No. _____

In the Supreme Court of the United States

TAMER MAHMOUD AND ENAS BARAKAT; JEFF AND SVITLANA ROMAN; CHRIS AND MELISSA PERSAK, IN THEIR INDIVIDUAL CAPACITIES AND EX REL. THEIR MINOR CHILDREN; AND KIDS FIRST, AN UNINCORPORATED ASSOCIATION,

Petitioners,

v.

THOMAS W. TAYLOR, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE MONTGOMERY COUNTY BOARD OF EDUCATION; THE MONTGOMERY COUNTY BOARD OF EDUCATION; AND SHEBRA EVANS, LYNNE HARRIS, GRACE RIVERA-OVEN, KARLA SILVESTRE, REBECCA SMONDROWSKI, BRENDA WOLFF, AND JULIE YANG, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF EDUCATION,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

Petitioners filed suit, not challenging the curriculum, but arguing that compelling their elementary-age children to participate in instruction contrary to their parents' religious convictions violated the Free Exercise Clause. Construing *Wisconsin* v. *Yoder*, the Fourth Circuit found no free-exercise burden because no one was forced "to *change* their religious beliefs or conduct."

The question presented is:

Do public schools burden parents' religious exercise when they compel elementary school children to participate in instruction on gender and sexuality against their parents' religious convictions and without notice or opportunity to opt out?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners Tamer Mahmoud and Enas Barakat, Jeff and Svitlana Roman, and Chris and Melissa Persak are parents of elementary-age children in Montgomery County, Maryland. They are plaintiffs below.

Petitioners Chris and Melissa Persak are also acting *ex rel.* their minor children, who are plaintiffs below.

Petitioner Kids First is an unincorporated association and is a plaintiff below. It does not have a parent corporation or issue stock.

Respondent Thomas W. Taylor is the Montgomery County Superintendent of public schools. He is sued in his official capacity. His predecessor, Monifa B. McKnight, was a defendant below in her official capacity.

The Montgomery County Board of Education was a defendant below.

Shebra Evans, Lynne Harris, Grace Rivera-Oven, Karla Silvestre, Rebecca Smondrowski, Brenda Wolff, and Julie Yang are members of the Board of Education and are defendants in their official capacities.

RELATED PROCEEDINGS

There are no related proceedings.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT ii

RELATED PROCEEDINGS iii

TABLE OF AUTHORITIES xii

INTRODUCTION 1

OPINIONS BELOW 4

JURISDICTION 4

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 5

I. Statutory Background 5

II. Factual Background 8

A. Petitioners' religious beliefs 8

B. The Pride storybooks 11

C. The Board's notice and opt-out ban 14

D. The proceedings below 17

REASONS FOR GRANTING THE PETITION 19

I. The decision below deepens a 5-1 split over whether forced participation in public school instruction can create a free-exercise burden 19

A. Five circuits hold that forced participation in public school instruction cannot alone burden free exercise. 20

B. The Eighth Circuit holds that forced participation in public school instruction may alone burden religious exercise. 22

II. The decision below conflicts with this Court's free-exercise jurisprudence. 23

A. The decision below misreads *Yoder*. 24

B. The decision below conflicts with free-exercise precedents from *Sherbert* to *Kennedy*. 26

III. The petition presents a pressing question of nationwide importance. 30

CONCLUSION 35

APPENDIX

Opinion, *Mahmoud* v. *McKnight*, No. 23-1890 (4th Cir. May 15, 2024) 1a

Opinion, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. Aug. 24, 2023) 76a

Order, Denying Motion for Preliminary Injunction and Motion for Injunction Pending Appeal, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. Aug. 24, 2023), Dkt. 60 ..... 155a

Verified First Amended Complaint, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. July 6, 2023), Dkt. 36 ..... 156a

Ex. A to Complaint, 2022-2023 Guidelines for Respecting Religious Diversity in Montgomery County Public Schools, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. May 24, 2023), Dkt. 1-2 ..... 210a

Ex. B to Complaint, Newly Approved LGBTQ-Inclusive Texts by Grade Level, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. May 24, 2023), Dkt. 1-3 ..... 234a

Ex. C to Complaint, *Pride Puppy*, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. May 24, 2023), Dkt. 1-4 ..... 254a

Ex. D to Complaint, News Article Regarding Pride Storybooks, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. May 24, 2023), Dkt. 1-5 ..... 272a

Ex. E to Complaint, *Uncle Bobby's Wedding*, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. May 24, 2023), Dkt. 1-6 ..... 279a

Ex. F to Complaint, *Intersection Allies*, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. May 24, 2023), Dkt. 1-7 ..... 309a

Ex. G to Complaint, *My Rainbow*, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. May 24, 2023), Dkt. 1-8 ..... 357a

Ex. J to Complaint, *Prince & Knight*, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. May 24, 2023), Dkt. 1-9 ..... 390a

Ex. H to Complaint, *Love, Violet*, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. May 24, 2023), Dkt. 1-10 ..... 429a

Ex. I to Complaint, *Born Ready*, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. May 24, 2023), Dkt. 1-11 ..... 448a

Ex. K to Complaint, Email from Principal Dina Brewer to Sherwood Families, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. May 24, 2023), Dkt. 1-12 ..... 483a

Ex. L to Complaint, Roman Family Correspondence with School Administrators, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. May 24, 2023), Dkt. 1-13 ..... 486a

Ex. M to Complaint, Mahmoud & Barakat Family Correspondence with School Administrator, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. May 24, 2023), Dkt. 1-14 ..... 497a

Ex. N to Complaint, Slide Deck regarding Pride Storybooks, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. May 24, 2023), Dkt. 1-15 ..... 499a

Declaration of Tamer Mahmoud and Enas Barakat in Support of Plaintiffs' Motion for a Preliminary Injunction, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. June 12, 2023), Dkt. 23-2 ..... 529a

Declaration of Jeff Roman and Svitlana Roman in Support of Plaintiffs' Motion for a Preliminary Injunction, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. June 12, 2023), Dkt. 23-3 ..... 535a

Declaration of Chris Persak and Melissa Persak in Support of Plaintiffs' Motion for a Preliminary Injunction, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. June 12, 2023), Dkt. 23-4 ..... 542a

Declaration of Eric Baxter in Support of Plaintiffs' Motion for a Preliminary Injunction, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. June 12, 2023), Dkt. 23-5 ..... 546a

Exhibit 1 to Declaration of Eric Baxter in Support of Plaintiffs' Motion for a Preliminary Injunction, *What Are Your Words?*, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. June 12, 2023), Dkt. 23-5 ..... 548a

Exhibit 2 to Declaration of Eric Baxter in Support of Plaintiffs' Motion for a Preliminary Injunction, *Jacob's Room to Choose*, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. June 12, 2023), Dkt. 23-5 ..... 565a

Exhibit 1 to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, Defendants' Nondiscrimination Policy, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. July 12, 2023), Dkt. 42-2 ..... 581a

Declaration of Niki T. Hazel in Support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. July 13, 2023), Dkt. 43 ..... 597a

Declaration of Robert McCaw, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. July 26, 2023), Dkt. 47-1 ..... 610a

Exhibit A to Declaration of Robert McCaw, Response to Maryland Public Information Act ("MPIA") Request, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. July 26, 2023), Dkt. 47-1 ..612aExhibit B to Declaration of Robert McCaw, Documents Produced in Response to MPIA Request, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. July 26, 2023), Dkt. 47-1 ..... 614a

Exhibit 1 to Second Declaration of Eric Baxter in Support of Plaintiffs' Motion for a Preliminary Injunction, Adding an LGBTQ+ Lens to Our Critical Selection Repertoire, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. Aug. 8, 2023), Dkt. 49-1 ..... 622a

Declaration of Grace Morrision in Support of Plaintiffs' Motion for a Preliminary Injunction, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. Aug. 11, 2023), Dkt. 52 ..... 624a

Exhibit 3 to Third Declaration of Eric Baxter in Support of Plaintiffs' Motion for a Preliminary Injunction, Sample Call-Ins, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. Aug. 16, 2023), Dkt. 55-3 ..... 628a

Exhibit 4 to Third Declaration of Eric Baxter in Support of Plaintiffs' Motion for a Preliminary Injunction, Responding to Caregivers / Community Questions *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md. Aug. 16, 2023), Dkt. 55-4 ..... 636a

Excerpts from Transcript of August 9, 2023 Preliminary Injunction Hearing, *Mahmoud* v. *McKnight*, No. 8:23-cv-1380 (D. Md.) 642a

