No. 23-10656-B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOMS FOR LIBERTY – BREVARD COUNTY, FL, et al.,
Plaintiffs-Appellants,

v.

BREVARD PUBLIC SCHOOLS, et al,
Defendants-Appellees.

Appeal from a judgment of the United States District Court for the Middle District of Florida, The Hon. Ray B. Dalton, Jr.
(Dist. Ct. No. 6:21-cv-01849-RBD-DAB)

BRIEF OF *AMICI CURIAE* STATES OF SOUTH CAROLINA, ALASKA, ARKANSAS, IDAHO, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, AND TEXAS SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL

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April 17, 2023

CERTIFICATE OF INTERESTED PERSONS

Amici States certify that the following is a complete list of interested persons, in addition to those already listed in the brief of the parties, as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1:

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To the best of their knowledge, Amici States certify that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

s/ Thomas T. Hydrick
Thomas T. Hydrick

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INTERESTS OF AMICI

Amici curiae are the States of South Carolina, Alaska, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, and Texas.

Many of the undersigned Amici States have local chapters of the Moms for Liberty organization or have similar parental rights advocacy groups. The Amici States are committed to ensuring that these groups are able to exercise their constitutional and statutory rights.

In the decision below, the district court granted summary judgment in favor of a Florida school district on constitutional claims brought by a parents' rights organization. In concluding that the school district did not violate the First Amendment rights of these parents, the court failed to acknowledge—or even mention—the vital roles parents and parental speech play in our national tradition and constitutional structure. Amici States file this amicus brief to ensure that the constitutional and statutory rights of parents are respected and vindicated.

SUMMARY OF ARGUMENT

Plaintiffs' claims in this case are representative of a long tradition of parental advocacy and involvement in local schools. From the colonial period to the present, parents have played the central role in shaping America's school systems.

In recent decades, courts have increasingly been asked to intervene in disputes between parents and local school officials. In resolving these disputes, courts have

considered and weighed a variety of constitutional and statutory considerations and factors. Often, parents assert First and Fourteenth Amendment claims, ranging from free exercise to petition to freedom of speech. Here, Plaintiffs asserted speech and petition claims against their local school board.

In considering these claims, courts should respect and acknowledge the unique role of parents in our constitutional system and society. Courts should do so for at least three reasons. First, parental rights are among the oldest and most sacrosanct rights in our political tradition. Second, parental educational rights are constitutionally protected. Third, parental advocacy has been a tool for social progress for generations.

Because the district court failed to acknowledge the unique role and contributions of parents in our constitutional and societal structure, this Court should reverse the district court's grant of summary judgment.[1]

ARGUMENT

I. Parental rights are deeply rooted in the history and tradition of the United States.

Parental rights are arguably pre-political and are "older than the Bill of Rights" itself. *See Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977); *see also* Lawson B. Hamilton, *Parent, Child, and State:*

[1] This brief addresses only the legal issues stated herein and does not address other issues that may be present in the case.

Regulation in A New Era of Homeschooling, 51 J.L. & EDUC. 45, 47 (2022). Some jurists have even characterized parental rights as "intrinsic human rights." *See* 431 U.S. at 845.

Whatever their origins, parental rights, particularly in the realm of education, are deeply rooted in the history and tradition of the United States. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Under English common law, parents had "both the responsibility and the authority to guide their children's development and make important decisions on their behalf." *See* Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting Mozert After 20 Years*, 38 J.L. & EDUC. 83, 108 (2009). In this tradition, the educational choices of parents were "sacred." *Id*. at 111.

During the colonial period in America, parental rights were considered "absolute." *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 823 (2011) (Thomas, J., dissenting). Perhaps the most important parental right recognized during this time was the right—and duty—to educate a child. *See id.* Indeed, throughout most of the colonial period, parents were primarily responsible for the education of their children. *See* Todd A. DeMitchell and Joseph J. Onosko, *A Parent's Child and the State's Future Citizen: Judicial and Legislative Responses to the Tension over the Right to Direct an Education*, 22 S. CAL. INTERDISC. L.J. 591, 597 (2013) (describing colonial education as "primarily a family responsibility"). These views are rooted in much older "Western civilization concepts of the family

as a unit with broad parental authority over minor children." *See Parham v. J.R.*, 442 U.S. 584, 602 (1979).

During the revolutionary period, parents "continued to have both the right and duty to ensure the proper development of their children." *See Brown*, 564 U.S. at 824. Parents exercised considerable control over the education of their children, including "control over the books that children read." *Id*. Parental control "extended into the schools" of the time, and members of the founding generation thought the "quality of teachers and schools" had to be carefully monitored by parents. *See id*. at 830.

