No. 24-297

IN THE
Supreme Court of the United States

TAMER MAHMOUD, *ET AL.*,
Petitioners,
v.
THOMAS W. TAYLOR, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE MONTGOMERY COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

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

Brief *Amici Curiae* of America's Future, Citizens United Foundation, Public Advocate of the United States, U.S. Constitutional Rights Legal Def. Fund, Fitzgerald Griffin Foundation, and Conservative Legal Def. and Education Fund in Support of Petitioners

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March 10, 2025

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Citizens United Foundation, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, Fitzgerald Griffin Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Most of these *amici* filed an *amicus* brief in support of Petitioner's Petition for Certiorari. *See* Brief *Amici Curiae* of America's Future, *et al.*, *Mahmoud v. Taylor*, U.S. Supreme Court No. 24-297 (Oct. 16, 2024).

STATEMENT OF THE CASE

In October 2022, Montgomery County, Maryland public schools ("MCPS") announced its adoption of "over 22 LGBTQ+-inclusive texts." *Mahmoud v. McKnight*, 688 F. Supp. 3d 265, 272 (D. Md. 2023) ("*Mahmoud I*"). Some of these books promoted same-sex marriage and changing "gender identity," and were intended for students from pre-K through fifth grade.

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[1] It is hereby certified that that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Id. at 273. In March 2023, MCPS announced that it would stop informing parents when teaching such controversial sexual material and would no longer permit parents and students to opt out as it had previously done. *Id.* at 271, 273-74.

Three sets of parents filed suit to challenge the policy: Tamer Mahmoud and Enas Barakat, a Muslim couple; Jeff and Svitlana Roman, members of the Roman Catholic and Ukrainian Orthodox faiths, respectively; and Catholic parents Chris and Melissa Persak. *Id.* at 274. They maintained that under *Wisconsin v. Yoder*, 406 U.S. 205 (1972), strict scrutiny should apply to the MCPS decision to deny the right to opt out. *Mahmoud I* at 288.

The district court ruled that *Yoder* was "inexorably linked to the Amish community's unique religious beliefs and practices" and has no application to other religions. *Id.* at 294. The court ruled that the plaintiffs had not proven that the schools would coerce the children to change their beliefs, so there was no substantial burden on the free exercise of religion. *Id.* at 301. The district court also found that, for substantive due process purposes, *Yoder* does not explicitly hold a parent's interest in the religious upbringing of their children to be a fundamental right. *Id.* at 304. Thus, the elimination of the opt-out provision need pass only rational basis review and the court ruled that it did so. *Id.* at 306. Accordingly, the court denied injunctive relief. *Id.* at 307.

The Fourth Circuit affirmed over a strong dissent. The Court of Appeals ruled that "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." *Mahmoud v. McKnight*, 102 F.4th 191, 208 (4th Cir. 2024) ("*Mahmoud II*"). As the district court had, the Fourth Circuit decided there was no coercion (*id.* at 209), and it ratified the district court's limited reading of *Yoder* (*id.* at 211). The court ruled that the plaintiffs could not show likelihood of success on either their free exercise challenge or substantive due process claim. *Id.* at 216-217.

Judge Quattlebaum concluded in dissent that the schools' decision "burdened these parents' right to exercise their religion and direct the religious upbringing of their children by putting them to the choice of either compromising their religious beliefs or foregoing a public education for their children." *Id.* at 218 (Quattlebaum, J., dissenting).

SUMMARY OF ARGUMENT

There was a time not so very long ago when the proponents of homosexual rights represented that all that they wanted was to be left alone to do what they wanted to do in the privacy of their own bedrooms. In adopting a curriculum to proselytize young grade school children with the school's LGBTQ+ views, MCPS has moved well beyond that initial demand. Moreover, by eliminating the ability of parents and students to "opt out" of LGBTQ+ indoctrination, MCPS is acting in a truly coercive and abusive manner to indoctrinate students with its secular humanist, religious agenda.

One would have thought that the 1972 *Wisconsin v. Yoder* decision a half-century ago had established the rule that compulsory education could not be used to override the religious liberties of parents and students — but MCPS and the courts below make the untenable argument that only the Amish may enjoy that decision's protection under *Yoder*. That decision articulates many legal propositions which support the position of Petitioners here.

However, this Court should address the true purpose of the Free Exercise Clause — the recognition of a jurisdictional divide between the authority of the state and areas of individual autonomy where no government may intrude — in matters of "conscience." As Madison put it in his Memorial and Remonstrance: "Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." In areas of religion, we are guaranteed Free Exercise of our own conscience. Applied here, parents' views of the LGBTQ+ agenda are matters of faith and "conscience," where our duty is owed only to God, making it an "unalienable right" not within the reach of government. Thus, Petitioners should prevail, not based on judicial "interest balancing," but because the state has no authority whatsoever over matters of conscience.

