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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 TAMER MAHMOUD, ET AL.,)
4 Petitioners,)
5 v.) No. 24-297
6 THOMAS W. TAYLOR, ET AL.,)
7 Respondents.)
8 - - - - -

9
10 Washington, D.C.
11 Tuesday, April 22, 2025
12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:08 a.m.
16

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19 of the Petitioners.
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25 behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 24-297,
5 Mahmoud versus Taylor.

6 Mr. Baxter.

7 ORAL ARGUMENT OF ERIC S. BAXTER

8 ON BEHALF OF THE PETITIONERS

9 MR. BAXTER: Mr. Chief Justice, and
10 may it please the Court:

11 Parents everywhere care about how
12 their young children are taught sexuality and
13 gender identity. That's why nearly every public
14 school in the country that provides sexuality
15 education requires parental consent first. But
16 Montgomery County is an extreme outlier,
17 insisting that every elementary school student
18 must be instructed that, among other
19 controversial matters, doctors guessed at their
20 sex when they were born and that anyone who
21 disagrees is hurtful and unfair.

22 Forcing Petitioners to submit their
23 children to such instruction violates their
24 religious beliefs and directly interferes with
25 their ability to direct the religious upbringing

1 of their children.

2 The Board claims this straightforward
3 burden analysis will invite chaos. But schools
4 nationwide have long applied expansive opt-out
5 policies without significant difficulty,
6 including the Board itself, which stills allows
7 opt-outs for choir students who object to
8 singing religious songs or students who object
9 to certain storybooks, such as one that portrays
10 an image of the Prophet Muhammad. Exempting
11 students for some religious reasons but not
12 others cannot be squared with the First
13 Amendment.

14 Nowhere else to go, the Board pleads
15 for remand on strict scrutiny. But Petitioners
16 have been seeking preliminary relief for two
17 years already at significant personal expense.
18 One family moved in with grandparents to afford
19 private school. Another is home-schooling at
20 the loss of \$25,000 a year in special services
21 the school provided their daughter with Down
22 syndrome. Most have no alternatives.

23 Petitioners deserve complete
24 preliminary relief. In a system where thousands
25 of students are daily opted in and out of the

1 class for multiple reasons, there's no basis for
2 denying opt-outs for religious reasons.

3 The Board does not dispute that under
4 its theory, it could compel instruction using
5 pornography and parents would have no rights.
6 The First Amendment demands more. Parents, not
7 school boards, should have the final say on such
8 religious matters.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Could you spend a
11 minute or two to -- to explain how the -- why
12 the record shows that the childrens are more
13 than merely exposed to the -- these sorts of
14 things in the storybooks?

15 MR. BAXTER: Yes, Your Honor. I would
16 start with the books themselves. The books
17 themselves teach, for example, that
18 children's --

19 JUSTICE THOMAS: No, I mean, what I'm
20 talking about is not necessarily what the books
21 say, but, rather, is that -- are the books just
22 there and no more, or are they actually being
23 taught out of the books?

24 MR. BAXTER: No. We know that the --
25 the teachers are required to use the books.

1 When the books were first introduced in August
2 of 2022, the Board suggested they be used five
3 times before the end of the year. That's in
4 the -- that's at 273a in the cert appendix. One
5 of the schools, the Sherwood School, in June,
6 for Pride Month, said that they were going to
7 read one book each day to celebrate Pride Month.
8 The Board's own testimony through Superintendent
9 Hazel said that the books must be used as part
10 of the instruction and that, at 650 -- 642 in
11 the appendix, that discussion will ensue.

12 That was the entire point of
13 withdrawing the opt-outs and removing even
14 notifying parents. They're not even allowed to
15 know. The Board said in that statement it was
16 so that every student would be taught from the
17 inclusivity storybooks. And also, the district
18 court transcript at 63 has counsel's admission
19 that there have -- some of the books have to be
20 used and it can be more.

21 CHIEF JUSTICE ROBERTS: The school
22 board -- alleges that the opt-out system became
23 unworkable. Is that a -- is that a factor we
24 should take into account in deciding whether
25 it -- could be required?

1 MR. BAXTER: Certainly, there --

2 CHIEF JUSTICE ROBERTS: Does it have
3 to be required?

4 MR. BAXTER: -- there could be
5 situations where it could be unworkable. The
6 Board never raised that until after this
7 litigation commenced. When they announced the
8 withdrawal, they said it was because every
9 student needed to read the inclusivity books.
10 When they produced documents in response to an
11 open records request, there was no mention of it
12 not being workable.

13 When -- parents met with the
14 superintendents -- this is at the -- in the
15 Hisham Garti declaration at JA 44 -- the reason
16 given there was inclusivity. There was no
17 mention of administrability until we get to --
18 until the litigation's been filed, and even
19 then, all the Board was able to come up with was
20 the argument that in -- in one instance in one
21 school, there were dozens of students who opted
22 out, where, if the average school size in
23 Montgomery County is 700 students across at
24 least a dozen classrooms, you're talking maybe
25 one student per classroom. That hardly compares

1 with the one in eight students who are opted out
2 for individual education programs, students --
3 15 percent of students in Montgomery County who
4 are taking English for speakers of a second
5 language, the Board's own opt-outs that are
6 required from the same instruction, required by
7 state law to be opted out when the -- when the
8 same books are read in health class.

9 JUSTICE SOTOMAYOR: Counsel, that
10 wasn't the basis of the circuit's -- the
11 district court or the circuit court's denial of
12 preliminary injunction. They never reached the
13 issue of whether or not there was disruption or
14 what the motive was for taking away the opt-out.
15 What they decided was that there wasn't coercion
16 here, that there was mere exposure.

17 I understood from the record that all
18 that was required is that the be -- books be put
19 on the bookshelf. If that's all that's
20 required, is that coercion?

21 MR. BAXTER: Well, that's not what's
22 required here. We know it's undisputed --

23 JUSTICE SOTOMAYOR: Please answer my
24 question.

25 MR. BAXTER: If -- if all that's

1 required is exposure, in our clients are not
2 contesting that that would be -- are not saying
3 that would be a burden in that case.

4 JUSTICE SOTOMAYOR: All right. Then
5 let's go to the second step. Let's see -- let's
6 say there's compulsion to read the book out
7 loud. Is merely being exposed to the reading of
8 book -- of the book out loud coercion?

9 MR. BAXTER: Well, even the Board
10 admits that some -- that exposure could be a
11 burden. And, for example, they say at 25 Note 7
12 of their brief that if they were exposed to
13 pictures of Muhammad, that that would be a
14 burden that they would allow an opt-out for.

15 And, certainly, whether there's a
16 burden will always depend --

17 JUSTICE SOTOMAYOR: Let's go back. Is
18 it generally that the mere exposure -- haven't
19 we made very clear that the mere exposure to
20 things that you object to is not coercion?

21 MR. BAXTER: It would really depend on
22 the individual religious beliefs. Here, for
23 example, our Catholic clients --

24 JUSTICE SOTOMAYOR: So what you're
25 saying is that the exposure of children to the

1 fact that two people are getting married is
2 coercion? That two people of the same sex --
3 are getting married is coercion?

4 MR. BAXTER: So our clients have not
5 raised that objection. I suppose someone --

6 JUSTICE SOTOMAYOR: So then let's --

7 MR. BAXTER: -- could raise that,
8 but --

9 JUSTICE SOTOMAYOR: -- let's talk
10 about what in the portrayals so that the mere
11 reading or looking at the pictures, like looking
12 at an image of Muhammad, would be coercion,
13 because I'm looking at the books. I've looked
14 through all of them. They have two men, Little
15 Bob's -- Bobby's Wedding, where they're getting
16 married. One is black and one is white in this
17 rendition of the book. I had one with mice --
18 the two male mice looked identical to me.

19 Is looking at two men getting
20 married -- is that the religious objection?

21 MR. BAXTER: Again, it would depend on
22 the individual beliefs of the clients. For
23 example, many parents would object to their
24 child being exposed to something like
25 pornography or extreme violence.

1 JUSTICE SOTOMAYOR: I --

2 MR. BAXTER: It would vary from --
3 from --

4 JUSTICE SOTOMAYOR: We're not going
5 there, counsel.

6 JUSTICE KAGAN: So, Mr. Baxter -- I'm
7 sorry.

8 JUSTICE SOTOMAYOR: I'm sorry. Let me
9 just finish this line.

10 JUSTICE KAGAN: Sure.

11 JUSTICE SOTOMAYOR: So just answer my
12 question. Is looking at the pictures -- is
13 there any affidavit from any parent that merely
14 looking at people getting married, holding
15 hands -- none of them are even kissing in any of
16 these books; the most they're doing is holding
17 hands -- that mere exposure to that is coercion?

18 MR. BAXTER: Our parents would object
19 to that. They follow --

20 JUSTICE SOTOMAYOR: All right. Now --
21 so let's move to what I think your objection is.
22 I think your objection is to the student
23 guidance, correct?

24 MR. BAXTER: Our objections would be
25 even to reading books that violate our -- our

1 clients' religious beliefs. They've been --
2 their -- their faith teaches, for example, they
3 shouldn't be exposed to information about sex
4 during their in -- years of innocence without
5 being accompanied by moral principles.

6 And, here, we have both books that
7 violate their moral principles and instruction
8 that tells them that, for example, they can pick
9 their pronouns based on the way they feel, not
10 even just for -- based on their gender but how
11 they feel from moment to moment.

12 JUSTICE ALITO: But, Mr. Baxter --

13 JUSTICE KAGAN: But, Mr. Baxter --

14 JUSTICE ALITO: -- before we -- before
15 we move away from the book that Justice
16 Sotomayor was referring to, Uncle Bobby's
17 Wedding, I've read the -- that book as well as a
18 lot of these other books. Do you think it's
19 fair to say that all that is done in Uncle
20 Bobby's Wedding is to expose children to the
21 fact that there are men who marry other men?

22 MR. BAXTER: No, Your Honor. And this
23 Court in Obergefell promised that parents would
24 be able to continue to teach what this car --
25 Court called decent and honorable beliefs, that

1 same sex marriage is immoral according to their
2 beliefs.

3 And it's a far stretch from that for
4 schools to compel students to attend. Parents
5 are paying taxes that they have to pay at threat
6 of -- of criminal fines or penalties or the
7 expense of private school.

8 And then to have teachers telling them
9 things that are directly contrary to their
10 religious beliefs or outside their beliefs --

11 JUSTICE ALITO: Yeah, the book has --
12 the book has a clear message, and a lot of
13 people think it's a good message, and maybe it
14 is a good message, but it's a message that a lot
15 of people who hold on to traditional religious
16 beliefs don't agree with.

17 I don't think anybody can read that
18 and say, well, this is just telling children
19 that there are occasions when men marry other
20 men -- Uncle Bobby gets married to his
21 boyfriend, Jamie, and everybody's happy and
22 everything is -- you know, it portrays this --
23 everyone accepts this except for the little
24 girl, Chloe, who has reservations about it. But
25 her mother corrects her: No, you shouldn't have

1 any reservations about this.

2 As I said, it has a clear moral
3 message. There may be --

4 JUSTICE SOTOMAYOR: Wait a minute.
5 The reservation is about --

6 JUSTICE ALITO: Can I finish, please?

7 CHIEF JUSTICE ROBERTS: Counsel.
8 Yeah.

9 JUSTICE ALITO: It has a clear moral
10 message. And it may be a good message. It's
11 just a message that a lot of religious people
12 disagree with.

13 MR. BAXTER: And when you add to that,
14 Your Honor, instruction that if -- if a student
15 disagrees, teachers are supposed to say things
16 like: Well, I have friends in that situation,
17 do you think it's really fair for you to agree
18 or to suggest that it's hurtful for students who
19 disagree, and that --

20 JUSTICE KAGAN: Mr. Baxter, I -- I --
21 I guess I'm interested in what the nature of the
22 rule you're asking for is. I mean, when you
23 started, it was -- it was about, you know,
24 matters pertaining to sex.

25 But, as you've answered some of these

1 questions, you've basically said: Well, you
2 know, my clients have religious principles that
3 conflict with what is being taught.

4 And -- is -- does it go that far? In
5 other words, you know, does it matter what the
6 subject matter is? Does it matter what the age
7 of the child is? Does it matter what the nature
8 of the instruction is? If so, how does it
9 matter?

10 Or, in the end, is what you're saying:
11 When a religious person confronts anything in a
12 classroom that conflicts with her religious
13 beliefs or her parents' that -- that the parent
14 can then demand an opt-out?

15 MR. BAXTER: It's really the latter,
16 Your Honor. And that's exactly what Montgomery
17 County allowed in its own religious diversity
18 guidelines. Anything that violated a
19 student's -- or imposed a substantial burden, in
20 their language, on a student's religious or
21 parent's religious beliefs, they had the right
22 to opt out. And that was --

23 JUSTICE KAGAN: So this is a rule that
24 applies as well to a 16-year-old in biology
25 class saying, you know, I don't -- you know, the

1 parents say: I don't want my child to be there
2 for the classes on evolution or on other
3 biological matters which conflict with my
4 religion? It would apply just as well to that?

5 MR. BAXTER: We know that those don't
6 happen very often because countries -- or
7 schools --

8 JUSTICE KAGAN: But it would if there
9 were?

10 MR. BAXTER: Certainly. And schools
11 have -- there are laws, for example, in states
12 that allow students to opt out of dissection
13 because they don't want to participate in that.

14 And there are schools that allow --
15 there are schools across the country -- Hawaii,
16 which has a school district about the same size
17 as Montgomery County, which allows --

18 JUSTICE KAGAN: And if that's the --
19 if -- so that's a pretty broad rule. If that's
20 the -- let me ask what the next step of that is.

21 Suppose there are things that, you
22 know, students opt out of, and then, you know,
23 the parents think it's just not really fair that
24 my student -- that my kid has to leave the
25 classroom or has to put on, you know, headphones

1 or, you know, has to otherwise be made to feel
2 isolated. So the next challenge is really the
3 class can't do this either.

4 Would -- what -- what would your
5 position be on that?

6 MR. BAXTER: Well, no student, Your
7 Honor, has the right to tell the school what to
8 teach or to tell other students what they have
9 to learn. You would clearly run into problems
10 in that situation where --

11 JUSTICE KAGAN: But, to the extent
12 that this is a rule about people being able to
13 access public education in a sort of equal
14 manner, the parent might say: My child is not
15 being able to access education in that equal
16 manner because, you know, he's made to leave the
17 classroom or he's made to, you know, do
18 something else that isolates him from the class.

19 I mean, certainly, that's an argument
20 that we've often heard with respect to prayer
21 and that people have accepted with respect to
22 prayer -- accepted with respect to prayer, that
23 it's kind of like not a sufficient answer to
24 just say: Don't worry, the prayer can go on,
25 you don't have to be part of it.

1 So I'm just wondering whether that's
2 the next step here.

3 MR. BAXTER: No, Your Honor, I don't
4 think so, because the -- of course, under the
5 Establishment Clause, there are different rules,
6 but under the Free Exercise Clause, we think
7 that the -- on strict scrutiny, those parents
8 would -- would always lose if they're trying to
9 direct the school what to teach or tell other
10 students what they must teach.

11 We know also that these --

12 JUSTICE KAGAN: Okay. But you are
13 suggesting -- okay. So that's a -- that's a --
14 a -- a straightforward answer. I appreciate
15 that.

16 But just to go back -- and this was
17 also a straightforward answer, which I
18 appreciate. But, in terms of opt-out, you're
19 basically saying opt out for anything. It's --
20 it's really the parents that get to decide --
21 you know, assuming that their beliefs are
22 sincere, right, it's really the parent that gets
23 to decide. It doesn't matter the kid's age,
24 doesn't matter sex, not sex. Doesn't -- doesn't
25 really matter this whole idea, I suppose, of

1 pressure or coercion. You know, if, like, just
2 looking at a book would be in conflict with
3 religious principles, that would be enough?

4 MR. BAXTER: Well -- I would -- just
5 to be clear, under Yoder, the Court left open
6 what would happen if there were kids who
7 objected.

8 But we know that these things -- you
9 know, schools around the country already have
10 these very broad opt-out policies across the
11 curriculum: in Hawaii for anything
12 controversial; in Arizona for anything that
13 parents find -- deem harmful.

14 And we just don't find these kinds of
15 cases or these kinds of burdens where -- parents
16 are bringing extreme examples. You know,
17 parents with kids really don't have a lot of
18 time to be suing the school board, and they're
19 looking for a reasonable compromise.

20 JUSTICE SOTOMAYOR: I'm sorry, I -- I
21 have a whole list of cases where parents have
22 objected to "biographical" -- I'm quoting --
23 "biographical material about women who have been
24 recognized for achievements outside of their
25 home" because some people believe women should

1 not work.

2 So too parents have objected to
3 teachers reading books featuring divorce,
4 interfaith marriage, or immodest dress. Forget
5 about the evolution because that's come too,
6 you've -- just said.

7 Are these all coercive?

8 MR. BAXTER: Well, again, it's whether
9 they -- whatever "coercive" means, they do --
10 they do -- could create a burden. This Court
11 has defined "burden" very simply that if someone
12 is trying to exercise a sincere religious belief
13 and the government is prohibiting or inhibiting
14 their ability to exercise, that creates a
15 burden.

16 JUSTICE SOTOMAYOR: So say if
17 someone's prohibiting just looking at something
18 that they object to, that that's burdening their
19 religion?

20 MR. BAXTER: Again, we don't see these
21 cases arise in -- in reality. And -- and --

22 JUSTICE SOTOMAYOR: For reality's
23 sake, you see interfaith couples all the time
24 walking around. You see interracial couples
25 walking -- walking around. You see women on

1 this Court in positions of work outside the
2 home.

3 MR. BAXTER: And no one here is
4 raising a -- a -- a burden in that situation.
5 We're far beyond that where our
6 indoctrination --

7 JUSTICE SOTOMAYOR: But people are
8 in -- but there are cases to that effect in
9 schools.

10 MR. BAXTER: And those cases, you
11 know, in --

12 JUSTICE SOTOMAYOR: So tell me where
13 you're going to draw the line --

14 MR. BAXTER: The --

15 JUSTICE SOTOMAYOR: -- other than
16 saying that if anyone objects to a book -- well,
17 you want more than that because the request here
18 is to instruct the school to tell you its
19 curricula, to guess at what you might find
20 offensive, and then let you opt out, because
21 that's the injunction you're asking for, isn't
22 it? You're asking for the ability for schools
23 to provide you with information about what's
24 being taught and, if you object to it on
25 religious grounds, to opt out.

1 MR. BAXTER: Your Honor, I see my
2 light is on. May I answer the question?

3 CHIEF JUSTICE ROBERTS: You may, yes.

4 MR. BAXTER: Your Honor, even under
5 Yoder -- without Yoder, under a Smith regime,
6 in, here, those things would trigger strict
7 scrutiny.

8 If you're in a regime where there's
9 direct discrimination, like we have here -- we
10 have students who are being told that they can
11 opt out for certain religious reasons but not
12 other religious reasons -- then that's always
13 going to get you to strict scrutiny.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 As far as simply looking at
17 something -- looking at the image of Muhammad is
18 a serious matter for someone whose -- follows
19 that faith, right?

20 MR. BAXTER: That's correct, Your
21 Honor. And Barnette already helps -- provides
22 some guidance on this, that forcing people to do
23 things that directly violate their -- their
24 faith violates the -- the Free Exercise Clause.

25 CHIEF JUSTICE ROBERTS: I don't know

1 how often it comes up in the schools, but our
2 religious -- our religion clause jurisprudence
3 does have the element of sincerity.

4 MR. BAXTER: That's correct. There
5 has to be a religious belief. It can't be just
6 something that you disagree with for political
7 or philosophical reasons. It must be sincere.
8 There's also a substantiality requirement that
9 depends on the -- objective pressure that the
10 government's putting on you.

11 All of those things provide a -- a
12 significant screen. And just we know from
13 history, from common sense and looking at what's
14 happened in schools that have these broad
15 opt-out policies, like Montgomery County itself
16 had prior to this lawsuit, anything that
17 violated your -- your beliefs, you could opt
18 out, and we didn't see these kinds of -- and
19 when they have come up, courts have dealt with
20 them in reasonable ways.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas?

24 JUSTICE THOMAS: I think you mentioned
25 Yoder a couple of times. Would you spend a

1 minute on how you -- Yoder would -- role it
2 would play in your -- in our analysis or should
3 play?

4 MR. BAXTER: Thank you, Your Honor.
5 Yoder looked in significant part at the
6 coerce -- unique coercive environment of the
7 public schools. It referred to the hydraulic
8 insistence on conformity that you find in
9 schools and removing parent -- children from
10 their parents for eight hours a day.

11 Here, we have a situation that's even
12 more egregious than in Yoder, where you have
13 children of an extremely young age being
14 indoctrinated in a topic that's known to be
15 sensitive -- every school in the country allows
16 opt-outs since sex ed has been introduced --
17 unique because of its capacity to evoke
18 curiosity in children, and -- a curriculum
19 that's designed to disrupt students' either/or
20 thinking on -- on sexuality and gender identity.

21 In Yoder, you had incidental
22 encounters with values that were contrary to
23 those of the Amish. And so, in many ways, this
24 case is easier than Yoder.

25 JUSTICE THOMAS: Whose interests are

1 we concerned with here? Is it the interests of
2 the children, or is it the interests of the
3 parents?

4 MR. BAXTER: Thank you, Your Honor.
5 We have named children, but -- for the
6 preliminary injunction, which, again, was filed
7 two years ago, we have raised the -- the rights
8 of the parents.

