No. 24-297

In the Supreme Court of the United States

TAMER MAHMOUD, ET AL.,
Petitioners,
v.
THOMAS W. TAYLOR, ET AL.,
Respondents.

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

BRIEF FOR PROFESSORS DOUGLAS LAYCOCK, RICHARD W. GARNETT, HELEN M. ALVARÉ, THOMAS C. BERG, AND MICHAEL W. MCCONNELL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are constitutional law scholars whose scholarship and teaching have a focus on the First Amendment Religion Clauses. For decades, these professors have closely studied constitutional law and religious liberty, published books and scholarly articles on the topic, and addressed it in litigation. The *amici* bring to this case a deep theoretical and practical understanding of the First Amendment.[*]

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[*] Pursuant to Rule 37.2, *amici* provided timely notice of their intention to file this brief. In accord with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

a five-volume collection under the overall title *Religious Liberty*.

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SUMMARY OF THE ARGUMENT

Over the past few decades, this Court has refined Free Exercise Clause doctrine. It has made clear that parents have a broad right to direct the religious upbringing of their children; that religious claimants have the best understanding of the importance of their own religious beliefs; that indirect coercion is a burden on free exercise; and that the government cannot evade constitutional limits by casting its benefit programs as a voluntary "choice" by religious claimants and thus excluding them.

But confusion still reigns in the lower courts on the question of how—and when—to assess burdens on religious exercise. The Fourth Circuit's decision below epitomizes that confusion. The Montgomery County Board of Education adopted mandatory "LGBTQ-Inclusive Books as part of the English Language Arts Curriculum" starting in preschool. App. 10a. For instance, as the Fourth Circuit explained, "the alphabet primer Pride Puppy!" instructs a "three-and four-year-old audience" "to look for items such as '[drag]king,' 'leather,' 'lip ring,' '[drag]queen,' and 'underwear.'" *Ibid.* (brackets in original).

Though the school district initially provided notice and opt-out rights to objecting parents, the Board decided "in a complete about-face that a notice and opt-out option would no longer be permitted." App. 15a. The reason, even as stated in a *post hoc* declaration by an administrator? Letting parents excuse their children from mandatory sexuality and gender curriculum would "undermin[e] [the school system's] educational mission." App. 16a.

No wonder, then, that even the district court below understood that the point of the Board's mandatory (and covert) readings is to "influence" children. App. 133a. And the Fourth Circuit acknowledged that "elementary-age students"—and certainly preschool children—"are more likely to be impressionable than teenagers and adults." App. 41a. So the burden on the Plaintiffs' free exercise right—specifically, their parental right to direct their children's religious upbringing—is obvious. Especially given the topics of these forced readings, which touch sensitive and deeply personal issues regarding sexuality and gender that have not traditionally been part of public school curriculum, the school district's "influence" comes at the expense of the moral and religious instruction of many believers across many faiths. Whether to protect these parents' free exercise rights should not have been a close call.

The Fourth Circuit, however, aligned itself with outdated decisions from several other circuits and erected an improperly high burden requirement for parental religious challenges to school instruction, asking whether the Plaintiffs proved a compelled "*change*" in beliefs, a compelled "affirm[ation]" of other beliefs, or a compelled "perform[ance] [of] acts undeniably at odds with" their beliefs. App. 34a, 39a. Finding no evidence of these types of burdens, the court left religious parents "to incur the additional (and in some cases prohibitive) cost of pursuing an alternative to public schooling"—while reiterating its view that although this "position" might be "undesired," it is "not unconstitutionally coercive." App. 46a–48a. The Fourth Circuit dismissed this Court's contrary holding in *Wisconsin* v. *Yoder*, 406

U.S. 205 (1972), as "markedly circumscribed" and "limited" to "facts suggesting an exceptional burden." App. 37a–38a (cleaned up).

The decision below, like other decisions to reach similar conclusions, shows why this Court's intervention is needed. The lower courts are hopelessly confused—and largely wrong—about the nature of religious coercion in the school instructional context. When the government seeks to instruct students about value-laden sexuality and gender issues in a way that contradicts their parents' religious instruction, without telling the parents or providing an opt-out, the parents' First Amendment rights have been burdened.

