No. 24-297

In the Supreme Court of the United States

TAMER MAHMOUD, ET AL.,
Petitioners,

v.

THOMAS W. TAYLOR, ET AL.,
Respondents.

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

BRIEF FOR PROFESSORS DOUGLAS LAYCOCK, RICHARD W. GARNETT, THOMAS C. BERG, MICHAEL W. MCCONNELL, AND DAVID M. SMOLIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CHRISTOPHER MILLS
Counsel of Record
Spero Law LLC
557 East Bay Street
#22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

Counsel for *Amici Curiae*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amici are constitutional law scholars whose scholarship and teaching have a focus on the First Amendment Religion Clauses. For decades, these professors have closely studied constitutional law and religious liberty, published books and scholarly articles on the topic, and addressed it in litigation. The *amici* bring to this case a deep theoretical and practical understanding of the First Amendment.[*]

Douglas Laycock is the Robert E. Scott Distinguished Professor of Law Emeritus at the University of Virginia and the Alice McKean Young Regents Chair in Law Emeritus at the University of Texas. He is one of the nation's leading authorities on the law of religious liberty, having taught and written about the subject for more than four decades at the University of Texas, the University of Virginia, the University of Chicago, and the University of Michigan. He has testified many times before Congress and the Texas legislature and has argued many religious freedom cases in the courts. He was lead counsel in several cases in this Court, including *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. 171 (2012). His many writings on religious liberty have been republished in a five-volume collection under the overall title *Religious Liberty*.

---

[*] In accord with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Richard W. Garnett is the Paul J. Schierl/Fort Howard Corporation Professor at Notre Dame Law School. He teaches and writes about the freedoms of speech, association, and religion, and constitutional law more generally. He is a leading authority on the role of religious believers and beliefs in politics and society. He has published widely on these matters, and is the author of dozens of law review articles and book chapters. He is the founding director of Notre Dame Law School's Program on Church, State, and Society, an interdisciplinary project that focuses on the role of religious institutions, communities, and authorities in the social order.

Thomas C. Berg is the James L. Oberstar Professor of Law and Public Policy at the University of St. Thomas School of Law. He combines advocacy with scholarship as one of the nation's leading experts on religious liberty and law and religion. He is the author of six books, including a leading casebook, *Religion and the Constitution* (with Michael McConnell and Christopher Lund, Aspen Publishing); *The State and Religion in a Nutshell* (West); and the recently released *Religious Liberty in a Polarized Age* (Eerdmans Publishing 2023).

Michael W. McConnell is the Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School, and a Senior Fellow at the Hoover Institution. From 2002 to 2009, he served as a Circuit Judge on the United States Court of Appeals for the Tenth Circuit. He has published widely in the fields of constitutional law and theory, especially church and state, equal protection, and separation of powers. His book, *The President*

Who Would Not Be King: Executive Power Under the Constitution, was published by Princeton University Press in 2020, based on the Tanner Lectures in Human Values, which he delivered at Princeton in 2019. His latest book, co-authored with Nathan Chapman, *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience*, was published by Oxford University Press in mid-2023.

David Smolin is the Harwell G. Davis Professor of Constitutional Law and Director of the Center for Children, Law and Ethics at Samford University's Cumberland School of Law. He has published over sixty law review articles and book chapters, approximately twenty of which address law and religion topics, and many of which concern issues related to children and the law. He teaches in the areas of constitutional law, law and religion, children and the law, and bioethics and law. One of his areas of expertise is cases like this one that involve a combination of religious liberty and children, and he joined an *amicus* brief in *Fulton* v. *City of Philadelphia*.

SUMMARY OF THE ARGUMENT

Over the past few decades, this Court has refined Free Exercise Clause doctrine. It has made clear that parents have a broad free exercise right to direct the religious upbringing of their children; that religious claimants have the best understanding of the importance of their own religious beliefs; that indirect coercion is a burden on free exercise; and that the government cannot evade constitutional limits by casting its benefit programs as a voluntary "choice" by religious claimants and thus excluding them.

But lower courts are still confused about how to assess burdens on religious exercise. The Fourth Circuit's decision below epitomizes the problem. The Montgomery County Board of Education adopted mandatory "LGBTQ-Inclusive Books as part of the English Language Arts Curriculum" starting in preschool. App. 10a. For instance, as the Fourth Circuit explained, "the alphabet primer Pride Puppy!" instructs a "three-and four-year-old audience" "to look for items such as '[drag]king,' 'leather,' 'lip ring,' '[drag]queen,' and 'underwear.'" *Ibid.* (brackets in original).

