No. 20-1137

In The
Supreme Court of the United States

CALIFORNIA PARENTS FOR THE EQUALIZATION OF EDUCATIONAL MATERIALS, *et al.*,

Petitioners,

v.

TOM TORLAKSON, in his official capacity as State Superintendent of Public Instruction, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

THE STATE RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a plaintiff challenging non-conduct-regulating state action (*e.g.*, the language used to help educators develop history curricula) as "non-neutral" toward their religion (despite unanimous judicial recognition of its neutrality) may be required to show that the action actually burdens the exercise of their religion to establish a "Free Exercise" violation.

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COUNTER-STATEMENT OF THE CASE

The Petition's core argument – that this case is a vehicle to resolve a deep circuit split – is wrong. It is premised on mischaracterizations of the record, the proceedings below, and the law.

The Petition asserts that this case challenges classroom curriculum content that students are required to read and repeat in class and on tests. (Petition ["Pet."] at 3.) That is not the case. The History-Social Science Content Standards ("Standards") and Curriculum Framework ("Framework"), adopted by the State Board of Education ("SBE"), are general guides for local school district officials to use to craft their own specific classroom curricula and to select the textbooks of their choice. (Petitioners' Appendix ["Pet. App."] at 4a and 24a-25a.) While local decision-makers are expected to determine that the curricula they design and the textbooks they select are "aligned" with the Standards and Framework, those specific choices are not reviewed and approved by the State Respondents,[1] and no such curriculum decisions are challenged in this case. (*Id*. at 8a and 68a-69a.) Significantly, the Framework includes a seven-page appendix specifically devoted to ensuring that all local instruction adheres to the First Amendment's religion clauses, by articulating the key principles derived from this Court's opinions and by providing resources for handling the

[1] The "State Respondents" are officials named only in their official capacity as members/officials with the SBE and the California Department of Education ("CDE").

subject of religion in a secular, historical-social scientific way. (*Id*. at 31a-32a.) Thus, although no actual classroom materials, activities or tests are challenged here, any such content utilized at the local level that contravenes the First Amendment is simply not properly aligned with the Standards and Framework.

The Petition also asserts that this case presents a question about how to analyze state action that "singles out a religion for disfavored treatment." (Pet. at 2.) Not so. Each of the four judges below unequivocally concluded that the record exhibited no discrimination, disfavored treatment or hostility toward Hinduism. (Pet. App. at 21a.)

The Petition also claims that the "sole basis" for the Ninth Circuit's rejection of the Free Exercise claim was that it deemed a burden on Petitioners' Free Exercise rights as insufficiently "substantial" – intimating that the rule applied below allows for minor direct governmental restrictions on religiously-motivated conduct. (Pet. at 3.) But that claim ignores two important points. First, the Ninth Circuit's decision explains that the circuit's precedent requires plaintiffs "to allege a substantial burden on their religious exercise *where*, ***as here***, *no law or other regulatory government conduct is involved*." (Emphasis added.) (Pet. App. at 10a-11a.) The state action in this case was essentially government speech about how to develop curricula to teach history-social science (one of government's indisputably appropriate and important functions), and it did not prohibit or coerce conduct. Thus, the

"substantial burden" element recognized below is nowhere near as expansive as the Petition describes.

Second, Petitioners did not (and could not) allege any burden on the exercise of Hinduism in this case, and their appeal on the Free Exercise claim was limited to the argument that recent decisions of this Court prohibited *any* inquiry into whether *any* state action that a plaintiff describes as "non-neutral" actually burdens religious exercise. (Pet. App. at 15a: "Appellants do not challenge that conclusion here. . . . Appellants' only argument is that. . . .") Thus, this is not a case where a burden on religiously-motivated conduct was alleged and recognized, but deemed "insubstantial" by the courts. Rather, Petitioners' argument was that government speech that admittedly does not actually burden religiously-motivated conduct supports a Free Exercise claim.

The Petition's reliance on what is essentially dicta in a few distinguishable cases in a couple of circuits, and its avoidance of much more recent and relevant authority in those and other circuits, belies its report of a current and relevant circuit split. (*See* pp. 23-30, *infra*.) And for reasons alluded to above and further discussed below (pp. 30-31, *infra*), even if there was a circuit split exactly as the Petition describes it (and there certainly is not), this case could never promise to resolve it.

I. RELEVANT FACTS

A. Standards and Frameworks are General Guidelines for Local Curriculum Decisions Not Raised Here

Decisions about what precisely is taught in public school, and how, are made by locally-elected school district governing boards. Cal. Educ. Code §§ 60000(b)-(c), 60210(a), 60618. Nonetheless, state law directs the SBE to adopt model content standards in major subjects to promote high-quality learning and assist educators across the state. Cal. Educ. Code §§ 60602.5(a)(1), 60605 and 60618. It also requires the SBE to adopt standards-aligned curriculum frameworks as resources for local officials. Cal. Educ. Code §§ 60000, 60005; Cal. Code Regs. tit. 5, §§ 9510-9616. Local education officials develop their own specific curricula and select the textbooks of their choice, which they determine are "aligned" with the more general state-level standards and frameworks. (Pet. App. at 4a, 24a-25a and 68a-69a.)

This case challenges only the history-social science Standards and Framework. It does not challenge any specific classroom curriculum, instructional materials, or grading or participation requirements (let alone any required by the Standards/Framework). (*Id*., *see also id*. at 8a, recognizing that "none" of Petitioners' claims "relate to material students actually see in the classroom.")