More broadly, the courts of appeals are confused about the role of burdens in the free exercise analysis, especially when the challenged policy discriminates against religion—*i.e.*, is not neutral or generally applicable. The Plaintiffs showed that the Board's policy here was neither neutral nor generally applicable, yet the Fourth Circuit sidestepped that problem by reasoning that they had not proved a sufficiently extreme burden. But when the government discriminates against religious exercise, many courts of appeals—and this Court—have explained that this discrimination necessarily burdens religion.

The widespread confusion in the courts of appeals about the nature of religious burdens stemming from mandatory public school instruction has left largely unprotected the core parental right to direct their children's religious upbringing. The Court should grant certiorari.

REASONS FOR GRANTING THE WRIT

I. The lower courts are confused—and mostly wrong—about whether religious burdens from mandatory school instruction implicate the First Amendment.

Parents have a broad free exercise right to prevent their children from being indoctrinated into beliefs that contradict their religious faith. This Court, "[d]rawing on 'enduring American tradition,'" has "long recognized the rights of parents to direct 'the religious upbringing' of their children." *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 486 (2020) (quoting *Yoder*, 406 U.S. at 213–214). It has firmly held that "[t]he child is not the mere creature of the state." *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925). Rather, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Troxel* v. *Granville*, 530 U.S. 57, 65–66 (2000).

Yet the Fourth Circuit adopted the Defendants' argument that the Board's mandatory indoctrination "does not impose any constitutionally significant burden" because it "does not coerce Plaintiffs to refrain from raising their children in their preferred religious faith or penalize them for their religious conduct." D. Ct. Dkt. 42, at 9–10; see App. 34a. Other courts of appeals faced with challenges to school instructional materials have adopted similar reasoning. This reasoning misunderstands the Free Exercise Clause, including its scope as recognized in *Yoder*.

A. The Free Exercise Clause protects parents from indirect coercion against their religious practice.

First, the Fourth Circuit's decision fails to account for this Court's Free Exercise Clause jurisprudence about indirect coercion on religious practice. As this Court has often explained, "the Free Exercise Clause of the First Amendment protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Carson* v. *Makin*, 596 U.S. 767, 778 (2022) (cleaned up); see *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 463 (2017).

According to the Fourth Circuit, the district court did not err in denying the Plaintiffs a preliminary injunction because "the Board's decision not to permit opt-outs" does not "compel[] the Parents or the children to *change* their religious beliefs or conduct, either at school or elsewhere." App. 34a. The court also found it convincing that the parents had failed to show "anything at this point" to prove that the Board's decision "affects what they teach their own children" or forces them "to affirm views contrary to their own." *Ibid.* This misses the mark.

The Fourth Circuit's focus on whether the Board's decision "affects what [the parents] teach their own children" (*ibid.*) elides the nature of their claims, which are that the government's forced indoctrination on ideological sexuality topics burdens their religious exercise by contradicting their religious upbringing of their children. This burden easily amounts to (at least) indirect coercion. The government is using the inherently coercive environment of the public school

for instruction at odds with the Plaintiffs' religious beliefs. Not only does the curriculum instruct students about sexuality and gender issues in a way that contradicts the parents' religious beliefs, but it instructs teachers to tell dissenting children in front of their peers that their beliefs are "hurtful" and "negative." App. 94a. Both are coercive. See *Lee* v. *Weisman*, 505 U.S. 577, 592 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."); *Edwards* v. *Aguillard*, 482 U.S. 578, 584 (1987) ("The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.").

The parents' diverse religious belief systems all require both that they teach their kids certain values about "human sexuality, gender, and family life" *and* that they "shield their children" from sexually explicit material and from "teachings that contradict and undermine their religious views on those topics." App. 63a (Quattlebaum, J., dissenting). The Fourth Circuit was dismissive of their claims based on these beliefs, stating that "simply hearing about other views does not necessarily exert pressure to believe or act differently than one's religious faith requires." App. 35a.