Rule 28(j) Notice of Supplemental Authority, Declaration of Grace Morrison, *Mahmoud* v. *McKnight*, No. 23-1890 (4th Cir. Sept. 29, 2023), Dkt. 49 ..... 644a

Exhibit A to Rule 28(j) Notice of Supplemental Authority, Declaration of Grace Morrison, Second Declaration of Grace Morrison, *Mahmoud* v. *McKnight*, No. 23-1890 (4th Cir. Sept. 29, 2023), Dkt. 49..... 647a

Exhibit 1 to Exhibit A to Rule 28(j) Notice of Supplemental Authority, Declaration of Grace Morrison, Second Declaration of Grace Morrison, *Mahmoud* v. *McKnight*, No. 23-1890 (4th Cir. Sept. 29, 2023), Dkt. 49 ..... 650a

Exhibit 2 to Exhibit A to Rule 28(j) Notice of Supplemental Authority, Declaration of Grace Morrison, Second Declaration of Grace Morrison, *Mahmoud* v. *McKnight*, No. 23-1890 (4th Cir. Sept. 29, 2023), Dkt. 49 ..... 654a

5 Things to Know, Montgomery County Public Schools (Mar. 23, 2023) 657a

Stephanie Ramirez, *MCPS Revises policy on LGBTQ-friendly books*, Fox 5 DC (Mar. 24, 2023) 658a

Excerpts of Memorandum from Karen B. Salmon, Ph.D., State Superintendent of Schools, to Members of the State Board of Education (June 4, 2019) 664a

2023-2024 Guidelines for Respecting Religious Diversity in Montgomery County Public Schools, Montgomery County Public Schools..... 669a

TABLE OF AUTHORITIES

Page(s)

Cases

Apache Stronghold v. *United States*,
101 F.4th 1036 (9th Cir. 2024),
petition for cert. pending,
No. 24-___ (filed Sept. 11, 2024) 34

Bostock v. *Clayton County*,
590 U.S. 644 (2020) 34

Bowen v. *Roy*,
476 U.S. 693 (1986) 27

Brown v. *Hot, Sexy & Safer Prods., Inc.*,
68 F.3d 525 (1st Cir. 1995) 20

C.N. v. *Ridgewood Bd. of Educ.*,
430 F.3d 159 (3d Cir. 2005)..... 22-23

*California Parents for the Equalization
of Educ. Materials* v. *Torlakson*,
973 F.3d 1010 (9th Cir. 2020) 31

Carson v. *Makin*,
596 U.S. 767 (2022) 25

Church of Lukumi Babalu Aye, Inc. v.
City of Hialeah,
508 U.S. 520 (1993) 30

Donahoe v. *Richards*,
38 Me. 379 (1854) 33

Employment Div. v. *Smith*,
494 U.S. 872 (1990) 24

Espinoza v. *Montana Dep't of Revenue*,
591 U.S. 464 (2020) 24, 28-29, 31, 32, 34

Fleischfresser v. *Directors of Sch. Dist. 200*,
15 F.3d 680 (7th Cir. 1994) 21

Florey v. *Sioux Falls Sch. Dist. 49-5*,
619 F.2d 1311 (8th Cir. 1980) 22

Fulton v. *City of Philadelphia*,
593 U.S. 522 (2021) 27, 28, 30, 34

Kennedy v. *Bremerton School District*,
597 U.S. 507 (2022) 29-30

Leebaert v. *Harrington*,
332 F.3d 134 (2d Cir. 2003)..... 20, 25

Loper Bright Enters. v. *Raimondo*,
144 S. Ct. 2244 (2024) 32, 33

Masterpiece Cakeshop v. *Colorado C.R. Comm'n*,
584 U.S. 617 (2018) 30

Minersville Sch. Dist. v. *Gobitis*,
310 U.S. 586 (1940) 32

Morse v. *Frederick*,
551 U.S. 393 (2007) 31, 33-34

Mozert v. *Hawkins Cnty. Bd. of Educ.*,
827 F.2d 1058 (6th Cir. 1987) 20-21, 25, 33

Nken v. *Holder*,
556 U.S. 418 (2009) 25

Parham v. *J.R.*,
442 U.S. 584 (1979) 33

Parker v. *Hurley*,
514 F.3d 87 (1st Cir. 2008) 20

Ramirez v. *Collier*,
595 U.S. 411 (2022) 25

Salazar v. *Buono*,
559 U.S. 700 (2010) 30-31

Sheetz v. *County of El Dorado*,
601 U.S. 267 (2024) 31-32

Sherbert v. *Verner*,
374 U.S. 398 (1963) 26, 27, 29

Spence v. *Bailey*,
465 F.2d 797 (6th Cir. 1972) 23

Tatel v. *Mt. Lebanon Sch. Dist.*,
637 F. Supp. 3d 295 (W.D. Pa. 2022) 23

Texas v. *United States*,
809 F.3d 134 (5th Cir. 2015) 25

Thomas v. *Review Bd.*,
450 U.S. 707 (1981) 21, 26

Trinity Lutheran Church of Columbia, Inc. v. *Comer*,
582 U.S. 449 (2020) 29

Wisconsin v. *Yoder*,
406 U.S. 205 (1972) 24, 31, 32, 34

West Virginia State Bd. of Educ. v. *Barnette*,
319 U.S. 624 (1943) 32

Statutes and Regulations

28 U.S.C. § 1254 4

Ala. Code § 16-40A-5 6

Ala. Code § 16-41-6 6

Alaska Stat. § 14.30.355 6

Alaska Stat. § 14.30.356 6

Ariz. Rev. Stat. § 15-711 7

Ariz. Rev. Stat. § 15-716 7

Ark. Code § 6-16-1006 6

Cal. Educ. Code § 51937 6

Colo. Rev. Stat. § 22-1-128 6

Colo. Rev. Stat. § 22-25-104 6

Conn. Gen. Stat. § 10-16e 6

D.C. Mun. Regs. subtit. 5, § E2305.5. 7

Fla. Stat. § 1001.42 6

Fla. Stat. § 1002.20 6

Fla. Stat. § 1003.42 6

Ga. Code § 20-2-143 6

Haw. Dep't of Educ., Bd. of Educ. Policy 103-5 6

Haw. Dep't of Educ., Bd. of Educ. Policy 101-13 6

Haw. Dep't of Educ. Reg. No. 2210.1 6

Idaho Code § 33-1608 6

Idaho Code § 33-1611 6

105 Ill. Comp. Stat. 5/27-9.1a 6

Ind. Code § 20-30-5-17 7

Iowa Code § 256.11 6

Kan. Admin. Regs. § 91-31-35 7

Ky. Rev. Stat. § 158.1415 7

La. Stat. § 17:281 6

La. Stat. § 17:412 6

Mass. Gen. Laws ch. 71, § 32A 6

Md. Code Educ. § 7-301 17

Md. Code Regs. § 13A.04.18.01 ..... 4, 5, 6, 7

Me. Rev. Stat. tit. 22, § 1911 6

Mich. Comp. Laws § 380.1507 6

Minn. Stat. § 120B.20 6

Miss. Code § 37-13-173 7

Mo. Stat. § 170.015 6

Mont. Code § 20-7-120 6

N.C. Gen. Stat. § 115C-81.30 6

N.H. Rev. Stat. § 186:11 6

N.J. Stat. § 18A:35-4.7 6

N.M. Code R. § 6.29.6.11 6

Neb. Rev. Stat. § 79-532 6

Nev. Rev. Stat. § 389.036 7

N.Y. Comp. Codes R. & Regs. tit. 8, § 135.3 6

Ohio Rev. Code § 3313.60 6

Okla. Stat. tit. 70, § 11-103.3 6

Or. Dep't of Educ. Admin. R.
581-021-0009 7

Or. Dep't of Educ. Admin. R.
581-022-2050 6-7

Or. Rev. Stat. § 336.465..... 6

22 Pa. Code § 4.4..... 7

22 Pa. Code § 4.29..... 7

R.I. Gen. Laws § 16-22-17 7

R.I. Gen. Laws § 16-22-18 7

R.I. Gen. Laws § 16-22-24 7

S.C. Code. § 59-32-50..... 7

S.D. Codified Laws § 13-33-6.1 6

Tenn. Code § 49-6-1305 7

Tenn. Code § 49-6-1307 7

Tenn. Code § 49-6-1308 7

Tex. Educ. Code § 28.004 7

Utah Code § 53E-9-203 7

Utah Code § 53G-10-205 7

Utah Code § 53G-10-403 7

Va. Code. § 22.1-207.2 7

Vt. Stat. tit. 16, § 134 7

W. Va. Code § 18-2-9 7

Wash. Rev. Code. § 28A.230.070 7

Wis. Stat. § 118.019 7

Wyo. Stat. § 21-9-104 ..... 6, 7

Other Authorities

Ismail Allison, *Over 1,000 Maryland Parents, Community Members, Urge MCPS to Restore Curriculum Opt-Out Option and Parental Notice, Dialogue with Families*, Council on American-Islamic Relations (Apr. 17, 2023) 15

