No. 24-297

In the Supreme Court of the United States

TAMER MAHMOUD AND ENAS BARAKAT; JEFF AND SVITLANA ROMAN; CHRIS AND MELISSA PERSAK, IN THEIR INDIVIDUAL CAPACITIES AND EX REL. THEIR MINOR CHILDREN; AND KIDS FIRST, AN UNINCORPORATED ASSOCIATION,

Petitioners,

v.

THOMAS W. TAYLOR, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE MONTGOMERY COUNTY BOARD OF EDUCATION; THE MONTGOMERY COUNTY BOARD OF EDUCATION; AND SHEBRA EVANS, LYNNE HARRIS, GRACE RIVERA-OVEN, KARLA SILVESTRE, REBECCA SMONDROWSKI, BRENDA WOLFF, AND JULIE YANG, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF EDUCATION,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

The Board's opposition confirms the split. Quoting the Eighth Circuit, the Board says that "[e]veryone agrees that a public school generally cannot force a student to *actively* 'participate in an activity' that violates the student's religion." BIO.14 (emphasis added). The adverb is the tell. Five circuits recognize a burden only if a student is compelled to participate "actively"—to some heightened degree. In the Fourth Circuit's decision below, that means no religious burden until students are forced "to *change* their religious beliefs or conduct." But in the Eighth Circuit, children cannot be forced to participate against their religious convictions at all. That divide alone warrants certiorari. Parents should not have to wait until too late to protect their children against forced participation in instruction that violates their faith.

The Board's apologia of the decision below highlights the confusion that reigns on the wrong side of the split, where *Yoder* is demoted to an Amish one-off. And the Board has no answer for the Fourth Circuit's total departure from sixty years of Supreme Court free-exercise precedent, from *Sherbert* to *Kennedy*.

The Board cannot dispute that this is a case of tremendous national importance. Few things matter more than the right of parents to control the religious upbringing of their children. If the Fourth Circuit's rewrite of this Court's precedent is accepted, it is parents who cannot afford private schooling that lose out. They will never be able to protect their children from instruction that violates their faith—even grossly ideological instruction on gender and sexuality aimed at vulnerable elementary-school kids. The Court should grant certiorari to protect them.

ARGUMENT

I. There is a 5-1 circuit split over when forced public school instruction burdens religious exercise.

To oppose review, the Board touts the lopsided nature of the split, discounting the Eighth Circuit's ruling in *Florey*. BIO.15. But *Florey* cited *Yoder* and ruled definitively: "forcing any person to participate in an activity that offends his religious * * * beliefs will generally contravene the Free Exercise Clause." *Florey*, 619 F.2d at 1318-1319. A district court within the Eighth Circuit would be hard pressed to shrug this off as "dicta." BIO.15. Nor have other courts. And in just the last year, at least two district courts have similarly recognized that "Free Exercise rights are implicated" when parents are denied notice and opt-outs. *Nelson* v. *Nazareth Indep. Sch. Dist.*, No. 2:24-cv-177, 2024 WL 4116495, at *4 (N.D. Tex. Sept. 6, 2024); *Tatel* v. *Mt. Lebanon Sch. Dist.*, No. 22-cv-837, 2024 WL 4362459, at *18, 36 (W.D. Pa. Sept. 30, 2024). Another case is pending. *S.E.* v. *Grey*, No. 24-cv-1611 (S.D. Cal.).

The Board pretends this isn't happening. It mischaracterizes *Nelson* and *Tatel*,[1] ignores *Grey*, and pushes *Florey* outside the split—claiming *Florey* involves "mere exposure," not compulsion to participate "actively." BIO.3, 14. But that distinction is the Board's gloss on *Yoder*, not *Florey*'s. *Florey* involved students sitting through activities like a Christmas assembly with a "religious theme." 619 F.2d at 1314.

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[1] See BIO.18 n.4 (*Nelson* about state law when it invokes *Yoder*); BIO.17 (*Tatel* about "non-curricular agenda" when it says "de facto policy").

Similarly, the Amish in *Yoder* objected to public high school only because the "values" taught there were "in marked variance with Amish values," "expos[ed]" the children to "a 'worldly influence,'" and "pressure[d]" them to "conform" to their peers. *Yoder*, 406 U.S. at 211. They were not denied relief because their children had not yet been compelled "to *change* their religious beliefs." App.34a. Compelled participation in "read-alouds" that celebrate Pride parades and gender transitions is at least as coercive as participating in the assemblies in *Florey* or the classes in *Yoder*—especially considering the children's age and vulnerability. BIO.2.