But the Plaintiffs' claims are not about "simply hearing about other views." *Ibid.* Instead, the injury to the parents results from the Board's decision to forbid them from opting their young children out of specific, school-sanctioned sexuality and gender

instruction that directly conflicts with their religious beliefs. "Indoctrination on that sort of question is not part of the school's basic educational mission." Douglas Laycock, *High-Value Speech and the Basic Educational Mission of A Public School: Some Preliminary Thoughts*, 12 Lewis & Clark L. Rev. 111, 119 (2008).

The Fourth Circuit suggested that, to have a valid free exercise claim, these parents would be required to show that schoolteachers are forcing their children to *affirm* views contrary to their religion. App. 34a–35a. What the Fourth Circuit misunderstands is that the very act of instructing children on these highly personal topics at such a young age—and telling them that their prior beliefs are "hurtful"—necessarily pressures students and violates the parents' religious rights. These parents are not seeking to prevent the school from using these books. See App. 17a; App. 56a (Quattlebaum, J., dissenting). And no one asserts that the school must adopt curriculum that is consistent with the parents' religious convictions. See App. 25a–26a. The parents' injury is "simple[] to remedy": they want the chance to opt their own children out of instruction that directly conflicts with their religious beliefs. Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 172 (2004). Again, even the district court agreed that the schools are "us[ing]" the books to "influence" children, App. 133a, and the schools said that *not* using the books would "undermin[e]" their "mission." App. 16a. So requiring evidence that teachers have actively pressured children "to affirm views contrary to their own" (App. 34a)

misapprehends the basis of the parents' free exercise claim.

What's more, it is not so obvious that the children here face no forced affirmation. "[W]hen students are subjected to doctrine that is offensive to their religion," "not only may it improperly influence their beliefs, but their very presence and respectful silence may be taken as assent to that doctrine." George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 Case W. Res. L. Rev. 707, 718 (1993). "The endorsement of an idea by the teacher—a government official and an authority figure—may torment a student to whom the idea is religiously offensive. If her peers fail to protest, she assumes that they agree with the teacher, which makes the student feel like even more of a misfit or pariah." *Ibid.* This Court made the same point in *Lee* v. *Weisman*, prohibiting a short graduation prayer in *high school* and emphasizing that, "given our social conventions," "remaining silent can signify adherence to a view." 505 U.S. at 593. That elementary school students face even greater pressure to remain silent makes the point more forceful here.

As noted, the schools have argued that their mandatory indoctrination "does not impose any *constitutionally significant* burden" because it "does not coerce Plaintiffs to refrain from raising their children in their preferred religious faith or penalize them for their religious conduct." D. Ct. Dkt. 42, at 9–10 (emphasis added). The decision below similarly held that the Plaintiffs "have not shown a *cognizable* burden" because "hearing about other views" is not enough. App. 34a–35a (emphasis added).

This view, however, contradicts this Court's explanation that judges should not "determine the 'centrality' of religious beliefs" as a threshold requirement for a free exercise claim. *Employment Div.* v. *Smith*, 494 U.S. 872, 887 (1990). The Defendants' reference to "'[c]onstitutionally significant burden'"—and the Fourth Circuit's references to "cognizable burden"—"would seem to be 'centrality' under another name." *Id.* at 887 n.4. Any "inquiry into 'severe impact' is no different from inquiry into centrality." *Ibid.* "Such a threshold requirement would wholly deny protection . . . when religious significance is somewhat underestimated." Douglas Laycock, *The Religious Exemption Debate*, 11 Rutgers J. L. & Religion 139, 151 (2009). Courts should hesitate before telling religious claimants that "the connection between what [they] must do and the end that they find to be morally wrong is simply too attenuated." *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 591 U.S. 657, 681 (2020) (cleaned up).