Though the school district initially provided notice and opt-out rights to objecting parents, the Board decided "in a complete about-face that a notice and opt-out option would no longer be permitted." App. 15a. The reason, even as stated in a *post hoc* declaration by an administrator? Letting parents excuse their children from mandatory sexuality and gender curriculum would "undermin[e] [the school system's] educational mission." App. 16a.

No wonder, then, that even the district court understood that the point of the Board's mandatory (and covert) readings is to "influence" children. App. 133a. And the Fourth Circuit acknowledged that "elementary-age students"—and certainly preschool children—"are more likely to be impressionable than teenagers and adults." App. 41a. So the burden on the Plaintiffs' free exercise right—specifically, their parental free exercise right to direct their children's religious upbringing—is obvious. Especially given the topics of these forced readings—sensitive and deeply personal issues regarding sexuality and gender that have not traditionally been part of public school curriculum—the school district's "influence" comes at the expense of the moral and religious instruction of many believers across many faiths. Whether to protect these parents' free exercise rights should not have been a close call.

The Fourth Circuit, however, aligned itself with outdated decisions from several other circuits and erected an improperly high burden requirement for parental religious challenges to school instruction. The court asked whether the Plaintiffs proved a compelled "*change*" in beliefs, a compelled "affirm[ation]" of other beliefs, or a compelled "perform[ance] [of] acts undeniably at odds with" their beliefs. App. 34a, 39a. Finding no evidence of these types of burdens, the court left religious parents "to incur the additional (and in some cases prohibitive) cost of pursuing an alternative to public schooling"—while reiterating its view that although this "position" might be "undesired," it is "not unconstitutionally coercive." App. 46a–48a. The Fourth Circuit dismissed this Court's contrary holding in *Wisconsin* v. *Yoder*,

406 U.S. 205 (1972), as "markedly circumscribed" and "limited" to "facts suggesting an exceptional burden." App. 37a–38a (cleaned up).

The decision below manifests the rampant error in the lower courts about the nature of religious coercion in the school instructional context. When the government seeks to instruct students about value-laden sexuality and gender issues in a way that contradicts their parents' religious instruction, without telling the parents or providing an opt-out, the parents' free exercise rights have been burdened.

The Fourth Circuit also failed to recognize that discrimination against religion *is* a burden, too. The Plaintiffs showed that the Board's policy here was neither neutral nor generally applicable—meaning it discriminated against religion—yet the Fourth Circuit sidestepped that problem by reasoning that the Plaintiffs had not proved a sufficiently extreme burden. But when the government discriminates against religious exercise, this discrimination necessarily burdens religion.

The Court should reverse and correct the widespread error in the courts of appeals about the nature of religious burdens stemming from mandatory public school teaching opposed to parents' own religious instruction.

ARGUMENT

I. Religious burdens from mandatory school instruction implicate the First Amendment.

Parents have a broad free exercise right to prevent their children from being indoctrinated in beliefs that contradict their religious faith. This Court, "[d]rawing on 'enduring American tradition,'" has "long recognized the rights of parents to direct 'the religious upbringing' of their children" as part of their religious exercise. *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 486 (2020) (quoting *Yoder*, 406 U.S. at 213–214). Yet the Fourth Circuit adopted the Defendants' argument that the Board's mandatory indoctrination "does not impose any constitutionally significant burden" because it "does not coerce Plaintiffs to refrain from raising their children in their preferred religious faith or penalize them for their religious conduct." D. Ct. Dkt. 42, at 9–10; see App. 34a. Other courts of appeals faced with challenges to school instructional materials have adopted similar reasoning.

This reasoning misunderstands the Free Exercise Clause, including its scope as recognized in *Yoder*. The Clause protects against even indirect coercion. And the type of coercion here is no different in kind from the coercion in *Yoder*: both involve educational pressure on children that countermands their parents' religious instruction and beliefs. Likewise, in neither case does the common refrain—"go to a private school"—eliminate the free exercise coercion, and this Court's precedent does not require a total religious bar before finding a burden. The Plaintiffs here have established that their religious exercise is burdened by the lack of notice and opt-out rights before their

children are subjected to highly contentious sexuality and gender readings that contradict their religious beliefs. These points are analyzed in turn.