The Board's assurances that teachers don't "take[] a side" and that no students are "asked to change how they feel" are pablum. BIO.6. The storybooks themselves are ideological, stressing that "[n]ot everything" about gender "*needs* to make sense," that children should be free to use their preferred bathroom, and that "pronouns are like the weather" and may "change depending on how [children] feel"—to cite just a few examples. App.465a, App.578a-579a, App.548a-564; App.552a. And even the Board's alleged statements of neutrality are one-sided. There's nothing "neutral" in saying kids should let go of "doing gender correctly," App.637a, or that there is "no single way to be a boy, girl, or any other gender," App.638a. See also App.54a-55a, 62a. Under *Florey*, parental objections to such

content easily trigger strict scrutiny, while five other circuits would let it pass.[2]

The Board would add *Torlakson* to its side of the split. BIO.12. But there, the plaintiffs "failed to allege any [free exercise] burden," contending that this Court had "eliminated the requirement." 973 F.3d at 1019. The district court disagreed, and the plaintiffs did "not challenge" that conclusion on appeal. *Ibid*. The Ninth Circuit agreed the plaintiffs had "not alleged interference with [the] exercise of their religion." *Ibid*. And in its brief recitation of free exercise principles, the court made no mention of *Yoder* and did not grapple with the question presented here. See BIO.12. Regardless, with or without *Torlakson*, the split cannot be ignored. And even without *Florey*, so many circuits all ruling the wrong way would still warrant review. See, *e.g.*, *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 17-18 (2022) (rejecting courts of appeals' "consensus" test for assessing Second Amendment burdens).

Unable to avoid the split, the Board finally suggests that resolving it can wait—at least for discovery and summary judgment below. BIO.3. But the Board has already moved to dismiss, arguing that the Fourth Circuit's heightened standard means Petitioners lack not only sufficient facts, but also standing. Defs.' Mot. to Dismiss Br.4-11, D. Ct. Doc. 78-1 (July 18, 2024). If that motion is granted, it is because Petitioners lack the Fourth Circuit's conception of a cognizable burden,

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[2] If the Board is not trying to change students' views, why deny parents notice? Why accuse students of "parroting dogma" or compare parents to "white supremacists" and "xenophobes"? App.106a, 107a.

bringing Petitioners right back with the same petition. If it is denied, discovery won't answer the question presented. "Everyone" already agrees that strict scrutiny applies once students have been "compel[led] * * * to *change*" their beliefs. BIO.14; App.34a. The question is whether students can be "compel[led] * * * to participate" in the first place.

II. The decision below conflicts with this Court's precedent.

A. The decision below gutted *Yoder*.

The Fourth Circuit sidelined *Yoder* as "markedly circumscribed," saying it applied only if absence of the opt-out "coerces" students to "to *change*" their "beliefs or conduct" or "to *believe* or *act* contrary to their religious views." App.37a, 34a, 31a. The Board contends this was applying *Yoder* "faithfully." BIO.19. That is twice wrong.

First, *Yoder* required no heighted evidence of coercion. There, heightened scrutiny was triggered by the mere possibility of "pressure to conform." 406 U.S. at 217; Pet.24; Laycock Br.14. If a burden exists where students are instructed by "teachers who are not of the Amish faith—and may even be hostile to it," *Yoder*, 406 U.S. at 211-212, then a burden exists when public schools intentionally seek to "[d]isrupt" students' thinking about gender, Pet.13.

Second, Petitioners' objection is to children sitting through instruction on gender and sexuality that confounds their faith. Pet.8-11. That is why they sought and were granted opt-outs for the 2022-2023 school year. Denying even notice of when books will be read does force them to "*change*" that "conduct" and "*act* contrary" to their religious conviction. As in *Yoder*,

this puts the "very architecture" of Petitioners' sacred obligations at stake. Laycock Br.14.

Nor, contrary to the Fourth Circuit, does *Yoder* demand the "exceptional burden" of showing that Petitioners' "religious way of life" is "incompatible with *any* schooling system." App.38a; BIO.20 ("at all"). Because the Amish sought to remove their children from school entirely, they made a showing "few other[s]" could make: an "alternative" form of "informal vocational education." *Yoder,* 406 U.S. at 235-236. But that went "[b]eyond" burden to the "particularity" of strict scrutiny. *Ibid.*; Laycock Br.13-17.

Here, Petitioners seek much more modest relief. They seek only to opt their children out of instruction on gender and sexuality—a traditional part of parental authority the Board itself honored until fall 2023. Pet.5-7, 14. By demanding that Petitioners' narrow request meet the same standards as the Amish's broader one, the decision below upended what "courts must" do: "scrutinize the asserted harm of granting *specific* exemptions to *particular* religious claimants." *Fulton*, 593 U.S. at 541 (cleaned up) (emphases added); Pet.25.

