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 FOR RESPONDENTS

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QUESTION PRESENTED

Whether petitioners have established a burden on their religious exercise by virtue of their children's exposure in public school to curricular material that petitioners oppose on religious grounds.

PARTIES TO THE PROCEEDING

Petitioners Tamer Mahmoud and Enas Barakat, Jeff and Svitlana Roman, and Chris and Melissa Persak, in their individual capacities and on behalf of their minor children, are plaintiffs below and were parties to the preliminary-injunction proceeding below.

Petitioner Kids First, an unincorporated association, is a plaintiff below. Kids First did not join the preliminary-injunction motion and thus, as the Fourth Circuit recognized, Kids First was not a proper participant on appeal. Pet.App.16a-17a n.4.

Respondent Thomas W. Taylor, in his official capacity as Superintendent of Montgomery County Public Schools, is a defendant below. He was substituted under Fed. R. Civ. P. 25 for his predecessor in office Monifa B. McKnight, who was a defendant and a party to the preliminary-injunction proceeding below.

Respondent Montgomery County Board of Education is a defendant below and was a party to the preliminary-injunction proceeding below.

Respondents Shebra Evans, Lynne Harris, Grace Rivera-Oven, Karla Silvestre, Rebecca Smondrowski, Brenda Wolff, and Julie Yang, in their official capacities as members of the Montgomery County Board of Education, are defendants below and were parties to the preliminary-injunction proceeding below.

DIRECTLY RELATED PROCEEDINGS

There are no related proceedings.

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INTRODUCTION

The threshold element of a free-exercise claim is coercion—that is, compulsion or pressure to alter one's religious convictions or practice. Mandatory public-education laws can have this coercive effect if they forbid parents from pursuing an alternative that accords with their religion. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925) (private school); *Wisconsin* v. *Yoder*, 406 U.S. 205, 222 (1972) (vocational education). This Court likewise has found impermissible coercion where public schools require students to affirm a belief contrary to their religion, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 633 (1943), and where governments disqualify individuals from public benefits based on their religious practice, *e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). But this Court has never held that parents who choose to send their children to public school are similarly coerced by virtue of their children's exposure in the classroom to curricular content that the parents find objectionable on religious grounds.

The Court should not take that step here. The Fourth Circuit correctly held that the sparse preliminary-injunction record fails to establish coercion. Petitioners introduced no evidence that any parent or child was penalized for his or her religious beliefs, asked to affirm any views contrary to his or her faith, or otherwise prohibited or deterred from engaging in religious practice. What the record does show is that Montgomery County Public Schools ("MCPS") supplemented its many language-arts texts with a handful of storybooks featuring LGBTQ characters in order to better represent all Montgomery County families; that it expressly forbade teachers from using the storybooks to pressure students to change or disavow religious views; that the

storybooks are not sex-education materials; and that MCPS tried to accommodate parent requests to opt their children out of class when the storybooks were used until doing so became unworkably disruptive.

The Constitution's text, this Court's precedent, First Amendment principles, and history and tradition all establish that petitioners are not cognizably burdened under the Free Exercise Clause. To start, this Court has made clear (beginning in *Barnette*, which petitioners list among the cases that "control the result here," Pet.Br.28) that parents who choose to send their children to public school are not cognizably coerced by virtue of their children's exposure there to religiously objectionable ideas.

Petitioners also fail to establish that the no-opt-out policy is coercive (of themselves or their children) as a matter of fact: The scant record is devoid of evidence that petitioners or their children are compelled or pressured to modify their religious beliefs or practice. There is no evidence of how the storybooks have been or will be used in MCPS classrooms, save for MCPS's directive that teachers *not* use them to contradict religious beliefs or to instruct students on gender or sexuality. And this Court has rejected the argument that parents are coerced whenever they believe that availing their children of a public benefit (here, a public education) would undermine their efforts to raise their children in accordance with their faith. Crediting petitioners' burden theory would not only contravene constitutional text, history, and precedent, but also—as courts have long recognized—"leave public education in shreds," *Illinois ex rel. McCollum* v. *Board of Education of School District No. 71*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring), by entitling parents to pick and choose which aspects of the curriculum will be taught to their children.

Petitioners' failure to show a cognizable burden should end the Court's inquiry. But if the Court finds a cognizable burden, it should remand for the lower courts to determine in the first instance whether MCPS's policy is neutral and generally applicable (which it is) and, if necessary, whether any burden it imposes is justified. Petitioners sought this Court's review on the limited question of whether they have established a burden, so the substantial portion of their brief urging this Court to hold that the no-opt-out policy fails strict scrutiny is irrelevant. In any event, the policy would satisfy strict scrutiny if it applied, as the policy is narrowly tailored to MCPS's compelling interest in maintaining an effective, undisrupted educational environment.

This Court should affirm.

STATEMENT

A. Montgomery County Public Schools

MCPS is governed by an elected school board, Md. Educ. Code §3-901, whose meetings are open to the public. MCPS parents frequently speak at Board meetings about issues important to them. *E.g.*, Pet.App.100a-107a. Numerous aspects of school administration are conducted with public input and deliberation, including the selection of instructional materials and the creation and implementation of MCPS policies. *See* Pet.App.212a, 601a.

This case arises at the intersection of two sets of MCPS policies. The first concerns the selection of instructional materials. As described below, MCPS adopts instructional materials for district-wide use through Regulation IIB-RA, a participatory process that has been in place for decades. JA17-29. This process relies on reading and instructional specialists to evaluate texts

for consistency with curricular standards and on parents and other community members to review texts and provide input before any new text is approved. *See id.*

The second concerns MCPS's guidelines respecting religious diversity (the "Guidelines"). Pet.App.210a-233a. MCPS developed the Guidelines in partnership with the Montgomery County Executive's Faith Community Working Group to "promote respect and appreciation for the religions, beliefs, and customs of our diverse student population." Pet.App.212a-213a. The Guidelines make clear that students may pray at school, distribute religious literature, organize and join religious clubs, and express their religious beliefs in the classroom. Pet.App.214a-215a. The Guidelines mandate that students can miss school for religious observance and receive extensions on assignments. Pet.App.215a-217a. They further emphasize "the importance of neutrality toward religion," and of ensuring that all "students have the right to their religious or nonreligious beliefs and practices." Pet.App.212a. The version of the Guidelines in effect when petitioners sued required schools to excuse students from instruction, subject to the proviso that if opt-out requests "become too frequent or too burdensome, the school may refuse to accommodate the requests." Pet.App.221a.[1]

[1] Revised in 2023, the Guidelines now provide that "[s]tudents may be excused from noncurricular activities, such as classroom parties or free-time events that involve materials or practices in conflict with a family's religious, and/or other, practices. However, MCPS cannot accommodate requests for exemptions from required curricular instruction or the use of curricular instructional materials based on religious, and/or other, objections." Pet.App.672a.

B. Selection Of Instructional Materials

MCPS purchases its elementary English Language Arts ("ELA") curriculum from an outside vendor. As required by the MCPS curriculum development regulation, a committee of professional educators, parents, and other community stakeholders reviews proposed curricula and advises the Board in its selection of a vendor.[2] MCPS chose Benchmark to provide the ELA curriculum in 2019 and switched to Amplify CKLA in 2024.[3]

The primary purpose of the ELA curriculum is to teach students literacy. JA5-6. The ELA texts MCPS uses are also intended to foster the tools students need to "[v]alue the richness of cultural pluralism and commonality," "work effectively in cross-cultural environments," and "[c]onfront and eliminate stereotypes." Pet.App.589a. These goals are widely shared by school boards nationwide. In Texas, for example, to "establish[] the foundation for responsible citizenship in society," kindergarteners are required to "understand[] similarities and differences among individuals … such as kinship and religion" and "compare family customs and traditions." 19 Tex. Admin. Code §113.11(b)(1), (10).

The off-the-shelf ELA curriculum MCPS purchased did not fully reflect the diversity of MCPS families. MCPS therefore initiated a process under Regulation IIB-RA to supplement that curriculum, in line with previous efforts to supplement curricula with relevant texts. Pet.App.602a-603a.

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[2] The MCPS policy for curriculum development is available online. *See* Regulation IFA-RA, MCPS (rev. Sept. 20, 2005).

[3] Griffin, *School Board Adopts New Elementary English Language Arts Curricula For MCPS*, Bethesda Mag. (Mar. 20, 2024).

First, a committee of reading and instructional specialists participated in rounds of evaluations of each proposed additional book. Pet.App.603a-604a. Committee members evaluated whether each text was "age/grade appropriate[]" and "relevant to and reflective of the multicultural society," and whether it would "support … student achievement toward MCPS curriculum standards." JA21-22; *see* JA30-42. The committee determined that the five storybooks at issue here satisfied these criteria. Pet.App.603a-604a. The committee also reviewed a number of books that it decided not to recommend for approval. Pet.App.604a.

As with all curricular changes under Regulation IIB-RA, preliminarily approved texts were publicly displayed "to permit examination by professional staff and parents" before approval was finalized. Pet.App.601a. Parent feedback was solicited. *See id.* Parents, moreover, always retain the right to request that the storybooks, like any other instructional materials, be reconsidered and removed from the curriculum. JA25-27.