The MCPS removal of the "opt-out" provision also violates this Court's Establishment Clause jurisprudence. Under a long and unbroken line of this Court's decisions, government schools may not teach the Bible, or have organized prayer, or even post the

Ten Commandments. If public schools may not teach traditional morality, surely the MCPS cannot teach a pagan morality — especially when MCPS rules prevent parents and students from opting out to avoid being subjected to a LGBTQ+ catechism.

ARGUMENT

I. THE MCPS POLICY IS UNCONSTITUTIONAL UNDER *YODER*.

A. Petitioners Have Demonstrated a Violation of the Free Exercise Clause.

Petitioners place heavy emphasis on *Wisconsin v. Yoder*, 406 U.S. 205 (1972). These *amici* believe that Petitioners ably have demonstrated that the challenged policy violates the Free Exercise Clause, based on the application here of the following principles drawn from *Yoder*:

- Parents have special authority to control the education of their children, even when attending government schools, on matters which violate religious beliefs and morals, and particularly with respect to impressionable and vulnerable young children (*Yoder* at 211-14);
- compulsory education laws combined with compulsory LGBTQ+ training, and no opt-out, subject young children to education at odds with the family's religious views (*id.* at 211);
- the actions of Montgomery County Schools substantially interfere with the rights of

parents to their free exercise of religion (*id.* at 218-19); and

- the fact that the curriculum was designed to disrupt children's moral presuppositions shows the intentionality and substantiality of the Schools' actions (*id.* at 217-18).

Petitioners also contend that strict scrutiny should apply, that the MCPS has demonstrated no compelling state interest, and that there is no evidence that they considered less restrictive means before infringing on the fundamental interests of parents. Brief for Petitioners at 47-52. However, the *Yoder* case was decided without any reference to strict scrutiny, intermediate scrutiny, or rational basis tests. The *Yoder* Court viewed the issue before it in the same way the Court did in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) — a choice between the state's power to "impose reasonable regulations for the control and duration of basic education" versus the "right of parents" to chose the method of education. *Yoder* at 213. Thus, the *Yoder* Court balanced interests, seeking to achieve a "reasonable" result. Justice White believed the case required what he called "a delicate balancing of important but conflicting interests." *Id*. at 237 (White, J., concurring).

The problem with interest "balancing" to achieve a "reasonable" result in *Yoder*, as well as here, is that it becomes a replacement for the judiciary's obligation to search for the original meaning of the Free Exercise Clause. As a result, litigants must argue more from policy than from law in order to persuade judges to

find their position more "reasonable" — an inherently standardless, indeed arbitrary, objective.

The notion of "reasonableness" is widely used in tort law, primarily used by juries, to determine what a reasonable person might be expected to do. Its use to determine the constitutionality of a challenged rule transforms the U.S. Constitution into an empty vessel into which each judge can read his own truth. While disputes can and do occur in a search for the true, objective original meaning of constitutional text, arguments about reasonableness are subjective, entirely dependent on the background and personality of the judge. When the method is balancing and the goal is reasonableness, the case is determined by "the eye of the beholder."

In the context of the Second Amendment, Justice Scalia revealed the appeal of "interest balancing" to judges — it empowers judges to decide cases based on their own personal preferences. That is why Justice Scalia coined the phrase "judge-empowering 'interest-balancing inquiries.'" *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008). These *amici* suggest that the proper way to analyze a constitutional challenge is textual, as discussed in Section II, *infra.* Nevertheless, since legal reasoning is conducted by analogy from precedent, there is much to be found in the *Yoder* decision, which supports Petitioners here.

B. Principles Drawn from *Yoder*.

The circuit court made several errors in its reading of *Yoder*. It erroneously believed this Court's ruling applied only to the facts of that case, that "requiring [Amish] children to attend formal secondary education compelled both the parents and their children 'to perform acts undeniably at odds with fundamental tenets of their religious beliefs.'" *Mahmoud II* at 210. To be sure, the Court extensively addressed Amish religious beliefs and culture, but *Yoder* also articulated Free Exercise Clause principles that are in no way limited to protecting one religious sect.

Second, the circuit court erred in divining from *Yoder* that there could be no Free Exercise violation unless the government was actually compelling persons to change their religious views. It stated: "there's no evidence at present that the Board's decision not to permit opt-outs **compels** the Parents or their children to ***change*** their religious beliefs or conduct." *Id.* at 209 (bold added, italics original). Nowhere in *Yoder* is there support for this proposition. However, it is astonishing that the circuit court could find no coercion here. Coercing children to attend school, and then subjecting them to systematic and intentional indoctrination geared toward undercutting the parents' religion and inoculating their children does constitute coercion to abandon the family's religious views. *See generally* Brief for Petitioners at 16-19.

