No. 24-297

IN THE

Supreme Court of the United States

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

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; UNITED STATES CONFERENCE OF CATHOLIC BISHOPS; THE ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE LUTHERAN CHURCH – MISSOURI SYNOD; THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; THE ANGLICAN CHURCH IN NORTH AMERICA; THE ORTHODOX CHURCH IN AMERICA; THE DIOCESE OF EASTERN AMERICA OF THE SERBIAN ORTHODOX CHURCH; THE COALITION FOR JEWISH VALUES; AND THE JEWISH COALITION FOR RELIGIOUS LIBERTY AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

The Constitution's guarantee of religious freedom includes the right of parents to decide how to educate their children in the religiously significant matters of sexuality and gender. Montgomery County Public Schools (MCPS) has violated that right by denying petitioners notice or an opportunity to remove their children from a novel program teaching young students LGBT-related topics from a viewpoint hostile to traditional religion. *Amici* are religious organizations with an overwhelming interest in the vigorous application of the Constitution's guarantee of religious freedom. We urge the Court to reverse the Fourth Circuit and to hold that petitioners have suffered a burden on their free exercise of religion for which the First Amendment requires relief.

SUMMARY OF ARGUMENT

The right of parents to transmit their religious faith to their own children is one of the ancient landmarks of our law. Without that right, no religion can survive to the next generation. Yet Montgomery County has violated that right by pursuing a novel reading program that seeks to indoctrinate young children into the County's viewpoint on sexuality and gender without accommodating objecting religious parents. The Fourth Circuit affirmed the County's position on the extraordinary ground that the reading program imposes no burden on the parents' exercise of religion.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

That holding is wrong and should be reversed for all the reasons expressed in petitioners' briefs. We add three arguments of our own.

First, petitioners' objections to the Pride Storybooks reading program arise from sincere religious beliefs and practices. These parents sincerely believe that they have a religious duty to guide their children regarding sexuality and gender; that sexuality is properly expressed only between a man and a woman who are married; and that gender is exclusively a function of biological sex. These beliefs are not the province of a hard-to-accommodate minority. Diverse religious denominations, Catholic and Protestant, The Church of Jesus Christ, Jewish and Muslim—all teach religious doctrines closely resembling those cherished by petitioners. They merely ask for the same opt-out rights long granted by Montgomery County for such sensitive matters.

Second, actual coercion is not the *sine qua non* of a valid claim under the Free Exercise Clause. Pressure to abandon or change one's religious beliefs or practices is sufficiently burdensome to support a free exercise claim. So is interference with efforts to transmit one's faith to others. This Court's decisions consistently teach that the Free Exercise Clause protects the freedom to practice religion—not merely the freedom from direct government coercion.

Third, petitioners suffer a substantial burden on their religious exercise because of Montgomery County's Pride Storybook program and the County's refusal to accommodate parents' religious objections. Without accommodation, Maryland's compulsory attendance law requires petitioners' children to attend classes where sexuality and gender are presented in ways contrary to the religious precepts petitioners

teach at home. Disrupting the parent-child relationship on matters of religious significance such as sexuality and gender poses an exceptionally serious burden on the exercise of religion. And petitioners' demand for accommodation takes the modest form of prior notice when their children's teachers will be discussing Storybooks from the reading program and an opportunity for their children, on those occasions, to be excused. That request is fully consistent with similar laws in Maryland and elsewhere that strike sensible balances between the educational judgments of public-school officials and the religious judgments of parents.

In short, petitioners present a compelling claim for relief under the Free Exercise Clause. Montgomery County's denial that its Storybook program interferes with the parents' exercise of religion is implausible. Because the County lacks any compelling reason not to accommodate petitioners' religious objections, they are entitled to the accommodations they seek.

ARGUMENT

I. PETITIONERS' RELIGIOUS OBJECTIONS TO THE COUNTY PROGRAM REFLECT WIDESPREAD RELIGIOUS BELIEFS AND PRACTICES.

Like the *amici,* petitioners represent diverse religions. And like the *amici,* despite theological differences, petitioners' religious beliefs about marriage, sexuality, and gender, and about parents' religious duty to guide their children, closely resemble each other. These mutually overlapping beliefs are at the root of petitioners' objections to Montgomery County's reading program. By refusing to respect these beliefs, the County has burdened petitioners' exercise of religion

in a way that entitles them to relief under the Free Exercise Clause.[2]

A. Petitioners' Objections Are Rooted in Sincere Religious Beliefs About Parental Duty, Sexuality, and Gender.

1. Petitioners Tamer Mahmoud and Enas Barakat are Muslims who consider themselves under a "sacred obligation" to teach their children how religion informs their understanding of marriage, sex, and gender. App.531a Tamer and Enas say the Pride Storybooks "directly undermine our efforts to raise our elementary-aged children in accordance with our faith." *Id.* at 532a.

Petitioners Jeff and Svitlana Roman share similar convictions. Jeff is Catholic and Svitlana is Ukrainian Orthodox. They affirm, with respect to their beliefs about marriage, sexuality, and gender, that they "have a sacred obligation to teach these principles to our son." *Id.* at 538a.

Chris and Melissa Persak are Catholic and echo the same sense of "a God-given responsibility" to teach their children how Catholic beliefs shape their understanding of sexuality and gender. *Id.* at 543a.