B. The Standards is an Outline of Topics for Critical Exploration, Which Must Be Read Along with the Framework

The Standards, adopted by the SBE in 1998, is an outline of topics for exploration using critical-thinking skills from various disciplines. (Excerpts of Record ("ER") 1448-49.) Its most relevant part – Grades 6-7, which spans almost all of human history – is only nine pages. (ER1472-81.) In bullet-point fashion, it calls for educators to instruct students to "analyze the geographical, political, economic, religious, and social structures" of civilizations by "identifying," "describing," and "discussing" aspects of them. (*Id*.)

While the Standards includes lists of "figures that could be studied," the lists are "illustrative" and "do not suggest that all of the figures mentioned are required for study, nor do they exclude the study of additional figures that may be relevant to the standards." (ER1448.)

The Standards cautions that its statements "do not exist in isolation" and should be used together with a revised framework in crafting curricula. (*Id*.) It also encourages the study of primary source materials. (*Id*.)

C. The Framework Adoption Process

The Framework adoption process, which began in 2008 and culminated in 2016, was long, robust and public. The process involved review during multiple,

publicly-noticed and open meetings by a specially-appointed Curriculum Framework and Evaluation Criteria Committee ("CFCC"), which included experienced teachers and "content review experts"; review and editing during multiple, publicly-noticed and open meetings by the Instructional Quality Commission ("IQC"), a standing advisory body charged with studying curriculum matters; the State Respondents' open solicitation of public comments from all interested members of the public during multiple lengthy public comment periods; the receipt of well over 10,000 written public comments from various and diverse groups; and the SBE's review, editing and adoption of the Framework during publicly-noticed and open meetings. (*See* Pet. App. at 28a-30a and 53a-57a.)

The Petition insinuates that there was one monolithic "Hindu" perspective expressed in the public comments during the Framework development process, and that the IQC/SBE rejected all edits requested by Hindu advocacy groups. (Pet. at 10.) Both claims are false. For example, multiple groups that advocated against eliminating an examination of whether ancient Indian elites used concepts found in early Hindu texts to perpetuate the social hierarchy made a point to note that their membership included Hindus. (*See*, *e.g.*, Supplemental Excerpts of Record ["SER"] at 209 ["Some of us are members of devout Hindu families, while others on the committee have made the study of the texts or practices of Hinduism a lifelong project."]; SER294 ["We are Hindu, Muslim, Sikh . . . and are from families deemed both upper and lower caste."];

SER267 [noting that group's membership includes Hindus]. Rather than wanting to denigrate Hinduism, those voices could be perceived as wanting to ensure that aspects of early Hindu texts could not be contorted by privileged actors in the present and future. (*Id*.) Those voices' concerns were echoed by scores of professors who lent their knowledge to the process, as well as by several other religious advocacy groups and academic societies. (Pet. App. at 56a, n.18.)

But the SBE did not simply pick one side's slate of edits – it took a balanced approach. (Pet. App. at 21a, the Ninth Circuit concluding that "[t]he Standards and Framework reflect careful crafting by the State Board to achieve a balanced portrayal of different world religions.") As discussed further below, the Framework conveys several positive things about Hinduism and ancient India, and in discussing sensitive topics like the caste system, includes appropriate qualifying language. The State Respondents also deleted, among other things, draft language that would have compared the ancient caste system to slavery in the United States. (SER 144 [post-adoption article]; *see also* State Respondents' Appendix of Exhibits in Support of Motion for Summary Judgment, Ex. 73 at 1810 [referencing summary table of recommended edits], Ex. 74 at 1830-31 [summary table], and Ex. 2 at 245 [corresponding adopted Framework page].). They also settled a debate in favor of Hindu advocacy groups that urged that the phrase "South Asia" not replace the

word "India" in several places. (Pet. App. at 30a; SER144.)[2]

D. Framework Content

1. The Framework Approaches All Religions from a Historical-Social Scientific Perspective, and Recognizes Hinduism's Conception of its Divine Origins

The Framework is not a set of facts for blind acceptance, but rather a resource for helping local educators teach students to "learn how to analyze multiple points of view, cite evidence from sources, and make claims based on that evidence in writing and speaking." (ER1660.) The Framework's "guiding principle" is "a focus upon student inquiry." (ER1517.) It "relies upon students being active participants in the learning process" and "is designed to help teachers and

[2] The Petition also asserts that a CDE employee secretly solicited "anti-Hindu" public comment from a group of history professors – the South Asia Faculty Group ("SAFG") – and that those professors' private emails evince "anti-Hindu" sentiment. (Pet. at 10, 12.) District Judge Breyer correctly recognized, *inter alia*, that: "the e-mail Plaintiffs rely on to establish that [one CDE employee] was directing the SAFG contributions is hearsay" (Pet. App. at 53a-54a); the SAFG emails actually show that the group's "stated intention was to make the Framework more accurate" (Pet. App. at 55a); the SAFG's submissions were all made as public comments that the State Respondents made available for public review (*id.*; ER2483); the SBE *rejected* many of the SAFG's proposed edits (Pet. App. at 56a); and there was significant support for the SAFG's positions from a broad array of other commenting groups (*id.*; SER243-322).

administrators create a curriculum where students ask questions, develop and support arguments, conduct independent research, evaluate interpretations and evidence, and present findings in a cogent and persuasive manner." (*Id*.)

The Framework does not call for ritualistic performances or affirmations/disaffirmations, and it deals with all religions from a secular, historical-social scientific perspective. (Pet. App. at 20a-21a [the Ninth Circuit agreeing with the District Court that the Standards and Framework "do not call for the teaching of biblical events or events as historical fact, thereby implicitly endorsing Judaism, Christianity, and Islam[,]" and neither denigrate Hinduism nor deny that religion's conception of its "divine origins."].)

