No. 24-297

In the Supreme Court of the United States

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

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

BRIEF OF CONSTITUTIONAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Amici are constitutional scholars with special expertise in the Religion Clauses and a professional and pedagogical commitment to the proper development of the law in this field. They submit this *amicus* brief to explain that Petitioners' view of the Free Exercise Clause contradicts settled precedent and abiding principles of religious liberty in a pluralistic society.[1]

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in any part, and that no person or entity other than *amici* or their counsel made a monetary contribution to fund its preparation and submission.

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INTRODUCTION & SUMMARY OF ARGUMENT

Petitioners advance several theories in support of reversal, but their principal contention is that public schools burden Free Exercise Clause rights whenever students are exposed to curricular instruction that offends parents' religious beliefs. As Respondents ably explain, this position should be rejected. *Amici* submit this brief to highlight two additional points.

First, Petitioners materially misread *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which concerned the particular circumstances of a religious obligation that adherents remove themselves from society. For over half a century, federal and state courts have rightly recognized that *Yoder* does not support a presumptive opt-out right whenever public-school instruction may expose students to material or ideas that they or their

parents find objectionable on religious grounds. This longstanding judicial consensus in turn reflects an appropriate effort to balance and calibrate competing constitutional values in the public-education context. The Fourth Circuit correctly articulated and applied that approach here, and its ruling should be affirmed.

Second, accepting Petitioners' mistaken theory of the Free Exercise Clause would cause harmful consequences. Petitioners do not identify any credible limiting principle to mitigate the chaos that would ensue from a presumption in favor of requiring opt-outs whenever a public-school curriculum collides with someone's religious beliefs. Moreover, their position would unleash continuing conflict and litigation over curriculum design and school administration—placing the Judiciary in the painful position of *de facto* superintendent for public-school systems. This is especially undesirable because Petitioners' theory invites absurd and unworkable results: teachers being forced to create bespoke curricular plans for every student with a unique set of religious objections (while administrators scramble to devise staffing solutions to address those opt-out dynamics); conflicts over the propriety of tests and other assessments in light of opt-outs (especially if exams feature any material that might itself draw a religious objection); anxiety about instructing students on literary classics, artistic masterpieces, and core scientific theories due to potential objections; and the unavoidable reality that any public-school student may be exposed to people or families whose very identities they consider objectionable on religious grounds (which shows the ultimate absurdity of objecting to mere exposure to people or ideas).

At bottom, Petitioners' position will not promote religious liberty as contemplated by the First Amendment. But it will invite religious discord, and disputes over religious preferentialism, as public schools seek to rid their curricula of anything that might draw burdensome religious objections and as families inevitably disagree over which objections to sustain. Rather than open the door to struggles between adherents of different religious traditions—and between adherents and nonadherents—this Court should reaffirm the proper understanding of *Yoder* that has prevailed for over fifty years and reject Petitioners' novel theory.

ARGUMENT

I. COURTS HAVE LONG AND RIGHTLY REJECTED PETITIONERS' VIEW OF *YODER*

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court held that parents whose families were members of the Old Order Amish faith could not—consistent with the Free Exercise Clause—be forced under threat of criminal sanction to send their children to public school after the eighth grade. Citing unique features of the Amish religion, community, and way of life, this Court concluded that high-school attendance would imperil the Amish community's religious practices (and, ultimately, its very existence). Ever since, lower courts have rejected attempts to misread *Yoder* as affording parents a constitutional right to determine what and how public schools teach their children. Petitioners ask this Court to jettison that precedent and replace it with the opportunity for notice, the right to opt out, and aggressive judicial intervention whenever a student must "participate in instruction" that may

conflict with their religious belief. Pet. Br. 1. But Petitioners' theory is not—and never has been—the law.

