No. 20-

IN THE

Supreme Court of the United States

CALIFORNIA PARENTS FOR THE EQUALIZATION OF EDUCATIONAL MATERIALS; VISHNUKUMAR THUMATI, individually and as parent and next friend of P.T. and N.T.; and SHAILESH SHILWANT, individually and as parent and next friend of P.S. and P.S.S.,

Petitioners,

v.

TOM TORLAKSON, in his official capacity as State Superintendent of Public Instruction and Director of Education for the California Department of Education, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Free Exercise Clause permits the government to single out a religion for disfavored treatment so long as it does not "substantially burden" religious exercise.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are California Parents for the Equalization of Educational Materials ("CAPEEM"), a nonprofit organization primarily comprising Hindu parents whose children are enrolled in California public schools, and two Hindu parents, Vishnukumar Thumati and Shailesh Shilwant, whose children are enrolled in California public schools.

Pursuant to this Court's Rule 29.6, Petitioner CAPEEM states that it does not have any parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondents are the following California state and local educational administrators involved in curriculum development and approval:

- Tom Torlakson, in his official capacity as State Superintendent of Public Instruction and Director of Education for the California Department of Education;
- Tom Adams, in his official capacity as Deputy Superintendent of the Instruction and Learning Support Branch of the California Department of Education;
- Stephanie Gregson, in her official capacity as Director of the Curriculum Frameworks and Instructional Resources Division of the California Department of Education;
- Michael Kirst, Ilene Straus, Sue Burr, Bruce Holaday, Feliza I. Ortiz-Licon, Patricia Ann Rucker, Nicolasa Sandoval, Ting L. Sun, and Trish Boyd Williams, each in their official capacity as a member of the California State Board of Education;

- Myong Leigh, in his official capacity as Interim Superintendent of the San Francisco Unified School District;

- Shamann Walton, Hydra Mendoza-McDonell, Stevon Cook, Matt Haney, Emily M. Murase, Rachel Norton, and Mark Sanchez, each in their official capacity as a member of the San Francisco Unified School District;

- Rick Schmitt, in his official capacity as Superintendent of the San Ramon Valley Unified School District;

- Mark Jewett, Ken Mintz, Rachel Hurd, Denise Jennison, and Greg Marvel, each in their official capacity as a member of the San Ramon Valley Unified School District Board of Education;

- Wendy Gudalewicz, in her official capacity as Superintendent of the Cupertino Union School District;

- Anjali Kausar, Liang Chao, Kristen Lyn, Soma McCandless, and Phyllis Vogel, each in their official capacity as a member of the Cupertino Union School District Board of Education;

- Cheryl Jordan, in her official capacity as Superintendent of the Milpitas Unified School District; and

- Daniel Bobay, Danny Lau, Chris Norwood, Hon Lien, and Robert Jung, each in their official capacity as a member of the Milpitas Unified School District Board of Education.

Arvind Raghavan, a plaintiff-appellant below, is a nominal respondent before this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners CAPEEM, Vishnukumar Thumati, and Shailesh Shilwant respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a–22a) is reported at 973 F.3d 1010. The relevant orders of the district court (Pet. App. 67a–94a and Pet. App. 23a–66a) are reported at 267 F. Supp. 3d 1218 and 370 F. Supp. 3d 1057.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on September 3, 2020. Pet. App. 2a. Petitioner filed a timely petition for rehearing, which the Ninth Circuit denied on September 23, 2020. *Id.* at 95a–97a. On March 19, 2020, in light of public-health concerns relating to COVID-19, this Court entered an order extending the time to file a petition for a writ of certiorari to 150 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. The Fourteenth Amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." *Id.* amend. XIV, § 1.

Section 1983 of Title 42 of the U.S. Code states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

This case presents the fundamental question of what is the appropriate legal standard to use in deciding whether government action that singles out a religion for disfavored treatment violates the Free Exercise Clause. In the decision below, the Ninth Circuit reaffirmed its settled view that the Free Exercise Clause offers no protection against hostile government action directed at a religious group or belief unless it imposes a "substantial burden" on religious exercise. Pet. App. 10a–11a. That view, which is shared by other courts of appeals, conflicts directly with the legal standard applied by the Third and Sixth Circuits. Review is warranted to resolve this deep and acknowledged conflict among the federal courts of appeals on an issue of surpassing national importance.

In this case, the Ninth Circuit affirmed the dismissal of Petitioners' Free Exercise claim alleging that California's public school curriculum requirements and policies had singled out the Hindu faith for a hostile and derogatory portrayal. Pet. App. 3a–4a. Unlike the government's depiction of the origin and beliefs of other religions, which are described in a favorable (or at least neutral) manner, California fundamentally disparages Hinduism, describing it as a negative social

construct built on a "caste" system imposed from without by Aryan invaders, rather than as a divinely inspired religion. That negative depiction of Hinduism is taught to the children of Petitioners and their members, and those children are expected to repeat the negative portrayals of their Hindu faith in class and on tests. ER2681–84.[1] The sole basis for the Ninth Circuit's rejection of this claim was that California's conduct did not impose a "substantial burden" on their religious exercise. Pet. App. 10a–11a.