Petitioners contend that the Standards and Framework denigrate Hinduism by suggesting that it developed and evolved. However, the Framework recognizes that all religions developed, and both shaped, and were shaped by, social and political forces. (ER1679: "Judaism was heavily influenced by the environment, the history of Israelites, and their interactions with other societies"; ER1714: "As it became a state religion, Christianity changed . . . The teacher points out that all religions change over time.") The same is true of the Standards. (ER1473: "Discuss how Judaism survived and developed. . . ."; ER1478: "Trace the development of distinctive forms of Japanese Buddhism"; ER1480: "List the causes for the internal turmoil in and weakening of the Catholic Church (*e.g.*, tax policies, selling of indulgences.)".) As for Hinduism,

the noted developments are positive and dispel any notion that an inflexible social hierarchy is a core, indispensable Hindu belief. (ER1727: "Hinduism continued to evolve with the Bhakti movement," which "emphasized" "social and religious equality[.]")

Contrary to Petitioners' factual claims, the Framework recognizes that Hindus believe that Hinduism has divine origins. For example, the Framework observes:

> Ancient Hindu *sages* (brahmins and others) expounded the idea of the oneness of all living things and of Brahman as the *divine* principle of being. The Hindu tradition is thus monistic, the idea of reality being a unitary whole. Brahman, an *all-pervading divine supreme reality*, may be manifested in many ways, including incarnation in the form of Deities. *These Deities are worshipped* as distinct personal Gods or Goddesses, such as Vishnu who preserves the world, Shiva who transforms it, and Sarasvati, the Goddess of learning.

(Emphasis added.) (ER1687.)

The fact that the Framework goes on to describe how "[t]hese teachings were transmitted orally at first, and then later in written texts . . . the *Bhagavad Gita*[,]" belies the assertion that the Standards/Framework treat the *Bhagavad Gita* as merely a piece of secular literature unlike other holy books. (*Id*.) The same is true for the *Ramayana*, which the Framework explains is a "text that Hindus rely on for solutions to moral dilemmas" and "one of ancient India's most

important literary *and religious* texts." (Emphasis added.) (ER1689; *see also* ER1828 [including both the *Bhagavad Gita* and the *Ramayana* among "the Torah and Hebrew Bible, the Qur'an, and the Christian Bible" as "classical texts" worthy of study]; ER1713 [referring to *biblical* "literature"].)

2. There are No Overtly Hostile or False Statements About Hinduism, and Sensitive Subjects Are Treated with Balance and Care

Throughout this case, Petitioners have not pointed to any gratuitous, overtly hostile or obviously false statements about Hinduism. That is because there are none. Instead, Petitioners alleged only that a few statements either reference Hinduism "in sociological and anthropological terms" (ER2675, ¶95), or present as fact matters that are either true but unflattering, or subject to scholarly debate. (ER2671, ¶82 [complaining about linking of ancient Hinduism and caste "irrespective of the accuracy of the language"]; SER43, lns.17-18, SER44, ln.1 [Plaintiffs conceding that their challenge is primarily "apart from the accuracy or offensiveness of any specific content"]; ER38, lns.15-18; ER18, lns.8-11.)

Petitioners allege that the Framework overly emphasizes the caste system. However, as the District Court recognized (Pet. App. at 43a-45a), a reasonable and objective reader would understand that much of the language regarding caste was included to *reduce*

any misplaced negative sentiment toward Hinduism. The Framework conveys that: (a) the caste system was a social and political construct, in addition to having connections to ancient priestly elites' religious teachings (ER1689);[3] (b) social-class stratification developed in "all" early civilizations (ER1688); (c) priests/rulers in *other* societies used religion to justify social hierarchies (ER1689); (d) caste "provided social stability and gave an identity to each community" (ER1688); (e) today many Hindus do not consider themselves as belonging to a caste (ER1689); and (f) Hinduism "continued to evolve with the Bhakti movement, which emphasized . . . social and religious equality" (ER1727).

Petitioners also claim that Hinduism is denigrated because of the reference to an "Aryan invasion" theory in the Standards. That claim is unfounded. The Standards says to "Discuss the significance of the Aryan Invasions." (ER1474.) In the context of the inquiry-based Standards, "discussing the significance" of a theory about the movement of people more than 3,000 years ago includes examining whether and how new evidence supports the theory. The Standards also states that it must be read together with the current framework (ER1448), and the Framework contains no mention of "invasion." The Framework discusses a majority view that "people speaking Indic languages, which are

[3] Petitioners never claimed that this partial linkage between early Hindu texts and the ancient caste system was false. (Pet. App. at 70a: the District Court recognizing that Petitioners "do not argue that this statement is necessarily false"; *see also id*. at 56a, n.18: noting public comment from academic scholars advocating against the elimination of such linkage.)

part of the larger Indo-European family of languages, entered South Asia, probably by way of Iran," *but expressly recognizes a competing theory* that "suggests that the language was indigenous to India and spread northward[.]" (ER1686-87.)

Whether there was an influx of Indo-Aryan people 3,000 years ago, and whether that influx is best referred to as an invasion or migration, says nothing derogatory about Hinduism. Petitioners claim that the issue ties in with the origins of Hinduism. (Pet. at 7, 9.) However, the Framework observes that archeological finds from the Harappan civilization, which *predates* the theorized movement of Indo-Aryan people, "show features that are all present in modern Hinduism, such as a male figure that resembles the Hindu God Shiva in a meditating posture, as well as small clay figures in the posture of the traditional Hindu greeting *namaste*." (ER1686; *see also* Pet. App. at 48a-49a: District Court's recognition of Petitioners' factual misconception.) But, much more fundamentally, it should not be controversial to suggest in a historical-social scientific context that major world religions emerged *somewhere* among *some* peoples. Identifying multiple theories about how that occurred for a religion does not reasonably convey disapproval of that religion's beliefs. (Pet. App. at 50a.)