The circuit court erred in trying to distinguish *Yoder* because of the duration of the religious

tradition. The court believed *Yoder* was predicated on "a record that the Supreme Court recognized 'probably few other religious groups or sects could' develop," demonstrating **hundreds of years** of religious tenets proving that the Amish were religiously opposed to attendance at public high schools. *Mahmoud II* at 210. Petitioners here follow teachings that oppose LGBTQ+ beliefs which are **thousands of years** old. The Christian Petitioners believe that God created human beings in His own image, distinctly and unchangeably as male and female, and forbade the treating of the sexes as malleable. In Jesus' own words in Matthew 19:4-5: "[H]e which made them at the beginning made them male and female, And said, For this cause shall a man leave father and mother, and shall cleave to his wife: and they twain shall be one flesh." The Muslim Petitioners herein share similar, ancient, fundamental beliefs about sexuality. Moreover, exactly the same as the Amish, all Petitioners here are concerned about "values they reject as influences that alienate man from God." *Yoder* at 212. They believe that LGBTQ behavior is a sin, and that allowing their children to be indoctrinated into the ways of sin is also sin.[2]

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[2] *See, e.g.*, *Jeremiah* 10:2 ("Thus saith the Lord, Learn not the way of the heathen"); *Psalm* 1:1 ("Blessed is the man that walketh not in the counsel of the ungodly, nor standeth in the way of sinners, nor sitteth in the seat of the scornful"); *Deuteronomy* 6:6-7 ("And these words, which I command thee this day, shall be in thine heart: And thou shalt teach them diligently unto thy children, and shalt talk of them when thou sittest in thine house, and when thou walkest by the way, and when thou liest down, and when thou risest up"). *See also Isaiah* 54:13; *Deuteronomy* 31:12-13; *Genesis* 18:19; *Proverbs* 13:20; and *Deuteronomy* 30:2.

Yoder clearly established that the religious upbringing of children is at the core of the freedoms protected by the Free Exercise Clause. The *Yoder* parents shared the concerns of Petitioners here:

> object[ing] to the high school, and higher education generally, because the **values they teach** are in **marked variance** with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a '**worldly' influence in conflict with their beliefs**. [*Yoder* at 210-11 (emphasis added).]

It was not a coercive requirement to change beliefs that offended the Free Exercise Clause, but a requirement to expose children to "worldly" religious values "at marked variance" with those of the parents. And, again as here, the *Yoder* Court understood that forced high school attendance "places Amish children in an **environment hostile** to Amish beliefs with ... **pressure to conform** to the styles, manners, and ways of the peer group." *Id.* at 211 (emphasis added).

One of the Montgomery school children speaking in support of an opt-out was attacked by a school board member who "accused [the] student ... of **'parroting' his parents' 'dogma**.'" Brief for Petitioners at 42 (emphasis added). One of the challenged books claims that by "'standing together,' ... **we will 'rewrite the norms**.'" *Id.* at 10 (emphasis added). The guidance documents for the LGBTQ curriculum "also instruct teachers — twice — to '**[d]isrupt** the either/or thinking' of elementary students about biological sex."

Id. at 12 (emphasis added). Even some elementary school principals in Montgomery County objected that the teaching "invite[s] '**shaming** comment[s]' toward students who disagree" and is "'**dismissive** of religious beliefs.'" *Id.* at 13 (emphasis added). After proclaiming that "'Everyone Needs These Books' to combat the 'dominance, superiority and entitlement' of the 'dominant culture,'" the MCPS "acknowledges that '[a]ny child ... may come away from [the storybook] instruction' with 'a new perspective **not easily contravened by their parents**.'" *Id.* at 13 (emphasis added).

As with *Yoder*, Petitioners here have demonstrated that the hostility of Maryland schools to their beliefs "interposes a serious barrier to the integration of the [children] into [their] religious communit[ies.]" *Yoder* at 211-12. Just as with the Amish in 1972, so too with the Petitioner parents here, "contemporary society [is] exerting a hydraulic insistence on conformity to majoritarian standards." *Id.* at 217.

The *Yoder* Court noted in particular "the child's crucial adolescent period of religious development." *Id.* at 223. Yet if the "adolescent period" is crucial, surely pre-K through fifth grade, where Maryland's programs are targeted, can hardly be less so. In *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), this Court recognized that young children are especially impressionable about sexual subjects, and that, as such, "the government's interest in the well-being of its youth and in supporting parents' claim to authority in their own household justified the regulation of otherwise protected expression." *Id.* at 749 (internal quotation

marks omitted). Concurring, Justice Powell noted that "representations of ... erotic acts" may be "potentially degrading and harmful to children." *Id.* at 758 (Powell, J., concurring). Justice Powell correctly found parental authority to be the fount of the right of government to regulate sexual material disseminated to children. He noted that "[Constitutional] interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society," and therefore it is proper to "leav[e] to parents the decision as to what speech of this kind their children shall hear and repeat." *Id.*