Nicole Asbury and Katie Shepherd, *Hundreds of Maryland parents protest lessons they say offend their faith*, Washington Post, June 27, 2023 15-16

Catechism of the Catholic Church 10

Zainab Chaudry, *Montgomery parents want an opt-out on gender education restored*, Washington Post, July 17, 2023 15-16

Jessica Fillak, *The History Of Sexuality Education In The United States*, Sexual Health Alliance, June 8, 2021 5

John 9

Genesis 9

Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 Va. L. Rev. 1759 (2022) 34

Guttmacher Institute, *Sex and HIV Education* (Sept. 1, 2023)..... 5

Keith T. Hayashi, Superintendent, Haw. Dep't of Educ., Annual Memorandum: Notice on Board of Education Policy 101-13 Controversial Issues (June 23, 2023) 6

Michael A. Helfand, *Substantial Burdens as Civil Penalties*, 108 Iowa L. Rev. 2189 (2023)..... 34

Aleja Hertzler-McCain, *Montgomery County, Maryland, was most religiously diverse US county in 2023*, Religion News Service, Aug. 30, 2024..... 8

Kan. Dep't of Educ., *Frequently Asked Questions about Health Education in Kansas* (2018) 7

Kan. Dep't of Educ., *Kansas Model Curricular Standards for Health Education 2018* 7

Letter from Thomas Jefferson to Joseph Cabell, Sept. 9, 1817, in 17 Writings of Thomas Jefferson (Mem. ed. 1904) 24

Pontifical Council for the Family, *The Truth and Meaning of Human Sexuality: Guidelines for Education within the Family* (Dec. 8, 1995) 10

Katherine Schaeffer, *U.S. public, private and charter schools in 5 charts*, Pew Research Center, June 6, 2024 31

SIECUS, *Guidelines for Comprehensive Sexuality Education* (3d ed. 2004) 5

SIECUS, *Sex Ed State Law and Policy Chart* (July 2022) 6

SIECUS, *State Profiles* 5

Surah Al-An'am 9

Surah Al-Furqan 9

1 *Thessalonians* 10

INTRODUCTION

In November 2022, Respondent Montgomery County Board of Education mandated new "inclusive" storybooks that celebrate gender transitions, explore Pride parades, and introduce same-sex romance between young children. At the time, parents were promised they would be notified and could opt their children out when the storybooks were read. That practice was consistent with Maryland state law and the Board's own policies, both of which contemplate parental notice and opt-outs. In March 2023, the Board confirmed in a press statement that before one of the storybooks is read, "a notification goes out to parents" and, "[i]f a parent chooses to opt out, a teacher can find a substitute."

But the very next day, without explanation, the Board reversed course. Beginning with the 2023-2024 school year, it announced, no further notice would be provided and no opt-outs tolerated as to the storybooks. Yet the Board continued to allow opt-outs from analogous instruction in the sex education unit of state-mandated health classes, including for high schoolers. If parents did not like what was taught to their elementary school kids, their only choice was to send them to private school or to homeschool.

Hundreds of parents—mostly Muslim and Eastern Orthodox—packed the Board's summer meetings. Dozens testified that they had religious obligations not to subject their young children to instruction on gender and sexuality that conflicted with their religious beliefs. The parents emphasized how impressionable young children are and how they lack independent judgment to process such complex and sensitive issues. In response, Board members publicly accused

them of promoting "hate" and compared them to "white supremacists" and "xenophobes."

After the Board refused to accommodate them, Petitioners filed suit under the Free Exercise Clause, seeking to retain the same opt-out rights the Board had guaranteed just months earlier. The district court denied a preliminary injunction, and the Fourth Circuit affirmed in a 2-1 decision. According to the panel majority, there is no free-exercise burden because denying opt-outs did not "compel[]" Petitioners to "*change* their religious beliefs or conduct." App.34a. Because Petitioners remain "free[]" to "discuss[] the topics raised in the [s]torybooks with their children" and to "teach[] their children as they wish," the court found no First Amendment violation. App.35a.

The Fourth Circuit's decision deepens a 5-1 split under *Yoder* over whether forced instruction *ever* burdens parental rights under the Free Exercise Clause. Five circuits now hold that—absent some "coercive effect"—*Yoder* essentially provides parents no protection once they place their children in the public system. As one circuit judge put it, outside the Establishment Clause, there is "no limitation on [a school's] power to require any curriculum, no matter how offensive." By contrast, another circuit has recognized that, under *Yoder*, forced instruction *does* burden parental rights under the Free Exercise Clause.

The majority rule is inconsistent with *Yoder* itself, which held that "the fundamental interest of parents * * * to guide the religious future and education of their children" is "now established beyond debate." But it is also inconsistent with a long line of burden cases—extending from *Sherbert* to *Fulton*—which hold that even indirect pressure to forgo a religious practice

creates a religious burden. And the Fourth Circuit ignored, or got wrong, a string of other free-exercise cases such as *Bowen* v. *Roy*, *Espinoza* v. *Montana Department of Revenue*, and *Kennedy* v. *Bremerton School District*. The result is that, by demoting *Yoder*, the Fourth Circuit and circuits aligned with it apply a burden standard that effectively exempts public schools, alone among government actors, from the Free Exercise Clause.

The Fourth Circuit's rule—that parents essentially surrender their right to direct the religious upbringing of their children by sending them to public schools—contradicts centuries of our history and traditions. Those traditions uphold what the decision below tears down: parents' right to protect their children's innocence and direct their religious upbringing. Under the Fourth Circuit's reasoning, parents cannot be heard until after the damage has been done to their children. But there is no unringing that bell—by then, innocence will be lost and beliefs undermined.

The First Amendment "lies at the heart of our pluralistic society." It cannot do its work if free-exercise rights must be sacrificed by all who attend the nation's public schools. New government-imposed orthodoxy about what children are "supposed" to think about gender and sexuality is not a constitutional basis to sideline a child's own parents. The Court should grant review.

OPINIONS BELOW

The Fourth Circuit's opinion affirming the district court's denial of Petitioners' motion for a preliminary injunction is reported at 102 F.4th 191 and reproduced at App.1a. The district court's opinion denying Petitioners' motion for a preliminary injunction is reported at 688 F. Supp. 3d 265 and reproduced at App.76a. The associated order denying the preliminary injunction is unreported. App.155a.

JURISDICTION

The Fourth Circuit issued its opinion and judgment on May 15, 2024. App.3a. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. Const. amend. I.

Maryland's Code of Regulations requires "[e]ach local school system" to provide "comprehensive health education" that includes "family life and human sexuality." Md. Code Regs. §§ 13A.04.18.01(A), (C)(1)(c) and (D)(2). The regulations also require schools to "establish policies, guidelines, and/or procedures for student opt-out regarding instruction related to family life and human sexuality objectives," *id.* § 13A.04.18.01(D)(2)(e)(i), and to provide students that opt-out "with appropriate alternative learning activities and/or assessments in health education," *id.* § 13A.04.18.01(D)(2)(e)(ii). They also require local

school systems to "provide an opportunity for parents/guardians to view instructional materials to be used in the teaching of family life and human sexuality objectives." *Id*. § 13A.04.18.01(D)(2)(e)(iv).

STATEMENT OF THE CASE

I. Statutory Background

States have long guarded parents' right to determine when and how their children are taught sensitive subjects around gender and sexuality. Although modern public education has its roots in the nineteenth century, "comprehensive sexual education curriculum" was not "formed and introduced" until the 1990s.[1] Yet even with that sea change, the sensitive nature of such instruction came with a longstanding national consensus in favor of parental control. Today, only three states mandate "comprehensive" sex education,[2] with another 27 and the District of Columbia requiring some instruction.[3]

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[1] Jessica Fillak, *The History of Sexuality Education in the United States*, Sexual Health Alliance, June 8, 2021, https://perma.cc/BRL8-MSH3.

[2] See SIECUS, *State Profiles*, https://perma.cc/V5QL-9MNG (California, Oregon, Washington—each involving opt-outs, see *infra* n.5); see also SIECUS, *Guidelines for Comprehensive Sexuality Education*, at 13-20 (3d ed. 2004), https://perma.cc/2QZB-9SS9 (describing "comprehensive" sexuality education).