3. The Framework Discusses Difficult Facts Regarding Religions and Societies Other than Hinduism and Ancient India

The Framework does not shy away from difficult facts regarding other historical societies and religions. For example, the Framework notes "examples of slavery in the ancient and medieval world . . . where slaves belonged to all ethnic groups" and observes that "[i]n the medieval Mediterranean, Christians and Muslims enslaved captives who did not belong to their own religions." (ER1753.) The Framework also explains that social hierarchies developed in *all* premodern civilizations. (ER1673, ER1676, ER1699-1700, ER1688 ["As in all early civilizations . . . "]; ER1844-45.)

The Framework also discusses the historically patriarchal structure of Judaism, Christianity and Islam, and observes that patriarchy was the global norm. (ER1679, ER1713, ER1721, ER1682-83, ER1674, ER2175.)

In considering how Christianity changed as it became a state religion, the Framework notes how "Church leaders" "vigorously tried to convert everyone to Christianity." (ER1714.) Similarly, it observes that early Muslim leaders conquered new land and forced non-Muslims to pay special taxes and forced some non-Muslims to convert to Islam. (ER1721.)

The Framework notes "extensive" "criticism of the clerical and institutional practices of the Catholic Church (*e.g.*, the selling of indulgences and corruption

by the clergy)" during the Reformation. (ER1755.) It also describes how European states, increasingly dominated by Christian institutions/belief systems, waged wars with each other as they forcefully converted, executed, or expelled non-believers. (ER1755-56.)

It also notes that Galileo Galilei "was charged with heresy by the Catholic Church for his public support of Copernicus' theory that the earth revolved around the sun" and "spent his final days under house arrest." (ER1759.)

4. The Framework Conveys Positive Things About Ancient India and Hinduism

The Framework describes the ancient Harappan civilization as a "flourishing urban civilization" with "well-planned" and "well-engineered" infrastructure, exhibiting cultural items showing "features that are all present in modern Hinduism." (ER1686.) Regarding the Vedic period, it calls for an exploration of Vedic teachings, which "built up a rich body of spiritual and moral teachings that form a key foundation of Hinduism as it is practiced today." (ER1687.) It observes that "[m]any of the central practices of Hinduism today, including home and temple worship, yoga and meditation, rites of passage (*samskaras*), festivals, pilgrimage, respect for saints and gurus, and, above all, a profound acceptance of religious diversity, developed over time." (ER1688.)

The Framework also discusses "the Gupta Dynasty," which "presided over a rich period of religious, socio-economic, educational, literary, and scientific development, including the base-ten numeral system and the concept of zero." (ER1726.) It lists several of the culture's "[e]nduring contributions" and envisions students analyzing "maps indicating the extent of the Gupta Empire and visuals of its achievements in science, math, art . . . architecture, and Sanskrit literature." (ER1726-27.) It notes that the "Chola Empire" is "associated with significant artistic achievement that included the building of monumental Hindu temples and the creation of remarkable sculptures and bronzes." (ER1727.) It also posits that "Hinduism continued to evolve with the Bhakti movement," which "emphasized" "social and religious equality[.]" (*Id*.)

5. There is an Appendix Devoted to Ensuring Respectful and Legal Treatment of Religion

The Framework contains an appendix "designed to overcome uncertainty about best practices in dealing with religious topics and issues" that instructs educators to treat all religions "with fairness and respect" and prohibits the promotion/denigration of any religion. (ER2307-13.) The appendix specifies that "[c]lassroom methodologies must not include religious role-playing activities or simulations or rituals or devotional acts" and that "[i]nstructional language should avoid absolutes such as 'all Buddhists believe[.]'" (ER2310.) It provides guidelines derived "from a series of Supreme

Court interpretations of the First Amendment" as a resource, and stresses that "[i]f schools are neither to inculcate nor inhibit religion, both the curriculum and instructional materials and the teachers or presenters guiding their interpretation must be neutral and balanced." (ER2309.)

E. The Generally Positive Reaction to the Framework

Reaction to the Framework among Hindu advocacy groups was generally positive. The Hindu American Foundation issued a press release entitled "Hindu Americans Take Significant Steps Towards Equitable Education in California," which began:

> Important steps were taken today towards ensuring that Hinduism and India are presented equitably and accurately following the California State Board of Education's decision to approve the History-Social Science Framework.
>
> The widely contested Framework, adopted after a nearly two-year process, including extensive input from Hindu American community groups, parents, and school children, now incorporates prominent mention of Hinduism's pluralistic ethos, Hindu sages of diverse backgrounds, and the importance of the Bhakti movement.

(ER2469, ¶10; SER128.) The release went on to conclude that "Hindu Americans can rightly claim victory on many fronts[.]" (SER129.)

The Hindu Education Foundation issued a similar statement, which reported that "Hindu American organizations . . . expressed satisfaction at the incremental changes to the framework[.]" (SER139-40; ER2469, ¶11.)

India-West published an article entitled "California Board of Education Votes on New Framework for Textbooks, Opposing Sides Claim Victory." (ER2469, ¶12; SER142-46.) The article described a "vigorous debate" between groups that "complained that Hinduism and its cultural practices were not accurately being portrayed in the new guidelines," and a coalition of others that argued that proposed changes "erased the history of caste-based oppression, especially towards Dalits[.]" (SER143.) As its title implies, the article's main point was that "[g]roups on both sides of the debate claimed a victory after the vote." (SER144.)

