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 OF *AMICUS CURIAE* CALIFORNIA PARENTS FOR THE EQUALIZATION OF EDUCATIONAL MATERIALS IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF *AMICUS CURIAE* 1
SUMMARY OF ARGUMENT 3
ARGUMENT 5
I. Schools and the Free Exercise Clause 5
II. A Test for Free Exercise Claims Challenging School Curricula 6
1. The Negation of Religious Beliefs or Practices 7
2. Targeted Hostility 8
3. Lack of Neutrality 9
4. Coercion 10
CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Bauchman v. West High Sch.,
132 F.3d 542 (10th Cir. 1997) 12

Brandon v. Kinter,
938 F.3d 21 (2d Cir. 2019) 8

Cal. Parents for the Equalization of Educ. Materials v. Torlakson,
267 F. Supp. 3d 1218 (N.D. Cal. 2017) 7

California Parents for Equalization of Educational Materials v. Noonan,
600 F. Supp. 2d 1088 (E.D. Cal. 2009) 2

California Parents for the Equalization of Educational Materials v. Torlakson,
973 F.3d 1010 (9th Cir. 2020) 1, 7, 8, 12, 13

Church of Lukumi Babalu Aye v. City of Hialeah,
508 U.S. 520 (1993) 9, 10, 11

Espinoza v. Mont. Dep't of Revenue,
591 U.S. 464 (2020) 8, 11

Goldman v. Weinberger,
475 U.S. 503 (1986) 11

Illinois ex rel. McCollum v. Bd. of Educ.,
333 U.S. 203 (1948) 8

Lynch v. Donnelly,
465 U.S. 668 (1984) 8

Lyng v. Nw. Indian Cemetery Protective Ass'n,
485 U.S. 439 (1988) 12

Mahmoud v. McKnight,
102 F.4th 191 (4th Cir. 2024) 1, 9, 12

Mahmoud v. McKnight,
688 F. Supp. 3d 265 (D. Md. 2023) 1

Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n,
584 U.S. 617 (2017) 8, 9, 10

Oliver v. Arnold,
19 F.4th 843 (5th Cir. 2021) 7

Sch. Dist. of Abington Twp. v. Schempp,
374 U.S. 203 (1963) 5

Trinity Lutheran Church of Columbia, Inc. v. Comer,
582 U.S. 449 (2017) 8, 11

Williams v. Hansen,
5 F.4th 1129 (10th Cir. 2021) 8

Constitutional Provisions

U.S. Const. amend. I 2, 8, 9

Statutes, Rules and Regulations

Supreme Court Rule 37 1

Other Authorities

Kiri Blakeley, *Seventh grader 'had to say God wasn't real' in classroom assignment at her Texas school*, Daily Mail, Oct. 28, 2015 7

Brief of Amici Curiae, *Cal. Parents for the Equalization of Educ. Materials v. Torlakson*, (No. 20-1137) 141 S. Ct. 2583 (2021) 2

Brief of Respondents in Opposition, *Mahmoud v. Taylor* (No. 24-297) (Dec. 18, 2024) 1

Petition for Writ of Certiorari, *Mahmoud v. Taylor* (No. 24-297) (Sept. 12, 2024) 1

Petition for Writ of Certiorari, *Cal. Parents for the Equalization of Educ. Materials v. Torlakson*, 141 S. Ct. 2583 (No. 20-1137) 9

Reply of Petitioners, *Mahmoud v. Taylor* (No. 24-297) (Dec. 27, 2024) 1

Bruce Schreiner & Gilma Avalos, *Florida school apologizes after students stomp on 'Jesus'*, NBC News, Mar. 27, 2013 7

The Supreme Court 2019 Term: Leading Case: *Espinoza v. Montana Department of Revenue*, 134 Harv. L. Rev. 470 (2020) 6

INTEREST OF *AMICUS CURIAE*[1]

California Parents for the Equalization of Educational Materials (CAPEEM) is a nonprofit, nonpartisan organization that is at the forefront of advocating for religious freedom and the equal treatment of Hindu public school students. For two decades, CAPEEM has tried to eradicate the disparaging treatment of Hinduism in California's statewide public school curriculum. That curriculum upends Hindu beliefs by using secular theories to present the religion as nothing more than a social construct in statewide textbooks, California's History-Social Science Content Standards, and the state's History-Social Science Framework.

CAPEEM's most recent case, *California Parents for the Equalization of Educational Materials v. Torlakson*, 973 F.3d 1010 (9th Cir. 2020), has been cited throughout the current proceedings.[2] The Circuit Court and the parties cite *Torlakson* for different,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of the brief; and no person other than *amicus*, its members, or its counsel contributed money intended to fund the preparation or submission of the brief.