2. On matters of sexuality, Tamer and Enas believe that "sex and sexuality are sacred gifts from God to be expressed through the forming of a spiritual, marital bond between spouses—one male and one female—for the shared promise of security, tranquility,

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[2] The Free Exercise Clause protects the religious freedom of both parents and children. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 215–19 (1972). Here, the parents assert free exercise rights on behalf of themselves and their children. See App.162a–163a.

compassion, contentment, and joy. *Surah al-A'raf* 7:189; *Surah ar-Rum* 30:21." *Id.* at 530a.

The Romans likewise believe that "human sexuality is precious with its power to create life" and "is properly expressed only in marriage between a man and a woman for creating life and strengthening the marital union. [Catechism of the Catholic Church] §§ 2360–63; Genesis 2:24; Mark 10:6–9." *Id.* at 536a–537a.

The Persaks espouse similar Catholic beliefs. To them, "following God's commandments for marriage and family is not only necessary for raising the next generation of children, *see* Genesis 1:28, but also leads to human flourishing and happiness. *See* John 8:51, 14:21, 15:10." *Id.* at 543a.

3. On gender issues, Tamer and Enas also believe that "as taught by the Qu'ran * * * mankind has been divinely created as male and female, *Surah al-Hujurat* 49:13." *Id.* at 530a. And "as a general rule, Islam strictly prohibits medical procedures that attempt to alter the sex of a healthy person" unless it is "medical care" for "biological ambiguities." *Id.* at 531a.

The Romans also believe that "a person's biological sex is not arbitrary, but rather a gift bestowed by God that entails differences in men's and women's bodies and how they relate to each other and to the world. *See* Genesis 5:2; Catechism of the Catholic Church, § 2393." *Id.* at 536a.

The Persaks likewise believe that "all humans are created as male or female, and that a person's biological sex is a gift bestowed by God that is both unchanging and integral to that person's being. *See* Genesis 5:2." *Id.* at 543a.

B. Petitioners' Religious Beliefs Reflect Mainstream Religious Faiths Cherished by Many Americans.

1. Many diverse religions believe that parents have a religious duty to guide their children regarding sexuality and gender.

Petitioners' statements of faith reflect not only their own religious commitments, but religious beliefs cherished by many other faith communities, including *amici*.

Consider Islam. It recognizes the duty of parents to guide their children. The Prophet Muhammad taught: "All of you are shepherds and each of you is responsible for his flock. A man is the shepherd of the people of his house and he is responsible. A woman is the shepherd of the house of her husband and she is responsible." Al-Adab Al-Mufrad, Book 10, Hadith 212 (2018). Muslims understand this teaching to encompass an obligation to teach children regarding gender and sexuality. See Siti Suhaila Ihwani et al., *Sex Education: An Overview from Quranic Approach*, 1 J. Quran Sunnah Educ. & Special Needs, no. 2, at 1 (Dec. 2017).

In a similar vein, Roman Catholics understand the family as "the domestic church. In it parents should, by their word and example, be the first preachers of the faith to their children." Pope Paul VI, *Dogmatic Constitution on the Church:* Lumen Gentium, para. 11 (Nov. 21, 1964). Pope John Paul II taught that "[s]ex education, which is a basic right and duty of parents, must always be carried out under their attentive guidance, whether at home or in educational centers chosen and controlled by them." Pope John Paul II, *Apostolic Exhortation:* Familiaris Consortio, para. 37 (Nov. 22, 1981).

Orthodox Christians believe in the sanctity of the family and affirm that parents are charged with sacred duties toward their children to "bring them up in the discipline and instruction of the Lord (Ephesians 6:4)." Holy Synod of Bishops of the Orthodox Church in America, *Synodal Affirmations on Marriage, Family, Sexuality, and the Sanctity of Life*, para. 48 (July 1992).

Southern Baptists believe that "[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." Southern Baptist Convention, *Baptist Faith & Message 2000*, art. XVIII (June 14, 2000).

The Church of Jesus Christ of Latter-day Saints declares that "[p]arents have primary responsibility for the sex education of their children. Parents should have honest, clear, and ongoing conversations with their children about healthy, righteous sexuality." The Church of Jesus Christ of Latter-day Saints, *General Handbook: Serving in The Church of Jesus Christ of Latter-day Saints* § 38.6.17 (*Handbook*).

Jewish teachings follow a similar pattern. The Shema prayer includes this instruction: "And you shall teach them diligently to your children." *Devarim* (Deuteronomy) 6:7. As the commentary of Moses Nachmanides explains, "this expressed commandment was implied previously [where the Torah says your children must know the laws and the Covenant] * * * how were they to know if we did not teach them?" *Commentary of Nachmanides*, *in* 5 Mikraos Gedolos 85–86 (Rabbi Yaakov Menken trans., 1971). Jews today understand these ancient commands as an important duty for parents to guide children on matters of gender and sexuality. See Derech Project, *Sex and Relationships Education in Jewish Schools* 11 (2006).

2. Many diverse religions share petitioners' belief that sexual expression belongs only between a married man and woman.

Petitioners' beliefs about sexuality are also shared by many large faith groups, including *amici*.

A consensus among Islamic scholars holds that sexuality belongs only within marriage. "By a decree from God, sexual relations are permitted within the bounds of marriage, and marriage can only occur between a man and a woman. * * * Moreover, premarital and extramarital sexual acts are prohibited in Islam." *Navigating Differences: Clarifying Sexual and Gender Ethics in Islam* (May 23, 2023).

