No. 24-297

In the Supreme Court of the United States

TAHMER MAHMOUD, *et al.*,
Petitioners,

v.

THOMAS W. TAYLOR, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF FOR LIBERTY COUNSEL AS AMICUS CURIAE SUPPORTING PETITIONERS

ANITA L. STAVER
HORATIO G. MIHET
DANIEL J. SCHMID
AVERY B. HILL
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854

MATHEW D. STAVER
Counsel of Record
LIBERTY COUNSEL
109 Second Street NE
Washington, D.C. 20002
(202) 289-1776
court@lc.org

Counsel for Amicus

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a national civil liberties organization that provides education and legal defense on issues relating to religious liberty, the family, and sanctity of life. Liberty Counsel is committed to upholding the historical understanding and protection of the rights to free speech and free exercise of religion and ensuring those rights remain an integral part of the country's cultural identity. Liberty Counsel has been substantially involved in advocating for the religious liberty of Americans who's sincerely held religious beliefs compel adherence to Biblical positions on education, sexual orientation, gender, and marriage. Liberty Counsel attorneys have represented clients before this Court, including in a number of cases in which the Free Exercise Clause was a seminal issue, *e.g.*, *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021), and frequently represent clients in free exercise cases in every federal circuit court of appeals and federal district courts. Its attorneys have also spoken and testified before Congress on matters relating to government infringement on First Amendment rights.

Amicus has an interest in ensuring that parents retain freedom and autonomy to live out their faith in daily life, including the fundamental right to remove their children from education hostile to their beliefs and degrading to their purity. Amicus also

---

[1] No counsel for any party authored this brief in whole or in part, and no person other than Amicus or its counsel made a monetary contribution intended to fund this brief's preparation or submission.

advocates that the First Amendment prohibits educational programs that force parents to choose between the government benefit of public education and their faith.

SUMMARY OF ARGUMENT

This case at bar is merely the latest example of the problems begat by this Court's reformulation of the Free Exercise Clause in *Em. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990). For nearly 35 years, Governments—shielded by *Smith*—have undermined the Free Exercise Clause by liberally restricting the exercise of religion so long as they do so with "neutral" and "generally applicable" laws. *Fulton v. City of Philadelphia*, 593 U.S. 522, 523 (2021) (citing *Smith*, 494 U.S. at 878-882). The Fourth Circuit took *Smith* a constitutionally defunct step further, effectively nullifying Free Exercise Clause protections in the public education setting. The decision below held that neither compulsory classroom instruction that violates a parent's sincerely held religious beliefs, nor forcing parents to choose between public education and their faith creates "a cognizable burden" on religious liberty, "even if the choice places the parents in an undesired – but not unconstitutionally coercive – position." *Mahmoud v. McKnight*, 102 F.4th 191, 216 (4th Cir. 2024). That holding simply cannot be reconciled with the First Amendment.

Despite "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary public schools," *Lee v. Weisman*, 505 U.S. 577, 592 (1992), Respondents' actions, and the Fourth Circuit's ruling below, unconstitutionally

coerce parents into subjecting their children to material antithetical to Christian and Islamic religions. Resp't Br. in Opp'n 7. Respondents stripped the parents representing "[t]he growing number of opt-out requests" of their right to opt their children out of education about gender and sexuality because of the *alleged* "risk of exposing students who believe the storybooks represent them and their families to social stigma and isolation." Resp't Br. in Opp'n 7. In essence, the Fourth Circuit permitted the government to ignore religious beliefs and impose whatever burden on those religious beliefs it deemed fit because some *other* parents might have found those views offensive. The First Amendment knows no such parental heckler's veto, and this Court must reject it. The First Amendment demands that this intolerance of, and masked hostility toward, religion and impermissible value judgments demeaning the religious rights of parents who seek an opt out from the curriculum that violates their religious beliefs be subjected to strict scrutiny.

In *Wisconsin v. Yoder*, this Court unequivocally held that parents cannot be forced to subject their children to an environment hostile to their religious beliefs. 406 U.S. 205, 233-34 (1972). No one questions the State's asserted interest in providing public education, but that alleged interest is subservient to the oldest fundamental right known to the Republic—the right to direct the upbringing and education of one's child. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) The Fourth Circuit, echoing similar perspectives from the First, Second, Sixth, Seventh, and Eight Circuits, incorrectly treated *Yoder* as some

aberration in the Court's Free Exercise Clause jurisprudence. *Mahmoud*, 102 F.4th at 210. *It is not*.

Respondents' policies place a substantial burden on Petitioners' religious exercise by forcing parents to choose between the benefit of public education and their faith. "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed [for] Saturday worship." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

The requirement that Government action be "neutral" or "generally applicable" does not, and historically has not, prevented Government interference with religious exercise. In fact, such relaxed terms are far too often used (as below) to justify, rather than condemn, discriminatory treatment on religious exercise. The Free Exercise Clause "requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005) (citing *Locke v. Davey*, 540 U.S. 712, 718 (2004); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970)). This Court last recognized Constitutionally compliant Free Exercise Clause protections in *Sherbert*, 374 U.S. at 404. Placing religious adherents in the irresolvable conflict between forfeiting a benefit and abandoning faith is impermissible interference with religious exercise.

