No. 24-297

In the Supreme Court of the United States

TAMER MAHMOUD., et al.,

v.

THOMAS W. TAYLOR, et al.

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

BRIEF OF JUSTIN DRIVER AND EUGENE VOLOKH AS *AMICI CURIAE* SUPPORTING RESPONDENTS

H. RODGIN COHEN
SULLIVAN & CROMWELL LLP
125 Broad St.
New York, N.Y. 10004

AMANDA FLUG DAVIDOFF
Counsel of Record
DANIEL J. RICHARDSON
HARRISON J. TANZOLA
SULLIVAN & CROMWELL LLP
1700 New York Ave., NW
Suite 700
Washington, D.C. 20006
(202) 956-7570
davidoffa@sullcrom.com

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INTEREST OF *AMICI CURIAE*[1]

Amici are constitutional law scholars with expertise in the First Amendment and public education. They submit this brief to explain the First Amendment framework applicable to public schools, and to draw the Court's attention to the practical consequences of requiring public schools to let students opt out of any portion of the curriculum that is arguably in tension with their religious faith.

Justin Driver is the Robert R. Slaughter Professor of Law at Yale Law School. An elected fellow of the American Academy of Arts & Sciences and a member of the American Law Institute, he teaches and writes on constitutional law. Professor Driver is the author of *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind* (2018), which received the Steven S. Goldberg Award for Distinguished Scholarship in Education Law, and was selected as a *Washington Post* notable book of the year.

Eugene Volokh is the Thomas M. Siebel Senior Fellow at the Hoover Institution at Stanford University and the Gary T. Schwartz Professor of Law Emeritus at the University of California, Los Angeles, as well as a member of the American Law Institute. Professor Volokh is known for his scholarship in First Amendment law.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners ask this Court to hold that parents have a constitutional right to interfere with the routine curricular decisions of public schools. Whether this Court answers that question by applying its existing free-exercise precedents or—as members of this Court have recently suggested—by considering analogies to free-speech doctrine, *see Fulton* v. *City of Phila.*, 593 U.S. 522, 543 (2021) (Barrett, J., concurring); *id.* at 565 n.28 (Alito, J., concurring in the judgment), the answer is the same: The First Amendment does not shield public-school students from the mere exposure to ideas that conflict with their personal views, whether secular or religious.

Every day, thousands of public schools throughout the United States make countless decisions about the best way to educate their students. Those decisions reflect the input of educators, parents, and local communities. They thus incorporate competing views about both the materials that should be included in public-school curricula and the role of public education in civil society. In a country as diverse as the United States, those decisions also often expose students to ideas that may be in tension with their deeply held beliefs.

This Court has developed an extensive body of law that balances the needs of the public-school system against the free-exercise rights of students and parents. These decisions prevent public schools from espousing or indoctrinating religious views, require schools to accommodate students' private religious practices, and let parents educate their children outside the public-school system altogether. At the same

time, they also recognize the importance of local control over education and the harms that can arise from judicial interference in curricular decision-making. Taken together, this Court's precedents have established a stable framework—one that has allowed religious exercise to flourish on and off school grounds, but without inhibiting the ability of local communities to make decisions about public education and to expose public-school students to a wide variety of ideas.

Petitioners' suit would upset that balance. In this case, the Montgomery County Public School Board approved a set of books for its English curriculum that include LGBT characters. The Board added these books to "assist students with mastering reading concepts" and to teach respect for other students. Pet. App. 10a. Petitioners challenged MCPS's decision, arguing that the Free Exercise Clause requires the county either to remove the books or to accommodate opt-outs for any student who has a religious objection to reading them. In advancing that claim, Petitioners did not contend that the books espoused any religious or anti-religious view, nor did they show that the Board included the books to coerce students into adopting any particular viewpoint. Instead, they argued that merely introducing students to books in tension with their religious faith violated the Free Exercise Clause.

Petitioners' sweeping opt-out theory is inconsistent with free-exercise law and would undermine the educational system. For decades, this Court has recognized that students do not surrender their constitutional rights at the schoolhouse gate. But it has also explained that the protections of the First Amendment must be tailored to the unique demands of the school environment, and has cautioned against constitutional theories

that would displace the "vital national tradition" of local control over education. *Missouri* v. *Jenkins*, 515 U.S. 70, 99 (1995).