[3] SIECUS, *State Profiles*, *supra* n.2; see also Guttmacher Institute, *Sex and HIV Education*, Table 1 (Sept. 1, 2023), https://perma.cc/4FPY-ZEVY (arriving at a slightly lower figure).

All fifty states and the District of Columbia permit certain aspects of sexual education.[4] But of those jurisdictions, 38 require parental opt-outs.[5] Four more

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[4] See SIECUS, *Sex Ed State Law and Policy Chart* (July 2022), https://perma.cc/EM89-GU4C (recording 47 states and the District of Columbia); Idaho Code § 33-1608 (the "local school board" may decide "whether or not any program in family life and sex education is to be introduced in the schools"); S.D. Codified Laws § 13-33-6.1 (requiring "character development instruction" including "sexual abstinence" unless the appropriate body chooses otherwise); Wyo. Stat. § 21-9-104 (authorizing instruction on child sexual abuse in health class).

[5] See Ala. Code §§ 16-40A-5, 16-41-6; Alaska Stat. §§ 14.30.355(b)(7), 14.30.356(b)(6); Ark. Code § 6-16-1006(c); Cal. Educ. Code § 51937; Colo. Rev. Stat. §§ 22-25-104(6)(d), 22-1-128(3)(a), (4) and (5); Conn. Gen. Stat. § 10-16e; Fla. Stat. §§ 1001.42(8)(c)(3), 1002.20(3)(d), 1003.42(5); Ga. Code § 20-2-143(d); Haw. Dep't of Educ., Bd. of Educ. Policy 103-5; Haw. Dep't of Educ., Bd. of Educ. Policy 101-13; Haw. Dep't of Educ. Reg. No. 2210.1, https://perma.cc/6QAT-B6EL; Keith T. Hayashi, Superintendent, Haw. Dep't of Educ., *Annual Memorandum: Notice on Board of Education Policy 101-13 Controversial Issues* (June 23, 2023), in *Opening of the School Year Packet for School Year 2023-2024*, Haw. Dep't of Educ. 61 (June 2023), https://perma.cc/T6DS-XSWP; Idaho Code § 33-1611; 105 Ill. Comp. Stat. 5/27-9.1a(d); Iowa Code § 256.11(6)(a); La. Stat. §§ 17:281(D), 17:412; Mass. Gen. Laws ch. 71, § 32A; Md. Code Regs. §§ 13A.04.18.01(D)(2)(e)(i) and (iii); Me. Rev. Stat. tit. 22, § 1911; Mich. Comp. Laws § 380.1507(4); Minn. Stat. § 120B.20; Mo. Stat. § 170.015(5)(2); Mont. Code § 20-7-120; N.C. Gen. Stat. § 115C-81.30(b); Neb. Rev. Stat. § 79-532(3); N.H. Rev. Stat. § 186:11(IX-c); N.J. Stat. § 18A:35-4.7; N.M. Code R. § 6.29.6.11; N.Y. Comp. Codes R. & Regs. tit. 8, § 135.3; Ohio Rev. Code § 3313.60(A)(5)(c), (d) and (f); Okla. Stat. tit. 70, § 11-103.3(C); Or. Rev. Stat. § 336.465(1)(b); Or. Dep't of Educ. Admin. R. 581-

states go still further, requiring a parental *opt-in* before children receive instruction.[6] And another six states feature a combination of opt-out and opt-in rights.[7] In total, 47 states and the District of Columbia provide for parental opt-out or opt-in protections related to sex education; only three states (Delaware and the Dakotas) are silent on the matter. And no state has gone so far as to bar such accommodations.

Maryland is among the majority of states that require parental opt-outs. Its "Health Education" regulation requires all local schools to establish "procedures for student opt-out regarding" any "instruction related to family life and human sexuality objectives" (other than "menstruation"). Md. Code Regs. §§ 13A.04.18.01(D)(2)(e)(i) and (iii).

022-2050(5); Or. Dep't of Educ. Admin. R. 581-021-0009; 22 Pa. Code §§ 4.29(c), 4.4(d)(3); R.I. Gen. Laws §§ 16-22-17(c), 16-22-18(c), 16-22-24(b); S.C. Code. § 59-32-50; Va. Code. § 22.1-207.2; Vt. Stat. tit. 16, § 134; Wash. Rev. Code. § 28A.230.070(4); Wis. Stat. §§ 118.019(3) and (4); W. Va. Code § 18-2-9(c); D.C. Mun. Regs. subtit. 5, § E2305.5.

[6] See Ky. Rev. Stat. § 158.1415(1)(e); Miss. Code § 37-13-173; Nev. Rev. Stat. § 389.036(4); Wyo. Stat. § 21-9-104(b).

[7] See Ariz. Rev. Stat. §§ 15-711(B), 15-716(E); Ind. Code § 20-30-5-17(c), (d); Kan. Admin. Regs. § 91-31-35(a)(6); Kan. Dep't of Educ., *Frequently Asked Questions about Health Education in Kansas* (2018), https://perma.cc/JTW9-8FUH; Kan. Dep't of Educ., *Kansas Model Curricular Standards for Health Education 2018*, Appendix A, https://perma.cc/TNA9-8ENE; Tenn. Code §§ 49-6-1305, 49-6-1307, 49-6-1308; Tex. Educ. Code § 28.004(i) and (i-2); Utah Code §§ 53E-9-203(3), 53G-10-205, 53G-10-403.

Montgomery County is the most religiously diverse county in the United States.[8] Consistent with that diversity, the Board's 2022-2023 Religious Diversity Guidelines provided even broader accommodations than Maryland law or the national consensus. Those Guidelines allowed opt-outs from any "classroom discussions or activities that [parents or students] believe would impose a substantial burden on their religious beliefs." App.220a-221a. Schools were directed to "try to make reasonable and feasible adjustments to the instructional program to accommodate requests from students." App.220a. Schools retained discretion, however, to deny accommodations "if such requests become too frequent or too burdensome." App.221a.

II. Factual Background

A. Petitioners' religious beliefs

Petitioners Tamer Mahmoud and Enas Barakat reside in Montgomery County, Maryland, with their children, including a son in elementary school. App.529a. Respect for "God's wisdom in creation" lies at the heart of their Islamic faith. App.531a. This includes a religious conviction that "'gender' cannot be unwoven from biological 'sex'" without "rejecting the dignity and direction God bestowed on humanity from the start." App.530a. They believe their children will "attain their fullest God-given potential by embracing their biological sex." App.531a.

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[8] Aleja Hertzler-McCain, *Montgomery County, Maryland, was most religiously diverse US county in 2023*, Religion News Service, Aug. 30, 2024, https://perma.cc/86PU-3QLA.

For Mahmoud and Barakat, this is a sacred obligation. It underlies their beliefs regarding the importance of marriage and sexuality for "creating children and teaching them virtue—not only to build a loving family but also to serve as an example of righteousness for society at large." App.530a (citing *Surah Al-Furqan* 25:74). To avoid confusing these matters, their Islamic faith forbids them from "exposing [their] impressionable, elementary-age son to activities and curriculum on sex, sexuality, and gender that undermine Islamic teachings." App.532a (citing *Surah Al-An'am* 6:68-69). After the district court rejected their right to excuse their son from such instruction, they felt religiously compelled to remove their son from public school pending appeal.

Petitioners Chris Persak and Melissa Persak are Roman Catholic and have two elementary-age children in the Montgomery County Public Schools. App.542a. They believe that "a person's biological sex is a gift bestowed by God that is both unchanging and integral to that person's being." App.543a. They have a religious obligation to teach their children about the "immutable sexual differences between males and females, the biblical way to properly express romantic and sexual desires, and the role of parents to love one another unconditionally and sacrificially within the confines of biblical marriage." *Ibid.*

These beliefs are foundational to their religious understanding of the importance of "creat[ing] and sustain[ing] a family," which is "not only necessary for raising the next generation of children" but also for "human flourishing and happiness." App.543a (citing *Genesis* 1:28; *John* 8:51, 14:21, 15:10). Because elementary-age children "are highly impressionable to

ideological instruction presented in children's books or by schoolteachers," their faith compels them to avoid instruction that undermines their religious beliefs on gender and sexuality. App.544a.

Petitioners Jeff Roman and Svitlana Roman are Roman Catholic and Ukrainian Orthodox, respectively. They reside in Montgomery County with their elementary-age son. They believe that gender and biological sex are "intertwined and inseparable," App.537a-538a, and "an integral part of God's design," App.536a (citing 1 *Thessalonians* 5:23; Catechism of the Catholic Church, cc. 362-368). They have a religious obligation to help their son "accept [his] own body as it was created" and to "attain [his] fullest God-given potential by embracing [his] biological sex." App.537a-538a.