The Court should reverse the decision below and return free exercise jurisprudence to its original understanding—requiring not merely tolerance, but accommodation of religion. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Anything less turns the Free

Exercise Clause into merely a nondiscrimination provision it was never intended to be, *Fulton*, 593 U.S. at 567 (Alito, J., concurring), and infringes the right of religious adherents to exercise their faith free from government interference.

ARGUMENT

I. Montgomery County Public Schools Contravened the Free Exercise Clause By Subjecting Children to a Curriculum Intolerant of Their Families' Sincerely Held Religious Beliefs.

Maryland was the first colony to enact a "Free Exercise Clause" concerning religion. Despite that admirable history, Respondents' policies below trample that history and dismantle the same protections provided by the First Amendment's Free Exercise Clause.

Three hundred and seventy-seven years ago, in the Colony of Maryland, Cecil Calvert, better known as Lord Baltimore, obtained a promise from the Governor of the Colony that he and his councilors would not disturb Christians "in the 'free exercise' of their religion.'" *City of Boerne v. Flores*, 521 U.S. 507, 551 (1997) (O'Connor, J., dissenting) (citing Michael W. McConnel, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1425 (1990)).

Maryland's founders established the colony as a sanctuary for Catholics fleeing persecution in England. Thomas Kidd, The Founding of Maryland, Bill

of Rights Institute (Feb. 27, 2025).[2] The Colony quickly became a bastion of religious diversity, forcing the state to forge a resolution that would allow the Colony's many cultures to coexist peacefully. *Id.* In 1649, Maryland's General Assembly developed the model for establishing governmental protection for the free exercise of religion. The Assembly passed the "Act Concerning Religion," a radical legislative measure at the time, which read:

> No person … professing to believe in Jesus Christ, shall from henceforth bee any waies troubled, Moelested or discountenanced for or in respect of his or her religion nor in the free exercise thereof … nor any way [be] compelled to the beleife or exercise of any other Religion against his or her consent, soe as they may be not unfaithful to the Lord Protietary, or molest or conspire against the civil Governemt.

City of Boerne, 521 U.S. at 551 (O'Connor, J., dissenting) (citing Act Concerning Religion of 1649, reprinted in 5 the Houdners' Constitution 49, 50 (P. Kurland & R. Lerner eds. 1987)).

"[T]he act decreed all Christians free to worship as they wished, so long as they believed in the Trinity (the existence of God in three persons: Father, Son, and Holy Spirit) and in the divinity of Jesus Christ." Thomas Kidd, *The Founding of Maryland*,

---

[2] Available at https://billofrightsinstitute.org/essays/the-founding-of-maryland.

Bill of Rights Institute (Feb. 27, 2025).[3] "No Christians would be persecuted for their faith, and none could be forced to attend services of or pay tithes to any other denomination." *Id.*

Maryland's "Act Concerning Religion" initiated a wave of efforts among the colonies to strengthen religious protections. By 1787, Maryland, Rhode Island, New York, New Hampshire, Georgia, and the Northwest Ordinance—made up of Ohio, Indiana, Michigan, Wisconsin, and part of Minnesota—had all enacted constitutions establishing protections for the free exercise of religion. *City of Boerne*, 521 U.S. at 554-55 (O'Connor, J., dissenting). In Virginia, James Madison and George Mason debated the language to incorporate in the Commonwealth's Free Exercise Clause. *Id.* Mason initially proposed use of the language, "that all men should enjoy the fullest toleration in the exercise of religion…." *Id.* at 551 (quoting Committee Draft of the Virginia Declaration of Rights, 1 Papers of George Mason 284-85 (R. Rutland ed. 1970)).

Madison objected to "the term 'toleration,' contending that the word implied that the right to practice one' religion was a governmental favor, rather than an inalienable liberty." *Id.* Madison's preferred language was, "'[t]hat religion, or the duty we owe our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence or compulsion, all men are equally entitled to the full and free exercise of its religion… unless under color of religion the preservation of equal

[3] Available at https://billofrightsinstitute.org/essays/the-founding-of-maryland.

liberty, and the existence of the State be manifestly endangered.'" *Id.* at 555-56 (quoting G. Hunt, James Madison and Religious Liberty, in 1 Annual Report of the American Historical Association, H.R. Doc. No. 702, 57th Cong., 1st Sess., 163, 166-167 (1901)). "[U]nder Madison's proposal, the State could interfere in a believer's religious exercise only if the State would otherwise 'be manifestly endangered.'" *Id.*

In light of this historical context, the Constitutional Convention adopted the separate and distinct Free Exercise clause – the subject of today's debate. The First Amendment's Free Exercise Clause, made applicable to the States through the Fourteenth Amendment to the United States Constitution, provides the government "shall make no law … prohibiting the free exercise of religion." U.S. CONST. amend. I. "[T]he Free Exercise Clause, requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter*, 544 U.S. at 719.

America's settlers did not risk disease and death at sea from a 10-week journey to the Colonies to receive the miniscule protections afforded to religious exercise by *Smith* and the Fourth Circuit's constitutionally infirm interpretation of its protections. These settlers had no question of their desired protection for religious liberty—it was the *raison d'etre* of their voyage. They sought American protection from governmental interreference with religion, *entirely*, not just directly. The Free Exercise Clause they adopted provided it, and *Smith* took it away.