This process culminated in the selection of a handful of additional storybooks—one per grade level—that include LGBTQ characters. Pet.App.604a. These supplemented the hundreds of other books recommended for use as part of the ELA curriculum. At the beginning of the 2022-2023 school year, seven of these storybooks were purchased for use in elementary grades. Pet.App.234a-253a. Only five are at issue in this appeal: *Uncle Bobby's Wedding*; *Intersection Allies*; *Prince & Knight*; *Love, Violet*; and *Born Ready*.[4]

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[4] As Petitioners acknowledge, *Pride Puppy* and *My Rainbow* were originally approved, but later reevaluated pursuant to standard MCPS procedures and removed from instructional use. Asbury,

C. The Storybooks

In classics like *Sleeping Beauty* and *Peter Pan*, young readers encounter stories about love and navigating life within families and communities. The MCPS ELA curriculum introduces students to similar stories—such as retellings of *Rapunzel*, *Cinderella*, and *Goldilocks*—and to a range of age-appropriate texts that touch on these same themes. For example, the Amplify CKLA curriculum now in place recommends that kindergarteners read *Princess Hyacinth*, in which a young princess develops a crush on a boy her age.[5] The only difference between the storybooks and the other ELA texts is that the storybooks include LGBTQ characters and their points of view. The five books that are at issue in this case are in the record, available for anyone to read.

Take ***Uncle Bobby's Wedding***. This storybook introduces students to Chloe, who loves spending time with her uncle. When her uncle announces his engagement, Chloe worries that he will be too busy for her. But Chloe's worry dissipates as she gets to know her uncle's fiancé. She even saves the day at the wedding by finding the grooms' lost rings. Pet.App.279a-305a.

Prince & Knight tells the story of a prince who does not want to marry any of the princesses he meets. When a dragon attacks the kingdom, the prince races to confront the beast. A knight arrives and the two work

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Montgomery Schools Stopped Using Two LGBTQ-Inclusive Books Amid Legal Battle, Wash. Post (Oct. 23, 2024).

[5] *See* Curriculum, Elementary School English Language Arts, Montgomery Cnty. Pub. Schs.

together to subdue the dragon. The two fall in love, filling the king and queen with joy. Pet.App.393a-425a.

In ***Love, Violet***, Violet daydreams about adventures with her classmate Mira. On Valentine's Day, Violet makes a card for Mira but is too shy to deliver it. In the end, however, Mira is delighted to receive Violet's card. Violet and Mira then skip off together in search of adventure. Pet.App.431a-446a.

Intersection Allies introduces students to a range of characters. Alejandra uses a wheelchair and does not let that stop her from playing basketball. Kate likes to wear a superhero cape instead of skirts and frills. Adilah wears a hijab in ballet class. These characters get along despite their differences. Pet.App.314a-347a.

Finally, ***Born Ready*** tells the story of Penelope, who likes skateboarding, wearing baggy jeans, and doing karate. Penelope tells his mother that he is a boy and feels "warm, golden love" when she accepts him. When Penelope's brother says it "doesn't make sense" for Penelope to be a boy, Penelope's mother does not chide him or tell him he is wrong; instead, she hugs both children and whispers, "Not everything *needs* to make sense. *This is about love.*" With the support of his parents and school principal, Penelope wears a boy's uniform to school. Enjoying newfound confidence, Penelope takes karate lessons and wins a tournament. Pet.App.450a-480a.

Petitioners largely focus on material not at issue. As noted, neither *My Rainbow* nor *Pride Puppy* is currently approved for instructional use. Petitioners nevertheless feature and distort *Pride Puppy*, implying a salacious bent to the book's search-and-find word list, Pet.Br.9-10, which is separate from the text of the book, and prompts readers who might consult it to find

"leather" by directing them to a character in a leather jacket, Pet.App.261a. Two other books petitioners feature, *What Are Your Words?* and *Jacob's Room To Choose*, are not among those approved and purchased for classrooms. *See* Pet.App.234a-253a. Finally, the excerpts of discussion notes that petitioners select from *Intersection Allies* were written by the publisher (not MCPS), Pet.App.350a, and like the "think aloud" prompts for *Love, Violet* and other stories, Pet.App.275a, are directed at teachers (not students) to use or not use at the teacher's discretion.

MCPS made clear from the beginning that the storybooks were to be used in the same way as any other book in the ELA curriculum: placed on a shelf for students to find on their own; offered as an option for literature circles, book clubs, or reading groups; or used for read-alouds. Pet.App.604a-605a. Teachers are not required to use any of the storybooks in any given lesson, and were not provided any associated mandatory discussion points, classroom activities, or assignments. Teachers are expected to incorporate the storybooks into the curriculum based on their professional judgment and experience. *Id.*

MCPS has, moreover, made clear that teachers' discretion is limited in that the storybooks are not to be used outside of their intended purpose. In sample responses to anticipated questions from parents, the district stressed that "there are no planned explicit lessons related to gender and sexuality," Pet.App.639a, and that "[n]o child … is asked to change how they feel about" those issues, Pet.App.640a. MCPS further explained that the purpose of the storybooks is "[a]bsolutely not" to "teach [a] child to reject the[] values" that parents seek to instill at home. Pet.App.638a. The storybooks are instead intended to "promot[e] acceptance and

respect and teach[] [students] more about the diverse people and families in the world." Pet.App.637a.

The record contains no evidence that teachers have been or will be "directed" or "instructed" to inject any views about gender or sexuality into classroom discussions about the storybooks. *Contra* Pet.Br. 11-12. Petitioners point only to a document providing teachers with suggestions for how they might respond to student questions and comments. These suggestions emphasize civility: If a student says, "Being [gay] is wrong and not allowed in my religion," a teacher might respond with, "I understand that is what you believe, but not everyone believes that. We don't have to understand or support a person's identity to treat them with respect and kindness." Pet.App.628a. There is no effort to change any child's beliefs—only a recognition that "[s]chool is a place where we learn to work together regardless of our differences." *Id.* The document accordingly suggests that if a student says, "That's weird. He can't be a boy if he was born a girl," a teacher might begin by explaining that calling someone "weird" "is hurtful; we shouldn't use negative words to talk about peoples' identities." Pet.App.630a. The document also suggests that teachers might "[d]isrupt either/or thinking" reflecting "[s]tereotypes" like "those are boy toys." Pet.App.633a.

D. The Family Life And Human Sexuality Unit Of Instruction

Maryland requires that each school district provide, separate from its ELA curriculum, a comprehensive health-education program. COMAR §13A.04.18.01(A)(1). State health-education standards require that students "comprehend concepts related to health promotion and disease prevention," including "[m]ental and emotional health," "[s]afety and violence

prevention," and "[f]amily life and human sexuality." *Id.* §13A.04.18.01(C)(1). In addition, students must "analyze the influence of family, peers, culture, media, technology, and other factors on health behaviors." *Id.* §13A.04.18.01(C)(2). Instruction on family life and human sexuality must cover topics such as "sexual activity," "sexually transmitted infections, including HIV," "pregnancy," "contraception," "condoms," and "consent." *Id.* §13A.04.18.01(D)(2). Under state law, parents are entitled to opt their children out of this instruction. *Id.*

MCPS provides the required curriculum through a discrete Family Life and Human Sexuality Unit of Instruction. Pet.App.608a. The "direct teaching and instruction on [family life and human sexuality] objectives" is "confined to [that] unit of study within the health class." *Janss* v. *Montgomery County Board of Education*, 2024 Md. Cir. Ct. LEXIS 5, at *8 (Md. Cir. Ct. Dec. 23, 2024), *appeal docketed*, ACM-REG-2221-2024 (Md. Ct. App. Jan. 17, 2025). MCPS parents may opt their children out of this instruction for any reason. Pet.App.608a. The storybooks are not part of the Family Life and Human Sexuality Unit of Instruction. Nor are other ELA materials with similar themes, such as *Princess Hyacinth*.

The Maryland State Board of Education has determined that school districts such as MCPS are not required to "confine any mention or discussion of LGBTQ+ resources to the [family life and human sexuality] portion of the curriculum." *T.J. & D.J.* v. *Montgomery County Board of Education*, Md. State Bd. of Educ. Op. No. 24-10, at *7 (Apr. 30, 2024). That decision was affirmed by a Maryland court, which held as a matter of Maryland law that the "incorporation of more inclusive language, including reference to the diverse LGBTQ+

community, into instructional materials … is not 'instruction' on family life or human sexuality, nor is such reference the promotion of an 'objective.'" *Janss*, 2024 Md. Cir. Ct. LEXIS 5, at *8.

E. The No-Opt-Out Policy

At the beginning of the 2022-2023 school year, some parents asked that their children be excused from class when the storybooks were read. Pet.App.606a-607a; *see also* Pet.App.185a, 494a, 497a. Some of these opt-out requests were based on religious beliefs; others were not. Pet.App.606a-607a. For example, some objected to materials they considered age-inappropriate, with no mention of religion. *See* Pet.App.606a. "Other parent groups have shared their strong support for the materials to be used." Pet.App.617a.

Individual teachers and administrators initially accommodated parents' opt-out requests. Pet.App.606a-607a. Petitioners requested and were granted permission to excuse their children from class when the storybooks were used. Pet.App.533a-534a, 540a-541a, 544a-545a. The record does not describe how the storybooks were used in petitioners' children's classrooms or whether petitioners' children were in fact ever opted out of class.