A. *Yoder* addressed a religious obligation that adherents separate themselves from society

This Court has repeatedly reinforced two venerable principles involving public schooling. *First*, to sustain itself over time, a healthy democracy must instill constitutional values in its youth, so that children will internalize those values and become citizens who embody them. The public schools are and long have been the "primary vehicle for transmitting the values on which our society rests," *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quotation marks omitted), and a "vital civic institution for the preservation of a democratic system of government," *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring). The "fundamental values" taught in public schools must therefore "include tolerance of divergent political and religious views." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); *see also, e.g.*, *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) ("The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny."). *Second*, "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges," *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988), although courts must always "apply the First Amendment's mandate in our educational system where essential to safeguard" protected rights, *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

Yoder illuminates how these principles properly interact when parents want to withdraw their children completely from public schools based on religious objections. In *Yoder*, three Amish parents were convicted of violating Wisconsin's compulsory-school-attendance law by declining to send their children to public school after those children completed the eighth grade. 406 U.S. at 207–08. This Court issued a narrow ruling that these convictions were invalid under the Free Exercise Clause.

In doing so, this Court made clear that the Amish way of life (as articulated by the parties before it) was uniquely and categorically irreconcilable with public-school education during the high-school years. The Court explained that "[f]ormal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs . . . but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life." 406 U.S. at 211. In this respect, mandatory attendance at a public high school significantly encroached on the students' (and their parents') religious beliefs, which required "separation from, rather than integration with, contemporary worldly society." *Id.*; *see also id.* at 210 ("[S]alvation requires life in a church community separate and apart from the world and worldly influence."). Compulsory attendance thus "carrie[d] with it a very real threat of undermining the Amish community and religious practice as they exist[ed]." *Id.* at 218. Based on that reasoning, the Court granted a limited free-exercise exemption from public school attendance focused only on circum-

stances in which a plaintiff's religious beliefs and religious community would not survive mandatory participation.

Yoder was a self-consciously limited ruling. Indeed, the Court pointedly observed that "probably few other religious groups or sects could make" the same type of showing as the parents did there. 406 U.S. at 236.

Lower courts have abided by this understanding of *Yoder* for more than fifty years, interpreting it as applying to circumstances in which compulsory public-school attendance violates adherents' beliefs and imperils the survival of a religious community. *See, e.g.*, *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003) ("Th[e] threat to the Amish community's way of life, posed by a compulsory school attendance statute, was central to the holding in *Yoder*."); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (noting that *Yoder* involved a threat to the Amish community's "entire way of life"); *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1067 (6th Cir. 1987) ("*Yoder* was decided in large part on the impossibility of reconciling the goals of public education with the religious requirement of the Amish that their children be prepared for life in a separated community.").

Amici are aware of no case endorsing Petitioners' assertion that *Yoder* announced a constitutional right to opt out of participating in specific public-school lessons that conflict with a student's or parent's religious beliefs unless the government can satisfy heightened scrutiny.

A survey of precedent confirms that federal courts have rejected this view. For example, the First Circuit has reinforced the "well recognized" proposition that the Constitution does not give parents a right to dictate curriculum. *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008); *see also Brown*, 68 F.3d at 532–33 (rejecting the idea of a "fundamental constitutional right to dictate the curriculum at the public school to which [parents] have chosen to send their children"). The Second Circuit has rejected the suggestion that there is "a fundamental right of every parent to tell a public school what his or her child will and will not be taught." *Leebaert*, 332 F.3d at 141. The Sixth Circuit has emphasized that, "[w]hile parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child." *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005); *see also id.* at 395–96. And the Tenth Circuit has held that "public schools are not required to delete from the curriculum all materials that may offend any religious sensibility." *Bauchman ex rel. Bauchman v. West High Sch.*, 132 F.3d 542, 558 (10th Cir. 1997) (quotation marks omitted).

State courts have followed suit. *E.g.*, *Larson v. Burmaster*, 720 N.W.2d 134, 151 (Wisc. Ct. App. 2006) (relying on *Yoder* to hold that "[d]ecisions as to what the curriculum offers or requires are uniquely committed to the discretion of local school authorities, . . . not that of parents and students" (internal citation omitted)); *Ware v. Valley Stream High Sch. Dist.*, 75 N.Y.2d 114, 125 (1989) ("[P]arents have no constitutional right to tailor public school programs to individual preferences, including religious preferences."); *North*

Dakota v. Patzer, 382 N.W.2d 631, 637 (N.D. 1986) (noting "the exceptional considerations present in *Yoder*").