9 CHIEF JUSTICE ROBERTS: Justice Alito?

10 JUSTICE ALITO: You've made a very
11 broad argument here at times, and it might be
12 good, it might not be good, but let's focus on
13 what's actually at issue in this particular
14 case.

15 What are the ages of the children who
16 are involved here?

17 MR. BAXTER: These books were approved
18 for pre-K, which in Montgomery County can start
19 as early as 3 if they're going to turn 4 that
20 fall.

21 JUSTICE ALITO: And it goes up to
22 what?

23 MR. BAXTER: The -- the books that
24 we've all talked about go through grade 6.

25 JUSTICE ALITO: All right. So you're

1 talking about children maybe in the age of 5 to
2 11 or 4 to 11. Now would you agree that at a
3 certain age -- at that -- at a certain age,
4 students are capable of understanding this
5 point, which probably is not a point that can be
6 understood by a four- or five-year old, and that
7 is that my teacher, who is generally telling me
8 that certain things are right and that certain
9 things are wrong, isn't necessarily going to be
10 correct on everything? It is possible for me to
11 disagree with him or her on certain subjects?
12 Would you agree that there comes a point when a
13 student is able to make that distinction?

14 MR. BAXTER: That's right. And many
15 of our clients' objections would be diminished
16 as their children got older. But, here, we're
17 in a situation where Montgomery County's own
18 principals objected that these books were
19 inappropriate for the age, that they were
20 dismissive of religion and shaming toward
21 children who disagree. The Board itself
22 withdrew two of the books for what it said were
23 content concerns because it finally agreed that
24 what parents and petition -- and its own
25 principals were saying was accurate.

1 JUSTICE ALITO: Yeah. And one final
2 factor that may distinguish this particular case
3 from some of the others that you have -- been
4 asked to express a view about, an -- and you did
5 touch on this, is the fact that it concerns sex
6 and -- and gender and that the -- the Maryland
7 legislature itself has recognized these subjects
8 raise special concerns and has provided for an
9 opt-out from the health classes where these
10 matters are discussed.

11 MR. BAXTER: That's right. And,
12 currently, from -- in Montgomery County, you can
13 opt out from the very same instruction during
14 health class, but then you're required to stay
15 during -- during story time.

16 JUSTICE ALITO: All right. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 JUSTICE SOTOMAYOR: Counsel, a couple
20 of questions to clarify things.

21 Uncle Bob's Wedding, the character,
22 the child character, wasn't objecting to
23 same-sex marriage. She was objecting to the
24 fact that marriage would take her uncle away
25 from spending more time with her, correct?

1 MR. BAXTER: Again, it would be -- you
2 know, courts would be engaged in religious
3 discrimination entanglement if they --

4 JUSTICE SOTOMAYOR: I'm asking you to
5 answer my question. It wasn't that she was
6 objecting to gay marriage qua gay marriage,
7 period. She was objecting to having her uncle's
8 time taken by someone else?

9 MR. BAXTER: I'm not sure that's
10 correct, Your Honor. I think, for a child of
11 that age --

12 JUSTICE SOTOMAYOR: Then now we --
13 now --

14 MR. BAXTER: -- it's hard to express
15 what their actual concerns are.

16 JUSTICE SOTOMAYOR: Well, when the
17 character says "he'll have less time for me," it
18 seems self-evident, isn't it?

19 MR. BAXTER: You know, Your Honor,
20 I -- again, Montgomery County's own principals
21 objected to this --

22 JUSTICE SOTOMAYOR: All right. Now
23 let's go back to this question of age, okay,
24 and -- and what teachers are saying or not
25 saying.

1 Do you want a special rule for
2 children between kindergarten and sixth grade?

3 MR. BAXTER: Well, if the Court wanted
4 to go there, that certainly would make common
5 sense. Parents everywhere know that children
6 are especially vulnerable when exposed --

7 JUSTICE SOTOMAYOR: Where in our case
8 law would you see that as just mere age is
9 coercion -- exposure is mere coercion of a
10 certain age?

11 MR. BAXTER: Well, this Court has
12 frequently -- you know, recognized that, for
13 example, children lack the maturity to make
14 decisions to discern sometimes between truth and
15 error, to weigh what their parents are saying
16 versus what their teachers are saying.

17 JUSTICE SOTOMAYOR: So, if some of
18 this objection -- you said you don't have an
19 objection to showing an interracial marriage.
20 You don't have an objection qua objection to
21 merely gay couples -- shown to -- to marrying as
22 long as you don't have approval of that? Is
23 that what you would object to?

24 MR. BAXTER: Well, Your Honor, again,
25 it would depend on the individual's beliefs.

1 And this Court has already held, for example, in
2 Bob Jones that the burden --

3 JUSTICE SOTOMAYOR: So, if none of
4 the -- all of the parents -- many of the
5 affidavits that the parents put here said they
6 don't mind teaching respect and kindness towards
7 people who are different. The objections appear
8 to be with some of the teacher instructions, the
9 ones having to do with altering the mind-set of
10 children or the ones talking about gender being
11 a guess at birth. Those were the things that I
12 saw the parents objecting to.

13 MR. BAXTER: The parents object to the
14 books and to the instructions. There's no
15 question that together --

16 JUSTICE SOTOMAYOR: We can look at the
17 record --

18 MR. BAXTER: -- and even separately
19 the books go to indoctrination more than
20 exposure.

21 JUSTICE SOTOMAYOR: We can look to the
22 record for that, correct?

23 MR. BAXTER: I'm sorry?

24 JUSTICE SOTOMAYOR: We can look to the
25 record for it?

1 MR. BAXTER: That's correct.

2 JUSTICE SOTOMAYOR: All right. Thank
3 you.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: I want to take you
6 back to some of the questions that Justice Alito
7 was asking because I too was struck by these
8 are, you know, young kids' picture books, and on
9 matters concerning sexuality, I suspect there
10 are a lot of non-religious parents who weren't
11 all that thrilled about this, and then you, you
12 know, add in religion, and -- and that's -- you
13 know, even more serious.

14 But I guess I'm searching for what in
15 your legal arguments would allow us to draw
16 lines in this area, and I'm -- I'm -- I'm kind
17 of not finding it from what you were saying to
18 me in our earlier -- or -- or what you said to
19 Justice Alito because, when Justice Alito said
20 how about that 17-year-old, you said, well, many
21 parents' objections would decrease.

22 But that still indicates that if
23 that -- if a parent said no even with respect to
24 that 17-year-old, I still care about this, I
25 want an opt-out, you're not giving anything that

1 would allow lines to be drawn. And I'm just
2 curious if you think lines can be drawn and
3 where they would be drawn and on the basis of
4 what First Amendment doctrine they would be
5 drawn.

6 MR. BAXTER: We think there are lines
7 that can be drawn there, the same lines that
8 this Court has drawn in every other free
9 exercise case. And the burden -- a -- a
10 plaintiff has to show that its beliefs are
11 religious, that they are sincere, they have --
12 there has to be a -- substantial infringement
13 and -- or burden or pressure.

14 And then, on the strict scrutiny side,
15 there are also --

16 JUSTICE KAGAN: But I'm -- I'm -- I'm
17 hearing you saying that the burden that you're
18 saying -- and, of course, we're just assuming
19 that all these people have sincere religious
20 beliefs. Let's just assume that.

21 But what I'm hearing you saying is the
22 burden is basically up to the parent to decide
23 this conflicts with my religious beliefs, I want
24 an opt-out. Is that correct?

25 MR. BAXTER: Yes. And on the Sherbert

1 side, under strict scrutiny, they would have to
2 first show that there is a -- a law that's not
3 neutral or generally applicable, so there's a
4 limit there.

5 And on the Yoder side, if this Court
6 didn't want to go all the way to address the
7 issues that aren't present in this case, it
8 could rely on the uniquely coercive environment
9 of the -- environment of the schools.

10 And now putting those kinds of
11 issues --

12 JUSTICE KAGAN: Okay. So those --

13 MR. BAXTER: -- on the burden side --

14 JUSTICE KAGAN: -- those still, it's
15 like just pretty -- I mean, you're -- I'm -- I'm
16 really searching for something, and I can -- I
17 know that you realize that, and you're still not
18 giving me anything other than, if it's in a
19 school and a sincere religious parent has an
20 objection, that objection is always going to
21 result in an opt-out --

22 MR. BAXTER: That's the first --

23 JUSTICE KAGAN: -- no matter how --
24 what -- no matter what the instruction is like,
25 no matter what the materials are, no matter how

1 old the kids are.

2 MR. BAXTER: And that's the rule that
3 schools everywhere in the country are -- are --
4 are working under right now. By their own
5 choice, there -- that was Montgomery County's
6 own rule before this lawsuit came in. And there
7 were never these kinds of problems until it
8 really introduced a doc -- a curriculum that was
9 clearly indoctrinating students in -- in things
10 that the principal said was introducing things
11 as fact that aren't fact.

12 JUSTICE KAGAN: Yeah, but once we
13 articulate a rule like that, you're going to
14 have a lot of parents, it seems to me -- I -- I
15 don't think you can say just because it hasn't
16 happened, once we say something like what you're
17 asking us to say --

18 MR. BAXTER: Well --

19 JUSTICE KAGAN: -- it'll be like, you
20 know, opt-outs for everyone.

21 MR. BAXTER: Well, certainly, the
22 government always wants to put these things on
23 the burden side instead of the strict scrutiny
24 side.

25 We heard these arguments in Hobby

1 Lobby, where there was a lot of concerns about
2 what would happen, in O Centro, what would
3 happen with drugs. And -- and, in reality, we
4 didn't see those kinds of -- of floods happen --
5 and when they have, the courts have managed to
6 deal with them without any significant
7 difficulty.

8 JUSTICE KAGAN: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch?

11 JUSTICE GORSUCH: You've spoken a
12 little bit about Yoder today. I'd like you --
13 hear your thoughts about the Smith side of the
14 argument and the Fourth Circuit's suggestion --
15 I think it's a fair reading of the footnote but
16 maybe not -- I'd like both sides to think about
17 this -- whether, if -- if you fail Smith's
18 neutral and generally applicable rule, whether a
19 plaintiff still has to show a substantial burden
20 or whether you go straight to strict scrutiny.

21 MR. BAXTER: I think you would just
22 have to go -- I mean, I think, at that point, if
23 you've shown lack of neutrality and general
24 applicability, you would still have to have an
25 injury, maybe something --

1 JUSTICE GORSUCH: For constitutional
2 Article III purposes?

3 MR. BAXTER: Con -- exactly.

4 JUSTICE GORSUCH: But do you have to
5 show a substantial burden, or is -- is that law
6 that is not neutral, that discriminates against
7 religion auto -- go -- does that go straight to
8 strict --

9 MR. BAXTER: I think the standing
10 injury would be sufficient, and here's an
11 example why. If you look at the Board's, for
12 example, revised diversity guidelines, they try
13 to draw a line between curricular activities and
14 extracurricular activities.

15 Yet they also say -- and this is at
16 674 of the appendix -- that you can opt out of
17 in choir or band if you object to the religious
18 songs, even -- and if -- is that curricular or
19 extracurricular?

20 On -- they also say on the
21 extracurricular side you can opt out from things
22 like Valentine's Day if you don't like the
23 religious overtones of that holiday.

24 But, when the -- when Sherwood
25 Elementary School announced that it was going to

1 read one book of the inclusivity books every day
2 in June for the month of moon -- for the month
3 of June to celebrate Pride Month, you couldn't
4 opt out.

5 So there's this discrimination where
6 you get -- some religious reasons get opted out,
7 some don't. There is these labels about
8 curricular, extracurricular, English and
9 language arts versus health. But, in the end,
10 it's the same -- the same thing, and some
11 students are getting opt-outs, and that -- and
12 some aren't. That discrimination alone is a
13 burden that gets us to strict scrutiny.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh?

16 JUSTICE KAVANAUGH: A few questions.

17 What's your understanding of how the
18 surrounding counties are dealing with this,
19 Frederick County, Howard County, Prince George's
20 County, Anne Arundel County, and the like?

21 MR. BAXTER: Yeah, Carroll County, for
22 example, has taken the position that it will
23 teach inclusivity without indoctrinating
24 students. And so it's not introducing inform --
25 this ideology -- extreme ideology about gender,

1 whether your body says anything about your
2 gender, whether doctors guessed at your sex,
3 whether your pronouns change day to day based on
4 the weather or not, whether you should petition
5 for, you know -- you know, unisex bathrooms.
6 It's -- it's teaching inclusivity without
7 those -- that indoctrination.

8 And -- and our clients agree, every
9 student deserves to be respected and loved,
10 and -- and nobody disagrees with that. But you
11 don't do that by forcing others -- in fact,
12 religion is another one of the categories in the
13 equity regulation that is required to be
14 respected.

15 The principals, when they first
16 respond to this -- this curriculum, their
17 concern was for the religious students, that
18 they were going to be dismissed and shamed for
19 their beliefs.

20 JUSTICE KAVANAUGH: And I think you
21 just said this, but you're not seeking to
22 prohibit instruction in the classroom, you're
23 just seeking not to be forced to participate in
24 that instruction?

25 MR. BAXTER: That's correct.

1 JUSTICE KAVANAUGH: The term
2 "coercive," I think, has been used in some of
3 the colloquy, but the right term is "burden,"
4 isn't that correct?

5 MR. BAXTER: That's correct, Your
6 Honor. And -- and if you think about their
7 example of saying, like, the court -- the Fourth
8 Circuit said that, you know, the students were
9 never asked to change their religious beliefs.
10 Is it enough if you just ask them: Will you
11 change your religious beliefs? Or does there
12 have to be something more? I mean, that is
13 really a -- not a workable standard.

14 And I -- you know, schools should not
15 be treated differently than any other government
16 entity as far as what their obligation is. And
17 it somewhat flips the Bill of Rights on its head
18 if we're worried more about extreme examples
19 that don't happen to protect the government from
20 the parents as opposed to parent -- protecting
21 the parents' fundamental rights to direct the
22 religious upbringing of their children.

23 JUSTICE KAVANAUGH: And then, in terms
24 of sincerity, in other words, if you're lying
25 about your religious belief, that can be

1 inquired -- into, but not the legitimacy, the
2 reasonableness, the acceptability, the
3 consistency. None of that -- a court has no
4 business questioning any of that about someone's
5 religious beliefs as I understand our case law.

6 MR. BAXTER: That's right, Your Honor.
7 In this case, again, the fact that the Board has
8 admitted that they would give opt-outs to
9 Muslims who object to their children viewing an
10 image of the Prophet Muhammad but not our Muslim
11 clients who object to their students reading
12 these books shows that that kind of analysis
13 would entangle courts in religious questions and
14 invite religious discrimination.

15 JUSTICE KAVANAUGH: And then I guess I
16 am a bit mystified as a life-long resident of
17 the county how it came to this.

18 Can you just tell us what happened
19 when -- in March of '23, you know, what -- what
20 happened in terms of the objections and how the
21 School Board responded to give us a little
22 bit --

23 MR. BAXTER: Well, I share your
24 concern. My kids graduated -- two of my kids
25 graduated from MoCo and were opted out when

1 they -- when they asked on their own accord to
2 opt out of some instruction on -- on sex
3 education.

4 And what happened is -- we're not even
5 entirely sure because, for the entire first
6 year, the Board promised in multiple places,
7 on -- on Fox News and other media, that parents
8 would be -- be notified and then they would be
9 opted out.

10 The last notice happened on March 22,
11 2023. The very next day, overnight, with no
12 explanation, the Board came out and said: We're
13 changing the rule because we -- because we want
14 every -- all students to be instructed on
15 inclusivity. That's at 547 in the appendix,
16 that emphasis on all students have to receive
17 this instruction, nothing about
18 administrability.

19 And then, from there on -- even then,
20 they said: If we've already told you you can
21 opt out, we'll let you do that, but new -- more
22 parents can't ask.

23 And then it wasn't until later in the
24 year when they actually revised their
25 guidelines, which still allow certain religious

1 opt-outs and just not others.

2 So this was clearly targeted at
3 religious parents objecting --

4 JUSTICE KAVANAUGH: But then
5 complaints were raised, right?

6 MR. BAXTER: That's right. Hundreds
7 of parents -- complained. These were mostly --
8 according to news articles, mostly families from
9 Muslim -- faith and -- Ethiopian Orthodox who
10 were objecting.

11 When they -- when they spoke to the
12 Board, the Board accused them of using their
13 religious beliefs as another reason to hate,
14 accused a young Muslim girl of -- of parroting
15 her parents' dogma, and then accused the parents
16 of aligning with racist xenophobes and white
17 supremacists.

18 And so, again, in -- there's no
19 question in this case that there is a burden,
20 that it was imposed with animosity, and that
21 it's discriminating against our clients because
22 of their religious beliefs.

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

1 JUSTICE BARRETT: So, counsel, we've
2 talked a lot about burden, and I'd like to get a
3 definition.

4 So Justice Sotomayor's questions, I
5 think, track what the Fourth Circuit said, which
6 is that compulsion is required.

7 That's not your position, that
8 compulsion is too far, right? So can you
9 precisely define for me what it means to have a
10 burden?

11 MR. BAXTER: Yes. I think there's
12 three main ways this Court has reviewed that.

13 Under Yoder, it would be: Is there
14 substantial interference with the parents'
15 ability to direct the religious upbringing of
16 their children? We think we've shown that here.

17 Under cases like Sherbert that have
18 continued through to Fulton, it's: Are the
19 parents being pressured to abandon or modify
20 their religious beliefs in order to access a --
21 a public benefit, like public education?

22 And then I think we also have what I
23 think Justice Gorsuch may have been suggesting,
24 just if there's straight-up discrimination,
25 where some religious students are opted out and

1 others aren't, then that itself would also be a
2 burden.

3 And I think we satisfy any one of
4 those tests.

5 JUSTICE BARRETT: Okay. I have
6 questions for you about those tests, but I'm
7 going to bracket them to just follow up on the
8 burden question.

9 Substantial interference from Yoder,
10 so would you say you could root it in that
11 because it's rooted in the case? Is it somehow
12 rooted in the definition of "prohibit" in the
13 First Amendment?

14 Because it seems to me that, you know,
15 the questions that you're getting are about line
16 drawing. I mean, Justice Kagan was making this
17 point. And one place where some of that line
18 drawing might happen is in the definition of
19 "burden."

20 So I think the definition of "burden"
21 is important, and, really, that's the -- the
22 main thing that's before us. The question of
23 whether you get an op-out -- opt-out really goes
24 to the Smith analysis or strict scrutiny under
25 Yoder. We don't even have to decide that,

1 right? We don't have to decide whether you get
2 the opt-out. We just have to decide if the
3 Fourth Circuit accurately defined what a burden
4 is.

5 MR. BAXTER: I mean, the Court doesn't
6 have to, it's true. I think there are multiple
7 reasons why this Court should.

8 JUSTICE BARRETT: I know you want us
9 to. But we don't have to.

10 MR. BAXTER: Correct.

11 JUSTICE BARRETT: Really, what we have
12 to do is nail down what it means to burden the
13 right, right?

14 MR. BAXTER: That's correct.

15 JUSTICE BARRETT: Okay. So
16 unreasonable interference, and you would root
17 that primarily in -- in Yoder for that strain of
18 the doctrine?

19 MR. BAXTER: Correct.

20 JUSTICE BARRETT: Okay. Now what kind
21 of a claim are you bringing? Are you bringing a
22 hybrid rights claim for purposes of Yoder? Are
23 you kind of bringing all of them, like a
24 straight-up free exercise claim, a Smith claim?
25 I mean, it's a little bit hard to pin down.

1 MR. BAXTER: Yeah, I think we're
2 bringing all of them. We think, in Smith, the
3 Court said that Yoder fell outside of its rule.
4 Excuse me. And -- and so we think that that's a
5 separate track. And whatever -- whatever the
6 Court meant by hybrid rights or other rights
7 that were at issue in -- in Yoder, we have those
8 same here, however you define that. This is
9 almost exactly the same situation where parents
10 are concerned about what their children are
11 being taught in the highly coercive environment
12 of the public schools. And -- and, here, we
13 have even more egregiously the curriculum
14 designed -- the Board said, when you select
15 these books, we want you to select books that
16 will disrupt cis-normativity, disrupt
17 hetero-normativity. And so we think that
18 whatever -- whatever Smith meant by hybrid
19 rights that were -- may have been at issue in --
20 in Yoder, we -- we meet that definition.

21 JUSTICE BARRETT: Do we have to
22 embrace the hybrid rights theory in order to --
23 to analyze your claim or your -- your definition
24 of burden for purposes of Yoder? Do we have to
25 say Yoder is about hybrid rights and -- and this

1 is why you satisfy that definition?

2 MR. BAXTER: I don't think so, Your
3 Honor. This Court, as recently as in Espinoza,
4 recognized Yoder as a case being about the free
5 exercise right of parents. The questions
6 presented in Yoder were all about free exercise.
7 And so I don't think that any side statements
8 that were made in Smith have to govern how this
9 Court treats that rule here.

10 JUSTICE BARRETT: Okay. And now let
11 me ask you about the burden in this case.

12 So there's been a lot of talk about
13 exposure. The Fourth Circuit said this is just
14 about exposure. You've pointed out, you know,
15 that in cases like, you know,
16 IntersectionAllies, there's actually in the
17 book -- you know, it -- it presents a world
18 view, right?

19 MR. BAXTER: And it says let's disrupt
20 the norms, that book.

21 JUSTICE BARRETT: Let's disrupt the
22 norms. And -- and -- and many of the books,
23 it's not just pictures; it's actually the text
24 is -- you know, it's -- it's talking about there
25 are not just two genders, embracing, you know,

1 non-binary and -- and pronouns, et cetera.