II. PROCEDURAL HISTORY

In February 2017, Petitioners filed suit under 42 U.S.C. § 1983 alleging that the Standards' and Framework's content, and "the process leading up to" the Framework's adoption, violated the U.S. Constitution's Due Process, Free Exercise, Establishment and Equal Protection Clauses. (ER2653.)

In April 2017, the State Respondents moved to dismiss. They also requested judicial notice of the Standards' and Framework's complete text, which Petitioners agreed with, and the Court granted. (ER39, lns.5-7 and 27-28.)

The District Court held a hearing, and as its dismissal order later observed: "[a]t the hearing, Plaintiffs admitted that their claims fit most squarely under the Equal Protection and Establishment Clauses, not the Free Exercise Clause, which they include 'as a catch-all' to preserve the claim." (Pet. App. at 74a.) When pressed on the issue of burden, "Plaintiffs acknowledged at the hearing that they had not pled a burden on religious exercise 'in the sense of worship.'" (*Id*. at 76a.) While the Complaint did not challenge or describe specific classroom curriculum content or testing/grading requirements (let alone any mandated by the Standards or Framework, or otherwise reviewed and approved by the State Respondents), the Petitioners nonetheless argued that requiring students to learn and be tested on material that conflicts with their religious beliefs should be sufficient to state a claim under the Free Exercise Clause. (*Id*.) However, the District Court correctly recognized that "the complaint does not allege that students ever read or even see the Framework" and that there were no allegations that the State Respondents' actions or policies actually burdened Petitioners' religious exercise in any way. (*Id*.)

In July 2017, after taking the matter under submission, the District Court issued its ruling, which dismissed all of Petitioners' claims except for their Establishment Clause claim premised on disapproval of Hinduism. (Pet. App. at 67a-94a.) In dismissing the Free Exercise claim, District Judge Breyer cited decisions from multiple circuits in the public education

context, and echoed the principle that "'distinctions must be drawn between those government actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspective prompted by religion.'" (*Id*. at 77a, quoting *Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1543 (9th Cir. 1985) (Canby, J., concurring), *cert. denied*, 474 U.S. 826 (1985).)

Discovery proceeded. By February 2018, the State Respondents produced more than 18,000 pages of documents, plus all audio/video recordings of all relevant meetings of the CFCC, IQC and SBE. The document production comprised all documents in the State Respondents' possession that even the most attentive and interested observer in the community could have viewed in assessing the Standards, Framework and the public Framework development process. (ER1109-10.)

In May 2018, the District Court set trial for December 2018. (ER2711.)

In August 2018, only four months before the trial date, the State Respondents filed their motion for summary judgment ("MSJ"). (ER2715.) In lieu of an opposition, Petitioners: (1) moved the Magistrate Judge to compel further discovery; (2) moved to amend their Complaint to "add back" their Free Exercise claim based on the notion that there had been "a tectonic shift in the law on free exercise" due to two then-recent decisions of this Court (ER1434 at ln.9; ER1436 at

lns.19-25);[4] and (3) based on those motions, moved to defer a ruling on the MSJ. (ER2716-17.)

In October 2018, the District Court entered an order: (a) denying Petitioners' motion-to-amend; (b) adjusting the summary judgment briefing schedule in light of Petitioners' motion to defer and the still-pending discovery motion; and (3) vacating the trial date. (ER1105-06.)

While the District Court's ruling on the motion to amend was premised on the rejection of Petitioners' "tectonic shift" theory, it expressed no opinion on the multiple alternative arguments that State Respondents asserted for why leave to amend should have been denied, including undue delay and prejudice. (*Id*.)

In November 2018, the Magistrate Judge entered an order denying Petitioners' motion to compel in its entirety. (SER21-24.) Petitioners did not object to that ruling in the proceedings below; nor did they present or challenge it on appeal.

In January 2019, Petitioners opposed the MSJ and filed a cross-motion.

On February 28, 2019, the District Court issued its order granting the MSJ (Pet. App. at 23a-66a), as well as its Judgment (ER57).

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[4] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017), and *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018).

Petitioners appealed, and with respect to their Free Exercise claim, their appeal was limited to the argument that the District Court erred in rejecting Petitioners' claim that this Court's recent decisions prohibited any inquiry into whether any state action that a plaintiff describes as "non-neutral" actually burdens religious exercise. (Pet. App. at 15a.)

In its decision, the Ninth Circuit clarified that its precedent requires a showing of a "substantial burden" on religious exercise "where, as here, no law or other regulatory government conduct is involved." (Pet. App. at 10a-11a.) It also rejected Petitioners' argument that this Court's recent decisions "eliminated the requirement that plaintiffs plead a burden on their religious exercise" in a case like this. (*Id*. at 15a-17a.) Agreeing with the District Court that "Appellants allege *no* penalty or coerced conduct" and "failed to allege '*any* specific religious conduct that was affected by the Defendants' actions[,]'" the Ninth Circuit unanimously affirmed the District Court's decision. (*Id*. at 16a.) Significantly, both in its analysis of the Free Exercise claim and the other Constitutional claims, the Ninth Circuit held that the record exhibited no basis to conclude that the challenged government action discriminated against, disparaged or exhibited hostility toward Hinduism. (*See*, *e.g.*, *id*. at 17a (in course of Free Exercise analysis, stating: "We have no expressions of hostility here."), at 20a ("From an objective perspective, none of the challenged material, alone or considered together, has the effect of disparaging Hinduism."), *etc*.)