Courts interpreting *Yoder* have thus consistently rejected Petitioners' view that exposure to educational materials or ideas that may conflict with a student's or a parent's religious beliefs burdens Free Exercise Clause rights. Contrary to Petitioners' views, neither *Yoder* nor the First Amendment requires public schools to prevent students from being exposed to ideas that offend their religious beliefs when "the school imposes no requirement that the student agree with or affirm those ideas." *Parker*, 514 F.3d at 106; *see also Curtis v. Sch. Comm. of Falmouth*, 420 Mass. 749, 763 (1995) ("Although the program may offend the religious sensibilities of the plaintiffs, mere exposure at public schools to offensive programs does not amount to a violation of free exercise."); *Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 14 (1st Cir. 2010). Students may be required to read assigned materials, even if those readings might offend their religious sensibilities: "in the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice," there is no "unconstitutional burden on the students' free exercise of religion." *Mozert*, 827 F.2d at 1065; *accord Ware*, 75 N.Y.2d at 124–25 ("The First Amendment does not stand as a guarantee that a school curriculum will offend no religious group."). Unless a school compels students to take affirmative steps against their

religion, exposure alone is insufficient to burden religion in a way that triggers heightened scrutiny under the Free Exercise Clause.[2]

B. The settled judicial understanding of *Yoder* properly balances competing interests

In light of these consistent interpretations of *Yoder*, States and local school boards have for fifty years had the freedom to address the extent to which students should be permitted to opt out of certain subjects based on local norms and preferences. These opt-out procedures tend to be limited to courses that do not implicate the same administrability concerns that arise when opt-outs become commonplace throughout compulsory subjects such as language arts and science. *See* Br. for AASA et al. as *Amici Curiae* 10–14. Or they are limited to discrete units within larger courses, as opposed to general topics or issues that may arise at any point within a course. Such familiar and common opt-out procedures operate in a manner least disruptive to teachers, other children, and the learning environment. *See id.*

Under Petitioners' view, however, these circumscribed procedures, developed and calibrated by state and local authorities over two generations, would be replaced with a presumptive and extremely disruptive opt-out right forcing schools to satisfy heightened judicial scrutiny. Opt-outs would inevitably become far

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[2] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), confirms that compelling public-school students to affirm a political creed violates the Free Speech Clause. Contrary to Petitioners' assertion, Pet. Br. 25, *Barnette* is not a religious-exemption case. *See* 319 U.S. at 634–35.

more prevalent—yet also less consistent in form and effect—if triggered by a sweeping rule that parents must receive notice and the opportunity to opt out of any exposure to materials offensive to their religious beliefs. As Judge Boggs warned, "[i]t is a substantial imposition on the schools to *require* them to justify each instance of not dealing with students' individual, religiously compelled, objections (as opposed to *permitting* a local, rough and ready, adjustment)." *Mozert*, 827 F.2d at 1080 (Boggs, J., concurring). Widespread, constitutionalized opt-outs would thus be a severe departure from how courts, school districts, and parents have successfully managed the delicate balance between curriculum and religion.

C. The Fourth Circuit correctly interpreted and applied *Yoder* in this litigation

The Fourth Circuit properly concluded, on the record here, that the Board's curricular decisions did not violate the Free Exercise Clause. As it found, Petitioners presented "no evidence" that "the Board's decision not to permit opt-outs compels the Parents or their children to *change* their religious beliefs or conduct, either at school or elsewhere." Pet. App. 34a. Instead, "teachers will occasionally read one of the handful of books, lead discussions and ask questions about the characters, and respond to questions and comments in ways that encourage tolerance for different views and lifestyles." Pet. App. 134a (district court opinion).

Throughout this educational process, "discussion will focus on the characters, not on the students." Pet. App. 135a; *see id.* ("While some instructional guidance

seems to encourage student introspection, none encourages students to share their personal experiences or to discuss their or their families' romantic relationships, gender identities, or sexuality."). And "the Parents' declarations do not suggest, nor does the existing record show, that the Parents or their children have in fact been asked to affirm views contrary to their own views on gender or sexuality, to disavow views on these matters that their religion espouses, or [to] otherwise affirmatively act in violation of their religious beliefs." Pet. App. 34a. Nothing about this fact pattern suggests a First Amendment violation under *Yoder*.

Furthermore, parents "still may instruct their children on their religious beliefs regarding sexuality, marriage, and gender, and each family may place contrary views in its religious context." Pet. App. 136a. They have complete freedom to explain why the books are inconsistent with their religion and to "instruct their children in their faiths." Pet. App. 139a. The record thus does not establish a Free Exercise Clause violation under *Yoder* or the cases that have consistently interpreted and applied it for the past half-century.