A. The Free Exercise Clause protects parents from indirect coercion against their religious practice.

First, the decision below glossed over this Court's Free Exercise Clause jurisprudence about indirect coercion on religious practice. As this Court has often explained, "[t]he Free Exercise Clause of the First Amendment protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Carson* v. *Makin*, 596 U.S. 767, 778 (2022) (cleaned up); see *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 463 (2017).

According to the Fourth Circuit, the district court did not err in denying the Plaintiffs a preliminary injunction because "the Board's decision not to permit opt-outs" does not "compel[] the Parents or the children to *change* their religious beliefs or conduct, either at school or elsewhere." App. 34a. The court also found it convincing that the parents had failed to show "anything at this point" to prove that the Board's decision "affects what they teach their own children" or forces them "to affirm views contrary to their own." *Ibid.* This misses the mark.

The Fourth Circuit's focus on whether the Board's decision "affects what [the parents] teach their own children" (*ibid.*) elides the nature of their claims, which are that the government's forced indoctrination on ideological sexuality topics burdens their religious exercise by contradicting their religious upbringing of

their children. This burden easily amounts to (at least) indirect coercion. The government is using the inherently coercive environment of the public school for instruction of a captive audience at odds with the Plaintiffs' religious beliefs. Not only does the curriculum instruct students about sexuality and gender issues in a way that contradicts the parents' religious beliefs, but it instructs teachers to tell dissenting children in front of their peers that their beliefs are "hurtful" and "negative." App. 94a. Both are coercive. See, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009) ("[C]hildren mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate."); *Johnson* v. *Texas*, 509 U.S. 350, 367 (1993) (explaining that youth "is a time and condition of life when a person may be most susceptible to influence").

The parents' diverse religious belief systems all require both that they teach their kids certain values about "human sexuality, gender, and family life" *and* that they "shield their children" from sexually explicit material and from "teachings that contradict and undermine their religious views on those topics." App. 63a (Quattlebaum, J., dissenting). The Fourth Circuit dismissed their claims based on these beliefs, stating that "simply hearing about other views does not necessarily exert pressure to believe or act differently than one's religious faith requires." App. 35a.

But the Plaintiffs' claims are not about "simply hearing about other views." *Ibid.* Instead, the injury to the parents results from the Board's decision to forbid them from opting their young children out of specific, school-sanctioned sexuality and gender

instruction that directly conflicts with their religious beliefs. "Indoctrination on that sort of question is not part of the school's basic educational mission." Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 Lewis & Clark L. Rev. 111, 119 (2008).

The Fourth Circuit suggested that, to have a valid free exercise claim, these parents would be required to show that schoolteachers are forcing their children to *affirm* views contrary to their religion. App. 34a–35a. What the Fourth Circuit misunderstood is that the very act of instructing children on these highly personal topics at such a young age—and telling them that their prior beliefs are "hurtful"—necessarily pressures students and violates the parents' religious rights. These parents are not seeking to prevent the school from using these books. See App. 17a; App. 56a (Quattlebaum, J., dissenting). And no one asserts that the school must adopt curriculum that is consistent with the parents' religious convictions. See App. 25a–26a. The parents' injury is "simple[] to remedy": they want the chance to opt their own children out of instruction that directly conflicts with their religious beliefs. Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 172 (2004).

Again, even the district court agreed that the schools are "us[ing]" the books to "influence" children, App. 133a, and the schools said that *not* using the books would "undermin[e]" their "mission." App. 16a. So requiring evidence that teachers have actively

pressured children "to affirm views contrary to their own" (App. 34a) misapprehends the basis of the parents' free exercise claim.

What's more, it is not so obvious that the children here face no forced affirmation. "[W]hen students are subjected to doctrine that is offensive to their religion," "not only may it improperly influence their beliefs, but their very presence and respectful silence may be taken as assent to that doctrine." George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 Case W. Res. L. Rev. 707, 718 (1993). "The endorsement of an idea by the teacher—a government official and an authority figure—may torment a student to whom the idea is religiously offensive. If her peers fail to protest, she assumes that they agree with the teacher, which makes the student feel like even more of a misfit or pariah." *Ibid.*

As noted, the schools have argued that their mandatory indoctrination "does not impose any *constitutionally significant* burden" because it "does not coerce Plaintiffs to refrain from raising their children in their preferred religious faith or penalize them for their religious conduct." D. Ct. Dkt. 42, at 9–10 (emphasis added). The decision below similarly held that the Plaintiffs "have not shown a *cognizable* burden" because "hearing about other views" is not enough. App. 34a–35a (emphasis added).