II. THE FREE EXERCISE CLAUSE PROVIDES MUCH BROADER PROTECTIONS THAN THE FOURTH CIRCUIT BELIEVES.

A. The Free Exercise Clause Draws Its Genesis from Madison's Virginia Declaration of Rights.

The First Amendment provides that "Congress shall make no law ... prohibiting the free exercise [of religion]." The Fourth Circuit reads this language to mean that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Mahmoud II* at 206 (quoting *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021)). To the Fourth Circuit, the Clause "requires merely that the law at issue be rationally related to a legitimate governmental interest." *Id.* at 206. But the historical reality is that the Free Exercise Clause

embodies James Madison's revolutionary ideal that government has **no jurisdiction** or authority whatsoever to indoctrinate Americans with respect to **matters of conscience**, as they are **duties owed only to God**, such as their view of LGBTQ+ issues.

Unlike some early state constitutions which provided only for government "tolerance" of religion,[3] Virginia charted a different path that led directly to the First Amendment. Dr. Charles C. Haynes, founding director of the Religious Freedom Center of the Newseum Institute, describes how Virginia embarked on the "world's boldest ... experiment in religious freedom," based on Madison's and Jefferson's ideal of "**liberty of conscience**, for all:"[4]

> [I]n 1776 ... at the convention called to declare Virginia's independence … Madison successfully called for an amendment to the venerable George Mason's draft of the Virginia Declaration of Rights, **changing "toleration in the exercise of religion" to "free exercise of religion.**"
>
> With that small change in language, Virginia moved from toleration to full religious freedom — a precedent that would greatly

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[3] *See, e.g.*, Massachusetts Constitution, section XXVIII, R. Perry and J. Cooper, eds., Sources of Our Liberties, Revised ed. (American Bar Foundation: 1978) (hereinafter Sources of Our Liberties).

[4] C. Haynes, Ph.D., "James Madison: Champion of the 'cause of conscience,'" *Washington Times* (Dec. 12, 2016) (emphasis added).

> influence the new nation's commitment to **free exercise** of religion under the First Amendment. **No longer would government have the power to decide** which groups to "tolerate" and what **conditions to place on the practice of their religion**. [*Id*. (emphasis added).]

B. This Court Has Defined "Religion" by Madison's Definition.

In *Reynolds v. United States*, 98 U.S. 145 (1879), this Court also viewed the Virginia Declaration of Rights as the ideological precursor to the Free Exercise Clause. *Id.* at 162-63. Noting that "'religion' is not defined in the Constitution," this Court looked to the definition in the Declaration of Rights. *See id.* at 162-63. Section 16 of the Declaration of Rights declared that **religion** is:

> **the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence**. [Constitution of Virginia, Section 16, reprinted in Sources of Our Liberties at 312 (emphasis added).]

The *Reynolds* Court recognized that "religion" was exactly as Madison defined it, a subject area that "was not within the cognizance of civil government." *Reynolds* at 163. The Court explained that this **jurisdictional principle** was detailed in James Madison's Memorial and Remonstrance, submitted to the Virginia Assembly in 1785, some nine years after

the Declaration of Rights, in support of Thomas Jefferson's Bill for Establishing Religious Freedom. Quoting from the Declaration, Madison wrote these words:

> [W]e hold it for a fundamental and undeniable truth, "that **Religion** or **the duty which we owe to our Creator and the manner of discharging it**, can be directed only by **reason and conviction**, not by **force or violence**." [citing the Virginia Declaration of Rights]. The Religion then of every man must be left to the conviction and **conscience** of every man; and it is the right of every man to exercise it as these may dictate.... We maintain therefore that in matters of Religion, **no man's right is abridged by** the institution of **Civil Society** and that **Religion is wholly exempt from its cognizance**.[5]

Four months later, the General Assembly passed Jefferson's "Act for Establishing Religious Freedom." In the preamble, as the *Reynolds* Court noted, this same **jurisdictional principle** was reaffirmed. *See Reynolds* at 163. The preamble read:

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[5] J. Madison, "Memorial and Remonstrance" to the Honorable General Assembly of the Commonwealth of Virginia (June 20, 1785), reprinted in 5 The Founders' Constitution at 82 (item # 43) (P. Kurland & R. Lerner, eds., U. of Chi.: 1987) (emphasis added) (hereinafter The Founders' Constitution).

> Whereas Almighty God hath created the mind free; that **all attempts to influence it by temporal punishments or burthens, or by civil incapacitations** ... are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do....[6]

Accordingly, the *Reynolds* Court incorporated Madison's definition of "religion" as the best expression of the intent of the Framers of the Free Exercise Clause.

The LGBTQ+ agenda being forced on students is a set of teachings on moral topics falling squarely in the area of conscience. It is being forced not only on parents and children who follow Christianity and Islam, but also on those who follow no organized religion and could be agnostics or atheists. The Free Exercise of Religion **does not protect religious people**; rather it protects a sphere of our lives — termed "**religion**" — from any governmental intrusion. That area of "religion" describes all matters that are matters of conscience — such as our view of moral issues — which are areas where no government may proselytize or coerce.