The Ninth Circuit's decision implicates a deep and longstanding conflict among the courts of appeals. Decisions of other federal circuits have aligned with the Ninth Circuit in imposing a "substantial burden" requirement for Free Exercise claims. See *infra* at 18–20. At the same time, the Third Circuit and the Sixth Circuit have expressly rejected the other courts' "substantial burden" analysis. See *infra* at 16–18. In doing so, they have explained that the "substantial burden" standard embraced by the Ninth Circuit would improperly immunize petty harassment of religious minorities from any First Amendment scrutiny. See *infra* at 17.

This case provides an excellent vehicle for resolving this conflict because the decision below was predicated on the Ninth Circuit's standard for stating a claim under the Free Exercise Clause. Here, the Ninth Circuit expressly rejected the Free Exercise claim for the sole reason that it concluded that the harm alleged by Petitioners had not sufficiently burdened Petitioners' free exercise of religion. If the case were instead governed by the standard applied to government conduct

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[1] "ER" citations refer to the Appellants' Excerpts of Record, *CAPEEM* v. *Torlakson*, No. 19-15607 (9th Cir. Aug. 8, 2019), ECF No. 11.

singling out a particular religion that controls in the Third and Sixth Circuits, then Petitioners' claim would have moved forward into discovery and ultimately to an assessment of whether the treatment of the Hindu faith by California satisfies strict scrutiny.

What is more, the application of the "substantial burden" requirement to a claim the government is *targeting* religion cannot be reconciled with this Court's decisions. Indeed, the Court has repeatedly affirmed that government action targeting religion violates the Free Exercise Clause unless the government can survive strict scrutiny. See, *e.g.*, *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546, (1993). More recently, in *Trinity Lutheran*, this Court expressly rejected the argument that discriminatory state action violates the Free Exercise Clause only when it "*meaningfully* burden[s]" religious exercise. See *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2022 (2017) (emphasis added). To the contrary, when it comes to "express discrimination against religious exercise," *id.*, the First Amendment prohibits "indirect coercion," *id.* (quoting *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)); see also *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("The Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion."). Put simply, when a plaintiff alleges the government is singling out a religion for disfavored treatment, there is no "substantial burden" requirement to state a claim under the Free Exercise Clause.

The petition for certiorari should be granted.

A. Factual Background

The California State Board of Education (the "State Board") develops the State's official policies concerning

curriculum content and standardized requirements for local school districts. Pet. App. 4a. Local school districts must adhere to the dictates of these materials, known as the History-Social Science Content Standards (the "Standards") and the History-Social Science Framework (the "Framework"), in designing course materials. See Cal. Educ. Code § 60119 (requiring curricular alignment with Standards and Framework as a condition of eligibility for state funds); *id.* § 60200(c)(4) (generally requiring that state-approved instructional materials be "aligned to the content standards adopted by the state board"). These documents are State policy documents that control the content of the curricula.

The Standards are outlines of the topics and content California public school students must be taught at each grade level. Cal. Educ. Code § 60603(i); Pet. App. 25a. The Standards at issue here were adopted in 1998 and cover the history and social science content covered during sixth and seventh grade. As relevant here, the Standards (i) outline the origins of the world's major religions, including Judaism, Hinduism, Buddhism, Christianity, and Islam, and (ii) require that students learn the basic tenets and beliefs of each of these faiths. Pet. App. 100a–117a. The Standards purport to identify what the government contends are the most salient and fundamental aspects of any religion. For instance, concerning Christianity, the Standards require that students learn "the origins of Christianity in the Jewish Messianic prophecies, the life and teachings of Jesus of Nazareth as described in the New Testament, and the contribution of St. Paul the Apostle to the definition and spread of Christian beliefs (e.g., belief in the Trinity, resurrection, salvation)." *Id.* at 106a.

The Standards "do not exist in isolation" and are meant to be read together with the Framework, which is "the blueprint for implementing the standards." S. Comm. on Educ., Analysis of S.B. 1540, 2011-12 Reg. Sess., at 1 (Cal. 2012); ER1448. Whereas the Standards are more general, the Framework elaborates on the items listed in the Standards to provide detailed guidance for what school districts must teach. See Cal. Educ. Code § 60010. For instance, while the Standards contain a single bullet point on Christianity, the Framework includes almost a page of text, which provides details regarding what California has decided that public school students must learn about that religion: "students will learn about those teachings of Jesus that advocate compassion, justice, and love for others. He taught that God loved all his creation, regardless of status or circumstance, and that humans should reflect that love in relations with one another." Pet. App. 124a–125a. California adopted the current version of the Framework in 2016 after public comment and feedback. *Id.* at 28a–30a.

Because California law requires local school district curricula to align with the Standards and the Framework in order to receive funding, not surprisingly, textbooks and lesson plans closely follow the Standards and the Framework. See, *e.g.*, ER146. Accordingly, students must learn the material outlined in the Standards and Framework. See ER146; ER1202.