This view, however, contradicts this Court's explanation that judges should not "determine the 'centrality' of religious beliefs" as a threshold requirement for a free exercise claim. *Employment Div.* v. *Smith*, 494 U.S. 872, 887 (1990). The Defendants' reference to "'[c]onstitutionally

significant burden'"—and the Fourth Circuit's references to "cognizable burden"—"would seem to be 'centrality' under another name." *Id.* at 887 n.4. Any "inquiry into 'severe impact' is no different from inquiry into centrality." *Ibid.* "Such a threshold requirement would wholly deny protection . . . when religious significance is somewhat underestimated." Douglas Laycock, *The Religious Exemption Debate*, 11 Rutgers J. L. & Religion 139, 151 (2009). Courts should hesitate before telling religious claimants that "the connection between what [they] must do and the end that they find to be morally wrong is simply too attenuated." *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 591 U.S. 657, 681 (2020) (cleaned up).

The Defendants do not appear to dispute the sincerity of the Plaintiffs' beliefs, and the Plaintiffs "believe[] that [use of these books] is tantamount to endorsement." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 532 (2021). "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Ibid.* (cleaned up). And especially for elementary school children, official endorsement *is* indoctrination. As the district court agreed, the Defendants are "us[ing]" these sexuality and gender books to "influence" children. App. 133a. After all, the Defendants could scarcely pretend to pass strict scrutiny—as they did below—if they thought that their mandatory reading does not affect students.

Thus, the burden analysis should have been straightforward: forcing parents to submit their elementary-age children to mandated sexuality and

gender readings contrary to their religious beliefs burdens their religious exercise.

B. Contrary to the decision below and similar decisions, *Yoder* applies in this context.

Yoder confirms the burden on parental religious rights here, and the Fourth Circuit was wrong to limit *Yoder* to its facts. The court described *Yoder* as a "limited holding" constrained to "the unique record established concerning the Amish faith's rejection of formal secondary education as a whole." App. 38a. "[O]ther circuit courts of appeals have expressed a similar understanding of [*Yoder*'s] limited holding." *Ibid.* (collecting cases). But *Yoder* sweeps more broadly, and its free exercise teachings about burdens on parental religious rights apply here.

First, *Yoder* was a free exercise case. It should not be dismissed as a constitutional outlier or relegated to "hybrid" claims involving free exercise "in conjunction with" "the right of parents . . . to direct the education of their children," as this Court suggested in *Smith*. 494 U.S. at 881–82 (cleaned up). *Yoder* "expressly relied on the Free Exercise Clause." *Id.* at 896 (O'Connor, J., concurring in judgment). "The Yoders raised only a free-exercise defense to their prosecution under the school-attendance law; certiorari was granted only on the free-exercise issue; and the Court plainly understood the case to involve 'conduct protected by the Free Exercise Clause' even against enforcement of a 'regulatio[n] of general applicability.'" *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 567 n.4 (1993) (Souter, J., concurring in part and concurring in judgment) (citations omitted); *see* Pet. for Writ of Cert., *Yoder*,

No. 70-110, at 3 (U.S. Apr. 1, 1971) (listing questions presented, all relating to the Free Exercise Clause). The Court's analysis of "the quality of the claims of the" families in *Yoder* focused on their rights "to the free exercise of the[ir] religious beliefs." 406 U.S. at 215.

Yoder was not about parental rights *absent* religious exercise or belief. "[T]he opinion in *Yoder* expressly stated that parents do *not* have the right to violate the compulsory education laws for nonreligious reasons." Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1121 (1990) (citing *Yoder*, 406 U.S. at 215–16). "One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder*" and should not "be taken seriously." *Id.* at 1121–22; see also *Fulton*, 593 U.S. at 561 (Alito, J., concurring); *Lukumi*, 508 U.S. at 566–67 (Souter, J., concurring in part and concurring in judgment). At any rate, if a "hybrid" claim were a valid concept, and *Yoder* involved such a claim, so does this case.

Yoder also does not imply some extraordinarily high bar for free exercise claims in the context of parental rights over their children's religious upbringing as it relates to their schooling. *Yoder* explained that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." 406 U.S. at 213–14. Because the law in *Yoder* was a compulsory attendance law, the Amish had to show a burden from *that* law—and rebut the state's compelling interest argument about it. That "'probably few other religious groups or sects could'

develop" a record to show a burden and sufficient justification to avoid compulsory education laws (App. 37a (quoting *Yoder*, 406 U.S. at 236)) says little about other types of government intrusion.