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[6] Act for Establishing Religious Freedom (Oct. 31, 1785), reprinted in 5 The Founders' Constitution at 84 (item #44) (emphasis added).

C. Compulsory Government Education Violates the Free Exercise of Religion.

As Jefferson and Madison saw it, and as the *Reynolds* Court later agreed, the Free Exercise Clause cannot be understood in terms of judicial "levels of scrutiny" that have given judges the power to manipulate the text of the Constitution since they were introduced in the mid-1900s. Under the Free Exercise Clause, government has no jurisdiction whatsoever over the area of "religion." No jurisdiction means no jurisdiction. Under balancing, government can intrude on the rights of Americans if judges believe such intrusion meets the terms of some judge-made, atextual test. A few restrictions on free exercise cannot be glossed over in service to some other interests, such as tolerance, or the recently popular Diversity, Equity, and Inclusion. There is "no compelling government interest" which can authorize government to intrude on matters of religion. Where there is no jurisdiction, there is nothing to balance. The domain of religion is "wholly exempt from [the] cognizance" of the civil magistrate.

In truth, compulsory education in government schools by itself offends the Free Exercise Clause, as all education has a spiritual underpinning. This principle once was understood broadly, as "both Jefferson and Madison denied to the state any authority to educate or tax the people to support an educational program."[7] In his Act for Establishing

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[7] H. Titus, "The Free Exercise Clause: Past, Present and Future," 6 REGENT U. L. REV. 7, 60 (1995).

Religious Freedom, Jefferson wrote that "to suffer the civil magistrate to intrude his powers into the field of opinion ... is a dangerous fallacy, which at once destroys all religious liberty, because he being of course the judge ... will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with his own."[8]

The Act asserted that, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."[9] That principle shared by Madison and Jefferson, applied here, has been disrespected in the extreme by MCPS and the courts below — which have no problem with compelling the Petitioner parents not just to pay for government propagation of religious beliefs which are anathema to them, but to also then compound the offense by seeking to co-opt Petitioners' children and indoctrinate them with those beliefs.

III. THE MCPS' COMPULSORY LGBTQ+ INDOCTRINATION POLICY VIOLATES THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE.

Although in the courts below focus was placed on the Free Exercise Clause, it deserves mention that the MCPS policy also violates 80 years of this Court's Establishment Clause jurisprudence. LGBTQ+ indoctrination is every bit as much a matter of

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[8] Act for Establishing Religious Freedom at 85.

[9] *Id.* at 84.

conscience and religion as are the Christian disciplines long banned by this Court. In other words, if this Court's Establishment Clause jurisprudence prevents teaching **against** LGBTQ+ doctrine, then it most certainly also prevents the teaching **in favor of** LGBTQ+ doctrine.

A. LGBTQ+ Doctrine Is at Its Core Religious.

Holy Writ addresses and condemns lesbian, gay, and bisexual practices in the ancient world numerous times in both Old and New Testaments:

- *Leviticus* 18:22: "You shall not lie with a male as with a woman; it is an abomination."
- *Leviticus* 20:13: "If a man lies with a male as with a woman, both of them have committed an abomination; they shall surely be put to death; their blood is upon them."
- *Jude* 1:7: "Just as Sodom and Gomorrah and the surrounding cities, which likewise indulged in sexual immorality and pursued unnatural desire, serve as an example by undergoing a punishment of eternal fire."
- *Romans* 1:26-28: "For this reason God gave them up to dishonorable passions. For their women exchanged natural relations for those that are contrary to nature; and the men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in themselves the due penalty for their error. And since they did not

see fit to acknowledge God, God gave them up to a debased mind to do what ought not to be done."

- *Genesis* 2:24: "Therefore a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh."
- *Mark* 10:6-9: "But from the beginning of creation, 'God made them male and female.' 'Therefore a man shall leave his father and mother and hold fast to his wife, and the two shall become one flesh.' So they are no longer two but one flesh. What therefore God has joined together, let not man separate."
- *1 Corinthians* 6:9-10: "Or do you not know that the unrighteous will not inherit the kingdom of God? Do not be deceived: neither the sexually immoral, nor idolaters, nor adulterers, nor men who practice homosexuality, nor thieves, nor the greedy, nor drunkards, nor revilers, nor swindlers will inherit the kingdom of God."
- *1 Timothy* 1:8-11 ESV: "Now we know that the law is good, if one uses it lawfully, understanding this, that the law is not laid down for the just but for the lawless and disobedient, for the ungodly and sinners, for the unholy and profane, for those who strike their fathers and mothers, for murderers, the sexually immoral, men who practice homosexuality, enslavers, liars, perjurers, and whatever else is contrary to sound doctrine, in accordance with the gospel of the glory of the blessed God with which I have been entrusted."

