

No. 23-601

In the Supreme Court of the United States

JOHN AND JANE PARENTS 1 AND JOHN PARENT 2,

Petitioners,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S.
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF OF AMICI CURIAE JEWISH COALITION
FOR RELIGIOUS LIBERTY, AMERICAN
HINDU COALITION, ISLAM AND RELIGIOUS
FREEDOM ACTION TEAM, CHRISTIAN LEGAL
SOCIETY, AND ETHICS AND RELIGIOUS
LIBERTY COMMISSION IN SUPPORT OF
PETITIONERS**

KAYLA A. TONEY
FIRST LIBERTY INSTITUTE
1331 Pennsylvania Ave. NW
Suite 1410
Washington, DC 20004
(202) 921-4105

Counsel for Amici Curiae

KELLY J. SHACKELFORD
Counsel of Record
JEFFREY C. MATEER
DAVID J. HACKER
JUSTIN E. BUTTERFIELD
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy
Suite 1600
Plano, TX 75075
(972) 941-4444
kshackelford@firstliberty.org

QUESTIONS PRESENTED

- I. When a public school, by policy, expressly targets parents to deceive them about how the school will treat their minor children, do parents have standing to seek injunctive and declaratory relief in anticipation of the school applying its policy against them?
- II. Assuming the parents have standing, does the Parental Preclusion Policy violate their fundamental parental rights?

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIES..... iv

INTEREST OF *AMICI CURIAE*1

SUMMARY OF ARGUMENT3

ARGUMENT.....5

 I. The Free Exercise Clause protects parents’ freedom to direct their children’s education and impart their sincere religious beliefs without government interference5

 II. The Policy substantially burdens the sincerely held religious beliefs of many different faith groups.....12

 A. Timeless Jewish beliefs about sex and gender14

 B. Hindu beliefs about sex and gender16

 C. Muslim beliefs about sex and gender18

 D. Christian beliefs about sex and gender21

 III. The Policy disproportionately impacts families from minority faith backgrounds23

 A. Minority faiths are most likely to be misunderstood and targeted by hostile government officials23

B. Families from minority faith backgrounds often lack educational alternatives.....	25
CONCLUSION	27

TABLE OF AUTHORITIES

Cases

<i>A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.</i> , 611 F.3d 248 (5th Cir. 2010).....	23
<i>Arnold v. Bd. of Educ. of Escambia Cnty., Ala.</i> , 880 F.2d 305 (11th Cir. 1989).....	10
<i>Ben-Levi v. Brown</i> , 136 S. Ct. 930 (2016).....	24
<i>Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico</i> , 457 U.S. 853 (1982).....	9
<i>Espinoza v. Montana Dep’t of Revenue</i> , 140 S. Ct. 2246 (2020).....	7
<i>Gonzales v. Mathis Indep. Sch. Dist.</i> , No. 2:18-cv-43, 2018 WL 6804595 (S.D. Tex. Dec. 27, 2018).....	23
<i>Gruenke v. Seip</i> , 225 F.3d 290 (3d Cir. 2000)	10, 12
<i>Fulton v. City of Philadelphia</i> , 141 S. Ct. 1868 (2021).....	5, 6, 24
<i>Holt v. Hobbs</i> , 574 U.S. 352 (2015).....	24

<i>Kennedy v. Bremerton School District</i> , 142 S. Ct. 2407 (2022).....	3
<i>Mahanoy Area Sch. Dist. v. B. L. by & through Levy</i> , 141 S. Ct. 2038 (2021).....	26
<i>Masterpiece Cakeshop Ltd. v. Colo. Civ. Rts. Comm'n</i> , 138 S. Ct. 1719 (2018).....	5, 6
<i>Mirabelli v. Olson</i> , No. 3:23-cv-00768-BEN-WVG, 2023 WL 5976992 (S.D. Cal. Sept. 14, 2023)	11
<i>Morse v. Frederick</i> , 551 U.S. 393 (2007).....	25
<i>Our Lady of Guadalupe Sch. v. Morrissey-Berru</i> , 140 S. Ct. 2049 (2020).....	7, 9
<i>Parents Defending Education v. Linn Mar Cmty. Sch. Dist.</i> , 83 F.4th 658 (8th Cir. 2023)	10
<i>Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.</i> , No. 2:23-CV-01595, 2023 WL 4848509, (S.D. Ohio July 28, 2023).....	10, 11
<i>Tatel v. Mt. Lebanon School District</i> , No. CV 22-837, 2022 WL 15523185 (W.D. Pa. Oct. 27, 2022)	11, 25, 26
<i>Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.</i> , 450 U.S. 707 (1981).....	13, 24, 25

West Virginia Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 9

Wisconsin v. Yoder,
406 U.S. 205 (1972) 7, 12, 25

Other Authorities

Asma Afsaruddin, *Muslim Views on Education: Parameters, Purview, and Possibilities*, 44 J. CATH. LEGAL STUDIES 143 (2005) 9

Marwan Ibrahim Al-Kaysi, MORALS AND MANNERS IN ISLAM: A GUIDE TO ISLAMIC ADAB (1986) 19

Aum School, Aum Educational Society of America (2022) 26bapti

Baptist Faith and Message (2000) 9, 22

Catholic Catechism, No. 2333 21

Catholic Catechism, No. 2361 13

Deuteronomy 6:7 8

Dharma Sastra, Vol. 6 Manu Sanskrit 17

Dr. Sikiru Gbena Eniola, *An Islamic Perspective of Sex and Sexuality: A Lesson for Contemporary Muslims*, 12 IOSR JOURNAL OF HUMANITIES AND SOCIAL SCIENCE 2 (May-Jun. 2013) 13