REASONS TO DENY THE PETITION

I. THERE IS NO CIRCUIT SPLIT

This case does not involve a relevant circuit split. Petitioners assert that the Ninth Circuit's rule is in conflict with the Third Circuit's approach, citing *Brown v. Borough of Mahaffey, Penn.*, 35 F.3d 846 (3d Cir. 1994) and *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002). Neither case reveals a conflict.

Brown involved the government intentionally locking a gate in order to physically impede access to congregational religious services – a focused government action directly obstructing the quintessential exercise of religion. 35 F.3d at 849. In declining to engage in a "substantial burden" analysis in that case, the court stressed that it was dealing with one of the "rare cases" where there was a focused and direct burden on religiously-motivated conduct. *Id*. But the case at bar is not one of those "rare cases," and as previously discussed (at p. 2 *supra*), the Ninth Circuit's decision below does not call for indiscriminate application of a substantial burden analysis for every conceivable Free Exercise claim. (Pet. App. at 10a-11a.) Notably, in the more common case, where the state is not infringing directly on religious exercise, but seeking "to achieve legitimate, secular purposes[,]" the *Brown* court stressed that it would be "necessary" to utilize a substantial burden analysis in order "to place logical limits" on free exercise claims. *Id*. at 850. Thus, *Brown*

would *require* a substantial burden analysis in this case.

Similarly, *Tenafly* is unhelpful to Petitioners because, unlike this case, it dealt with enforcing a conduct-regulating ordinance (in a non-religiously-neutral way) to prohibit specific and identified "religiously motivated acts" by members of a religion (in that case, Orthodox Jews). 309 F.3d at 151. In addition, the *Tenafly* court apparently treated the "neutral" and "generally applicable" inquiries as encompassing a threshold "burden on religious conduct" requirement. *Id*. at 165 ("On the other hand, if the law is not neutral (*i.e.*, if it discriminates against *religiously motivated conduct*) or is not generally applicable (*i.e.*, if it *proscribes particular conduct* only or primarily when religiously motivated), strict scrutiny applies *and the burden on religious conduct* violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest." Emphasis added.) Thus, *Tenafly* would not require application of strict scrutiny in this case because, among other things, Petitioners did not show that the SBE's adoption of the Standards/Framework infringed on religiously motivated conduct.[5]

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[5] At least one later Third Circuit decision also seems to have treated the "neutral and generally applicable" analysis as encompassing a threshold "burden on religiously motivated conduct" element. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) ("A law is 'neutral' if it does not target *religiously motivated conduct* either on its face or as applied in practice. A law fails the general applicability requirement if it *burdens a category of religiously motivated conduct* but exempts or does not reach a substantial category of conduct that is not religiously motivated. ***If a***

But the best indication that the Third Circuit has not dispensed with a "substantial burden" element is the existence of more recent authority expressly requiring it. In *Anspach v. City of Philadelphia*, the Third Circuit could not have been clearer:

> The First Amendment prohibits the government from burdening the free exercise of religion. However, the First Amendment is only implicated if the governmental burden on religion is 'substantial.' In order to establish a substantial burden, Plaintiffs must once again allege state action that is either compulsory or coercive in nature. (citations omitted)

503 F.3d 256, 272 (3d Cir. 2007). Not surprisingly, multiple recent district court decisions from within the Third Circuit have imposed a substantial burden requirement. *Hashem v. Hunterdon County*, Civ. No. 15-8585 (FLW) (DEA), 2016 WL 5539590, *17 (D. N.J. Sept. 29, 2016) (citing *Anspach* in imposing substantial burden element); *Lloyd v. Barr*, Civ. No. 4:20-1107, 2020 WL 5076065, *4 (M.D. Pa. Aug. 27, 2020) (same).

The only other circuit that Petitioners claim to be in conflict with the Ninth Circuit is the Sixth Circuit,

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law burdening religiously motivated conduct is not neutral and generally applicable it must satisfy strict scrutiny.") (Emphasis added; citations omitted). As previously noted, Petitioners in this case did not challenge the District Court's conclusion that no burden on religiously motivated conduct was alleged, and only argued to the Ninth Circuit that no such burden is ever required.

and for that proposition, Petitioners cite only one Sixth Circuit decision: *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995). However, Petitioners' reliance on *Hartmann* is misplaced. Similar to *Brown* and *Tenafly*, *Hartmann* dealt with a government regulatory scheme that directly prohibited religiously motivated conduct. *Hartmann*, 68 F.3d at 975 ("The regulations governing this program prohibit Providers from having any religious practices, such as saying grace or reading Bible stories, during their day-care program.") Moreover, the *Hartmann* court clearly viewed those direct prohibitions as substantial infringement. *Id*. at 985-86 ("It would be an extraordinary and unprecedented expansion of governmental (and military) authority to allow the direct and unequivocal regulation, and even prohibition, of private acts of religious conscience and practice by non-members of the military in their homes under the guise of regulating day-care.") In addition, as with *Tenafly*, the *Hartmann* court incorporated an actual "burden on religious conduct" requirement into its "neutral and generally applicable" analysis. *Id*. at 978.