II. PETITIONERS' VIEW LACKS MERIT AND WOULD CAUSE HARMFUL CONSEQUENCES

Demanding a dramatic departure from decades' worth of precedent, Petitioners propose a new reading of *Yoder* that would require schools to provide parents with notice and the presumptive right to opt their children out of any religiously offensive instruction or exposure. Yet Petitioners propose no meaningful limiting principle.

Requiring school districts to notify parents and to permit opt-outs from *any* exposure to materials or ideas that might offend someone's religious beliefs invites uncertainty and costly litigation. It also demands that every teacher and administrator become an expert in the wide array of religious beliefs and commitments in our religiously pluralistic society. Petitioners' proposed rule would, in other words, cause administrative difficulties for all stakeholders involved and result in religious disharmony and discord across the Nation. Accordingly, the Court should reject Petitioners' position—or, at minimum, should hold that these concerns are fundamental to any judicial analysis of the circumstances in which opt-outs are required.

A. Petitioners offer no real limiting principle

There are over forty-seven million students enrolled in our Nation's K-12 public schools, with 3,372,000 in kindergarten, 13,562,000 in grades 1-4, 14,925,000 in grades 5-8, and 15,351,000 in grades 9-12. *See* Jacob Fabina et al., U.S. Census Bureau, *School Enrollment in the United States: 2021*, at 2, (2023). Those students are instructed in countless works and materials ranging across many subjects—and the students and their families adhere to an exceptionally wide range of religious beliefs. Announcing a presumption in favor of opt-outs whenever the curriculum collides with someone's religious beliefs would risk chaos in this system.

In an effort to downplay the sea change that would foreseeably result from adopting their position, Petitioners suggest that opt-outs would be limited to the

"narrow[]" issue of instruction on "gender and sexuality," emphasizing that this issue necessarily implicates religious doctrine. Pet. Br. 22, 29, 31–32. But Petitioners' contention that a ruling in their favor could be limited on this ground collapses under scrutiny. Even Petitioners seem to acknowledge as much: the reason *why* these particular topics trigger heightened scrutiny, they argue, is that "Petitioners sincerely believe that subjecting their children to instruction contrary to their religious beliefs" threatens their religious standing. Pet. Br. 28. By its own terms, that claim could encompass a wide range of topics covered in public schools, including instruction on any scientific discipline, history, literature, art, and more.

Nor can Petitioners solve this problem by cabining opt-outs to religious beliefs supported by "history and tradition." Pet. Br. 31. For starters, that approach would unduly privilege some religious traditions over others, most obviously prejudicing traditions that are newer to this country or less widely established. In any event, defining which religious beliefs are supported by "history and tradition" would involve courts in fraught exercises—and would still invite objections to a host of core topics and canonical materials taught in public schools. This approach would also bring some religious traditions into conflict with others, since issues that necessarily implicate faith and doctrine for one religion may not align with—or may be diametrically opposed to—those of another. *See* Clifford Grammich et al., *2020 U.S. Religion Census* 7–8 (2020).

The register of educational materials potentially requiring notice and opt-out rights under Petitioners' theory—which would shift the primary locus of those

decisions from States and localities to parents, students, and courts—is thus vast and unbounded.

This danger is underscored by the many decisions that refuse to expand *Yoder* as Petitioners request. The religious objections in *Mozert*, for example, included passages addressing "biographical material about women who have been recognized for achievements outside their homes," "evolution," and teaching "children to use imagination beyond the limitation of scriptural authority." 827 F.2d at 1062. The parents in that case also objected to reading materials that discussed magic, supernaturalism, or death. *See id.*; *see also, e.g.*, *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 683 (7th Cir. 1994) (addressing religious objections to reading materials containing "wizards, sorcerers, giants and other unspecified creatures with supernatural powers"); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1030 & n.10 (9th Cir. 1998) ("There is, of course, an extremely wide—if not unlimited—range of literary product that might be considered injurious or offensive . . . .").

