No. 20-1137

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Petitioners previously demonstrated that there is a deep circuit conflict over whether the Free Exercise Clause permits the government to discriminate against religion so long as it does not impose a "substantial burden," that is, a burden that directly prevents religious worship. Pet. 15-21. This case implicates that conflict and warrants this Court's review because the court of appeals affirmed dismissal of Petitioners' Free Exercise claim based on the application of Ninth Circuit precedent imposing a "substantial burden" requirement—a legal standard expressly rejected by the Third and Sixth Circuits and foreclosed by this Court's precedent. *Id.* at 22-23, 24-26.

Respondents insist that there is no circuit split, no conflict with this Court's decisions, no burden (substantial or otherwise) present or alleged, and no deviation from neutrality. But they are wrong on every point. *First*, Respondents misconstrue decisions rejecting the "substantial burden" test as requiring it *implicitly*, Opp. 23-27, and ignore the Third and Sixth Circuits' holdings that Article III injury is all Free Exercise plaintiffs must allege to challenge State action targeting religion. Respondents also ignore the Ninth Circuit's "substantial burden" precedent that the decision below applied in rejecting Petitioners' claim.

Second, with regard to this Court's decisions, Respondents do not meaningfully address that the holding in *Trinity Lutheran* is irreconcilable with the Ninth Circuit's "substantial burden" requirement. Opp. 33. If a showing of direct obstruction of religious worship were required to state a Free Exercise claim, then *Trinity Lutheran* and this Court's subsequent decision in *Espinoza* were wrongly decided.

Third, Respondents' argument that there is no "burden" here, Opp. 31, merely incorporates their—and the Ninth Circuit's—erroneous view that the Free Exercise Clause does not forbid government action that indirectly burdens Free Exercise. Pet. 18-19. The legitimacy of this "substantial burden" requirement is the question presented here.

Finally, Respondents are wrong that the district court and the court of appeals found the challenged Standards and Framework to be "neutral." Opp. 31. Both courts sidestepped the neutrality question by rejecting Petitioners' Free Exercise claim based solely on the threshold "substantial burden" issue. Nor can Respondents credibly defend the religious "neutrality" of requiring Hindu children to learn and recite that their religion derives from a racist theory and espouses the moral horror of the caste system as an article of their individual faith. Instead, Respondents simply ignore the "confusion and shame," the "psychological harm … and alienation," their actions have inflicted on those children, and, ultimately, leave the question the children ask unanswered: "Why did you have to embarrass us and humiliate us?" ER1428-29.

This case remains an ideal vehicle to resolve the conflict among the courts of appeals and the conflict between the decision below and this Court's Free Exercise decisions. The petition should be granted.

I. THE DECISION BELOW IMPLICATES A CIRCUIT SPLIT OVER WHETHER THE FREE EXERCISE CLAUSE REQUIRES THAT RELIGIOUS DISCRIMINATION "SUBSTANTIALLY BURDEN" RELIGIOUS EXERCISE.

A. The Circuits Are Divided On The Question Presented.

Petitioners previously showed that the Ninth Circuit's "substantial burden" framework conflicts with decisions of the Third and Sixth Circuits. Pet. 15-21. To argue otherwise, Respondents misread—or ignore—the relevant cases.

First, in claiming that there is no circuit split, Opp. 23, Respondents ignore the Ninth Circuit precedent at the heart of the circuit conflict—as well as the decisions that acknowledge that conflict. Indeed, Respondents completely ignore *Vernon* v. *City of Los Angeles*, 27 F.3d 1385 (9th Cir. 1994) and *American Family Ass'n, Inc.* v. *City & County of San Francisco*, 277 F.3d 1114 (9th Cir. 2002), notwithstanding that the application of those two cases was the basis for the district court's and court of appeals' rejection of Petitioners' Free Exercise claim. Pet. 22; see also Pet. App. 15a, 75a-77a. Nor do Respondents acknowledge the Ninth Circuit decision expressly recognizing that Circuit's disagreement with the Third and Sixth Circuits. See *KDM ex rel. WJM* v. *Reedsport Sch. Dist.*, 196 F.3d 1046, 1054 (9th Cir. 1999) (Kleinfeld, J., dissenting). Respondents cannot avoid the circuit conflict by wishing away the decisions that present and highlight that conflict.

Second, Respondents disregard the *holdings* of the Third and Sixth Circuit decisions that have rejected the Ninth Circuit's "substantial burden" requirement.