B. Petitioners' Challenge to the Standards and Framework

Petitioners are individual parents of Hindu children in California public schools and CAPEEM, an organization devoted to promoting an accurate portrayal of the Hindu religion in California public schools. Pet. App. 67a. In 2017, Petitioners sued officials at the California Department of Education and members of the

State Board, along with several California school districts, alleging that the 1998 Standards and 2016 Framework discriminated against Hinduism by singling out and negatively portraying the Hindu faith, thereby requiring students to be tested based on a distorted depiction of Hinduism in graded assignments. *Id.* at 67a–70a.

As to the Standards, Petitioners explained that their depiction of the origins, beliefs, and scriptures of Hinduism was hostile, derogatory, and dismissive.

To begin with, the Standards require students to "Discuss the significance of the Aryan invasions." Pet. App. 104a. As Petitioners explained in their Complaint, the "Aryan Invasion Theory" regarding the origins of Hindu religion and culture is a racist, colonialist, and erroneous theory that perpetuates the idea that fair-skinned and putatively superior "Aryan" peoples invaded India and were responsible for creating the Hindu faith. ER2675; ER635–36. The State Board was well aware of these pejorative connotations when it approved this language. See ER865.

The Standards compound this negative portrayal by requiring that students be able to "[e]xplain the major beliefs and practices of Brahmanism in India and how they evolved into early Hinduism." Pet. App. 104a. The term "Brahmanism" is offensive to Hindus and historically has been used in a derogatory manner. ER2661. The term identifies Hinduism as the religion of Aryan priests of the Brahmin caste. *Id.* In other words, the Standards portray Hinduism as developing from "Brahmanism," and tie its development to the Aryan Invasion Theory. Then, underscoring the supposed relationship between the development of Hinduism from "Brahmanism" and the caste system, the Standards require that students be able to "[o]utline the social structure of the caste system." Pet. App. 104a. Thus,

the Standards link the caste system directly to the development of Hinduism.

In addition to challenging these negative portrayals of Hinduism, Petitioners also highlighted that the Standards further discriminated against Hinduism by omission. That is, for other religions, the Standards generally identify and highlight a religion's sacred scriptures and core beliefs. See *supra* at 5 (describing Christianity's values). The Standards for Judaism, for instance, require students to learn that (i) Judaism was "the first monotheistic religion based on the concept of one God who sets down moral laws for humanity"; (ii) "the Hebrew Bible" and "the Commentaries" are "the sources of the ethical teachings and central beliefs of Judaism"; and (iii) Judaism's "belief in God, observance of law, practice of the concepts of righteousness and justice, and importance of study . . . are reflected in the moral and ethical traditions of Western civilization." Pet. App. 102a. Likewise, the Standards for Islam require students to (i) "[t]race the origins of Islam and the life and teachings of Muhammad" and (ii) "[e]xplain the significance of the Qur'an and the Sunnah as the primary sources of Islamic beliefs, practice, and law." *Id.* at 108a–109a.

By contrast, the Standards identify no central tenets of Hinduism apart from its purported derivation from "Brahmanism" and its relationship to the caste system. Pet. App. 104a–105a. The only reference to Hindu sacred scripture is a later bullet point that refers to the *Bhagavad Gita*, which Hindus believe to be divinely inspired scripture, but is classed as merely an example of "Sanskrit literature." *Id.* at 105a. Put bluntly, in contrast to Christianity, Judaism, and Islam, the Standards treat Hinduism not as a religion, but as a singularly negative "social structure." *Id.* at 104a–105a.

Petitioners challenged the Framework, which must be read alongside and in light of the Standards, for similar reasons. The Framework repeats and highlights aspects of the negative treatment of Hinduism set forth in the Standards. For example, though not using the phrase "Aryan invasion," as in the Standards, the Framework introduces Hindu culture with a description of "Indic speakers"—a synonym for Aryans—entering India. Pet. App. 120a–121a. The Framework asserts that from these Indic speakers a "Vedic culture emerged as a belief system," which eventually became Hinduism, *id.* at 121a, but this flatly contradicts Hindu doctrine identifying the divine origins of its followers' faith. The Framework goes on to describe the origin of Hinduism as involving "*Brahmins*, that is priestly families," who "assumed authority over complex devotional rituals," thereby relying on the offensive, caste-focused, and colonialist description of the Hindu faith in the Standards. *Id.* Finally, the Framework mandates that "[t]eachers should make clear to students" that the caste system was not just "a social and cultural structure" but also "a religious belief," *id.* at 123a, which makes plain the Standards' disparaging suggestion that Hinduism and caste are inextricably linked.

Petitioners also highlighted that the Framework's treatment of Hinduism was markedly different from its treatment of other religions, whose origins and beliefs were treated in a favorable or, at the very least, a neutral manner. In fact, where earlier drafts of the Framework could have been viewed as negatively characterizing other religious faiths, the State Board sustained objections to and amended the document to omit these negative portrayals. Thus, when a Jewish organization objected to the Framework's reference to the New Testament's Parable of the Good Samaritan

because it purportedly "demean[s]" Judaism, reference to that parable was removed. ER2669–71. Or, when groups objected to the Framework's statement that sometimes "Muslim leaders forced Hindus to convert," the statement was deleted. ER2673.