In the same vein, other parents have sought to prevent their children from attending or participating in school activities ranging from anti-harassment training, to programs on drug and alcohol abuse, to instruction on critical and creative thinking. *See, e.g.*, *Morrison ex rel. Morrison v. Bd. of Educ.*, 419 F. Supp. 2d 937 (E.D. Ky. 2006) (objection to anti-harassment training), *aff'd sub nom. Morrison v. Bd. of Educ.*, 521 F.3d 602 (6th Cir. 2008); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49 (2d Cir. 2001) (objection to meditation, yoga, decisionmaking skills, Earth Day ceremo-

nies, exercises in creativity and learning, and discussions of drugs and alcohol, including the D.A.R.E. program); *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 479 F. Supp. 3d 808 (D. Ariz. 2020) (objection to discussion of Islamic terrorism in a World Politics class), *aff'd*, 44 F.4th 867 (9th Cir. 2022).

Under Petitioners' expansive view of *Yoder*, refusals to allow opt-outs from these curricula, or portions of them large or small, would be subject to heightened judicial scrutiny. That view threatens to "leave public education in shreds." *McCollum*, 333 U.S. at 235 (Jackson, J., concurring).

B. Petitioners' view invites uncertainty and constant litigation over curricular design

Decisions following *Yoder* have delicately and successfully balanced students' and families' constitutional rights to freely exercise their religious beliefs with States' "undoubted right to prescribe the curriculum for its public schools," *Epperson*, 393 U.S. at 107. Yet Petitioners' proposed rule would upset that careful, reasonable balance, inviting uncertainty and costly lawsuits over when notice and opt-out opportunities might be required for various types of curricula. School boards and local administrators would need to grapple with the potential for students or parents to request notice and opt-outs any time a student is "exposed . . . to a concept offensive" to a parent's or student's "religious belief." *Parker*, 514 F.3d at 105. In practice, demands would immediately be imposed on public schools, school boards, and education agencies to demonstrate that denying opt-outs with respect to particular issues satisfies heightened scrutiny.

But schools, local school boards, and state education agencies already operate with limited resources and stretched budgets. Providing notice and opt-out opportunities on topics of instruction that might potentially conflict with any parent's or student's religiously based view and "[a]ccommodating so many objectors[,] would involve a significant reallocation of resources involving space and personnel." Ira C. Lupu, *The Centennial of* Meyer *and* Pierce*: Parents' Rights, Gender-Affirming Care, and Issues in Education*, 26 J. Contemp. Legal Issues 147, 215 (2025); *see also* AASA Br. 15 ("School administration and teachers may be forced to divert their already limited resources and time to ensure full compliance with this expansion of parental notification rights."); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 Stan. L. Rev. 233, 298 (1989) ("Litigation and institutional chaos could quickly engulf a public school system compelled to excuse students from classes considering ideas offensive to their religious beliefs.").

To navigate that new reality, school boards and school administrators would need to shift resources to setting the boundaries between potentially objectionable curricula (requiring notice and opt-out opportunities) and unobjectionable curricula (not requiring notice and opt-outs). They would then need to devise notification plans that would provide parents and students with sufficient time to opt out of potentially objectionable lessons and to litigate any disagreements.

The likelihood that all parents would agree with every—or, indeed, any—decision made by schools, lo-

cal school boards, and state education agencies is vanishingly small. Petitioners' view would thus significantly transform the role of courts, which have historically played a limited but crucial part in disputes about public-school curricula. Now, judges would have to function as curricular experts and school administrators. They would effectively be tasked with difficult decisions about whether exposure to secular educational materials conflicts with religious beliefs; when notice and opt-out opportunities should have been required for exposure to past materials; whether schools have adequately explained why a student should be exposed to materials that might turn out to conflict with religious beliefs; and what kinds of opt-out opportunities are in fact required.

In the comparatively few court cases on these matters post-*Yoder*, judges were required to "examine the record very carefully to make certain that a constitutional violation ha[d] occurred before they order[ed] changes in an educational program adopted by duly chosen local authorities." *Mozert*, 827 F.2d at 1070. Petitioners' view would instead prompt far more litigation and require a supervisory role for the judiciary over public-school curricula, management, and daily instruction. And even after costly initial litigation, the scope of remedial orders would be subject to constant interpretation and the possibility of further litigation.