[2] *See Mahmoud v. McKnight*, 102 F.4th 191, 210 (4th Cir. 2024); *Mahmoud v. McKnight*, 688 F. Supp. 3d 265, 290 (D. Md. 2023); Petition for Writ of Certiorari, at 31, *Mahmoud v. Taylor* (No. 24-297) (Sept. 12, 2024); Brief of Respondents in Opposition, at 12, *Mahmoud v. Taylor* (No. 24-297) (Dec. 18, 2024); Reply of Petitioners, at 4, *Mahmoud v. Taylor* (No. 24-297) (Dec. 27, 2024).

sometimes contradictory, propositions. CAPEEM also litigated *California Parents for Equalization of Educational Materials v. Noonan*, 600 F. Supp. 2d 1088 (E.D. Cal. 2009), in which the court and the parties tried to navigate the sometimes overlapping provisions of the Constitution that apply to public school curricula. CAPEEM's experience litigating violations of the rights of a religious group in schools gives it an important perspective on the inadequacies of existing law on the application of the Free Exercise Clause to school curricula.

CAPEEM enjoys widespread support in Hindu communities throughout the country. More than 150 Hindu temples and religious educational organizations serving over half a million Hindus filed an amicus brief in support of CAPEEM's petition for writ of certiorari in 2021, underscoring the importance of this issue for Hindus. *See* Br. of Amici Curiae, *Cal. Parents for the Equalization of Educ. Materials v. Torlakson*, (No. 20-1137) 141 S. Ct. 2583 (2021).

CAPEEM takes no position on the ultimate issues in this case, but notes that lower courts currently lack sufficient guidance on free exercise law on school curricula to adequately protect the free exercise rights of students. We would like to see a clear, simple test emerge from this case that will guide schools in ensuring that their curricula are consistent with the Free Exercise Clause of the First Amendment.

SUMMARY OF ARGUMENT

Millions of public school students across the country rely on state boards of education and local school boards to protect their free exercise rights. When state and local school boards fail to adequately protect those rights, students and parents must go to the courts. The problem right now is that there is not a clear body of law to guide parents, students, school boards, and lower courts when confronting free exercise issues arising in schools.

CAPEEM's experience litigating the religious freedom of Hindu parents and students for nearly two decades has informed a proposed four-part test to determine if school policies and practices violate the Free Exercise Clause:

> (1) Does the curriculum material negate religious beliefs or practices?
>
> (2) Does the curriculum material itself or the process through which it was adopted reflect targeted hostility toward religion or a particular religion?
>
> (3) Does the curriculum material or the process through which it was adopted lack neutrality toward a particular religion?
>
> (4) Is the curriculum material coercive?

This test draws on the history of Supreme Court free exercise cases to propose a coherent standard for school curriculum compliance with the Free Exercise Clause. The prongs of the test

recognizable most easily are neutrality and coercion, with targeted hostility toward religion emphasized in more recent decisions. The negation of religious beliefs is also important because there are so many ways, direct and indirect, that schools can negate students' religious beliefs, including by teaching the purported secular origin of a religion, which is a manner of instructing students that their religion is not a real religion. This four-pronged test can be used in this case and others to address free exercise challenges to school curricula.

ARGUMENT

> Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom.

Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 230 (1963).

I. Schools and the Free Exercise Clause

Given the centrality of religion in the history of the world and the United States, school curricula will invariably include instruction on how civilization and this country have been influenced by different faiths as a way to understand the world we live in. While any subject taught in school can have significance within the context of religion, whether it is physics and Galileo, biology and the theory of evolution, or many types of literature, schools are at their most coercive when they teach about religion itself. Thus, schools must be fair and neutral in their descriptions of religions and their adherents. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (Goldberg, J., concurring) ("The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that *it work deterrence of no religious belief*.") (emphasis added).

Notwithstanding the importance of schools' adherence to free exercise principles in how they develop curricula and teach students, vast confusion persists in how the Free Exercise Clause is understood in that context. *See* The Supreme Court 2019 Term: Leading Case: *Espinoza v. Montana Department of Revenue*, 134 Harv. L. Rev. 470, 470 (2020) ("The Religion Clauses of the Constitution have proven difficult for the Supreme Court to untangle.") The case before the Court provides an opportunity to, in the process of deciding Petitioners' appeal, provide clarity.

II. A Test for Free Exercise Claims Challenging School Curricula

CAPEEM proposes the test explained below to guide lower courts and school boards in determining whether school curricula infringe on students' free exercise rights. We submit that this test properly recognizes the flexibility needed by school boards in crafting their curricula, while also protecting the free exercise rights of students and parents this country holds dearly.

(1) Does the curriculum material negate religious beliefs or practices?

(2) Does the curriculum material itself or the process through which it was adopted reflect targeted hostility toward religion or a particular religion?

(3) Does the curriculum material or the process through which it was adopted lack neutrality toward a particular religion?

(4) Is the curriculum material coercive?