Petitioners' footnoted assertion that the Second Circuit "appears largely in alignment" with the Sixth and Third Circuit also misses the mark. (Pet. at 18, n.2.) *Altman v. Bedford Cent. Sch. Dist*. 245 F.3d 49 (2d Cir. 2001) cannot be read as supporting the application of strict scrutiny under the Free Exercise Clause to government action that does not actually burden religiously motivated conduct. *Altman* actually underscores that strict scrutiny in a non-neutral/non-generally applicable context must involve some actual

"restriction on a plaintiff's religious activities" or "restrictive effect." *Altman*, 45 F.3d at 79. *Altman* supports the decision below: it held that an Earth Day celebration at school did not violate the plaintiffs' Free Exercise rights just because they found the ceremonies to be offensive to their religious beliefs. *Id*. at 79-80.

Significantly, a later Second Circuit decision discusses the post-*Smith*/post-*Lukumi* landscape at greater length and makes clear that the substantial burden inquiry is a threshold issue. *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574-75 (2d Cir. 2002) ("Government enforcement of laws or policies that substantially burden the exercise of religious beliefs is subject to strict scrutiny.") The government may be able to significantly reduce judicial scrutiny of its burden-inflicting action by demonstrating that the action is neutral and generally applicable. *Id*. But it is a logical fallacy to turn that opportunity into a rule that all other things that the government may do (that do not burden religious exercise) must undergo strict scrutiny to survive the Free Exercise Clause. The Second Circuit followed that same approach outlined in *Fifth Ave. Presbyterian Church* one decade later in *Fortress Bible Church v. Feiner*, 694 F.3d 208, 220 (2d Cir. 2012).

In the Eighth Circuit, from a 1995 *en banc* decision, to more recent appellate decisions, the Court of Appeals has repeatedly acknowledged a threshold substantial burden requirement. *See*, *e.g.*, *Brown v. Polk County, Iowa*, 61 F.3d 650, 656, 658, 660 (8th Cir. 1995) (en banc); *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997)

(stating: "As an initial matter, a person claiming that a governmental policy or action violates his right to exercise his religion freely must establish that the action substantially burdens his sincerely held religious belief[,]" and noting that such rule applies even in a "non-RFRA" context); *Gladson v. Iowa Dept. of Corr.*, 551 F.3d 825, 831-33 (8th Cir. 2009) (recognizing existence of a substantial burden as a "threshold issue" in Free Exercise context); *U.S. v. Ali*, 682 F.3d 705, 709 (8th Cir. 2012) (quoting *Weir* for same principle); *Mbonyunkiza v. Beasley*, 956 F.3d 1048, 1053-54 (8th Cir. 2020) (recognizing and applying substantial burden element of Free Exercise claim).

All of the other Circuits are in accord:

D.C. Circuit: *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) ("[T]he First Amendment is implicated when a law or regulation imposes a substantial, as opposed to inconsequential, burden on the litigant's religious practice. Our cases make clear that this threshold showing must be made before the First Amendment is implicated.")

First Circuit: *Parker v. Hurley*, 514 F.3d 87, 99 (1st Cir. 2008) (claim challenging curriculum materials failed because claimants did not allege constitutionally significant burden on their Free Exercise rights) ("Even if [this Court's 1990 *Smith* decision] largely set aside in free exercise jurisprudence, at least in some contexts, 'the balancing question – whether the state's interest outweighs the plaintiff's interest in being free from interference,' it did not alter the standard

constitutional threshold question. That question is 'whether the plaintiff's free exercise is interfered with at all.'" (Citations omitted.))

Fourth Circuit: *Carter v. Fleming*, 879 F.3d 132, 139 (4th Cir. 2018) (recognizing "substantial burden" as "threshold" element).

Fifth Circuit: *U.S. v. Grant*, 117 F.3d 788, 792-93 (5th Cir. 1997) (criminal defendant's challenge to financial disclosure requirement in district court's sentencing order failed, because the requirement did "not substantially burden [the defendant's] free exercise of religion").

Seventh Circuit: *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 689-90 (7th Cir. 1994) (holding that plaintiffs' claim based upon religiously-motivated offense to public school curriculum failed due to lack of substantial burden on their Free Exercise rights, but that even if such a burden were present, state's compelling interest in setting curricula would outweigh any burden).

Tenth Circuit: *Bauchman v. West High Sch.*, 132 F.3d 542, 557-58 (10th Cir. 1997) ("Ms. Bauchman must allege something more than the fact that song lyrics and performance sites offended her personal religious beliefs. She must allege facts demonstrating the challenged action created a burden on the exercise of religion . . . [W]hile the Free Exercise clause protects, to a degree, an individual's right to practice her religion within the dictates of her conscience, it does not

convene on an individual the right to dictate a school's curricula to conform to her religion.")

Eleventh Circuit: *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1256-58, n.25-26 (11th Cir. 2012) (analyzing and rejecting plaintiffs' argument that this Court's 1993 *Lukumi* decision obviated the need for a Free Exercise claimant to allege that the challenged state action imposes a constitutionally impermissible burden on religious exercise, and noting that its "sister circuits are in accord with our position," without noting any contrary circuit level authority).

II. THIS CASE IS NOT A VEHICLE TO ANSWER THE QUESTION THAT PETITIONERS MISTAKENLY ASSERT IS PRESENTED

For several reasons, this case does not present, nor could it ever promise to resolve, the question that Petitioners assert is presented, *i.e.*, "[w]hether 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." First, Petitioners' question insinuates that the "substantial burden" rule is indiscriminately applied to all Free Exercise claims, when the Ninth Circuit's decision below clarified that it is applied "where, *as here*, no law or other regulatory government conduct is involved." (Emphasis added.) (Pet. App. at 10a-11a.) This case dealt with government language about how to develop history curriculum – not a regulation or law that prohibits, coerces or penalizes conduct. The decision below

does not necessarily mandate imposition of a "substantial burden" element with respect to all other types of claims, such as those of direct government restrictions or penalties on religious conduct or belief.