Fatwa No. 88708, “Sisters object to barrier between them and men in the mosque,” <i>Islamweb.net</i> (Sept. 29, 2004)	19
First Liberty Institute, <i>Public Comment on Section 1557 NPRM</i> (Oct. 3, 2022)	21
“Gender and Sexuality,” <i>Religion Library: Hinduism, PATHEOS</i>	17
<i>Genesis 1:27</i>	14, 21
<i>Homosexuality in Jewish Law</i> , JEWISH VIRTUAL LIBRARY.....	13
Rabbi Dov Lev, <i>Women and Mitzvot in Judaism</i> , AISH.....	15
Maimonides, <i>Mishne Torah, Hilkhhot Talmud Torah</i> . 8	
<i>Male, Female, or Other: Ruling of a Transgender Post Sex Change Procedures</i> , AMERICAN FIQH ACADEMY (May 2, 2017).....	18
<i>Marriage in Islam, Why Islam? Facts About Islam</i> (March 5, 2015)	13, 18
KEWAL MOTWANI, <i>MANU DHARMA SASTRA: A SOCIOLOGICAL AND HISTORICAL STUDY</i> (1958) ...	8, 17
"On Opposing Gender Transitions," <i>Southern Baptist Convention</i> (June 15, 2023)	22
“On Transgender Identity,” <i>Southern Baptist Convention</i> (June 1, 2014)	22

Orthodox Church of America, <i>“In the Beginning...”</i> <i>Healing our Misconceptions</i>	21
Chaim Rapoport, <i>Judaism and Homosexuality: An Alternate Rabbinic View</i> , 13 HAKIRAH, FLATBUSH JOURNAL OF JEWISH LAW AND THOUGHT 29	14
Yehuda Shurpin, <i>Why Are Women Exempt From Certain Mitzvahs?</i> , Chabad.org	15, 16
<i>Surah An-Nisa</i> 4:1	18
<i>Surah Nur</i> 24:31	19
The Church of Jesus Christ of Latter-Day Saints, <i>Chastity, Chaste</i>	13
Asma Uddin, WHEN ISLAM IS NOT A RELIGION: INSIDE AMERICA’S FIGHT FOR RELIGIOUS FREEDOM (2019)	24
<i>Women are the Twin Halves of Men</i> , KASHMIR OBSERVER, (March 9, 2017).....	13, 20
Christopher Yuan, <i>Gender Identity and Sexual Orientation</i> , THE GOSPEL COALITION	13
Rabbi Avi Zakutinsky, <i>Dancing at a Wedding</i>	15

Ani Amelia Zainuddin, et al, *The Islamic Perspectives of Gender-Related Issues in the Management of Patients with Disorders of Sex Development*, NATIONAL LIBRARY OF MEDICINE (April 21, 2016).....
.....18. 19, 20

INTEREST OF *AMICI CURIAE*¹

The Jewish Coalition for Religious Liberty (JCRL) is a cross-denominational organization of Jewish rabbis, lawyers, and professionals committed to defending religious liberty. As members of a minority faith that adheres to practices that many in the majority may not know or understand, the Jewish Coalition for Religious Liberty has an interest in ensuring that government actors are prohibited from evaluating the validity of religious objectors' sincerely held beliefs. The Jewish Coalition for Religious Liberty is also interested in ensuring that parents' and students' First Amendment free exercise rights are protected.

The American Hindu Coalition (AHC) is an apolitical national advocacy organization representing Hindus, Buddhists, Jains, Sikhs, and related members of minority religions that frequently face discrimination and misunderstanding in the public school system, as their religious practices and beliefs are unfamiliar to mainstream America. AHC members have advocated for a parent-partnered public school education in various local and state-wide school boards. AHC seeks to defend religious parents and children against discriminatory practices in public

¹ All parties were timely notified of the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* or their counsel made a monetary contribution to this brief's preparation or submission.

school education, and to protect families' First Amendment rights to freely exercise their religion.

The Islam and Religious Freedom Action Team (IRF) of the Religious Freedom Institute amplifies Muslim voices on religious freedom, seeks a deeper understanding of support for religious freedom inside Islamic teachings, and protects Muslims' religious freedom. The IRF engages in research, education, and advocacy on core issues including freedom from coercion and equal citizenship for diverse faiths. The IRF translates resources by Muslims about religious freedom, fosters inclusion of Muslims in religious freedom work, and partners with the Institute's other teams in advocacy. The IRF has an interest in protecting parents' ability to raise their children according to their sincerely held religious beliefs.

Christian Legal Society (CLS) is a nondenominational association of Christian attorneys, law students, and law professors, with more than 4,000 members. CLS's legal advocacy division, the Center for Law & Religious Freedom, works to protect the free exercise rights of all Americans, both in this Court, in administrative regulation, and in Congress. CLS members and their clients have an interest in clarifying and preserving the full and free exercise of religion by all Americans, including in the upbringing of their children.