Applying those decisions, lower courts have consistently (and correctly) held that the Free Exercise Clause does not allow parents to override routine public-school curricular decisions. As these courts have recognized, "[p]ublic schools often walk a tightrope between the many competing constitutional demands made by parents, students, teachers, and the schools' other constituents." *Parker* v. *Hurley*, 514 F.3d 87, 107 (1st Cir. 2008). When weighing those demands, our constitutional system vests authority in "the normal political processes for change," rather than the federal courts. *Ibid.*

That result is not unique to free exercise. In recent years, members of this Court have suggested that the Free Exercise Clause should be understood in light of other First Amendment freedoms. Justice Barrett's concurrence in *Fulton* suggested that the meaning of free exercise may be informed by how "this Court[]" has treated "other First Amendment rights—like speech and assembly." 593 U.S. 522, 543 (2021) (Barrett, J., concurring) (joined by Breyer, J., and Kavanaugh, J.). And Justice Alito's *Fulton* opinion argued that "the phrase 'no law' applies to the freedom of speech and the freedom of the press, as well as the right to the free exercise of religion, and there is no reason to believe that its meaning with respect to all these rights is not the same." *Id.* at 565, n.28 (Alito, J., concurring in the judgment) (joined by Thomas, J. and Gorsuch, J.).

Examining how "other First Amendment rights" apply to school curricula confirms that the decision below was correct. This Court has long held that schools can expose students to materials on various subjects

without infringing the free-speech rights of students and parents. And federal courts have long rejected claims (like Petitioners') that would either require student-specific opt-outs or empower individual parents to dictate educational decisions for the entire school. This Court should not announce an opt-out right for religious objectors under the Free Exercise Clause that its precedents would foreclose for students objecting to public-school curricula under the Free Speech Clause.

The practical implications of Petitioners' opt-out theory provide another reason for caution. Were this Court to adopt Petitioners' view, public schools would be forced to either (i) offer student-specific instruction every time a parent identifies a potential conflict between the public-school curriculum and their religious faith, or (ii) develop a curriculum so anodyne that it aims to avoid even the slightest risk of exposing students to ideas that may conflict with *any* conceivable religious belief—a task that would almost certainly prove impossible in practice.

Such a result would be both unworkable and undemocratic. Parents would have the right to flyspeck curricula in a vast range of academic subjects, as they have already tried to do. *See, e.g.*, *Fleischfresser* v. *Directors of Sch. Dist. 200*, 15 F.3d 680, 683 (7th Cir. 1994) (discussing a free-exercise challenge to books that reference "wizards, sorcerers, [and] giants"). And schools would be discouraged from providing the education they believe to be most valuable, in favor of making choices that—they hope, but can never know—would provoke relatively few parents to opt out.

The Court of Appeals' decision correctly applied free-exercise law, aligned with other First Amendment doctrines, and honored the importance of local control over education. This Court should affirm.

ARGUMENT

I. The Free Exercise Clause does not require student-specific opt-outs.

This Court has decided many cases related to religious exercise and public education. Those decisions have harmonized the demands of the Free Exercise Clause with the needs of school administrators, thereby allowing students and parents to practice their faith without disrupting the day-to-day activities of public schools.

Petitioners' expansive opt-out theory departs from that framework. On their view, public schools must forego instruction on important subjects or adopt a student-specific curriculum whenever a parent alleges that a public school is exposing students to ideas in conflict with their religious faith. This Court's precedents do not endorse that far-reaching and disruptive view of the Free Exercise Clause, which would shift control over education from democratically elected officials to individual parents and federal courts ill-equipped to supervise public schools.

A. This Court's Religion Clause precedents have established a stable framework that accommodates competing interests.

1. This Court's decisions offer important protections for parents and students' First Amendment rights.

Many strands of modern constitutional law (i) confirm that students do not shed their religious identities at the schoolhouse gate, (ii) allow states to support a wide range of private schools chosen by parents, and (iii) recognize the rights of students and parents to pur-

sue a religious education outside the public-school system. These cases provide broad protection for free-exercise rights.