A. Government Coercion Prohibiting Children and Parents From Exercising Their Faith in Daily Life Fails Strict Scrutiny.

1. The parents' sincerely held religious beliefs require they direct and train their children in accord with their faith.

Petitioners are Islamic, Roman Catholic, and Ukrainian Orthodox. Pet. for Writ of Cert. 9. Unnamed, yet interested parties include over 1,100 parents that signed a petition asking the Board to restore Maryland's mandatory notice and opt-out requirements. Pet. for Writ of Cert. 15.

The Islamic faith forbids parents from exposing their young children "'to activities and curriculum on sex, sexuality, and gender that undermine Islamic teachings.'" Pet. for Writ of Cert. 9 (citing *Surah-Al-An'am* 6:69-69). Similarly, Christians believe that parents must direct the upbringing of their children. *Proverbs* 22:6 (KJV) ("Train a child up in the way he should go, and when he is old he will not depart from it."). As Petitioners articulated, the Bible requires teaching children that "a person's biological sex is a gift bestowed by God that is both unchanging and integral to that person's being." Pet. for Writ of Cert. 9 (citing Pet. App. 543). Roman Catholic, Ukrainian Orthodox, and many other Christian churches specifically hold, integral to their faith, a sincere religious belief that "during 'the years of innocence' from about five years of age until puberty,' children 'must never be disturbed by unnecessary information about sex.'" Pet. for Writ of Cert. 10 (citing Pet. App. 539).

Petitioners exhausted the record with evidence of their sincerely held religious beliefs, which the Fourth Circuit defined as requiring parents direct and train their children "in accord with their faith on what it means to be male and female; the institution of marriage; human sexuality; and related themes." *Mahmoud*, 102 F.4th at 210. Yet, the court held that governmental hostility towards those beliefs imposed no "direct or indirect pressure to abandon religious beliefs," and was thus not a violation of the First Amendment. *Id.* Substituting its own beliefs for the sincerely held religious beliefs of Petitioners, the decision below stated that "simply hearing about other views does not necessarily exert pressure to believe or act differently than one's religious faith requires." *Id.* That is plainly incorrect.

2. Respondents' intolerance of religious beliefs directly interfered with parents' ability to live out their faith, thus requiring strict scrutiny.

It is beyond cavil that Respondent's elimination of any religious parental opt-out from pre-school sex education unreasonably interferes with and substantially burdens the liberty of parents to direct the upbringing and education of their children and thus live out their faith. Respondents threaten to destroy a "distinct community and lifestyle," that is "fundamentally incompatible with any schooling system" that teaches young children about sex, gender ideology, and the acceptance and eventual assumption of the mental distress known as "gender dysphoria." Resp't Br. in Opp'n 20 (quoting *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008)).

Data substantiates this position. Specifically, "85% of adult believers say they made a decision for the Lord before age 14. The 4-14 window is critical in the [religious journey] of a child." Mat Staver, Their Refusal to Obey Will be Costly, Liberty Counsel (Jan. 6, 2025).[4] In the United States in 2020, 63% of adolescents ages 13-17 self-identified as Christian, *U.S. Teens Take After Their Parents Religiously, Attend Services Together and Enjoy Family Rituals*, Pew research Center (Sep. 10, 2020),[5] and 17% of those children developed religious identities different from their parents, likely through teachings outside of the home. *Id.*

Despite the Fourth Circuit's conclusions below, neither the Fourteenth Amendment nor the Free Exercise Clause allows the government to subjugate children to educational curriculum that steers children *away* from the faith their parents have instructed them in and desire for their lives. Indeed, as this Court has unequivocally stated, the Fourteenth Amendment, "[w]ithout doubt . . . denotes the right of the individual to establish a home and bring up children, [and] to worship God according to the dictates of his own conscience." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (cleaned up). And, it matters not that the Board's refusal to provide an opt-out to the curriculum did not explicitly target religion because "[t]he Free Exercise Clause protects against government hostility that is masked, as well

---

[4] Available at https://lc.org/newsroom/details/250106-their-refusal-to-obey-will-be-costly.

[5] Available at https://www.pewresearch.org/religion/2020/09/10/religious-affiliation-among-american-adolescents/.

as overt." *Church of Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

Despite the purported "neutrality" of Respondents' curriculum or its alleged "general applicability,"[6] the Board's hostility towards the parent's religious beliefs directly interfered with their ability to live out their faith in daily life, requiring this Court apply strict scrutiny.

3. This Court's "incidental burden" circumvention of strict scrutiny is incompatible with the Free Exercise Clause.

The First Amendment "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (citing *Zorach v. Clauson*, 343 U.S. 206 (1952)). Rather than ignoring it for the sake of superficial neutrality, the Government must positively accommodate religious beliefs. *See Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 584 U.S. 617, 638 (2018). Unsurprisingly, the lower Court turned to *Smith* to support Respondents' masked targeting of religious parents by deeming the curriculum only "incidentally burdening religion," removing it from the confines of strict

---

[6] Amicus rejects the contention that a government policy prohibiting religious opt-outs from a curriculum that primarily draws objections from parents with sincerely held religious beliefs against such curriculum should be considered neutral or generally applicable. Indeed, it is no more neutral or generally applicable than Hialeah's ritual animal sacrifice provision in *Lukumi*, that—though seemingly neutral on its face—was neither neutral nor generally applicable because it singled out for prohibition a practice engaged in solely by religious adherents. *Lukumi*, 508 U.S. at 543.

scrutiny, and instead grading it on a curve using this Court's "neutral and generally applicable" standard. *Mahmoud*, 102 F.4th at 206 (citing *Fulton*, 593 U.S. at 531).