2 So that's exposure, though, to those
3 ideas. It's not just exposure to the pictures
4 of, you know, the two men getting married. It's
5 exposure to the ideas.

6 MR. BAXTER: That's correct.

7 JUSTICE BARRETT: But, to clarify,
8 what are your clients objecting to? Are they
9 objecting only to exposure, or are they
10 objecting to what they're calling
11 indoctrination?

12 MR. BAXTER: If, by exposure, you mean
13 having the books read to them, they do object to
14 that. They're not objecting to the books being
15 on the shelf or available in the library without
16 a teacher requiring them to read it or reading
17 it to them.

18 JUSTICE BARRETT: So you would not be
19 making the same claim based on your clients'
20 religious beliefs if they were just on the
21 shelves or just in the library?

22 MR. BAXTER: Correct.

23 JUSTICE BARRETT: Could another parent
24 bring that claim?

25 MR. BAXTER: I -- I suppose they

1 could, but then you would -- I mean, again, we
2 don't see these kinds of claims happening, but
3 they would almost certainly lose because it
4 would -- it would -- strict scrutiny would
5 easily be satisfied if every student were
6 allowed to say I want this book or not that
7 book. I mean, no -- no student has the right to
8 tell the school which books to choose or what
9 curriculum to teach or what other students will
10 have to learn.

11 And so we think that would easily --
12 those would easily fail under strict scrutiny.

13 JUSTICE BARRETT: Okay. So it's not
14 about exposure. It's not about books on the
15 shelf. It's not about books in the library.
16 It's about actually reading the books with the
17 text that communicates the ideas that are
18 contrary to your clients' sincerely held
19 religious beliefs?

20 MR. BAXTER: Right. Their beliefs --
21 they follow, for example, the papal exhortation
22 under Familiaris Consortio that they shouldn't
23 expose their children during their -- during
24 their innocent years to instruction on sex
25 that's disconnected or disassociated from moral

1 principles.

2 And so that's -- that's what they're
3 and -- and, you know, the Mahmoud family, they
4 also have an objection to any kind of discussion
5 for young children outside of their family
6 circle, as do many families, as the Court's
7 noted.

8 JUSTICE BARRETT: Okay. And so I -- I
9 want to talk about the public benefit analysis.
10 So the government frames this in terms of a
11 public education as a public benefit, and your
12 friends on the other side do too.

13 And I'm just trying to figure out if
14 that's the right way to think about this
15 because, in Maryland, you're compelled to send
16 your children to public schools, and it's a
17 misdemeanor if you don't and you're fined if you
18 don't. And it's true that the statute gives you
19 an exemption to that compulsion if you choose
20 home-schooling or private school and, you know,
21 what is it, like, thorough and comparable --

22 MR. BAXTER: Right.

23 JUSTICE BARRETT: -- instruction?

24 But this isn't like a public benefit
25 like we apply for, you know, rubber tires for

1 our playground or, you know, we apply for a
2 license to engage in some kind of activity.
3 There's actually a compulsion here.

4 So is public benefit the right way to
5 think about this?

6 MR. BAXTER: Well, I think, if you --
7 if the Court does think about it in that
8 context, it's a much more valuable benefit than
9 just getting access to rubber tires or some of
10 the other things this Court has found burdened
11 religion. And so -- but also, I think the
12 coercive element is -- is adequate for this
13 Court to reach a conclusion in favor of my
14 client.

15 JUSTICE BARRETT: Well, which way do
16 you think it fits better? I mean, you're
17 compelled to -- send your child to public school
18 on pain of fine unless you take advantage of an
19 exemption. So it's just hard for me to see how
20 it's a public benefit in the same way that some
21 of our cases have talked about public benefit.
22 So which model -- I mean, I understand you don't
23 want to disclaim public benefit, but which way
24 do you think it fits best?

25 MR. BAXTER: Well, I think, certainly,

1 bar -- the Barnette example is a very good
2 example of where you're actually compelling
3 children to do things that are against their
4 beliefs, and I think that would be a -- that's a
5 very fitting model for this case.

6 JUSTICE BARRETT: Okay. Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Jackson?

9 JUSTICE JACKSON: So I guess I -- your
10 colloquy with Justice Barrett makes me wonder
11 whether this case is really the right vehicle to
12 evaluate any of these issues. I mean, how can
13 we say that you meet any definition of the
14 burdens -- Justice Barrett went over several
15 different versions of them -- when we don't even
16 know how these books are actually being used in
17 the classroom? I mean, this was what I
18 understood the Fourth Circuit's primary holding
19 to be, that the record is thread-bare. It
20 contains no information about how any teacher or
21 school employee has actually used any of the
22 books or what any child has been taught in
23 conjunction with their use.

24 And it seems that aspects of your
25 argument are turning on whether the books are

1 just on the shelves or whether students are
2 being taught. And so why wouldn't we wait until
3 we have a record regarding those things before
4 we make any legal pronouncements about what's
5 happening in this case?

6 MR. BAXTER: Well, two responses, Your
7 Honor. First, this is a preliminary injunction,
8 but if you think about the case, for example,
9 Brown versus, you know, Hot, Sexy, and Safe, is
10 that -- and I don't even want to describe what
11 happened in that case, but should that kind of
12 graphic sex simulation between -- with a
13 student --

14 JUSTICE JACKSON: No. I -- I --
15 but --

16 MR. BAXTER: -- and a teacher have to
17 happen before you bring a claim?

18 JUSTICE JACKSON: But I need you to
19 focus on my question. You -- this is a -- this
20 is a preliminary injunction. I appreciate that.
21 When you seek a preliminary injunction, you
22 actually have to have a factual record that is
23 the basis for the court to make a determination
24 in your favor that some conduct that you're
25 complaining about needs to be enjoined.

1 And what's confusing to me and hard,
2 really hard, in this situation is that we have a
3 lot of sincerely held beliefs and concerns and
4 children and principals, and I see all of those
5 things and so really want to be careful about
6 making the pronouncement that relates to this.

7 I don't understand how we can do it on
8 this record because we can't know -- we don't --
9 we don't at this moment, based on the record
10 you've provided, know that these books aren't
11 just sitting on the shelves. And you've said
12 that if that's the case, that's not going to be
13 enough.

14 MR. BAXTER: I disagree, Your Honor.
15 The record is undisputed. And I again will
16 refer you to the district court transcript at
17 63, where counsel said that --

18 JUSTICE JACKSON: So you're saying the
19 Fourth Circuit is wrong when it says, "We don't
20 have any information about how any teacher or
21 school employee has actually used any of the
22 books?"

23 MR. BAXTER: The -- the -- the -- the
24 court of appeals did not dispute that some of
25 the books have to be used. And we have all --

1 JUSTICE JACKSON: No, I understand
2 that. I --

3 MR. BAXTER: -- of the teachers'
4 instructions that the Board's not disputed.

5 JUSTICE JACKSON: I understand that,
6 but the Fourth Circuit made a ruling that we
7 don't know "what any child has been taught in
8 conjunction with their use."

9 So are you saying that you do have
10 affidavits and information about teachers in the
11 classroom and what they've taught children of
12 different ages about these books?

13 MR. BAXTER: Yes, we do. The -- all
14 of our clients have -- in their declarations,
15 they describe which books are going to be read
16 to their children and why they asked it --

17 JUSTICE JACKSON: Were the clients in
18 the classroom?

19 MR. BAXTER: They were not in the
20 classroom, but they know we -- in the end, we
21 don't have to wait until the injury has happened
22 to get relief. The point of a preliminary
23 injunction is that we can -- when -- when the
24 injury is imminent, we can seek relief --

25 JUSTICE JACKSON: All right. Let me

1 ask you another --

2 MR. BAXTER: -- to stop it from
3 happening before our children's innocence is
4 destroyed.

5 JUSTICE JACKSON: Let me ask you --
6 let me ask you another series of questions
7 because I'm just trying to understand the
8 implications of the rule that you want us to
9 reach on this record where we -- we're not
10 really sure what's going on.

11 Is your argument actually confined to
12 the content of the school's curriculum? I mean,
13 I appreciate that you say we're in the public
14 school, this is a uniquely coercive environment,
15 but what -- what if we have a teacher who is gay
16 and has a photo of a wedding on her desk? Is a
17 parent able or could they opt out of having
18 their student be in that classroom?

19 MR. BAXTER: Well, we think no because
20 the student -- you know, the student may have
21 a -- may claim a burden and that -- but the --
22 on the question of -- the student doesn't have
23 the right to tell a teacher what to say. The
24 teacher has speech rights that would go again to
25 all those things --

1 JUSTICE JACKSON: But I guess I don't
2 understand that given your argument. I mean,
3 so, you know, Example 1, we have a gay teacher
4 in the classroom and they have a -- a -- a
5 wedding photo on their desk, and the children
6 are exposed then to the same kinds of picture
7 that you say is in the book that you don't want
8 children to be exposed to.

9 What -- what about the parent -- the
10 teacher showing pictures from the wedding or the
11 teacher goes off to get married and comes back
12 and talks about their spouse? Do we have
13 opt-out provisions for children in that
14 situation?

15 MR. BAXTER: Again, we think the same
16 rules would apply. And if you were in a system
17 where --

18 JUSTICE JACKSON: The same rules would
19 apply. So this is not just about books. This
20 is about exposure to people of different sexual
21 orientations and the objection, the sincerely
22 held objection, that children shouldn't be
23 exposed to this?

24 MR. BAXTER: Again, our clients are
25 not raising those. And we know that these kinds

1 of objections aren't happening. Here, the Board
2 is imposing indoctrination on children --

3 JUSTICE JACKSON: What if -- what
4 if --

5 MR. BAXTER: -- that violates their
6 religious beliefs.

7 JUSTICE JACKSON: -- what if a student
8 group puts up "Love is Love" posters around the
9 school featuring same-sex couples or trans
10 youth? May parents what -- do parents have to
11 have notice of this and the ability to opt their
12 children out of going into the parts of the
13 school where these posters are?

14 MR. BAXTER: Again, we don't think
15 that any child has the right to dictate what the
16 school does or what other students say on
17 campus.

18 JUSTICE JACKSON: No, they're not
19 dictating. They just want an opt-out. They
20 don't want their children walking in the --

21 MR. BAXTER: We think they would lose
22 on that -- in that situation.

23 JUSTICE JACKSON: Why?

24 MR. BAXTER: For --

25 JUSTICE JACKSON: What -- what about

1 your principle does not also mean that if we
2 have a section of the school with "Love is Love"
3 posters and, you know, children who have to go
4 through there, what about your principle says
5 that a religious parent shouldn't be able to
6 say: I don't want my kid walking in that part
7 of the school?

8 MR. BAXTER: Well, they would lose
9 because the strict scrutiny analysis would favor
10 the Board in that situation, because it would be
11 impossible for the Board to -- have -- to
12 satisfy every student's needs about what's on
13 the board.

14 Now, if you're in a situation where --

15 JUSTICE JACKSON: I'm sorry. It would
16 be impossible for them to -- to actually
17 implement an opt-out in that situation?

18 MR. BAXTER: That's right. So, if --
19 if -- if the request, for example, is so broad,
20 like it was in Yoder, that the only -- the only
21 option is for the students to be removed from
22 the school entirely, that would be then the --
23 least restrictive means available. And so,
24 under normal strict scrutiny analysis, these
25 things would sort out in favor of the schools.

1 JUSTICE JACKSON: Can I give you one
2 more? What about a trans student in the
3 classroom? There's a student who's in the
4 class. Must the teacher notify the parents of
5 the student's existence and give them an opt-out
6 to not be in the same classroom with this child?

7 MR. BAXTER: No. And we've never said
8 that there is an independent right to be
9 notice -- for schools to anticipate what parents
10 might object to. But, when parents know
11 something, there could be a sincere religious
12 burden, but, again --

13 JUSTICE JACKSON: Yes, a parent knows.
14 A parent -- the child comes home and says there
15 is a trans -- transgender child in my classroom,
16 and I know what you've taught me in terms of
17 religious teachings, I object to that.

18 Parent knows. Can a parent insist
19 that the school --

20 MR. BAXTER: Again, we think the
21 parent --

22 JUSTICE JACKSON: -- allow the child
23 to sit out?

24 MR. BAXTER: Again, we think the
25 parents would lose in that context.

1 JUSTICE JACKSON: All right. Let me
2 ask you one other set of questions about
3 coercion because Justice Kavanaugh points out
4 that -- that, you know, the -- the test is
5 burden.

6 I had understood that the way in which
7 this Court analyzed burden in these kinds of
8 cases is to look to coercion. So they really
9 aren't a separate thing.

10 And I guess what I'm really puzzling
11 over is that it seems to me that coercion in
12 this context is actually operating at two
13 different levels and that we have to kind of
14 really focus on that in order to understand
15 what's happening.

16 One is to the students in the
17 classroom, the coercion of being forced to be
18 exposed to these kinds of materials or these
19 kinds of things, or can they opt out.

20 But I think there's another coercion,
21 and you've touched on it a little bit, and that
22 is: Assuming that there's no opt-out in this
23 environment, are students being coerced into
24 being in that school at all?

25 And I think those two different ways

1 are really, really important. I mean, as I read
2 our cases, we could have set up a constitutional
3 framework in which all students are required to
4 attend public school. They have to go to public
5 school.

6 And I think, in that situation, you
7 would have a pretty strong argument that it
8 burdens a parent's religious exercise if the
9 public school teaches children things that
10 contradict the parent's religious beliefs.

11 Here I am, I'm a religious parent, I
12 have to put my kid in this school. And when my
13 kid goes there, it -- he's learning all sorts of
14 things that I'm saying against my religious
15 belief.

16 I -- I -- I get that. But what do we
17 do about the world that we're actually in, which
18 is where Pierce says that the parent can choose
19 to put their kid elsewhere, that you don't have
20 to send your kid to public school?

21 In that situation, I guess I'm
22 struggling to see how it burdens a parent's
23 religious exercise if the school teaches
24 something that the parent disagrees with. You
25 have a choice. You don't have to send your kid

1 to that school. You can put them in another
2 situation. You can home-school them.

3 How is it a burden on the parent if
4 they have the option to send their kid
5 elsewhere?

6 MR. BAXTER: Well, Your Honor, the
7 world we live in in this case is that most
8 parents don't have that option. They have two
9 working parents. They can't afford to send to
10 private school.

11 JUSTICE JACKSON: Yes, as a matter of
12 practicality, absolutely.

13 MR. BAXTER: And that's the reality
14 for our parents.

15 JUSTICE JACKSON: I understand. But,
16 in so many other constitutional doctrines, we
17 don't focus on whether people actually can
18 afford to protect their rights.

19 MR. BAXTER: Well, here, they're
20 forced --

21 JUSTICE JACKSON: In so many other
22 doctrines --

23 MR. BAXTER: -- they're forced to pay
24 for the public schooling.

25 JUSTICE JACKSON: No, I understand.

1 But, usually, we set aside and we say: But you
2 still have the right to get an attorney in a
3 civil case even if you can't afford it, right?
4 So we don't focus on whether or not they can
5 actually do it. They have an option.

6 And what I guess I'm worried about is
7 a world in which, when there is an option to
8 send your kid somewhere else, it seems to me
9 that these parents would be dictating what this
10 school does in the way that you say our cases
11 say they can't do, right?

12 MR. BAXTER: In Carson versus Fulton,
13 this Court never required coercion. The parents
14 were already paying tuition to go to the school.

15 In -- in -- in -- in all those cases,
16 Lukumi, the -- the schools didn't really need
17 tires. They weren't being coerced to do
18 anything.

19 This Court has always -- since
20 Sherbert -- Adele Sherbert, Thomas, they weren't
21 being coerced to do anything. They just were
22 being pressured to violate the religious
23 beliefs --

24 JUSTICE JACKSON: Thank you.

25 MR. BAXTER: -- in order to access a

1 benefit that's much less value than --
2 education.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Ms. Harris.

6 ORAL ARGUMENT OF SARAH M. HARRIS
7 FOR THE UNITED STATES, AS AMICUS CURIAE,
8 SUPPORTING THE PETITIONERS

9 MS. HARRIS: Mr. Chief Justice, and
10 may it please the Court:

11 When the government forces people to
12 choose between violating sincerely held
13 religious beliefs or foregoing a public benefit,
14 that burdens religious exercise.

15 In Fulton, offering foster care
16 contracts only to groups that would certify
17 same-sex couples burdened groups that believe
18 marriage is only between a man and a woman. In
19 Sherbert, offering unemployment benefits only to
20 people willing to work Saturdays burdened those
21 for whom Saturday is the Sabbath.

22 Here, Montgomery County offers a free
23 public education to parents only if their
24 children use books featuring same-sex
25 relationships and transgender issues. That

1 burdens parents of multiple faiths whose
2 religious duty is to shield their young children
3 from such content.

4 Public schools routinely accommodate
5 those burdens with opt-outs, which respect
6 families of many faiths and backgrounds.
7 Several states allow opt-outs from any learning
8 material on religious grounds. Montgomery
9 County allows many other opt-outs, just not
10 here.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Ms. Harris, is there
13 any daylight between your argument and
14 Petitioners' argument?

15 MS. HARRIS: Only as a matter of
16 emphasis. I think they're making a more varied
17 range of arguments with respect to sort of
18 parental rights as potentially a separate
19 strain.

20 Here, I think we all agree that,
21 certainly, one framework and the framework we're
22 advocating for is to view this as putting a
23 price on a public benefit of public education at
24 the expense of foregoing your religious beliefs.
25 Petitioners agree with that.

1 And we agree with Petitioners that the
2 fact that there is a long history of parents
3 controlling the religious upbringing of their
4 children in the school context is -- if
5 anything, just illustrates exactly why there's
6 an obvious burden here.

7 JUSTICE THOMAS: What role does Yoder
8 play in your analysis?

9 MS. HARRIS: Yoder is a textbook
10 example of parents being forced to choose
11 between paying a price, which is having to
12 face -- severe sanctions, potential sanctions
13 for not sending their children to school, or
14 being able to exercise their faith by preserving
15 their children -- their teenagers from being
16 exposed to worldly influences.

17 And, again, that was contrary to the
18 Amish faith, which prescribed that at ages 14
19 and older, that's the critical time for children
20 to be closer to home and not be exposed to the
21 worldly influences of high school.

22 So I think we're on all fours with
23 Yoder. If -- you know, the idea that we're just
24 talking about mere exposure here that is not
25 something that would be cognizable just sort of

1 runs -- flat in the face of that decision.

2 CHIEF JUSTICE ROBERTS: Your approach
3 focuses on, as articulated, sincere religious
4 beliefs. How -- how do you measure whether a
5 belief is sincere or not?

6 MS. HARRIS: Based on this Court's
7 cases, it's whether someone is expressing their
8 understanding of what their religion entails.

9 Thomas, I think, is this Court's sort
10 of canonical description of what it entails.
11 You don't ask: Does a majority of people of
12 your faith agree with you? You're just saying:
13 Does someone, based on their understanding of
14 what their religion is, believe this? And
15 they're not lie -- you know, they're not making
16 false representations.

17 And I think that's how this Court has
18 consistently applied the sincerely held
19 religious beliefs test. And there's no question
20 in this case that Petitioners would qualify. I
21 don't think anyone has challenged the sincerity
22 of their views.

23 CHIEF JUSTICE ROBERTS: Is there an
24 example in this particular case of a articulated
25 religious belief being rejected as insincere?

1 MS. HARRIS: In this particular case?
2 No, I don't -- I don't think there is an example
3 of that.

4 JUSTICE GORSUCH: Ms. Harris, you --
5 you've heard the discussion so far, and it's
6 focused in part on what qualifies as a
7 substantial burden.

8 At one end, you know, you might
9 imagine a book being in the library. At the
10 extreme other end, you might imagine a teacher
11 coercing a student to write a -- a -- a certain
12 passage or do a certain thing that's contrary to
13 their religious beliefs.

14 Where -- where in that spectrum do you
15 fall?

16 MS. HARRIS: We might not even fall in
17 the spectrum because I think the question is
18 not: Are you objectively looking at the world
19 and asking how does a child of a particular age
20 or outlook feel about a particular encounter
21 with a teacher or particular material?

22 It is, in the first instance, do
23 parents have a sincerely held religious belief
24 that their faith obligates them to shield
25 children from particular material? And I think

1 that's important because, if you take the
2 opposite approach and say, you know, people
3 should get in the business of thinking about are
4 four-year-olds more susceptible, are
5 16-year-olds sort of insulated, you start
6 slicing and dicing among different faiths. You
7 say that faiths that believe that four-year-olds
8 must be shielded might have a better right or
9 better -- better -- free exercise right than the
10 Amish, who believe, for instance, that it's
11 actually 14 that matters for their faith to
12 shield people.

13 And so I think that the concern
14 with -- religious discrimination is really,
15 really important in terms of the first step of
16 defining what a burden is.

17 JUSTICE KAGAN: But, if it's -- if --
18 if it's all about a sincerely religious parent
19 wanting to shield her child, then to take what I
20 think might be thought on some views as -- as
21 one end of the spectrum, you know, a book in the
22 library, right, and they say, well, my kid is
23 not shielded from this book because, you know,
24 there's library free time, and she could find
25 this book on the library shelves. What would

1 you do with that?

2 MS. HARRIS: Right. So what we do
3 with this is twofold. One is I think you have a
4 threshold state action question with respect to,
5 like, whether it's the child finding it, whether
6 it's the school making it available.