First, students are generally permitted to engage in individual religious expression while in public schools. *See* The Schoolhouse Gate, *supra*, at 394-399. In *Wallace* v. *Jaffree*, 472 U.S. 38, 59-61 (1985), the Court struck down an Alabama statute authorizing moments of silence in public school "for meditation or voluntary prayer." Ala. Code § 16-1-20 (1981). But in so doing, the Court issued a decision that was broadly supportive of other "moment-of-silence statutes," which do not refer to prayer and "provide students who wish to pray with an opportunity to do so." The Schoolhouse Gate, *supra*, at 397 (explaining that *Wallace* was hailed as a "victory" for religious expression at the time). Similarly, the Court has held that schools may provide "equal access" to school facilities for religious student organizations without violating the Establishment Clause. *Board of Educ. of Westside Cmty. Schs.* v. *Mergens*, 496 U.S. 226, 247-253 (1990); *see also Fellowship of Christian Athletes* v. *San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 672, 685-694 (9th Cir. 2023) (en banc) (holding that a school district violated the Free Exercise Clause by "penaliz[ing]" a student group "based on its religious beliefs").

Second, the Court has held that state and local governments can provide indirect public funds for families who wish to enroll their children in private religious schools. *See Zelman* v. *Simmons-Harris*, 536 U.S. 639, 662-663 (2002) (upholding school-choice program that provided tuition aid for students attending religious schools); *Mitchell* v. *Helms*, 530 U.S. 793, 843 (2000) (upholding program by which "government aid sup-

ports a school's religious mission only because of independent decisions made by numerous individuals") (O'Connor, J., concurring in the judgment); *Agostini* v. *Felton*, 521 U.S. 203, 225-226 (1997) (holding that the government may provide tuition aid "available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited") (citation omitted). As a result of these decisions, communities can use tax dollars to support religious education indirectly, so long as religious schools are treated on the same terms as other private schools. *See generally* Volokh, *Equal Treatment Is Not Establishment*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 341 (1999) (arguing before decisions such as *Trinity Lutheran Church* v. *Comer*, 582 U.S. 449 (2017), that the Constitution compels equal treatment of religious schools when government funds are made available for private education).

Third, the Court's decisions provide religious parents with broad rights to instruct their children outside of the public-school system. A century ago, the Court recognized the right of Nebraska's Zion Parochial School to provide Biblical instruction to the children of German families in their native tongue. *See Meyer* v. *Nebraska*, 262 U.S. 390, 402-403 (1923); *see also* Driver, *Three Hail Marys:* Carson, Kennedy, *and the Fractured Détente over Religion and Education*, 136 Harv. L. Rev. 208, 234 (2022). Just two years later, the Supreme Court rejected Oregon's effort to mandate public-school attendance and prevent parents from providing "[s]ystematic religious instruction and moral training according to the tenets of the Roman Catholic Church." *Pierce* v. *Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 532 (1925). The Court's more recent free-exercise decisions chart

a similar course, ensuring that States do not discriminate against parents who wish to educate their children in private religious schools, *see Carson* v. *Makin*, 596 U.S. 767, 781 (2022) (holding that states discriminate against religion when they "pay[] tuition for certain students at private schools—so long as the schools are not religious"), or compel school attendance when doing so would needlessly pose a "danger to the continued existence of an ancient religious faith," *Wisconsin* v. *Yoder*, 406 U.S. 205, 218 n.9 (1972).

Each of these decisions recognizes that there is no categorical "school exception" to the First Amendment. Students have broad rights to engage in religious practice and to be free of religious discrimination while at school, just as parents have freedom to pursue private religious education for their children.

2. This Court's decisions recognize that school curricula are subject to judicial determinations only in limited circumstances.

This Court's decisions do not, however, permit parents, students, or judges to supplant local control over routine educational decisions. On the contrary, this Court has repeatedly affirmed that decisions about public-school curricula should be made through the democratic process, not through litigation in federal court.

This Court has rejected constitutional theories that would require courts to second-guess public schools' curricular decisions or saddle judges with the burden of overseeing the day-to-day operations of a public-school system. In *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 6 (1973), for example, the Court rejected a claim alleging that Texas's system for financing public schools, which resulted in some schools

receiving substantially fewer resources than others, violated the Equal Protection Clause. The Court justified that decision by explaining that courts lack "the expertise and the familiarity with local problems" that are necessary to effectively manage public education. *Id.* at 41; *see* Wilkinson, Goss *v.* Lopez*: The Supreme Court as School Superintendent,* 1975 Sup. Ct. Rev. 25, 73-74 (1975) (criticizing decisions that "load upon the public school system . . . constitutional baggage" and hamper local communities' "capacity to influence" public schools).

The Court has taken the same approach to constitutional remedies. Even when a federal court is tasked with curing a constitutional violation involving public schools, it "must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution." *Missouri* v. *Jenkins*, 515 U.S. 70, 99 (1995). That is because "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process." *Milliken* v. *Bradley*, 418 U.S. 717, 741-742 (1974).