This *Yoder* confusion is widespread. The Fourth Circuit, and the Board, for example, concede—as they must—that the Free Exercise Clause is triggered by indirect coercion. App.24a; BIO.18. If this case does not involve indirect coercion, what would? No circuit has a clear answer. The closest any has come effectively ignored indirect coercion: *Parker*—the lead circuit on the wrong side of the split—looked for "direct coercion." 514 F.3d at 105. Similar confusion reigns in the other circuits on that side. Pet.20-22, 23 n.11. The result is a morass, with standards that range from

"[in]sufficiently coherent" to "inescapably imponderable." *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College*, 600 U.S. 181, 214, 215 (2023).

This morass lets lower courts twist *Yoder* into an enemy of standard free-exercise law. On this distorted view, things that free exercise law normally prohibits—like a centrality inquiry—are required. Pet.25; Laycock Br.11-13; App.38a (requiring Amish's "unusual degree of separation"). Things that free exercise analysis would normally credit—like the enduring national tradition of parental religious authority, especially on human sexuality instruction—are deemed "irrelevant," BIO.22; but see Pet.24-25; DeGroff Br.6-10; States Br.12-18; AFL Br.5-10.[3]

Instead of asking whether religious parents are burdened—as in any other free exercise case—courts instruct public school parents to "choose alternatives," App.46a, and incur "increased costs," App.47a, even though most "realistically, have no choice," *Morse*, 551 U.S. at 424 (Alito, J., concurring). For this backwards view, public school parents are like prisoners who must find "alternatives" to their religious exercise. See BIO.27-28. But even in prisoner cases courts care about whether alternatives "fully accommodate" free

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[3] Evasively, the Board pretends the storybooks are "not" sexuality education. BIO.22; BIO.5-6 ("everyday tales"). But before filing its BIO—and without telling the Court—the Board pulled *Pride Puppy* and *My Rainbow* over "concerns about the content"—something parents and principals picked up on two years ago. Nicole Asbury, *Montgomery schools stopped using two LGBTQ-inclusive books amid legal battle*, *Washington Post*, Oct. 23, 2024, https://perma.cc/EPR7-AXBB; App.614a-615a.

exercise, or whether the claimant's activity was previously "allowed." *Turner* v. *Safley*, 482 U.S. 78, 91, 98 (1987); Pet.25 (*Ramirez*). Yet with *Yoder* demoted, schools can do what prisons cannot: flip-flop on free exercise rights without judicial review. *Ibid.*

If parents' "primary role * * * in the upbringing of their children is now established beyond debate," *Yoder*, 406 U.S. at 232, then "[p]arents do not implicitly relinquish all that authority when they send their children to a public school," *Mahanoy Area Sch. Dist.* v. *B.L. ex rel. Levy*, 594 U.S. 180, 202 (2021) (Alito, J., concurring) (citing *Yoder* and *Pierce*). Here, the Board is not acting on a subject where "the children's actual parents cannot protect, guide, and discipline them." *Id.* at 189 (majority opinion) ("circumstances" of "*in loco parentis*"). Rather, the Board is deliberately denying parents the knowledge needed to protect, guide, and discipline their children on a subject traditionally at the core of parental authority. That is an obvious burden, and it is only deniable by gutting *Yoder*.

B. The decision below violates free exercise cases from *Sherbert* to *Kennedy*.

The Board also misrepresents the past sixty years of free exercise precedent. Pet.26-30. On the Board's telling, every free exercise case "require[d]" a religious claimant to do something religiously violative. BIO.23-25. Not so. What mattered was the "pressure" to modify religious beliefs. Pet.26-27, 29-30.

Indeed, the religious claimant in each case had a theoretical alternative—but that never mattered to the Court's free-exercise analysis. It did not matter in *Kennedy* that the coach "could have prayed at home." App.64a. It did not matter in *Espinoza* that religious

families could send their children to religious schools without "benefits." 591 U.S. at 486. It did not matter in *Thomas* that the unemployment benefits claimant quit his job. 450 U.S. at 718. Nor did it matter in *Sherbert* that the unemployment benefits claimant was "willing[] to accept employment" elsewhere. 374 U.S. at 399 n.2. What mattered was that the respective benefit conditions "inevitably deter[red] or discourage[d] the exercise of First Amendment rights." Pet.29; App.63a-66a. Such deterrence or discouragement is the "indirect coercion," or "pressure," that constitutes a free exercise burden. Pet.26-27, 29.

This point is crystal clear in *Fulton*—which the Board ducks entirely. There, Philadelphia insisted that CSS must certify same-sex couples as foster parents, because all it was being asked to do was "satisfy the statutory criteria." 593 U.S. at 532. But, by virtue of CSS's religious teachings, certification was "tantamount to endorsement," and that sufficed. *Ibid.* That was true even though Philadelphia argued CSS could still have served orphans "in its private capacity." Philadelphia Merits Br.27, *Fulton* v. *City of Philadelphia*, 593 U.S. 522 (2021). So too here. App.61a-62a.