By March 2023, the experience of teachers, principals, and administrators showed that these opt-outs were unworkable. Some schools, for example, experienced unsustainably high numbers of absent students. Pet.App.607a. All schools faced substantial hurdles in using the storybooks while honoring opt-out requests. Teachers would have to track opt-outs, manage the removal of students from class, and plan alternative activities for excused students. *See id.* Librarians and reading specialists who spent time in multiple classrooms

each day—and thus interacted with every child in a given school—would have to ensure that they were kept current on all opt-outs and implemented all accommodations. *See id.* The need to shuttle students in and out of the classroom would, moreover, disrupt those classrooms and undermine MCPS's curricular goals by making it impossible to weave the storybooks seamlessly into ELA lessons. *See id.*; Pet.App.604a-605a.

On March 23, 2023, MCPS sent a message to the community. Pet.App.657a. This message reiterated that the storybooks would be used, but it explained that parents would not receive individual notifications each time the books were read and would not be permitted to opt their children out of class for any reason. *Id.* Parents who had already received permission to opt out their children would be able to do so for the remainder of the semester. Pet.App.608a. The updated message made clear that parents could continue to opt their children out of the Family Life and Human Sexuality Unit of Instruction. Pet.App.657a.

F. Proceedings Below

Petitioners sued the Board, its members, and the MCPS Superintendent in May 2023, asserting (inter alia) a violation of the Free Exercise Clause. Pet.App.107a-108a. Petitioners then moved for a preliminary injunction on that claim, seeking to require MCPS to notify them each time any of the storybooks was to be read or discussed, and to provide them an opportunity to opt their children out. Pet.App.76a-77a.[6]

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[6] In July 2023, petitioners amended their complaint to add plaintiff Kids First. Kids First did not join the preliminary-injunction motion. Pet.App.17a n.4, 32a n.13, 108a n.7, 133a-134a.

Petitioners sought relief on a sparse factual record. They relied primarily on the storybooks themselves, optional teacher guidance, and declarations describing their religious views. The Mahmoud-Barakats did not want their children to be "[i]ntentionally expos[ed] … to activities and curriculum on sex, sexuality, and gender that undermine Islamic teaching on these subjects." Pet.App.532a. According to the Persaks, "exposing our elementary-aged daughters to viewpoints on sex, sexuality, and gender that contradict Catholic teaching on these subjects is inappropriate and conflicts with our religious duty to raise our children in accordance with Catholic teaching." Pet.App.544a. And the Romans attested that having MCPS "teach principles about sexuality or gender identity that conflict with [their] religious beliefs significantly interferes with [their] ability to form [their son's] religious faith and religious outlook on life and is spiritually and emotionally harmful to his well-being." Pet.App.541a.

The declarations broadly characterize "[t]he storybooks at issue in this lawsuit and others like them" as addressing issues of sex, sexuality, and gender identity outside the petitioners' preferred context. Pet.App.532a-533a; *see* Pet.App.538a-539a; Pet.App.541a; Pet.App.544a. Petitioners' declarations go on to describe ways in which the storybooks *could be* used to contravene petitioners' religious teachings. For example, the declarations oppose use of the storybooks for "ideological instruction," Pet.App.544a, that petitioners believe is "false religiously and scientifically," Pet.App.539a, or for classroom conversations that require students "to discuss romantic relationships or sexuality with schoolteachers or classmates," Pet.App.532a. Neither the declarations nor other record materials

establish that the storybooks have been or are likely to be used in these ways.

On this record, the district court denied a preliminary injunction and the Fourth Circuit affirmed. Pet.App.154a; Pet.App.9a. Both courts emphasized that petitioners' limited evidence failed to substantiate the wide-ranging relief they sought: an injunction against *all* uses of *all* storybooks in the presence of their children. *See, e.g.*, Pet.App.134a; Pet.App.9a. As the Fourth Circuit held, the "scant record" required petitioners to assert a single, broad theory: that their children's exposure to any of the storybooks, in and of itself, burdened their religious exercise. Pet.App.9a; Pet.App.37a. The Court explained that this theory is contrary to this Court's free-exercise jurisprudence, under which petitioners can demonstrate a free-exercise burden only by showing that the storybooks are used to coerce them or their children, directly or indirectly, to act or believe contrary to their religious faith. Pet.App.49a.

The Fourth Circuit found no evidence of coercion on the "threadbare" record before it. Pet.App.33a. It explained that "*none* of [the parents'] declarations provides any information about how any teacher or school employee has actually used any of the Storybooks," "how often the Storybooks are actually being used," "what any child has been taught in conjunction with their use," or "what conversations have ensued about their themes." *Id.* The court further explained that petitioners similarly failed to show that any school's teaching in any way "affects what they teach their own children" or otherwise coerces their children's religious upbringing by compelling them "to change their religious beliefs or conduct, either at school or elsewhere." Pet.App.34a (emphasis omitted).

In reaching this conclusion, the Fourth Circuit agreed with the First, Second, Sixth, Seventh, and Ninth Circuits that "simply hearing about other views does not necessarily exert pressure to believe or act differently than one's religious faith requires." Pet.App.35a. It rejected petitioners' principal argument that "compelled presence or exposure" to different views in public school "necessarily establishes the existence of a burden" on religious exercise, finding that this view "relies on too expansive a reading" of *Yoder*. Pet.App.36a-37a. And it held that the no-opt-out policy did not deny petitioners access to a public benefit based on religion because MCPS remained "open to all students" regardless of their faith and petitioners were not pressured to "disavow their religious views before they [could] send their children to public school." Pet.App.46a.

Judge Quattlebaum dissented. The dissent recognized that "it is generally true that the First Amendment provides no guarantee that students will not be exposed to views they (or their parents) disagree with in public schools." Pet.App.64a. The dissent also acknowledged that "use of the books in instructing K-5 children does not coerce or require the parents or their children to change their religious views," and that petitioners remained free to "teach their religious beliefs at home." Pet.App.63a. Judge Quattlebaum opined that the no-opt-out policy nonetheless likely burdened petitioners' religious exercise by requiring them to choose between "adher[ing] to their faith or receiv[ing] a free public education for their children." Pet.App.62a. He declined to address "the question of whether opt-outs are required anytime a school's curriculum decisions burden religious freedom." Pet.App.75a n.6.

SUMMARY OF ARGUMENT

I. To establish a burden on religious exercise, petitioners must show that they or their children face coercion to modify their religious convictions or practice. This requirement is rooted in the text of the Free Exercise Clause and runs through every one of this Court's free-exercise cases. Petitioners wrongly contend that this Court "rejected" the coercion requirement, Pet.Br. 44; the cases they cite instead stand for the principle that coercion may be direct (by outright prohibiting religious belief or conduct) or indirect (by deterring or discouraging the same, such as by disqualifying individuals from public benefits based on their religious practice).

Petitioners fail to establish the requisite coercion. The "very limited record developed" so far, Pet.App.31a, evinces only public-school students' exposure to ideas that clash with their parents' religious beliefs—not instruction (much less indoctrination) on gender or sexuality. And this Court has made clear that students in public school (including elementary school) and the parents who send them there do not suffer constitutionally cognizable coercion by virtue of such exposure. Abandoning this longstanding principle would render public education unworkable. And upholding the principle does not call into question the sincerity of petitioners' beliefs. Rather, it reflects a legal judgment rooted in First Amendment principles.

In any event, even if parents or students could theoretically establish a burden based on exposure to the storybooks, petitioners have not established coercion of themselves or their children, and thus a free-exercise burden, as a factual matter. To start, the record is devoid of evidence that students are compelled or pressured to act or believe contrary to their faith. In fact,

MCPS expressly disavows use of the storybooks to that end, and nothing in the record controverts that disavowal, or indeed shows *anything* about how the storybooks have been or will be used in classrooms. Nor is there evidence that petitioners themselves are coerced. This Court has explained that parents cannot show compulsion or pressure to abandon their religious practice solely by virtue of their sincere belief that availing themselves (and their children) of a public benefit would conflict with their efforts to raise their children in accordance with their faith. To be sure, individuals may be burdened when the government disqualifies them from a public benefit due to their religious practice—but that is not this case. Petitioners instead assert that they are burdened because they cannot avail themselves of a public benefit while altering aspects of the benefit that they believe would impede their efforts to impart their faith to their children.

Petitioners' burden theory breaks from precedent. Unlike this case, *Yoder* and the other cases petitioners invoke each involved coercion—direct or indirect—to abandon one's religious practice. Indeed, this Court has already corrected the "misread[ing]" of *Yoder* that petitioners urge, *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 456 (1988), and *Yoder* itself deemed it "obvious" that the Free Exercise Clause does not license parents to withdraw their children from "discrete aspects" of a public-school curriculum, *Yoder*, 406 U.S. at 235. Nor does petitioners' claim find support in history and tradition. To the contrary, since the dawn of public schools, courts have routinely approved public schools' denial of opt-out requests, including for religious reasons.

II. Petitioners cannot prevail on their free-exercise claim without establishing a cognizable burden.

Petitioners' contrary argument—that a policy's non-neutrality or lack of general applicability *independently* triggers strict scrutiny—is untethered to the Constitution's text and inverts this Court's free-exercise doctrine.