This Court's free-exercise decisions adhere to those precedents. Although the Court has recognized a right for students who wish to engage in religious expression to be treated on the same terms as other students, *see Mergens*, 496 U.S. at 247-253, it has not required schools to make benefits available to certain religious groups that are not available to others. Indeed, even in *Yoder*, on which Petitioners rely extensively, the Court's decision permitted Old Order Amish parents to opt out of the public-school system altogether, but not to commandeer the administration of the public schools. *See* 406 U.S. at 218-219.

* * *

This Court's precedents have allowed religious expression to thrive alongside democratically accountable public schools. Today, 34 states have enacted statutes authorizing moments of silence consistent with the decision in *Wallace*. *See* The Schoolhouse Gate, *supra*, at 397. Students throughout the country are free to participate in religious clubs as part of their public-school education. *See For a Lot of American Teens, Religion Is a Regular Part of the Public School Day*, Pew Rsch. Ctr. (Oct. 3, 2019), https://tinyurl.com/ytdw2nje. And millions of students are either homeschooled or take advantage of neutral voucher programs that support private religious education. *See* EdChoice, *The ABCs of School Choice* 8 (2024), https://tinyurl.com/5b2865hw; Ray, *Research Facts on Homeschooling*, National Home Educ. Rsch. Inst. (July 20, 2023), https://nheri.org/research-facts-on-homeschooling/. These forums for religious expression are now common features of American education. And importantly, none of them erodes local control over schools or allows students or parents to disrupt the education of others whose religious beliefs differ.

B. Petitioners' opt-out theory would undermine this framework.

Legitimating Petitioners' claim would foment the very disruption and judicial intrusion that this Court has rightly sought to avoid. On Petitioners' view, the Free Exercise Clause shields students from mere exposure to ideas that conflict with their religious faith—here, books that include LGBT characters and promote respect for LGBT people. That understanding of the First Amendment finds no support in this Court's prec-

edents and would transfer control over curricular decisions from elected school boards to individual parents and the federal judiciary.

1. As MCPS has explained (at 22-25), a student's mere exposure to ideas that may conflict with his or her faith does not establish an unconstitutional burden under the Free Exercise Clause. "The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen* v. *Roy*, 476 U.S. 693, 699 (1986). Nor does the Free Exercise Clause allow some citizens to impose their religious views on others. *See United States* v. *Lee*, 455 U.S. 252, 261 (1982) (rejecting a free-exercise claim that would "operate[] to impose the employer's religious faith on the employees").

Accordingly, courts have long rightly rejected claims that routine public-school curricular decisions unconstitutionally burden the free-exercise rights of students or parents. Those decisions uniformly recognize that "[p]ublic schools are not obliged to shield individual students from ideas which potentially are religiously offensive," *Parker*, 514 F.3d at 106, and "[t]he requirement that students read the assigned materials and attend reading classes . . . does not place an unconstitutional burden on the students' free exercise of religion," *Mozert* v. *Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1060 (6th Cir. 1987). "Were the free exercise clause violated whenever governmental activity is offensive to or at variance with sincerely held religious precepts, virtually no governmental program would be constitutionally possible." *Grove* v. *Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1542 (9th Cir. 1985) (Canby, J., concurring).

Moreover, Petitioners' expansive opt-out theory undermines the "vital national tradition" of local autonomy over education. *Missouri*, 515 U.S. at 99. If MCPS is forced to choose between establishing a reticulated opt-out regime or removing any books with gay characters from the shelves, many other schools will soon be confronted with similar choices involving social science, biology, and history. *See infra*, Part III. And federal judges will be required to supervise those choices, deciding if a school has sufficiently prevented students from encountering ideas that may conflict with their faith. That is the exact result this Court has warned against. *See, e.g.*, *Rodriguez*, 411 U.S. at 41; *McCollum* v. *Board of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring) ("If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds.").

2. Petitioners principally rely on *Yoder* to support their opt-out theory. On their view, *Yoder's* holding that parents have a right to "withdraw[]" their children "from public schools entirely" necessarily justifies their "much narrower request to opt their children out of discrete instruction that deliberately seeks to confound their religious values." Pet'rs' Br. 21-22. That argument reads far too much into *Yoder* and ignores the practical implications of Petitioners' theory. As this Court made clear, it is *Yoder*'s holding that is narrow, while Petitioners' theory is sweeping.