The Ethics and Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 50,000 churches and

congregations and nearly 14 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

SUMMARY OF ARGUMENT

As this Court recently recognized in *Kennedy v. Bremerton School District*, suppressing religious expression in public schools “would undermine a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been ‘part of learning how to live in a pluralistic society.’” 142 S. Ct. 2407, 2430 (2022). Yet the Montgomery County Board of Education's Policy does just that, by requiring staff to hide children's gender transitions from their own religiously-observant parents based on a subjective assessment of whether the parents will be “unsupportive.”

Amici raise significant concerns that the Policy violates the First Amendment. The Free Exercise Clause protects the right of parents to raise their children in accordance with their sincere religious beliefs, without being undermined by public school administrators. Under the Policy, religious parents teaching their faith to their children will be excluded as their children must choose between following the ideals they learned at home or succumbing to school

pressure to support gender transitions. Given this situation, many religious parents' consciences will compel them to remove their children from public school at great personal expense, denying them a public benefit available to their neighbors. Parents from minority faith backgrounds, who have no viable choice but public school, will be last to learn that their child has secretly transitioned at school. For Petitioners, and parents in districts adopting similar policies, such concerns are neither speculative nor hypothetical. Yet under the Fourth Circuit's faulty holding, none of these parents have standing to sue.

Montgomery County's Policy substantially burdens the sincerely held religious beliefs of many different faith groups. Families from diverse religious backgrounds hold traditional beliefs about gender and sexuality, directly contradicted by the Policy. *Amici* represent views from the Jewish, Hindu, Muslim, and Christian faiths, in which many adherents hold the beliefs that sex is biological and immutable, and that parents, not schools, are entrusted with the care and religious upbringing of their children. The Policy disproportionately harms families from minority faith backgrounds, because government officials are likely to misunderstand their beliefs.

This Court must address the deepening circuit split as such policies proliferate nationwide. Parents need not wait until their children are irreversibly harmed to challenge a facially unconstitutional policy. *Amici* urge this Court to uphold free exercise rights and consider the impact of such policies on religious families nationwide, particularly families from minority faith backgrounds.

ARGUMENT

I. The Free Exercise Clause protects parents' freedom to direct their children's education and impart their sincere religious beliefs without government interference.

The Policy raises three significant free exercise concerns: it triggers strict scrutiny under *Fulton* by allowing exceptions, runs afoul of *Masterpiece* by requiring government evaluation of parents' beliefs, and interferes with the free exercise rights of religious parents to direct their children's education in accordance with their beliefs.²

First, the Policy triggers and fails strict scrutiny under *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878-1879 (2021). In *Fulton*, this Court held that where a government policy “incorporates a system of individual exemptions” or “a formal system of entirely discretionary exceptions,” strict scrutiny applies. *Id.* at 1878. This is true “regardless whether any exceptions have been given, because it ‘invite[s] the government to decide which reasons . . . are worthy of solicitude.’” *Id.* at 1879. Here, the Policy empowers state officials with the discretionary power to grant exceptions.

The Policy also violates the First Amendment under *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1731 (2018), because the

² Although Petitioners did not bring a free exercise claim, the Policy burdens religious parents' free exercise rights which this Court, we respectfully submit, must consider in its parental rights analysis.

government may not “act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” Here, the Policy vests administrators with individualized discretion by requiring staff to rank a parent’s perceived “support level” using a subjective scale of 1 to 10, based solely on conjecture. App.30a. This all-important decision of whether to notify parents that their child is transitioning is made without the staff speaking with the parents. The decision below failed to recognize that this is constitutionally problematic regardless whether the Plaintiffs’ children have begun transitioning.

Thus, the Policy violates free exercise under both *Fulton* and *Masterpiece*. It fails under *Fulton* by empowering officials to deny discretionary religious accommodations. It fails under *Masterpiece* by requiring government officials to evaluate parents’ beliefs and facilitate or frustrate their involvement based on the government’s assessment of parents’ viewpoints. App.38a–39a.

Third, an independent exception to *Employment Division v. Smith*’s cribbed reading of the First Amendment applies here, where the religious rights of parents are at stake.³ The First Amendment provides robust protection for families seeking to raise their children in accordance with their religious beliefs. See

³ *Amici* highlight that this confusion regarding the level of scrutiny in free exercise cases is one of many reasons that this Court should revisit *Employment Division v. Smith*, 494 U.S. 872 (1990). See, e.g., Brief for Jewish Coalition for Religious Liberty and Islam & Religious Freedom Action Team of the Religious Freedom Institute, as *Amici Curiae* in Support of Petitioner, *Tingley v. Ferguson*, 144 S. Ct. 33 (No. 22-942) (*cert. denied*).

Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (parental rights regarding religious upbringing are “specifically protected by the Free Exercise Clause,” “[l]ong before . . . universal formal education”). The *Yoder* Court drew a direct connection between parental rights and religious beliefs, explaining that “[t]he duty to prepare the child for ‘additional obligations,’ referred to by the Court, must be read to include the inculcation of moral standards, [and] religious beliefs.” *Id.* at 233. Any infringement of a parent’s free exercise right to raise her children in accordance with her faith is subject to strict scrutiny. See *Yoder*, 406 U.S. at 215 (“[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”). While *Yoder* did not involve minor children disagreeing with their Amish parents’ decision to forgo public high school, the Court observed that “such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here.” *Id.* at 231-232.