Roman Catholics believe that "Holy Scripture affirms that man and woman were created for one another. 'It is not good that the man should be alone.'" *Catechism of the Catholic Church* § 1605 (USCCB 2d ed. 2019) (*Catechism*). Marriage is exclusively between one man and one woman. See *id.* § 1601.

Southern Baptists believe that "[m]arriage is the uniting of one man and one woman in covenant commitment for a lifetime. It is * * * the framework for intimate companionship, the channel of sexual expression according to biblical standards, and the means for procreation of the human race." *Baptist Faith & Message 2000*, art. XVIII.

So too for Orthodox Christians, who believe that "[t]he union between a man and a woman in the Sacrament of Marriage reflects the union between Christ and His Church (Ephesians 5:21–33). As such, marriage is necessarily monogamous and heterosexual. Within this union, sexual relations between a husband and wife are to be cherished and protected as a sacred expression of their love that has been blessed by God."

Standing Conference of the Canonical Orthodox Bishops in the Americas, *Statement on Moral Crisis in Our Nation*, para. 4 (Aug. 27, 2003) (*Moral Crisis*).[3]

The Church of Jesus Christ of Latter-day Saints "solemnly proclaim[s] that marriage between a man and a woman is ordained of God and that the family is central to the Creator's plan for the eternal destiny of His children." The First Presidency and Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints, *The Family: A Proclamation to the World*, para. 1 (Sept. 23, 1995) (*Family Proclamation*). Further, the Church "declare[s] that God has commanded that the sacred powers of procreation are to be employed only between man and woman, lawfully wedded as husband and wife." *Id.* at para. 4.

Within Jewish tradition, "Judaism recognizes the central role of the two-parent, mother-father led family as the vital institution in shaping the entire human race. Within the Jewish people, the two-parent marriage is a model not only for human relations but for relations with the Divine." Rabbi Tzvi Hersh Weinreb, *Orthodox Response to Same-Sex Marriage*, para. 4 (June 5, 2006).

3. Many diverse religions share petitioners' belief that gender is a function of biological sex.

Petitioners' beliefs about gender are also common among large faith communities, including *amici*.

Scholars of Islam agree that "[t]he notion that humanity is divided into male and female and that sex

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[3] Although the Standing Conference has been replaced, this organizational change has no effect on the validity of the *Statement on Moral Crisis* as a correct expression of Orthodox beliefs.

or gender is a defining characteristic of human experience is firmly embedded into the Muslim worldview." Kecia Ali & Oliver Leaman, *Islam: The Key Concepts* 42 (2008) (emphasis omitted).

Roman Catholics believe that "'[b]eing man' or 'being woman' is a reality which is good and willed by God: man and woman possess an inalienable dignity which comes to them immediately from God their Creator." *Catechism* § 369. The Holy See understands the term *gender* as grounded in biological sexual identity, male or female. Statement of the Holy See, *Beijing Declaration and Platform for Action* (1996). The Church acknowledges that "biological sex and the socio-cultural role of sex (gender) can be distinguished but not separated." *Declaration of the Dicastery for the Doctrine of the Faith:* Dignitas Infinita, para. 59 (Apr. 8, 2024). At the same time, the Catholic Church recognizes that "[i]n this cultural context, it is clear that sex and gender are no longer synonyms or interchangeable concepts, since they are used to describe two different realities." Congregation for Catholic Education, *Male and Female He Created Them: Towards a Path of Dialogue on the Question of Gender Theory in Education*, para. 11 (2019) (emphasis omitted).

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 of God's creation." *Baptist Faith & Message 2000*, art. III.

And Orthodox Christian tradition holds that "God made them male and female * * * (Mark 10:6–8)." *Moral Crisis*, para. 3. People with gender identity conflicts "are to be cared for with the same mercy and

love that is bestowed by our Lord Jesus Christ upon all of humanity." *Id.* at para. 5.

The Church of Jesus Christ of Latter-day Saints teaches that "[a]ll human beings—male and female—are created in the image of God. * * * Gender is an essential characteristic of individual premortal, mortal, and eternal identity and purpose." *Family Proclamation*, para. 2. "Gender" is authoritatively defined as "biological sex at birth." *Handbook* § 38.6.23.

Traditional Judaism understands personal identity as eternally male or female. The Torah records, "And G-d Created man in His image, in the Image of G-d He Created him, male and female He created them." Genesis 1:27; see also Jonathan Sacks, *The Role of Women in Judaism*, *in* Man, Woman, and Priesthood 27, 29 (Peter Moore ed., 1978) ("Man as such—and woman as such—was made in the image of God * * *. It was the recognition of this that was to be the basis of the covenant between God and all humanity.").

Petitioners' objections to MCPS's new reading program thus reflect religious beliefs that are broadly consistent with each other and mutually reinforced by religious beliefs common among all Abrahamic faiths. Those beliefs are not the preserve of an eccentric or hard-to-accommodate minority. They are the honest convictions of men and women trying to rear their children within their faith. See *Emp't Div., Dep't of Hum. Res. of Or.* v. *Smith*, 494 U.S. 872, 884 (1990) (recognizing that the Free Exercise Clause guards against "an attempt to regulate * * * the raising of one's children in [religious] beliefs").