During the public comment and revision process leading up to the adoption of the 2016 Framework, Petitioners and other Hindu groups identified the draft Framework's problematic characterization of Hinduism, which exacerbated the Standards' defects. For example, the first Hindu American Member of Congress, Tulsi Gabbard, wrote to the State Board, requesting that it refrain from identifying the caste system "as a defining feature or a foundational religious belief of Hinduism," and explained that this "goes against the essence of Hindu teachings and scriptures, which posit that divinity is inherent in all beings." ER836–37. But all such requests were rejected. To the contrary, as Petitioners explained in their Complaint, the State Board adopted edits that *highlighted* the connection between Hinduism and the caste system, relying heavily "upon anti-Hindu reports and recommendations submitted by several professors under the name 'South Asia Faculty Group'" or "SAFG." ER2663–64.

Petitioners' lawsuit also detailed how the challenged Standards and the Framework harmed Hindu parents and their children. Because California law requires alignment between the curricula taught at school and the Standards and Framework, Hindu students are forced to learn and expected to repeat on tests and assignments the state-sponsored, pejorative description of their religion. ER2682. As a result, Hindu students "suffer psychological harm, including humiliation and alienation" and are led to "feel Hinduism is inferior." ER2681–83.

Given the corrosive influence of this negative depiction of Hinduism, Hindu parents faced the choice of allowing their children to suffer these harms or pulling their children out of school and paying private school tuition; some made the latter choice. ER2681. Those who could not remove their children from public school were compelled to take remedial steps at home, trying to dispel the discriminatory characterization of Hinduism mandated as part of California's curriculum. ER2681–82.

Armed with these facts, Petitioners challenged the Standards and Framework in the District Court for the Northern District of California, alleging violations of the Fourteenth Amendment's Equal Protection and Due Process Clauses and the First Amendment's Establishment and Free Exercise Clauses.

C. The Proceedings Below

1. Shortly after Petitioners filed their lawsuit in February 2017, Respondents moved to dismiss. In July 2017, the district court dismissed all of Petitioners' claims except for an Establishment Clause claim.

Regarding Petitioners' Free Exercise claim, the district court held that the Complaint failed to state a claim because it did not allege a "substantial burden" on any religious practice. Pet. App. 75a–77a. The court explained that the "Ninth Circuit has explicitly rejected the argument that after *Smith*, plaintiffs are not required to demonstrate a substantial burden on their exercise of religion." *Id.* at 75a (citing *Am. Family Ass'n, Inc.* v. *City & Cty. of San Francisco*, 277 F.3d 1114, 1123–24 (9th Cir. 2002)). Petitioners had failed adequately to allege a substantial burden, the district court asserted, because there were no "allegations that student Plaintiffs are prevented from practicing their faith, or that parent Plaintiffs are in any way barred

from instructing their children on religion at home." *Id.* at 76a. Petitioners' allegations regarding the corrosive effect on their children's beliefs and other injuries were insufficient, therefore, because "an 'actual burden on the profession or exercise of religion is required'" to demonstrate a "substantial burden." *Id.* at 77a.

2. Following the district court's order, the parties began discovery regarding Petitioners' Establishment Clause claim. While that discovery was ongoing, Petitioners sought to file an amended complaint adding allegations, based in part on evidence obtained in discovery, to bolster and thereby reassert their dismissed Free Exercise claim.

In particular, the amended complaint included evidence that members of the California Department of Education had coordinated with and expressly arranged for input from the anti-Hindu SAFG. ER315. Emails from members of the SAFG explicitly identify their "task" as preventing "recommendations" by Hindu groups like CAPEEM from "having any traction." ER318. They likewise identify the process as a "smoke and mirrors situation," *id.*; they repeatedly mischaracterize CAPEEM and similar groups as "Hindu nationalist organizations," ER316; they debate whether or how to push the idea that Petitioners' Hindu faith is "invented[]," ER321; and they assert that "Hindus and Hinduism have appropriated the Vedas, Upanishads, and the [Bhagavad] Gita," ER322. Indeed, it was the SAFG that caused the State to change the Framework to identify the caste system as a matter of Hindu *belief*. *Id.* What is more, when the 2016 Framework was released, two members of the SAFG were revealed to be co-authors of the Frame-

work itself, underscoring that the SAFG's recommendations were not run-of-the-mill public comments. ER1522–23.

Petitioners also identified new evidence regarding textbooks and other curricula implementing the Standards and Framework, which expressly taught "the Aryan Invasions" and "caste system" were "central to Hinduism, and Brahmanism." Discovery even revealed an in-class activity where students were forced to role-play the caste system. ER1399; ER1415–17. Lastly, Petitioners included allegations highlighting the harm suffered by Hindu children, ER1427–29, and pointing to this Court's recent decisions, such as *Trinity Lutheran* and *Masterpiece Cakeshop*, which confirm that a "substantial burden" on religious practice is not necessary to support a Free Exercise claim alleging the government targeted a religion, ER1436. The district court denied Petitioners' motion to file an amended complaint. ER1105. The court dismissed reliance on *Trinity Lutheran* and *Masterpiece Cakeshop*, and their new factual allegations, concluding that Petitioners' "amendment would be futile." *Id.*

3. Petitioners timely appealed to the Ninth Circuit, challenging, *inter alia*, the district court's dismissal of their Free Exercise claim and denial of their motion to amend. The Ninth Circuit affirmed.