Rather, what matters under *Yoder* is whether the government action "contravenes the basic religious tenets and practice of the . . . faith, both as to the parent and the child." 406 U.S. at 218. As *Yoder* recognized, "exposing [school] children to worldly influences in terms of attitudes, goals, and values contrary to [their religious] beliefs" can impose this type of burden. *Ibid.* So can "interfering with the religious development of the" child. *Ibid.* Each "carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Ibid.*

"[L]ike *Yoder*, the school content at issue here undermines the very architecture" of the faith of objecting families. Helen M. Alvaré, *Families, Schools, and Religious Freedom*, 54 Loyola U. Chi. L. J. 579, 629 (2023). Public school instruction communicating "coercively framed viewpoints touch[es] students' beliefs and conduct regarding" significant aspects of many faiths' teachings on sexuality and gender. *Ibid.*

Further, "there is a strong argument that contradicting the familial architecture of [a religious] faith *does* constitute a threat to its transmission, in a manner similar to Wisconsin's compulsory education regime in *Yoder*." *Id.* at 630 (emphasis added). After all, "a rejection of [religious] familial teachings is one important reason that people reject the faith, and an important predictor of a breakdown in the transmission of faith." *Ibid. Yoder* noted in its

conclusion that "school attendance with teachers who are not of the Amish faith—and may even be hostile to it—interposes a serious barrier to the integration of the Amish child into the Amish religious community." 406 U.S. at 211–12. "The same dynamic is present here." Alvaré, *supra*, at 630; see Dent, *supra*, at 738 ("To survive, religious groups depend on raising their members' children within the faith.").

Rather than read *Yoder* narrowly as defining parental religious rights related to schooling no matter the underlying government policy, courts should recognize it as an example of a religious burden—and one that is closely analogous to the burdens on the parents here.

Unfortunately, the decision below was not alone in reading *Yoder* too narrowly. One oft-referenced case, cited by the decision below, is *Parker* v. *Hurley*, 514 F.3d 87 (CA1 2008). There, parents "assert[ed] that they must be given prior notice by the [public] school and the opportunity to exempt their young children from exposure to books they find religiously repugnant." *Id.* at 90. Holding that the Free Exercise Clause and *Yoder* were not implicated, *Parker* emphasized that "there is no claim of direct coercion." *Id.* at 105.

As discussed, "direct coercion," whatever exactly that means, is never required. And especially given "the inherent power asymmetry" and peer pressure in schools, *Arizona Students' Ass'n* v. *Arizona Bd. of Regents*, 824 F.3d 858, 869 (CA9 2016), it is hard to see how no coercion is present in requiring elementary students "to sit through a classroom reading of" books

that "affirmatively endorse[] homosexuality and gay marriage." *Parker*, 514 F.3d at 106.

The First Circuit agreed that "[i]t is a fair inference that the reading" "was precisely *intended* to influence the listening children toward tolerance of gay marriage": "That was the point of why that book was chosen and used." *Ibid.* Yet the court said that "the mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently." *Id.* at 105.

The First Circuit did not explain what this point has to do with any question relevant to the free exercise analysis, and such a connection is not apparent. Countermanding a parent's religious instruction with "religiously repugnant" instruction (*id.* at 90)—especially without providing the parent notice of this instruction (see *id.* at 106)—burdens the parent's religious upbringing of their children. Of course the parent can "instruct[] the child differently," *id.* at 105, but "popular majorities and well-meaning third parties—however confident they might be in their own virtue or powers of perception"—may not increase that burden by actively countering the parents' religious teaching. Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 Notre Dame L. Rev. 109, 134 (2000).

Several other circuit decisions are similarly wrong. The Sixth Circuit's opinion in *Mozert* v. *Hawkins County Board of Education*, for example, also limited *Yoder* to its "singular set of facts," saying that it did not "announce a general rule." 827 F.2d 1058, 1067

(CA6 1987). And the Seventh Circuit in *Fleischfresser* v. *Directors of School District 200* dismissed the "burden to the parents" as "at most, minimal" because the parents "are not preclud[ed]" "from meeting their religious obligation to instruct their children." 15 F.3d 680, 690 (CA7 1994). As discussed, that red herring does not alter the burden on parents whose religious instruction is being covertly undermined by government officials.