III. Even if the neutrality and general applicability of MCPS's policy were relevant, this Court should not reach that issue, which was not addressed below by either court. In any event, the policy is neutral and generally applicable. It treats comparable religious and secular activity exactly the same; *no* opt-outs from ELA lessons using the storybooks are permitted. Nor does the record establish anti-religious animus behind the policy. MCPS determined that opt-outs were infeasible after attempting to accommodate "[m]any … opt out requests [that] were not religious in nature." Pet.App.606a.

IV. If this Court finds a cognizable burden, it should remand for the lower courts to determine in the first instance whether that burden is justified. Petitioners sought certiorari solely to determine whether they established a cognizable free-exercise burden. In any event, MCPS's policy is narrowly tailored to its compelling interest in providing an effective educational environment for all students and thus would satisfy strict scrutiny if it applied.

ARGUMENT

I. PETITIONERS HAVE NOT ESTABLISHED A BURDEN ON RELIGIOUS EXERCISE

A. A Free-Exercise Burden Requires Coercion To Act Or Believe Contrary To One's Faith

A "violation of the Free Exercise Clause" must be "predicated on coercion." *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 223 (1963). Hence, "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Id.* This requirement runs through every one of this Court's free-exercise cases. *See, e.g.*, *Carson* v. *Makin*, 596 U.S. 767, 778 (2022) ("coercion"); *Espinoza* v. *Montana Department of Revenue*, 591 U.S. 464, 478 (2020) ("coercion"); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 463 (2017) ("coercion"); *Lyng*, 485 U.S. at 450 ("coercion"); *Thomas* v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707, 717 (1981) ("coercive impact"); *Harris* v. *McRae*, 448 U.S. 297, 321 (1980) ("coercive effect"); *Tilton* v. *Richardson*, 403 U.S. 672, 689 (1971) ("coercion"); *Board of Education* v. *Allen*, 392 U.S. 236, 249 (1968) ("coercive effect"); *Sherbert*, 374 U.S. at 404 n.5 ("coercive effect"); *Zorach* v. *Clauson*, 343 U.S. 306, 311 (1952) ("coercion"). That includes *Yoder*. As this Court has explained, "there is nothing whatsoever in the *Yoder* opinion to support the proposition that the 'impact' on the Amish religion would have been constitutionally problematic if the statute at issue had not been coercive in nature," *Lyng*, 485 U.S. at 457; *see infra* pp.38-40.

This coercion requirement is rooted in the First Amendment's protection against "*prohibiting* the free exercise" of religion. U.S. Const. amend. I (emphasis

added). "The crucial word in the constitutional text is 'prohibit.'" *Lyng*, 485 U.S. at 451. Unlike the word "infringing," which appeared in rejected drafts of the Free Exercise Clause, 1 Annals of Cong. 451, 759 (J. Gales ed., 1834), and unlike the word "abridge," which the framers employed to define a burden on the non-religious freedoms guaranteed by the First Amendment, U.S. Const. amend. I, the word "prohibiting" connotes a "tendency to coerce individuals into acting contrary to their religious beliefs," *Lyng*, 485 U.S. at 450.

In fact, anti-coercion is central to both religion clauses. Although an "Establishment Clause violation," unlike a free-exercise violation, "need not be" "predicated on coercion," *Schempp*, 374 U.S. at 223, "coercion … was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted" the Establishment Clause, *Kennedy* v. *Bremerton School District*, 597 U.S. 507, 537 (2022). The Court has accordingly applied a "coercion" test in Establishment Clause cases. *E.g.*, *id.*; *Town of Greece* v. *Galloway*, 572 U.S. 565, 589-590 (2014). Two members of this Court, moreover, have opined that the Establishment Clause "as understood at the founding" was *exclusively* intended to protect against "coercion." *Espinoza*, 591 U.S. at 490 (Thomas, J., concurring).

Petitioners dispute that "this Court's cases require" free-exercise plaintiffs to show "coercion to change or act contrary to one's religious beliefs," contending that the Court "rejected" that standard "in cases from *Sherbert* to *Carson*." Pet.Br.43-44. That is wrong. What this Court explained in those cases is that the Free Exercise Clause "protects against … not just outright prohibitions," i.e., *direct* coercion, but also "indirect coercion," *Carson*, 596 U.S. at 778, i.e., government action that

"deter[s] or discourage[s]" religious beliefs or practice, *Sherbert*, 374 U.S. at 405.

Contrary to petitioners' contention, then, the touchstone of a free-exercise burden is "coercion"—whether direct or indirect—"to change or act contrary to one's religious beliefs," Pet.Br.43. Petitioners resist this requirement presumably because, as explained below, they cannot satisfy it.

B. Petitioners Have Not Established Cognizable Coercion

Petitioners have not established a free-exercise burden because, under this Court's precedents, public-school students and their parents are not cognizably coerced by students' exposure in the classroom to religiously objectionable ideas. Coercion requires compulsion or pressure to act or believe contrary to one's religion, which the limited record does not establish.

Contrary to the United States' suggestion, this analysis does not "overlook[] that the relevant religious practices are *parents'* sincere beliefs that sending their children to" a public school where the storybooks are used "violates their religious obligations." U.S.Br.3. Parents are not cognizably burdened by virtue of their belief, however sincere, that their children's exposure to ideas in public school conflicts with their obligation to raise their children in accordance with their faith.

1. Petitioners' asserted burden is non-cognizable

Petitioners' assertion that MCPS's no-opt-out policy "coerce[s]" and thus "'burdens'" their religious exercise under their "common-sense understanding" of those terms, Pet.Br.43, 46, does not establish constitutionally cognizable coercion and thus a free-exercise burden. *See*

U.S.Br.24 (acknowledging that not all "burdens on religion" are "constitutionally cognizable"). This Court has made the legal and practical judgment that neither students in public school nor their parents are cognizably coerced by virtue of students' exposure in the classroom to ideas that clash with their religion.

a. This Court has consistently recognized that students' exposure to religiously objectionable ideas in public school, including elementary school, is not a basis for students or their parents to claim constitutionally cognizable coercion.

Start with *Barnette*, which petitioners suggest "control[s] the result here," Pet.Br.28. The Court there held that Jehovah's Witnesses whose children in public elementary school were required to pledge allegiance to the flag suffered "coerc[ion]" and thus "an unconstitutional denial of religious freedom" only because the school's pledge-of-allegiance policy "require[d] affirmation of a belief." 319 U.S. at 630, 633; *see also id.* at 631 (resting holding on the "compulsion of students to declare a belief"). The Court took pains to clarify that the parents and their children would *not* have been cognizably "coerced" if the students were "merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means." *Id.* at 631, 633; *see also id.* at 634 (explaining that there would not have been "compulsion" if students were allowed to "remain[] passive during a flag salute ritual"). That is, the Court distinguished *exposure* to ideas from a "require[ment] … to *communicate … acceptance* of [those] ideas," and made clear that elementary-school students and their parents may be "coerced" for free-exercise purposes only by the latter. *Id.* at 633 (emphases added); *see Parker* v. *Hurley*, 514 F.3d 87, 105 (1st Cir. 2008) (recognizing that *Barnette* "carefully distinguished" these concepts).

Thus, the principle from *Barnette* that "control[s] the result," Pet.Br.28—as distilled in another case brought by a parent challenging a public elementary school's flag-salute policy as "indoctrination of his child that violates the First Amendment," *Elk Grove Unified School District* v. *Newdow*, 542 U.S. 1, 5 (2004)—is that "the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree," *id.* at 44 (O'Connor, J., concurring), *quoted in Town of Greece*, 572 U.S. at 589.

The Court has repeatedly invoked this principle in the public-school context, most recently reiterating in *Kennedy* that "[o]ffense … does not equate to coercion" for Establishment Clause purposes, 597 U.S. at 539-540. In *Espinoza*, moreover, two members of this Court rebuffed the notion that "mere exposure" may render "an offended observer sufficiently injured to bring suit" under the Establishment Clause, because "mere exposure" does not mean a plaintiff has been "coerced in any way." 591 U.S. at 495-496 (Thomas, J., concurring). That logic applies with even greater force to free-exercise claims, which share "essential characteristic[s]" with establishment claims, *Cantwell* v. *Connecticut*, 310 U.S. 296, 310 (1940), but which, unlike establishment claims, *require* a showing of coercion.

This Court's teaching that neither parents nor students are coerced by virtue of exposure to ideas in public school exemplifies this Court's instruction that "courts must apply the First Amendment 'in light of the special characteristics of the school environment,'" *Mahanoy Area School District* v. *B.L.*, 594 U.S. 180, 187 (2021); *accord Morse* v. *Frederick*, 551 U.S. 393, 410-411 (2007) (Thomas, J., concurring) ("[T]he history of public education suggests that the First Amendment … does not protect student speech in public schools."). It also accords

with this Court's endorsement in the public-school context of this country's "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,'" *Kennedy*, 597 U.S. at 541. And it vindicates this Court's recognition that "access to ideas … prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Board of Education, Island Trees Union Free School District No. 26* v. *Pico*, 457 U.S. 853, 868 (1982).