They accept Roman Catholic teaching that during "'the years of innocence' from about five years of age until puberty," children "must never be disturbed by unnecessary information about sex." App.539a (quoting Pontifical Council for the Family, *The Truth and Meaning of Human Sexuality: Guidelines for Education within the Family*, 78 (Dec. 8, 1995)). Especially while their young son inherently "loves" and "implicitly trusts" his teachers, the Romans have a religious obligation not to expose him to instruction that could confuse his religious understanding of gender and sexuality. App.540a-541a. After the district court rejected their right to protect their son from such instruction, they felt religiously compelled to remove him from public school pending appeal.

Petitioner Kids First is an unincorporated association formed to protect parental opt-out rights in the Montgomery County schools. It includes hundreds of

parents of diverse faiths, all of whom—like the named families—have a religious obligation not to expose their young children to instruction on gender and sexuality that violates their religious beliefs. App.163a, App.168a.

One of those parents is Grace Morrison. Morrison and her husband adopted their youngest daughter, who has Down Syndrome and Attention Deficit Disorder, from Ukraine. App.624a. Because of her disabilities, their daughter's capacity to make independent judgments is impaired, making her particularly impressionable. App.644a-645a. To know when the Pride storybooks would be read to their daughter, the Morrisons asked her teacher for a curriculum schedule. App.648a. They were refused and informed that, although they could know what would be presented, they could not know when. *Ibid.* After the district court rejected their right to protect their daughter from such instruction, the Morrisons were religiously compelled to remove her from public school, at a cost of $25,000 a year in "therapy and * * * academic services and supplies" that their daughter previously could access through the public schools. App.648a-649a.

B. The Pride storybooks

In November 2022, the Board introduced for the first time "LGBTQ-inclusive" storybooks for students in elementary school, with corresponding guidance for teachers. App.272a, see also App.273a-275a. It told employees responsible for selecting the books to review options through an "LGBTQ+ Lens" and to ask whether "stereotypes," "cisnormativity," and "power hierarchies" are "reinforced or disrupted." App.622a.

One of the books, *Pride Puppy*, is a picture book directed to three- and four-year-olds that describes a Pride parade and what a child might find there. App.234a, App.254a-271a. The book invites students to search for various images, including "underwear," "leather," "lip ring," "[drag] king" and "[drag] queen," and "Marsha P. Johnson," a controversial LGBTQ activist and sex worker. App.270a (brackets in original).

Intersection Allies, a picture book intended for "Kindergarten through Grade 5," invites children to ponder what it means to be "transgender" or "non-binary" and asks "[w]hat pronouns fit you?" App.236a, App.350a. By "standing together," the book claims, we will "rewrite the norms." App.345a.

In yet another book, *What Are Your Words?*, an uncle visits to comfort a niece/nephew, whose pronouns are "like the weather. They change depending on how I feel." App.548a, App.552a. The child spends the day agonizing with friends and neighbors over the right pronouns. App.553a-561a. Only at the end of the day, while watching fireworks, does the child finally conclude that "I'm like fireworks! * * * My words finally found me! *They* and *them* feel warm and snug to me." App.562a. At least for "today." App.564a.

Another, *Love, Violet*, also for "Kindergarten through Grade 5," is about a same-sex playground romance. App.239a, App.429a-447a. Teachers are invited to have a "think aloud" moment with students to ask how it feels when they "don't just 'like'" but "like like" someone. App.275a.

Born Ready, for all elementary ages, tells the story of a biological girl named Penelope who identifies as a boy. App.240a,App.448a-482a. When Penelope's

brother questions how someone can "become" a boy, his mother chides him that "[n]ot everything *needs* to make sense. *This is about love*." App.465a. Teachers are told to instruct students that, at birth, people "guess about our gender," but "[w]e know ourselves best." App.630a-631a, App.276a.

Finally, *Jacob's Room to Choose* is about two young children who identify as transgender. App.565a-580a. Their teacher uses a game to persuade their classmates to support gender-free bathrooms. App.572a-576a. After relabeling the bathroom doors to welcome multiple genders, the children parade with placards that proclaim "Bathrooms Are For Every Bunny" and "[choose] the bathroom that is comfy 4 u." App.578a.

Along with the storybooks, the Board issued guidance that directs teachers to emphasize that "not everyone is a boy or girl" and that "[s]ome people identify with both, sometimes one more than the other and sometimes neither," so students "shouldn't" "guess" but instead solicit others' "pronouns." App.631a-632a. The guidance directs teachers to frame disagreement with these ideas as "hurtful," App.630a, 634a, and to "[d]isrupt the either/or thinking" of students, App.629a, App.633a.

In correspondence obtained through a Maryland Public Information Act request, App.612a, the Board's own elementary school principals objected to the storybooks. App.614a-615a. In their view, the books "support the explicit teaching of gender and sexuality identi[t]y," invite "shaming comment[s]" toward students who disagree, "[s]tate[] as * * * fact" things that "[s]ome would not agree" are facts, and are "dismissive of religious beliefs." App.619a-621a. The principals also found it "problematic to portray elementary

school age children falling in love with other children, regardless of sexual preferences." App.617a.

The Board nonetheless requires teachers to read at least one of the books to their students each year. App.137a n.12, App.89a-90a, App.273a. The Board "do[es]n't dispute" that the books must be read and has conceded that "there will be discussion that ensues." App.642a, App.161a, App.184a; see also National Education Association *et al.* C.A. Amicus Br. 7-8, 2023 WL 7296671 (first- and second-grade MCPS teachers admitting to reading and discussing the books with their students). The Board further admits that "[a]ny child * * * may come away from [the] instruction with a new perspective not easily contravened by their parents." Defs.' Resp. to Suppl. Br. 4, D. Ct. Doc. 54 (Aug. 15, 2023).

C. The Board's notice and opt-out ban

Consistent with its Religious Diversity Guidelines, throughout most of the 2022-2023 school year, the Board honored parental opt-outs as to the storybooks. App.533a-534a, App.540a, App.544a-545a, App.185a-187a, App.497a-498a. Indeed, on March 22, 2023, the Board issued a public statement making clear that "[i]f a parent chooses to opt out, a teacher can find a substitute text for that student that * * * aligns with curriculum." App.184a, App.662a.

But the next day, with no explanation, the Board reversed course. It issued a public statement announcing that, beginning with the new school year, "[s]tudents and families may not choose to opt out" and will not be informed when "books are read in the future." App.185a, App.657a. The statement affirmed, however, that students could continue opting out of

the "Family Life and Human Sexuality Unit of Instruction," *ibid.*—*i.e.*, the sex education unit of their health courses, which are taught in both elementary and high school. And because of the Religious Diversity Guidelines, students were still permitted to opt out of any other instruction that violated their religious beliefs. App.81a-82a, App.220a-221a. Only the Pride storybooks were excluded.

Within weeks of the Board's reversal, over 1,100 parents signed a petition asking the Board to restore their notice and opt-out rights.[9] Hundreds of people—"largely * * * Muslim and Ethiopian Orthodox parents"—claimed "the school system is violating their religious rights protected under the First Amendment."[10] Board members responded by publicly accusing them of promoting "hate" and comparing them to "white supremacists" and "xenophobes." App.103a, App.107a, App.187a; see also App.514a ("dehumanizing form of erasure").

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[9] Ismail Allison, *Over 1,000 Maryland Parents, Community Members Urge MCPS to Restore Curriculum Opt-Out Option and Parental Notice, Dialogue with Families*, Council on American-Islamic Relations (Apr. 17, 2023), https://perma.cc/JH3S-LQKG.

[10] Nicole Asbury & Katie Shepherd, *Hundreds of Maryland parents protest lessons they say offend their faith*, Washington Post, June 27, 2023, https://perma.cc/MJ2Q-BXTW (first photograph below); Zainab Chaudry, *Montgomery parents want an opt-out on gender education restored*, Washington Post, July 17, 2023, https://perma.cc/CB3L-3DES (second photograph below).

Months later and in response to this lawsuit, the Board revised its Religious Diversity Guidelines to state that the Board "cannot accommodate requests for exemptions from required curricular instruction or the use of curricular instructional materials based on religious, and/or other, objections." App.672a. Opt-outs are still permitted, however, for "noncurricular activities" or "free-time events" that "conflict with a family's religious, and/or other, practices." *Ibid.*

Under Maryland law, parents are required by penalty of law to keep their children in public school unless they have capacity to send them to private school or to homeschool. Md. Code Educ. §§ 7-301(a-1)(1) and (e)(1)-(2).