The Defendants do not appear to dispute the sincerity of the Plaintiffs' beliefs, and the Plaintiffs "believe[] that [use of these books] is tantamount to endorsement." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 532 (2021). "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Ibid.* (cleaned up). And especially for elementary school children, official endorsement is indoctrination. As the district court agreed, the Defendants are "us[ing]" these sexuality and gender books to "influence" children. App. 133a. After all, the

Defendants could scarcely pretend to pass strict scrutiny—as they did below—if they thought that their mandatory reading does not affect students. Thus, the burden analysis should have been straightforward: forcing parents to submit their elementary-age children to mandated sexuality and gender readings contrary to their religious beliefs burdens their religious exercise.

B. Contrary to the decision below and similar decisions, *Yoder* applies in this context.

Yoder confirms the burden on parental religious rights here, and the Fourth Circuit was wrong to limit *Yoder* to its facts. The court described *Yoder* as a "limited holding" constrained to "the unique record established concerning the Amish faith's rejection of formal secondary education as a whole." App. 38a. But the Fourth Circuit "overlook[ed] the substantial weight the *Yoder* Court granted parental interests in their children's religious upbringing generally." Helen M. Alvaré, *Families, Schools, and Religious Freedom*, 54 Loyola U. Chi. L. J. 579, 627 (2023).

As this Court explained in *Yoder*, "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Yoder*, 406 U.S. at 213–14. Because the law in *Yoder* was a compulsory attendance law, the Amish had to show a burden from *that* law—and rebut the state's compelling interest argument about it. That "'probably few other religious groups or sects could' develop" a record to show a burden and sufficient justification to avoid compulsory education laws (App. 37a (quoting *Yoder*, 406 U.S. at

236)) says little about other types of government intrusion.

Instead, what matters under *Yoder* is whether the government action "contravenes the basic religious tenets and practice of the . . . faith, both as to the parent and the child." *Yoder*, 406 U.S. at 218. As *Yoder* recognized, "exposing [school] children to worldly influences in terms of attitudes, goals, and values contrary to [their religious] beliefs" can impose this type of burden. *Ibid.* So can "interfering with the religious development of the" child. *Ibid.* Each "carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Ibid.*

"[L]ike *Yoder*, the school content at issue here undermines the very architecture" of the faith of objecting families. Alvaré, *supra*, at 629. These "coercively framed viewpoints touch students' beliefs and conduct regarding" significant aspects of many faiths' teachings on sexuality and gender. *Ibid.*

Further, "there is a strong argument that contradicting the familial architecture of [a religious] faith *does* constitute a threat to its transmission, in a manner similar to Wisconsin's compulsory education regime in *Yoder*." *Id.* at 630 (emphasis added). After all, "a rejection of [religious] familial teachings is one important reason that people reject the faith, and an important predictor of a breakdown in the transmission of faith." *Ibid. Yoder* noted in its conclusion that "school attendance with teachers who are not of the Amish faith—and may even be hostile to it—interposes a serious barrier to the integration of the Amish child into the Amish religious community."

406 U.S. at 211–12. "The same dynamic is present here." Alvaré, *supra*, at 630; see also Dent, *supra*, at 738 ("To survive, religious groups depend on raising their members' children within the faith.").

Rather than read *Yoder* narrowly as defining parental religious rights related to schooling no matter the underlying government policy, the Fourth Circuit should have recognized it as an example of a religious burden—and one that is closely analogous to the burdens on the parents here. Unfortunately, the Fourth Circuit is not alone in reading *Yoder* too narrowly. One oft-referenced case, cited by the decision below, is *Parker* v. *Hurley*, 514 F.3d 87 (CA1 2008). There, parents "assert[ed] that they must be given prior notice by the [public] school and the opportunity to exempt their young children from exposure to books they find religiously repugnant." *Id.* at 90. Holding that the Free Exercise Clause and *Yoder* were not implicated, *Parker* emphasized that "there is no claim of direct coercion." *Id.* at 105. As discussed, "direct coercion," whatever exactly that means, is never required. And given that this Court in *Lee* v. *Weisman* "detected coercion in a thirty-second prayer that a public school helped organize for graduation ceremonies," Alvaré, *supra*, at 623, it is hard to see how coercion does not exist in requiring elementary students "to sit through a classroom reading of" books that "affirmatively endorse[] homosexuality and gay marriage." *Parker*, 514 F.3d at 106.