In sum, this Court has consistently taught that no constitutional burden lies where public-school students are "merely made acquainted with" ideas that clash with their religion and there is no "compulsion of students to declare a belief" in those ideas. *Barnette*, 319 U.S. at 631.[7]

b. Petitioners' question presented refers to "participat[ion] in instruction"—a capacious and undefined term. *Cf. Epperson* v. *Arkansas*, 393 U.S. 97, 103 (1968) (recognizing "the infinite varieties of communication embraced within the term 'teaching'"). Whatever that term

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[7] The United States suggests there is "no sound basis to distinguish" between parents seeking to avoid their children's exposure to ideas that clash with their religion and Muslim parents seeking to avoid their children's exposure to "images of the Prophet Mohammad." U.S.Br.29-30. But the distinction is plain: In the latter case, parents seek to avoid not their children's exposure to ideas, but rather their children's engaging in conduct (viewing a physical depiction of the Prophet) expressly forbidden by their faith. Moreover, any display of an image of the Prophet in a public-school curriculum would likely be discriminatory in a way no one claims the storybooks to be, as there is no apparent reason other than religious animus for a school to portray a religion's central figure in a manner forbidden by that religion.

may ordinarily encompass, this case, on the "very limited record developed" at "this early stage," Pet.App.9a, 31a, concerns only exposure to ideas, with no "compulsion of students to declare a belief" in them, *Barnette*, 319 U.S. at 631.

To start, the storybooks themselves do not instruct about gender or sexuality. They are not textbooks. They merely introduce students to characters who are LGBTQ or have LGBTQ family members, and those characters' experiences and points of view. *See supra* pp.7-8.

MCPS's written guidance, moreover, expressly contemplates only "exposure to diversified gender and sexuality identity representation, not explicit instruction." Pet.App.636a. It disclaims instruction on gender and sexuality by clarifying that "there are no planned explicit lessons related to gender and sexuality," Pet.App.639a; that use of the storybooks "is not about making students think a certain way," Pet.App.638a; and that "[n]o child … is asked to change how they feel about" gender or sexuality, Pet.App.640a. MCPS thus expressly disclaims anything resembling "compulsion of students to declare a belief" about gender or sexuality. *Barnette*, 319 U.S. at 631.

To the extent the record suggests that *any* teaching about "concepts or terms that relate to gender and sexual identity" might take place, it would be limited to "defin[ing] words that are new and unfamiliar to students." Pet.App.640a; *see also* Pet.App.630a (suggested teacher response if a student asks, "What's transgender?"). In other words, it would be limited to "inform[ing]" students "what [a term or concept] is or … what it means," *Barnette*, 319 U.S. at 631—precisely

what this Court has distinguished from a basis for cognizable coercion.

Beyond that, the only potential instruction evinced by the record pertains to literacy, *see* Pet.App.641a (the storybooks "are directly connected to language arts standards"), or mutual respect, *see* Pet.App.636a ("children are taught to respect one another"). Petitioners misstate the record to suggest otherwise. For instance, what a teacher-guidance document suggests teachers might characterize as "hurtful" is not "disagreement with the[] ideas" reflected in the storybooks, Pet.Br.12, but rather "us[ing] negative words to talk about people's identities," Pet.App.630a. Any lesson about mutual respect, moreover, extends to respect for religious beliefs. For instance, one challenged storybook features a character who says: "My hijab is my choice—you can choose your own way," Pet.App.624a. This Court has endorsed such lessons of mutual respect, holding that "a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught." *Ambach* v. *Norwick*, 441 U.S. 68, 80 (1979).

In light of this record, petitioners necessarily have litigated this case as one about exposure to religiously objectionable ideas. In their words, they oppose "exposing" their children "to viewpoints … that contradict" or "undermine" the teachings of their religion. Pet.App.532a, 544a. This exposure is precisely what this Court has deemed constitutionally non-coercive. *See supra* Part I.B.1.a.[8]

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[8] Petitioners' "belie[f] that young children should enjoy a time of innocence, when it is not necessary for them to have detailed understanding of issues surrounding human sexuality," Pet.App.538a-

c. Ruling for petitioners therefore would require overturning the principle that exposure to objectionable ideas does not by itself constitutionally burden public-school students' or their parents' free-exercise rights. That is confirmed by petitioners' request for this Court to overrule the many court-of-appeals decisions that rest on that principle. *See* Pet.20-23. Jettisoning the principle would seriously impair the administration of public education. Given that courts accept a plaintiff's factual description of how a policy affects his or her religious exercise, *see Thomas*, 450 U.S. at 715, abandoning the principle would mean parents could invoke religious beliefs to subject any public-school curricular decision to searching judicial scrutiny.

For good reason, this Court has never taken the "significant step" of "[i]mposing on school boards the delicate task of satisfying the 'compelling interest' test to … justify each instance of not dealing with students' individual, religiously compelled, objections." *Mozert* v. *Hawkins County Board of Education*, 827 F.2d 1058, 1079-1080 (6th Cir. 1987) (Boggs, J., concurring). Consider the Sixth Circuit's decision in *Mozert*—one of the several court-of-appeals precedents petitioners would have this Court overrule—denying parents an injunction that, like the one requested here, would have required elementary schools "to excuse [children] from participating in reading classes where [certain] textbooks [we]re used," *id.* at 1059. The parents there opposed (on free-exercise grounds) their children's

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539a, is not implicated here because, as explained, *see supra* pp.7-10, the storybooks are not used to provide a detailed understanding of issues surrounding human sexuality. Indeed, the storybooks provide no more detail on human sexuality than other books in the language-arts curriculum that feature a "mom and dad" or "a Prince [who] kisses a Princess," Pet.App.636a.

exposure to, among other ideas, "evolution," "secular humanism," "pacifism," "magic," and "women who have been recognized for achievements outside their homes." *Id.* at 1062. Public schools simply cannot accommodate opt-outs and create alternative lesson plans any time these or countless other religiously objectionable concepts arise in the classroom, as petitioners' position demands.

This Court has long recognized that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint." *Epperson*, 393 U.S. at 104. That is especially so here; there are hundreds of "separate and substantial religious bodies" in this country, and requiring schools to permit opt-outs from "everything that is objectionable to any of" them would "leave public education in shreds." *McCollum*, 333 U.S. at 235 (Jackson, J., concurring). As amici school administrators supporting neither party explain, a constitutionally mandated notice-and-opt-out right has no discernible limit; it would encompass "all texts and discussion topics for every subject area," from science to world history, as well as "the contents of every book, word problem, game, slideshow, lecture, textbook, and reading packet taught or available in the classroom"—forcing educators "to divert their already limited resources and time to ensure full compliance." AASA.Br.15. Petitioners' amici confirm the unbounded nature of this purported right, asserting that "*all* education at least 'indirectly coerces' students to adopt the positions being taught," Am.Ctr.L.J.Br.8. In fact, amici suggest that the *only* kind of exposure that comports with the Free Exercise Clause is "simply having a teacher who is gay or transgender" or who "wear[s] religious attire," NC.Values.Inst.Br.23 & n.5—although

it is unclear why that would not be a cognizable burden under petitioners' theory.[9]

d. Adhering to the principle that exposure to objectionable ideas in public school does not cognizably burden religious exercise does not require questioning the sincerity of petitioners' religious beliefs. To be clear, MCPS does not question the sincerity of petitioners' averment that its no-opt-out policy "'burdens'" their religious exercise under their "common-sense understanding of th[at] term," Pet.Br.46. But "constitutional adjudication … is not simply a matter of common sense use of words." *Mozert*, 827 F.2d at 1079 (Boggs, J., concurring). "[F]or the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference." *Bowen* v. *Roy*, 476 U.S. 693, 700-701 n.6 (1986).

The constitutional question whether petitioners' religious exercise is *cognizably* burdened necessarily entails a judgment concerning the legal and factual context of their claim. *See Kaemmerling* v. *Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) ("[a]ccepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened"). A contrary approach would, for example, allow easy circumvention of this Court's rejection of taxpayer standing under the Free Exercise Clause, *see Tilton*, 403 U.S. at 689; *Allen*, 392 U.S. at 249, as

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[9] The United States suggests that *maintaining* the distinction between exposure to ideas in public school and constitutionally cognizable coercion is "not administrable." U.S.Br.28. But as illustrated by the myriad decisions applying that distinction, *see supra* Part I.B.1.a; Pet.20-23, courts have managed to administer it just fine.

taxpayers could simply assert that the required payment of taxes burdens their religious exercise because some portion of that payment funds religious activity with which they disagree.

For all the legal and practical reasons above, this Court has appropriately deemed petitioners' asserted burden non-cognizable.

2. The preliminary-injunction record does not establish coercion as a factual matter

Even if petitioners could theoretically establish a burden based on their children's exposure to the storybooks, to do so they would have to make some showing of coercion—i.e., compulsion or pressure to modify their religious convictions or practice. This Court's precedent makes clear that coercion is an affirmative showing that must be supported by record evidence: "[I]t is necessary in a free exercise case for one to *show* the coercive effect," *Harris*, 448 U.S. at 321 (emphasis added); *see also Allen*, 392 U.S. at 248-249; *Schempp*, 374 U.S. at 223, and this Court has declined to find a free-exercise burden where "[t]here is no evidence in the record" of "coercion," *Zorach*, 343 U.S. at 311.