7 But, even setting that aside --

8 JUSTICE KAGAN: The school is making
9 it available.

10 MS. HARRIS: Separate --

11 JUSTICE KAGAN: The school is, like,
12 you know, deciding how to spend their money and
13 which books to buy and --

14 MS. HARRIS: Right.

15 JUSTICE KAGAN: -- put on the shelves.

16 MS. HARRIS: So I'll spot you that.
17 Just setting that aside, I think those kinds of
18 questions do cash out, as Petitioners are
19 saying, with respect to, if you get past Smith,
20 you end up in Smith -- assuming that you are in
21 strict scrutiny world, depending on the nature
22 of, like, whether the library allows opt-outs or
23 not, I think it does cash out on strict scrutiny
24 because we agree with Petitioners --

25 JUSTICE KAGAN: So you would get to

1 strict scrutiny, that sort of counts just
2 because you find some kind of conflict, a
3 religious parent saying no, I don't -- I -- my
4 kid would not be shielded from something that is
5 in conflict with my religion.

6 And so the only way for a school to
7 win that is in strict scrutiny land?

8 MS. HARRIS: Well, no. I think the
9 school could win in a couple of ways. One is,
10 if they have a generally applicable policy, they
11 don't allow opt-outs for anything, obviously,
12 they could be outside of -- they could be in
13 Smith world. But, assuming we're in strict
14 scrutiny world, this is how things work.

15 I think the way that it works is: Are
16 you saying that children -- that schools have to
17 operate as sort of policemen to make sure that
18 there's no child at any point in the day who
19 might run into a book or pages of a book that
20 violate their parents' religious obligations?
21 And I think then you're just in the same
22 territory as United States versus Lee or in
23 Fulton or in other cases that say, at the point
24 where you have a combination of -- you're --
25 essentially forcing the school or the

1 institution to shoulder the burdens of reworking
2 the institution for -- and essentially giving
3 that one person a right to restructure it for
4 everyone else, that's not the kind of
5 accommodation that is permissible under strict
6 scrutiny. United States v. Lee is a good
7 example where, for the income tax --

8 JUSTICE KAGAN: Well -- I'm sorry. Go
9 ahead.

10 MS. HARRIS: Sorry. Income tax,
11 everyone accepted that the Amish carpenter at
12 issue in Lee had a sincerely held religion --
13 religious objection to Social Security taxes,
14 not part of their faith. But the Court said no,
15 you can't just say that you get to ensure that
16 everyone else doesn't pay their taxes or that
17 you get to essentially rewrite the income tax as
18 to everyone because you can't have a sort of
19 system like that.

20 Now we're in the opposite of that
21 world here because opt-outs with respect to
22 pieces of instruction, the entire curriculum,
23 with respect to extracurriculars, with respect
24 to everything else, are a sort of very
25 traditional feature of public schools and,

1 indeed, the means by which --

2 JUSTICE KAGAN: So, with respect to
3 all of those things that you just said --
4 curricular instruction, extracurriculars, blah,
5 blah, blah -- that does not raise the Lee issue
6 in your mind? You know, there --

7 MS. HARRIS: It doesn't.

8 JUSTICE KAGAN: -- there the opt-out
9 is necessary, you know, whatever you might think
10 about, you know, this is -- about the kids' age,
11 about the nature of the instruction, about
12 anything else?

13 MS. HARRIS: That's where we think we
14 draw the line, and I guess that would also --

15 JUSTICE KAGAN: I mean, there is no
16 line then?

17 MS. HARRIS: No, no, I think there
18 absolutely is a line. I mean, I think you --
19 we've heard hypotheticals with respect to can
20 you essentially veto someone else's children
21 being in a classroom? Can you veto a teacher
22 being in the classroom? Can you make sure that
23 no one else is being taught a particular book?

24 And those, in our view, again, Fulton
25 is a good example. Barnette too.

1 JUSTICE KAGAN: What -- what --
2 what -- what would happen if, like, an
3 eight-year-old -- you know, there's a -- a --
4 a -- a -- a part of the school day where people
5 show and tell and talk about things that matter
6 to them and to their families, and an
7 eight-year-old says: I want to talk about, you
8 know, having two moms? Would -- would another
9 student be able to say: I'd like to exercise my
10 opt-out now?

11 MS. HARRIS: I don't think so because,
12 in that particular context, what you're talking
13 about is other students talking. Just as if
14 there's a lunchtime conversation among students
15 that raises various issues, schools do not
16 have -- schools and teachers and -- and the
17 board are not engaged in state action just by
18 not policing everything that any student --

19 JUSTICE KAGAN: So --

20 MS. HARRIS: -- in the school says in
21 any part of the day.

22 JUSTICE KAGAN: Yeah. So it's just --
23 it's just what the teacher says?

24 MS. HARRIS: It's what the teacher
25 says, and -- then again, I guess I'd take it yet

1 a further level. So there's teacher liability,
2 and then, for the Board, of course, to be
3 liable, you have Monell issues with respect to
4 whether it's a policy. And just how this works
5 out practically, teachers --

6 JUSTICE KAGAN: And do you think it's
7 okay -- Mr. Baxter's answer to one of my
8 questions, he said, you know, he has no
9 objection to the fact that, you know, the school
10 would say, well, you know, you should leave the
11 room. And then, if the next thing is I don't
12 want to leave the room, I want to be in the
13 room, you know, the same way as everybody else
14 is, I just don't want them to be talking about
15 that -- does that -- is that a claim?

16 MS. HARRIS: We agree with Petitioners
17 that would be this -- that's just the same
18 version of the veto that we already talked
19 about. That's not a permissible -- that would
20 fail under strict scrutiny. That's not how
21 opt-out works, and I think it's very telling
22 if --

23 JUSTICE KAGAN: Because the person
24 could say --

25 JUSTICE GORSUCH: Ms. -- Ms. --

1 JUSTICE KAGAN: -- like, I'm not
2 getting the same education, the same public
3 good, as everybody else is because I have to
4 leave the room.

5 MS. HARRIS: And I don't think that
6 happens as a matter of practice, and the reason
7 is, again, you have five states ranging from
8 Pennsylvania to Arizona, Utah, Hawaii,
9 Minnesota, that have very broad opt-outs, even
10 broader than any sort of constitutional rule
11 being proposed here, and you don't see people
12 saying I have a sort of right -- a state law
13 action to, like, a -- not have this particular
14 opt-out opt -- operate that way.

15 The way these have always worked is
16 you either are sort of -- sort of outside for a
17 brief period of time or you're offered some --
18 some sort of alternative. And, again, this is
19 not something that's hard for schools. It's
20 something that schools have done for a long
21 time. It is not a sea change.

22 And Respondents have the same problem,
23 which is, if you accept that it is some sort of
24 level of compulsion that triggers it, they're
25 accepting the same whole series of opt-outs and

1 alternatives too --

2 CHIEF JUSTICE ROBERTS: Thank --

3 MR. HARRIS: -- even in --

4 CHIEF JUSTICE ROBERTS: Thank you,

5 counsel.

6 Justice Thomas, anything further?

7 Justice Alito?

8 Justice Sotomayor?

9 JUSTICE SOTOMAYOR: The injunction

10 here sought by defendants asks for two things:

11 parents' notice and an opportunity to opt their

12 children out of reading, listening to, or

13 discussing the Pride storybooks.

14 The injunction presumably would

15 require what you say is not required, to take

16 the books off the shelf, correct?

17 MS. HARRIS: No, I don't think that's

18 what they're requesting at all. And Petitioners

19 seem to have disclaimed that. Petitioners are

20 saying they would like the ability to -- they

21 basically want the status quo ante.

22 JUSTICE SOTOMAYOR: To opt out from

23 forcing the child to read the book?

24 MS. HARRIS: So they want the child to

25 be --

1 JUSTICE SOTOMAYOR: But that's not the
2 words used here.

3 MS. HARRIS: Yes. They want the child
4 to be outside of the classroom if they -- if
5 they are exposed to the book. They want the
6 status quo ante that Montgomery County
7 previously offered.

8 JUSTICE SOTOMAYOR: All right. So --
9 but you're not objecting either to having the
10 books on the bookshelf in the classroom?

11 MS. HARRIS: We're -- we don't
12 understand that to be the claim here.

13 JUSTICE SOTOMAYOR: All right. Now
14 they also asked the court to "enjoin defendants
15 from -- denying them advance notice and
16 opportunity to opt their children out of any
17 other instruction related to family life or
18 human sexuality that violates the parents' or
19 their children's religious beliefs."

20 Is that an enforceable injunction?

21 MS. HARRIS: Is that an enforceable
22 injunction? I --

23 JUSTICE SOTOMAYOR: I don't know what
24 "related to family life" would mean. It could
25 be any picture, any book that talks about people

1 getting married.

2 MS. HARRIS: I -- I take it --

3 JUSTICE SOTOMAYOR: Interracial
4 couples.

5 MS. HARRIS: I think it's defined by
6 the contours of their particular claim and by
7 the way in which Montgomery County and the State
8 of Maryland have defined the topics.

9 JUSTICE SOTOMAYOR: We require
10 injunctions to be more precise than that.

11 MS. HARRIS: I think, regardless of
12 how the Court feels with respect to the
13 specificity of this injunction, it seems pretty
14 definite in the context of the case. And with
15 respect to the question presented, whether there
16 is a burden if parents are not able to have the
17 advance notice of opt-out of the material that
18 the religious obligations prohibit, that's a
19 clear burden.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?
21 Justice Gorsuch?

22 JUSTICE GORSUCH: The way you --
23 you've briefed the case, the government's
24 briefed the case, is a -- as a public benefit
25 case, as you discussed.

1 Another way to think about the case,
2 as Justice Barrett was discussing with your
3 colleague, was through the lens of Smith and
4 whether the county's acted neutrally pursuant to
5 a generally applicable rule.

6 What are your thoughts about that? We
7 have some statements that Justice Kavanaugh
8 referenced from Board members to parents and
9 children, and we have opt-outs for all manner of
10 other kinds of considerations, for Valentine's
11 Day and Halloween and -- and other things.
12 Would that be another way to approach this case?

13 MS. HARRIS: It absolutely could be.
14 I think that the way it would work would be you
15 would find discrimination on the basis of
16 religion, not just that there was not a
17 generally applicable policy. So, obviously,
18 non-generality would be enough to get you out of
19 Smith.

20 But I take the Petitioners to be going
21 further and saying there's evidence in the
22 record of more like a Lukumi-like animus-type
23 claim where there is sort of the -- the -- the
24 only explanation for the Board's shift is they
25 did not like the religious objections, they have

1 expressed hostility in various comments to
2 religion. So that is absolutely another pathway
3 the Court could go down.

4 And, again, we chose the public
5 benefits path because, on this particular
6 record, it seems particularly sort of clear that
7 parents have a sincerely held religious
8 obligation that is being denied in this context,
9 that would suffice to get to strict scrutiny and
10 sort of go through the rest.

11 JUSTICE GORSUCH: Oh -- I'm sorry.

12 CHIEF JUSTICE ROBERTS: Sure.

13 JUSTICE GORSUCH: I have one other
14 question. Some -- some lower courts have taken
15 the view that even if you have a discrimination
16 against religion, so you fail the Smith test,
17 that you still have to show a burden, a
18 substantial burden, in addition to that. And
19 one might read a footnote in the Fourth
20 Circuit's opinion to suggest that.

21 Do you have thoughts about that?

22 MS. HARRIS: This Court has held in
23 cases, certainly, most recently in the Trinity
24 Lutheran -- Trinity that discrimination on the
25 basis of religion, if you are treating people of

1 faith worse or a particular religion worse or
2 discriminating in the Lukumi sense, that
3 triggers strict scrutiny.

4 JUSTICE GORSUCH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh?

7 JUSTICE KAVANAUGH: Just to be clear,
8 your position in this case is that you're not
9 seeking to alter the instruction in the
10 classroom or what's the content of the
11 classroom, you're only seeking not for this --
12 these children to be forced to remain in the
13 classroom, correct?

14 MS. HARRIS: Exactly.

15 JUSTICE KAVANAUGH: And then, if there
16 is a substantial burden, you get to the next
17 step of the analysis. Why do you think this is
18 not generally applicable?

19 MS. HARRIS: Two sets of reasons.

20 One is that it's discretionary. So,
21 by definition, it's not generally applicable.
22 The Board can turn on a dime and change who gets
23 exemptions, what kinds of exemptions are
24 covered. And that's, in fact, the record here,
25 that they changed overnight as to what kinds of

1 exemptions they would allow.

2 And two, in terms of lack of general
3 applicability, is the patchwork of exemptions
4 they currently allow. They allow exemptions for
5 musical performances. They allow -- I think
6 they allow exemptions for dissection. They
7 allow exemptions for Halloween, for birthdays,
8 for any kind of religious observances on
9 Saturdays or Sundays that might interfere
10 with -- extracurriculars. The one thing they --
11 they allow exemptions for sexual education in
12 the classroom components.

13 The one thing they don't allow is the
14 exemptions for the storybooks, and that is sort
15 of the hallmark of something that is not a
16 generally applicable policy.

17 JUSTICE KAVANAUGH: On your first
18 point there, the alternative one about changing
19 the policy, couldn't that be said about every
20 policy that exists, even one that has no
21 exemptions at all? Oh, well, they could change
22 it tomorrow, therefore, it's discretionary,
23 therefore, strict scrutiny?

24 How -- how would you answer that?

25 MS. HARRIS: I would answer that by

1 saying that the Court has looked at sort of
2 legislation and other sort of binding -- things
3 that are binding differently and said, you know,
4 if you have a law that says there's no
5 exceptions, it's a different situation from if
6 a -- if the decision maker tomorrow just retains
7 flexibility.

8 I mean, think -- if you think about
9 Fulton, the way in which the Court thought about
10 case-by-case discretion in that case, if you
11 have a decisionmaker who can just say: I'm
12 going to, in my discretion, reverse course,
13 decide to give you a one-off opt-out or a
14 categorical opt-out tomorrow, it seems hard to
15 see why that would be generally applicable.

16 And, again, the fact that the Board
17 did something similar to that here seems to
18 suggest --

19 JUSTICE KAVANAUGH: We don't need to
20 address that here, I suppose --

21 MS. HARRIS: No.

22 JUSTICE KAVANAUGH: -- because of the
23 exemptions that exist for other things makes it
24 not generally applicable in your view?

25 MS. HARRIS: Yes.

1 JUSTICE KAVANAUGH: And then, on
2 strict scrutiny, why does the county fail strict
3 scrutiny?

4 MS. HARRIS: The county fails strict
5 scrutiny because the question is whether the
6 county has a compelling interest. Here, their
7 asserted interest appears to, first and
8 foremost, be in administrability and not
9 granting opt-outs to the Petitioners. That's
10 the way the courts framed the burden analysis in
11 Fulton and Yoder, and so it's key to a sort of
12 not granting the exemptions.

13 And it is very, very hard even on this
14 sort of preliminary injunction record to
15 understand why it is not administrable to --
16 offer the opt-outs in this particular context
17 that they used to offer but offer a host of
18 opt-outs for virtually everything else under the
19 sun and not have the -- all the same concerns
20 flooding forward, especially given that they
21 have, in addition to the things that they have
22 identified in their policy, conceded that they
23 would need opt-outs for things like exposure to
24 images of the Prophet Muhammad or any instances
25 where classroom instruction rose to the level of

1 compulsion under their view.

2 And so I think their line-drawing
3 problems really would doom any kind of a --
4 attempt to satisfy strict scrutiny.

5 JUSTICE KAVANAUGH: Is the United
6 States aware of any other school board in the
7 country that's done something like this?

8 MS. HARRIS: We aren't. I can't vouch
9 for it not happening. But I think, more
10 relevantly, we're -- aware of many, many states
11 and school districts that take the opposite tack
12 and allow opt-outs far beyond any kind of
13 constitutional rule that would be adopted in
14 this case.

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 JUSTICE BARRETT: Ms. Harris, so
19 there's a lot of concern about line drawing and
20 what this would mean, and maybe some of that
21 would be handled under strict scrutiny or
22 under -- or under Smith. I mean, it's not
23 saying that anybody wins or loses if we're just
24 talking about initial steps.

25 But, to the point of line drawing, is

1 there a way -- let's imagine that the Court
2 decided that there was a burden here, that a
3 free exercise right was triggered, that the
4 government thinks we should be careful about to
5 not implicate other things.

6 I'm thinking about what if a teacher
7 was transgender and the student was very
8 respectful to the teacher but didn't want to use
9 the pronouns and the parents didn't want the
10 child to use the pronouns. Like, say, you know,
11 call the teacher "Mister," you know, when she
12 was transgender -- when the teacher was
13 transgender. Same for a student in the
14 classroom.

15 You know, those might present
16 different -- different issues that would be more
17 difficult. So is there something that the
18 government has in mind that would be some
19 limiting principle?

20 MS. HARRIS: Yes. So just to take the
21 limiting principle first and then your pronoun
22 hypothetical second.

23 With respect to the limiting principle
24 on what a burden is, I think it's almost -- this
25 is the easy case because you have parents'

1 religious obligations, and the obligations
2 encompass being exposed to material and it's
3 just an outright prohibition.

4 But I think Professor Girgis's article
5 is actually a very good guide to different kinds
6 of burdens that might arise in this context or
7 or others that wouldn't qualify.

8 So take the hypothetical of parents
9 want to opt out from school for a month to take
10 their kids on a religious pilgrimage. If your
11 faith is indifferent to doing so in September
12 versus during, like, spring break or summer
13 recess, you don't have a burden on your
14 religious exercise because you have equally
15 available or alternative means of doing your
16 religious exercise that don't require the
17 opt-out and don't require -- don't really put
18 you to the choice that we're talking about.

19 So, when you're thinking about things
20 that aren't sort of the prohibition on exposure
21 things, I think there are real teeth in this
22 doctrine. And there's a lot of hypotheticals
23 that you can think of in the school context that
24 would implicate that.

25 With respect to your pronouns

1 hypothetical, I actually think that's a case
2 that raises even more concerns in the sense that
3 you also have -- and this is what the court of
4 appeals cases bear out -- compelling --

5 JUSTICE BARRETT: Speech.

6 MS. HARRIS: -- potential compelled
7 speech concerns with respect to you're requiring
8 everyone else in the classroom -- first of all,
9 free exercise issues, but also compelled speech
10 issues -- to refer to a particular person by
11 pronouns. That's how the cases are kind of
12 getting litigated out in the lower courts right
13 now.

14 JUSTICE BARRETT: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Jackson?

17 JUSTICE JACKSON: I guess, in
18 following up on that, I'm just not sure I
19 understand your answer.

20 So is it a burden for a religious
21 student who is being taught at home and through
22 their religion that gender is not a situation
23 that can be changed, people should not be in a
24 transgender circumstance, is it a burden for
25 them to be in a public school classroom where

1 the teacher is referring to another student by
2 what this student believes is the wrong pronoun
3 or whatever?

4 MS. HARRIS: Well, I think the
5 relevant burden there would be the parents'
6 religious exercise, as we have conceived of,
7 like, the -- the -- the -- the -- the nature of
8 the religious beliefs in this particular case.

9 As Petitioners note, you could also
10 have questions with respect to the student's
11 free exercise rights. I think that's a
12 particular question.

13 JUSTICE JACKSON: Right. So is it a
14 burden on the parent to have their child in a
15 classroom with a transgender student and the
16 teacher is referring to them by pronouns that
17 the parent thinks is inappropriate?

18 MS. HARRIS: I mean, I think, even
19 under Respondents' view, that that would, in
20 fact, constitute a burden on religious exercise,
21 and here's why. It is a burden on religious
22 exercise in the parents' view because you are --
23 because not only do they have a religious
24 obligation to ensure that their children are
25 not -- sort of exposed to the idea that you must

1 sort of recognize people's pronouns in that
2 particular way, but I think, even under
3 Respondents' view, there's a level of compulsion
4 or affirmation of a particular view of -- of how
5 someone's pronouns should -- should work out.

6 JUSTICE JACKSON: And it doesn't
7 matter that the parent could send their kid to a
8 different school because they don't like this
9 environment?

10 MS. WILSON: I mean --

11 JUSTICE JACKSON: I mean, they're --
12 they're being -- they're -- they're not -- you
13 agree that they're not being compelled to
14 actually go to that school where this sort of
15 thing is happening that they disagree with?

16 MS. HARRIS: I think two points on
17 that. One is that actually shows the burden
18 because you're being forced to forego the
19 benefit of a public education and pay for a
20 private school.

21 JUSTICE JACKSON: Well, we'll get to
22 that. I'm just trying to understand --

23 MS. WILSON: Yeah, I think -- that's a
24 problem.

25 JUSTICE JACKSON: I'm trying to

1 understand. So you're saying, even -- even if
2 the parent has a choice to put their kid in
3 another environment that doesn't do the kind of
4 thing that they object to, it's still a burden
5 if they opt to put their parent -- their child
6 in this environment?

7 MS. HARRIS: Absolutely, unless you
8 want to overturn Barnette --

9 JUSTICE JACKSON: All right. Well --

10 MS. HARRIS: -- because Barnette too,
11 I think, had that same choice.

12 JUSTICE JACKSON: -- let me ask you
13 about -- this is following up on that choice.
14 So is it really confined to the public school
15 context?

16 So, in that same scenario about
17 foregoing a benefit, what -- what if the
18 government puts up ads on public transportation
19 that informs the public that the clerk's
20 office -- the government's clerk's office
21 performs and certifies gay marriages? And this
22 is on a bus. This is on the subway. And
23 children can see these ads that are talking
24 about state-sponsored gay marriages.

25 And what I guess I'm trying to

1 understand from your argument is whether it
2 substantially burdens the religious exercise of
3 parents whose religions teach that marriage is
4 between a man and a woman to ride on those -- to
5 have those ads displayed on public
6 transportation.