The First Circuit agreed that "[i]t is a fair inference that the reading" "was precisely *intended* to influence the listening children toward tolerance of gay

marriage": "That was the point of why that book was chosen and used." *Ibid.* Yet the court said that "the mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently." *Id.* at 105.

The First Circuit did not explain what this point has to do with any question relevant to the free exercise analysis, and such a connection is not apparent. Countermanding a parent's religious instruction with "religiously repugnant" instruction (*id.* at 90)—especially without providing the parent notice of this instruction (see *id.* at 106)—burdens the parent's religious upbringing of their children. Of course the parent can still try to "instruct[] the child differently," *id.* at 105, but the state may not make that burden more difficult by actively countering the parents' teaching.

Several other circuit decisions are similarly wrong. The Sixth Circuit's opinion in *Mozert* v. *Hawkins County Board of Education*, for example, also limited *Yoder* to its "singular set of facts," saying that it did not "announce a general rule." 827 F.2d 1058, 1067 (CA6 1987). And the Seventh Circuit in *Fleischfresser* v. *Directors of School District 200* dismissed the "burden to the parents" as "at most, minimal" because the parents "are not preclud[ed]" "from meeting their religious obligation to instruct their children." 15 F.3d 680, 690 (CA7 1994). As discussed, that red herring does not alter the burden on parents whose religious instruction is being covertly undermined by government officials.

All these cases underestimate *Yoder*. When this Court in *Smith* announced the "neutral and generally applicable" standard, it excepted free exercise claims asserting parental rights. The Court referred to this as a "hybrid situation," where "the Free Exercise Clause [acts] in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children." *Smith*, 494 U.S. at 881–82 (cleaned up).

Here, the burden on the Plaintiffs' free exercise stems from the government's efforts to contradict their religious upbringing via mandatory indoctrination on highly personal and contested sexuality and gender issues. This burden implicates parents' fundamental right to opt their children out of mandatory education contrary to their religious beliefs. The Free Exercise Clause and this Court's precedents demand strict scrutiny.

C. A total religious bar is not required.

The Fourth Circuit also downplayed the nature of the burden facing these parents on the ground that the Board's policy does not "overtly bar[]" students from "enrollment" based on "their religious views." App. 45a–46a. This too misunderstands the stakes for religious parents.

As this Court has said, citizens have "a right to participate in a government benefit program without having to disavow [their] religious [exercise]," for "[t]he imposition of such a condition upon even a gratuitous benefit inevitably deters or discourages the exercise of First Amendment rights." *Trinity Lutheran*, 582 U.S. at 463 (cleaned up).

To avoid this line of cases, the Fourth Circuit emphasized that the schools are "open to all students who meet the requirements of enrollment, none of which relate to the religious affiliation or beliefs of students or their parents." App. 46a. It also dismissed the Plaintiffs' arguments that, to avoid the consequences of the no opt-out policy, "they would be forced to incur the additional (and in some cases prohibitive) cost of pursuing an alternative to public schooling." *Ibid.* The court recognized that "[m]ost parents, realistically, have no choice but to send their children to a public school." App. 47a (quoting *Morse* v. *Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring)). Yet the court looked for an "overt[] bar[]," App. 45a, and finding none, ruled against the parents.

Contrary to the Fourth Circuit's analysis, this Court's precedent does not require that religious observers be barred from a public benefit to show a burden. *Sherbert* v. *Verner* is instructive. *Sherbert* held that the government could not deny employment benefits to employees whose religious convictions required that they not work on the Sabbath. 374 U.S. 398, 399–404 (1963). Forcing people to choose between following their convictions and receiving benefits, this Court said, "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* at 404; see Thomas C. Berg, *Free Exercise Renewal and Conditions on Government Benefits*, 98 Notre Dame L. Rev. Reflection S20, S27 (2023).