- *1 Corinthians* 7:2: "But because of the temptation to sexual immorality, each man should have his own wife and each woman her own husband."

Transgenderism also has ancient spiritual roots. Without even knowing it, many of its proponents have embraced what was a foundational principle of early pagan religions. One of the "gods" of the pagan world was Ishtar, the "goddess of war and sexual love." *See* "Ishtar," *Britannica.* "An ancient Mesopotamian tablet records ... [Ishtar saying] 'When I sit in the alehouse, I am a woman, and I am an exuberant young man.'" J. Cahn, The Return of the Gods (Frontline: 2022) at 118. The goddess Ishtar had summertime festivals and parades. "The parades of the goddess featured men dressed as women, women dressed as men, each dressed as both, male priests parading as women, and cultic women acting as men. They were public pageants and spectacles of the transgendered, the cross-dressed, the homosexual, the intersexual, the cross-gendered." *Id*. at 181. Transgenderism likewise is at odds with Scripture:

- *Genesis* 5:2: "Male and female he created them, and he blessed them and named them Man when they were created."
- *Matthew* 19:4: "And he answered and said unto them, Have ye not read, that he which made them at the beginning made them male and female."

B. This Court Has Long Banned Proselytizing in Government Schools.

Under this Court's jurisprudence, when compulsory public schools affirm some religious beliefs while disparaging others, an Establishment Clause violation occurs. This Court has been clear in its view that coercion to change religious practices is not necessary to trigger an Establishment Clause violation. Merely putting the imprimatur of the state in favor of one religious belief over another is sufficient. Consider this line of cases:

- In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court banned government schools compelling children to salute the flag and pledge allegiance regardless of the particular religious views of the child or the sincerity with which they are held.
- In *McCollum v. Board of Education*, 333 U.S. 203 (1948), the Court stated that compulsory, tax-supported public schools could not enable sectarian groups to give religious instruction to public school students in public school buildings.
- In *Engel v. Vitale,* 370 U.S. 421 (1962), the Court ruled that students in government school could not be required to recite an official state prayer, **even if students may**

remain silent or be excused, and the prayer was denominationally neutral.[10]

- In *Abington School District v. Schempp*, 374 U.S. 203 (1963), the Court ruled that school boards many not require passages from the Bible be read or the Lord's Prayer be recited, **even if students may be excused from attending or participating**.[11]
- In *Stone v. Graham*, 449 U.S. 39 (1980), the Court prohibited posting a copy of the Ten Commandments purchased with private contributions on the wall of school classrooms.[12]

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[10] "Neither the fact that the prayer may be denominationally neutral nor the fact that **its observance on the part of the students is voluntary** can serve to free it from the limitations of the Establishment Clause," this Court ruled. *Engel* at 430 (emphasis added). "[I]t is no ... business of government to compose official prayers for any group of the American people to recite." *Id.* at 425.

[11] "Any child shall be excused from such Bible reading ... upon the written request of his parent or guardian." *Abington* at 205. "The fact that some pupils ... might be excused ... does not mitigate the obligatory nature of the ceremony for [the state law] unequivocally requires the exercises to be held every school day." *Id.* at 210-211.

[12] "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.... [T]his ... is not a permissible state objective under the Establishment Clause." *Stone v. Graham* at 42. "It does not matter that ... the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies ... provides the 'official support of the State ... Government' that

- In *Wallace v. Jaffree,* 472 U.S. 38 (1985), the Court struck down a state law authorizing a one-minute period of silence in public schools for meditation and voluntary prayer.
- In *Edwards v. Aguillard*, 482 U.S. 578 (1987), this Court struck down a Louisiana law requiring public schools that taught the theory of evolution to also teach the theory of creation.[13]
- In *Lee v. Weisman*, 505 U.S. 577 (1992), including clergy to offer prayers at a public school graduation ceremony was found to violate the Establishment Clause.
- In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), this Court struck down a policy permitting student-initiated, student-led prayer at graduations and football games, although the prayers were required to be "nonsectarian" and "non-proselytizing."

Both the district court and the Fourth Circuit's Free Exercise analyses turned on the (claimed) absence of "coercion" in the elimination of the opt-out policy. As the district court put it, "The *sine qua non* of a free exercise claim is coercion, and the plaintiffs have not shown the no-opt-out policy likely will ...

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the Establishment Clause prohibits...." *Id.* at 42.

[13] The Court ruled that "the Act ... has the ... purpose of discrediting evolution by counterbalancing its teaching ... with the teaching of creationism." *Id.* at 589. The Court declared that the purpose of the Establishment Clause is to ensure that "Government not intentionally endorse religion or a religious practice." *Id.* at 587.

otherwise coerce their children to violate or change their religious beliefs...." *Mahmoud I* at 298. But in the Establishment Clause context, this Court has been crystal clear that no coercion need be shown whatsoever. Even when children could be excused, proselytization of all sorts was banned by this line of cases. Students who sought protection from prayer, Bible reading, the Ten Commandments, and even a moment of silence, or even hearing a prayer were protected.