This Court's "incidental burden" analysis circumvents strict scrutiny in a way that is incompatible with the Free Exercise Clause. "[T]he Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 450-51 (2017) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 484 U.S. 439 (1988))."

Free Exercise Clause protection "requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter*, 544 U.S. at 719. Indeed, "the government may (*and sometimes must*) accommodate religious practices." *Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136, 144-45 (1987) (emphasis added). In light of this Court's precedent regarding child rearing, the special solicitude given parental rights, and Petitioners' religious beliefs concerning the education of their children, this Court cannot recognize the State's purported interest in public education as sufficient to preclude accommodation of a parent's sincerely held religious objections to certain aspects of that education.

B. Exposing Children to Government Indoctrination, Which Substantially Interferes With Religious Development, Creates a Substantial Burden On Religious Exercise.

Respondents argue that the central question of this case 'is whether the facts involve government *coercion* to violate religious beliefs." Resp't Br. in Opp'n 19. Respondents attempt an answer to their own question by a false comparison to *Yoder*, "[i]n *Yoder*, they did; here they do not." *Id.* (citing *Yoder*, 406 U.S. 205 (1972)). This "question and answer" obfuscates the truth by assigning this Court's opinion in *Yoder* to a newly imagined and irrelevant question. In *Yoder*, this Court addressed whether the State's interest in "establishing and maintaining an educational system overrides the defendant's right to the free exercise of their religion." *Yoder*, 406 U.S. at 213. This Court's answer was, appropriately, a resounding, no. *Id.*

1. *The State's role in providing public education ranks at the apex of government function, but it must yield to the fundamental rights of parents to direct the education of their children.*

The majority below never reached this point in its analysis, because it found no "cognizable burden on their free exercise of religion." *Mahmoud*, 102 F.4th at 211. As addressed *supra*, the decision below is incompatible with the Free Exercise Clause. Judge Quattlebaum, in his dissent, explains the fundamental flaw in Respondents' policy. While Respondents contend the pre-school sex education

program reflects "the diversity of its community" and allegedly "fosters inclusivity of students in the LGBTQ+ community," this Court has long held that such purported goals cannot serve to override the sincerely convictions of religious adherents. *Mahmoud*, 102 F.4th at 227 (Quattlebaum, J., dissenting).

In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023), this Court determined that the "benefits" of "educating its student through diversity," although a commendable goal, is "not sufficiently coherent for purposes of strict scrutiny." *Id.* at 214. Likewise, here, "[t]he board advances neither a compelling government interest nor a policy narrowly tailored to that interest, [and] is likely to fail constitutional muster." *Mahmoud*, 102 F.4th at 227 (Quattlebaum, J., dissenting).

Courts rightly defer to schools to form curricula to benefit pupils. And, the First Amendment was not intended to turn this Court into ersatz deans or educators. Nevertheless, even legitimate pedagogical interest are subservient to fundamental parental rights in the constitutional pecking order. While education is paramount, and "[p]roviding public schools ranks at the very apex of the function of a State," it must yield to the rights of parents to direct the education of their children." *Yoder*, 406 U.S. at 213.

This Court addressed this matter in *Yoder*. There, the parents explained that education beyond the eighth grade is "contrary to Amish beliefs" because, *inter alia*, it places "Amish children in an

environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group," during a "crucial and formative adolescent period of life." *Yoder*, 406 U.S. at 211. The same concerns hold true for Petitioners here. The Board seeks to educate students in pre-kindergarten through fifth grade about sex and sexuality, transgenderism, sinful fetishes, and the like, in an environment that degrades the purity of the children in a manner directly contrary to the parents' faith. *Mahmoud*, 102 F.4th at 197-98. These teachings subject children to the promotion of deadly sins like lust, hedonism, and the worship of self over a number of monotheistic deities, including the one true Christian God. Respondents, with the imprimatur of the Fourth Circuit below, said such burdens are no problem because it is necessary to ensure no one who holds a different view is offended by Petitioner's religious opposition to it.

Yoder demands a finding that exposing children to worldly influences, like that contained in Respondents' curriculum, substantially interferes with the religious development of children and creates a cognizable and substantial burden on religious free exercise.

2. The First Amendment does not allow for the sacrifice of families' sincerely held religious beliefs or the conscription of children as creatures of the State.

The Fourth Circuit improperly circumscribes *Yoder* into a "narrower principle," concerning "whether the challenged government action

'affirmatively compel[led] them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.'" *Mahmoud*, 102 F.4th at 211 (quoting *Yoder*, 406 U.S. at 218). *Yoder* is not so limited. Indeed, in the very next breath, this Court held that the burden on religion arose—not merely from threat of criminal sanction—but from the "very real threat of undermining the Amish community and religious practice." *Yoder*, 406 U.S. at 218. The Fourth Circuit's diminution of the First Amendment protections in *Yoder* would effectively eliminate parental rights in education altogether by claiming no opt out is available for religious adherents unless the education policy poses a threat of criminal sanction. That is neither what *Yoder* said, nor what the First Amendment permits.