C. Petitioners' proposed rule would interfere with the administration of public schools

Petitioners' proposed rule should also be rejected because it would substantially interfere with the prudent administration of public schools. As Petitioners

would have it, a school must give parents advance notice and an opportunity to insulate their student from objected-to material—and therefore must provide separate space, supervision, and alternative lessons for opted-out students—any time the curriculum or any particular lesson, instructional material, or class discussion touches on an issue that might potentially conflict with some student's or parent's religious beliefs.

In practice, this approach risks creating pockets of separated students and a patchwork curriculum, with public schools becoming a thicket of competing opt-out claims on a range of religiously divisive topics. Students who opt out would be separated from their peers and miss valuable learning and socializing. Teachers would be required to fashion not one but many lesson plans and assessments, trying to ensure that lesson plans do not differ in terms of difficulty and educational purpose. "[G]iven the diversity of religious views in this country, if the standard were merely inconsistency with the beliefs of a particular religion there would be very little that could be taught in the public schools." *Smith v. Bd. of Sch. Comm'rs of Mobile Cnty.*, 827 F.2d 684, 693 n.10 (11th Cir. 1987); *see* Nadine Strossen, *"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 Ohio St. L.J. 333, 377 n.231 (1986) ("If the values at issue are among the essential, widely shared ones that public schools are permitted to inculcate, they are more likely to pervade the curriculum, and to make exemption an unworkable option."). These results reinforce why Petitioners' theory—that exposure

to materials that conflict with religious beliefs requires notice and the ability to opt out—cannot be correct.

This very case exemplifies the point. Here, Petitioners focused their opt-out requests on a small set of reading materials. Yet even that caused serious administrability issues. *See* Pet. App. 607a–608a (declaration explaining that "MCPS decided that it was not feasible or consistent with MCPS's curricular goals to accommodate requests for students to be excused from the LGBTQ-Inclusive Books" after receiving a "growing number of opt-out requests"). Administrators cited concerns with the effects that opt-out requests would have on rates of absenteeism and "the infeasibility of managing numerous opt-outs." Pet. App. 98a, 607a. Now imagine a school board faced with a multitude of different and conflicting opt-out requests across the vast range of topics in the entire curriculum. That is precisely the administrative chaos that will result if this Court accepts Petitioners' invitation to upend the settled understanding of *Yoder*.

Simply put, requiring school boards and local school administrators to determine whether and how they must provide notice and opt-outs from exposure to any potentially objectionable material would tend toward absurd results. For example, books for younger readers, such as E.B. White's *Charlotte's Web* and A. A. Milne's *Winnie the Pooh*, feature talking animals, while other commonly used books such as *The Polar Express* by Chris Van Allsburg and *The Magic School Bus* series by Joanna Cole and Bruce Degen include magic and supernatural characters—all of which

would likely offend some religious adherents. Similarly, many materials common on middle-school or high-school reading lists include topics that fall within likely objectionable categories.[3] Shakespeare's *The Tempest* features Prospero (a sorcerer) and *Macbeth* features the Weird Sisters (witches). *The Great Gatsby's* protagonist, former flapper Daisy Buchanan, drank alcohol and engaged in an affair. *Lord of the Flies* explores themes of good versus evil, including by portrayals of torture.

And that's just in English class. Under Petitioners' proposed rule, many classic works of art, history, and literature, and some core topics in science courses, could provoke religious objection. Excluding students from lessons on each of these matters would likely require teachers to fashion an alternative lesson plan of the same length and difficulty that does not contain any religiously objectionable material, and would require schools to assign a separate teacher to administer that curriculum for as long as necessary.

For younger children, who require higher levels of supervision for their own safety and development, a teacher would at a minimum need to separate certain students from the remainder of the class. In a more complex scenario, with numerous opt-outs from multiple classrooms at different times on different grounds

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[3] *See, e.g.*, *Recommended Reading: New York State Education Department*, NCPR, https://www.northcountrypublicradio.org/programs/local/list1.html; *Required Reading List for All Grades*, Barnes & Noble, https://www.barnesandnoble.com/b/required-reading/_/N-2quo; *High School Reading List*, The Education Alliance, https://arkansashomeschool.org/index.php/free-info/curriculum-resources/high-school-reading-list/.

in the same school, several teachers may be required to stand by for backup instruction, devise alternative lesson plans, or teach unfamiliar lessons.