Yoder involved a challenge to a compulsory education law brought by adherents to the Old Order Amish religion. After surveying the "lengthy and successful track record of the Old Order Amish as a stand-alone society,"—as well as the relationship of faith to the society's "entire mode of life" and the Amish belief that

children should receive a "program of informal vocational education," *Yoder*, 406 U.S. at 211, 219—the Court held that "the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs." The Schoolhouse Gate, *supra*, at 406.

Yoder's highly limited, even idiosyncratic holding does not suggest a constitutionally compelled opt-out regime for all students attending public schools and for a wide variety of subjects and subject matters. *See* Pet. App. 36a-40a; *Parker*, 514 F.3d at 98-100 (distinguishing *Yoder* because "plaintiffs have chosen to place their children in public schools"); *Mozert*, 827 F.2d at 1067 (noting the "dramatic[] difference between *Yoder* and the present case"); *see also* MCPS Br. 38-40.

Petitioners are also wrong to suggest (at 25) that their opt-out theory is "narrower" than the one embraced by *Yoder*. *Yoder* did not inhibit local control over public education: It simply permitted Old Order Amish parents to withdraw their children from the public-school system after the eighth grade when requiring their continued enrollment in that system would be incompatible with their faith. *See* 406 U.S. at 221 (discussing the state's asserted interest in "compulsory education").

By contrast, Petitioner's opt-out theory empowers parents to function as lesson planners and ultimately as censors: Any time they disagree with the content of educational material, the school would need to either strike it from the curriculum altogether or establish bespoke lesson plans for those who opt out; otherwise, students who opt out would not receive the same educational opportunities as others. It is hard to see how

schools could possibly "sift out of their teaching everything inconsistent with [the] doctrines" of America's multitudinous religious sects. *McCollum*, 333 U.S. at 235 (Jackson, J., concurring). And the Free Exercise Clause does not require that extreme result. "[P]arents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject." *Swanson* v. *Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998).

II. This Court's free-speech precedents confirm that Petitioner's opt-out theory is misguided.

Petitioners' opt-out theory also finds no support in other First Amendment doctrines. In arguing that the Free Exercise Clause compels an opt-out regime, Petitioners invoke (at 25-26, 45) foundational free-speech precedents like *West Virginia State Board of Educ.* v. *Barnette*, 319 U.S. 624 (1943). And in recent years, several members of this Court have indicated that free-speech law could be instructive when resolving disputes involving religious freedom. *See Fulton*, 593 U.S. at 543 (2021) (Barrett, J., concurring) (joined by Breyer, J. and Kavanaugh, J.); *id.* at 565, n.28 (Alito, J., concurring in the judgment) (joined by Thomas, J. and Gorsuch, J.). If the Court considers its free-speech framework here, the result will be the same: Public schools are not constitutionally compelled to shield students from ideas that conflict with the personal views of their parents.

A. This Court's free-speech precedents recognize that school authorities must have the right to set the curriculum.

As with the Free Exercise Clause, students do not "shed their constitutional rights to freedom of speech

or expression . . . at the schoolhouse gate." *Tinker* v. *Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969). "America's public schools are the nurseries of democracy," and therefore have "an interest in protecting a student's unpopular expression." *Mahanoy Area Sch. Dist.* v. *B.L.*, 594 U.S. 180, 191 (2021). As a result, public schools cannot prohibit students from engaging in core political speech simply based on "undifferentiated fear or apprehension of a disturbance" or to prevent "discomfort and unpleasantness." *Tinker*, 393 U.S. at 508-509; *see Morse* v. *Frederick*, 551 U.S. 393, 403-404 (2007).

That said, "courts must apply the First Amendment 'in light of the special characteristics of the school environment.'" *Mahanoy*, 594 U.S. at 187 (quoting *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 266 (1988)). One important feature of that environment is the government-speech doctrine, which recognizes that "[a] government entity has the right to speak for itself" on important matters, even when that speech requires the government to take sides on a political or social debate. *Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 467 (2009) (citation omitted); *see Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005) (explaining that viewpoint discrimination in speech by the government "does not alone raise First Amendment concerns"). Without the government-speech doctrine, elected officials would be unable to take positions on important issues, rendering them incapable of addressing the very problems they are tasked with solving. "Indeed, it is not easy to imagine how government could function if it lacked this freedom." *Pleasant Grove*, 555 U.S. at 468.