D. The proceedings below

Stripped of their opt-out rights, Petitioners sued and moved for a preliminary injunction. After a hearing, the district court denied the motion, holding that Petitioners were unlikely to succeed because they could not show "that the no-opt-out policy burdens their religious exercise." App.114a.

Petitioners immediately sought an injunction pending appeal from the Fourth Circuit. The court denied the motion but ordered expedited briefing on the underlying merits.

A divided panel affirmed the district court's ruling. The majority found no free-exercise burden because there was "no evidence at present" that Petitioners were "compel[led] * * * to *change* their religious beliefs or conduct" or "what they teach their own children." App.34a (emphasis in original). Nor were they "asked to affirm views contrary to their own" or to "change how they feel about" gender and sexuality. *Ibid*. Absent such "coercive effect," the court held there could be no religious "burden." App.36a. Petitioners, the court reasoned, remained "free[]" to "discuss[] the topics raised in the [S]torybooks with their children" and to "teach[] their children as they wish." App.35a. The majority also found *Yoder* inapplicable, because "in the decades since it was decided," it has been

"markedly circumscribed," and given a "limited holding" based on its "unique record" and "singular set of facts." App.37a-39a.

Petitioners had also argued that their free-exercise rights were burdened under the unconstitutional conditions line of cases from *Sherbert* to *Fulton*, because the Board forced them to relinquish control over when their children are taught about gender and sexuality as the price of attending public schools. But the court ignored this argument, as well as Petitioners' argument that application of the opt-out ban was not neutral or generally applicable.

Judge Quattlebaum dissented. First, he stated that "burdening the exercise of religion is not limited to direct coercion." App.59a. Rather, under the *Sherbert* line of cases, religious liberty "protects [against] less direct religious burdens" and "may be infringed by the denial of or placing of conditions upon a benefit or privilege." App.63a, App.60a. In his view, "the board's actions put the parents in a very similar position" by preventing them "from exercising * * * aspects of their faith if they want their children to obtain a public education." App.63a. Because the no-opt-out policy forced parents "to either live out their faith or forego the public benefit," their religious exercise was burdened. App.66a.

Judge Quattlebaum also concluded that the Board's approach was not neutral or generally applicable. Its own Religious Diversity Guidelines retained "discretion to grant religious opt-out requests." App.68a. And "throughout much of the 2022/2023 school year," the Board in fact did grant "opt-out requests with respect to the [challenged] texts." *Ibid.*

The dissent further emphasized that Maryland law requires "notice and opt-out procedures for all 'family life and human sexuality' instruction," and there was "nothing in the Maryland regulations that would permit the [B]oard to avoid [that] requirement * * * just by adding instruction in that area to other classes." App.70a-71a.

Having found that strict scrutiny applied, Judge Quattlebaum concluded it could not be met. App.72a-73a. He therefore would have granted a preliminary injunction. App.75a.

Without analyzing religious burden under the *Sherbert* line of cases, or addressing neutrality and general applicability, the majority remanded to the district court for further proceedings. The Board has since moved in the district court to dismiss on the ground that the complaint purportedly does not allege a "coercive effect" as required by the Fourth Circuit's majority opinion. App.36a.

REASONS FOR GRANTING THE PETITION

I. The decision below deepens a 5-1 split over whether forced participation in public school instruction can create a free-exercise burden.

The lower courts are now split 5-1 over whether compelled participation in public school instruction burdens the religious exercise of objecting parents. The First, Second, Fourth, Sixth, and Seventh Circuits say it does not, instead requiring "direct coercion" or "compulsion." The Eighth Circuit has said that compelled instruction alone is sufficient to create a free-exercise burden.

A. Five circuits hold that forced participation in public school instruction cannot alone burden free exercise.

In *Parker* v. *Hurley*, parents of an elementary-age child sought notice and opt-outs regarding the classroom reading of books that "depict[ed] and celebrate[d]" gay marriage. 514 F.3d 87, 106, 90 (1st Cir. 2008). The First Circuit held that even though the parents' "sincerely held religious beliefs were deeply offended," there was no "constitutionally significant burden on [their] rights." *Id.* at 99. Having "chosen to place their children in public schools," the parents could not bring a claim absent evidence of what the court called "direct coercion." *Id*. at 100, 105. Requiring children to "sit through a classroom reading" that "was precisely intended to influence" their views on gay marriage was deemed insufficient. *Id*. at 106. The parents had to show a heightened level of "indoctrination" or a "constant stream of like materials." *Ibid*.; see also *Brown* v. *Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 529 (1st Cir. 1995) (no parental right to shield children from "sexually explicit monologues," "simulated masturbation," or presentation where adult had a "male minor lick an oversized condom with her").

The Second, Sixth, and Seventh Circuits have reached similar conclusions. In *Leebaert* v. *Harrington*, 332 F.3d 134 (2d Cir. 2003), the Second Circuit rejected a father's free-exercise challenge to his son's mandatory participation in health curriculum—which conflicted with his belief that "sex before marriage" was inappropriate—because there was no "irreconcilable * * * clash" and no threat to "his community's entire way of life" as in *Yoder*. *Id*. at 144-145. In *Mozert* v. *Hawkins County Board of Education*, 827 F.2d 1058

(6th Cir. 1987), a case challenging an assigned "reader series," the Sixth Circuit found no First Amendment burden because students were "not required" to "deny a belief or engage * * * in a practice prohibited * * * by their religion." *Id.* at 1070. It held that "without compulsion to act, believe, affirm or deny," there could not be an unconstitutional burden. *Id.* at 1067. And in *Fleischfresser* v. *Directors of School District 200*, 15 F.3d 680 (7th Cir. 1994), the Seventh Circuit found "no coercion" where "use of [a reading] series" did not preclude parents from "meeting their religious obligation to instruct their children" and did not compel them or their children "to do or refrain from doing anything of a religious nature." *Id.* at 690.

In a concurring opinion in *Mozert*, Judge Boggs conceded that forcing students to "study the books" *was* compelled "'conduct' contrary to their beliefs." *Mozert*, 827 F.2d at 1078 (Boggs, J., concurring). He recognized that, "[i]n any sensible meaning" of the term, the burden here was "greater than in *Thomas* [v. *Review Board*, 450 U.S. 707 (1981)] or *Sherbert*," because it meant "many years of education, being required to study books that * * * systematically undervalue, contradict and ignore [the parents' and their children's] religion." *Id.* at 1079. Yet despite the "strong[] economic compulsion" in forcing parents to choose between public schooling and their religious beliefs, Judge Boggs found no free-exercise violation, concluding that, beyond the Establishment Clause, there is "no limitation on [a school's] power to require any curriculum, no matter how offensive or one-sided." *Id.* at 1073.

The Fourth Circuit has now joined these circuits in holding that, absent a "coercive effect" causing "children to *change* their religious beliefs or conduct," App.36a, App.34a, parents have no recourse when their children are forced to participate in classroom instruction against their religious beliefs.

B. The Eighth Circuit holds that forced participation in public school instruction may alone burden religious exercise.

The Eighth Circuit rejects the majority view. In *Florey* v. *Sioux Falls School District 49-5*, the Eighth Circuit addressed Free Exercise Clause and Establishment Clause challenges to a school policy regarding observance of religious holidays. 619 F.2d 1311, 1313 & n.2 (8th Cir. 1980). Under the Establishment Clause, the court ruled that the policy did "not unconstitutionally entangle the * * * school district in religion or religious institutions." *Id.* at 1318. But under the Free Exercise Clause, the court agreed that "forcing any person to participate in an activity that offends his religious or nonreligious beliefs will generally contravene the Free Exercise Clause[.]" *Id.* at 1318-1319 (citing *Yoder*). The court found no violation in that case, however, because the challenged policy "expressly provided that students may be excused from activities authorized by the rules if they so choose." *Id.* at 1319.[11]

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[11] In a due process case, the Third Circuit—referring to the proto-free-exercise "*Meyer-Pierce* rubric"—similarly rejected the

While the Eight Circuit stands alone, it has the advantage of being right. Its approach aligns with the national statutory consensus in favor of religious opt-outs for sexual education. *Supra* at 6-7. It also aligns with how religious burdens have been analyzed in every one of this Court's analogous free-exercise cases. Considering the other circuits' misreading of that precedent, beginning with *Yoder*, and the split's duration and obstinance—not to mention the importance of the underlying issues—the Court should intervene to close the divide.

II. The decision below conflicts with this Court's free-exercise jurisprudence.

The Fourth Circuit's "coercive effect" standard misreads *Yoder*. But it also ignores or misapplies every free-exercise decision by this Court that has followed. The result is a double standard under which religious burdens are more difficult to prove against public schools than against any other government agency. Such selective deference would be problematic anywhere but is especially harmful where it involves the state's ability to interfere with traditional parental authority to direct children and educate them about gender and sexuality.