7 MS. HARRIS: Yeah, I would just add
8 caveats with respect to, like, how the
9 government's speech inquiry would -- would sort
10 of cash out in that context and what kinds of
11 challenges you can bring to transit.

12 But I would just say, as a more
13 general matter, our position is not limited to
14 the idea that if there are other contexts -- I
15 mean, I -- if there are other contexts, like,
16 take Bowen, where you're being forced to use
17 Social Security numbers by the government and
18 that violates --

19 JUSTICE JACKSON: No, I want this
20 context. I want the answer to --

21 MS. HARRIS: Okay. But I'm just
22 saying, like, the answer's going to be yes in
23 terms of, like --

24 JUSTICE JACKSON: So -- the answer's
25 going to be yes. So -- so the --

1 MS. HARRIS: In terms of it applies to
2 other context.

3 JUSTICE JACKSON: So I don't --

4 MS. HARRIS: But I don't know the --

5 JUSTICE JACKSON: -- I guess I don't
6 understand how that -- how that -- squares with
7 our cases about not making the government change
8 its position or do things just because of your
9 religion.

10 I mean, we have a public bus, and the
11 person can choose not to ride the bus if they
12 don't want their children exposed to the ads
13 that are on the bus.

14 But you seem to be saying that because
15 the bus is a public good, the religious parent
16 has the right to tell the bus people and the
17 state that they have to take those ads down --

18 MS. HARRIS: Sorry.

19 JUSTICE JACKSON: -- because they
20 don't want their children to be exposed to them.

21 MS. HARRIS: I need to be more precise
22 in terms of how I'm answering the
23 hypothetical --

24 JUSTICE JACKSON: Yes.

25 MS. HARRIS: -- versus the general

1 extension of the cases outside the school
2 context. We obviously think that the range of
3 you can't be forced to forego a public benefit
4 extends beyond the -- school context because --
5 the Respondents are asking for the reverse, to
6 confine it everywhere except for the school
7 context.

8 With respect to your hypothetical, I
9 think you're getting into the question of how
10 far does, like, the Lyng decision extend with
11 respect to government property. Can you force
12 people --

13 JUSTICE JACKSON: No. I just want --
14 I'm just trying to find a public benefit. You
15 have schools, you say, is a public benefit that
16 parents are being forced in a way -- they're --
17 they're to give up if they want to have an
18 environment that their children --

19 MS. HARRIS: Right.

20 JUSTICE JACKSON: -- is not exposed to
21 these sorts of ideas. I'm just trying to find
22 an analogous public --

23 MS. HARRIS: Okay.

24 JUSTICE JACKSON: -- benefit outside of
25 the school context and ask you whether your

1 position is that it substantially burdens the
2 rights of religious parents if there are
3 advertisements on a public bus that say things
4 that they don't want their children exposed to.

5 MS. HARRIS: So, again, I think, at
6 the first stage of the burden inquiry, it
7 depends on whether you're in a Lyng category of
8 cases where you're saying I'm essentially
9 burdened by something that's on -- government
10 property or you're in the sort of stage here,
11 where we're -- where we're -- we're not talking
12 about that context.

13 But just to abstract out -- outside of
14 that, there are obviously going to be contexts
15 besides the school context in which we would
16 agree that there is a burden. Again, I think
17 Bowen is really the best example, where parents
18 would be -- if -- if you take the Bowen
19 hypothetical that was reserved, parents are
20 forced to use Social Security numbers to get
21 benefits, right, to apply for various things.
22 That burdens their religious exercise.

23 So, yes, it applies in those contexts,
24 but I think that is a virtue -- that's sort of a
25 feature of this Court's jurisprudence because

1 this Court has not said that public benefits
2 can't be burdened at the price of --

3 JUSTICE JACKSON: But isn't a feature
4 of our jurisprudence that we haven't said before
5 that mere exposure to these sorts of things
6 create burdens? I mean, I understand that most
7 of our jurisprudence in this area is about
8 forcing people to affirm, you know, the pledge
9 of allegiance, forcing people to go to the
10 public school.

11 It would be one thing if the state in
12 my hypothetical said everybody has to ride this
13 bus, just like the state used to say everybody
14 has to go to public school, the Amish have to go
15 to public school --

16 MS. HARRIS: Okay.

17 JUSTICE JACKSON: -- past 16, but if
18 you have an option to do something else, I guess
19 I'm just worried about suggesting that exposure
20 to things you disagree with in a situation in
21 which you have an option not to expose yourself
22 to that because you can do something else counts
23 from the standpoint of substantial burden.

24 MS. HARRIS: So two points. One is I
25 think -- because there's two concepts in here.

1 One is with respect to the concept of -- like,
2 "mere exposure" versus beliefs. I think that
3 line is not a line that can be held without
4 discriminating on the basis of religion. I
5 think, if you had a situation where, let's say,
6 Ms. Sherbert -- believed that she couldn't view
7 images of the Prophet Muhammad, that the only
8 options for her Saturday employment for whatever
9 reason involved seeing that or involved
10 employment that would have violated her -- her
11 obligation not to view other things that are
12 religiously objectionable to different faiths, I
13 think it would be the same setup. It wouldn't
14 matter that it's unemployment benefits versus a
15 school context.

16 Now second issue with respect to can
17 you avoid it through other means, I think this
18 Court in Fulton confronted the -- a very similar
19 situation. The Court did not say, Catholic
20 Social Services, you have a mission that's
21 religiously motivated of making sure you provide
22 for the needy of Philadelphia. Instead of doing
23 so through foster care placements, you have lots
24 of other ways to serve those children, so go off
25 and do so, even though the -- the mean -- only

1 means of serving foster care children through
2 Philadelphia required violating their sincerely
3 held religious beliefs in terms of affirming
4 same-sex marriages.

5 JUSTICE JACKSON: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Schoenfeld.

9 ORAL ARGUMENT OF ALAN E. SCHOENFELD
10 ON BEHALF OF THE RESPONDENTS

11 MR. SCHOENFELD: Mr. Chief Justice,
12 and may it please the Court:

13 Every day in public elementary school
14 classrooms across the country, children are
15 taught ideas that conflict with their family's
16 religious beliefs. Children encounter real and
17 fictional women who forego motherhood and work
18 outside the home. Children read books
19 valorizing our nation's veterans who fought in
20 violent wars. And children in Montgomery County
21 read books introducing them to LGBT characters.
22 Each of these things is deeply offensive to some
23 people of faith, but learning about them is not
24 a legally cognizable burden on free exercise.

25 Adopting Petitioners' view of the case

1 would conscript courts into playing the role of
2 school board, a task for which this Court has
3 recognized they are ill suited. And a
4 constitutional requirement to provide opt-outs
5 from anything someone finds religiously
6 offensive would mean public schools must find
7 alternative classrooms, supervision for young
8 students, and substitute lessons each time a
9 potentially offensive topic arises. That is not
10 what the Constitution requires, particularly
11 given the special characteristics of the school
12 environment.

13 This Court has made clear that
14 exposure to offensive ideas does not burden free
15 exercise, and it has held that the government is
16 not required to do its daily work in ways that
17 make it easier for parents to raise their
18 children in the faith.

19 Given the diversity of religious
20 beliefs in America, Petitioners' rule would
21 require courts to adjudicate an infinite variety
22 of curriculum challenges brought by parents with
23 different religious beliefs. That is not
24 hypothetical, as 40 years of litigation on these
25 issues makes clear.

1 The books at issue here, five among
2 hundreds in the curriculum, are meant to foster
3 mutual respect in a pluralistic school
4 community. MCPS makes explicitly clear that
5 students do not need to accept, agree with, or
6 affirm anything they read or anything about
7 their classmates' beliefs or lives. The lesson
8 is that students should treat their peers with
9 respect.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Couldn't you solve
12 those differences simply by restoring the
13 opt-out?

14 MR. SCHOENFELD: You -- Your Honor,
15 I -- I think, in this case, the record makes
16 clear that the school district did try to honor
17 the opt-out, and at some point, it became
18 infeasible. Certainly, there are circumstances
19 where the right decision a school board might
20 make in view of the particular needs of a
21 community is to offer the opt-out. It's a
22 different question from whether it's
23 constitutionally required.

24 JUSTICE THOMAS: How would you
25 distinguish your case, this case, from Yoder?

1 MR. SCHOENFELD: I think Yoder
2 involved a religious obligation that adherents
3 remove themselves physically from society. So
4 what was at issue there was the conflict between
5 the Yoders' sincerely held religious beliefs
6 that they needed to remove their children from
7 society in order to provide them with the
8 vocational training that the religion required,
9 and that conflicted with Wisconsin's criminal
10 compulsory education law.

11 Yoder was a very clear application of
12 Meyer and Pierce that simply went to the
13 parents' right to determine where their children
14 would be execute -- educated and not anything
15 about what would go on in the schools. And
16 Yoder, in fact, makes clear that it wasn't
17 opining on the question of parent -- parent --
18 of whether parents have any prerogative to
19 dictate the discrete aspects of the curriculum,
20 a clarification both Meyer and Pierce before
21 Yoder themselves made.

22 JUSTICE THOMAS: So the -- so Yoder is
23 a complete withdrawal of the students from
24 school. And you say that's not as drastic as
25 picking and choosing certain messages that the

1 parents don't think their kids should hear?

2 MR. SCHOENFELD: Precisely. And,
3 again, I think Yoder was a direct application of
4 Meyer and Pierce. Meyer and Pierce said 50
5 years before that parents get to decide whether
6 to -- enroll their children in public schools.
7 And Yoder simply recognized the right of the old
8 order Amish to withdraw their children from
9 school at age 18.

10 Meyer, Pierce, and Yoder are all very
11 clear that they are not offering any opinion on
12 what the rights of parents are once they enroll
13 their children in public schools for precisely
14 that reason. It becomes infinitely more
15 complicated to honor parents' individual
16 religious beliefs once they're in the public
17 school environment.

18 JUSTICE THOMAS: Well, why wouldn't
19 you -- why wouldn't a parent argue that the
20 opt-out is a more specific version of Yoder
21 because you're simply opting them out of
22 specific programs as opposed to the entire
23 school program?

24 MR. SCHOENFELD: It may be for one
25 parent that that is a more narrowly tailored

1 approach. But the question presented here is
2 whether it constitutes a burden to be exposed to
3 this sort of instruction. And when parents have
4 a right to invoke the Free Exercise Clause to
5 shield their children from all manner of
6 offensive curriculum, I think it becomes
7 infinitely more complicated.

8 CHIEF JUSTICE ROBERTS: Counsel, you
9 said that nothing in the policy requires
10 students to affirm what's being taught or what's
11 being presented in the books.

12 Is that a realistic concept when
13 you're talking about a five-year-old? I mean,
14 do you -- do you want to say you don't have to
15 follow the teacher's instructions, you don't
16 have to agree with the teacher? -- I mean, that
17 may be a more dangerous message than some of the
18 other things.

19 MR. SCHOENFELD: Well, there -- there
20 are express -- express directives in the support
21 materials that Montgomery County provided along
22 exactly those lines. But, Your Honor, I would
23 point the Court to Barnette, where the kids were
24 young, they were 8 and 10, and the Court made a
25 distinction between being required to pledge

1 allegiance and affirm a belief in a graven image
2 in that case and merely being required to remain
3 passive during the pledge ceremony and being
4 instructed on what the pledge was, what the flag
5 was, and what it meant.

6 CHIEF JUSTICE ROBERTS: Well, that's a
7 particular ceremony, which I think I would --
8 sort of -- put aside when we're talking about
9 the basic instruction here, you know, read this
10 or this is what it -- what it shows on an
11 issue that presents serious religious objections
12 for -- for the parent.

13 So, I -- I mean, I understand the idea
14 when you're talking about a sophomore, a junior,
15 whatever, in high school, you know, where the
16 point is you want to -- to sort of push back on
17 some of this. But I'm not sure that same --
18 qualifying factor applies when you're talking
19 about five-year-olds.

20 MR. SCHOENFELD: Well, so, if that's
21 relevant to the question, Your Honor, then I
22 think that the line that we advocate between
23 exposure and coercion is the relevant one. And
24 there may be circumstances where, given the age
25 of the student or given the particular

1 presentation of information in the classroom, a
2 plaintiff may be able to make out a case that
3 their child is being coerced.

4 But the Court, I think, has to accept
5 what Montgomery -- what Montgomery County sort
6 of represents as the basis for the presentation
7 of this curriculum.

8 And what's in the record are
9 directives to say, for example: I understand
10 that is what you believe, but not everyone
11 believes it. In any community, we'll always
12 find people with beliefs different from our own,
13 and that's okay. We can still show them
14 respect.

15 That's exactly --

16 JUSTICE GORSUCH: Counsel -- counsel,
17 on -- on -- on that score, the exposure --
18 line -- versus coercion line that you asked us
19 to draw, how does that play out in -- in the
20 case of the Muhammad image for a Muslim student?
21 I didn't see you answer that in your brief.

22 MR. SCHOENFELD: So -- so I -- I think
23 we do answer it in the brief. But, to answer
24 the question directly, assuming that the
25 prohibition is on viewing a visual depiction of

1 the Prophet Muhammad, in those circumstances,
2 the school is coercing an individual to act
3 contrary to a religious belief.

4 JUSTICE GORSUCH: Even though just
5 being exposed to the image?

6 MR. SCHOENFELD: The -- the -- the
7 exposure --

8 JUSTICE GORSUCH: So the exposure
9 there is coercion in your view?

10 MR. SCHOENFELD: I think it's the
11 difference between exposure to ideas --

12 JUSTICE GORSUCH: Uh-huh.

13 MR. SCHOENFELD: -- and activity that
14 coerces you to engage in -- in -- in conduct
15 that is in violation of your belief.

16 JUSTICE GORSUCH: So --

17 MR. SCHOENFELD: So when --

18 JUSTICE GORSUCH: -- the idea is the
19 image of the Prophet --

20 MR. SCHOENFELD: I -- I think the
21 image is the image. In other words, if there
22 were a book --

23 JUSTICE GORSUCH: So it's an image
24 that makes the difference rather than an idea?

25 MR. SCHOENFELD: I think it's conduct

1 that makes the difference. And I think this is
2 an important distinction.

3 So, if there were a book that
4 described someone drawing an image of the
5 Prophet Muhammad, I don't think a parent would
6 have an -- the ability to object even given the
7 religious prohibition at issue on simply being
8 exposed to the idea that people might depict the
9 image of the Prophet Muhammad.

10 Being required to view the depiction
11 of the Prophet Muhammad, in contravention of a
12 religious objection, is being required to engage
13 in conduct --

14 JUSTICE GORSUCH: Well, the child is
15 sitting passively and the teacher's just reading
16 a -- a storybook.

17 MR. SCHOENFELD: I -- I -- I think, if
18 the storybook features the depiction of the
19 Prophet Muhammad --

20 JUSTICE GORSUCH: Yes.

21 MR. SCHOENFELD: -- that is a
22 compulsion to engage in conduct that violates
23 your religious belief.

24 JUSTICE GORSUCH: Okay.

25 MR. SCHOENFELD: Now, again, I think

1 what's important here is that this goes simply
2 to the question of whether the right is being
3 burdened. It's very hard --

4 JUSTICE GORSUCH: No, I -- I
5 understand that. Okay.

6 MR. SCHOENFELD: But it's very --

7 JUSTICE GORSUCH: I -- counsel, I do
8 understand that.

9 MR. SCHOENFELD: Okay.

10 JUSTICE GORSUCH: I -- I have a
11 slightly different question.

12 And -- and you say this is only about
13 exposure, but we also have in the record some
14 guidance materials for teachers and one of which
15 is, if a student says that a -- a boy can't be a
16 girl because he was born -- born a boy, a
17 teacher is to respond: That comment is hurtful,
18 and we shouldn't use negative words to talk
19 about people's identities.

20 Is that just -- is that exposure, or
21 is that something else for a three- to
22 five-year-old?

23 MR. SCHOENFELD: So two points on
24 that, Your Honor. The first is that the record
25 is seriously underdeveloped on whether and how

1 these support materials are used. These were
2 recommended -- potential answers for questions
3 that students might pose. There's nothing in
4 the record about whether any teacher --

5 JUSTICE GORSUCH: Okay. Let's say a
6 teacher does as instructed, though, and -- and
7 uses that. Is that exposure, or is that
8 coercion in your world?

9 MR. SCHOENFELD: I think that as Your
10 Honor has recited it, it is exposure to
11 particular ideas and teaching students to be
12 civil in the classroom.

13 There are certainly circumstances
14 where use of that script in a particular context
15 could give rise to a claim of coercion.

16 If, for example -- and, again, I -- I
17 think the distinction between exposure and
18 coercion is one that's quite familiar to the
19 Court. The Court undertook precisely that
20 analysis in Kennedy and in Town of Greece versus
21 Galloway.

22 JUSTICE GORSUCH: I'd like to talk
23 about Kennedy and -- and -- and maybe
24 Masterpiece a little bit too, where -- forget
25 about Yoder and substantial burden -- the Court

1 focused on, in -- particularly in Masterpiece,
2 the -- the statements of those involved in --
3 in -- in the policy.

4 And -- and, here, we have some
5 statements from Board members suggesting the
6 students were parenting their -- their
7 parents' -- parroting their parents' dogma,
8 suggesting that some parents might be promoting
9 hate and suggesting that it was unfortunate that
10 they were taking a view endorsed by white
11 supremacists and -- and -- and xenophobes.

12 I didn't see you directly address
13 those comments in your brief, and I -- I just
14 want to give you an opportunity to do so here
15 and ask you: Does that suggest a -- a hostility
16 toward religion akin to what we found in
17 Masterpiece? And why wouldn't that be enough to
18 trigger strict scrutiny on its own?

19 MR. SCHOENFELD: In the first place,
20 the question of whether there's a burden, I
21 think, is a relevant starting point, and so I
22 don't think we get to Smith or strict scrutiny.

23 JUSTICE GORSUCH: Well, we -- we found
24 in Smith and -- you know, in Smith, if you're
25 not neutral, if you're expressing discrimination

1 towards religion, and in Masterpiece, if you're
2 expressing this kind of hostility toward
3 religion, you go to strict scrutiny. And we
4 don't need to get into all the rest of these
5 coercion versus exposure and -- and dog -- and
6 doctrine about what constitutes a substantial
7 burden.

8 MR. SCHOENFELD: Respectfully, I -- I
9 think those cases, there's -- there was a clear
10 burden in each of those cases.

11 So, as the question comes before the
12 Court on how you define the burden, I think that
13 still needs to be answered before you get into
14 any of the anterior parts of --

15 JUSTICE GORSUCH: So you take the view
16 that even if you have a non-neutral policy, and
17 even if it was motivated by hostility toward
18 religion, and even though the parents claim a
19 burden, you still have to somehow meet an
20 additional -- objective substantial burden test?

21 MR. SCHOENFELD: I -- correct. I
22 think that there is a prerequisite for any free
23 exercise --

24 JUSTICE GORSUCH: Okay. Let -- let --
25 I got your answer. I appreciate that.

1 Do you -- do you want to comment about
2 those remarks and -- and -- and -- and -- and
3 what they represent?

4 MR. SCHOENFELD: Certainly. I -- I
5 think the position of the Board with respect to
6 this policy is clear. The Board adopted neutral
7 policies where it allowed opt-outs for all
8 reasons, including religious reasons, in a
9 sincere effort to accommodate the viewpoints of
10 all of the members of the community.

11 It tried that. It failed. It was not
12 able to accommodate the number of opt-outs at
13 issue. It then adopted an entirely neutral
14 policy where no opt-outs were permitted.

15 I think some of those comments have
16 been taken out of context. I think many of them
17 post-date the actual withdrawal of the opt-out
18 right by the School Board. And --

19 JUSTICE GORSUCH: So I understand that
20 some of them were in response to a parents
21 meeting after the withdrawal. So do you want to
22 defend them at all or -- or have any explanation
23 for them, that it isn't based on hostility
24 toward sincerely held religious beliefs?

25 MR. SCHOENFELD: Your Honor, my -- my

1 answer is that I think the statements speak for
2 themselves. They are taken largely out of
3 context, I think, in Petitioners' brief.
4 They're certainly --

5 JUSTICE GORSUCH: Do you have any
6 context you wish to give them?

7 MR. SCHOENFELD: I -- I -- they are
8 intemperate statements. I don't deny that. I
9 think the question of whether they motivated the
10 School Board to adopt a policy that
11 discriminates against people on the basis of
12 religion is not borne out by the record.

13 And, finally, I'd just point out that
14 in -- I -- I apologize, Justice Barrett.

15 JUSTICE BARRETT: Oh, no, no, that --
16 you can finish your answer.

17 MR. SCHOENFELD: No. Please go ahead.

18 JUSTICE BARRETT: Okay. I -- I just
19 wanted to ask: So there's been some question
20 about the record and whether these were just
21 books on the shelf or whether they were actually
22 used in the classroom.

23 How could it be that the opt-out
24 policy became unmanageable if they weren't part
25 of the instruction? Because, if they were just

1 on the shelf and the parents sought an
2 injunction saying we don't want to be taught,
3 then, presumably, that's no big deal. You'd
4 say: Okay, fine, you don't -- you're not going
5 to be taught. There's nothing to opt out of
6 because they're just on the shelf.

7 MR. SCHOENFELD: Certainly. There
8 were certainly classrooms -- in the -- there
9 were certainly classrooms where the books were
10 read out loud, where they were pulled off the
11 shelf by a student and the student read it with
12 a peer or many peers. They were used in the
13 classroom the way that any book is read in a
14 third- or second-grade classroom.