The government-speech doctrine is critical for public schools. Schools engage in all manner of speech,

whether through "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 271. In those contexts, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech." *Id.* at 273; *see also Morse*, 551 U.S. at 422-423 (Alito, J., concurring) (explaining that *Hazelwood* "allows a school to regulate what is in essence the school's own speech"). "The government, through the public school, may say what it wishes through its official house organ." The Schoolhouse Gate, *supra*, at 110.

Schools' authority is at its apex for decisions involving school curricula. "Few activities bear a school's imprimatur and involve pedagogical interests more significantly than speech that occurs within a classroom setting as part of a school's curriculum." *Axson-Flynn* v. *Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004) (citations and quotation marks omitted). For that reason, "students assigned to write a paper about the American Revolution—who would prefer to tackle the Cuban Revolution—[do not] have a legitimate claim to their preferred topic under the First Amendment[.]" The Schoolhouse Gate, *supra*, at 19.

This Court recognized that principle in *Island Trees School District Board of Education* v. *Pico*, 457 U.S. 853, 864 (1982). In that case, the Justices who joined the lead opinion reasoned that the Constitution limits a school library's decision to remove books in certain instances. *Id.* at 863. But in doing so, even those Justices expressed "full agreement with petitioners that local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values,'" *id.* at 864, and noted that "Petitioners

might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values," *id.* at 869; *see id.* at 878 n.1 (Blackmun, J., concurring in part and concurring in the judgment) (reasoning that "it is difficult to see the First Amendment right that I believe is at work here," *i.e.*, the right not to be subjected to viewpoint discrimination in excluding books from a school library, "playing a role in a school's choice of curriculum").

Another "special characteristic of the school environment" is the need for school administrators to create and maintain an environment conducive to student learning. *Tinker* explained that schools can regulate student speech if that speech is likely to "materially and substantially disrupt the work and discipline of the school." 393 U.S. at 513. Following *Tinker*, this Court has repeatedly rejected free-speech challenges involving school discipline for speech made at school or as part of school-sponsored activities, including in situations where the speech at issue was purely private and did not "bear the imprimatur of the school." *Morse*, 551 U.S. at 405 (quoting *Hazelwood*, 484 U.S. at 271) (holding that schools can regulate private student speech promoting the use of illicit drugs); *see Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 685 (1986) (holding that a school did not violate the First Amendment by disciplining a student who made lewd remarks at a school assembly). In light of these decisions, it is well-settled that public-school free-speech claims are not always subject to strict scrutiny.

B. This Court's free-speech precedents refute any claim to student-specific opt outs.

The principles laid out above illustrate the error of Petitioners' position. Every day, school districts across the country define their learning objectives and select

the educational materials they will use to meet them. Those decisions invariably conflict with the views of at least some families in the community.

But students do not have a right to prevent or limit school expression that they dislike. Instead, "states enjoy broad discretionary powers in the field of public education," which include "the authority to establish public school curricula which accomplishes the states' educational objectives." *Chiras* v. *Miller*, 432 F.3d 606, 611 (5th Cir. 2005). Accordingly, schools are not constitutionally compelled to create elaborate opt-out regimes that will burden teachers, administrators, and other students.

Indeed, free-speech doctrine even permits schools to *require* that students write or speak. *See, e.g.*, *Axson-Flynn*, 356 F.3d at 1291-1292 ("Requiring an acting student, in the context of a classroom exercise, to speak the words of a script as written is no different than requiring that a law or history student argue a position with which he disagrees."). Such decisions highlight the broad latitude afforded to public-school administrators under the Free Speech Clause: If the government required citizens to convey a certain message outside the public schools, its actions would generally be struck down. *See, e.g.*, *National Inst. of Family & Life Advocates* v. *Becerra*, 585 U.S. 755, 766 (2018). But the schooling context makes the analysis different. And if schools can serve their pedagogical objectives by requiring that students write or speak, surely they can require that students read or hear as well.

For these reasons, an analogy to free-speech doctrine confirms that, as the Fourth Circuit held below, Petitioners do not have a constitutional right to opt their children out of the public-school curriculum while

they remain in public schools simply because of disagreement with the ideas to which their children have been exposed. And because the proper result here aligns with other First Amendment freedoms, this case is a poor vehicle to revisit bedrock free-exercise precedents. Pet'rs' Br. 3 (suggesting that, if *Employment Div.* v. *Smith*, 494 U.S. 872 (1990), forecloses their claim, "then *Smith* is in direct conflict with free-exercise guarantees and should be overruled").