Parental rights are included within with free exercise rights and are especially strong for religious families seeking to teach their faith to the next generation. For nearly 100 years, the Court has reaffirmed the “enduring American tradition” of “the rights of parents to direct ‘the religious upbringing’ of their children.” *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020) (quoting *Yoder*, 406 U.S. at 213-214); see also *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2065-2066 (2020) (describing how many religious traditions entrust parents with primary responsibility for imparting their faith to their children without government

interference). Not only does the First Amendment protect parents' freedom to teach their faith to their children, but for many, including *amici*, this obligation is at the core of the parents' own religious exercise.

For example, Jews believe they have a biblical obligation to teach their children God's commandments. See Deuteronomy 6:7 ("And you shall teach them to your sons and speak of them when you sit in your house, and when you walk on the way, and when you lie down and when you rise up."). This is an obligation of the highest order, for "the world exists only by virtue of the breath coming from the mouths of children who study Torah."⁴

For Hindus, child-rearing is a parent's highest righteous (Dharmic) duty. Hindu legal texts from 200 B.C. provide detailed instructions regarding both parents' rights and responsibilities in child-rearing. "The educative influence of the mother during the early years is incalculable. She is the first teacher of the child The father and the mother transmit to the child the social ideals and values."⁵ Thus, parental instructions on a Dharmic life are essential to a child's education.

For Muslim Americans, "the acquisition of at least rudimentary knowledge of religion and its duties [is]

⁴ Maimonides, *Mishne Torah*, *Hilkhot Talmud Torah* 1:2; 2:1, 3, <https://perma.cc/989H-JFYW>.

⁵ KEWAL MOTWANI, *MANU DHARMA SASTRA: A SOCIOLOGICAL AND HISTORICAL STUDY* 121 (1958).

mandatory for the Muslim individual.”⁶ This obligation, which applies to parents as they raise children, comes from the Prophet Mohammad, who proclaimed that “[t]he pursuit of knowledge is incumbent on every Muslim.”⁷

For millions of Christians, “[p]arents are to teach their children spiritual and moral values and to lead them, through consistent lifestyle example and loving discipline to make choices based on biblical truth.”⁸

Courts consistently recognize the link between parental rights and free exercise rights in the context of public-school policies. This Court has recognized that “the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.” *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982); see also *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“Boards of Education . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual[.]”).

⁶ *Our Lady of Guadalupe*, 140 S. Ct. at 2065 (citing Asma Afsaruddin, *Muslim Views on Education: Parameters, Purview, and Possibilities*, 44 J. CATH. LEGAL STUDIES 143, 143–44 (2005)).

⁷ *Id.*

⁸ Baptist Faith and Message (2000), <https://perma.cc/6SGV-79K4>.

Especially where “the situation raises profound moral and religious concerns,” public schools may not “depriv[e] parents of the opportunity to counter influences on the child the parents find inimical to their religious beliefs or the values they wish instilled in their children.” *Arnold v. Bd. of Educ. of Escambia Cnty., Ala.*, 880 F.2d 305, 313-314 (11th Cir. 1989) (school officials violated Constitution when they coerced minor into abortion without parents’ knowledge); see also *Gruenke v. Seip*, 225 F.3d 290, 307 (3d Cir. 2000) (when coach revealed student’s pregnancy against family’s wishes, court recognized that “[i]t is not educators, but parents who have primary rights in the upbringing of children”). The same principles apply here: public schools may not interfere with the foundational relationship between parents and children, especially in areas such as sexuality that involve religious beliefs.

The decision below highlights the split in the circuits that have grappled with the issues of parental rights and gender identity. In *Parents Defending Education v. Linn Mar Community School District*, 83 F.4th 658, 667 (8th Cir. 2023), the Eighth Circuit reversed the district court’s finding that parents lacked standing to challenge a similar policy in Iowa. In accord with the longstanding doctrine of pre-enforcement challenges, the Eighth Circuit also found that “[p]arents have standing to sue when the practices and policies of a school threaten the rights and interests of their minor children.” See also *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, No. 2:23-CV-01595, 2023 WL 4848509, at *6 (S.D. Ohio July 28, 2023), *appeal docketed*, No. 23-3630 (6th Cir. July 31, 2023) (“plaintiffs need not wait

to be punished or prosecuted to bring a facial challenge, especially where they have refrained from engaging in certain conduct for fear of punishment”).

Several federal courts have protected free exercise rights in disputes about gender identity. In *Tatel v. Mt. Lebanon School District*, 637 F. Supp. 3d 295, 330 (W.D. Pa. 2022), *aff'd on reh'g*, 2023 WL 3740822 (May 31, 2023), the court vindicated parents' free exercise claims based on their “sincerely held religious beliefs about sexual or gender identity and the desire to inculcate those beliefs in their children.” There, a first-grade teacher advocated her own agenda and beliefs about gender identity despite parents' objections. Contrasting the parents' beliefs that “humans are created beings who must accept their place in a larger reality” with the transgender movement's assertion that “human beings are autonomous, self-defining entities who can impose their internal beliefs about themselves on the exterior world,” the court recognized the “contradictions between these worldviews” and upheld free exercise rights. *Id.* at 321. In *Mirabelli v. Olson*, No. 3:23-cv-00768-BEN-WVG, 2023 WL 5976992 (S.D. Cal. Sept. 14, 2023), the court enjoined a school policy requiring teachers to conceal gender transitions from parents, finding that this violated religious teachers' free exercise rights. The court rejected the “mistaken view that the District bears a duty to place a child's right to privacy above, and in derogation of, the rights of a child's parents. The Constitution neither mandates nor tolerates that kind of discrimination.” *Id.* at *15.