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conclusion that if a "parent chose to send their children to public school" a parental rights claim must "fail." *C.N.* v. *Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 n.26 (3d Cir. 2005); see also *Tatel* v. *Mt. Lebanon Sch. Dist.*, 637 F. Supp. 3d 295, 302, 335 (W.D. Pa. 2022) (applying *Ridgewood* to allow a free-exercise challenge to transgender instruction where parents lacked "notice and opt out rights"). And in a post-*Yoder*, pre-*Smith* case, the Sixth Circuit originally landed on this side of the split as well. *Spence* v. *Bailey*, 465 F.2d 797 (6th Cir. 1972) (finding free-exercise burden from forced classroom participation).

A. The decision below misreads *Yoder*.

The Fourth Circuit's decision cannot be reconciled with *Yoder*.

This Court has "long recognized the rights of parents to direct 'the religious upbringing' of their children." *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 486 (2020); *id.* at 525 (Breyer, J., dissenting); see also *Employment Div.* v. *Smith*, 494 U.S. 872, 881-882 (1990) ("hybrid situation"). *Wisconsin* v. *Yoder* upheld this "enduring American tradition" against a "relatively recent development" in "compulsory education," where the state was at the "very apex" of its power. 406 U.S. 205, 232, 226, 213 (1972). The Court reasoned that "exposing Amish children to worldly influences" that "substantially interfer[ed] with [their] religious development * * * at the crucial adolescent stage" was a cognizable free-exercise burden. *Id.* at 218. That standard ought to apply even more forcefully with preadolescent children in elementary school.

Instead, the decision below demotes *Yoder* into an Amish one-off. It denigrates *Yoder* as a "limited holding," applying "a narrower principle to a singular set of facts," claiming it is "essentially sui generis." App.38a-39a. But nothing in *Yoder* requires those limits, and by imposing them, the Fourth Circuit creates myriad problems.

First, the decision below violates the traditional "reluctanc[e] to directly force instruction of children 'in opposition to the will of the parent.'" *Yoder*, 406 U.S. at 226 n.14 (quoting Letter from Thomas Jefferson to Joseph Cabell, Sept. 9, 1817, in 17 Writings of Thomas Jefferson 417, 423-424 (Mem. ed. 1904)). For sex education in particular, there is a longstanding national

consensus that instruction should not proceed absent parental permission. *Supra* at 6-7. "Nor is there a basis for deference" to the Board's break from the consensus—especially given that it "historically and routinely allowed" notice and opt-outs. *Ramirez* v. *Collier*, 595 U.S. 411, 429 (2022).

Second, limiting *Yoder* to its "singular set of facts" invites religious discrimination by suggesting that every other free-exercise claim in the public school context must be judged against the "unusual degree of separation from modern life that the Amish religious faith compels." App.38a. See, *e.g.*, *Mozert,* 827 F.2d at 1067 ("dramatic[] * * * difference between *Yoder* and the present case"); *Leebaert*, 332 F.3d at 144 (no "irreconcilable *Yoder*-like clash"). Such comparisons raise "serious concerns about state entanglement with religion and denominational favoritism." *Carson* v. *Makin*, 596 U.S. 767, 787 (2022).

Finally, by reducing *Yoder* to the vanishing point, the decision below inevitably creates conflict with "a fundamental principle of preliminary injunctions: An injunction is of no help if one must wait to suffer injury before the court grants it." *Texas* v. *United States*, 809 F.3d 134, 173 n.137 (5th Cir. 2015). Here, the Fourth Circuit found that, absent a "coercive effect,"—*i.e.*, unless their children are forced "to *change* their religious beliefs or conduct"—parents have no First Amendment remedy. App.36a, App.34a. But if *Yoder* means parents must simply accept the government's efforts to "[d]isrupt" their children's religious development as the price of public education, App.629a, App.633a, then a later injunction won't help, *Nken* v. *Holder*, 556 U.S. 418, 428 (2009) (purpose of preliminary injunction is to "prevent[] some action" *before* its legality can

be "conclusively determined"). It is hard to imagine an injury more irreparable than a child's lost innocence. And with *Yoder* and the Free Exercise Clause sidelined, so are parents trying to exercise their traditional rights to guide their children.

B. The decision below conflicts with free-exercise precedents from *Sherbert* to *Kennedy*.

The *Yoder* error is not the only one. The decision below also conflicts with multiple other of the Court's core free-exercise rulings.

1. Start with *Sherbert*, where the plaintiff Seventh-day Adventist was "discharged" because "she would not work on Saturday." *Sherbert* v. *Verner*, 374 U.S. 398, 399 (1963). The state denied her unemployment benefits, and then argued the denial imposed no burden—because it did not "in any way prevent" her from "observ[ing] her religious beliefs." *Id*. at 401. This Court rejected that argument, holding that although the pressure was "indirect," denying benefits "force[d]" the plaintiff to "choose between following the precepts of her religion and forfeiting benefits" or "abandoning one of the precepts of her religion * * * to accept work." *Id*. at 404. This put "the same kind of burden upon the free exercise of religion as would a fine." *Ibid*.

The *Sherbert* standard was upheld and applied in *Thomas*, which similarly found a free-exercise burden based on "substantial pressure" to "modify * * * behavior" from denying the plaintiff unemployment benefits after he quit his job for religious reasons. *Thomas*, 450 U.S. at 717-718. The same standard was reaffirmed in *Fulton*, which found a free-exercise burden where Philadelphia put Catholic Social Services "to

the choice of curtailing its mission [in foster care] or approving relationships inconsistent with its beliefs." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 532 (2021); see also App.60a-61a (Quattlebaum, J., dissenting) (recounting this Court's 60-year history of protecting religious expression from impermissible "conditions upon a benefit or privilege").

Here, the Board "put the parents in a very similar position," App.61a (Quattlebaum, J., dissenting), but the Fourth Circuit failed to recognize it. Petitioners "face that choice" to "either live out their faith or forego the public benefit." App.66a. It doesn't matter that they can still "observe" other aspects of their faith, *Sherbert*, 374 U.S. at 401, such as "teach[ing] their religious beliefs at home," App.63a. Having been denied notice and opt-outs "they must either forego a public education or violate their deeply held religious beliefs." App.61a.

By using *Yoder* to sidestep *Sherbert*, the Fourth Circuit gave public schools a pass on its "unlawful conditions" standard, see 374 U.S. at 404-406, which would have triggered a finding of religious burden in any other public program.

2. The decision below also conflicts with *Bowen* v. *Roy*, 476 U.S. 693 (1986). There, the plaintiff believed that any use of a social security number for his daughter would "rob" her spirit and "prevent her from attaining greater spiritual power." *Id.* at 696. In the first (and more familiar) holding of *Bowen*, the Court concluded that the Free Exercise Clause did not prevent the government from itself assigning and using a number for the daughter. *Id.* at 699 (Free Exercise Clause does not require government to "conduct its own internal affairs" to "comport with the religious beliefs of

particular citizens"). But whether the daughter could *herself* be compelled to use the number "pose[d] very different constitutional problems." *Id.* at 720 (Stevens, J., concurring in part and in judgment). And "five Members of the Court agree[d]"—to the extent the issue was not moot—that "*Sherbert* and *Thomas* * * * control[led]" that analysis." *Id.* at 731 (O'Connor, J., concurring in part and dissenting in part); see also *id.* at 733 (White, J., dissenting) (similar).

The Fourth Circuit misapplied *Bowen* to hold that "public school curriculum choices" are the Board's "own internal affairs" and thus "outside the scope of the Free Exercise Clause." App.40a. But Petitioners have not challenged the selection or use of any curricula. They ask only to excuse their own children from the classroom when certain books are read and discussed in class. See *Fulton*, 593 U.S. at 542 ("CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else."). *Bowen* confirms that, but for the distortion of *Yoder*, the normal burden standard would have applied. See also *Fulton*, 593 U.S. at 536 ("[The Court] ha[s] never suggested that the government may discriminate against religion when acting in its managerial role.").