II. DIRECT COERCION IS NOT A NECESSARY CONDITION FOR JUDICIAL PROTECTION UNDER THE FREE EXERCISE CLAUSE.

Requiring petitioners' children to participate in the MCPS Storybook program creates obvious burdens on petitioners' ability to transmit their faith to their children. Yet the Fourth Circuit concluded there was no burden on petitioners' religious exercise because the program does not "coerce[]" petitioners or their children "to believe or act contrary to their religious faith." App.49a. But explicit coercion is not required for a claim under the Free Exercise Clause. And the Fourth Circuit's holding to the contrary cannot be reconciled with this Court's Establishment Clause decisions striking down religious content in schools even when schools *provide* robust prior notice and opportunity to opt out.

A. The First Amendment Guarantees the "Free Exercise" of Religion—Not Merely the Freedom from Government Coercion.

1. The Free Exercise Clause protects the "free *exercise*" of religion, not merely freedom from direct government coercion. U.S. Const. amend. I (emphasis added). Colonial and early State protections for religious freedom confirm this understanding. In 1649, Maryland adopted the first colonial law securing the free exercise of religion. It provided that "no person* * * professing to believe in Jesus Christ, shall from henceforth be any ways troubled * * * for * * * his or her religion nor in the free exercise thereof." Act Concerning Religion of 1649 (spelling modernized), *reprinted in* 5 The Founders' Constitution 49, 50 (Philip B. Kurland & Ralph Lerner eds., 1987). Rhode Island's 1663 charter similarly protected residents from being "in any wise molested, punished, disquieted, or called into question,

for any differences in opinion in matters of religion, [who] do not actually disturb the civil peace of our said colony." R.I. Charter of 1663 (spelling modernized), *reprinted in* 2 Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 1595, 1596 (Benjamin Perley Poore ed., 2d ed. 1878) (Federal and State Constitutions). Nowhere did these provisions require evidence of government "coercion."

State constitutions adopted immediately following the American Revolution "defined the free exercise right affirmatively, based on the scope of duties to God perceived by the believer." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1459 (1990). New York's 1777 constitution guaranteed "the free exercise and enjoyment of religious profession and worship, without discrimination or preference." N.Y. Const. of 1777, art. XXXVIII, *reprinted in* 2 Federal and State Constitutions at 1328, 1338. New Hampshire's 1784 constitution provided that "no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping God, in the manner and season most agreeable to the dictates of his own conscience." N.H. Const. of 1784, pt. I, art. V, *reprinted in* 2 Federal and State Constitutions at 1280, 1281. Again, free exercise was understood as a positive right to practice one's beliefs free from discrimination, harm, or restraint—not merely as a negative right against government coercion.

James Madison made a similar point in his *Memorial and Remonstrance*, where he wrote that it is "the right of every man to exercise" his religion as his "conviction and conscience" dictate and "the duty of every man to render to the Creator such homage * * * as he believes to be acceptable to him." James

Madison, *Memorial and Remonstrance Against Religious Assessment*, *in* 2 The Writings of James Madison 183, 184 (Gaillard Hunt ed., 1901). For Madison, the right of free exercise consisted in the right to perform religious duties and obligations, not just as a shield against government coercion.

2. Early case law following adoption of the Bill of Rights lends further support. While reported cases on federal and state religion clauses during this period are sparse, two New York cases addressing the priest-penitent privilege reflect the view that religious liberty encompasses more than the negative right against government pressure to violate one's beliefs.

In *People* v. *Philips*, the court rejected the prosecution's request to order a Catholic priest to break the seal of confession. See William Sampson, The Catholic Question in America 8–9 (1813), *excerpted in Privileged Communications to Clergymen*, 1 Catholic Law. 199 (1955). The court ruled for the priest, not out of concern that ordering him to breach the confessional would coerce him to violate his religious beliefs, but rather because the "ordinances," "ceremonies," and "essentials" of religion "should be protected." *Id.* at 207. The court explained: "To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman Catholic religion would be thus annihilated." *Ibid.*

Similarly, *People* v. *Smith* denied a defendant's motion to bar the testimony of a Protestant clergyman the defendant had confessed to in prison. 2 City Hall Recorder (Rogers) 77 (N.Y. 1817), *reprinted in Privileged Communications to Clergyman* at 209. Because the defendant's confession was a communication with a friend and not an act of religious observance, the

priest's testimony did not raise free exercise concerns. See *ibid.* As in *Philips*, the court's holding turned on the nature of the contested practice and whether it constituted religious exercise.

3. This Court's decisions likewise confirm that direct government coercion is not a prerequisite for a free exercise violation. *Cantwell* v. *Connecticut* held that prosecuting Jehovah's Witnesses for soliciting religious donations without a state-issued certificate contravened their free exercise rights. 310 U.S. 296, 301–04 (1940). The Court struck down the certificate requirement not because it "coerced" the Witnesses, but rather because it conditioned their religious exercise based on "a determination by state authority as to what is a religious cause." *Id.* at 307.

Sherbert v. *Verner* described how the government may "burden" a person's free exercise rights in terms that reach beyond "coercion." 374 U.S. 398, 403 (1963). The government burdens religious practice, for instance, when it "impede[s] the observance" of such practices, "discriminate[s]" between religions, *or* "inhibit[s] or deter[s] the exercise of First Amendment freedoms." *Id.* at 404–05. Although *Sherbert* found that the South Carolina unemployment law "pressure[d]" the plaintiff to abandon her Sabbatarian practices, *id.* at 404, the Court identified multiple ways that the government can impose a burden on free exercise. See *id.* at 402–03.