The Policy here violates the Free Exercise Clause by interfering with religious parents' constitutionally

protected ability to raise their children in accordance with their sincere beliefs. The Board might wish to be “empowered, as *parens patriae*, to ‘save’ a child from himself or his [religious] parents” so that “the State will in large measure influence, if not determine, the religious future of the child.” *Yoder*, 406 U.S. at 232. But that is a power the Constitution does not permit it to wield. The Board’s Policy sets students and parents at odds by requiring parental exclusion and allowing the staff and student total control over religiously sensitive decisions about gender identity. App.29a–31a. These actions violate the Supreme Court’s holding that parents have the responsibility to inculcate “moral standards, religious beliefs, and elements of good citizenship.” *Yoder*, 406 U.S. at 233. As in *Gruenke*, “when such collisions [between parental rights and public school policies] occur, the primacy of the parents’ authority must be recognized and should yield only where the school’s action is tied to a compelling interest.” 225 F.3d at 305. Here, the Policy triggers strict scrutiny, and it cannot pass muster because it is maximally restrictive of parents’ First Amendment rights.

II. The Policy substantially burdens the sincerely held religious beliefs of many different faith groups.

Traditional adherents to religions from diverse cultures and geographic regions assert—as they have for millennia—that sex is an objective, binary category that cannot be changed by self-perception and should

not be obscured by medical intervention.⁹ Sacred texts that define beliefs on marriage, sexuality, chastity, and sex as male and female include the Catholic Catechism,¹⁰ the Hebrew Bible,¹¹ the New Testament, the Quran,¹² Hadith,¹³ and the Book of Mormon.¹⁴ The First Amendment provides robust protection for religious believers who adhere to these faiths, as well as for individuals who do not believe in and exercise a widely known faith but who hold sincere religious beliefs about the body, sexuality, marriage, and gender.¹⁵

⁹ See, e.g., Christopher Yuan, *Gender Identity and Sexual Orientation*, THE GOSPEL COALITION, <https://perma.cc/58K4-WAXM>.

¹⁰ Catholic Catechism, No. 2361, <https://perma.cc/6XUW-2JMX>.

¹¹ *Homosexuality in Jewish Law*, JEWISH VIRTUAL LIBRARY, <https://perma.cc/M9AJ-UPE2>.

¹² *Marriage in Islam*, Why Islam? Facts About Islam (March 5, 2015), <https://www.whyislam.org/social-issues/marriage-in-islam/>; *Women are the Twin Halves of Men*, KASHMIR OBSERVER, (March 9, 2017), <https://perma.cc/4QX4-GMTP>.

¹³ Dr. Sikiru Gbena Eniola, *An Islamic Perspective of Sex and Sexuality: A Lesson for Contemporary Muslims*, 12 IOSR JOURNAL OF HUMANITIES AND SOCIAL SCIENCE 2 (May–Jun. 2013), at 20-28, <https://perma.cc/5JRM-933X>.

¹⁴ *Chastity, Chaste*, The Church of Jesus Christ of Latter-Day Saints, <https://perma.cc/SF2V-D6BU>.

¹⁵ See *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

A. Timeless Jewish beliefs about sex and gender

Millions of Jewish Americans follow *halachic* teaching rooted in Jewish law dating back three millennia. The Torah is very clear that God created human beings distinctly male and female.¹⁶ “[W]e have to strive to ‘maintain sexual purity’ on a universal level and it is ‘our obligation . . . to incorporate the Holiness Code into our everyday civic and communal life.’”¹⁷ Observant Jews follow the timeless prescriptions of the Torah and codifications of Jewish Law and respect their specific commands regarding sexual purity and holiness.

The Torah does not recognize the possibility of changing sex or gender. Thus, many Orthodox Jewish parents believe that, according to their faith, it is impossible for a person to change sexes. “This distinction between women and men is also reflected in the role parents have in determining the identity of their child. The essence of Jewishness is determined by the mother, whereas the particulars of Jewishness,

¹⁶ *Genesis* 1:27, The Contemporary Torah, Sefaria (“And God created humankind in the divine image, creating it in the image of God—creating them male and female.”) <https://perma.cc/X7M6-UE4L>

¹⁷ Chaim Rapoport, *Judaism and Homosexuality: An Alternate Rabbinic View*, 13 HAKIRAH, THE FLATBUSH JOURNAL OF JEWISH LAW AND THOUGHT 29, 32 (citing Sanhedrin 58a (expounding on *Genesis* 2:24) and Maimonides, *Mishneh Torah*, *Hilkhot Melakhim* 9:5), <https://perma.cc/WLZ3-YQZY>.

such as tribal identity, are determined by the father.”¹⁸

Differences between the biological sexes, in accordance with divine creation, are fundamental to the structure and pattern of Jewish religious worship. The distinctions between men and women also factor into eligibility to perform communal roles such as counting for a prayer quorum or leading prayers. Thus, if members of the Jewish community could act as if they had changed their sex or gender at will, and could also force others to act if they believed this untruth, this would not only disrupt their own religious practice, as the core obligations for men and women are not subject to change, but it would also disrupt the religious life of the community.