The Free Exercise Clause must be read to protect American ideals and, most especially, "the central values underlying the Religion Clauses in our constitutional scheme of government[.]" *Yoder*, 406 U.S. at 233-34. "The First Amendment "cannot accept a parens patriae claim of such all-encompassing scope and with such sweeping potential for broad and unforeseeable application," and in so doing sacrifice families' sincerely held religious beliefs. *Id.* To do so would allow the State to "in large measure influence, if not determine, the religious future of the child," as long as it is unaccompanied by threat of criminal sanction. *Yoder*, 406 U.S. at 233-34. But, this Court long ago rejected a claim that a "children is a mere creature of the State," *Pierce v. Soc'y of Sisters*, 258 U.S. 510, 534-45 (1925), rather, "those who nurture him and direct his destiny have the right, coupled

with the high duty, to recognize and prepare him for additional obligations." *Id.*

Respondents go even further by attempting to confine *Yoder* to a statement on the Amish. Resp't Br. in Opp'n 19. This overly strained reading of *Yoder* is inconsistent with this Court's decision and cannot serve as a justification for restricting the free exercise rights at issue here.

If this Court were to reduce *Yoder* to Respondent's circumscribed version, and grant schools permission to invoke greater influence over children, even at the detriment of parental rights, public education will begin to mimic the schools of Sparta. "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians." *Meyer*, 262 U.S. at 402. Respondents endeavor even more austere measures for better results, beginning their indoctrination at five-year-olds in pre-kindergarten classes.

"The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." *Pierce*, 268 U.S. 510 at 535. Despite Respondents' contentions to the contrary, these values, central to "our constitutional scheme of government" do not only reside within the walls of an Amish settlement. *Yoder*, 406 U.S. at 232. Instead, "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can

overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

Similar to the Amish in *Yoder*, the Muslim and Christian Petitioners' religious faiths and ways of life, including abstaining from kindergarten sexual education, are "inseparable and independent[ly] rooted in religious belief," and ones their "forbears have adhered to for almost three centuries." *Id.* (cleaned up). Compared to the evidence in the record below, the Amish's three centuries of faith pales in comparison to the Muslim's two millennia old beliefs and the Christian's 5,785-year-old traditions. Chris Jennewein, *Rosh Hashanah 2024: Jewish New Year 5785 Begins at Sundown on Wednesday*, Times of San Diego (Oct. 1, 2024).[7] Traditions, both of which far precede even the etymological history of the phrases "transgender," "gender ideology," and "LQBTQ+," concepts even more recent than the development of artificial intelligence, let alone the Christian Bible or Muhammad's teachings. Alan M. Turing, *Computing Machinery and Intelligence*, Mind, Volume LIX, Issue 236, 433-460 (Oct. 1950). Yet, somehow, that history escaped the Fourth Circuit below.

If the Court is searching for another way in which to relate Amish faith and the Petitioners' religious beliefs, it may turn to *Parker*, which Respondents favorably cite throughout their brief. Resp't Br. in Opp'n 11; 15 (citing *Parker*, 514 F.3d at 100). In *Parker*, the First Circuit found two distinctions between

---

[7] Available at https://timesofsandiego.com/life/2024/10/01/rosh-hashanah-2024-jewish-new-year-5785-begins-at-sundown-on-wednesday/.

plaintiff's faith and the Amish. First, "plaintiffs have chosen to place their children in public schools." *Parker*, 514 F.3d at 100. This first distinction is addressed in the next section as an impermissible choice between a government benefit and religious practice. The second distinction is that "[e]xposure to the materials in dispute here will not *automatically* and *irreversibly* prevent the parents from raising Jacob and Joey in the religious belief that gay marriage is immoral." *Id.* (emphasis added).

In the present case, Respondents' curriculum automatically and irreversibly prevents Christian Petitioners from raising their children in accordance with their faith—which, even under Respondents' logic should place this case squarely within *Yoder*'s framework. The school's curriculum, which prevents Petitioners from following the requirements of their faith by shielding their children from sexual education, makes it statistically unlikely these parents will ever be able to re-direct their children towards the LORD.[8] Respondents' curriculum takes children away from central tenants of the Bible "during the crucial and formative adolescent period of life." *Yoder*, 406 U.S. at 211.

However, the law does not decide disputes based on the age of a religion or the level to which the State's harm is irreversible, but rather it makes decisions by balancing the importance of societal interests. The impact of compulsory attendance on Petitioners' religion, absent a legally required opt-out program, is "not only severe, but inescapable," for the law compels the performance of acts "undeniably

[8] *See supra* n.4 and accompanying text.

at odds with fundamental tenants of their religious beliefs." *Yoder*, 406 U.S. at 218. This is "the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Id.*

"And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a reasonable relation to some purpose within the competency of the State is required to sustain the validity of the state's requirement under the First Amendment." *Id.* at 233-34 (cleaned up).