Second, Petitioners' question implies that this is a case where some actual burden on religiously motivated conduct was alleged and recognized, but deemed of insufficient magnitude. But as previously noted (*supra*, at p. 3), in this case, Petitioners did not allege any burden on their religious exercise, and their appellate argument was limited to arguing that three of this Court's recent decisions eliminated the need for a plaintiff to plead any burden on their religious exercise in a case like this. (Pet. App. at 15a.)

Third, Petitioners' question ignores the fact that both the District Court and the unanimous Ninth Circuit panel unequivocally held that there was no religious non-neutrality or anti-Hindu discrimination in the Standards or Framework, or anywhere else in the record. (Pet. App. at 17a ["We have no expressions of hostility here"], 20a ["We also conclude, as did the district court, that none of Appellants' characterizations of the Hinduism materials as disparaging is supported by an objective reading of those materials"], and 21a [agreeing with district court that even Petitioners' "isolated passages" alone and out of context could not be read as implying any hostility].)

The *actual* question that this case presents is set forth at the beginning of this brief, and it has consistently only ever been resolved in the defendant's favor.

III. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS

This Court has long recognized that the Free Exercise Clause is not a general protection of religious sensibilities, but rather a limit on unjustified government-imposed burdens on the "exercise" of religion. *See*, *e.g.*, *Sch. Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963) (examining relationship between Establishment and Free Exercise Clauses, and stating that "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent – a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."); *see also id*. at 225 (contrasting the holding of truly religious ceremonies in the public schools, with the study of religion and religious texts from a historical or literary perspective); *Bowen v. Roy*, 476 U.S. 693, 699-700 (1986) ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. . . . '[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.'") (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

This Court's decisions in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990) and *Church of Lukumi Babalu Aye, Inc. v.*

Hialeah, 508 U.S. 520 (1993) did not sweep away the substantial burden element from all Free Exercise claims. By clarifying that "a law *that burdens religious practice* need not be justified by a compelling government interest if it is neutral and of general applicability" (*Lukumi*, 508 U.S. at 523 [emphasis added]), *Smith* and *Lukumi* are well understood as having made it *harder* to establish a Free Exercise claim. Indeed, in direct response to those decisions, Congress passed legislation to provide "very broad protection for religious liberty" and even "greater protection for religious exercise than is available under the First Amendment" – but those laws *still* imposed a "substantial burden" element on plaintiffs. *See Holt v. Hobbs*, 574 U.S. 352, 356-57 (2015).

Trinity Lutheran, Masterpiece Cakeshop and *Espinoza v. Montana Dept. of Revenue*, 140 S.Ct. 2246 (2020) do not represent a "tectonic shift" in Free Exercise jurisprudence and they do not change the result in this case. (Pet. App. at 15a-17a.)

Trinity Lutheran involved a state law that "expressly require[d]" a church "to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it [was] fully qualified." 137 S.Ct. at 2024. The Court held that such a condition "imposes a penalty on the free exercise of religion[.]" *Id*.

Similarly, in *Espinoza*, this Court struck down state action that disqualified otherwise eligible would-be recipients from tangible, valuable public benefits

solely because of the would-be recipients' religious character. It held that such action burdens religious exercise because of its clear, natural coercive effect. *Espinoza*, 140 S.Ct. at 2255 ("[D]isqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion[.]' "), and at 2256 ("To be eligible for government aid . . . a school must divorce itself from any religious control or affiliation. Placing such a condition on benefits or privileges 'inevitably deters or discourages the exercise of First Amendment rights.' "). Significantly, the Court stressed that the "straightforward rule" it was applying was "no 'doctrinal innovation," but rather was "unremarkable in light of" "decades of precedent." *Id*. at 2260. As the lower courts in this case correctly concluded, there are no conditions or penalties in this case. (Pet. App. at 15a-17a.)

Masterpiece Cakeshop involved enforcement of a law that would have required the plaintiff to use his artistic skills to create a wedding cake for a same-sex marriage ceremony – an event that, to that plaintiff, "directly goes against the teachings of the Bible, [and] would have been a personal endorsement and participation in the ceremony and relationship that [the two] were entering into." 138 S.Ct. at 1724. Colorado's enforcement of that law resulted in a cease-and-desist order directed at the plaintiff (thereby requiring him to engage in such "personal endorsement and participation" in ceremonies that went "directly" against his faith), as well as additional "remedial measures," including "changes to any and all company policies" to

comply with the cease-and-desist order, and the submission of quarterly compliance reports. *Id*. at 1724, 1726. This Court held that when Colorado adjudicated the underlying conduct and whether such enforcement action should be taken, it needed to do so "in an adjudication in which religious hostility on the part of the State itself would not be a factor[.]" *Id*. at 1724.

Masterpiece Cakeshop did not eliminate a threshold burden requirement. It stressed that, to the plaintiff, being forced by the state to create a wedding cake for a same-sex wedding "would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs." *Id*. It observed that "the religious and philosophical objections to gay marriage are protected views" and "[w]hen it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to free exercise of religion." 138 S.Ct. at 1727. The Court continued: "[t]his refusal would be well understood in our constitutional order as an exercise of religion[.]" *Id*. Because adjudication and enforcement of Colorado's law *punished* such refusals, the Free Exercise claim exhibited a substantial burden on Free Exercise rights.

There is no such burden here. And just as importantly, the record in this case is completely devoid of state government expressions of hostility toward Hinduism. (Pet. App. at 17a and 21a.)

CONCLUSION

The petition for writ of certiorari should be denied.

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