For example, traditional Jewish synagogues provide physical and visual separation between men and women during prayers.¹⁹ Also, while men and women are equally obligated to obey the negative commandments (such as do not murder and do not steal), women are exempt from many positive time-bound commandments.²⁰ According to some explanations, this is based on the belief that God created men and women with different biological roles and abilities, and that “[a]s the primary creators and nurturers of human life, women more closely resemble

¹⁸ Yehuda Shurpin, *Why Are Women Exempt From Certain Mitzvahs?*, Chabad.org, <https://perma.cc/S642-BN7C>.

¹⁹ Rabbi Avi Zakutinsky, *Dancing at a Wedding*, <https://perma.cc/V9NK-XKKL>.

²⁰ Rabbi Dov Lev, *Women and Mitzvot in Judaism*, AISH, <https://perma.cc/XG2B-983T>.

God than men do.”²¹ Thus, only men are obligated to pray at specific times each day, to blow the shofar on Rosh Hashanah, and to live in the ceremonial booth on Sukkot.²² Women are allowed, but not required, to complete these practices. Another potential explanation for this difference is that women are not required to observe such commandments because doing so might interfere with family responsibilities, and “raising children is considered one of the most elevated forms of service to God, crucial to the continuation of His nation and His Torah.”²³ Only men traditionally wear *tzitzit* and *tefillin*.²⁴ The morning prayer service contains specific blessings for men and women.²⁵ Thus, the biological differences between the sexes have important ramifications for Jewish community life and worship, and it is vitally important that this Court protect parents’ First Amendment right to transmit the Jewish teaching on such matters to their children.

B. Hindu beliefs about sex and gender

Hindu scripture, culture, and values emphasize marriage and child-rearing as essential to *Dharma* (religious or moral duties). Hindu teaching makes clear that men and women have distinct identities, that “marriage should be treated as a sacrament” in

²¹ *Women and Mitzvot in Judaism*, *supra* note 20.

²² *Id.*

²³ Shurpin, *Why Are Women Exempt From Certain Mitzvahs?*, Chabad.org, *supra* note 18.

²⁴ *Women and Mitzvot in Judaism*, *supra* note 20.

²⁵ *Id.*

which “two complementary halves are brought together to make a complete whole,” and that sexual activity belongs within heterosexual marriage.²⁶ Both the vow and the institution of marriage are defined and sanctioned by divine authority.²⁷ It is only within marriage that sexual behavior aligns with *dharma* or righteous living.²⁸

Producing offspring and rearing children are considered sacred duties essential to marriage, with distinct roles for mother and father; “[t]he constituent unit of social life, therefore, is not the individual, but the trinity of the father, the mother, and the child.”²⁹ Hindus believe that parents’ rights and responsibilities in child-rearing are sacred and must be protected against government infringement.

Obedience to authority is another sacred obligation that Hindu parents instill in their children. “The student should not do anything without knowledge or guidance of the teacher, the father and the mother.”³⁰ School policies that place teachers at odds with parents confuse children regarding whose authority to respect.

²⁶ MOTWANI, *supra* note 5, at 116.

²⁷ See, e.g., *Dharma Sastra*, Vol. 6 Manu Sanskrit, Chapter III, pp. 80-93.

²⁸ “Gender and Sexuality,” *Religion Library: Hinduism*, PATHEOS, <https://perma.cc/4R9N-387J>.

²⁹ MOTWANI, *supra* note 5, at 119.

³⁰ *Id.* at 86.

C. Muslim beliefs about sex and gender

In the Muslim faith, sacred writings and specific teachings make clear that men and women are two distinct biological sexes with important differences and relationships toward one another. The Quran elucidates this, teaching that “all human beings, whether male or female, are descended from Adam and Eve.”³¹ Both Shi’ah and Sunni Muslims hold to the Prophet Mohammad’s words: “men and women are twin halves of each other’ (Bukhari).”³² Muslims’ belief that sex is binary, fixed, and immutable is closely linked to the creation narrative and “brings home the fact that men and women are created from a single source. Furthermore, by using the analogy of twin half, the Prophet (pbuh) has underlined the reciprocal and interdependent nature of men and women’s relationships.”³³

Islamic teaching does not recognize alternate gender identities, because even when someone changes his or her outer appearance or receives hormones or surgery, there is no fundamental change in biology at the cellular level and thus “the rulings of that [biological] sex continue to apply.”³⁴

³¹ *Surah An-Nisa* 4:1; see also Ani Amelia Zainuddin, et al, *The Islamic Perspectives of Gender-Related Issues in the Management of Patients with Disorders of Sex Development*, NATIONAL LIBRARY OF MEDICINE (April 21, 2016), <https://perma.cc/JX2C-3UJX>.

³² *Marriage in Islam*, *supra* note 12.

³³ *Id.*

³⁴ *Male, Female, or Other: Ruling of a Transgender Post Sex Change Procedures*, AMERICAN FIQH ACADEMY (May 2, 2017), <https://perma.cc/FFN6-336X>.

Because the identities of biological men and women are unique and divinely created, this belief has important implications for religious worship, marriage, and discussions about gender identity. “Men and women in Islam have different roles, responsibilities, and accountabilities, as they differ in anatomy, physiology, and psychology.”³⁵ As a matter of religious obedience, Muslims must observe decency (*ihlisham*), which prevents a Muslim female from sharing a restroom with the opposite biological sex, modesty (*hijab*), which includes behavior as well as dress, and seclusion (*khalwa*), which means a man and woman who are unrelated and unmarried cannot be alone together in an enclosed space.³⁶ In religious worship, men and women sit in separate areas to reduce distractions and protect modesty; this is a “way of preventing men and women from seeing each other and a way of increasing attention to prayer.”³⁷ The obligation to go to Friday prayers applies to men but not women, and traditionally a woman’s prayer is more rewarded if she prays at home rather than at the

³⁵ Zainuddin, *The Islamic Perspectives of Gender-Related Issues in the Management of Patients with Disorders of Sex Development*, *supra* note 31.