> Religious scruples of Moslems require them to attend a mosque on Friday and to pray five times daily. Religious scruples of a Sikh require him to carry a regular or a symbolic sword. Religious scruples of a Jehovah's Witness teach him to be a colporteur, going from door to door, from town to town, distributing his religious pamphlets. Religious scruples of a Quaker compel him to refrain from swearing and to affirm instead. Religious scruples of a Buddhist may require him to refrain from partaking of any flesh, even of fish. The examples could be multiplied, including those of Seventh-day Adventist whose Sabbath is Saturday and who is advised not to eat some meats.

Sherbert, 374 U.S at 411-12 (Douglas, J., concurring) (internal citations omitted).

This Court should add that the religious scruples of Christians and Muslims require that education

about sex, sexuality, and gender be discussed only in the confines of the home and unquestionably later in life than before kindergarten—before a child even understands such concepts. The harm in this case is Respondents' interreference with the parents' religious scruples, "an important area of privacy which the First Amendment fences off from government." *Id.* at 412.

"We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests." *Id.* Though this Court has determined public education is at the apex of State priority, it has also plainly held that such interest must nonetheless yield for the religious beliefs of the Amish. That is no less true here—where the parents just so happen to be Christian, Muslim, and Jewish. The First Amendment protects *all* religious beliefs and is not contingent on a particular religion or religious sect.

II. Montgomery County Public Schools Has Forced Parents to Choose Between Their Sincerely Held Religious Beliefs and Educating Their Children.

"Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U.S. 488 (1961), nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. State of R.I.*, 345 U.S. 67 (1953), nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Com. Of Pennsylvania*, 319 U.S. 105 (1943); *Follett v. Town of McCormick, S.C.*, 321 U.S.

573 (1944); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936)." *Sherbert*, 374 U.S. at 402 (cleaned up).

The Fourth Circuit permitted Respondents to impose an ultimatum that violates two of these principles. Petitioners must either pull their children from school or abandon their religious beliefs. This pressure to choose between religious exercise and government benefit impermissibly strains the free exercise of religion. The present case is another display of the ever-increasing number of purportedly neutral and general applicable state actions that also impose special disability based on religion, compel affirmation of a repugnant belief, and/or penalize the free exercise of faith. Such actions demand strict scrutiny, and the Court should return the Free Exercise Clause to the blanket of protection provided by "the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534.

A. The Pressure to choose between religious exercise and government benefits strains the free exercise of religion.

From the outset of its opinion, the Fourth Circuit defines "coercion" to include "direct or indirect" coercion, "meaning that a burden exists whenever government conduct either 'compel[s] a violation of conscience' or 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Mahmoud*, 102 F.4th at 215. However, the Court quickly circumvents this rule by stating that Respondents' curriculum *does not* "bar[] religious adherents from eligibility to participate in the benefit *because of* the plaintiff's religious beliefs or *unless*

the plaintiff agreed to act in contradiction to his beliefs," and it is thus not violative of the Free Exercise Clause. *Mahmoud*, 102 F.4th at 215 (emphasis original) (citing *Fulton v. Town of McCormick, S.C.*, 593 U.S. 522, 531 (2021)). This statement entirely dismisses this Court's bar on "substantial pressure" to "modify behavior" and "violate beliefs" mentioned on the very same page of the Fourth Circuit's opinion. *Id.*

In light of the facts of this case, it is difficult to ascertain the Fourth Circuit's distinction between the rule it defined and its holding. Respondents deliberately applied pressure on Petitioners by both eliminating their ability to opt their children out of education and simultaneously refusing to provide notice of when controversial school materials would be taught. Even if such a line can be drawn between the level of pressure the Court requires to find a cognizable burden, and the burden imposed by Respondents, "free exercise law is not nearly as cramped" as the Fourth Circuit attempts to portray. *Mahmoud*, 102 F.4th at 223 (Quattlebaum, J., Dissenting).

That parents are not compelled to send their children to public school is no excuse for barring them from this benefit "by state-imposed criteria forbidden by the Constitution." *McDaniel*, 435 U.S. at 634 (Brennan, J., concurring). Instead, a cognizable burden exists when there is denial of "a generally available benefit on account of religious identity," *Trinity Lutheran Church*, 582 U.S. at 450, or "unmistakable" pressure to forego a religious practice in exchange for government benefit. *Sherbert*, 374 U.S. at 404.

In *Trinity Lutheran Church*, this Court confirmed that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion." 582 U.S. at 450. And "laws imposing 'special disabilities on the basis of … religious status' trigger the strictest scrutiny.'" *Id.* (quoting *Lukumi*, 508 U.S. at 533). The Fourth Circuit evaded the plain import of *Trinity Lutheran Church* by noting that parents are not required to send their kids to public school. But does a choice really exist for the modern family in Montgomery County, Maryland?

"Private school in the United States is more expensive than it's ever been," recently hitting a "record-high $49,284, a 7.4 percent increase from last year[.]" Tori Latham, *Private-School Tuition in the U.S. Hits a Record-High $49,284*, Yahoo! Finance (Feb. 12, 2025).[9] For Petitioners, this situation is made worse in Maryland, one of the nation's most expensive states. "In Maryland, the median household income is $98,461, so your household would have to bring in $170,666 to be considered one of the upper members of the middle class." Martin Dasko, What is the Estimated Median Income for Upper-Middle Class in 2025?, Nasdaq (Feb. 16, 2025).[10] This "upper-middle class" standard is important for this Court's analysis because that is the income required to pay for "childcare for all of your children – or for one spouse not to work" – essentially the required income for a homeschool alternative to

[9] Available at https://finance.yahoo.com/news/private-school-tuition-u-hits-220000848.html.