3. The Fourth Circuit's ruling also runs afoul of *Espinoza* v. *Montana Department of Revenue*, 591 U.S. 464 (2020), which involved "a program to provide tuition assistance to parents who send their children to private schools." *Id.* at 467-468. The Montana Supreme Court struck down the program under the State Constitution's "no-aid" provision, "which prohibits any

aid to a school controlled by a 'church, sect, or denomination.'" *Id.* at 468. This Court reversed, holding that the program's eligibility requirements—which required a school to "divorce itself from any religious control or affiliation," *id.* at 478—would "'inevitably deter[] or discourage[] the exercise of First Amendment rights,'" *ibid.* (quoting *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 463 (2020) and *Sherbert*, 374 U.S. at 405). The Free Exercise Clause prohibited such "indirect coercion." *Ibid.*

That same pressure to "divorce" themselves from their religious obligations is imposed on Petitioners by the Board's ban on notice and opt-outs. Forced to choose between the public schools and their religious duty not to expose their children to ideological instruction on gender and sexuality, Petitioners are "inevitably * * * discourage[d]" from exercising their First Amendment rights. *Espinoza*, 591 U.S. 464 at 478. But under the Fourth Circuit's decision, "the rights of parents to direct 'the religious upbringing' of their children," including "by sending [them] to religious schools," *id.* at 486, does not extend to those who use the public schools.

4. Finally, the decision below also conflicts with *Kennedy* v. *Bremerton School District*, 597 U.S. 507 (2022). There, the Court held that "a plaintiff may carry the burden of proving a free-exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Id.* at 525. Respondents come nowhere close to meeting this standard.

The Board allowed opt-outs unconditionally—until it didn't. App.184a, App.657a. It said students, including high schoolers, could opt out of sex ed, but that elementary school kids cannot opt out of the storybooks. App.185a, App.657a. That kind of stop-start, wildly uneven policy is a far cry from "generally applicable." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 543-546 (1993). As justification, the Board cited its Religious Diversity Guidelines, which allow schools to "refuse to accommodate" if "requests become too frequent or too burdensome." App.221a. But that "discretion" itself destroys general applicability. *Fulton*, 593 U.S. at 535. Nor could the Board's policy be called neutral when accompanied by accusations of "hate," "white supremac[y]," and "xenophob[ia]." App.103a, App.107a, App.187a, App.514a; *Masterpiece Cakeshop* v. *Colorado C.R. Comm'n*, 584 U.S. 617, 634-636 (2018).

Yet here, because it found no burden under *Yoder*, the Fourth Circuit did not even consider these free-exercise "minimum[s]." *Lukumi*, 508 U.S. at 532. *Kennedy* makes clear that there are "various ways" in which "a plaintiff may carry the burden of proving a free exercise violation." 597 U.S. at 525. But because—for the Fourth Circuit—*Yoder* isn't one of them, neither were lack of neutrality and general applicability. That is wrong.

III. The petition presents a pressing question of nationwide importance.

The decision below upends "the spirit of practical accommodation that has made the United States a Nation of unparalleled pluralism and religious tolerance." *Salazar* v. *Buono*, 559 U.S. 700, 723 (2010)

(Alito, J., concurring in part and concurring in judgment). Some parents exercise their right to "direct 'the religious upbringing' of their children" by "sending their children to religious schools." *Espinoza*, 591 U.S. at 486 (quoting *Yoder*, 406 U.S. at 213-214, 232). But "[m]ost parents, realistically, have no choice but to send their children to a public school." *Morse* v. *Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring).[12] Once there, parents normally have "little ability to influence what occurs in the school." *Morse*, 551 U.S. at 424 (Alito, J., concurring).

It is critically important for these parents—and for the Religion Clauses' "spirit of practical accommodation"—that the Free Exercise Clause continue to apply in the public school context in a way that both ensures parental rights and is consistent with free-exercise jurisprudence elsewhere. By restricting application of the Free Exercise Clause, the court below and others like it have carved out a public-school-shaped hole to the rule that governs how free-exercise burdens are assessed in every other factual context.[13]

But public schools, like any other state or federal agency, are government authorities subject to constitutional constraints. See, *e.g.*, *Sheetz* v. *County of El*

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[12] More than 80% of the nation's students attend traditional public schools. Katherine Schaeffer, *U.S. public, private and charter schools in 5 charts*, Pew Research Center, June 6, 2024, https://perma.cc/64P4-HJ52.

[13] This disparity extends to cases decided under the Due Process Clause, the practical effect of which is that the right of parents there "does not extend beyond the threshold of the school door." *California Parents for the Equalization of Educ. Materials* v. *Torlakson*, 973 F.3d 1010, 1020 (9th Cir. 2020).

Dorado, 601 U.S. 267, 279 (2024) (under *Sherbert*, unconstitutional conditions doctrine prohibits "[f]ailing to give like treatment" to religious exercise). Holding otherwise leaves religious parents—especially those with no access to private education or capacity to homeschool—without constitutional protection.

The Fourth Circuit's deference to public school policymaking is particularly dubious when it comes to instruction on family life and human sexuality. Whether parents should have the primary role on that instruction has nothing to do with a school board's "technical subject matter expertise." *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2267 (2024). Rather it follows from the "'enduring American tradition'" of parental religious control over a child's upbringing. *Espinoza*, 591 U.S. at 486 (quoting *Yoder*, 406 U.S. at 232). Indeed, on no other subject is there such longstanding, nationwide consensus requiring parental consent before schools provide instruction. *Supra* at 6-7 But the Board seeks to subvert that consensus, claiming that education issues "of all stripes trigger deference." *Loper*, 144 S. Ct. at 2267; compare App.643a (Board's counsel stating that "[o]nce professional educators make a decision to include this in the curriculum," federal courts should not be involved). This Court rightfully rejected that approach 80 years ago when it abandoned *Minersville School District* v. *Gobitis*, 310 U.S. 586, 599 (1940), and instead found that the Bill of Rights was *judicially* enforceable, particularly against the orthodoxies of the day, *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943).

This is critical for children in pre-kindergarten through fifth grade—and especially children with spe-

cial needs—who are highly impressionable and instinctively trusting of authority figures like teachers. "The better presumption" is that parents do their "ordinary job"—forming their children on such sensitive issues. *Loper*, 144 S. Ct. at 2267; see also *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.").

Schools will always be concerned about defining their own mission, see Resp. C.A. Br. 37, "promoting cohesion," *Mozert*, 827 F.2d at 1072 (Kennedy, J., concurring), or "[r]unning a public school system of today's magnitude" efficiently, *id.* at 1079 (Boggs, J., concurring). But allowing those concerns to foreclose parental free-exercise claims puts the cart before the horse. Courts should first assess whether there is a religious burden and *then* weigh the government's asserted compelling interests. Reversing that order renders the Free Exercise Clause toothless.[14]

It also reinforces the "dangerous fiction * * * that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities." *Morse*, 551

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[14] The Board's argument about educational mission—that the books at issue are "essential to good citizenship," see Resp. C.A. Br. 37—harks back to disreputable history. This claim originates from a misguided belief that public schools are where governments make true "citizens" from the "[l]arge" and "weak" "masses of foreign population [that] are among us." *Donahoe* v. *Richards*, 38 Me. 379, 413 (1854). This 19th century anti-Catholic bigotry is "hardly * * * a tradition that should inform our understanding of the Free Exercise Clause." *Espinoza*, 591 U.S. at 482.

U.S. at 424 (Alito, J., concurring). Every free-exercise case teaches a contrary lesson: the tendency of some public schools to broadly "define[] their educational missions as including the inculcation of whatever political and social views are held" by school officials, *id.* at 423, ought to be cause for increased, not diminished, scrutiny. See *Fulton*, 593 U.S. at 541 ("the First Amendment demands a more precise analysis").

Furthermore, the enduring disarray over "*which burdens* on religion [a]re thought significant enough to require special justification" likewise requires this Court's attention. Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 Va. L. Rev. 1759, 1769 (2022); see also Michael A. Helfand, *Substantial Burdens as Civil Penalties*, 108 Iowa L. Rev. 2189, 2193 (2023) (noting "doctrinal puzzles * * * over how courts ought to determine what sorts of burdens ought to trigger First Amendment protections"). In this case and others, fumbling the burden question has dramatic consequences for statutory and constitutional guarantees. App.31a (requiring evidence of "coercive effect" or "*change* [in] religious beliefs or conduct"); see, *e.g.*, *Apache Stronghold* v. *United States*, 101 F.4th 1036, 1051-1052 (9th Cir. 2024) (en banc) (finding that total physical destruction of sacred site would cause no cognizable burden), petition for cert. pending, No. 24-___ (filed Sept. 11, 2024).

"The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children." *Yoder*, 406 U.S. at 232. The First Amendment—which "lies at the heart of our pluralistic society," *Bostock* v. *Clayton County*, 590 U.S. 644, 681 (2020)—can hardly play its

critical role if it offers no protection against forced participation in ideological instruction by government schools. Neither parental rights nor the First Amendment should be so lightly dismissed.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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