The court of appeals held that Petitioners "had failed to allege a plausible Free Exercise claim, because" binding precedent required Petitioners "to allege a substantial burden on their religious practice or exercise." Pet. App. 10a. The court of appeals also rejected Petitioners' argument that decisions like *Trinity Lutheran*, *Masterpiece Cakeshop*, and *Espinoza* v. *Montana Department of Revenue*, 140 S. Ct. 2246 (2020), obviated the need to prove a "substantial burden."

Limiting these decisions to their facts, the Ninth Circuit asserted that Petitioners' "allegations suggest at most that portions of the Standards and Framework contain material [they] find offensive to their religious beliefs" and that this was insufficient to show a cognizable burden on Free Exercise. Pet. App. 17a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition because the decision below directly implicates a mature conflict among the courts of appeals on a significant and recurring issue of national importance involving the fundamental right of freedom of religion.

First, the courts of appeals are deeply divided on whether plaintiffs alleging a Free Exercise claim must show that government action singling out and disparaging a specific religious faith also imposes a "substantial burden" on their religious exercise. The decision below reaffirms the Ninth Circuit's preexisting rule requiring such a showing. And multiple other courts have followed suit in adopting a "substantial burden" framework to claims challenging religious discrimination. At the same time, the Third Circuit and the Sixth Circuit have rejected the "substantial burden" requirement, explaining that it is contrary to this Court's decisions and would sanction the petty harassment of religious minorities. Because the Ninth Circuit rested its dismissal of Petitioners' Free Exercise claim on their failure to allege a "substantial burden," this case presents an ideal vehicle to resolve this conflict among the lower courts.

Second, this Court should grant the petition because this issue of First Amendment law is recurring and profound. Indeed, whether a court imposes a "substantial burden" requirement will determine whether a wide array of government action targeting religion

may survive constitutional scrutiny. This is doubly significant because the "substantial burden" requirement will prevent potentially meritorious claims from making it to discovery, which could (and did in this case) reveal evidence of overt governmental hostility toward religion that this Court has found critical when analyzing claims under the Free Exercise Clause.

Finally, this Court should grant the petition because the Ninth Circuit's decision conflicts with this Court's decisions. Indeed, the "substantial burden" requirement cannot be reconciled with the holdings of *Lukumi* and, most recently, *Trinity Lutheran*. As those decisions make plain, government action singling out and discriminating against religious minorities is not permissible merely because the burden it imposes fails to meet a court-imposed threshold of "substantiality."

I. THE DECISION BELOW IMPLICATES A MATURE CONFLICT AMONG THE COURTS OF APPEALS OVER WHETHER A FREE EXERCISE CLAIM REQUIRES THAT RELIGIOUS DISCRIMINATION "SUBSTANTIALLY BURDENS" RELIGIOUS EXERCISE.

A. There Is An Acknowledged Conflict Among The Courts Of Appeals Regarding Whether A Free Exercise Claim Requires That Religious Discrimination "Substantially Burdens" Religious Practice.

Review by the Court is warranted because the federal courts of appeals are intractably divided over whether plaintiffs alleging a claim under the Free Exercise Clause must allege that non-neutral and hostile government action imposes a "substantial burden" on the exercise or practice of their religion.

Prior to its decision in *Smith*, this Court applied a balancing test whereby "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Emp't Div.* v. *Smith*, 494 U.S. 872, 883 (1990) (citing *Sherbert* v. *Verner*, 374 U.S. 398, 402–03 (1963)). But *Smith* "largely repudiated the method of analysis" set out in prior decisions like *Sherbert*. See *Holt* v. *Hobbs*, 135 S. Ct. 853, 859 (2015). Instead, *Smith* imposed a bright line rule: "[N]eutral, generally applicable" government action does not violate the Free Exercise Clause, even if that action burdens, substantially burdens, or, indeed, prevents, a religious practice. *Smith*, 494 U.S. at 882–90. When government action is not neutral, however, and it singles out a religion for disfavored treatment, such action violates the Free Exercise Clause unless it can "survive strict scrutiny." *Lukumi*, 508 U.S. at 546.

Following *Smith*, the courts of appeals have issued conflicting decisions on whether plaintiffs asserting Free Exercise claims must, as a threshold matter, allege that non-neutral government action imposes a "substantial burden" on their religious practice.

1. Drawing on *Smith* and *Lukumi*, the Third Circuit has rejected the argument that Free Exercise claims require a showing that government action "would substantially burden their religious practice." *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002). Instead, where the government discriminates against religion, "plaintiffs need to show only 'a sufficient interest in the case to meet the normal requirement of constitutional standing.'" *Id.*

The Third Circuit's position dates from 1994, shortly after *Smith* and *Lukumi*. See *Brown* v. *Borough of Mahaffey*, 35 F.3d 846, 849 (3d Cir. 1994). In *Brown*, a

Pentecostal minister and his non-profit ministry sued a municipal borough and its council members for intentionally—though only slightly—impeding access to his tent revival meetings; council members had locked a gate, which forced attendees to walk an additional 100 to 200 feet to reach the tent. *Id.* at 848. The district court rejected the Free Exercise claim on the ground that there was no evidence the defendants' actions imposed a "substantial burden" on plaintiffs' exercise. *Id.* at 847. The Third Circuit agreed that the plaintiffs would "fail" a "substantial burden" test, but nevertheless reversed the district court. *Id.* at 850. The Third Circuit explained that the pre-*Smith* "substantial burden" requirement was intended "to balance the tension between religious rights and valid government goals advanced by 'neutral and generally applicable laws' which create an incidental burden on religious exercise." *Id.* at 849. But, for government action singling out and discriminating against a religion, the Third Circuit explained that a "substantial burden" requirement was improper because it "would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment." *Id.* at 849–50.