[10] Available at https://www.nasdaq.com/articles/what-estimated-median-income-upper-middle-class-2025.

Montgomery County School Board's pre-kindergarten sex education. Jennifer Taylor, Here's the Minimum Salary Required To Be Considered Upper-Middle Class in 2025, Yahoo! Finance (Feb. 12, 2025).[11]

This dramatic increase in the salary required to support a family has led to a growing number of parents seeking employment, further reducing the possibility of removing children from public education. "Among married-couple families with children, 97.6 percent had at least one employed parent in 2023, and in 67.0 percent of these families both parents were employed." Bureau of Labor Statistics, U.S. Department of Labor, Employment Characteristics of Families – 2023 (Apr. 24, 2024).[12]

But leaving this significant practical reality aside, whether parents are compelled to send their kids to public school is of no constitutional significance because the First Amendment prohibits barring them from State benefit by state-imposed criteria forbidden by the Constitution.

In *Sherbert*, this Court made it clear that such benefits cannot be restricted based on faith. There, the appellant was denied unemployment benefits due to her inability to work on Saturdays, a sincerely held religious belief. 374 U.S. at 404. It was apparent to this Court that the appellant's ineligibility for employment benefits was derived solely from her religious practice. *Id.* ("The ruling forces her to choose between following the precepts of her religion and

---

[11] Available at https://finance.yahoo.com/news/minimum-salary-required-considered-upper-230037556.html

[12] Available at https://www.bls.gov/news.release/pdf/famee.pdf.

forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."). The appellant could have easily denied disability benefits or chose to seek employment that did not require Saturday labor, but neither point was critical for this Court. The State's actions could not "be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.'" *Id.* at 405. The Constitution provides much broader support for the free exercise of religion, preventing "conditions upon public benefit … if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Id.* at 405.

The Montgomery County School Board has given Petitioners a choice – "additional costs" associated with private school and/or home school, or public schools with their concomitant prohibition on religious opt-outs, which the Fourth Circuit described as "undeniably a 'public benefit.'" *Mahmoud*, 102 F.4th at 215. "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Sherbert*, 374 U.S. at 404.

B. The exclusion of religious practitioners from government benefit, or failure to accommodate religious beliefs is patent hostility toward, not neutrality respecting, religion.

Petitioners do not seek special benefit, nor do they accept neutrality as sufficient free exercise

protection. They seek a constitutionally mandated accommodation and the abandonment of constitutionally prohibited hostility toward their religion.

In *Trinity Lutheran Church*, a church daycare was denied use of a State's Scrap Tire Program to replace a large portion of their playground's gravel with pour-in-place rubber surface provided by the program. *Trinity Lutheran Church*, 582 U.S. at 449. "The Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity." *Id.* Trinity Lutheran Church was not claiming any benefit but was asserting "a right to participate in a government benefit program without having to disavow its religious character." *Id.* at 465. This Court deemed the policy "express discrimination against religious exercise, and said, "the State's decision to exclude it for purposes of this public program must withstand the strictest scrutiny." *Id.*

Like the petitioners in *Trinity Lutheran Church*, the parents here are not claiming any entitlement or subsidy, rather they are asserting a right to participate in a government benefit program without having to disavow their religion. These cases are virtually indistinguishable in all practical effects, but that did not stop the Fourth Circuit from attempting one.

The Fourth Circuit stated, "while the Free Exercise Clause casts a wide net of protection, it does so in a particular direction, being written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Mahmoud*, 102 F.4th at 205

(cleaned up). "Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Id*. This is nonsense. For one, the parents are attempting to extract nothing from the government. Rather, Petitioner are seeking merely to extract *themselves* from a government curriculum violative of their sincere religious convictions. In other words, Petitioners seek a protection "in terms of what the government cannot do to" Petitioners—namely, demand they submit their children to objectionable sexual contents at 5 years old.

"For decades, the Supreme Court has made clear that the liberties of religion and expression may be infringed by the denial of or placing of condition upon a benefit or privilege." *Mahmoud*, 102 F.4th at 221 (Quattlebaum, J., dissenting). The exclusion of a religion's followers from a state benefit, or the failure to accommodate the religious needs of religious participants in a public benefit, "manifests patent hostility toward, not neutrality respecting, religion[.]" *McDaniel*, 435 U.S. at 636 (Brennan, J., concurring). And, in fact, the First Amendment requires that Respondents provide such recognition. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). "To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups." *Id.*

Indeed, as the Court has recognized, "we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the

effective scope of religious influence." *Id.* And, more than that, the First Amendment demands not mere tolerance, but affirmative accommodation and protection for Petitioners' religious beliefs.

III. *Employment Division v. Smith* Fails to Prevent Government Actions that Both Directly and Indirectly Interfere with the Free Exercise of Religion, Whereas *Sherbert* Protects Against Facially Neutral State Action that Burdens the Free Exercise of Religion.