They ignore, for example, that both the Third and the Sixth Circuits expressly held that when the government discriminates against religion, plaintiffs need allege only an Article III injury, see *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002); *Hartmann* v. *Stone*, 68 F.3d 973, 979 n.4 (6th Cir. 1995)—a requirement Petitioners plainly satisfy. See Pet. 22. Respondents likewise fail to address or explain why the "substantial burden" test they defend would not, as the Third Circuit has held, "make petty harassment of religious institutions and exercise immune from the protection of the First Amendment." *Brown* v. *Borough of Mahaffey*, 35 F.3d 846, 849-50 (3d Cir. 1994).

Third, instead of distinguishing these holdings, Respondents cherry-pick dicta to argue that (i) these circuits would, in fact, "*require* a substantial burden analysis in this case," Opp. 23-24, or, more broadly, (ii) those courts somehow implicitly require a "substantial burden"—*i.e.*, an actual obstruction of "religiously motivated conduct," *id.* at 24-26. Neither claim withstands scrutiny.

On the first point, Respondents contend that the Third Circuit in *Brown* held that the "substantial burden" test was "necessary" "to place logical limits" on Free Exercise whenever "the state is not infringing *directly* on religious exercise." Opp. 23 (emphasis added). What *Brown* actually says is that "[a] burden test is *only* necessary to place logical limits on free exercise rights in relation to laws or actions designed to achieve legitimate, secular purposes" and that "government actions intentionally discriminating against religious exercise *a fortiori* serve no legitimate purpose." *Brown*, 35 F.3d at 850 (emphasis added). Thus, under *Brown*,

California's discrimination against the Hindu faith requires no burden analysis at all—let alone the "substantial burden" required by the decision below.

Nor is there any merit to the argument that the Third and Sixth Circuits apply something akin to the "substantial burden" test. Respondents seize on these courts' references to religious "conduct" to argue that the Third and Sixth Circuits "incorporated an actual 'burden on religious conduct' requirement into [their] 'neutral and generally applicable' analysis." Opp. 25-26. But the category of religiously *neutral* laws cannot include laws that would require school children to learn derogatory descriptions of their religion. Moreover, the Third and Sixth Circuits suggest no such approach is legitimate.[1] While they sometimes refer to discrimination against religious "conduct," they also refer generally to "non-neutral government actions" and the "intentional targeting" of religion, *Brown*, 35 F.3d at 849-50, and they affirm that "[f]aith-based discrimination can come in many forms," *Roberts* v. *Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (per curiam).

Finally, Respondents' treatment of decisions from other circuits is unavailing. They misinterpret some

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[1] Respondents' argument that *Anspach ex rel. Anspach* v. *City of Philadelphia*, analyzes religious discrimination under a "substantial burden" standard, Opp. 25, is incorrect. 503 F.3d 256, 272 (3d Cir. 2007). *Anspach* did not involve discrimination on the basis of religion because the defendants were unaware of the plaintiff's religious objections to the contraceptive drugs they administered. *Id.*

cases,[2] and cite others that are inapplicable.[3] But at bottom, their survey of circuit decisions reinforces that the conflict presents a recurring, outcome-determinative issue under the Free Exercise Clause.

B. The Ninth Circuit's "Substantial Burden" Requirement Conflicts With This Court's Decisions.

Respondents' refusal to address the Ninth Circuit's decisions in *American Family* and *Vernon* is particularly significant because—like the decision below—those decisions are irreconcilable with this Court's Free Exercise precedent. This Court's decisions hold that "[t]he Free Exercise Clause protects against even 'indirect coercion.'" *Espinoza* v. *Mont. Dep't of Revenue*,

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[2] Respondents misread *Altman* v. *Bedford Central School District*, which limits the "substantial burden" analysis to neutral, generally applicable laws, and does not require any threshold obstruction of religious practice to trigger strict scrutiny. 245 F.3d 49, 79-80 (2d Cir. 2001). In *Altman*, the Second Circuit held that the Earth Day celebration at issue did not violate the student plaintiffs' Free Exercise rights because students were not "required to attend" the ceremonies or listen to the speeches. *Id.* Here, of course, Hindu students *are* required to learn California's disparaging treatment of Hinduism.