As in this case, *Wisconsin* v. *Yoder* involved parents who sought to excuse their children from religiously objectionable school instruction. There, a group of Amish parents challenged a Wisconsin law requiring school attendance by children through age sixteen. 406 U.S. at 207. The Amish held sincere religious objections to formal education past eighth grade. *Id.* at

210–11. Ruling for the parents, the Court identified multiple burdens on religious exercise:

- *First*, the law "contravene[d] the basic religious tenets and practice of the Amish faith" by "interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community." *Id.* at 218.
- *Second*, it "affirmatively compel[led]" the parents, "under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Ibid.*
- *Third*, it "carrie[d] * * * a very real threat of undermining the Amish community and religious practice." *Ibid.*

Yoder thus teaches that direct coercion is only one way that the government can burden free exercise rights. It is *not* a prerequisite for a viable claim under the Free Exercise Clause. Because the Fourth Circuit wrongly invoked coercion as a necessary condition of a free exercise claim, the decision below is erroneous and should be reversed.

B. Treating Coercion as a Necessary Condition Under the Free Exercise Clause Conflicts with Decisions Under the Establishment Clause.

Decisions under the Establishment Clause illustrate the flaws in the Fourth Circuit's coercion-only conception of the Free Exercise Clause.

1. Long before *Kennedy* v. *Bremerton School District*, 597 U.S. 507 (2022), a line of Establishment Clause cases addressed religious content in public schools. There, the Court took pains to guard students from the possibility of "pressure" to change or conform their

views. That acute sensitivity to religious expression is difficult to square with the Fourth Circuit's demand for proof of coercion before entertaining petitioners' free exercise claims. The discrepancy suggests a measure of hostility toward religion that the First Amendment does not abide.

Take *McCollum* v. *Board of Education*, 333 U.S. 203 (1948). There, parents were allowed to send their children to religious lessons on school grounds. *Id.* at 209. Parents who declined that opportunity could have their children take a secular study hour instead. *Ibid.* Although the religious instruction was voluntary, the Court found the program invalid under the Establishment Clause. *Id.* at 209–212.

Or consider *Engel* v. *Vitale*, 370 U.S. 421 (1962), where the Court voided the practice of beginning the school day with a 22-word nondenominational prayer. "No student * * * [was] compelled to take part" in the prayer, and State policy provided that neither "teachers nor any school authority shall comment on participation or non-participation." *Id.* at 438 (Douglas, J., concurring). A letter was sent to each parent, inviting them to opt their children out "without fear of reprisal or even comment by the teacher or any other school official." *Ibid.* Although any "governmental encroachment[] upon religion" caused by the prayer was "relatively insignificant," the Court struck down the practice. *Id.* at 436 (majority op.).

Abington School District v. *Schempp*, 374 U.S. 203 (1963), illustrates the same trend. There, the Court declared unconstitutional a state law directing public schools to open the school day with a reading of ten Bible verses. School staff could not comment on the meaning or importance of the verses, and parents were given notice and a chance to opt their children out of

that exercise. *Id.* at 207. As in *Engel*, even though the Bible-reading was a "minor encroachment[]" on religious neutrality, the Court found the law contrary to the Establishment Clause. *Id.* at 225.

Consider also *Stone* v. *Graham*, 449 U.S. 39 (1980). There, the Court invalidated a state law requiring public schools to post privately funded copies of the Ten Commandments in classrooms. Students and teachers did not have to read or discuss the Commandments. *Id.* at 42. Yet the Court struck down the law out of concern that placing a copy of the Commandments in the classroom could "induce the schoolchildren to read, meditate upon, and perhaps to venerate and obey" them. *Ibid.*

Finally, in *Lee* v. *Weisman*, 505 U.S. 577 (1992), the Court held that the Establishment Clause barred a nondenominational prayer offered at high school graduation. Attendance was voluntary, but the Court concluded that the special significance of the graduation ceremony, coupled with the school's "high degree of control over the precise contents of the program," made the prayer "a state-sanctioned religious exercise in which the student was left with no alternative but to submit." *Id.* at 597.

2. These decisions stand in considerable tension with the Fourth Circuit's demand for evidence of actual coercion before hearing petitioners' claims under the Free Exercise Clause.

Graham did not allow religious materials to be passively displayed in the classroom on the off-chance schoolchildren might "read" or "meditate upon" them. 449 U.S. at 42. In contrast, MCPS devoted an entire unit to the Pride Storybooks and invested in special

training for teachers on how best to instill the books' values in children. App.272a–278a.

McCollum, *Engel*, and *Schempp* likewise disallowed contested religious instruction even when parents received prior notice and a chance for their children to opt out. See *McCollum*, 333 U.S. at 209; *Engel*, 370 U.S. at 438; *Schempp*, 374 U.S. at 207. But here, when MCPS realized that the Pride Storybooks were controversial, it eliminated parental notice and opt-out. App.657a.

Then there's *Schempp*, which prohibited the neutral presentation of religious materials even when teachers could not comment on the material. 374 U.S. at 207. Yet here, Montgomery County's guidance directs teachers to defend the Pride Storybooks and correct a schoolchild who questions the viewpoints presented in them. See App.628a–635a (instructing teachers to label differing views as "hurtful" or "disrespectful" and "disrupt" any contrary beliefs).