Respondents have expressly discriminated against religious exercise, denied a public benefit on the basis of religion, and undermined the Free Exercise Clause, all while purportedly complying with *Smith* by not "directly or indirectly coerc[ing] children into changing their religious views or practices." *Mahmoud*, 102 F.4th at 213. The "proposition – that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment – is squarely … rejected by precedent." *McDaniel*, 435 U.S. at 633 (Brennan, J., concurring). *Smith* should be similarly rejected and abandoned.

A. The First Amendment's Free Exercise Clause has been demoted to a secondary non-discrimination clause, rather than applied, as intended, to prohibit the infringement of religious liberty by civil authority.

Pursuant to *Smith*, if a state action is "neutral" and of "general applicability," unless it more than

incidentally burdens a religion, it is likely free to restrict the exercise of that religion. *Emp. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990). *Smith* fails to adequately protect the free exercise of religion, and its requirement that State action directly coerce faith in order to trigger strict scrutiny, reduces the Clause to a second and weaker Establishment Clause.

This Court in *Smith* declined to "breathe into *Sherbert* some life beyond the unemployment compensation field," instead choosing to merge the Free Exercise and Establishment Clauses, by replacing strict scrutiny with the rational basis test for all neutral and generally applicable state action. *Smith*, 494 U.S. at 884. This represented an unfortunate erosion of the Religion Clauses.

Prior to *Smith* this Court went to great lengths to distinguish the two clauses, the later, "considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 222-223 (1963) ."The Religion Clauses of the First Amendment provide: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' . . . [T]he Free Exercise Clause – requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter*, 544 U.S. at 714 (citing *Locke v. Davey*, 540 U.S. at 718; *Walz v. Tax Comm'n of City of New York*, 397 U.S. at 668).

The purpose of the Free Exercise Clause is "to secure religious liberty in the individual by prohibiting

any invasions thereof by civil authority." *Id.* (emphasis added). This would inevitably include the Board's compelled education, which clearly invades Petitioners' faith.

B. The requirement that Government action be "neutral" does not prevent Government action from unconstitutionally interfering with religion.

This Court has two choices – continue down the bumpy and constitutionally dubious road of mere non-discriminatory "neutrality" paved by *Smith*, or it can reverse course and return to a firm foundation that requires "forbidding or hindering unrestrained religious practices or worship." *Fulton*, 593 U.S. at 565 (Alito, J., concurring).

The Fourth Circuit improperly, and without supporting precedent, redefines the range of permissible cognizable burdens on religious exercise. *Mahmoud*, 102 F.4th at 207. This opportunity for this error would be eliminated if this Court relied on *Sherbert* instead of allowing lower courts the opportunity to creatively define "cognizable burden." Instead, the Fourth Circuit turned to *Smith* and stated, "to show a cognizable burden, the Parents must show that the absence of an opt-out opportunity coerces them or their children to *believe* or *act* contrary to their religious views." *Id.* That is simply incorrect. The Free Exercise Clause does not require children be lured off the gender-ideology cliff by the State's transgender pied piper before there is harm. The First Amendment gives parents the right to prevent the harm from ever occurring.

This Court correctly articulated the broad bounds of the Free Exercise Clause and the low bar for "cognizable burdens" in *Masterpiece Cake Shop*. "The Constitution 'commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.'" *Masterpiece Cakeshop*, 584 U.S. at 638 (quoting *Lukumi*, 508 U.S. at 534).

This Court's *Smith* opinion warps that commission, instead asking religion to bend to the will of the State. *Smith* reduces religion to convictions that can neither contradict political society nor relieve the faithful "'from the discharge of political responsibility.'" *Smith*, 494 U.S. at 879-80 *(quoting Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594-95 (1940)). Whereas *Sherbert* recognizes a broader free exercise protection that prevents State action that burdens the free exercise of religion absent "'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'" *Sherbert v. Verner*, 374 US. 398, 403 (1963) (quoting *National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 438 (1963)).

Furthermore, under *Sherbert*, "if the purpose or effect of a law is to impede the observation of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being indirect." *Id.* at 404 (quoting *Braunfeld v. Brown*, *supra*, 366 U.S. 599, 607 (1961)). And, *Sherbert* recognizes that "liberties of religion and expression may

be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* (citing *American Communications Ass'n v. Douds*, 339 U.S. 382, 390 (1950); *Wieman v. Updegraff*, 344 U.S. 183, 191-92 (1952); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 155 (1946)).

The Court should restore the Free Exercise Clause to its original purpose, presupposing the freedom to practice religion, and requiring States that attempt to interfere with that practice, whether indirectly, with neutral and generally applicable laws, or through the restriction of a public benefit, prove the interest is of sufficient magnitude to override the free exercise of religion. This Court should overrule *Smith* and restore the Free Exercise Clause to its rightful position.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

ANITA L. STAVER
HORATIO G. MIHET
DANIEL J. SCHMID
AVERY B. HILL
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854

MATHEW D. STAVER
Counsel of Record
LIBERTY COUNSEL
109 Second Street NE
Washington, D.C. 20002
(202) 289-1776
court@lc.org

MARCH 2025

Counsel for Amicus