[3] A number of the cases Respondents cite in support of a "substantial burden" test involve Free Exercise claims in the prison context, where courts apply a unique standard of review. *See, e.g.*, *Gladson* v. *Iowa Dep't of Corr.*, 551 F.3d 825, 831-33 (8th Cir. 2009) (analyzing Free Exercise challenge under *Turner* v. *Safley*, 482 U.S. 78, 89 (1987) and *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 349-50 (1987)). Notably, although the prison context is *sui generis*, courts have split over whether a "substantial burden" analysis is appropriate there as well. *See, e.g.*, *Butts* v. *Martin*, 877 F.3d 571, 585-86 (5th Cir. 2017) (rejecting "substantial burden" requirement). Thus, assuming the prison cases *are* relevant, they simply reinforce the conflict and heighten the need for this Court's review.

140 S. Ct. 2246, 2256-57 (2020) (quoting *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2022 (2017)).

Indeed, all of the circuit court decisions Respondents rely upon to argue that "the other Circuits are in accord" with the Ninth Circuit's "substantial burden" analysis, Opp. 28, either predate *Trinity Lutheran* or ignore it. Here, Respondents' two-sentence analysis, *id.* at 33, merely parrots the decision below by limiting *Trinity Lutheran* to its facts. Respondents cannot and do not dispute that *Trinity Lutheran* rejected the argument that the government does not impose a "meaningful[] burden" on Free Exercise if it has "not *prohibit[ed]* the Church from engaging in any religious conduct or otherwise exercising its religious rights." *Trinity Lutheran*, 137 S. Ct. at 2022. The argument squarely rejected in *Trinity Lutheran* is the cornerstone for Respondents' defense of the decision below.

Espinoza, moreover, reaffirmed *Trinity Lutheran* on this point. It rejected the argument for affirming the Montana Supreme Court's decision that a "ban on sectarian aid" was constitutional because it "does not in any way interfere with or otherwise *substantially burden* the preexisting First Amendment right of parents to send their children to religiously-affiliated schools." *Espinoza* v. *Mont. Dep't of Revenue*, 435 P.3d 603, 624 (Mont. 2018) (Sandefur, J., concurring) (emphasis added). The rationale *Espinoza* implicitly rejected mirrors the district court's analysis here. See Pet. App. 76a (ruling that there was no "substantial burden" if

parents were not "in any way barred from instructing their children on religion at home").[4]

Thus, in contrast to the decisions of the Ninth Circuit, this Court's cases confirm that"[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Id.* (quoting *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993)). And, as discussed below, the disparagement of Hinduism in the Standards and Framework is far from "subtle."

II. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT.

Because the Ninth Circuit dismissed Petitioners' Free Exercise claim based solely on the application of its "substantial burden" standard, this case is an ideal vehicle for resolving the circuit conflict over whether that standard is appropriate. Pet. 22-23. Respondents' counterpoints are meritless.

First, Respondents contend that this case cannot resolve the circuit split because "no law or other regulatory government conduct is involved." Opp. 30-31. This argument is wrong on multiple levels. To begin with, the Standards and Framework *are* state "law," which school districts are not free to ignore, and which have a concrete impact on Petitioners and their children. Moreover, Respondents' argument presumes that the Free Exercise Clause protects only against "direct government restrictions or penalties on religious conduct

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[4] Even if *Masterpiece Cakeshop* might have involved a more direct form of coercion, Opp. 34-35, it too made clear that "the government … cannot impose regulations that are hostile to the religious *beliefs* of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious *beliefs* and practices." *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (emphasis added).

or belief," *id.*, but that view is refuted by this Court's cases.

Second, Respondents claim that this case is a poor vehicle because "Petitioners did not allege *any* burden on their religious exercise." Opp. 31 (emphasis added). That is wrong. Petitioners have consistently alleged the same burden on their Free Exercise of Religion that this Court recognized in *Trinity Lutheran*. See ER2680-84 (Original Complaint); ER1426-29 (Amended Complaint). As Petitioners have explained, for Hindu children "not to be penalized in their exam results and grades, they must disavow their religious beliefs," ER1429, and they "suffer psychological harm, including humiliation and alienation, and receive an inferior education as a direct result [of] [Respondents'] denigration of Hinduism," ER2683. Respondents cannot credibly contest that forcing Hindu children to memorize and be tested on a derogatory depiction of their faith is less burdensome and *coercive* than the risk of "a few extra scraped knees." *Trinity Lutheran*, 137 S. Ct. at 2024-25.

More to the point, Respondents' no-burden argument is circular, incorrectly presuming *again* that the Free Exercise Clause protects only against the direct obstruction of religious practices. Cf. Pet. App. 15a (ruling that Petitioners "failed to allege any burden on their religious exercise or practice" as "required by our decisions in *American Family* and *Vernon*" (citations omitted)).