In the 1800s, around the same time the Fourteenth Amendment was ratified, state courts continued to recognize significant parental authority over the education of children. For example, in *Morrow v. Wood*, 35 Wis. 59 (1874), the Wisconsin Supreme Court reversed a judgment in favor of a teacher who punished a child for following his father's instructions regarding his course of studies. In doing so, the Court observed, "we can see no reason whatever for denying to the father the right to direct what studies, included in the prescribed course, his child shall take." *Id*. at 64.

The Illinois Supreme Court recognized a similar principle in 1877 in *Trustees of Schools v. people ex rel. Van Allen*, 87 Ill. 303, 308 (1877). In that decision, the Court provided a general overview of parental rights with respect to education,

observing, "the policy of our law has ever been to recognize the right of the parent to determine to what extent his child shall be educated, during minority—presuming that his natural affections and superior opportunities of knowing the physical and mental capabilities and future prospects of his child, will insure the adoption of that course which will most effectually promote the child's welfare." 87 Ill. at 308.

In more recent decades, many States have continued this long tradition by adopting statutes that expressly protect parental rights and provide opportunities for parental advocacy in an educational setting. South Carolina, for example, has passed the Parental Involvement in Their Children's Education Act, which both affords certain rights to parents and sets expectations for those parents. *See* S.C. Code Ann. § 59-28-100, *et seq*. The purpose of the act is threefold: (1) to heighten the awareness of the importance of parents' involvement in the education of their children throughout their schooling; (2) to encourage the establishment and maintenance of parent-friendly school settings; and (3) to emphasize that when parents and schools work as partners, a child's academic success can best be assured. S.C. Code Ann. § 59-28-110.

Likewise, Texas has passed a comprehensive series of laws securing parental rights. *See* Tex. Educ. Code Ann. § 26.001. Among the rights secured by the Texas law is a parent's right to "complete access to any meeting of the board of trustees of the school district, other than a closed meeting . . . ." Tex. Educ. Code Ann. § 26.007.

Additionally, the Texas law ensures that parents have access to their children's school records. *See* Miles T. Bradshaw, *Parental Rights in Texas Public Schools Does in Loco Parentis Still Have Meaning?*, 83 TEX. B.J. 542, 543 (2020) ("An important theme of Chapter 26 of the Parent's Bill of Rights is 'access.' Parents are given access to all sorts of school records related to their child, including attendance records, test scores, grades, disciplinary records, health records, counseling records, student evaluations, and reports of behavioral patterns.").

And advocates continue to encourage States to adopt parental rights provisions. Just last year, Indiana amended its Open Door Law to allow public comment periods at school board meetings. *See* Ind. Code Ann. § 5-14-1.5-3.2. Other parental rights bills are pending in legislatures across the country.

These state statues continue the long tradition of respecting parental rights and recognize the unremarkable proposition that parents play the central role in their children's development and that our schools should actively encourage parental involvement. Consistent with this country's history and tradition, they acknowledge that parents are vital partners in the project of public education.

II. The Constitution protects parental educational rights.

Given the central role of parental rights in the country's history and tradition, it is perhaps unsurprising that the federal constitution protects parental rights, particularly in the educational arena.

A. Parental educational rights are a protected liberty interest.

Parental rights are "the oldest of the fundamental liberty interests" recognized by the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Chief among these rights is the right of parents to direct the education of their children. *See id*.[2] The Supreme Court first recognized this right nearly a century ago in *Meyer v. Nebraska*, 262 U.S. 390 (1923). In that decision, the Supreme Court concluded that a state law restricting the teaching of foreign languages to children of a certain age was unconstitutional, infringing in part upon the "right of parents" to engage a teacher "to instruct their children." 262 U.S. at 400.

Just two years later, the Court further clarified the scope of parental educational rights in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). In *Pierce*, the Supreme Court concluded that a state law mandating compulsory public education violated the federal constitution. *Id*. at 534. In reaching this conclusion, the Court famously observed that a "child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id*. at 535.

[2] While parental rights extend beyond the educational setting, those rights are obviously not absolute. Parents have no right to abuse or neglect their children, and some of their decisions may be "subject to a physician's independent examination and medical judgment." *Parham v. J.R.*, 442 U.S. 584, 604 (1979).

Picking up almost half a century later in *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), the Court made clear that parental educational rights are "an enduring American tradition." In describing the balance between parental rights and a State's interest in public education, the Court explained:

> There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in Pierce, made to yield to the right of parents to provide an equivalent education in a privately operated system. . . . As that case suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of Pierce, "prepare (them) for additional obligations."

406 U.S. at 213–14 (quoting *Pierce*, 268 U.S. at 535).

Significantly, the Court in *Yoder* deemed parental rights to be fundamental when paired with First Amendment free exercise concerns. 406 U.S at 207 ("[T]his case involves the fundamental interests of parents, as contrasted with that of the State, to guide the religious future and education of their children.").