Engel similarly prohibited the contested religious instruction even though parents could opt out "without fear of reprisal or even comment by the teacher or any other school official." 370 U.S. at 438 (Douglas, J., concurring). Here, an MCPS board member publicly accused parents who objected to the Pride Storybooks of promoting "hate" and compared them to "white supremacists" and "xenophobes." App.103a, 107a, 187a.

Lastly, there's *Weisman*, which considered high school seniors as uniquely susceptible to "pressure" from school authorities and declared "the government may no[t] * * * use social pressure to enforce orthodoxy." 505 U.S. at 593–94. In sharp contrast, MCPS's Pride Storybooks are taught to schoolchildren as young as *five or six*, whose susceptibility to pressure by teachers

to conform to secular orthodoxy is greater by orders of magnitude. App.239a–240a.

We do not offer these comparisons to argue that the County's actions violate the Establishment Clause. Rather, the comparisons highlight the flaws in the Fourth Circuit's interpretation of the Free Exercise Clause. To say that that Clause applies only on proof of government coercion reads the First Amendment's Religion Clauses in opposition to each other. That would mean that, under the Establishment Clause, parents offended by religious material may demand its complete removal from the classroom while under the Free Exercise Clause, parents whose religious exercise is burdened by instruction on sexuality and gender cannot even obtain notice and opt-out. Such inconsistency defies this Court's teaching that the Religion Clauses should be read in harmony. See, *e.g.*, *Kennedy*, 597 U.S. at 542 ("[T]here is no conflict between the constitutional commands before us.").

The upshot is this: If the Establishment Clause empowers secular students and parents to remove religious materials without proof of coercion, then surely the Free Exercise Clause—*at a minimum*—applies when religious parents request the more modest relief of notice and opt-out. See Pet. Br. 11–12.

III. THE CONTESTED STORYBOOK PROGRAM IMPOSES A SUBSTANTIAL BURDEN ON PETITIONERS' RIGHTS UNDER THE FREE EXERCISE CLAUSE.

Yet the Fourth Circuit affirmed the dismissal of petitioners' free exercise claim, holding that "the Parents have not shown a cognizable burden to support their free exercise claim." App.34a. Quoting the district court, the court of appeals brushed aside

petitioners' claim because they "still may instruct their children on their religious beliefs regarding sexuality, marriage, and gender, and each family may place contrary views in its religious context." *Id.* at 35a (quoting *id.* at 136a). The court added that "[n]o government action prevents the parents from freely discussing the topics raised in the [S]torybooks with their children or teaching their children as they wish." *Ibid.* (quoting *id.* at 136a–137a). Actually, the County's policy substantially burdens petitioners' religious exercise.

A. MCPS Has Directly Burdened Petitioners' Right to Direct their Children's Religious Education.

1. By concluding that the Free Exercise Clause is not implicated by what petitioners' children are compelled to hear in government-operated classrooms, the Fourth Circuit trivialized the constitutional issues. At stake is the right of parents to transmit their faith to their children without government interference. That right is fundamental. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Yoder,* 406 U.S. at 232.[4] The institution of the family—father, mother, and children—is "older than law, and stands

[4] A related line of decisions under the Due Process Clause affirms "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel* v. *Granville*, 530 U.S. 57, 66 (2000); accord *Pierce* v. *Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

outside the State." G.K. Chesterton, What's Wrong with the World 50 (8th ed. 1910).

Parental authority necessarily "include[s] the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Yoder*, 406 U.S. at 233. Central to that authority is "the guiding role of parents in the upbringing of their children." *Bellotti* v. *Baird*, 443 U.S. 622, 637 (1979) (plurality op.). The Court has explained that "[t]his affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens." *Id.* at 638. Indeed, our legal tradition disclaims any authority for the State to act as the moral guardian for children. See *ibid.*

By contrast, directing a child's religious education is a well-recognized aspect of parental authority. See, *e.g.*, *Yoder*, 406 U.S. at 213–14 (affirming that "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"); *Espinoza* v. *Mont. Dep't of Revenue*, 591 U.S. 464, 486 (2020) ("[W]e have long recognized the rights of parents to direct 'the religious upbringing' of their children." (quoting *Yoder*, 406 U.S. at 213–14)); *Smith*, 494 U.S. at 881 (1990) (acknowledging "the right of parents * * * to direct the education of their children"). That right holds preeminent importance for petitioners here.

2. Parents, no less than students and teachers, do not "shed their constitutional rights * * * at the schoolhouse gate." *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). This Court has disavowed the notion that "the State may impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental constitutional guarantees."

Id. at 506 n.2. Instead, "[f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Edwards* v. *Aguillard,* 482 U.S. 578, 584 (1987). Parents have the authority to direct their children's religious education—both at home and wherever the government acts on their behalf, in loco parentis. U.S. Const. amend. I.

MCPS cannot shirk its constitutional responsibility to respect the constitutional rights of parents by reciting its aim of LGBT equality. See App.71a. "The question, then, is not whether the [County] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [petitioners]." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 541 (2021). By teaching young children about sexuality and gender in ways that contradict their families' religious faith, the challenged reading program "raise[s] special concerns regarding state interference with the liberty of parents to direct the religious upbringing of their children." *Weisman*, 505 U.S. at 643 (Scalia, J., dissenting).