All these cases underestimate *Yoder*, whose protection for parents seeking to raise their children in the faith should have purchase here. The burden on the Plaintiffs' free exercise stems from the government's efforts to contradict their religious upbringing via mandatory indoctrination on highly personal and contested sexuality and gender issues. This burden implicates parents' fundamental right to opt their children out of mandatory education contrary to their religious beliefs. The Free Exercise Clause and this Court's precedent demand strict scrutiny.

C. A total religious bar is not required.

The Fourth Circuit also downplayed the nature of the burden facing these parents on the ground that the Board's policy does not "overtly bar[]" students from "enrollment" based on "their religious views." App. 45a–46a. This too misunderstands the stakes for religious parents.

As this Court has said, citizens have "a right to participate in a government benefit program without having to disavow [their] religious [exercise]," for "[t]he imposition of such a condition upon even a gratuitous benefit inevitably deters or discourages the

exercise of First Amendment rights." *Trinity Lutheran*, 582 U.S. at 463 (cleaned up).

To avoid this line of cases, the Fourth Circuit emphasized that the schools are "open to all students who meet the requirements of enrollment, none of which relate to the religious affiliation or beliefs of students or their parents." App. 46a. It also dismissed the Plaintiffs' arguments that, to avoid the consequences of the no opt-out policy, "they would be forced to incur the additional (and in some cases prohibitive) cost of pursuing an alternative to public schooling." *Ibid.* The court recognized that "[m]ost parents, realistically, have no choice but to send their children to a public school." App. 47a (quoting *Morse* v. *Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring)). Yet the court looked for an "overt[] bar[]," App. 45a, and finding none, ruled against the parents.

This Court's precedent does not require that religious observers be *barred* from a public benefit to show a burden. *Sherbert* v. *Verner* is instructive. *Sherbert* held that the government could not deny employment benefits to employees whose religious convictions required that they not work on the Sabbath. 374 U.S. 398, 399–404 (1963). Forcing people to choose between following their convictions and receiving benefits, this Court said, "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* at 404; see Thomas C. Berg, *Free Exercise Renewal and Conditions on Government Benefits*, 98 Notre Dame L. Rev. Reflection S20, S27 (2023).

"When, therefore, does a denial of benefits, even pursuant to a generally applicable condition, constitute a 'substantial burden' on religious exercise—an imposition on religious choice that triggers, or should trigger, strict scrutiny?" *Id.* at S28. This Court has already provided the answer. In *Thomas* v. *Review Board*, this Court held that a substantial burden exists "[w]here the state . . . denies [an important benefit] because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." 450 U.S. 707, 717–18 (1981). "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 718; see Berg, *supra*, at S29 ("Loss of an 'important' benefit can be enough to pressure recipients to modify their behavior and violate their beliefs. That is enough to be 'substantial.'").

This right against indirect coercion in government programs is particularly compelling in the context of public schools, given that states generally require attendance at either a public school or some costly alternative. See Md. Code Ann., Educ. § 7-301. The Fourth Circuit's (and the Defendants') suggestion to parents that they "choose alternatives such as a private school" (BIO 28 (quoting App. 46a)) echoes the dissent in the Wisconsin Supreme Court's *Yoder* decision: "There is no reason why the Amish community should not establish its own school," so "[u]ntil they do so, they are subject to criminal penalties." *State* v. *Yoder*, 182 N.W.2d 539, 551 (Wis. 1971) (Heffernan, J., dissenting). Wisconsin told this Court much the same thing: "The Amish may establish their own secondary schools consistent with

their religious beliefs," and if they "do not want to," "then their children should be required to go to a more 'worldly' public secondary school." Pet'r's Br. 18, 20 (U.S. July 14, 1971).

The Court in *Yoder* did not adopt this confused understanding of free exercise burdens. Indeed, it has repeatedly rejected tying free exercise rights to the "choice" to go to public or secular schools. For instance, in *Espinoza*, the Court explained that a state provision prohibiting aid to religious schools "burdens" "families whose children attend or hope to attend them" "by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one." 591 U.S. at 486. The Free Exercise Clause prohibits "put[ting] families to a choice between sending their children to a religious school or receiving such benefits." *Id.* at 480. Here too, the "choice" facing the plaintiff parents—send their children to public schools or raise them according to their religious convictions—is not one that that the Free Exercise Clause can tolerate.