Petitioners' proposal, moreover, is on its face not limited to opting out of planned instruction. Parents or students might also seek to be notified and have the right to opt out of ad hoc discussions that may arise in public-school classrooms and assemblies. Here, for example, Petitioners offer no reason why they would not be similarly offended if a discussion touching on gender or sexuality arose organically in the classroom rather than through planned instruction. Predicting when notice and a right to opt out would be required for discussions that may or may not occur at some point would be infeasible.

As a result, if a curious student asked unexpectedly about a topic to which other students' parents might object, and those parents had not been notified beforehand, teachers may be hesitant to respond to the student's inquiries. *See* AASA Br. 21–22. But school classrooms should be places where teachers foster a sense of understanding, trust, and care with their students. Doing so will be more challenging if teachers are forced to ignore or dismiss students' questions or else risk a free-exercise challenge from parents offended that their children heard something that a teacher or another student said.

Testing and other forms of assessment would likewise present substantial difficulties. Teachers would need to decide how to test students who studied different material, in different environments and in different social settings, under the guidance of different teachers. Especially at the high-school level, parents

and students may point out the inherent unfairness of giving different tests on different material to students in the same class and then assigning grades that will inevitably be compared by, among others, college admissions officers. As an alternative, teachers might determine that they must omit references in exams to any lesson that any student has opted out of—thus skewing assessments and outcomes and effectively extending opt-outs to the entire class (which knows it will not be tested on any objected-to materials).[4]

Nor is it clear that Petitioners' theory of exposure-based opt-out rights would be limited to the curriculum. Children are exposed to ideas about gender and sexuality every day—separate from the school curriculum—through interactions with other students, teachers, and staff. As particularly relevant here, students interact with people who are LGBTQ+ and those who hold different religious beliefs about gender, human attraction, and other matters. That is the reality of life. Allowing opt-outs would not satisfy Petitioners' stated concern that "[c]hildren in elementary school are at the most formative stage of their lives and are highly impressionable and vulnerable to peer pressure—especially on such potent and religiously laden topics as gender and sexuality." Pet. Br. 21.

Consider how these issues would play out in practice. If a student draws a family portrait in art class

[4] The signatories of this Brief are all current or former teachers. For the reasons explained above, none of us would allow students in our classes to freely opt out of reading assignments, because that would be inconsistent with our curricular design and the learning objectives of our courses.

depicting his two dads, do his classmates have a constitutional right to opt out of the remainder of the art class or refuse to sit next to him? Do the parents of those students need to be notified after their children have been "exposed" to a family with two dads—or beforehand that they *might* be exposed? Is the teacher prohibited from hanging that portrait on the wall or using it as an example in teaching technical skills to other students in the same class? What if a student draws a family portrait with a mom and dad—is that also considered "peer pressure" on "such potent and religiously laden topics as gender and sexuality," or does peer pressure exist only when children come from families that do not align with a specific religious view of who can form a family unit?

In the same vein, it is unclear how Petitioners would address mere exposure to people, be they teachers or other students, whose very identities are inconsistent with a student's religious beliefs. There are gay, lesbian, bisexual, and transgender teachers, students, families, and staff at public schools throughout the country. Students will inevitably interact with them while in school. Yet under Petitioners' view, reading a book in which a character happens to be gay (even if that fact is otherwise irrelevant to the curricular lesson) may provoke a constitutional opt-out right, whereas there is no similar right to opt out of a classroom that may include gay people. While opt-outs in this scenario will surely inflame religious and social discord, they will not avoid exposure to the reality that there are people in the world who comprehend their identity in ways that some others find objectionable.

And beyond issues of gender and sexuality, families could object, on religious grounds, to countless ways that other students or teachers dress, eat, interact, or speak. They may object to the toys with which some students play or the movies that children discuss. If a boy plays with a doll during playtime, some parents might be offended based on their religious views of gender roles. Does that mean no dolls are allowed in the kindergarten classroom, because one child might be exposed to another child playing with a doll?