Third, contrary to Respondents' argument, Opp. 31, neither the district court nor the court of appeals ruled that the Standards and Framework were neutral toward Hinduism. Rather, they dismissed the Free Exercise claim on the "threshold" substantial burden

question. See Pet. App. 76a-77a (district court); *id.* at 15a-17a (court of appeals).[5]

Nor would a finding of neutrality, on a motion to dismiss, be tenable. Respondents have no answer for why substantial changes were made to accommodate Judaism—*e.g.*, the removal of the Good Samaritan parable—and Islam, Pet. 9-10, while equal solicitude was not shown to Hinduism.[6] Likewise, Respondents do not address the Standards' use of the slur "Brahmanism," and they admit that the Standards and Framework inextricably link the caste system with Hindu belief. They defend this derogatory treatment—which no other religion faces—by arguing that Petitioners have not identified "any gratuitous, overtly hostile or obviously false statements about Hinduism." Opp. 11. That is emphatically not the case. For example, the Frame-

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[5] To be sure, the courts below analyzed the Standards and the Framework under the Establishment Clause and asked what an "objective, reasonable observer" would consider the "principal or primary effect" of the Framework and Standards. Pet. App. 21a. That analysis, however, is distinct from the "neutrality" inquiry required by this Court's Free Exercise precedents, which are at issue before this Court. *E.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

[6] Respondents' assertion regarding the "generally positive" response to the Standards and Framework, Opp. 17, is made possible only by omitting the contrary statements from the articles they cite. *See, e.g.*, SER128-29 ("We only wish they had shown the same empathy when discussing further changes on the presentation of Hinduism."); SER140 (emphasizing the need to "continue to fight against Hinduphobia and correct biases and stereotypes about Hindus and Indians in the textbooks"). That the revised Framework is *less* disparaging of Hinduism than it might have been—*e.g.*, by removal of a comparison with American chattel slavery, Opp. 7—is cold comfort to the parents of Hindu children subject to the humiliation spawned by the Framework and Standards.

work identifies the caste system as intrinsic to Hinduism, *id.* at 11-12, when Petitioners have consistently alleged and shown that it is not. See, *e.g.*, ER2676 (Original Complaint) ("The Framework … *unfairly* attributes the caste system to Hinduism …." (emphasis added)); *id.* ("The Framework also fails to note that the caste system … has not existed among Hindus of Indonesia and Fiji."); see also Temples' *Amici* Br. 4 (explaining that caste "is not intrinsic to the Hindu tradition").

As for the Aryan Invasion Theory highlighted in the Standards, Respondents reply that this is just a "theory" and that students will be able to "examin[e] whether and how new evidence supports the theory." Opp. 12. But for no other religion is any such *theory* adduced to explain the origins of its *beliefs*. To the contrary, the beliefs of Judaism, Christianity, Islam, Buddhism, Jainism, and Sikhism are described as originating not with a racist *theory* but with religious figures like Abraham, Jesus of Nazareth, Muhammad, Buddha, Mahavira, and Guru Nanak. Respondents likewise err in saying that Petitioners challenge any suggestion that Hinduism has "developed and evolved." *Id.* at 9. Rather, Petitioners challenge the degrading assertion that Hinduism developed or evolved *from* a caste system overseen by "*Brahmins*." Pet. App. 120a-122a.[7]

Equally irrelevant is the emphasis Respondents place on the fact that *students* do not read the Stand-

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[7] On this point, Respondents' survey of the Framework's positive comments regarding ancient India and negative comments regarding other cultures, Opp. 14-15, is irrelevant. This is a case about religion—not ethnography or geography—and it is what the Standards and the Framework have to say about the origins, beliefs, and scriptures of the Hindu religion that matters.

ards and Framework. The Standards and the Framework control what the students *do* read.[8] Pet. 6; ER146. This is why textbooks derived from the Standards and Framework treat the "caste system" and "the Aryan Invasions" as "central" to Hinduism—and why Hindu children are forced to participate in caste-system role-playing activities. Pet. 13; ER1428-29 ("[W]hen we were taught about Hinduism, I felt a mixture of confusion and shame and even felt like not wanting to be a Hindu.").

CONCLUSION

For these reasons, and those set forth in the petition, the petition should be granted.

Respectfully submitted,

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[8] As *amici* explain, moreover, the Standards and Framework control what students read not only in California but nationwide. *See* Temples' *Amici* Br. 18-20 (describing how Standards- and Framework-aligned curricula are sold to school districts across the country).