"When, therefore, does a denial of benefits, even pursuant to a generally applicable condition, constitute a 'substantial burden' on religious

exercise—an imposition on religious choice that triggers, or should trigger, strict scrutiny?" *Id.* at S28. This Court has already provided the answer. In *Thomas* v. *Review Board*, this Court held that a substantial burden exists "[w]here the state . . . denies [an important benefit] because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." 450 U.S. 707, 717–18 (1981). "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 717; see Berg, *supra*, at S29 ("Loss of an 'important' benefit can be enough to pressure recipients to modify their behavior and violate their beliefs. That is enough to be 'substantial.'").

This right against indirect coercion in government programs is particularly compelling in the context of public schools, given that states generally require attendance at either a public school or some costly alternative. See Md. Code Ann., Educ. § 7-301. Indeed, this Court has repeatedly rejected tying First Amendment rights to the "choice" to go to public school. For instance, in *Lee* v. *Weisman*, it rejected the argument that school-sponsored prayers at graduation ceremonies were permissible because of "the option of not attending the graduation." 505 U.S. at 595. The Court said that "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance." *Id.* at 596. "[S]ubtle and indirect" "pressure" "can be as real as any overt compulsion." *Id.* at 593. Here, the coercive "choice" facing these parents—send their children to public schools or raise them according to their religious

convictions—is not one that that the First Amendment can tolerate.

D. The Plaintiffs have provided ample evidence to support their free exercise claim.

Just as the Fourth Circuit mischaracterized the Plaintiffs' free exercise claim, it also articulated an unduly high evidentiary standard. From the start, the decision below repeatedly emphasized the purportedly "very limited record developed." App. 31a. But the record is easily sufficient—especially considering the nature of the Plaintiffs' claims.

The details about the no opt-out policy itself are clear. As Judge Quattlebaum pointed out, the parents have produced the books "that no one disputes will be used to instruct their K-5 children." App. 62a (dissenting op.). They also produced declarations that explain why reading these books to their children violates their religious beliefs—and, by extension, why the no opt-out policy does as well. *Ibid.* They have even produced "the board's own internal documents that show how it suggests teachers respond to students and parents who question the contents of the books." *Ibid.* These documents instruct teachers to "[d]isrupt the either/or thinking by saying something like: actually, people of any gender can like whoever they like." *Ibid.* They also direct teachers to tell K-5 students that "[o]ur body parts do not decide our gender. Our gender comes from our inside." *Ibid.* Again, even the district court understood that the point of the Board's policy is to "influence" children. App. 133a. No more evidence is necessary.

The Fourth Circuit's improperly high evidentiary standard disregards this Court's precedent on the "relevance of impressionable audiences—like the audiences here—to parental free exercise claims." Alvaré, *supra*, at 629. *Yoder* stressed that "interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community *at the crucial adolescent stage of development*[] contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child." 406 U.S. at 218 (emphasis added). The Fourth Circuit acknowledged that elementary-aged students are more impressionable than teenagers and adults but incorrectly held that more evidence was needed. App. 40a–41a.

Of course, the question would remain whether the Board's policy can satisfy strict scrutiny, an issue that the Fourth Circuit did not reach. But the evidence presented by the parents is more than enough to support their claim that strict scrutiny applies because their free exercise rights have been infringed. The widespread failure of the courts of appeals to appreciate the burden on parental religious rights that can result from mandatory school instruction on highly fraught topics requires this Court's attention.

II. The lower courts are also confused about the burden from discrimination against religious exercise.

The Fourth Circuit also failed to recognize that a government policy that discriminates against religion violates the First Amendment. As this Court "has repeatedly held, governmental discrimination against religion—in particular, discrimination against

religious persons, religious organizations, and religious speech—violates the Free Exercise Clause." *Morris Cnty. Bd. of Chosen Freeholders* v. *Freedom From Religion Found.*, 139 S. Ct. 909, 909 (2019) (Kavanaugh, J., respecting the denial of certiorari). For instance, in *Trinity Lutheran*, the Court held that "express discrimination against religious exercise" violates the First Amendment regardless of whether the government's policy "meaningfully burden[s]" that exercise. 582 U.S. at 462–63; see also *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) ("a law targeting religious beliefs as such is never permissible").