III. Petitioners' opt-out theory is unworkable and undemocratic.

A. Petitioners' theory would invite a virtually unlimited range of opt-out demands.

If Petitioners prevail, schools will be forced to adjust their curricula across a wide range of subjects, including biology, history, civics, and language arts. These concerns are hardly hypothetical; prior free-exercise challenges (all of which were unsuccessful) show that parents can and will challenge all manner of garden-variety educational determinations about course material, including:

- Stories for beginning readers that include a girl who reads a recipe from a cookbook to a boy who prepares a meal, for allegedly "communicat[ing] the idea that there are no God-given roles for the different sexes." *The Schoolhouse Gate*, *supra*, at 402 (discussing *Mozert* v. *Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1059 (6th Cir. 1987)) (quotation omitted).
- Books about "wizards, sorcerers, [and] giants," for allegedly "foster[ing] a religious belief in the existence of superior beings" and teaching children anti-Christian values such as "tricks" and

"despair." *Fleischfresser* v. *Directors of Sch. Dist. 200*, 15 F.3d 680, 683 (7th Cir. 1994).

- A social studies curriculum that (i) did not "describe the divine origins of Hinduism," (ii) "describe[d] Hinduism as consisting of 'beliefs and practices,'" and (iii) taught that the caste system "was a social and cultural structure as well as a religious belief," for allegedly disparaging Hindu faith. *California Parents for Equalization of Educ. Materials* v. *Torlakson*, 973 F.3d 1010, 1014-1015 (9th Cir. 2020).
- Science courses that reference elements of evolutionary theory, including the "Big Bang Theory" and "fossil record[s]," for allegedly "advancing the atheist religion" in violation of the Establishment Clause. *Reinoehl* v. *Penn-Harris-Madison Sch. Corp.*, 2024 WL 4008301, at *1-2 (S.D. Ind. Aug. 30, 2024).

And those free-exercise challenges would not stop at curriculum. In one case, a parent challenged a school's use of "Smart ID" badges because he "felt the chip in the badge was 'the mark of the beast.'" *A.H. ex rel. Hernandez* v. *Northside Indep. Sch. Dist.*, 916 F. Supp. 2d 757, 768 (W.D. Tex. 2013).[2]

Given the astonishing breadth of these challenges, Petitioners' opt-out theory would severely impair pub-

[2] Parents have raised similarly broad free-speech claims as well, and those claims were rightly rejected. *See Griswold* v. *Driscoll*, 625 F. Supp. 2d 49, 52-55 (D. Mass. 2009), *aff'd on other grounds*, 616 F.3d 53 (1st Cir. 2010) (challenge to the removal of certain materials from a "curriculum guide" on genocide and human rights, for allegedly violating the free-speech rights of parents, students, and teachers).

lic elementary and secondary education. Most obviously, an opt-out regime would impose costs on public school teachers, administrators, and their students. On subject after subject, schools would have to choose between substantially narrowing their curricula and sacrificing legitimate pedagogical goals along the way, or implementing onerous and impracticable systems for giving notice and opt-out rights to individual students. And, ultimately, those burdens would prevent schools from fulfilling their mission to prepare students to participate in a society filled with people who live and think in many different ways.

For schools forced to provide opt-outs, the additional burdens would be overwhelming. Students unwilling to participate in certain lessons would have to receive separate lessons to stay on track. Homework assignments would need to be adjusted to exclude objectionable material. And exams would need to change as well, with each student receiving a test tailored to their particular opt-outs. Those requirements would sap scarce resources from already harried public school officials, who would be forced to serve parents a curricular buffet to avoid any possibility of religious offense.

Of course, many schools would avoid these extra costs by eliminating altogether the topics that may yield opt-out requests. But such a decision would also harm other students, allowing a handful of parents to exercise a veto over valuable educational opportunities for the school as a whole. *See Lee*, 455 U.S. at 261 (noting that the limits imposed by individual religious beliefs should not be "superimposed" on the resources the government makes available to others); *Montiero* v. *Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1028 (9th Cir. 1998) (explaining that a student's equal-

protection challenge to the inclusion of books in a public-school curriculum would "severely restrict a student's right to receive material that his school board or other educational authority determines to be of legitimate educational value").