Accordingly, the question is whether this preliminary-injunction record establishes that "coercion is a real and substantial likelihood." *Town of Greece*, 572 U.S. at 590 (plurality op.). That "showing has not been made here." *Id.* As the courts below correctly concluded, "the extremely limited record" at "this early stage" of litigation does not "show that the absence of an opt-out opportunity coerces [petitioners] or their children"—either "direct[ly]" (through "compulsion") or "indirect[ly]" (through "pressure")—to abandon their religious beliefs or practice. Pet.App.9a, 31a, 34a, 40a.

a. Begin with the students. There is no evidence in the record that students are compelled or pressured to act or believe contrary to their or their parents' religious views. To the contrary, as the Fourth Circuit correctly noted, petitioners' "declarations do not suggest, nor does the existing record show, that [petitioners'] children have in fact been asked to affirm views contrary to their own views on gender or sexuality," or "to disavow views on these matters that their religion espouses." Pet.App.34a. Indeed, as the Fourth Circuit observed, there is "no basis in the current record for concluding that schools have acted inconsistent with" MCPS's commitment that "no student … is asked to change how they feel about these issues." Pet.App.34a; *see* Pet.App.640a (MCPS policy that "[n]o child … is asked to change how they feel about" gender or sexuality). As in *Zorach*, "[t]he present record indeed tells us that the school authorities are neutral in this regard." 343 U.S. at 311.

The guidance provided to teachers is not evidence otherwise. As explained, that guidance simply contemplates that teachers may "define words that are new and unfamiliar to students," Pet.App.640a; *see* Pet.App.630 (suggested teacher response if a student asks, "What's transgender?"), and recommends that teachers encourage students "to respect one another," Pet.App.636a. Again, this Court has approved of both teaching methods. *See Barnette*, 319 U.S. at 631 (students "may be informed as to what [a term or concept] is or even what it means"); *Ambach*, 441 U.S. at 80 (teachers may "promote civic virtues and understanding in their classes, regardless of the subject taught").

In any event, as the Fourth Circuit further noted, "[t]he record … does not provide examples of any *required* discussion points or actual conversations that

have occurred," "[n]or does it reflect whether any of the [teacher guidance materials] have ever been used." Pet.App.42a-43a. Thus, any "suggestions in the teachers' manuals" do not "support [the] view that objectionable ideas [a]re being inculcated," as there is "no proof" of whether, let alone how, the teacher materials have been or will be used. *Mozert*, 827 F.2d at 1064.

More broadly, the decision below correctly noted that nothing in the record "provides *any* information about how" or "how often the Storybooks are actually being used." Pet.App.33a (emphasis added). Indeed, contrary to petitioners' suggestion, nothing in the record suggests that teachers are not simply placing the storybooks "on shelves" in the classroom and "leav[ing] reading and discussing [them] up to the students," Pet.Br.51-52; *see* U.S.Br.6 (acknowledging that teachers may simply "put [the storybooks] on a shelf for students to find on their own"). The record merely reflects that "[t]eachers cannot … elect not to use the [storybooks] *at all*." Pet.App.605a (emphasis added). In any event, certainly nothing in the record suggests that children are not allowed to "remain[] passive during" any use or discussion of a storybook, which, per *Barnette*, refutes any claim of "compulsion." 319 U.S. at 634.

As the Fourth Circuit recognized, "[p]roof that discussions are pressuring students to recast their own religious views—as opposed to merely being exposed to the differing viewpoints of others—could serve as evidence that the Storybooks are being used in a coercive manner." Pet.App.43a. So might written or oral assignments requiring students to "communicate … acceptance of [particular] ideas," *Barnette*, 319 U.S. at 633; curricula that "subject [students] to a constant stream of like materials" to the exclusion of other materials, *Parker*, 514 F.3d at 106; instructing students "to keep

[classroom] discussions about gender topics secret from their parents," *Tatel* v. *Mt. Lebanon School District*, 675 F.Supp.3d 551, 566 (W.D. Pa. 2023); or "target[ing]" individual students for "approaches about gender dysphoria," *id.* In other words, it is assuredly not "the Board's view" that there is "no limit" on what may occur in the classroom. Pet.Br.3. Here, however, "no evidence in the record connects the requisite dots … to conclude that [petitioners] have already shown that a cognizable burden exists." Pet.App.41a.

b. Nor does any record evidence establish direct or indirect coercion of petitioners themselves, i.e., that petitioners are "prohibit[ed]," *Carson*, 596 U.S. at 778, or "deterred or discouraged," *Sherbert*, 374 U.S. at 405, from raising their children in accordance with their faith. Petitioners repeatedly confirm that "[d]irecting their children according to their … religious views" is "exactly what" they claim the no-opt-out policy impedes them from doing. Pet.Br.51. For instance, they define their relevant "religious exercise" as "guiding" their "children's religious formation" and "development," Pet.Br.2, and they define the "core … duty" allegedly "disrupt[ed]" as their duty to "pass [their religious] beliefs on to their young children," Pet.Br.53. As the Fourth Circuit correctly observed, however, petitioners "do not show anything at this point about the Board's decision that affects what they teach their own children." Pet.App.34a. Indeed, it is undisputed that the no-opt-out policy pertains only to what happens *at school*. And "transmission of religious beliefs and worship is a responsibility … committed to the *private* sphere," such that a government policy is not "coercive" of that activity unless it "invade[s] that private sphere." *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290, 310 (2000) (emphasis added).

To be sure, if the government withheld the benefit of a public education because of petitioners' efforts to raise their children in accordance with their faith, petitioners would face coercion because they would be deterred from engaging in those efforts. *See Carson*, 596 U.S. at 778 ("indirect coercion" exists where the government "excludes religious observers from otherwise available public benefits"); *infra* pp.40-41 (discussing indirect-burden cases). But the no-opt-out policy does not disqualify petitioners from sending their children to public school, let alone based on petitioners' religious exercise.

Petitioners (and amici) complain at bottom that the no-opt-out policy makes it *harder* for petitioners to "pass [their] beliefs on to their young children" and thereby "guid[e]" their children's religious "development." Pet.Br.2, 53; *see also*, *e.g.*, Liberty.Br.20 (claiming the policy "makes it statistically unlikely these parents will ever be able to re-direct their children towards the LORD"); Laycock.Br.15 (discussing "reason[s] that people reject the[ir parents'] faith"). But even if that concern were supported by record evidence (it is not), it would be immaterial, because whether a government policy "may make it more difficult" to "pursue spiritual fulfillment" is irrelevant to the "factual [coercion] inquiry," *Lyng*, 485 U.S. at 449-450.

In that inquiry, this Court has held, the "line between unconstitutional prohibitions on the free exercise of religion and … legitimate conduct by [the] government … cannot depend on measuring the effects of a governmental action on a religious objector's [or his family's] spiritual development." *Lyng*, 485 U.S. at 451. The Court has accordingly explained that parents are not compelled or pressured to act or believe contrary to their faith (and thus burdened) solely by virtue of being

subject to a government policy that they sincerely believe conflicts with their religious duty to "further [the] spiritual development … of [their] family." *Bowen*, 476 U.S. at 699.

In *Bowen*, the Court found no free-exercise violation despite a father's religious belief that the government's assignment of a Social Security number to his daughter would "'rob the spirit' of his daughter and prevent her from attaining greater spiritual power." 476 U.S. at 696. Invoking the same "duty" and "right of parents to direct the religious upbringing of their children" that petitioners invoke here, the father alleged that the challenged state action would "requir[e] [him] to violate [his] beliefs"—and his "high duty"—by "prevent[ing] him from preparing [his daughter] for greater spiritual power." Brief for Appellees, *Bowen* v. *Roy*, 476 U.S. 693 (1986) (No. 84-780), 1985 U.S. S. Ct. Briefs LEXIS 125, at *9, *11, *77. The Court rejected the free-exercise claim because the government action "does not itself in any degree impair [the father's] 'freedom to believe, express, and exercise' his religion." 476 U.S. at 700-701. The same is true here. As in *Bowen*, the challenged policy may conflict with a sincerely perceived religious "duty" to "direct" their children, Pet.Br.53, but it does not prohibit or deter any activity in the "private sphere" to which that duty is "committed," *Santa Fe Independent School District*, 530 U.S. at 310.[10]

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[10] The United States emphasizes that five justices in *Bowen* believed it was "possible" that parents religiously opposed to the assignment of Social Security numbers might experience a free-exercise burden by "being forced to cooperate actively with the Government by *themselves* providing their [children's] social security number on benefit applications," *Bowen*, 476 U.S. at 714 (Blackmun, J., concurring) (emphasis added). *See* U.S.Br.22 n.5, 29. But that

The limit this Court recognized in *Bowen* is not only consistent with the requirement for a free-exercise plaintiff to show coercion; it also preserves doctrinal administrability. Asserting that your child's interaction with the government would "conflict with [y]our religious duty to raise [y]our children in accordance with [y]our faith," Pet.App.532a, or that it would amount to a "dereliction of [such] religious duties," U.S.Br.15, cannot be enough to transform that interaction into a burden on a parent's free exercise. A contrary rule would enable, through recitations of "duty," a parental veto over any interaction between a child and the government that a parent deems inconsistent with his faith.

On this "extremely limited record," Pet.App.34a, petitioners have not as a factual matter established that they or their children have been or are likely to be compelled or pressured to act or believe contrary to their religion. They thus are not likely to succeed on their free-exercise claim.