The Sixth Circuit likewise has rejected a "substantial burden" requirement for Free Exercise claims. See *Hartmann* v. *Stone*, 68 F.3d 973, 979 nn.3–4 (6th Cir. 1995). In *Hartmann*, the Sixth Circuit explained that the "substantial burden" framework was "designed to judge those situations in which a neutral and generally applicable regulation imposes an indirect, albeit substantial, burden on the practice of religion." *Id.* at 979 n.3. Because the regulation in *Hartmann*—a military rule restricting provision of faith-based childcare—targeted religion, it was not neutral, and the plaintiffs, including parents who wished their child to

receive such childcare, needed only to "demonstrate a sufficient interest in the case to meet the normal requirement of constitutional standing." *Id.* at 979 n.4; see also *Draper* v. *Logan Cty. Pub. Library*, 403 F. Supp. 2d 608, 621 n.9 (W.D. Ky. 2005) (affirming that Free Exercise plaintiffs challenging non-neutral government action need not prove a "substantial burden").[2]

2. In stark contrast, the Ninth Circuit, in a series of decisions, has held that plaintiffs asserting Free Exercise claims must, even where they allege government discrimination against their religion or religious practice, establish that the government action imposed a "substantial burden."

In *Vernon* v. *City of Los Angeles*, the court analyzed a police chief's claim that an investigation into his religious views infringed on his Free Exercise rights by restricting his ability (i) to worship, (ii) to consult with his pastor, and (iii) to give public testimony regarding his faith. 27 F.3d 1385, 1394 (9th Cir. 1994). The district court rejected Vernon's claim for failure to establish that "his right freely to exercise his religion was substantially burdened by the government's action," *id.* at 1393, and the Ninth Circuit affirmed on this ground, *id.* at 1393–94. Specifically, the Ninth Circuit held that, to the extent the "chilling effects" Vernon alleged were cognizable burdens, "such burdens cannot

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[2] The Second Circuit appears largely in alignment with the Sixth and Third Circuits on this issue. The Second Circuit applies "substantial burden" analysis only when the government action is "neutral on [its] face" and "there is no indication that a restriction of a plaintiff's religious activities was the . . . actual objective." *Altman* v. *Bedford Cent. Sch. Dist.*, 245 F.3d 49, 79 (2d Cir. 2001).

be said to be 'substantial.'" *Id.* at 1395. The Ninth Circuit held that the failure to show a substantial burden doomed Vernon's Free Exercise claim. *Id.*

Likewise, in *American Family Association, Inc.* v. *City of San Francisco*, religious groups brought Free Exercise claims following the issuance by San Francisco of two public resolutions targeting and condemning the groups' advertising espousing certain of their religious views. 277 F.3d at 1118–20. Rejecting the plaintiffs' contention that they were not required to demonstrate a "substantial burden," the Ninth Circuit explained that it would continue to apply *Sherbert*'s "substantial burden" requirement whenever the challenged government action was not "an actual regulation or criminal law." *Id.* at 1123–24 (citing *Vernon*, 27 F.3d at 1393). As in *Vernon*, the court concluded that the "chilling effect" resulting from the city's resolutions "is not sufficient to constitute a substantial burden." *Id.* at 1124.

Finally, in the decision below, the Ninth Circuit recognized and adhered to circuit precedent by affirming the district court's determination that Ninth Circuit precedent required allegations of "a substantial burden on [Petitioners'] religious practice or exercise." Pet. App. 10a–11a (citing *American Family*, 277 F.3d at 1123–24).

3. In addition to the Ninth Circuit, post-*Smith* decisions in at least four other circuits have applied a "substantial burden" test to reject Free Exercise claims.

In *Strout* v. *Albanese*, the First Circuit applied a "substantial burden" test to reject a claim that a government program that excluded religious schools from participation in a program to subsidize schooling violated the Free Exercise Clause. 178 F.3d 57, 65 (1st

Cir. 1999). The court explained that the restriction did not place a "substantial burden" on religious belief or practice. *Id.* Likewise, in *Goodall ex rel. Goodall* v. *Stafford County School Board*, the Fourth Circuit ruled that even if the challenged policy—which required the plaintiffs to pay for their son's speech transliterator if he attended a religious school but not if he attended public school—were not "generally applicable," it did not violate the Free Exercise Clause because no "substantial burden ha[d] been placed upon [the plaintiffs]." 60 F.3d 168, 173 (4th Cir. 1995). To the same effect is *Fleischfresser* v. *Directors of School District 200*, in which the Seventh Circuit held that parents could not sustain a Free Exercise claim based on school curriculum contrary to their religious beliefs because "their religion is not substantially burdened." 15 F.3d 680, 690 (7th Cir. 1994). Finally, in *Branch Ministries* v. *Rossotti*, the D.C. Circuit rejected a church's claim that the revocation of its tax-exempt status violated the First Amendment "[b]ecause the Church has failed to demonstrate that its free exercise rights have been substantially burdened." 211 F.3d 137, 142, 144 (D.C. Cir. 2000).