15 JUSTICE BARRETT: And so that -- that
16 is in the record, that they were used in the
17 classroom.

18 And it is in the record that the
19 teachers had this discussion material in -- in
20 the, you know, IntersectionAllies, you know, the
21 discussion guide is actually part of the book.
22 You know, the explanations about gender and --
23 and -- and all of that sort of thing are not
24 even part of the separate instructional
25 materials but part of the book itself.

1 All of that is in the record, right?

2 MR. SCHOENFELD: Absolutely. So, with
3 respect to how the supporting materials, even
4 the ones that are an adjunct to the book, like
5 IntersectionAllies, absolutely in the record.

6 What's also in the record in the -- in
7 the Hazel declaration is that some use of the
8 books was required. Do I know how it was
9 actually used in all of the classrooms in 130
10 elementary schools? No. But the expectation is
11 that they're going to be used just as any other
12 curriculum material is used.

13 JUSTICE BARRETT: So it seems to me
14 then that, really, the -- the lack of a record
15 matters most if compulsion is the standard,
16 right?

17 MR. SCHOENFELD: Absolutely.

18 JUSTICE BARRETT: Because, if
19 compulsion is the standard, then I can see why
20 we would need more in the record about, you
21 know, if -- if it really is required that the
22 teacher would have to ask a student to renounce
23 beliefs or to abandon beliefs in some way, then
24 we would want to see record evidence.

25 But, if it's not compulsion, if it's

1 interference in the way that your friend on the
2 other side has articulated it, then it seems to
3 me we have that in the record because we have
4 the books being read in the classroom. It's not
5 mere exposure.

6 MR. SCHOENFELD: So I -- I think
7 exposure to ideas in the classroom, whether they
8 come in the form of a teacher reading a book to
9 a student or a student reading a book to a
10 fellow student, that is certainly on our side of
11 the line between exposure and coercion.

12 There is a set of facts where the
13 presentation of the material in the classroom
14 might give rise to coercion.

15 JUSTICE BARRETT: Well, it's not just
16 exposure to the idea, right? If it's
17 exposure -- if it's presentation of the idea as
18 fact, that's different, right?

19 MR. SCHOENFELD: I -- I don't --

20 JUSTICE BARRETT: It's not just some
21 people think. That's -- that's exposure. Some
22 people think X. Some people think Y.

23 It's saying: This is the right view
24 of the world. This is how we think about
25 things. This is how you should think about

1 things. This is like 2 plus 2 is 4.

2 MR. SCHOENFELD: I -- I disagree with
3 that characterization of the record. So I think
4 that in --

5 JUSTICE GORSUCH: Well, let's --
6 let's -- let's say that is in the record, okay?
7 Let's say it's not just some people think X,
8 other people think Y; we live in a pluralistic
9 society, period. Let's say it is some people
10 think X, and X is wrong and hurtful and
11 negative.

12 Is that -- I mean, that -- that --
13 that -- that's more than exposure, I think, on
14 your theory.

15 MR. SCHOENFELD: That is more -- more
16 than exposure, and those facts may well be
17 relevant to a coercion claim. I don't think
18 that is what the record bears out.

19 JUSTICE BARRETT: But, if it's not
20 coercion -- you know, it -- let's say that I
21 think it's something less than coercion. You --
22 you concede that that would show, you know,
23 interference with, hindering of a parent's right
24 to --

25 MR. SCHOENFELD: I -- I don't because

1 I think the parent's right to shield their
2 children from offensive curricular materials is
3 no greater than the child's right to be free
4 from offensive curricular materials. And if, on
5 our theory of the case, children have no right
6 to be shielded from offensive curricular
7 materials that share a view that conflicts with
8 their religious belief, parents don't have a
9 greater right then to shield their children
10 from --

11 JUSTICE KAVANAUGH: Counsel, can I --

12 JUSTICE ALITO: Can I ask you --

13 JUSTICE BARRETT: Can I ask you --

14 CHIEF JUSTICE ROBERTS: Justice Alito?

15 JUSTICE BARRETT: I just -- I just
16 have -- oh, sorry.

17 CHIEF JUSTICE ROBERTS: Go ahead.

18 JUSTICE BARRETT: I just have one
19 question to follow up. I just wanted to ask you
20 quickly about this idea of whether this is a
21 public benefit or compulsion given the
22 compulsory attendance law.

23 Is it kind of your position that
24 because parents have the right to send their
25 children to private school or to home-school

1 that that in and of itself is the opt-out?

2 MR. SCHOENFELD: No, that's not a
3 position we've taken here. I do -- the -- the
4 compulsory education analysis has always been
5 part of this Court's coercion inquiry. So, in
6 Lee versus Weisman and Santa Fe, the fact that
7 the children who were enrolled in this public
8 school were required to be there for the
9 graduation ceremony, and there's a lot of
10 discussion about whether it is or is not, I
11 think the compulsory nature of public education,
12 where a student is enrolled in public school, is
13 relevant to whether there is coercion. It is
14 one factor among others.

15 The fact that a student who is
16 enrolled in a public school and needs to be
17 there is exposed to offensive ideas simply goes
18 to the question of whether we're right that
19 exposure to ideas, regardless of whether they
20 conflict with religious belief, constitutes a
21 burden on free exercise.

22 JUSTICE BARRETT: So it --

23 JUSTICE ALITO: Mr. --

24 CHIEF JUSTICE ROBERTS: Justice -- oh.

25 JUSTICE BARRETT: -- doesn't matter to

1 you that you could go to a religious school or
2 private school or home-school for purposes of
3 the analysis, the legal analysis?

4 MR. SCHOENFELD: For purposes of the
5 analysis, correct.

6 JUSTICE ALITO: Mr. Schoenfeld, could
7 I make sure I understand what you mean by
8 coercion? You say in your brief that there are
9 three things that cannot be done. The state
10 cannot say you can't go to a private school or a
11 religious school. The state cannot say you must
12 affirm certain beliefs. And the state cannot
13 say that unless you -- that -- that you're going
14 to be disqualified from benefits because of your
15 religious beliefs.

16 Is that the universe? Those are the
17 three situations in which there's coercion?

18 MR. SCHOENFELD: No, Your Honor. I --
19 I think the -- what this Court said in Lyng is
20 that coercion is found when there's a tendency
21 to coerce individuals into acting contrary to
22 their religious beliefs.

23 So, for example, in the --

24 JUSTICE ALITO: So it -- it goes
25 further -- it goes further than that. So

1 suppose a school says we're going to talk about
2 same-sex marriage and same-sex marriage is legal
3 in Maryland and it's a good thing, it's moral,
4 it makes people happy, same-sex couples form
5 good families, they raise children. Now there
6 are those who disagree with that. Catholics,
7 for example, they disagree with that. They
8 think that it's not moral, but they're wrong and
9 they're bad, and anybody who doesn't accept that
10 same-sex marriage is -- is normal and just as
11 good as opposite-sex marriage is not a good
12 person.

13 Now what if -- what if that is what
14 the teacher -- the school teaches students?

15 MR. SCHOENFELD: I think that's
16 absolutely coercion. I think where I -- where I
17 found the line between exposure and coercion in
18 your presentation, Justice Alito, was this is
19 the state of the law in Maryland and elsewhere
20 in the United States. People can fall in love,
21 get married, even same-sex couples. Some people
22 believe in it. Catholics don't believe in it.

23 And then it stopped. And then it was
24 directly derogatory of a particular -- set of
25 religious beliefs. It was avowedly so, and that

1 I think under any fair reading would -- would
2 give rise to a coercion or a discrimination
3 claim.

4 JUSTICE ALITO: So you can -- the --
5 the school can teach students certain moral
6 principles that are highly objectionable to
7 parents and that's okay?

8 MR. SCHOENFELD: Yes.

9 JUSTICE ALITO: They can't opt out?

10 MR. SCHOENFELD: That -- that does not
11 burden their free exercise. There's no
12 constitutional requirement of completeness in
13 these contexts. A school could easily teach
14 that evolution is one theory and it is the
15 correct theory, and I don't think there's any
16 constitutional problem with that.

17 Certainly, if a student taking a test
18 said you've --- taught me about evolution, here
19 are the principles of evolution, I'm reciting
20 them to you, but I don't agree with that and my
21 faith teaches me differently, no teacher would
22 penalize the student for saying that, and if the
23 teacher did, that would certainly give rise to a
24 coercion claim.

25 JUSTICE ALITO: Now let me -- the

1 opposite end of your spectrum of possibilities
2 is exposure, which you talk about over and over.
3 What does that mean? I would think that
4 exposure -- and we can take the example of
5 same-sex marriage again. Exposure is telling
6 the students that there are a lot of people who
7 marry a person of the opposite sex, there are
8 also people who marry a person of the same sex.
9 Period. Leave it at that. That's exposure.

10 If you go beyond that, is it still
11 exposure?

12 MR. SCHOENFELD: It depends on the
13 context. I mean, I think Uncle Bobby's Wedding
14 is teaching third graders or second graders
15 precisely that. It's telling it through a
16 story. And the fact that in that case it's
17 Uncle Bobby and Jamie rather than, in Uncle
18 Peter's Chinese American wedding, it's Uncle
19 Peter and his wife --

20 JUSTICE ALITO: Well, don't you
21 think -- and Justice Sotomayor and I were
22 discussing this before, and we could have a --
23 you know, we could have a book club and have a
24 debate about how Uncle Bobby's marriage should
25 be understood.

1 But I think it clearly goes beyond
2 that. It just does -- it doesn't just say that
3 Uncle Bobby and Jamie are getting married. It
4 expresses the idea subtly, but it expresses the
5 idea this is a good thing.

6 "Mommy, said Chloe, I don't
7 understand, why is Uncle Bobby getting married."

8 "Bobby and Jamie love each other, said
9 Mommy. When people" -- "When grownup people
10 love each other that much, sometimes they get
11 married."

12 I mean, that's not sending -- subtly
13 sending the message this is a good thing?

14 MR. SCHOENFELD: I -- I think that's a
15 way of a mother consoling her daughter who's
16 annoyed that her favorite uncle is distracted
17 and doesn't have time for her. But, even if the
18 message were some people are gay, some people
19 get married, I -- I don't think there's anything
20 impermissibly normative about that.

21 It is a story that is being used to
22 teach students that, just as in the 99 of the
23 100 books that we read about couples, it's a man
24 and a woman, there also may be a man and a man.

25 JUSTICE ALITO: I mean, why -- why is

1 the Montgomery County Board of Education in this
2 argument running away from what they clearly
3 want to say? They have a view that they want to
4 express on these subjects, and maybe it's a very
5 good view, but they have a definite view, and
6 that's the whole point of this curriculum, is it
7 not?

8 MR. SCHOENFELD: I -- I -- I'm not
9 running away from anything the Board has used to
10 defend this. I think what's in the record is
11 that the Board wants to teach civility and
12 respect for difference in the classroom.

13 There is obviously an incidental
14 message in some of these books that these life
15 choices and these lifestyles are worthy of
16 respect. I don't know how you can teach
17 students to respect each other without teaching
18 that. If the book were about, you know, Uncle
19 Bobby's wedding, they get married, and the rest
20 of it is that was awful, then there would be a
21 serious equal protection violation in the
22 presentation of that curriculum.

23 So the incidental message that these
24 things ought to be normalized and treated with
25 respect, I think, is simply part of the work

1 that the school is doing in cultivating respect
2 in a pluralistic school.

3 JUSTICE ALITO: Well, the -- the
4 plaintiffs here are not asking the school to
5 change its curriculum. They're just saying,
6 look, we want out. Why isn't that feasible?
7 What is the big deal about allowing them to opt
8 out of this?

9 MR. SCHOENFELD: So I -- a couple of
10 answers. I think, on the facts of this case, we
11 have the natural experiment of the schools
12 permitting these opt-outs and then finding that
13 it was not administrable. It wasn't true in
14 every school.

15 JUSTICE ALITO: Well, why is it not
16 administrable? You have -- they're able to opt
17 out of the health class, right?

18 MR. SCHOENFELD: The health class is
19 taught discretely. There's a -- there's a --
20 there's a meeting, mandatory meeting, for all
21 parents where they are told exactly what's going
22 to be taught in it and they're given the option
23 of opting out of the unit of instruction, not
24 the particular --

25 JUSTICE ALITO: Well, that's how you

1 define the unit of -- of instruction. You could
2 define the unit of instruction to include the
3 reading of these storybooks.

4 MR. SCHOENFELD: And that's not
5 compelled as a matter of Maryland state law.
6 The Maryland state --

7 JUSTICE ALITO: It's not compelled as
8 a matter of state law, but why should it not be
9 compelled as a matter of the -- the Free
10 Exercise Clause of the First Amendment?

11 MR. SCHOENFELD: I -- I don't think --

12 JUSTICE ALITO: There's nothing --
13 what is infeasible about doing that?

14 MR. SCHOENFELD: So, again, I think
15 the experience of the schools with respect to
16 these five books show that it was infeasible.
17 And let me give you an example. Let's say the
18 school, a -- an exquisitely competent and
19 well-resourced school, is able to say on Tuesday
20 at 9:00 we're going to read Uncle Bobby's
21 Wedding, we're going to make arrangements for
22 alternative space, we're going to give suitable
23 supervision for our six-year-olds, and we're
24 going to give them an alternative assignment
25 that accomplishes the same ELA goals -- goals.

1 Let's say that happens, right? That they were
2 able to pull off.

3 The next week, someone says: That was
4 my favorite book ever. I'm going to pull it off
5 the shelf and I'm going ask Alan to sit down and
6 read it with me. What happens then? The
7 teacher can't simply summon a librarian to come
8 to the school, say those were the kids who opted
9 out of that lesson last week --

10 JUSTICE ALITO: Well, I -- I -- I
11 don't think you're really answering my question.
12 Why can't this all be put -- we're going to read
13 Uncle Bobby's Wedding and these other books, but
14 we're going to read it during a period of time
15 that includes the health class, and children are
16 already able to opt out of that, so they can opt
17 out of reading these books.

18 MR. SCHOENFELD: I think there's no
19 constitutional obligation to treat these books
20 that introduce people to LGBT characters in a
21 curriculum that is meant to teach about
22 different matters.

23 JUSTICE KAVANAUGH: I'm not
24 understanding why it's not feasible. The county
25 had an opt-out. You said every other school

1 board in the country has opt-outs for all sorts
2 of things. The county has opt-outs for all
3 sorts of things. The other Maryland counties
4 have opt-outs for all sorts of things.

5 And yet, for this one thing, they
6 changed in mid -- midyear and say no more
7 opt-outs. I'm just not understanding
8 feasibility.

9 MR. SCHOENFELD: So, again, I -- I
10 think what's in the record is that with respect
11 to these books as they were deployed in the
12 classroom, there was high absenteeism in some
13 schools, for example, dozens of students being
14 opted out in -- I think Mr. Baxter said the
15 average size of a -- of an elementary school in
16 Montgomery County is 700 students. So each
17 grade has 125. If you have dozens of students
18 walking out, making arrangements for those
19 students to have adequate space and supervision
20 and alternative instruction, I think, is -- is
21 infeasible. And that's --

22 JUSTICE KAVANAUGH: But then they do
23 it for all sorts of other opt-outs.

24 MR. SCHOENFELD: They don't do it for
25 all sorts of other opt-outs. There's a limited

1 universe of things that students can opt out
2 from. The family life and healthy sexuality
3 curriculum stands alone. It is mandated by the
4 state. It is something where you're able to
5 predict precisely when the curriculum is going
6 to be deployed. There's a four --

7 JUSTICE KAVANAUGH: It's the most
8 similar substantively to what we have here, and
9 there's an opt-out allowed there.

10 I guess I'm not understanding why
11 Montgomery County School Board stands alone, I
12 think, in the country. You can tell me if
13 there's another school board that's done
14 something like this in both --

15 MR. SCHOENFELD: I -- I don't -- I
16 apologize.

17 JUSTICE KAVANAUGH: -- in both the
18 kind of books that are being used and
19 prohibiting opt-outs.

20 And I guess I'm just not
21 understanding. The whole -- goal, I think, of
22 some of our religion precedents is to look for
23 the win/win, to look for the situation where you
24 can respect the religious beliefs and
25 accommodate the religious beliefs while the

1 state or city or whatever it may be can pursue
2 its goals.

3 And, here, they're not asking you to
4 change what's taught in the classroom. They're
5 not asking you to change that at all. A lot of
6 the rhetoric suggests that they might have --
7 that's a -- that they were trying to do that,
8 but that's not what they're trying to do.

9 They're only seeking to be able to
10 walk out so that they don't have -- so the
11 parents don't have their children exposed to
12 these things that are contrary to their own
13 beliefs.

14 MR. SCHOENFELD: I understand, Your
15 Honor. And there may well be circumstances
16 where a school can -- or a school district can
17 engineer the win/win.

18 Montgomery County schools tried to
19 accomplish an educational goal of introducing
20 these books for a particular purpose. They then
21 attempted to accommodate religious opt-outs in
22 the school, and they weren't able.

23 JUSTICE JACKSON: Mr. Schoenfeld, what
24 is that purpose?

25 I mean, I thought the answer to

1 Justice Kavanaugh's question was that the School
2 Board was explicit that the books were to be
3 used only to supplement the English language
4 arts curriculum as reading instruction and not
5 to teach about gender or sexuality.

6 So it wasn't as though the books were
7 being introduced for the purpose of enhancing
8 the gender and sexuality component --

9 MR. SCHOENFELD: Absolutely.

10 JUSTICE JACKSON: -- and, therefore,
11 people can opt out of that whole thing.

12 It was that we're talking about
13 English here. And, in addition to the other
14 kinds of picture books we have on the shelf and
15 we talk about in class, we're going to introduce
16 these books as well.

17 I think that seems pretty infeasible
18 in English, when you're talking about reading
19 instruction, that every time this particular
20 kind of book comes out, we have to start letting
21 people leave the classroom.

22 MR. SCHOENFELD: I -- I agree with
23 you. And I think it goes beyond the readings of
24 the book because -- as Justice Sotomayor quoted
25 the language sought in the injunction.

1 I do think that in the context of a
2 classroom, where one student is having a
3 discussion with another, or a student comes in
4 from the playground and asks the teacher to
5 define a particular concept, or someone said my
6 brother's transgender, what does that mean, I
7 think those are all within the scope of the
8 right that the Petitioners are urging here and
9 would require the sort of accommodation that
10 they want --

11 JUSTICE KAVANAUGH: I don't think --

12 JUSTICE GORSUCH: Counsel --

13 JUSTICE KAVANAUGH: -- they're talking
14 about anything student on student.

15 JUSTICE GORSUCH: Yeah.

16 JUSTICE KAVANAUGH: So I --

17 MR. SCHOENFELD: So --

18 JUSTICE KAVANAUGH: -- I disagree with
19 what you just said, that that's within the
20 scope.

21 MR. SCHOENFELD: -- I -- I disagree
22 with you. I understand why there -- they might
23 read it that way, but I think in -- if you think
24 about the way a third-grade classroom operates
25 and you think about the fact that there are some

1 students sitting in the corner and they say:
2 This is a great book, I'm going to take it off
3 the shelf, and three and then five and then nine
4 students gather around to read it, and they say:
5 Teacher, I want you to come over and watch us
6 doing that, all of those things, I think, fall
7 within the -- definition of "curriculum" at that
8 lower grades.

9 It's -- it's mayhem. And the ability
10 of teachers to manage the line between what is
11 curriculum content coming directly from the
12 teacher and coming indirectly from the sort of
13 socialization in the classroom, I think, is very
14 hard to draw.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 JUSTICE THOMAS: You -- in -- in, I
19 think, chatting with Justice Kavanaugh, you
20 mentioned that the opt-out was unworkable
21 because there were so many students who opted
22 out. What did you mean by that?

23 MR. SCHOENFELD: So the -- the record
24 is limited on this point, but the Hazel
25 declaration talks about the fact that principals

1 reported to the School Board that there was high
2 absenteeism and gave the example of one school
3 where dozens of students were opting out.

4 JUSTICE THOMAS: Was that because they
5 found the materials objectionable or -- for
6 religious reasons or what?

7 MR. SCHOENFELD: So -- there are two
8 different paragraphs of her declaration that
9 speak to this fact.

10 In that paragraph, it doesn't specify.
11 Elsewhere in the declaration it makes clear that
12 many of the opt-out requests were not religious
13 in nature and parents objected, for example, to
14 the age-appropriateness of materials, have
15 nothing to do with religious prohibitions.

16 CHIEF JUSTICE ROBERTS: Justice Alito?

17 JUSTICE ALITO: Well, we've had a
18 discussion of many different tests and
19 precedents and hypotheticals, but let me just
20 draw back to what's going on in this particular
21 case and -- and get your reaction to this.

22 So you have a case where some of the
23 plaintiffs are devout Muslims. They say: We
24 have a solemn religious obligation to raise our
25 children as Muslims, and that involves certain

1 moral principles that we want to instill in our
2 children, and the school is teaching our
3 children moral principles that are in conflict
4 with ours.

5 And we pay taxes to support the public
6 schools, but we don't have enough money to send
7 our children to private schools. And one of us
8 can't stay home and provide home-schooling. So
9 we just want to be able to take our children out
10 of the part of the instruction that we find
11 objectionable.

12 And what's your response to that?
13 Your response to that is just: Well, it's too
14 bad, all right? This is the public school and
15 the public school can teach what the public
16 school wants. And you don't like that. Well,
17 you can take your -- you can send your -- your
18 children to private schools.

19 MR. SCHOENFELD: There's no
20 indifference to the religious beliefs of the
21 Petitioners in this case. The school did what
22 it could to accommodate those views. There are
23 simply circumstances in which what the
24 Petitioner or what any plaintiff recognizes that
25 a burden on their religious belief is not a

1 legally cognizable one given legal and practical
2 justifications.