In summarizing these and other cases in *Troxel*, 530 U.S. at 66 (2000), the Court observed, "[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right

of parents to make decisions concerning the care, custody, and control of their children." Although the Court declined to expressly adopt a standard of review for parental right claims in *Troxel*, Justice Thomas urged the Court to adopt a strict scrutiny standard. *Id*. at 80 (Thomas, J., concurring) ("I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. . . . The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights."). [3]

B. Parental educational rights are protected by the First Amendment.

Although courts have generally found the source of parental rights in the Constitution to be the Fourteenth Amendment's Due Process Clause, parental rights in an educational setting may also be afforded protection by the First Amendment. *See Troxel*, 530 U.S. at 95 (Kennedy, J., dissenting) ("*Pierce* and *Meyer*, had they

[3] There is some debate in the lower courts about the proper standard of review for a parental educational rights claim. Some courts have afforded these claims heightened scrutiny when paired with other constitutional claims. *See*, *e.g.*, *Hicks ex rel. Hicks v. Halifax Cnty. Bd. of Educ.*, 93 F. Supp. 2d 649, 662 (E.D.N.C. 1999) ("As in *Yoder*, the conjunction of these two constitutional interests, in and of itself, merits heightened scrutiny in this case."). However, Supreme Court precedent strongly suggests that strict scrutiny should apply because parental educational rights have been deemed to be fundamental. *See Glucksberg*, 521 U.S. at 721 (explaining that the government may not infringe a fundamental liberty interest unless the infringement is narrowly tailored to serve compelling state interest).

been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion."); *Com. v. Ashcraft*, 691 S.W.2d 229, 231 (Ky. Ct. App. 1985) ("There are numerous cases standing for the proposition that First Amendment rights are not magically given up when one steps through the schoolhouse door. We believe this applies to parents as well as to teachers and students."); *see also* Merry Jean Chan, *The Authorial Parent: An Intellectual Property Model of Parental Rights*, 78 N.Y.U. L. REV. 1186, 1197 (2003) ("As an alternative to substantive due process, the First Amendment seems a more promising basis for parental rights.").

First Amendment protections are particularly important in a setting like a school board meeting—one of the few forums in which parents can provide direct feedback to school administrators and officials. *See Ryan v. Grapevine-Colleyville Indep. Sch. Dist.*, No. 4:21-CV-1075-P, 2023 WL 2481248, at *8 (N.D. Tex. Mar. 13, 2023) (describing school board meetings as a "vital forum for parental and citizen involvement"). Any First Amendment challenge brought by parents against a school board should generally be understood in light of the history and tradition of parental rights in the United States. *See Kennedy v. Bremerton School Dist.*, 142 S.Ct. 2407, 2428 (2022) (looking to the original meaning and history of the First Amendment); *see also Brown*, 564 U.S. at 835 (Thomas, J., dissenting) (analyzing the original meaning of the First Amendment in light of the history and tradition of

parental rights); Gilles, *On Educating Children*, 63 U. CHI. L. REV. at 944 (arguing that parental educative speech should receive high levels of First Amendment protections). As noted above, the Court in *Yoder* analyzed the parents' First Amendment free exercise claim in light of the history and tradition of parental rights. *See Yoder*, 406 U.S. at 232 ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. The primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."). [4]

Courts routinely uphold the free speech rights of parents at school board meetings under basic First Amendment principles. For example, in *Ison v. Madison Local School District Board of Education*, 3 F.4th 887 (6th Cir. 2021), a group of parents and grandparents sued their local school board after the board prevented them from voicing their objections to the board's handling of gun-related issues in local schools.

In ruling in favor of the parents and grandparents, the Sixth Circuit treated the school board meeting as a limited public forum and found that the school board engaged in impermissible viewpoint discrimination by prohibiting abusive and

[4] While the Amici States do not dispute that a school board meeting should be treated as a limited public forum for purposes of a First Amendment analysis, they do maintain that any First Amendment claims of parents should generally be understood in light of the historic rights of parents. *See Yoder*, 406 U.S. at 232; *see also Brown*, 564 U.S. at 835.

antagonistic speech. *See Ison*, 4 F.4th at 894 ("These terms plainly fit in the 'broad' scope of impermissible viewpoint discrimination because, like in *Matal*, *Iancu*, and *American Freedom Defense Initiative*, they prohibit speech purely because it disparages or offends.").

Likewise, in another recent parental rights case, a district court in Georgia granted a parental rights advocacy organization a temporary injunction in a speech case. *See Mama Bears of Forsyth County v. McCall*, No. 2:22-CV-142-RWS, 2022 WL 18110246, at *1 (N.D. Ga. Nov. 16, 2022). In that case, a parental rights advocacy organization sued a local school board over its revised public participation policy, which included a requirement that members of the public conduct themselves in a "respectful manner" and prohibited profane and abusive remarks. *Id.* at *3. This policy was instituted after several parents raised objections to library materials that parents considered to be sexually explicit and age inappropriate. *Id.* at *2.