The Board's failure to consider *Fulton* explains why it misunderstands "internal affairs." The Board claims that requiring notice and opt-out rights is "[t]elling public school teachers what to teach and not to teach." BIO.26. This was Philadelphia's argument: letting CSS opt out from one activity was "dictat[ing] how contractors carry out foster-care services." Philadelphia Merits Br.27. This Court rightly rejected that argument. Pet.28. Here, Petitioners seek only restoration of the notice and opt-outs the Board previously provided. Pet.14; Pet.28.

The Board also waves off *Kennedy* and the Fourth Circuit's refusal to consider "neutral[ity]" and "general applicab[ility]." BIO.27. But these are not "fact-bound disagreement[s]," *ibid.*; they are Free Exercise "minimum[s]," Pet.29-30 (quoting *Lukumi*); Laycock Br.21-25.

III. The question presented has profound national ramifications.

The Board's policy of parental exclusion is "a question of great and growing national importance." *Parents Protecting Our Children* v. *Eau Claire Area Sch. Dist.*, No. 23-1280, 2024 WL 5036271, at *1 (Dec. 9, 2024) (Alito, J., dissenting from denial of certiorari); Pet.30-35.

1. The question presented goes to "the heart of" parents' religious "decision-making authority on matters of the greatest importance." *Ridgewood*, 430 F.3d at 184. For many religious parents, forced participation in elementary-school instruction on gender and sexuality is contrary to their religious convictions. Pet.8-11; Protect the First Br.6-12.

The question presented also has profound national implications. In Montgomery County alone, the Board's policy cuts out the parents of roughly 160,000 students in the most religiously diverse county in the United States. Pet.8; App.602a. And the wrong side of the split affects millions of religious families across the country. See Protect the First Br.22-24. Forty-seven states and the District of Columbia provide for parental opt-out or opt-in protections related to human sexuality and other sensitive instruction. Pet.6-7. If those safeguards can be sidestepped by moving the content into a different class period, other public schools across

the nation will follow suit. Indeed, some already have—including in Pennsylvania (*Tatel*) and California (*Grey*).

2. Without denying the national consensus on notice and opt-outs for instruction on human sexuality, Pet.6-7, BIO.22, the Board dismisses it as "irrelevant." BIO.22; see also BIO.27 ("'upends' nothing"). The storybooks, it says, are "language-arts instruction, not sex education." BIO.28. But both classes feature lessons about gender identity and sexual orientation. Pet. C.A. Br.38-39 [Doc.56]. And, as the Board concedes, parents *do* get notice and opt-outs for the latter. BIO.22. "Only by adjusting the dials *just right* * * * can you engineer" this conclusion. *Masterpiece*, 584 U.S. at 652 (Gorsuch, J., concurring); see also BIO.5 ("gender identity" as "sentence structure"). Self-serving "categorizations" won't do. *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14, 17 (2020).

In trivializing the stakes, the Board ignores its refusal even to provide *notice* when the storybooks will be taught. App.185a, 657a. But there's an independent burden when schools "keep parents in the dark." *Parents Protecting*, 2024 WL 5036271, at *1 (Alito, J., dissenting). On such fundamental matters, there is no legitimate basis to conceal information from parents. Lack of notice also renders illusory the Board's "alternative." BIO.30. Parents cannot make a reasonable choice about whether to send their children to private school or to home school them if they are kept in the dark about what their children are being taught in public school.

3. Finally, failing to grant review leaves a public-school-shaped hole in standard free exercise analysis.

Lost in that gap is the religious authority of parents, the judicial role, and the innocence of children.

Absent review, school boards will be free to withhold notice and opt-outs and then introduce everything short of proscribed obscenity to schoolchildren of any age, cf. *Brown*, 68 F.3d at 529, subject only to *post hoc* evidentiary review for "coercion to change or act contrary to one's religious beliefs," BIO.20. This leaves parents with less free-exercise protection than anyone in any other public program—even schoolteachers harboring their own religious objections. See *Ricard* v. *USD 475 Geary Cnty.*, No. 5:22-cv-4015, 2022 WL 1471372, at *4-5 (D. Kan. May 9, 2022).

Absent review, the federal courts are also forever closed to parents seeking a preliminary injunction. Pet.25-26; BIO.20-21. If injunctive relief requires parents to first show their children are "likely" to or "necessarily" will "change" religious beliefs, BIO.21—and schools deny parents notice of when that may happen—then parents won't know to seek injunctive relief until too late. But injunctive relief must be available before it "might well be useless." *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). Parents should not lose their authority—and children their innocence—simply because their religious objections find no favor with the *bien-pensant*.

CONCLUSION

The Court should grant review.

Respectfully submitted.

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