3 JUSTICE ALITO: Well, it's nice that
4 you say that they respect the parents' religious
5 beliefs, but, basically, your answer is it's
6 just too bad.

7 MR. SCHOENFELD: I -- I think my
8 answer --

9 JUSTICE ALITO: You've got to send
10 your school -- your children to school. You
11 can't afford to send them to any place except a
12 public school, unlike, you know, most of the
13 lawyers who argue cases here, they can send
14 their children to -- to private schools, and
15 they think that that's the way most of the world
16 is. But it's not. It's just too bad.

17 MR. SCHOENFELD: My answer is that
18 public schools are democratically controlled for
19 a reason. The School Board here is
20 democratically elected. The entire process of
21 adopting this curriculum is open and
22 transparent. These books are on review for 30
23 days before they're even made part of the
24 curriculum. There is then a multi-level appeal
25 process. There is plenty of opportunity for

1 parental insight.

2 And just to draw an analogy to another
3 case from this Court, in Bowen versus Roy, there
4 was no dispute that the assignment of a Social
5 Security number would rob Little Bird of the
6 Snow of her spirit. And this Court made the
7 judgment in that case that, fully crediting the
8 sincerity of that belief and fully crediting
9 what the parents described as the imposition on
10 their daughter, there was still some breathing
11 room that the government needed to be given to
12 operate in that case.

13 JUSTICE ALITO: And you think that
14 providing a -- an opt-out under these
15 circumstances, where you already allow opt-outs
16 from the health class and opt-outs for other
17 things, is comparable to what the plaintiffs
18 were asking for in that case?

19 MR. SCHOENFELD: I -- I don't think
20 it's comparable in terms of what the plaintiffs
21 were asking for in that case.

22 I do think that under a doctrine where
23 you can't question the sincerity of the
24 beliefs -- and so, in that case, there was the
25 most dire consequence for Little Bird of the

1 Snow. There is simply no way for -- for the
2 government feasibly to honor the -- the
3 consequences of treating each person's
4 individual religious belief, no matter how
5 sincere, no matter how serious, as a burden that
6 triggers the entire scrutiny apparatus that
7 comes after it.

8 JUSTICE ALITO: So your answer to the
9 parents that I -- I talked about, which are real
10 parents here, is just, well, if you -- you don't
11 like this, you've got to get involved in
12 politics and run for the school board and change
13 it through politics. But, basically, the --
14 public schools can do pretty much whatever they
15 think is correct as far as the curriculum is
16 concerned?

17 MR. SCHOENFELD: I -- I don't agree
18 with the second part of your answer. I don't
19 think it's true that the public schools can do
20 whatever they want. There are clear lines to be
21 drawn. This Court has drawn them in cases like
22 Kennedy and Barnette and Town of Greece in a
23 different context.

24 But I -- I -- I -- I certainly don't
25 think it's true that public schools --

1 JUSTICE ALITO: All right. One -- one
2 last question. You -- you say that history
3 is -- is on your side.

4 History and tradition include not only
5 the -- it stretches back to the dawn of American
6 public education that parents can't get
7 opt-outs, right? That's what history shows us?

8 MR. SCHOENFELD: Correct.

9 JUSTICE ALITO: And you -- and one of
10 the cases you cite to support that is a decision
11 by the Maryland -- the Maine Supreme Court,
12 Donahoe versus Richards, decided in 1854?

13 MR. SCHOENFELD: Correct.

14 JUSTICE ALITO: And what was involved
15 in that case?

16 MR. SCHOENFELD: In -- that case
17 involved a Catholic student who did not want to
18 be required to read the King James Bible. I
19 fully credit --

20 JUSTICE ALITO: She was expelled.

21 MR. SCHOENFELD: And she was expelled.
22 And I fully credit that that was -- that reeks
23 of anti-Catholic bias, as this Court has
24 recognized in other contexts.

25 The point in that case --

1 JUSTICE ALITO: I -- I understand, but
2 why did you cite that as support for the history
3 that you think supports you?

4 MR. SCHOENFELD: Because --

5 JUSTICE ALITO: The history is that --
6 that public schools did all sorts of things that
7 might violate the Constitution today.

8 MR. SCHOENFELD: The point was in
9 response to Petitioners' invocation of a much
10 more recent history about opt-outs from sex
11 education.

12 JUSTICE ALITO: All right. Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

15 JUSTICE SOTOMAYOR: Mr. Schoenfeld,
16 you talked about the review parent -- process
17 for parents. They don't have to run for the
18 school board. It's a fairly complicated four
19 levels of review if a parent objects, correct?

20 MR. SCHOENFELD: Correct. There's a
21 process for adopting curriculum as part of the
22 school materials as instructional materials at
23 the beginning, and then, if parents don't like
24 it, either at that point in time or at some
25 later point in time given how it's being used,

1 they can appeal it to the school -- the deputy
2 superintendent for instruction, the
3 superintendent, the school board, the -- the
4 Maryland State School Board. And, in fact, we
5 cite a case in our papers where the parents
6 objected to the classification of these
7 materials outside of the family life and -- and
8 human sexuality unit, and that case went through
9 the state school board and is now working its
10 way through the Maryland state courts.

11 JUSTICE SOTOMAYOR: Now at least two
12 of the books, it was represented, were removed
13 from the curricula as a result of this appeal
14 process?

15 MR. SCHOENFELD: I -- I don't know
16 where they were in the appeal process, but they
17 were removed from the curriculum as part of the
18 ordinary review process, correct.

19 JUSTICE SOTOMAYOR: All right. Now
20 Justice Alito didn't -- I'd like you to address
21 Justice Gorsuch's point. Justice Barrett
22 questioned whether this is really a public
23 benefit because attendance is coerced.

24 So, if it's not a public benefit, that
25 leaves us, in part, with discrimination. And I

1 think you said to Justice Gorsuch that you still
2 need a burden even if you treat people
3 differently because of their religion?

4 MR. SCHOENFELD: Correct.

5 JUSTICE SOTOMAYOR: There is a line or
6 circuit split -- there was recently -- on that
7 very issue whether a de minimis burden qualifies
8 or doesn't. And we said no, a de -- minimis
9 burden doesn't qualify -- doesn't eliminate the
10 discrimination.

11 But there has to be a difference of
12 some meaning. Is it your point that this is not
13 being treated differently?

14 MR. SCHOENFELD: So I don't think that
15 there's any facial or non-facial discrimination
16 here. The opt-out applied to all -- to all
17 aspects of the curriculum previously, and then
18 there are no opt-out rights for any aspect of
19 the curriculum. The things that people are able
20 to opt out of are non-curricular, like
21 Valentine's Day or Halloween parties, or they
22 fall within the family life and human sexuality.
23 So there's --

24 JUSTICE SOTOMAYOR: Is that
25 distinction alone -- there are some who would

1 argue that that distinction alone is not
2 neutrally applicable?

3 MR. SCHOENFELD: I think, under
4 Tandon, it is neutral and generally applicable.
5 The question in Tandon is whether any secular
6 activity is being treated better than any
7 comparable religious activity. And there's
8 nothing like that here. There's no distinction
9 being made in either version of the policy
10 between secular and religious.

11 There's nothing intrinsically
12 religious about these opt-outs. Many of them
13 were taken for non-religious reasons. So, under
14 any of the Court's tests, including Master P
15 Cake -- Masterpiece Cakeshop, I don't think
16 there's anything that gives rise to even an
17 inference of discrimination that would trigger
18 some distinct analysis that might not require a
19 burden.

20 JUSTICE SOTOMAYOR: Why is this
21 different than Masterpiece? In Masterpiece, it
22 was a board member.

23 MR. SCHOENFELD: Well, in Masterpiece
24 Cakeshop, it was an adjudicative context. And
25 the Court made very clear in that context that

1 it was addressing the question of whether a
2 party whose case is being decided by the
3 adjudicative body had been discriminated against
4 and, therefore, had been pressured or coerced
5 into adopting a religious belief. The Court is
6 explicitly clear in Masterpiece that it was not
7 opining on whether that analysis is appropriate
8 in the legislative or executive context.

9 JUSTICE SOTOMAYOR: If we reply on the
10 statements of isolated board members, we're in a
11 real pickle, aren't we?

12 MR. SCHOENFELD: Yeah, and I think
13 that that's what Justice -- Justice Scalia
14 pointed out in Lukumi and other cases, where he
15 said it's folly to try to identify individual
16 statements made in the democratic process and
17 rely on the individual statements of
18 legislators.

19 JUSTICE SOTOMAYOR: You called the
20 statements by that one board member that Justice
21 Gorsuch read as intemperate. There were some.
22 But the examples that were provided about
23 xenophobes or white racists were in the concept
24 of the extent of public disruption that would
25 occur if an exemption was given to everyone for

1 any reason, correct?

2 MR. SCHOENFELD: Certainly, the prompt
3 for it was not anything about a particular
4 religious person or a particular set of
5 religious beliefs. It was in the context of a
6 discussion about whether opt-outs should be
7 allowed at all for any reason.

8 JUSTICE SOTOMAYOR: And it was
9 disruption that that board member was
10 concentrating?

11 MR. SCHOENFELD: Correct.

12 JUSTICE SOTOMAYOR: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 JUSTICE KAGAN: Mr. Schoenfeld, I
15 think it would be fair to say that Mr. Baxter
16 and Ms. Harris did not want to draw lines, that,
17 you know, if there was material and it was being
18 used in instruction in whatever way it was being
19 used to whatever age kids with respect to
20 whatever subject matter, if there was a parent
21 who had some sincere religious objection to
22 that, that that parent would be allowed to opt
23 out.

24 And when I pushed Mr. Baxter a little
25 bit on that as to the consequences of it, he

1 said, you know, like, I don't want to draw lines
2 for you, but, really, the problems, the problems
3 here, the places we see objections are in a much
4 more limited set of cases. We don't -- we don't
5 see a lot of objections in high schools. We
6 don't see a lot of objections about evolution
7 classes. You know, we -- is that true? And
8 should we count on it being true? And how can
9 we tell if it's true?

10 MR. SCHOENFELD: So two answers,
11 Justice Kagan. The first is I don't think you
12 can count on it being true for exactly the
13 reason Your Honor gave, which is, once this
14 Court constitutionalizes that prerogative,
15 you're in a completely different world in terms
16 of parents' willingness or ability to invoke it.

17 And with respect to the question of
18 whether it is empirically true, the best data
19 point is the last 40 years of litigation on this
20 topics. And I think the Superintendents' brief
21 in support of neither party, Professor Lupu's
22 brief, and also the NEA brief just recount for
23 you the dozens of cases to all aspects of the
24 curriculum that have been brought over the last
25 40 years. And the way that courts have

1 controlled for the volume of those cases is to
2 stop the inquiry at the burden stage and hold
3 consistently in those cases while fully
4 acknowledging that there may be circumstances
5 that give rise to coercion, fully recognizing
6 that exposure to ideas, even if they offend
7 religious beliefs, do not qualify as a burden
8 for free exercise purposes.

9 JUSTICE KAGAN: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch?

12 JUSTICE GORSUCH: I just want to make
13 sure I understand a -- a few thing -- fact
14 things and then a law question.

15 What age do you in Montgomery County
16 teach students normally about human sexuality?

17 MR. SCHOENFELD: I think that it
18 begins in either fourth or fifth grade.

19 JUSTICE GORSUCH: The human sexuality
20 class?

21 MR. SCHOENFELD: That family life and
22 human sexuality curriculum.

23 JUSTICE GORSUCH: Okay.

24 MR. SCHOENFELD: I'm not entirely
25 sure.

1 JUSTICE GORSUCH: Starts in fourth or
2 fifth grade, you think?

3 MR. SCHOENFELD: I think so.

4 JUSTICE GORSUCH: Is there anything
5 you can point us to in the record on that?

6 MR. SCHOENFELD: I don't think so.

7 JUSTICE GORSUCH: Okay. And, second,
8 these books are being used in English class?

9 MR. SCHOENFELD: The division between
10 English class and other things in a second grade
11 classroom doesn't really exist. You're sort of
12 in a room with a teacher and some kids are in
13 a --

14 JUSTICE GORSUCH: No, I -- I
15 appreciate that. I -- I went to second grade
16 too.

17 (Laughter.)

18 MR. SCHOENFELD: Yeah.

19 JUSTICE GORSUCH: But -- but -- but
20 it's -- it's part of the English curriculum that
21 these books are being used in? That's -- I
22 thought that was clear.

23 MR. SCHOENFELD: Yeah. I'm not -- I'm
24 not fighting the premise. I'm just saying that
25 the lines are --

1 JUSTICE GORSUCH: It's not the math
2 class.
3 MR. SCHOENFELD: It is not the --
4 JUSTICE GORSUCH: It's not the human
5 sexuality class. It's -- it's the English
6 class.
7 MR. SCHOENFELD: It's certainly not
8 the human sexuality class.
9 JUSTICE GORSUCH: Yeah.
10 MR. SCHOENFELD: I'm just sort of
11 fighting the premise that there's a neat
12 distinction.
13 JUSTICE GORSUCH: Okay. And they're
14 being used in -- in English language instruction
15 at age 3, some of them?
16 MR. SCHOENFELD: So Pride Puppy was
17 the book that was used for the prekindergarten
18 curriculum. That's no longer in the curriculum.
19 JUSTICE GORSUCH: That's the one where
20 they are supposed to look for the leather and
21 things -- and bondage, things like that, right?
22 MR. SCHOENFELD: It's not bondage.
23 JUSTICE GORSUCH: A sex --
24 MR. SCHOENFELD: It's a woman in a
25 leather --

1 JUSTICE GORSUCH: -- sex worker,
2 right?
3 MR. SCHOENFELD: No.
4 JUSTICE GORSUCH: No?
5 MR. SCHOENFELD: That's not correct.
6 No.
7 JUSTICE GORSUCH: I thought -- I
8 thought -- my gosh, I -- I read it.
9 JUSTICE BARRETT: It's a drag queen in
10 drag.
11 JUSTICE GORSUCH: Drag -- drag queen
12 in -- a drag queen.
13 MR. SCHOENFELD: So -- correct. The
14 leather that they're pointing to is a woman in a
15 leather jacket, and one of the words is drag
16 queen in this --
17 JUSTICE GORSUCH: And they're supposed
18 to look for those?
19 MR. SCHOENFELD: It is an option at
20 the end of the book, correct.
21 JUSTICE GORSUCH: Yeah. Okay. And
22 your -- you've included these in the English
23 language curriculum rather than the human
24 sexuality curriculum to influence students, is
25 that fair? That's what the district court

1 found. Do you agree with that?

2 MR. SCHOENFELD: I think, to the
3 extent the district court found that it was to
4 influence, it was to influence them towards
5 civility, the natural consequence of being
6 exposed to --

7 JUSTICE GORSUCH: Whatever, but to
8 influence them.

9 MR. SCHOENFELD: In the manner that I
10 just mentioned, yes.

11 JUSTICE GORSUCH: Okay. And
12 responding to parents who are concerned, you
13 agree that this -- there was some intemperate
14 language used?

15 MR. SCHOENFELD: I -- I don't know
16 that those were responding to parents who were
17 concerned. This was after the fact for most of
18 these comments. And this was in a very public
19 setting which obviously got heated and some
20 intemperate comments were used, certainly.

21 JUSTICE GORSUCH: Yeah. And -- and
22 I -- I wanted to understand your -- your --
23 your -- your context that you were giving about
24 the statement that some Muslim families -- it's
25 unfortunate that this -- that this issue puts

1 some Muslim families on the same side of an
2 issue as white supremacists and outright bigots.

3 I -- I think, in response to Justice
4 Sotomayor, you were trying to give some context
5 to that?

6 MR. SCHOENFELD: I -- I don't think I
7 was speaking directly about that comment. I
8 think that comment was given or was made in
9 June, which was several months after the
10 decision to withdraw the opt-outs was made. I
11 don't have context for that statement, no.

12 JUSTICE GORSUCH: Okay. And then the
13 legal question. Why isn't discrimination
14 against religion a burden on religion? If --
15 if -- if -- if a state -- now this is
16 hypothetical, not -- moving away from the
17 record.

18 If -- if state actors intentionally
19 discriminate against religion, what secular
20 purpose, valid secular purpose could that serve?
21 And how -- how wouldn't that be a burden?

22 MR. SCHOENFELD: So I -- I don't
23 know -- I mean, it depends on the hypothetical,
24 what the state is doing and whether there is a
25 secular purpose. It's hard to imagine one.

1 But, if the state is discriminating --

2 JUSTICE GORSUCH: Against Muslims or
3 Catholics or Protestants or whatever.

4 MR. SCHOENFELD: I think this Court
5 has recognized that when an enactment that
6 discriminates on its face -- or has recognized
7 with respect to an enactment that discriminates
8 on its face, it is intrinsically coercive.
9 That's how the Court has performed the burden
10 inquiry.

11 If you are privileging one religion
12 over another, you are coercing people to
13 subscribe to that particular set of beliefs in
14 order to get --

15 JUSTICE GORSUCH: So that's a burden.

16 MR. SCHOENFELD: Yeah. Absolutely.

17 JUSTICE GORSUCH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh?

20 JUSTICE KAVANAUGH: A few things.

21 On exposure, you've used that term, I
22 believe, to include not just exposure in the
23 sense of the book on the shelf but also the
24 communication of those ideas by the teacher in
25 the classroom.

1 MR. SCHOENFELD: Correct.

2 JUSTICE KAVANAUGH: And that's not
3 usually, I think, what we think of as exposure
4 as opposed to instruction, but --

5 MR. SCHOENFELD: Well, the -- the
6 question presented is about participation and
7 instruction, which was precisely one of the
8 things that the Barnettes objected to in being
9 present for the flag ceremony.

10 But I -- I think it's analogous to
11 Kennedy, right? The -- the question there was
12 whether people were merely exposed to Coach
13 Kennedy's prayer, even though the Court
14 acknowledged that people might see it, people
15 might hear it, and people might be offended by
16 the content of it.

17 JUSTICE KAVANAUGH: Okay. And on --
18 on Justice Kagan's question about the no lines,
19 I took that to be the position of Petitioners
20 and the United States with respect to burden in
21 the sense that you can have a substantial -- you
22 can claim a religious objection or burden to
23 lots of different things, and people do, but
24 that the line-drawing occurs when you do the
25 strict scrutiny analysis.

1 Is that not your understanding?

2 MR. SCHOENFELD: I don't know what
3 you're asking if it's my understanding of, but
4 let me try to answer it this way.

5 JUSTICE KAVANAUGH: Is that your
6 understanding of their position? In other
7 words, that they do draw lines, but it's at the
8 strict scrutiny stage?

9 MR. SCHOENFELD: Well, the -- the
10 question presented to the Court is obviously
11 limited to burden, and what I understood Justice
12 Kagan's exchange with Petitioners' counsel to
13 reflect is that there is no way to draw a line
14 once you are relying on the Petitioners' --

15 JUSTICE KAVANAUGH: As to substantial
16 burden, but once you get to strict scrutiny, as
17 some of our cases reveal, Social Security
18 numbers, et cetera, there are -- there is
19 line-drawing once you do that.

20 In other words, just because you have
21 a religious objection to something doesn't mean
22 you win. You agree with that, I think, in our
23 case law?

24 MR. SCHOENFELD: Yeah, absolutely,
25 though, in Bowen, the Court stopped at the

1 burden inquiry at least with respect to the
2 government's own use of the Social Security
3 number.

4 JUSTICE KAVANAUGH: And you've
5 mentioned a few times that the school board was
6 democratically elected, democratically
7 controlled, and being on the school board's a
8 hard job, so, you know, we all respect that.
9 But -- you know, that can't be the end of it,
10 right?

11 MR. SCHOENFELD: Absolutely not, no.
12 And I -- I didn't mean to --

13 JUSTICE KAVANAUGH: -- liberty --
14 we're -- we're -- we're here to protect the
15 liberty in the Constitution from the democratic
16 excess.

17 MR. SCHOENFELD: Absolutely. And so
18 that was not my intention at all. It was to
19 respond to a specific question about what
20 options parents have. And among them, I think,
21 is wresting control of the school board,
22 implementing their preferred policies, or
23 participating even in the curriculum selection
24 process.

25 JUSTICE KAVANAUGH: And then I -- I

1 don't think you answered this or maybe we got
2 past it last time. Do you -- are you aware of
3 any other county or city school board that has
4 something similar to what's going on here?

5 MR. SCHOENFELD: I -- I'm not, but I
6 think that the other side of the ledger is
7 overstated because what is described in the
8 amicus briefs about what other school boards and
9 other states do is limited to -- what we
10 traditionally consider health education. So I'm
11 not -- I'm not certain that there is a large
12 number of other states or county school boards
13 that allow opt-outs from any curriculum for any
14 reason.

15 JUSTICE KAVANAUGH: And then, last
16 point, just to comment, and you can respond to
17 it as you want, but Maryland was founded on
18 religious liberty and religious tolerance, a
19 haven for Catholics -- escaping persecution in
20 England going back to 1649. I'm sure you're
21 aware of this history.

22 And Montgomery County has been a
23 beacon of that religious liberty for all these
24 years with a strong Catholic population, a
25 substantial Jewish population, lots of different

1 Protestant. I mean, you drive down any --
2 any -- Connecticut Avenue or Georgia Avenue, you
3 know, you see religious building after religious
4 building.

5 And I guess I'm surprised given that
6 this is, you know, this is the hill we're going
7 to die on in terms of not respecting religious
8 liberty given that history. And so history
9 comes up. I just want to give you a chance to
10 respond to how you situate that in Maryland and
11 Montgomery County's history.