This conclusion is confirmed by the weight of government regulation of childhood education. Most children in the United States will go to a government school, which reflects states' simultaneous mandates for children to attend school and refusals to provide funds for non-government schools. So most American children will spend much of their waking time in government-sponsored instruction. "[T]he sheer pervasiveness" of this government intervention into families' lives means that, absent appropriate accommodations, "religious practice would be pressured toward homogeneity." Douglas Laycock,

The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1, 56. And given the Establishment Clause and general principles of neutrality, the pressure in this context will typically be toward the absence of any religious belief. That reality makes it even more important to provide some degree of parental autonomy when school instruction is affirmatively opposed to families' religious beliefs. Otherwise, persons of religious faith may "lose much of their capacity to preserve their distinctive traditions[,] values," and "witness." *Ibid.* The Defendants have burdened the Plaintiffs' religious exercise even if they have not outright barred the schoolhouse doors to believers.

D. The Plaintiffs have provided ample evidence to support their free exercise claim.

Just as the Fourth Circuit mischaracterized the Plaintiffs' free exercise claim, it also articulated an unduly high evidentiary standard. From the start, the decision below repeatedly emphasized the purportedly "very limited record developed." App. 31a. But the record is easily sufficient—especially considering the nature of the Plaintiffs' claims.

The details about the no opt-out policy itself are clear. As Judge Quattlebaum pointed out, the parents have produced the books "that no one disputes will be used to instruct their K-5 children." App. 62a (dissenting op.). They also produced declarations that explain why reading these books to their children violates their religious beliefs—and, by extension, why the no opt-out policy does as well. *Ibid.* They have even produced "the board's own internal documents that show how it suggests teachers respond to students and

parents who question the contents of the books." *Ibid.* These documents instruct teachers to "[d]isrupt the either/or thinking by saying something like: actually, people of any gender can like whoever they like." *Ibid.* They also direct teachers to tell K-5 students that "[o]ur body parts do not decide our gender. Our gender comes from our inside." *Ibid.* Again, even the district court understood that the point of the Board's policy is to "influence" children. App. 133a. No more evidence is necessary.

The Fourth Circuit's improperly high evidentiary standard disregards this Court's precedent on the "relevance of impressionable audiences—like the audiences here—to parental free exercise claims." Alvaré, *supra*, at 629. *Yoder* stressed that "interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community *at the crucial adolescent stage of development*[] contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child." 406 U.S. at 218 (emphasis added). The Fourth Circuit acknowledged that elementary-aged students are *more* impressionable than teenagers and adults but incorrectly held that more evidence was needed. App. 40a–41a. The parents have amply shown a burden on their religious exercise.

* * *

In sum, the Court should correct the widespread failure of the lower courts to understand the burden on parental religious rights that can result from mandatory school instruction on highly fraught topics. Not only would this understanding accord with the Free Exercise Clause and this Court's precedent, it

would protect and promote our pluralistic society. "In today's atmosphere of cultural-political polarization, properly defined protections for religious commitments can reduce fear, resentment, and social conflict." Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, Cato Sup. Ct. Rev., 2020-2021, at 33, 39. When the government countermands parents' religious teachings through mandatory instruction of their impressionable children, the government should have to show that it has a compelling reason to refuse the notice and opt-out rights that are readily available in other educational contexts.

II. Discrimination burdens religious exercise.

The Fourth Circuit also failed to recognize that a government policy that discriminates against religion violates the First Amendment. As this Court "has repeatedly held, governmental discrimination against religion—in particular, discrimination against religious persons, religious organizations, and religious speech—violates the Free Exercise Clause." *Morris Cnty. Bd. of Chosen Freeholders* v. *Freedom From Religion Found.*, 586 U.S. 1213, 1214 (2019) (Kavanaugh, J., respecting the denial of certiorari). For instance, in *Trinity Lutheran*, the Court held that "express discrimination against religious exercise" violates the First Amendment regardless of whether the government's policy "meaningfully burden[s]" that exercise. 582 U.S. at 462–63; see also *Lukumi*, 508 U.S. at 533 ("a law targeting religious beliefs as such is never permissible").

Accordingly, several courts of appeals have agreed that under the framework of *Smith* and *Lukumi*,

"there is no substantial burden requirement when government discriminates against religious conduct." *Tenafly Eruv Ass'n, Inc.* v. *Tenafly*, 309 F.3d 144, 170 (CA3 2002); see also *Kravitz* v. *Purcell*, 87 F.4th 111, 124–126, 126 n.11 (CA2 2023) ("We disagree with those circuits that continue to apply the substantial burden test"); *Hartmann* v. *Stone*, 68 F.3d 973, 979 n.4 (CA6 1995) (explaining that the plaintiffs in such cases "need not demonstrate a substantial burden on the practice of their religion"); *World Outreach Conf. Ctr.* v. *City of Chicago*, 591 F.3d 531, 534 (CA7 2009) (similar); *Altman* v. *Bedford Cent. Sch. Dist.*, 245 F.3d 49, 79 (CA2 2001) (similar).