3. MCPS still asserts that "mere exposure in public school to ideas that contradict religious beliefs does not burden the religious exercise of students or parents." Defs.-Appellees' Br. 24, Mahmoud v. McKnight, No. 23-1890 (4th Cir. Oct. 24, 2023) (quotation omitted) (Resp.). For support, MCPS turns to cherry-picked circuit court decisions—only one of which remotely resembles this case. Unlike *Mozert* v. *Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987), this case does not involve parental objections to a broad range of classroom instruction. *Id.* at 1062. Unlike

Fleischfresser v. *Directors of School District 200*, 15 F.3d 680 (7th Cir. 1994), petitioners' free exercise challenge does not implicate vague objections to "foster[ing] a religious belief in the existence of superior beings exercising power over human beings by imposing rules of conduct, with the promise and threat of future rewards and punishments." *Id.* at 683 (quotation omitted). And unlike *Bauchman* v. *West High School*, 132 F.3d 542 (10th Cir. 1997), the reading program here involves impressionable children in the youngest grades, not high school. See *id.* at 546.

That leaves *Parker* v. *Hurley*, 514 F.3d 87 (1st Cir. 2008). There, the First Circuit held that public schools did not violate parents' free exercise rights by declining to excuse their children from reading books aimed at "promot[ing] toleration of same-sex marriage." *Id.* at 106. *Parker* rests on the same mistaken ground as the decision below—that the Free Exercise Clause requires evidence of actual coercion. See *id.* at 105. Unlike *Parker*, petitioners' claim does not rest on "the mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief." 514 F.3d at 105. Here, the County's program pressures students to accept contested viewpoints about sexuality and gender and to blunt objections based on a child's and parent's religious beliefs. See Pet. Br. 29–30. The program intentionally seeks to inculcate secular orthodoxy in direct opposition to students' and parents' religious beliefs—not merely to expose students to different viewpoints. *Parker* is troubling—and wrong.

4. These lower court decisions thus fail to prop up the County's threadbare position, because mischaracterizing the Pride Storybook program as "mere exposure" turns out to be inaccurate. Resp. 24.

Requiring children to hear lessons aimed at contradicting their parents' faith on the religiously sensitive topics of sexuality and gender seeks to supplant the parents' moral judgments with the County's own and involves risks for the faith of every family represented in that classroom.

Coercion lurks in this case, even if it were a necessary condition of relief under the Free Exercise Clause. Age matters when discussing controversial topics such as sexuality and gender, as any sensible teacher will affirm. A class discussion with teenagers about same-sex attraction will spark a debate. But introducing the same topic in a classroom of five- and six-year-olds will find an impressionable audience.

Classroom discussions of sexual orientation and gender identity hold profound religious significance for parents of young children. As we have explained, many religions have beliefs and proscriptions governing the gendered nature of human beings and the appropriate exercise of sexual powers. The record in this case attests to the petitioners' sincerity on these points.

Given such sensitivities, some States have erected a statutory bar to public school instruction regarding sexuality and gender for young children. See, *e.g.*, Fla. Stat. § 1001.42(8)(c)(3) (prohibiting classroom instruction on "sexual orientation or gender identity" among "prekindergarten through grade 8" students except when required to provide instruction on sexual abstinence or health education); Ohio Rev. Code Ann. § 3313.473(E) (prohibiting classroom instruction on "sexuality content" among "kindergarten through [grade] three" students, where "sexuality content" excludes "[i]ncidental references to sexual concepts or gender ideology" outside of formal classroom instruction or presentations). MCPS did not need to go that far to

support the rights of objecting parents. It could have simply directed its schools to offer parents an opt-out—the same accommodation that petitioners seek. See, *e.g.*, Code Md. Reg. § 13A.04.18.01(D)(2)(e)(i).

Admittedly, in our religiously pluralistic society, petitioners' free exercise right to direct a child's religious upbringing cannot be unbounded. There are cases where parental concerns about public school curriculum amount almost to a demand for individualized educational instruction at public expense. See *Mozert*, 827 F.2d at 1062. That is not this case. Here, petitioners' religious objections are focused, laser-like, on a single unprecedented reading program aimed at teaching children in the youngest grades highly controversial ideas about romantic attraction and gender identity. Acknowledging the resulting burden on petitioners' religious exercise does not open the door to parental demands for individualized instruction. It simply respects the Constitution's guarantee that religious exercise must be free.

Against all this, MCPS cites *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), for the notion that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint." Resp. 32 (quoting *Epperson*, 393 U.S. at 104). But that statement, even taken at face value, does not suggest that courts should look the other way when public schools deprive parents of their First Amendment rights. And any suggestion that local school boards hold near-absolute power over the content of public education because of some ephemeral concern vaguely tied to the Establishment Clause should be discarded as a relic of "a 'bygone era' when this Court took a more freewheeling approach to interpreting legal texts." *Shurtleff* v. *City of Boston*,

596 U.S. 243, 276 (2022) (quoting *Food Mktg. Inst.* v. *Argus Leader Media*, 588 U.S. 427, 437 (2019)).

Petitioners, in short, have suffered a substantial burden on their exercise of religion.

B. Notice and Opt-Out Allow Public Schools to Deliver Controversial Content on Sexuality and Gender While Respecting Parents' First Amendment Rights.