In sum, the Ninth Circuit, and at least four other circuits, impose a "substantial burden" requirement in order to state a claim challenging government targeting of religion under the Free Exercise Clause.

4. The federal courts of appeals have acknowledged this conflict. Decisions by the Third and Ninth Circuits have recognized their clear disagreement regarding the applicability of the "substantial burden" framework. In *Tenafly*, the Third Circuit specifically cited the Ninth Circuit's decision in *American Family* as a decision which "persist[s] in imposing a *substantial burden* requirement." See 309 F.3d at 170 n.31 (emphasis added). Similarly, in a dissenting opinion in

KDM ex rel. WJM v. *Reedsport School District*, Judge Andrew Kleinfeld noted the Ninth Circuit's disagreement with the Third Circuit's decision in *Brown* and the Sixth Circuit's decision in *Hartmann*. 196 F.3d 1046, 1054 (9th Cir. 1999) (Kleinfeld, J., dissenting).[3] Judge Kleinfeld criticized the Ninth Circuit panel's majority decision upholding Oregon's requirement that special education services be provided only in religiously neutral settings and explained that, under Ninth Circuit law, "the government may discriminate against people based on their exercise of religion, so long as the discriminatory burdens it imposes are not more *substantial* than requiring a blind child with cerebral palsy to leave his school building and go down the street to a fire hall" to receive special education. *Id.* at 1052 (emphasis added).[4]

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[3] The majority in *KDM* spoke in terms of an "impermissible burden" rather than a "substantial burden." *Id.* at 1051 (majority opinion) ("We conclude that Oregon's regulation as applied to KDM and his parents does not impose an impermissible burden on their free exercise of religion."). Regardless, as the dissent recognized, the majority was essentially applying a "substantial burden" analysis. *Id.* at 1052–55 (Kleinfeld, J., dissenting).

[4] Judge Kleinfeld also concluded, *id.* at 1054, that the Ninth Circuit's approach was in conflict with the Eighth Circuit's decision in *Peter* v. *Wedl*, where the Eighth Circuit held that a Minnesota regulation barring special education services in private religious schools would violate the Free Exercise Clause. 155 F.3d 992, 996–97 (8th Cir. 1998) ("Government discrimination based on religion violates the Free Exercise Clause of the First Amendment . . . ."). Candidly, it is difficult to determine the Eighth Circuit's position on this circuit split because, in other contexts, it has applied a "substantial burden" analysis to non-neutral government conduct. *E.g.*, *Brown* v. *Polk County*, 61 F.3d 650, 655–56 (8th Cir. 1995) (en banc) (rejecting Free Exercise claim where government action was not "a 'substantial[ ] burden' upon [the plaintiff's] religious practices" (alteration in original)).

B. This Case Provides An Ideal Vehicle To Resolve The Conflict.

This case squarely implicates the conflict over the applicability of a "substantial burden" analysis to non-neutral government action. Both the district court and the Ninth Circuit expressly rested their rejection of Petitioners' Free Exercise claim on the failure to allege a "substantial burden" as required by *American Family* and *Vernon*. Pet. App. 10a–11a, 15a–17a ("Pleading such a burden is required by our decisions in *American Family* . . . and *Vernon* . . . .").

Had the Ninth Circuit instead embraced the approach taken by the Third and Sixth Circuits, it would have been obligated to reinstate Petitioners' Free Exercise claim. As noted above, when the government discriminates against a religion, the Third and Sixth Circuits require only that plaintiffs allege "a sufficient interest in the case to meet the normal requirement of constitutional standing.'" *Tenafly*, 309 F.3d at 170 (quoting *Hartmann*, 68 F.3d at 979 n.4). Petitioners plainly meet that standard in light of the injuries alleged in both their initial and amended complaints.

Because Petitioners' allegations "meet the normal requirement of constitutional standing," if their claims were brought in the Third or Sixth Circuits, they would not have been rejected because the burden on their religious exercise was not deemed "substantial." Rather, as Petitioners explained in the district court, the hostility to Hinduism in the Standards and Framework should trigger strict scrutiny, which would require the government to show (i) "a compelling interest" justifying its pejorative treatment of Hinduism and (ii) that the treatment of Hinduism was "narrowly tailored to meet that interest." *Hartmann*, 68 F.3d at 979; *Tenafly*, 309 F.3d at 172–78.

This case squarely presents the circuit conflict because the decision below dismissed Petitioners' Free Exercise claim on the ground that the harm alleged by Petitioners did not adequately burden their exercise or practice of religion.