12 MR. SCHOENFELD: Every school board
13 walks a tightrope, as this Court has recognized
14 and other courts have recognized. It's a
15 difficult job balancing the interests of a
16 diverse community. Montgomery County Public
17 Schools are the most religiously diverse in the
18 country.

19 There may be different ways to handle
20 this under other circumstances. Montgomery
21 County did its best under these circumstances
22 given their curricular goals. That seems to me
23 a fundamentally different question and it's an
24 important one, but it is a fundamentally
25 different question about whether there's a

1 constitutional right to opt your child out of
2 curriculum that you deem religiously offensive.

3 JUSTICE KAVANAUGH: Thank you. This
4 is a tough case to argue. I appreciate it.
5 Thank you.

6 MR. SCHOENFELD: Thanks, Your Honor.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: I just want to ask
10 you a couple questions about the instructional
11 materials. So part of the conversation today
12 has been about exposure and whether this is
13 about teaching civility, and so I just wanted to
14 read you a couple things from the instructional
15 materials to get your reaction of how, if at
16 all, this plays into the analysis.

17 So I don't understand Petitioners to
18 be arguing that, you know, there was an
19 objection to being taught respect and kindness
20 to those who have different beliefs.

21 I understood them to be more focused
22 on things like, you know, this is an instruction
23 to the teacher, "If a student observes that a
24 girl can only like boys because she's a girl,
25 the Board suggested that the teacher disrupt the

1 student's either/or thinking by saying something
2 like: Actually, people of any gender can like
3 whoever they like."

4 You know, or, on the transgender
5 issue, "When we're born, people make a guess
6 about our gender and label us boy or girl based
7 on our body parts. Sometimes they're right;
8 sometimes they're wrong. When someone's
9 transgender, they guess wrong. When someone's
10 cisgender, they guessed right."

11 So, you know, it's kind of along those
12 things, which seem to be more about influence,
13 right, and shaping of ideas and less about
14 communicating respect because it's less about
15 communicating respect for those, you know,
16 who -- who are transgender, who are gay, and
17 more about how to think about sexuality.

18 What is your take on that and how we
19 think about this, whether this really is just
20 about exposure and civility and learning to
21 function in a multicultural and diverse society
22 and how much of it is about influence or, as
23 Petitioners would say, indoctrination?

24 MR. SCHOENFELD: Certainly. I think
25 what you quoted, Your Honor, are suggested

1 responses or proposed responses for
2 age-appropriate ways to respond to questions
3 that may arise in response to these texts or
4 otherwise.

5 The same response about disrupt the
6 either/or thinking is given when someone says
7 dresses are for girls, boys can't paint their
8 nails, those are boy toys. These are simply
9 ways of contextualizing the information that's
10 being learned and to give students the
11 predicates for being able to respect each other.

12 The school -- the -- the express
13 directive from the school is you don't need to
14 understand your peers, you don't need to agree
15 with them, you don't need to affirm with them,
16 but you do need to treat them with respect.

17 When ensuring that that goal is met in
18 the classroom has the incidental sort of
19 implication of answering a direct question about
20 what it means to be transgender, that's an
21 option that's offered to a teacher. There are
22 certainly -- under certain circumstances where
23 use of these materials or different comments if
24 a teacher were to say something pejorative or
25 negative or begin to treat students differently

1 in terms -- in terms of allocation of sort of
2 resources in the classroom based on how they
3 responded to that, that's a coercion claim, but
4 simply explaining to students what fundamental
5 concepts are so that they can treat each other
6 with respect, I think, is no different than --

7 JUSTICE BARRETT: Well, but those
8 things that I read were more than about respect.
9 It was more about kind of what I was talking
10 with you about before, like 2 plus 2 is 4.
11 Like, this is how it is. You know, gender is
12 not something that can be identified at birth,
13 for example.

14 So, I mean, I guess that that is one
15 way of teaching -- teaching respect because it's
16 saying, you know, it's validating the other
17 world view here, the one that's different from
18 Petitioners, by saying no, no, no, this is
19 right. This is how we should understand that.
20 And so that is why you should respect and treat
21 with kindness or one could say I understand --
22 and -- and some of the instructional materials
23 did frame it this way, the way I'm about to
24 say -- which is you might not agree or this
25 might be different, but we have to respect

1 and -- and --

2 MR. SCHOENFELD: Certainly.

3 JUSTICE BARRETT: -- and treat
4 everyone with kindness. So I don't understand
5 Petitioners to be objecting to the latter kinds
6 of statements. I understand them to be
7 objecting to the "this is the way it is" kind of
8 statements.

9 MR. SCHOENFELD: I understand them to
10 be objecting to all of it --

11 JUSTICE BARRETT: To all of it?

12 MR. SCHOENFELD: -- including just
13 using the books with none of those materials.
14 The only --

15 JUSTICE BARRETT: Yeah, I -- I -- I
16 agree, sorry.

17 MR. SCHOENFELD: Yeah.

18 JUSTICE BARRETT: I'm just talking
19 about the instruction.

20 MR. SCHOENFELD: Oh, I'm sorry.

21 JUSTICE BARRETT: Yeah, yeah.

22 MR. SCHOENFELD: So I think you and I
23 see it the same way.

24 JUSTICE BARRETT: Yeah.

25 MR. SCHOENFELD: With respect to the

1 instructional materials, though, if we are in a
2 world where you and I are parsing which of these
3 materials are impermissible or give rise to a
4 burden on the impermissible side of the line
5 from the others, the record is woefully
6 underdeveloped on that point.

7 These books were in use for nine
8 months before Petitioners sued. There's not a
9 single factual statement in any of these
10 declarations or anything else that explains how
11 these supporting materials were used. It may
12 well be the case that no second grade teacher
13 ever uttered the words that you just quoted.

14 JUSTICE BARRETT: But I think what
15 Petitioners said in their argument is that we're
16 at the preliminary injunction stage, and the
17 instructional materials were given to the
18 teachers, and I think the instructional
19 materials reflect what the Board hoped to
20 accomplish by introducing these books into the
21 classroom.

22 And so what they're saying is
23 before -- we don't want to wait for the teacher
24 to say this to our child. Our whole point is we
25 know that this is part of the Board's curricular

1 choice, we know that these are the instructional
2 materials that are given to the teachers, and we
3 don't want our child to be exposed to that.

4 And so, frankly, if they got the
5 injunction they were asking for, you know, then
6 they wouldn't -- would never be uttered.

7 MR. SCHOENFELD: Yeah. I -- I don't
8 dispute anything you're saying. I think the
9 relevant inquiry takes account of that temporal
10 dimension --

11 JUSTICE BARRETT: Yeah.

12 MR. SCHOENFELD: -- for something --
13 essentially a pre-enforcement challenge here.
14 It would not have been difficult if this was
15 being used rampantly and impermissibly in
16 classrooms for them to find an -- a declarant
17 who didn't need to be a Petitioner to say this
18 is what's going on in this classroom. There are
19 hundreds --

20 JUSTICE BARRETT: But they didn't have
21 to have that for a PI --

22 MR. SCHOENFELD: They have to show --

23 JUSTICE BARRETT: -- right?

24 MR. SCHOENFELD: -- a reasonable
25 likelihood of success on the merits. And to

1 say --

2 JUSTICE BARRETT: And it's not a
3 reasonable likelihood of success or that this
4 is -- this injury is imminent to say this is
5 what teachers have been given as a suggested
6 discussion guide?

7 MR. SCHOENFELD: This was distributed
8 to 130 teachers in August of 2022 for teachers
9 who voluntarily attended one of these materials
10 and was otherwise made generally available.
11 It's not a script. You're not required to
12 answer that particular question if it arises
13 with that particular verbatim response. I don't
14 know any second grade teacher who could.

15 So I do think some more particularized
16 showing is required for someone to prevail even
17 at the preliminary injunction stage.

18 JUSTICE BARRETT: So, last question,
19 do you agree that it was the purpose of the
20 Board to try to disrupt students' thinking
21 and -- and make them see -- to disrupt their
22 thinking and have them not see gender as binary
23 and to accept, you know -- basically accept
24 LGBTQ relationships and ideas in -- in this way,
25 kind of the ways that I -- I just read?

1 MR. SCHOENFELD: I think the goal -- I
2 want to answer your question directly.

3 JUSTICE BARRETT: Yeah.

4 MR. SCHOENFELD: I think the goal was
5 to teach mutual respect. I think, to the extent
6 that students were unable to display mutual
7 respect for their peers without having some
8 further understanding that boys can play with
9 girls' toys, for example, then that was
10 absolutely part of the curriculum.

11 JUSTICE BARRETT: So it was part of
12 the curriculum to teach them that boys can be
13 girls or boys can -- or that your pronouns can
14 change depending on how you feel one day to the
15 next? That was part of the goal?

16 MR. SCHOENFELD: So I think you're
17 quoting from a book that was not part of the
18 curriculum, but let me just set that aside.

19 JUSTICE BARRETT: Well, I thought that
20 was an Inter- -- I -- I might -- they might be
21 blending --

22 MR. SCHOENFELD: They blend together.
23 Yeah.

24 JUSTICE BARRETT: -- together in my
25 mind. I thought that was from Inter- -- I

1 thought that was from the Allies book.

2 MR. SCHOENFELD: I -- I don't think --

3 JUSTICE BARRETT: The

4 IntersectionAllies?

5 MR. SCHOENFELD: I don't think so.

6 JUSTICE BARRETT: No?

7 MR. SCHOENFELD: I think there may be

8 a quotation from the --

9 JUSTICE BARRETT: Penelope's --

10 MR. SCHOENFELD: -- teachers' user

11 guide at the end, but --

12 JUSTICE BARRETT: Okay. Oh, at the

13 end of IntersectionAllies?

14 MR. SCHOENFELD: Yeah.

15 JUSTICE BARRETT: Oh.

16 MR. SCHOENFELD: It may be, though

17 I -- I recall it being a quote from another. It

18 doesn't matter.

19 JUSTICE BARRETT: Yeah.

20 MR. SCHOENFELD: So I -- I think the

21 way that these support materials are framed are

22 to help a teacher answer a student's question

23 when he says, in this book, there's a boy who

24 says that he's a girl; how can you be a girl

25 when you were born a boy? And it's one resource

1 to provide teachers with an answer to that
2 question.

3 The alternative was to provide nothing
4 to the teachers, which I think would abdicate
5 the School Board's responsibility to ensure that
6 their teachers are equipped to do their job.

7 JUSTICE BARRETT: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?

10 JUSTICE JACKSON: So -- two quick
11 final points. For those of us who are trying to
12 get a handle on the potential administrative
13 challenges of notice and opt-out rights, would
14 you be recommending that we look at the
15 student -- the School Superintendents
16 Association amicus brief? Because I thought
17 that's what they were focusing on, that here are
18 actual potential administrative challenges. Is
19 that --

20 MR. SCHOENFELD: Yeah. I think that's
21 a --

22 JUSTICE JACKSON: -- one of the
23 resources?

24 MR. SCHOENFELD: -- that's a -- that
25 resource is well worthwhile, I think, for two

1 reasons. The first is it goes through 40 years
2 of litigation on this going back to Mozert, and
3 it has I think a bulleted list of all of the
4 things that parents have raised even under the
5 sort of ancien régime where these were not
6 treated as burdens. And, second, I think it
7 makes a persuasive case about the
8 administrability of the isolated family life and
9 health education options.

10 JUSTICE JACKSON: All right. And,
11 finally, as I understand your response to
12 Justice Alito's question about what religious
13 parents are supposed to do, I understood you to
14 say that parents with religious objections can
15 vote for members of the school board, they can
16 go to school board meetings, they can object to
17 the curriculum. Maybe the school board will
18 agree with them, at which point we don't have a
19 problem, or maybe they won't. And if they don't
20 agree, those parents in Montgomery County at
21 least can pull their students out of school and
22 home-school them or send them somewhere else.

23 But, under Petitioners' rule, as I
24 understand it, parents who lose through the
25 democratic process, who are not able to get the

1 curriculum tailored in their local school boards
2 the way that they would like, would have another
3 option, and that option would be to go to
4 federal court. And so, instead of having
5 democratically elected representatives and
6 experts in the field making the decision about
7 which books should be taught to kids in the
8 classroom, you have federal judges flipping
9 through the picture books and deciding whether
10 these are appropriate for five-year-olds.

11 I mean, I don't know how we would even
12 go about that. It seems pretty troubling
13 because, ordinarily, public education has been
14 the subject of local control. We typically lack
15 the specialized knowledge and experience to know
16 what, you know, should be taught to kids and how
17 and to look at the instruction manual and say,
18 is this a proper response?

19 So that's kind of a concern, I think.
20 And I also think it's a concern that these
21 questions don't always have one answer. Maybe,
22 maybe, in one community, one set of values,
23 these books are fine, but in another community
24 with a different set of -- values, they're not.

25 And it's sort of the local process

1 that allows that to cash out where people live,
2 that allow their values to get expressed in the
3 context of schools. And if we constitutionalize
4 that, I wonder if we're going to have a real
5 problem in terms of people with different values
6 not being able to have a -- a say in their local
7 community as to what their kids learn.

8 MR. SCHOENFELD: I agree with all of
9 that, and I think it goes back to Justice
10 Kagan's point earlier where I think you
11 described it as a sort of hydraulic pressure,
12 which is, once you constitutionalize it, I think
13 you'll see an entirely different generation of
14 challenges to school curriculum.

15 So the last 40 years are the natural
16 experiment, where courts used burden as a
17 meaningful filtering system for mere exposure to
18 offensive ideas in the classroom versus where
19 the presentation of the curriculum was becoming
20 impermissibly coercive.

21 I grant that there are limits on what
22 schools can do with their time when students are
23 in the classroom. But exposing them to
24 different ideas, even ideas that offend their
25 family's religious beliefs or make it more

1 difficult for their families to raise them in
2 the faith, simply doesn't qualify as a burden
3 for purposes -- for the purposes in front of us.

4 And I think that that burden analysis
5 always has to be carried out in light of the
6 special characteristics of the school
7 environment, which I think, Justice Jackson, is
8 precisely what you're getting at. A very
9 important part of the special characteristics of
10 the school environment are the fact that federal
11 courts are not meant to sit as school boards in
12 deciding these curriculum disputes.

13 And I think my colloquy with Justice
14 Alito illustrates that. If the question really
15 turns on whether one reads Uncle Bobby's Wedding
16 one way versus the other way, courts are going
17 to be enmeshed in the most fine-grained disputes
18 about how to treat curricular materials.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Rebuttal, Mr. Baxter.

23 REBUTTAL ARGUMENT OF ERIC S. BAXTER
24 ON BEHALF OF THE PETITIONERS

25 MR. BAXTER: I'd like to start with

1 four corrections to the record. First, the book
2 What Are Your Words is the book where the --
3 children are told that their pronouns can change
4 day to day. At 80 -- and this is in the
5 district court's opinion. At 80a in the Cert
6 Appendix, note 1, the district court found that
7 this book and others were recommended. There
8 are certain books that were part of this
9 curriculum, but there are potentially hundreds
10 of others that the Board says you can use as
11 part of this.

12 There was a question about why this --
13 you know, why isn't there more evidence from
14 early on? Because there were opt-outs and the
15 Board insisted over and over that there were
16 opt-outs. We also know that the principals'
17 letter didn't come in 'til November of 2022
18 saying that teachers were uncomfortable
19 presenting this material, it was
20 age-inappropriate, they didn't want to be
21 talking about romance between two kids on the
22 playground regardless of their sexual
23 orientation.

24 On the question of use, I would refer
25 to C05 -- or 605 in the Cert Appendix, where

1 Hazel, the Board's representative, said that
2 they have to be used as part of instruction.
3 657 when they announced they were blocking the
4 opt-outs, they said teachers must utilize with
5 all students. These books are definitely being
6 read by the teachers as part of the curriculum.
7 And it's also at 63 of the district court
8 transcript.

9 And then also a question about when
10 sex ed starts. The Board's and the -- the
11 state's mandated regulation is in the record.
12 It's at pages 62 through 83 of the Joint
13 Appendix. There, you start in pre-K with
14 instruction that parents can -- or families can
15 come in all different forms with all different
16 kinds of parents, different kinds of gender
17 identities and expressions. The same things
18 that are being taught through the school --
19 schoolbooks, you can opt out when it comes up
20 during health class but not during story time,
21 which -- in which there's no instruction about
22 how to use these -- these books to develop
23 characters, a narrative arc, or anything else
24 that you would expect in an English class.

25 This was not a democratic process.

1 Withdrawing these overnight, comparing parents
2 to xenophobes and white supremacists, this can't
3 be part of the -- of the democratic process.

4 The line-drawing problem is on the
5 Board's side. I'm -- I'm confused now about
6 what exposure is. If you can -- are you being
7 exposed to the Prophet Muhammad, that's not
8 okay, but if you're being instructed something
9 derogatory about him, that is -- you can't get
10 an opt-out? Is it -- what does it mean to be
11 derogatory to someone who is in the third grade?

12 And the 40-year issue of litigation I
13 think proves the exact opposite point. If you
14 look at those cases in, for example, the NEA
15 brief, those are Establishment Clause cases.
16 They are curriculum challenges, where we agree
17 that the Plaintiffs should lose. There are
18 cases where people got a -- got a -- got relief
19 and still sued. And a lot of them were resolved
20 under strict scrutiny.

21 So -- and half the circuits have never
22 even addressed this question. This is a
23 question of first impression in the Fourth
24 Circuit. So there's no sense that these issues
25 are going to create lots of kinds of problems.

1 As far as feasibility, counsel made
2 lots of arguments that are not in the record.
3 This was their burden. The evidence was in
4 their control. They could have put it into the
5 record. It's not there. On a preliminary
6 injunction, they should be held to their burden.

7 We've been doing this for two years.
8 Our clients are making great sacrifice to send
9 their kids to private school, to home-school.
10 They've moved out of the county. They're not
11 knowing what their kids are being taught.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 MR. BAXTER: If -- if the First
15 Amendment means that --

16 CHIEF JUSTICE ROBERTS: Thank you.

17 MR. BAXTER: -- you are going to be
18 forced to pay, coerced to attend, indoctrinated,
19 and then told your --

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 MR. BAXTER: Thank you.

23 CHIEF JUSTICE ROBERTS: The case is
24 submitted.

25

1 (Whereupon, at 12:37 p.m., the case
2 was submitted.)
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<hr/> <p>6</p> <p>6 [1] 25:24</p> <p>605 [1] 177:25</p> <p>62 [1] 178:12</p> <p>63 [3] 6:18 54:17 178:7</p> <p>642 [1] 6:10</p> <p>65 [1] 2:8</p> <p>650 [1] 6:10</p> <p>657 [1] 178:3</p> <p>674 [1] 36:16</p> <hr/> <p>7</p> <p>7 [1] 9:11</p> <p>700 [2] 7:23 131:16</p>	<p>8</p> <p>8 [1] 105:24</p> <p>80 [1] 177:4</p> <p>80a [1] 177:5</p> <p>83 [1] 178:12</p> <hr/> <p>9</p> <p>9:00 [1] 129:20</p> <p>99 [1] 126:22</p> <hr/> <p>A</p> <p>a.m [2] 1:15 3:2</p> <p>abandon [2] 43:19 117:23</p> <p>abdicate [1] 172:4</p> <p>ability [9] 3:25 20:14 21:22</p> <p>43:15 58:11 78:20 109:6</p> <p>136:9 149:16</p> <p>able [24] 7:19 12:24 17:12,</p> <p>15 26:13 56:17 59:5 67:14</p> <p>75:9 80:16 107:2 114:12</p> <p>128:16 129:19 130:2,16</p> <p>132:4 133:9,22 138:9 145:19</p> <p>164:11 173:25 175:6</p> <p>above-entitled [1] 1:13</p> <p>absenteeism [2] 131:12</p> <p>137:2</p> <p>absolutely [15] 63:12 74:18</p> <p>81:13 82:2 93:7 117:2,</p> <p>5,17 123:16 134:9 156:16</p> <p>158:24 159:11,17 170:10</p> <p>abstract [1] 97:13</p> <p>accept [6] 77:23 102:5 107:4</p> <p>123:9 169:23,23</p> <p>acceptability [1] 40:2</p> <p>accepted [3] 17:21,22 73:11</p> <p>accepting [1] 77:25</p> <p>accepts [1] 13:23</p> <p>access [5] 17:13,15 43:20</p> <p>51:9 64:25</p> <p>accommodate [6] 66:4</p> <p>114:9,12 132:25 133:21</p> <p>138:22</p> <p>accommodation [2] 73:5</p> <p>135:9</p> <p>accompanied [1] 12:5</p> <p>accomplish [2] 133:19</p> <p>167:20</p> <p>accomplishes [1] 129:25</p> <p>accord [1] 41:1</p> <p>according [2] 13:1 42:8</p> <p>account [2] 6:24 168:9</p> <p>accurate [1] 26:25</p> <p>accurately [1] 45:3</p> <p>accused [3] 42:12,14,15</p> <p>achievements [1] 19:24</p> <p>acknowledged [1] 157:14</p> <p>acknowledging [1] 150:4</p> <p>across [4] 7:23 16:15 19:10</p> <p>100:14</p> <p>act [1] 108:2</p> <p>acted [1] 81:4</p> <p>acting [1] 122:21</p> <p>action [3] 71:4 75:17 77:13</p>	<p>activities [2] 36:13,14</p> <p>activity [4] 51:2 108:13</p> <p>146:6,7</p> <p>actors [1] 155:18</p> <p>actual [3] 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