Or consider instead a school cafeteria. If exposure to anything incongruent with one's religion is constitutionally infirm, Jewish parents may object to their children's exposure to pork; Hindu parents may object to exposure to beef; and Catholic parents may object to exposure to meat on Fridays. Are students then allowed to opt out of lunchtime? If so, Petitioners' approach would require, as a constitutional matter, a public-school system in which children eat their lunches in religiously segregated spaces, or where the cafeteria serves nothing objectionable to anyone. If Petitioners' view would allow opt-outs in these situations, administrative chaos will reign, because the list of moments and topics subject to opt-outs is endless.

As scholars with decades of experience studying the intersection of religion and government, we recognize that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). At the same time, "[j]udicial interposition in the operation of the public school system of the Na-

tion raises problems requiring care and restraint." *Epperson*, 393 U.S. at 104. The current system reflects that care and restraint: It protects the constitutional rights of students and their families, while ensuring that public education remains largely committed to the expertise of state and local authorities. Petitioners' proposal, by contrast, questions the decisions of the local architects of public schooling, urging persistent court intervention rather than restraint. That will make teachers' and administrators' jobs infinitely more difficult and the burdens on the courts more profound, while also disserving all students, whose education is degraded by inconsistencies, incoherencies, and conflicting claims to amend or avoid curriculum.

D. Petitioners' view invites religious conflict and a race to avoid any controversial topics

Although Petitioners insist that their proposed rule would advance religious freedom, Pet. Br. 53, it would have the opposite effect in many cases. Faced with the threat of discord and litigation, and with the administrative burdens involved in identifying and addressing opt-outs, school boards will gravitate to curricula that are as bland and inoffensive as they can be. Yet even still, given the breadth of religious beliefs and the inevitable spontaneity of classroom environments—and given the existence of LGBTQ+ people and some religious objections to the major theories of the natural sciences—conflict will be unavoidable. In practice, a school board's decision to teach one topic or perspective instead of another, or to feature one set of

readings and not a different set, will satisfy some religious adherents or nonadherents at the expense of others.

Mozert illustrates the point. There, a group of parents demanded a right to pull their children out of lessons involving "biographical material about women who have been recognized for achievements outside their homes." 827 F.2d at 1062. Under Petitioners' view, the school board in *Mozert* could have responded to the parents in one of two ways: It could have kept these assignments and faced the possibility that the adherents would opt out and require that their children be separated from classmates during the lesson. Or it could have removed the materials entirely from the curriculum, depriving all schoolchildren of valuable lessons about gender equality—including children whose religious beliefs promote achievements by men and women alike. Of course, the latter approach would harm *all* students, who would have otherwise benefitted from receiving the eliminated lesson. *See Epperson*, 393 U.S. at 103–09; *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947). As this example shows, "opt-out requests, in sufficient number, may effectively combine and become program vetoes," regardless of how valuable or essential the prescribed curriculum would have been to students. Lupu, *The Centennial of* Meyer and Pierce, 215.

This is no mere hypothetical. If Petitioners' view prevails, the threat of costly litigation from religious objectors may well shape curriculum for everyone in a school district, in ways that effectively privilege certain religious viewpoints in a community—even if those viewpoints reflect a minority perspective and

would result in the loss of secular curricular opportunities considered valuable and important to most families. And the threat of opting out would be present regardless of the plausibility or severity of the asserted conflict between religious belief and the curriculum. Courts shy away from judging the reasonableness of a person's religious beliefs. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981). School boards are under the same imperative. Whatever parents assert as religious convictions will end up controlling free-exercise claims.

As a result, accepting Petitioners' perspective risks inviting conflict between religious adherents and nonadherents, and between adherents of different religious understandings, as families threaten or invoke opt-out rights to seek to rid curricula of anything they find offensive. This situation would force religious disputes into the curriculum-design process nationwide, as different religious groups fight for dominance of their beliefs. Evidence-based learning objectives and content would be replaced with lessons (or the absence of lessons) reflecting religiously inflected politicking and litigation threats. That is a recipe for continuing religious discord and division, not religious freedom. Petitioners' reading of *Yoder* would thus result in *less* religious freedom and *more* inter-religious strife.[5]

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[5] For reasons explained in this section and above, this Court should affirm the Fourth Circuit's judgment that exposure to the challenged readings did not burden the parents' free-exercise rights. If this Court were to instead vacate the judgment and require heightened scrutiny when parents demand notice and opt-

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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out rights, it should instruct the lower courts on remand to take full and serious account of the concerns identified in this brief.