³⁶ See, e.g., *Surah Nur* 24:31 (describing concept of *hijab*); MARWAN IBRAHIM AL-KAYSI, MORALS AND MANNERS IN ISLAM: A GUIDE TO ISLAMIC ADAB 60-61 (1986) (describing restroom obligations).

³⁷ Fatwa No. 88708, “Sisters object to barrier between them and men in the mosque,” *Islamweb.net* (Sept. 29, 2004), <https://perma.cc/HY5W-9CPE>.

mosque.³⁸ This belief does not demean women but instead recognizes the traditional complementary spheres of keeping home and making a living in a more public way.³⁹ Thus, Muslims' belief in the distinct biological sexes is not only rooted in their sacred teachings but goes to the very core of their religious exercise.

Islamic teaching does recognize the rare occurrence of “*khuntha*” or “intersex” biology, when a child is born with sexual ambiguity because of opposite sex organs. Surgery is typically only allowed for *khuntha* individuals when medical doctors determine that it would allow the person to be designated as a certain sex, in order to be able to perform his or her duties as a Muslim.⁴⁰ For example, “[t]here are fatwas from different Islamic countries which give rulings regarding sex change surgery or gender reconstruction surgery . . . [t]hese fatwas generally agree that gender reconstruction surgery for the [*khuntha*] is permissible in Islam” but “totally prohibited” in other cases.⁴¹

³⁸ Zainuddin, *The Islamic Perspectives of Gender-Related Issues in the Management of Patients with Disorders of Sex Development*, *supra* note 31.

³⁹ *Women are the Twin Halves of Men*, OBSERVER NEWS SERVICE, (March 9, 2017), <https://perma.cc/JEW2-THTG>.

⁴⁰ Zainuddin, *The Islamic Perspectives of Gender-Related Issues in the Management of Patients with Disorders of Sex Development*, *supra* note 31.

⁴¹ *Id.*

D. Christian beliefs about sex and gender

Millions of Christians worldwide believe in and observe Biblical teaching about sexuality. Catholic doctrine makes clear that “[e]veryone, man and woman, should acknowledge and accept his sexual identity” and that “[p]hysical, moral, and spiritual difference and complementarity are oriented toward the goods of marriage and the flourishing of family life.”⁴² The Orthodox Church of America teaches that “[o]ur sexuality begins with our creation,” and “[t]he Bible says ‘Male and female He created them’ (Gen. 1:27).”⁴³ Within the Protestant faith, most denominations believe the Bible’s teaching that God created humans male and female in His image, and that this reality cannot be changed based on perceived gender identity, including but not limited to the Anglican Church, Assemblies of God, the Church of God in Christ, the Lutheran Church, the Presbyterian Church in America, and Southern Baptists.⁴⁴

Southern Baptists believe that “[m]an is the special creation of God, made in His own image. He created them male and female as the crowning work of His creation. The gift of gender is thus part of the goodness

⁴² Catholic Catechism, No. 2333, <https://perma.cc/DJQ5-G2DE>.

⁴³ “*In the Beginning...*” *Healing our Misconceptions*, Orthodox Church of America, <https://perma.cc/BU2X-BQ87> (quoting *Genesis* 1:27).

⁴⁴ For a complete list of sources, see First Liberty Institute, *Public Comment on Section 1557 NPRM* (Oct. 3, 2022), at 4-9, <https://perma.cc/97NU-VCMZ> (detailing religious beliefs of 20 faith groups on sex and gender).

of God’s creation.”⁴⁵ In 2014, the messengers at the Southern Baptist Convention’s annual meeting passed a resolution explaining: “[G]ender identity is determined by biological sex and not by one’s self-perception—a perception which is often influenced by fallen human nature in ways contrary to God’s design (Ephesians 4:17–18).”⁴⁶ The messengers at the Southern Baptist Convention’s 2023 annual meeting passed a resolution expressing that, “[t]he Bible teaches that the differences between men and women are complementary, determined at conception, immutable, rooted in God’s design, and most clearly revealed in bodily differences (Genesis 1:28; Psalm 100:3), not in self-defined and ultimately false notions of ‘gender identity.’”⁴⁷

Thus, the Policy infringes on the free exercise rights of a wide range of religious traditions by advocating an approach to gender identity that excludes parents and conflicts with their beliefs.

⁴⁵ Baptist Faith and Message (2000), *supra* note 8.

⁴⁶ “On Transgender Identity,” *Southern Baptist Convention* (June 1, 2014), <https://perma.cc/RCS9-UMHZ>.

⁴⁷ “On Opposing ‘Gender Transitions,’” *Southern Baptist Convention* (June 15, 2023), <https://perma.cc/BKK6-VBXA>.