1. Because MCPS has burdened petitioners' religious exercise, the County's actions must survive strict scrutiny. The record supports two grounds for that conclusion.

One, strict scrutiny is required when the government indulges in "official expressions of hostility to religion." *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 584 U.S. 617, 639 (2018). As petitioners show, Pet. Br. 15, that constitutional line was crossed by county officials who expressed open hostility to the religious viewpoints of petitioners and others. See App.187a (disparaging parents for engaging in a "dehumanizing form of erasure"); *id.* at 107a (comparing religious parents with "white supremacists" and "xenophobes").

Two, the government may not require someone to forego the exercise of religion as a condition of receiving a public benefit. See *Thomas* v. *Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981). That principle applies here, as Judge Quattlebaum discerned. App.60a–61a (Quattlebaum, J., dissenting). As petitioners have shown, Pet. Br. 21, MCPS's pursuit of the controversial Storybook program without accommodating petitioners' religious beliefs puts them to an intolerable choice: "[E]ither adhere to their faith or receive a free public education for the children"—

but not both. App.62a (Quattlebaum, J., dissenting). Since the County does not even try to satisfy strict scrutiny, it seems highly unlikely that MCPS's program can survive without accommodating petitioners' religion.

2. Accommodation should be easy. Petitioners ask only for notice and the right to have their children excused from the objectionable class discussions. *Id.* at 74a (emphasizing "the limited nature of the relief the parents seek").

Granting petitioners' relief is even consistent with Maryland law. State regulations require schools to provide opt-outs for any "instruction related to family life and human sexuality objectives" other than menstruation. Code Md. Reg. § 13A.04.18.01(D)(2)(e)(i). It's hard to see how MCPS can refuse that remedy to petitioners when the reading program operated for a year *with* the accommodations MCPS now stubbornly denies. App.97a–98a.

By requiring opt-outs from controversial coursework, Maryland law reflects the widely accepted means of accommodating religious and moral objections when it comes to sex education in public schools.[5] That is the device adopted by many States to accommodate parental concerns about such issues. See, *e.g.*, S.C. Code § 59-32-50 (requiring school boards to notify parents of the content of instructional materials regarding "reproductive health" and the option to "exempt" their child from instruction); Va. Code §§ 22.1-207.1(B), -207.2 (requiring public schools to give parents an opportunity to review instructional

[5] It has long been understood that "[s]ex education" can be used as a "weapon in an ideological war against the family," with the aim of "divest[ing] the parents of their moral authority." Philip Rieff, *The Triumph of the Therapeutic* 160 (1966).

materials regarding family life education, including "human sexuality" and "human reproduction," along with the option to "excuse" their child from all or part of such instruction); W. Va. Code § 18-2-9(c) (requiring public schools to give parents an opportunity to review curriculum materials and the option to "exempt" their child from participation in lessons concerning AIDS "and other sexually transmitted diseases").

Indeed, out of 44 states and the District of Columbia that require or permit sex education in public schools, 33 of them offer parental opt-out rights, "some for religious reasons only, others for moral or other objections as well." Melody Alemansour et al., *Sex Education in Schools*, XX Geo. J. Gender & L. 467, 477–478 (2019). Only five states—Delaware, Hawaii, Indiana, Kentucky, and Montana—require sex education with no provisions for parental notice and opt-out rights. *Id.* at 478.

Threats to parents' ability to rear their children in their faith cannot be brushed aside merely because the County weaves its viewpoint on sexuality and gender identity into classroom instruction on "language arts." See Resp. 2 (asserting that the Pride Storybook program "do[es] not belong in the Family Life and Human Sexuality Unit of the health-education curriculum"). Relabeling the instruction does not change its character or remove the religious burden it imposes on children and parents. The same basic conflict remains between the County's desired teachings and parents' right to be free from governmental interference in their children's religious upbringing.

The suggestion that the Pride Storybooks benignly "reflect the communities in which MCPS students live" is divorced from reality. *Ibid.* Concepts such as gender fluidity, figures such as drag queens, and relationships

of romantic attraction between two young girls—these are not the stuff of ordinary "language arts" instruction for children still learning the alphabet and how to spell their own names.

The County's other objections fall flat. That the opt-out carried administrative burdens does not relieve the County of its duties under the First Amendment. As this Court put it in *Carey* v. *Population Services, International*, 431 U.S. 678 (1977), "the prospect of additional administrative inconvenience has not been thought to justify invasion of fundamental constitutional rights." *Id.* at 691. Nor does the County get any mileage out of its complaint that respecting parents' constitutional rights might mean that some students feel isolated in a classroom with fewer students. See Resp. 51. Surely the County can find other ways to avoid such discomfort without violating petitioners' constitutional rights. One option would be to combine classes when materials from the MCPS Storybook program are taught. At all events, the County has no right to use the State's compulsory attendance law to create a forum for indoctrinating children against the objections of religious parents.

CONCLUSION

Petitioners seek to exercise their religion by guiding their children in matters concerning sexuality and gender. MCPS has instituted a reading program that teaches young children about LGBT characters and concerns from a viewpoint that is antithetical to petitioners' sincere religious beliefs. Petitioners do not seek to upend the County's program. They ask only for notice and an opportunity for their children to be excused. Under the First Amendment, their claim is sound. The Fourth Circuit should be reversed.

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