Accordingly, several courts of appeals have agreed that under the framework of *Smith* and *Lukumi*, "there is no substantial burden requirement when government discriminates against religious conduct." *Tenafly Eruv Ass'n, Inc.* v. *Tenafly*, 309 F.3d 144, 170 (CA3 2002); see also *Kravitz* v. *Purcell*, 87 F.4th 111, 124–126, 126 n.11 (CA6 2023) ("We disagree with those circuits that continue to apply the substantial burden test"); *Hartmann* v. *Stone*, 68 F.3d 973, 979 n.4 (CA6 1995) (explaining that the plaintiffs in such cases "need not demonstrate a substantial burden on the practice of their religion"); *World Outreach Conf. Ctr.* v. *City of Chicago*, 591 F.3d 531, 534 (CA7 2009) (similar); *Altman* v. *Bedford Cent. Sch. Dist.*, 245 F.3d 49, 79 (CA2 2001) (similar).

But the Fourth Circuit, siding with other circuits, reached the opposite conclusion, stating that it "continue[d] to look" for "*a* burden" even in cases involving discrimination against religion. App. 30a n.12; see also *Roman Catholic Bishop of Springfield* v.

City of Springfield, 724 F.3d 78, 98, 100 (CA1 2013) (Although "the Ordinance is not 'generally applicable,'" the plaintiff's claims fail because it has not proven "that it suffers a substantial burden on its religious exercise"); *Mbonyunkiza* v. *Beasley*, 956 F.3d 1048, 1053–54 (CA8 2020) ("like other courts, we have made the [free-exercise] standard more restrictive" by requiring a "substantial burden"); *Williams* v. *Hansen*, 5 F.4th 1129, 1133 (CA10 2021) (similar); *Levitan* v. *Ashcroft*, 281 F.3d 1313, 1320 (CADC 2002) (similar).

This latter group of circuits, including the Fourth Circuit, are wrong. Discriminating against religion burdens its exercise. "Because government actions intentionally discriminating against religious exercise *a fortiori* serve no legitimate purpose, no balancing test" between other religious burdens and "legitimate, secular purposes" "is necessary" or appropriate. *Brown* v. *Borough of Mahaffey*, 35 F.3d 846, 850 (CA3 1994). And adding a separate "substantial burden" test "to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment." *Id.* at 849–50.

Here, the Plaintiffs have shown that the Defendants' actions are not neutral or generally applicable in multiple respects—especially as these standards were recently clarified by this Court in *Tandon* v. *Newsom*, 593 U.S. 61, 62–63 (2021), and *Fulton*, 593 U.S. at 533–38. The Board revoked parents' ability to opt their children out of these readings precisely because many religious parents had been exercising the opt-out option under the Board's previous guidelines. See App. 68a–71a

(Quattlebaum, J., dissenting). This decision was contrary to Maryland state regulations that require that parents be notified and given the opportunity to opt out of instruction on family life and sexuality, as well as the Board's own "Guidelines for Respecting Religious Diversity." App. 55a–56a (Quattlebaum, J., dissenting). What's more, the decision to rescind parents' ability to opt-out did not apply generally—it only applied to the Storybooks that many parents had religious objections to. App. 56a (Quattlebaum, J., dissenting).

Fulton holds that state action is "not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." 593 U.S. at 533 (cleaned up). The Board insisted that it has eliminated discretion by deciding that no opt-outs will be permitted regarding the contested Storybooks. See App. 70a (Quattlebaum, J., dissenting). But as Judge Quattlebaum correctly explained, "that flip-flop was itself a purely discretionary decision." *Ibid.* Indeed, a policy that permits "a school board to decide one day that religious opt-outs are okay and the next day that they are not—because accommodating the request is not reasonable or feasible—is inherently discretionary." App. 69a (Quattlebaum, J., dissenting).

Given that the Board's policy discriminates against these parents' religious beliefs, no "substantial burden" is required to show that their First Amendment rights have been violated. The ongoing confusion in the courts of appeals about the burdens of

discrimination against religious exercise provides yet another reason for this Court to take this case.

CONCLUSION

For these reasons, the Court should grant the petition.

Respectfully submitted,

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