III. The Policy disproportionately harms families from minority faith backgrounds.

A. Minority faiths are most likely to be misunderstood and targeted by hostile government officials.

Public school administrators are likely to misunderstand the beliefs and practices of religious families that practice minority faiths. See, e.g., *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 260–61 (5th Cir. 2010) (school officials questioned Native American student’s belief in “keep[ing his] hair long and in braids as a tenet of [his] sincere religious beliefs”); *Gonzales v. Mathis Indep. Sch. Dist.*, No. 2:18-cv-43, 2018 WL 6804595, at *4 (S.D. Tex. Dec. 27, 2018) (where devout Catholic student had worn braid since childhood as *promesa* showing commitment to God, school officials argued that this was not “religious”).

Tragically—although America has generally been a welcoming home to Jewish people—antisemitism continues to pose a significant problem, especially toward Orthodox Jews who adhere to traditional Torah values and practices. In October 2023, the Secure Community Network recorded 772 incidents of antisemitism, and more than 3,500 incidents in 2023, with 149 instances of harassment, violence, and death threats in campus settings.⁴⁸ In congressional testimony on December 5, 2023, three university

⁴⁸ See, e.g., *Secure Community Network Logs Record High Antisemitic Incident Reports in October*, (Nov. 7, 2023), <https://perma.cc/P3TZ-XUH4>.

presidents were unable to answer the question, “Does calling for the genocide of Jews constitute bullying or harassment?”⁴⁹

Muslims are also likely to face hostility from government officials who do not afford them the same presumption of good faith that other religious groups may enjoy.⁵⁰

Given these sobering realities, children growing up in minority religious traditions face great pressure to conform to the values endorsed by school administrators. Furthermore, the Policy allowing government officials to decide whether parents will be “supportive” of a gender transition creates a very clear danger of making false or unfair assumptions based on the family’s religious beliefs. See, e.g., *Holt v. Hobbs*, 574 U.S. 352, 362 (2015) (government officials must not question merits of individual’s sincerely held religious beliefs); *Ben-Levi v. Brown*, 136 S. Ct. 930, 934 (2016) (Alito, J., dissenting from cert. denial) (“[T]he government cannot define the scope of personal religious beliefs.”). The Policy requires government officials to evaluate parents’ moral and religious beliefs without ever speaking with them. That violates the First Amendment under *Fulton*, *Holt*, and *Thomas*

⁴⁹ “University Presidents Testify on College Campus Antisemitism, Part 2 (Dec. 5, 2023), <https://perma.cc/DCV3-669A>; see also *Ingber v. New York University*, No. 1:23-cv-11123 (S.D.N.Y. Nov. 14, 2023) (Jewish students sued university for condoning egregious acts of harassment because of their faith).

⁵⁰ See, e.g., Asma Uddin, WHEN ISLAM IS NOT A RELIGION; INSIDE AMERICA’S FIGHT FOR RELIGIOUS FREEDOM 116–17 (2019).

v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707, 716 (1981) (government actors must not second-guess or “undertake to dissent” sincere religious beliefs, because they “are not arbiters of scriptural interpretation”). Furthermore, if students wear religious garb or disclose their family’s religious tradition, school officials will likely assume that the parents will not be “supportive” because of their beliefs. This ignores the fundamental relationship between children and their parents, which the Court has protected for nearly 100 years. *Yoder*, 406 U.S. at 213-214. And it ignores the fact that most religious parents are uniquely equipped to support their child because they know their child best and can address influences such as peer pressure and mental health challenges.

B. Families from minority faith backgrounds often lack educational alternatives.

Parental rights do not evaporate when parents choose to send their children to public school. *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring) (“It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities.”). Indeed, that approach would “be fundamentally unfair to parents who in reality do not have that choice.” *Tatel*, 2022 WL 15523185, at *21. As Justice Alito observed, “[m]ost parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school.” *Morse*, 551 U.S. at 424. “Constitutional rights should not be analyzed in a way that benefits only socially and economically

advantaged persons,” that is, parents who can afford private school or homeschooling. *Tatel*, 2022 WL 15523185, at *21.

Even for the fraction of parents who could afford private school, members of minority faiths have very few options that would not conflict with their beliefs. A Muslim family may choose Catholic school to avoid parental exclusion policies, but that would cause a different conflict as the student would learn one faith at home and another at school. Many Jewish parents, especially the Orthodox, do send their children to religious schools, but large geographical areas lack Jewish day schools altogether. Very few Hindu-American educational institutions exist.⁵¹

As this Court observed in *Mahanoy Area School District v. B. L. by & through Levy*, 141 S. Ct. 2038, 2046 (2021), “America’s public schools are the nurseries of democracy,” which “only works if we protect the ‘marketplace of ideas.’” Especially for members of minority faiths who are often misunderstood, “[t]hat protection must include the protection of unpopular ideas.” *Id.* Here, parents from a wide variety of religious, cultural, and political backgrounds are coming together to express deeply concerned opposition to the Policy. If allowed to stand, the decision below prevents religious parents from even *challenging* policies that violate their constitutional rights—until their children experience irreversible harm.

⁵¹ *Aum School*, Aum Educational Society of America (2023), <https://perma.cc/BJF9-ZNU6>.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

KAYLA A. TONEY
FIRST LIBERTY INSTITUTE
1331 Pennsylvania Ave. NW
Suite 1410
Washington, DC 20004
(202) 921-4105

KELLY J. SHACKELFORD
Counsel of Record
JEFFREY C. MATEER
DAVID J. HACKER
JUSTIN E. BUTTERFIELD
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy
Suite 1600
Plano, TX 75075
(972) 941-4444
kshackelford@firstliberty.org

Counsel for Amici Curiae

January 4, 2024