Petitioners' theory would also generate profound uncertainty for school administrators and judges, who would soon confront difficult questions about how far schools must go to comply with a constitutional opt-out requirement. If a student challenges multiple aspects of the public-school curriculum at once, would the school need to create a bespoke lesson plan for that particular child? If a student opts out of instruction on a particular topic, does a teacher violate the Constitution by responding to a question on that topic when the student is present? And if one parent's claim is diametrically opposed to another parent's claim—consider a Montgomery County parent whose faith teaches that it is wrong to exclude LGBT characters from the curriculum—how are educators supposed to referee those dueling challenges? These questions and many others are unavoidable under an opt-out regime. But Petitioners have not even tried to answer them.

And Petitioners' theory would erode local control over education. Facing a deluge of free-exercise challenges across a wide range of academic subjects, schools would be forced into a defensive crouch, avoiding exposure to topics or ideas altogether—even when elected officials and school administrators believe they are valuable. Such a regime deprives local communities of the ability to shape the school system through the normal democratic process.

B. Petitioners' proposed limiting principles would not work.

Perhaps recognizing the breadth of their opt-out theory, Petitioners offer two grounds for narrowing it. But neither one distinguishes this case from the many others that have challenged school curricula under the First Amendment.

First, Petitioners suggest (at 22) that "[t]he longstanding consensus of states deferring to parents on when and how their children will receive sex education confirms that compelled instruction against their religious beliefs substantially interferes with Petitioners' free exercise right." At the outset, it is not clear why assigning books that do not reference sex, but simply include gay characters, is "sex education."

More importantly, Petitioners have not explained why existing state laws concerning sex education are relevant to the meaning of the Free Exercise Clause. Communities have long debated whether to educate students on many subjects apart from sex education, including evolution, history, and civics. *See* Shaver, *Chalk Talk—The Debate over the Teaching of Evolution in Public Schools*, 3 J. L. & Educ. 399, 399 (2003); Nash et al., *History on Trial: Culture Wars and Teaching of the* Past 17-23 (2000); Murphy, *Against Civic Education in Public Schools*, 30 Int'l J. Pub. Admin. 651, 664-666 (2007). This Court has never held that school districts are constitutionally compelled to adopt the approach that has prevailed in the greatest number of local jurisdictions. And it would be strange to rely on the supposed "consensus" that has emerged through the democratic process to strip elected officials of the ability to continue making decisions about education related to sex, sexual orientation, and gender.

The facts of this case vividly illustrate the importance of leaving curricular decision-making in the hands of local communities. The materials Petitioners challenge have been the subject of active debate in Montgomery County for years. Advocates and detractors have made their voices heard at public fora, and democratically accountable officials have faced scrutiny and defended their decisions to the electorate. Pet. App. 13a-16a. This Court need not endorse MCPS's curricular choices to recognize that local elected officials, rather than unelected judges, are best positioned to make them.

Second, Petitioners contend (at 22) that their suit is distinct because MCPS's curriculum "deliberately seeks to confound their religious values." Notably, Petitioners do *not* argue that MCPS applied "direct or indirect pressure to abandon religious beliefs or affirmatively act contrary to those beliefs." Pet. App. 35a. Thus, all they can assert (at 42) is that the curriculum exposed students to views in "an area of curriculum that [MCPS] knew was laden with religious import."

That standard does not distinguish this case from prior decisions that have declined to impose opt-out regimes. In each of the cases discussed above, there can be little doubt that the parents believed the curriculum at issue was designed to "confound their religious values" and was "laden with religious import." *See supra*, at pp. 20-21. Courts are not equipped to scrutinize the accuracy of those beliefs. *See Thomas* v. *Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."). Nor could federal judges re-

liably determine which subjects are sufficiently important to warrant constitutional protection and which ones are not.

CONCLUSION

The decision below adhered to a longstanding body of law at the intersection of the First Amendment—including both religious freedom and free speech—and public education in the United States. Those precedents accommodate the needs of religious families in the educational system, while also preserving local control over public schools. Petitioners' request for a constitutionally compelled opt-out regime is incompatible with that doctrine and would fundamentally alter the relationship among public schools, parents, and the federal judiciary. The judgment of the court of appeals should be affirmed.

Respectfully submitted.

H. RODGIN COHEN
SULLIVAN & CROMWELL LLP
125 Broad St.
New York, N.Y. 10004

AMANDA FLUG DAVIDOFF
Counsel of Record
DANIEL J. RICHARDSON
HARRISON J. TANZOLA
SULLIVAN & CROMWELL LLP
1700 New York Ave., NW
Suite 700
Washington, D.C. 20006
(202) 956-7570
davidoffa@sullcrom.com

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