C. The Conflict Concerns An Important And Recurring Issue Of Federal Law.

As shown in Part I.A., ascertaining the standard for stating a Free Exercise claim alleging non-neutral government conduct is a recurring issue—one that trial courts and the courts of appeals have faced and will face again across the country. It is also a question with significant ramifications for the relationship between state action and the rights of religious minorities.

Under the Ninth Circuit's "substantial burden" approach, the government may discriminate against religious minorities so long as it does so in ways that do not "substantially" disrupt religious exercise or practice. Or, as the Third Circuit has put it, the Ninth Circuit's approach "make[s] petty harassment of religious institutions and exercise immune from the protection of the First Amendment." *Brown*, 35 F.3d at 849–50. Thus, how a court decides the question presented here will determine whether a wide array of government action targeting religion can survive constitutional scrutiny.

The correct legal standard is particularly significant because a "substantial burden" requirement applicable to a party's allegations would prevent many plaintiffs with potentially meritorious claims from making it to discovery—discovery which could well uncover the sort of evidence of religious animus that this Court has found significant in many post-*Smith* Free Exercise decisions. See *Lukumi*, 508 U.S. at 540–42 (relying on statements by city counselors reflecting animus

against Santeria); see also *Espinoza*, 140 S. Ct. at 2267–68 (Alito, J., concurring) (citing evidence of anti-Catholic motivation as supporting Free Exercise challenge to state exclusion of religiously affiliated schools from scholarship program).

Indeed, this is just such a case. Limited discovery in the trial court revealed animus-laden statements against Hindus by members of the SAFG, and underscored that group's quasi-governmental role in the Framework amendment process. See ER315–22 (the group, including two Framework co-authors, were asked by members of the California Department of Education to submit comments). In *Masterpiece Cakeshop*, this Court found analogous "expressions of hostility to religion" dispositive of the Free Exercise claim. See 138 S. Ct. at 1732.

For this reason, the "substantial burden" question presented here is critically important because it implicates and, in a practical sense, may control whether the Free Exercise Clause will constrain government action that discriminates against religious minorities.

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S "SUBSTANTIAL BURDEN" REQUIREMENT CONFLICTS WITH THIS COURT'S PRECEDENT.

In its Free Exercise decisions since *Smith*, the Court has never suggested that the Free Exercise Clause requires a showing of a "substantial burden" to challenge government action targeting religion. To the contrary, this Court's decisions prohibit such a limitation on First Amendment rights.

First, the Ninth Circuit's "substantial burden" requirement conflicts with the holding in *Lukumi*. There, this Court held that government action "target-

ing religious beliefs as such is *never* permissible," unless it can survive strict scrutiny. 508 U.S. at 533 (emphasis added). But, under the Ninth Circuit's rule, such government action is permissible, so long as it does not impose a "substantial burden" on the exercise or practice of religion. Thus, as Judge Kleinfeld's dissent in *KDM* recognized, the Ninth Circuit's rule is directly contrary to *Lukumi*. 196 F.3d at 1054–55 (Kleinfeld, J., dissenting); *id.* at 1056 ("[T]here is . . . no such thing as a *de minimis* exception to the Free Exercise Clause.").

Second, the "substantial burden" requirement cannot be reconciled with the holding in *Trinity Lutheran*. There, the State argued that preventing a Church from accessing a grant to purchase rubber playground surfaces could not violate the Free Exercise Clause because it did "not *meaningfully* burden the Church's free exercise rights." 137 S. Ct. at 2022 (emphasis added). This Court rejected that argument because when it comes to "express discrimination against religious exercise," the First Amendment prohibits even "indirect coercion." *Id.*

Here, the Ninth Circuit sought to reconcile its "substantial burden" test with *Trinity Lutheran*'s holding by essentially limiting that holding's applicability to "state program[s] that provide[] financial or other similar benefits" from which a religious entity is excluded. Pet. App. 15a–16a. Such exclusions, the Ninth Circuit held, "amount[] to a financial penalty," which the Free Exercise Clause prohibits. *Id.* But that misses the point of this Court's analysis. In *Trinity Lutheran*, it did not matter that the actual coercive effect of the "penalty"—*i.e.*, the Church's inability to resurface its playground—was likely negligible; instead, *Trinity Lutheran* holds that discrimination against religion re-

sults in "indirect coercion" against that religion's adherents and must be justified by a compelling interest and narrowly tailored to serve that interest. See 137 S. Ct. at 2022.

The Ninth Circuit's "substantial burden" requirement conflicts directly with *Trinity Lutheran*. There is no doubt that requiring Hindu students to "learn" and be tested on the State's disparaging depictions of their Hindu faith will result in more severe "indirect coercion" than a church's failure to obtain a new playground surface. Thus, the Ninth Circuit's suggestion that the impact of the depiction of Hinduism in the Standards and Framework was insubstantial cannot be reconciled with *Trinity Lutheran*.

Here, as in *Trinity Lutheran* and *Lukumi*, the state action targets Petitioners' Hindu faith. And, as in *Masterpiece Cakeshop*, the State has "sen[t] a signal of official disapproval of [Petitioners'] religious beliefs," 138 S. Ct. at 1731, and mandated that Petitioners' own children be indoctrinated with a derogatory and erroneous depiction of those beliefs. Under the Free Exercise Clause, Respondents' action should not be permitted to stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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