C. Neither Precedent Nor History And Tradition Supports Petitioners

Petitioners' claim that their rights are burdened by MCPS's no-opt-out policy finds no support in *Yoder*, any other free-exercise precedent, or this country's history and tradition. As the Sixth Circuit recently opined in another context—rejecting parents' claim of entitlement to obtain gender-affirming medical care for their children—petitioners here "overstate the parental right [to

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just confirms MCPS's point. Petitioners are not forced to cooperate actively with MCPS by *themselves* using the storybooks with their children. It is the public school—i.e., "the *government*," U.S.Br.22 n.5—that introduces students to the storybooks. Petitioners are not forced to do anything, and as noted, students may "remain[] passive," *Barnette*, 319 U.S. at 634, when the storybooks are used.

control the upbringing of their children] by climbing up the ladder of generality to a perch … that the case law and our traditions simply do not support." *L.W.* v. *Skrmetti*, 83 F.4th 460, 475 (6th Cir. 2023), *cert. granted sub nom. United States* v. *Skrmetti*, 144 S.Ct. 2679 (2024).

1. Precedent

Petitioners principally rely on *Yoder*. But unlike petitioners—who as explained have not shown direct or indirect coercion because they are neither required nor pressured to modify their religious practice—the *Yoder* parents made a "convincing showing" of such coercion, *Yoder*, 406 U.S. at 235-236. And unlike the *Yoder* parents—who complained of a compulsory attendance law requiring them to enroll their children in public high school—petitioners seek to pick and choose among curricular elements at the public schools in which they have chosen to enroll their children. Given these clear distinctions, even the dissent below showed no interest in petitioners' *Yoder* argument. *See* Pet.App.71a n.5.

As this Court has explained in rejecting the same "misread[ing]" of *Yoder* that petitioners (and the United States) urge, "[t]he statute at issue in" *Yoder* was "coercive in nature" because, by "directly compel[ling] the Amish to send their children to public high schools," it "prohibited the Amish parents, on pain of criminal prosecution, from providing their children with the kind of education required by the Amish religion." *Lyng*, 485 U.S. at 456-457. Critical to *Yoder*'s holding was that compulsory "high school attendance with teachers who are not of the Amish faith" law would "*not only*" expose the plaintiffs' children to "'worldly' influence in conflict with their beliefs," "*but also* … take[] them away from their community, physically," during a period when the

Amish religion requires that "children must" engage in a "program of informal vocational education" imparting "specific skills needed to perform the adult role of an Amish farmer or housewife." *Yoder*, 406 U.S. at 211, 222 (emphases added). It was this obligation of parents to integrate their adolescent children into "Old Order Amish daily life" through "home projects in agriculture and homemaking" that "c[a]me into conflict" with the challenged compulsory-high-school-attendance law. *Id.* at 209 n.3, 216.

Petitioners and the United States altogether ignore this fundamental aspect of *Yoder*, i.e., that "the record" in *Yoder* "strongly show[ed]" that the challenged law prohibited the plaintiffs from imparting their religion to their children at "home," as "mandated by the Amish religion," *Yoder*, 406 U.S. at 209 n.3, 217. Here, by contrast, petitioners do not dispute that they "remain free to impart their religion at home," Pet.Br.45 (quotation marks omitted). The Court thus is "not confronted in" this case "with a situation comparable to that of the Amish as revealed in [the *Yoder*] record." *Yoder*, 406 U.S. at 229.[11]

Moreover, unlike the *Yoder* plaintiffs, petitioners seek not to withdraw their children from public school but instead to choose the *elements* of the public-school curriculum their children will experience. *Yoder* established no such right to dictate how public schools educate children; it addressed only how to resolve parents' claims that the mere act of "sending their children to high school" would prohibit their free exercise of

[11] This is unsurprising, as the Court in *Yoder* predicted that "few other religious groups or sects could make" the "convincing showing" the *Yoder* plaintiffs made through voluminous "trial testimony." *Yoder*, 406 U.S. at 209, 219, 235-236.

religion, 406 U.S. at 209. That is why *Yoder* drew on *Pierce*, which likewise considered a compulsory public-school-attendance statute and recognized "the right of parents to provide an equivalent education in a privately operated system," *id.* at 213 (discussing *Pierce*)—a right not implicated here. Petitioners elide this distinction by asserting that they seek "narrower" relief than the parents in *Yoder*. Pet.Br.22. But *Yoder* in fact disapproves of the relief petitioners seek, emphasizing that its holding "in no way alter[ed] [the Court's] recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." 406 U.S. at 234-235; *see also Meyer* v. *Nebraska*, 262 U.S. 390, 402 (1923) (recognizing "the state's power to prescribe a curriculum for institutions which it supports").

Petitioners find no more support in this Court's "indirect coercion" cases, where the government was found to "deter[] or discourage[]" free exercise, *Espinoza*, 591 U.S. at 478. The common thread through those cases, as recently "distilled" by this Court, is that the government cannot "disqualify[] otherwise eligible recipients from a public benefit 'solely because of their religious character.'" *Id.* at 475. *Everson* v. *Board of Education of Ewing* held that States "cannot exclude … members of any [] faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." 330 U.S. 1, 16 (1947). *Sherbert* held that "disqualification for [unemployment] benefits" based on Sabbath observance was impermissible. 374 U.S. at 403. *Thomas* similarly condemned a State's "denial of unemployment compensation benefits" due to an individual's religious beliefs. 450 U.S. at 709. In *Trinity Lutheran*, the Court held that a State could not "condition" the availability of benefits

on an institution's willingness to abandon its religious practice. 582 U.S. at 462. And in *Espinoza*, the Court held that a State could not "bar[] religious schools from public benefits solely because of the religious character of the schools." 591 U.S. at 476.

This case is different. MCPS is not barring anyone from public school on the basis of their religious beliefs or practice. For example, MCPS has not adopted a rule that parents cannot send their children to MCPS schools if they provide religious education to their children that conflicts with lessons that MCPS provides—a rule that *would* constitute indirect coercion by deterring petitioners' "efforts to pass [their religious] beliefs on to their young children," Pet.Br.53. Instead, MCPS has adopted a policy that petitioners believe "undermine[s]" such efforts. Pet.App.532a. But as explained, potentially "mak[ing] it more difficult" for parents to "pursue spiritual fulfillment" for their family carries "no tendency to coerce individuals into acting contrary to their religious beliefs." *Lyng*, 485 U.S. at 450. In fact, the government may "interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs" without burdening free exercise. *Id.* at 449. That is because this Court has never "interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Bowen*, 476 U.S. at 699. That is precisely what petitioners say the Constitution requires here.

Finally, petitioners are wrong in asserting that "*Barnette* rejected th[e] argument" that petitioners are not prohibited or deterred from imparting their religion to their children (and thus not coerced) because they "remain free to impart their religion at home," Pet.Br.45. As discussed, *Barnette* actually *approved* of instruction

through which elementary-school students are "merely made acquainted with" material to which their parents object. *Barnette*, 319 U.S. at 631. As this Court explained in a post-*Barnette* challenge by a parent to his child's "exposure to [religiously objectionable] ideas" in public elementary school, "[n]othing … the School Board has done … impairs [the parent's] right to instruct his [child] in his religious views." *Elk Grove Unified School District*, 542 U.S. at 16-17.

2. History and tradition

Nor is petitioners' burden theory "buttressed by a strong history and tradition," Pet.Br.31. To start, petitioners' reliance on the historical treatment of "instruction on gender and sexuality," Pet.Br.31, is beside the point because the storybooks are not used for such instruction. *See supra* p.11. Again, MCPS expressly disclaims use of the storybooks for that purpose, *see supra* pp.9-10, and the storybooks themselves are no more focused on gender and sexuality than other books in the language-arts curriculum that feature a "mom and dad" or "a Prince [who] kisses a Princess," Pet.App.636a.

The relevant history and tradition is that of courts approving public schools' denial of parental opt-out requests. That history and tradition includes not only the decisions petitioners expressly ask this Court to overrule, *see* Pet.20-23; it also stretches back to the dawn of American public education, the period that members of this Court have deemed most relevant for assessing First Amendment claims in the public-school context, *e.g.*, *Espinoza*, 591 U.S. at 503-504 (Alito, J., concurring); *Morse*, 551 U.S. at 411 (Thomas, J., concurring). In 1854, for example, Maine's highest court rejected a parent's lawsuit seeking to excuse his daughter from instruction using the Protestant Bible "as a reading book." *Donahoe*

v. *Richards*, 38 Me. 379, 399 (1854). Courts nationwide followed suit, holding that parents could not demand opt-outs from lessons in algebra, *State* v. *Mizner*, 50 Iowa 145 (1878), public speaking, *Kidder* v. *Chellis*, 59 N.H. 473, 475-476 (1879), or music, *State ex rel. Andrews* v. *Webber*, 8 N.E. 708, 712-713 (Ind. 1886); *Christian* v. *Jones*, 100 So. 99, 99 (Ala. 1924). These courts recognized that "the power of each parent to decide … what studies" their children "should pursue" in public school "would be a power of disorganizing the school, and practically rendering it substantially useless." *Kidder*, 59 N.H. at 476.[12]

II. LACK OF NEUTRALITY OR GENERAL APPLICABILITY IS NOT A SUBSTITUTE FOR A BURDEN

Petitioners cannot prevail on their free-exercise claim if they have not established coercion. Petitioners' contrary argument—that a challenged policy's "lack[] [of] neutrality and general applicability" "separately triggers strict scrutiny," Pet.Br.2—is not before the Court. They sought review of only the narrow question of whether the no-opt-out policy "burden[s] parents' religious exercise." Pet.i. Whether the policy is neutral and generally applicable is a separate inquiry that courts undertake only after determining that the policy "'burden[s] ... sincere religious practice.'" *See* Pet.29. Unsurprisingly, neither the Fourth Circuit nor the district court performed that analysis. Pet.App.50a; 143a.