How could the Fourth Circuit remain faithful to this Court's many rulings on the Establishment Clause while allowing MCPS to use its compulsory attendance laws to hold students hostage to be indoctrinated in LGBTQ+ doctrine against their and their parents' wishes and beliefs?

Indeed, in *Everson v. Bd. of Education*, 330 U.S. 1 (1947), this Court made clear that the First Amendment "**requires the state to be a neutral** in its relations with groups of religious believers and non-believers." *Id.* at 18 (emphasis added). This Court nonetheless famously declared that:

> The "establishment of religion" clause of the First Amendment means at least this.... Government can[not] ... pass laws which aid one religion, aid all religions, or **prefer one religion over another**.... No tax in any amount, large or small, can be levied to support any religious activities ... whatever form they may adopt to teach or practice religion.... [*Id.* at 15-16 (emphasis added).]

In dissent, Justice Robert Jackson provided important background relevant to the MCPS policy, that "[o]ur [modern] **public school** ... is a relatively recent development dating from about 1840. It is **organized on the premise that secular education can be isolated from all religious teaching so that the school can ... maintain a strict and lofty neutrality as to religion**." *Everson* at 23-24 (Jackson, J., dissenting) (emphasis added). It could be argued that the *Everson* Court and Justice Jackson's dissent erred in believing that "secular education [could be] isolated from all religious teaching," or be strictly "neutral."

Most seem willing to believe that at least some subjects, such as arithmetic, can be taught in a secular manner, and not offend the secular/religious divide. Some may contend that teaching about diversity, equity, and inclusion is purely secular, but by the Madison/Jefferson definition, it is not. Meanwhile, few would argue that teaching children about sexual practices deemed sinful in multiple religious traditions is purely secular. Since the teaching of a LGBTQ+ curriculum constitutes religious teaching, it is barred by this Court's Establishment Clause Jurisprudence. The matter at issue in this case — the MCPS' elimination of the opt-out — is just the most egregious aspect of MCPS teaching a LGBTQ+ curriculum.

C. Public Schools Were Designed for the Propagation of the Religion of "Secular" Humanism.

It should come as no surprise that MCPS is pushing on students a distinctively irreligious LGBTQ+ agenda. Indeed, those most prominent in developing the public school model did so to shift the nation away from Christianity, beginning around 1840 with Massachusetts educator Horace Mann, who has been described as "the first great American advocate of public education." To Mann, the salvation of the human race was achieved not through doctrinal religious means, but academic ones. "Our public schools are the Ark of the American Covenant," Mann stated. "Education is our only political safety. Outside of this ark, all is deluge."[14]

In an 1840 lecture, Mann — wittingly or not — explained the inherently coercive nature of his compulsory education model. "We, then, who are engaged in the sacred cause of education, are **entitled to look upon all parents as having given hostages to our cause**," he said (emphasis added).[15] The Fourth Circuit, apparently, shares Mann's view.

Mann's still-moralistic secularism was quickly succeeded by the militantly secular humanism of John Dewey, perhaps the seminal figure in American public

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[14] 59 Ohio Education Monthly 650 (O.T. Corson: 1910).

[15] H. Mann, II, Life and Works of Horace Mann, 210, M. Mann, ed. (Lee and Shepherd Publishers: 1891).

education to this day. According to Dewey biographer Henry Edmondson, "Dewey's unrelenting attack on religion and traditional education is a conspicuous feature of his educational philosophy." H. Edmondson, John Dewey and the Decline of American Education at 19 (ISI: 2014).

> [W]ith reference to the notorious statement generally attributed to Marx, Dewey asserts that "religion is the opium of the people." Dewey makes little attempt to veil his **hostility to Christianity** in particular.... [*Id*. at 19 (emphasis added).]

Edmondson notes that "Dewey not only rejects conventional religion, he seeks to create a kind of **alternative faith** ... nothing more than a kind of shared democratic faith guided by science." *Id.* at 21 (emphasis added). Dewey conceived of the educator in surprisingly religious terms as something of a missionary, using the classroom as a pulpit, to replace the Christian religion with materialistic humanism. As Edmondson writes, "[g]iven these views, it is no surprise that Dewey signed the famous 'Humanist Manifesto' in 1933, a secularist call to arms that emphatically rejects religious faith." *Id*. at 20.

