FUT2-8X8F>].

355. Karen Niemi, *Niemi: CASEL Is Updating the Most Widely Recognized Definition of Social-Emotional Learning. Here’s Why*, 74: OP. (Dec. 15, 2020), <https://www.the74million.org/article/niemi-casel-is-updating-the-most-widely-recognized-definition-of-social-emotional-learning-heres-why/> [<https://perma.cc/H9QB-TF4X>].

356. *Social Emotional Learning (SEL) 101*, DEFENDING EDUC.: RES, <https://defendinged.org/resources/sel101/> [<https://perma.cc/X7VK-8QCY>].

357. *Social Emotional Learning: Don’t Be Fooled by the Title*, MOMS DEFENDING LIBERTY, <https://momsforlibertywc.org/wp-content/uploads/2022/12/sel-packet-121622-0913-2.pdf> [<https://perma.cc/PY7S-XYNN>].

About Mental Health?” described recent research about school-based mental health programs in the United Kingdom and Australia.³⁵⁸ This research suggested that mental health awareness campaigns in schools can be a double-edged sword: while they “help some young people identify disorders that badly need treatment,” they can negatively affect others, by prompting them to “over-interpret their symptoms and see themselves as more troubled than they are.”³⁵⁹ The 2024 book *Bad Therapy: Why the Kids Aren’t Growing Up*, by Abigail Shrier, makes similar arguments.³⁶⁰ In a review of Shrier’s book, Michael Strambler—a Yale School of Medicine psychologist who co-authored a meta-analysis of school SEL programs—noted that his research found widely varying effects of school-based SEL programs, due to variations in the programs themselves.³⁶¹ He reflected that “[t]hrowing out the baby with the bathwater could worsen the problems” with youth mental health that Shrier “rightfully bemoans.”³⁶²

It is beyond this Article’s scope to determine the best approach to SEL in the schools. But the intersections between it and the parental rights issues explored by this Article seem clear. To the extent that more concerns arise about potentially negative mental health effects from some types of SEL, parents are likely to press demands for greater notice and opt-out rights in connection with SEL-related programming. That may point toward keeping SEL programming more bounded, rather than weaving it into all of the academic instruction at the school, so that there is more opportunity to work with parents on effectuating limited opt-outs. These parental concerns may also play out on the student speech front as well. Given the developments described in this Article, it is easy to see how such concerns might be framed as arguments about students’ rights to express divergent viewpoints about what is being taught as part of SEL, and/or about their rights not to be “compelled” into expressing certain types of SEL-related speech. Assuming that the speech in question does not directly target or single out other students, schools should make room for these sorts of views.

358. Ellen Barry, *Are We Talking Too Much About Mental Health?*, N.Y. TIMES: HEALTH (May 6, 2024), <https://www.nytimes.com/2024/05/06/health/mental-health-schools.html> [<https://perma.cc/3GPX-UBS3> (staff-uploaded, dark archive)].

359. *Id.*

360. See ABIGAIL SHRIER, *BAD THERAPY: WHY THE KIDS AREN’T GROWING UP* 43–56, 64–65 (2024).

361. Michael Strambler, *Is Social and Emotional Learning “Bad Therapy”?*, EDUC. NEXT: SOC. & EMOTIONAL LEARNING, <https://www.educationnext.org/is-social-and-emotional-learning-bad-therapy/> [<https://perma.cc/JN9L-A6V4>] (last updated Apr. 25, 2024).

362. *Id.*

CONCLUSION

“Parents’ rights” rhetoric is now proliferating on multiple fronts, from the founding of organizations like Parents Defending Education and Moms for Liberty to curriculum-related legislation like Florida’s Parental Rights in Education Law to the lawsuits analyzed in this Article. The “parents’ rights” phrasing has become somewhat of a political talking point these days. But it does reflect a basic truth: parents are understandably invested in the ideas to which their children are exposed at school, as well as the room that their children have to express views of their own. And that is true across the political spectrum. Indeed, although the “parents’ rights” label is currently associated with conservative political leanings, other parents with differing political views may also start (justifiably) trying to claim the “parents’ rights” mantle for themselves. We may even be faced with new controversies pitting parents’ purported rights against each other, with the competing interests sometimes being funneled through their children’s speech rights. Meanwhile, the analyses of both the opt-out and free-speech species of parental rights cases will continue to evolve. The principles laid out in this Article—namely, schools’ need to work in partnership with parents, and to strike a clear and transparent balance between protection of student expression and protection of other students from harm—can serve as useful guideposts for thinking through these challenges in the years to come.