In concluding that the organization was likely to succeed on the merits of its First Amendment claim, the court observed the following:

> But it is this Court's view, the public participation policy's "respectful manner" requirement impermissibly targets speech unfavorable to or critical of the Board while permitting other positive, praiseworthy, and complimentary speech. And that is exactly what the First Amendment is intended to prevent in a setting like a school board meeting. Members of the public must be able to provide their feedback and critiques, even if some people, Board members included, find that distasteful, irritating, or unfair.

Id. at *7.

Although *Ison* and *Mama Bears of Forsyth County* did not explicitly consider the history and tradition of parental rights in the United States as part of their free speech analysis, both decisions implicitly acknowledged that parents should be afforded the opportunity to advocate for change in their local school systems, including the opportunity to engage in speech that opposes school board policies. *See Ison*, 3 F.4th at 894 ("The antagonistic restriction, by definition, prohibits speech opposing the Board."); *Mama Bears of Forsyth County*, 2022 WL 18110246, at *1 ("At its core, this case addresses fundamental First Amendment questions about what type of speech can and cannot be restricted at school board meetings."). Because the decision below failed to acknowledge this point, this Court should reverse.

III. Parental advocacy contributes to social progress.

Finally, there are important public policy reasons to afford some degree of respect to parental advocacy claims. The founding generation viewed parental rights as an essential tool for social progress, and the developments of subsequent centuries have only validated their beliefs. *See Brown*, 564 U.S. at 828 (Thomas, J, dissenting) (describing children as the pivot of the moral world). In the past hundred years, parental advocacy has brought about significant moral and social improvements in our society.

In the 1950s, 1960s, and beyond, the advocacy of African American parents brought about tremendous positive social change in America's public schools. *See, e.g.*, Wade Kolb III, *Briggs* v. *Elliott Revisited: A Study in Grassroots Activism and Trial Advocacy from the Early Civil Rights Era,* 19 J.S. LEGAL HIST. 123 (2011) (describing the efforts of parent activists to improve educational conditions in rural South Carolina); *see also* Kevin D. Brown, *Reexamination of the Benefit of Publicly Funded Private Education for African-American Students in A Post-Desegregation Era*, 36 IND. L. REV. 477, 481 (2003) ("Though integrating public schools required tremendous sacrifice by black parents, school children and teachers, that sacrifice was in the long term interest of the black community.").

In the 1970s, parents played a central role in advocating for and ultimately passing federal legislation protecting children with disabilities. *See* Erin Phillips, *When Parents Aren't Enough: External Advocacy in Special* Education, 117 YALE L.J. 1802, 1810 (2008) ("As this Note shows, parents have always been and should continue to be central to efforts to obtain equality for children with disabilities."); *see also* M. Hannah Koseki, *Meeting the Needs of All Students: Amending the Idea to Support Special Education Students from Low-Income Households*, 44 FORDHAM URB. L.J. 793, 807–08 (2017) ("[P]arents have played a fundamental role as advocates in the educational decision-making process for students with disabilities.").

In the 1980s, parents and parental rights organizations led efforts to legalize homeschooling across the country. *See* Jennifer Karinen, *Finding A Free Speech Right to Homeschool: An Emersonian Approach*, 105 GEO. L.J. 191, 196–97 (2016) (describing the history of the homeschooling movement).

In more recent decades, parents have been the driving force behind charter school movements in various states. *See* Judith Johnson and Alex Medler, *The Conceptual and Practical Development of Charter Schools,* 11 STAN. L. & POL'Y REV. 291, 294 (2000) (describing the growth of the charter school movement).

Although these are just a few examples of parental advocacy, recent history demonstrates that parental advocacy provides significant social benefits. In part because of these benefits, parental advocacy efforts should be respected.

CONCLUSION

Parental rights are a central component of the history and tradition of the United States and are a vital force for social progress. Given their importance to both the individual and the public, these rights are—and should be—afforded some degree of respect by our judicial system. Because the district court failed to meaningfully consider the importance of parental rights in its constitutional analysis, this Court should reverse its grant of summary judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,662 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman font) using Microsoft Word (the same program used to calculate the word count).

The Amici States are authorized to file this brief without the consent of the parties or the leave of the Court. Fed. R. App. P. 29(a)(2).

s/ Thomas T. Hydrick
Thomas T. Hydrick

April 17, 2023

CERTIFICATE OF SERVICE

I certify that certify that on April 17, 2023, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that the foregoing document is being served on this day on all counsel of record registered to receive a Notice of Electronic Filing generated by CM/ECF.

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April 17, 2023