Dewey's good friend Charles Francis Potter, author of Humanism: A New Religion and co-signer with Dewey of the Humanist Manifesto, was still clearer in stating his intent that the public schools should actively proselytize his "new religion." Potter wrote, "[e]ducation is thus a most powerful ally of Humanism, and **every American public school is a school of**

Humanism. What can the theistic Sunday school, meeting for an hour once a week, and teaching only a fraction of the children, do to stem the tide of a five-day program of humanistic teachings?"[16]

Modern humanists echo this theme. In a 1983 article in *The Humanist* magazine, John J. Dunphy wrote:

> [T]he battle for humankind's future must be waged and won in the **public school** classroom by **teachers** who correctly perceive their role as the **proselytizers of a new faith: a religion of humanity**.... These teachers must embody the same selfless dedication as the most rabid fundamentalist preachers, ... utilizing a classroom instead of a pulpit to convey humanists values in whatever subject they teach.... **The classroom must and will become an arena of conflict** between ... the **rotting corpse of Christianity** ... and the **new faith of humanism**....[17]

The development of secular humanism as a distinctly anti-Christian religion has not escaped the attention of this Court, as 63 years ago it recognized:

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[16] D. Noebel, J. Baldwin, and K. Bywater, Clergy in the Classroom: The Religion of Secular Humanism at 40 (Summit Press: 2007) (emphasis added).

[17] J. Dunphy, "A Religion For A New Age," *The Humanist* 43:1 (Jan.-Feb. 1983) (emphasis added).

"Among **religions** in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, **Secular Humanism** and others." *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (emphasis added).

This Court's hope in *Everson* that a comprehensive education could somehow be divorced from religion has never been justified in America's history. Throughout that history, the only real question has been, which religion will be taught in schools?

D. MCPS' LGBTQ+ Agenda Is Not Neutral toward Religion.

MCPS specifically instructs teachers how to proselytize, to counter the beliefs of students who may have religious objections to the storybooks. They are instructed:

> If a student says being "gay, lesbian, queer, etc." is "wrong and not allowed" by his or her religion, teachers might respond, "I understand that is what you believe, but not everyone believes that. We don't have to understand or support a person's identity to treat them with respect and kindness." [*Mahmoud I* at 279.]

MCPS is telling students that the state disapproves of their religious belief and that their belief lacks "respect and kindness." And MCPS goes far beyond merely posting privately funded religious

material on the wall. It actively uses the storybooks as part of its pedagogy, actively teaching children to "venerate and obey" the idea "that there is no single way to be a boy, girl, or any other gender" — a purely religious postulate, and one directly at odds with the religions of Petitioners. *Id.* at 278. And unlike the Ten Commandments in *Stone*, the storybooks are funded by tax dollars taken directly from the pockets of Petitioners, "for the propagation of opinions which [they] disbelieve[] and abhor[]."[18]

Contrast MCPS' approach with this Court's earlier statement in 1985 when it struck down an Alabama statute authorizing public school teachers to hold a moment of silence for "meditation or voluntary prayer." This Court ruled that "whenever the State itself speaks on a religious subject, one of the questions that we must ask is **whether the government intends to convey a message of endorsement or disapproval of religion**." *Wallace* at 60-61 (emphasis added). Here, teachers are affirmatively instructed to "convey a message of disapproval," that Petitioners' beliefs lack "respect and kindness." They are to actively serve as Dunphy's "ardent fundamentalists," as MCPS instructs "teachers [to] ... try to 'disrupt the either/or thinking' and provide examples like 'Harry Styles wears dresses' or 'my best friend is a woman ... married to another woman.'" *Mahmoud I* at 279. MCPS' promotion of one religious belief over another is blatant.

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[18] Act for Establishing Religious Freedom at 85.

Here, not only do Petitioners' religious beliefs not get equal time, but teachers are also instructed to actively disparage Petitioners' religious beliefs to their own children — in front of their peers. Moreover, unlike the student-initiated prayers in *Santa Fe*, here we have the teachers, the ultimate expression of government authority and sanction, conveying to young "members of the audience who are nonadherents" that "they are outsiders, not full members of the political community." *Id.* at 309. MCPS defies *Santa Fe*'s command that the Establishment Clause exists to "remove debate over this kind of issue from governmental supervision or control." *Id.* at 310. Rather, as even some MCPS noted (*see* Petition at 13), MCPS teachers' job is to end the debate, in favor of one religious perspective and against another.

In the light of these precedents, the MCPS compulsory reading policy, with no opt-out, is a painfully clear Establishment Clause violation. Although the policies this Court has struck down may have promoted Christian beliefs, the MCPS policy is the reverse, promoting beliefs at sharp odds with Christianity (as well as Islam, particularly affecting some Petitioners).

Abington promised that "[t]he government is neutral, and, while protecting all, it prefers none, and it disparages none." *Abington* at 215. MCPS's policy utterly destroys *Abington*'s promise and effects an unconstitutional establishment of religion under this Court's Establishment Clause jurisprudence.

CONCLUSION

The circuit court decision should be vacated and the case remanded to provide full relief to Petitioners.

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March 10, 2025