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[12] History and tradition does not support opt-outs even from *expressly religious* instruction that conflicts with one's faith. At the time of "the founding of the American common [i.e., public] school," the only recourse for "religious groups and families who objected to the common schools' religious programming" was to "create[] separate schools." *Espinoza*, 591 U.S. at 503-505 (Alito, J., concurring).

Petitioners' argument also is wrong. It cannot be squared with "[t]he crucial word in the constitutional text"—"prohibiting"—which roots a free-exercise burden in some "tendency to coerce individuals into acting contrary to their religious beliefs," *Lyng*, 485 U.S. at 450; *see supra* Part I.A (collecting cases). Petitioners' reimagined doctrine would short-circuit this textual requirement. And petitioners' framework profoundly inverts settled doctrine by mistaking a shield for a sword. Government action that does not burden religious exercise cannot nevertheless violate the Free Exercise Clause on the ground that it is not neutral or generally applicable; rather, neutrality and general applicability may *defeat* a free-exercise claim *despite* some burden on religious practice. *See Fulton* v. *City of Philadelphia*, 593 U.S. 522, 532 (2021).

Petitioners' cases confirm the point. Each involved a clear burden on religious practice independent of any lack of neutrality or general applicability: *Fulton* deemed it "plain"—"[a]s an initial matter," before turning to neutrality and general applicability—"that the City's actions ha[d] burdened [the plaintiff's] religious exercise." 593 U.S. at 532. The burdens in *Tandon* v. *Newsom*, 593 U.S. 61 (2021), and *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission*, 584 U.S. 617 (2018), were equally obvious, as the plaintiffs there were prohibited from holding religious gatherings, *Tandon*, 593 U.S. at 63, or forced to take affirmative steps they viewed as endorsing same-sex relationships in violation of their religious beliefs, *Masterpiece*, 584 U.S. at 629. And in *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), the Court recognized "the burden of the ordinance[s]" challenged there as a prerequisite to considering whether the ordinances were "not neutral or not of general application," *id.* at 536.

III. In Any Event, The No-Opt-Out Policy Is Neutral And Generally Applicable

No court has reached petitioners' arguments that MCPS's policy is not neutral or generally applicable. Pet.App.50a; 143a. This Court "of review, not of first view" should not be the first. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). But the policy is neutral and generally applicable.

First, the no-opt-out policy treats comparable religious and secular conduct exactly the same. As petitioners concede, no opt-outs—religious or secular—are permitted from ELA lessons that use the storybooks. Pet.Br.38. That means a parent's motivation for opting out plays no role in whether the opt-out is granted.[13] The challenged laws in *Tandon* and *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14 (2020), restricted attendance at worship services while allowing customers to visit spas and movie theaters where gatherings posed the same COVID transmission risks. In contrast, the no-opt-out policy does not "single out" any religious conduct "for especially harsh treatment." *Id.* at 17.

Petitioners nonetheless insist that because MCPS permits opt-outs from the Family Life and Human Sexuality Unit of Instruction, the no-opt-out policy treats some comparable secular activity more favorably than religious exercise. *See* Pet.Br.38. But the conduct MCPS forbids (opt-outs from the storybooks) is not religious, nor is the conduct MCPS permits (opt-outs from the health-education curriculum) secular. MCPS grants all requests for opt-outs from the Family Life and Human Sexuality unit, including many religiously

[13] The United States' assertion that the Board "prohibited opt-outs only for religious grounds," U.S.Br.33, is simply wrong.

motivated requests, Pet.Br.6-9; U.S.Br.18-22, and grants no ELA opt-out requests, including the "[m]any" that are "not religious in nature," Pet.App.606a. MCPS thus does not "single out" petitioners' religiously motivated opt-out requests "for especially harsh treatment." *Roman Catholic Diocese*, 592 U.S. at 17.

The record also lacks evidence that opt-outs from Family Life and Human Sexuality are "comparable" to opt-outs from the ELA curriculum under *Tandon*. Comparability is "judged against the asserted government interest that justifies the regulation at issue" and is "concerned with the risks various activities pose, not the reasons why people" undertake them. *Tandon*, 593 U.S. at 62. Here, there is no evidence that the risks of granting opt-outs from everyday ELA lessons—including absenteeism and administrability concerns, Pet.App.606a-608a—are present when a student is excused from the discrete, predictably timed Family Life and Human Sexuality Unit of Instruction. Family Life and Human Sexuality opt-outs therefore do not undermine "the asserted government interest that justifies" the no-opt-out policy. *See Tandon*, 593 U.S. at 62.

Second, the policy permits no discretionary exceptions. Petitioners concede that *no* opt-outs are permitted from the storybooks. Pet.Br.14, 38. There is no "mechanism for individualized exemptions." *Fulton*, 593 U.S. at 533. And the government is not "invite[d] … to decide which reasons for not complying with the policy are worthy of solicitude." *Id.* at 537. All storybook opt-out requests are denied. Pet.App.657a.

The "history of the Board's actions" does not compromise the general applicability of its no-opt-out policy, Pet.Br.38; U.S.Br. 32. The record contains no evidence that MCPS denied any opt-out requests before adopting

a blanket no-opt-out policy, let alone "consider[ed] the particular reasons for a person's" opt-out request in violation of *Fulton*, 593 U.S. at 533. Nor does the record indicate that schools "reserv[ed] … authority" to bypass the no-opt-out policy and grant opt-outs in their "sole discretion" or for "good cause." *Id.* at 535.

The record instead shows that a policymaking body transitioned from allowing opt-outs from classroom instruction to forbidding them. Nowhere does *Fulton* prohibit that change. Nor does *Fulton* suggest that MCPS exercises unconstitutional discretion by allowing parents to excuse their children from certain specified programs ("noncurricular activities" or "free-time events") but not others ("curricular instruction"). Pet.Br.39-40; U.S.Br.33.

Third, the policy does not target religion. The record contains no evidence that the no-opt-out policy is intended to "infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. Petitioners cite no record evidence in support of their supposedly "obvious" point that any burden imposed by the no-opt-out policy was designed to "f[a]ll predominately on religious families." Pet.Br.41. Indeed, the record reflects that "[m]any of the opt out requests" now subject to the no-opt-out policy "were not religious in nature." Pet.App.606a.

Finally, the record does not show that any opt-outs were denied because of "clear and impermissible hostility" toward religious beliefs. *Masterpiece*, 584 U.S. at 634. The record here contains nothing more than statements by a Board member opposing all opt-outs from the storybooks, whether rooted in religious or non-religious motives. *See* Pet.App.103a-107a. In that Board member's view, permitting any opt-outs from the storybooks

"would be an impossible disruption to the school system," requiring teachers to "screen the content they plan to teach every day and send out notices" to satisfy any number of objections. Pet.App.106a-107a. None of those statements suggested that any opt-out request would be judged by "the religious grounds for it." *Masterpiece*, 584 U.S. at 639.

IV. If The Court Finds A Cognizable Burden, It Should Remand For Scrutiny By The Lower Courts

This Court granted certiorari to determine whether MCPS's no-opt-out policy burdens religious exercise, and its inquiry should end there. That was the only question decided by the courts below. *See* Pet.App.50a, 143a. And petitioners "chose to limit their petition" to the question of whether a burden exists. *Opati* v. *Republic of Sudan*, 590 U.S. 418, 430 (2020); *see* Pet.i; U.S.Br.30 ("the question presented in this case addresses only the existence of a burden"). Yet they devote nearly a quarter of their opening brief's argument to urging this Court to hold that the no-opt-out policy fails strict scrutiny. Pet.Br.47-52. This Court should "decline to resolve th[is] or other matters outside the question presented." *Opati*, 590 U.S. at 430.

If the Court finds a burden, it should remand for the lower courts to determine in the first instance whether that burden is justified. As this Court has recognized for more than half a century, "courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." *Yoder*, 406 U.S. at 235. The "sensitive and delicate task" of weighing "religious claims for exemption from generally applicable education

requirements," *id.*, assuredly warrants due consideration by the lower courts.

If this Court does reach strict scrutiny, it should uphold MCPS's policy. The "great circumspection" this Court called for in *Yoder*, 406 U.S. at 235, is incompatible with fatal-in-fact review of public-school curricular decisions. The record shows that MCPS adopted the no-opt-out policy to serve the compelling interest of maintaining a school environment that is "safe and conducive to learning for all students," Pet.App.607a-608a. And indeed, schools have a "compelling interest in having an undisrupted school session conducive to the students' learning." *Grayned* v. *City of Rockford*, 408 U.S. 104, 119 (1972). The record shows that the storybook opt-outs undermined that interest. Pet.App.607a-608a. It also shows that the no-opt-out policy is narrowly tailored; it was adopted only after experience proved that schools "could not accommodate the growing number of opt out requests without causing significant disruptions to the classroom and undermining MCPS's educational mission." Pet.App.607a. The alternatives petitioners pose would each require MCPS to violate its educational mission and thus contravene its interest in an environment "conducive to learning for all students," Pet.App.607a-608a.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

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