But the Fourth Circuit reached the opposite conclusion, stating that it "continue[d] to look" for "*a* burden" even in cases involving discrimination against religion. App. 30a n.12; accord *Roman Catholic Bishop of Springfield* v. *City of Springfield*, 724 F.3d 78, 98, 100 (CA1 2013) (Although "the Ordinance is not 'generally applicable,'" the plaintiff's claims fail because it has not proven "that it suffers a substantial burden on its religious exercise"); *Mbonyunkiza* v. *Beasley*, 956 F.3d 1048, 1053–54 (CA8 2020) ("like other courts, we have made the [free-exercise] standard more restrictive" by requiring a "substantial burden"); *Williams* v. *Hansen*, 5 F.4th 1129, 1133 (CA10 2021) (similar); *Levitan* v. *Ashcroft*, 281 F.3d 1313, 1320 (CADC 2002) (similar).

This latter group of circuits, including the Fourth Circuit, is wrong. Discriminating against religion burdens its exercise. "Because government actions intentionally discriminating against religious exercise *a fortiori* serve no legitimate purpose, no balancing

test" between other religious burdens and "legitimate, secular purposes" "is necessary" or appropriate. *Brown* v. *Borough of Mahaffey*, 35 F.3d 846, 850 (CA3 1994). And adding a separate "substantial burden" test "to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment." *Id.* at 849–50; see also *Lukumi*, 508 U.S. at 579 (Blackmun, J., concurring in judgment) ("[A] law that targets religious practice for disfavored treatment both burdens the free exercise of religion and, by definition, is not precisely tailored to a compelling governmental interest.").

Here, the Plaintiffs have shown that the Defendants' actions are not neutral or generally applicable in multiple respects—especially as these standards were recently clarified by this Court in *Tandon* v. *Newsom*, 593 U.S. 61, 62–63 (2021), and *Fulton*, 593 U.S. at 533–38. The Board revoked parents' ability to opt their children out of these readings precisely because many religious parents had been exercising the opt-out option under the Board's previous guidelines. See App. 68a–71a (Quattlebaum, J., dissenting). Students could continue to opt out of materials in the "Family Life and Human Sexuality Unit of Instruction" for secular reasons. App. 657a. And under the Board's own "Guidelines for Respecting Religious Diversity," students from religious families could continue to "be excused from specific classroom discussions or activities that [families] believe would impose a substantial burden on their religious beliefs" in all other curricular areas—at least "[w]hen possible," on the schools' own determination. App. 81a; see App.

220a–221a. So the decision to rescind parents' ability to opt out of the Storybooks was a discretionary revocation of a policy that itself remains discretionary—and it deviated from the schools' approach to opt-outs in sex education otherwise.

Fulton holds that state action is "not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." 593 U.S. at 533 (cleaned up). The Board insisted that it has eliminated discretion by deciding that no opt-outs will be permitted regarding the contested Storybooks. See App. 70a (Quattlebaum, J., dissenting). But the underlying policy is discretionary to begin with, as it requires religious opt-outs "[w]hen possible." App. 81a. The Board's determination that opt-outs for the Storybooks would *never* be possible "was itself a purely discretionary decision." App. 70a (Quattlebaum, J., dissenting). A policy that permits "a school board to decide one day that religious opt-outs are okay and the next day that they are not—because accommodating the request is not reasonable or feasible—is inherently discretionary." App. 69a (Quattlebaum, J., dissenting). On top of all that, continuing to allow *secular* opt-outs from instruction that the schools categorize as part of the "Family Life and Human Sexuality Unit of Instruction" (App. 97a) treats "comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62.

Given that the Board's policy discriminates against these parents' religious beliefs, no "substantial burden" is required to show that their First Amendment rights have been violated. Discrimination

against religious exercise is a burden and triggers strict scrutiny.

CONCLUSION

For these reasons, the Court should reverse.

Respectfully submitted,

CHRISTOPHER MILLS
Counsel of Record
Spero Law LLC
557 East Bay Street
#22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

Counsel for *Amici Curiae*

MARCH 10, 2025