1. The Negation of Religious Beliefs or Practices

The first prong for determining whether a school's curriculum violates the Free Exercise Clause is the denial of a student's or parent's religious beliefs or practices. Violations of religious beliefs can come in either direct or indirect forms. Direct forms are such as those described by Judge Ho in his concurrence in a denial of a petition for rehearing en banc: "Some teachers force students to express views deeply offensive to their faith. *See, e.g.*, Kiri Blakeley, *Seventh grader 'had to say God wasn't real' in classroom assignment at her Texas school*, Daily Mail, Oct. 28, 2015; Bruce Schreiner & Gilma Avalos, *Florida school apologizes after students stomp on 'Jesus'*, NBC News, Mar. 27, 2013." *Oliver v. Arnold*, 19 F.4th 843, 844 (5th Cir. 2021) (Ho, J., concurring).

Indirect forms of negation include teaching secular theories about the origins of Hinduism with no reference to the belief in the divine and attributing human authorship to the Vedas (Hindu scriptures), while teaching how adherents of other religions believe in the divine origins of their faiths and scriptures without providing secular explanations. *See Cal. Parents for the Equalization of Educ. Materials v. Torlakson*, 267 F. Supp. 3d 1218, 1223 (N.D. Cal. 2017), *aff'd*, 973 F.3d 1010 (9th Cir. 2020).

The negation of religious beliefs or practices criterion that CAPEEM proposes does not rise to the level of a substantial burden, which several Circuit Courts still require to maintain a free exercise claim. *See Cal. Parents for the Equalization of Educ. Materials v. Torlakson*, 973 F.3d 1010, 1019 (9th Cir. 2020) (pleading substantial burden is required by this court's free exercise decisions); *Williams v. Hansen*, 5 F.4th 1129, 1133 (10th Cir. 2021); *Brandon v. Kinter*, 938 F.3d 21, 32 (2d Cir. 2019). The substantial burden test is flatly inconsistent with this Court's recent free exercise cases involving forms of coercion that do not directly suppress religious practices. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 467 (2017) (The consequence [of the state law] is, in all likelihood, a few extra scraped knees. But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 489 (2020); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 584 U.S. 617, 640 (2017).

2. Targeted Hostility

The Free Exercise Clause has long forbidden government hostility toward religion or a particular religion. The "Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions, and *forbids hostility toward any*." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (emphasis added); *see also Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 211-212 (1948) ("[G]overnmental hostility to religion or religious teachings . . . would be at war with our national tradition as embodied in the First

Amendment's guaranty of the free exercise of religion."). More recently, this Court has reiterated that strict scrutiny applies when official action demonstrates governmental hostility toward religion. *Masterpiece Cakeshop*, 584 U.S. at 649 ("[N]o bureaucratic judgment condemning a sincerely held religious belief as "irrational" or "offensive" will ever survive strict scrutiny under the First Amendment."); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("The Free Exercise Clause protects against governmental hostility which is masked as well as overt.")

In this case, decided on a motion for preliminary injunction, the Fourth Circuit found that more factual development was needed to determine if the board of education's abrupt change in policy that had previously allowed opting out of part of the curriculum reflected hostility toward religion. *Mahmoud v. McKnight*, 102 F.4th 191, 216 (4th Cir. 2024). In CAPEEM's experience, describing Hinduism as a negative social construct built on an oppressive "caste" system imposed from without by Aryan invaders, rather than as a divinely inspired religion, and the use of the term 'Brahmanism' which has historically been used in a derogatory manner, constitute targeted hostility that should invoke strict scrutiny. Petition for Writ of Certiorari, *Cal. Parents for the Equalization of Educ. Materials v. Torlakson*, 141 S. Ct. 2583 (No. 20-1137).

3. Lack of Neutrality

Government neutrality with respect to religion is a touchstone of the Free Exercise Clause. In the

Masterpiece Cakeshop case, a baker refused to make a wedding cake for a same-sex couple because of his religious objection to same-sex marriage. The Colorado Civil Rights Commission found that he violated the Colorado Anti-Discrimination Act, which Colorado state courts affirmed. This Court reversed. In addition to the hostility the Commission showed to the baker's religion, as discussed above, this Court held that he "was entitled to the *neutral and respectful* consideration of his claims in all the circumstances of the case." *Masterpiece Cakeshop*, 584 U.S. at 634 (emphasis added); *id.*, at 644 (Gorsuch, J., concurring) ("the Colorado Civil Rights Commission failed to act neutrally toward [the baker]'s religious faith").

Thus, the Court was deeply concerned with the religious bigotry the Commission showed toward the baker during its administrative review process. School boards, too, have an administrative process for adopting curricula. CAPEEM urges the Court to look closely at Respondent board of education's administrative process in this case and submits that neutrality not just in content but in process be made an essential part of any test the Court develops for analyzing free exercise claims in connection with school curricula. The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion." *Lukumi Babalu Aye*, 508 U.S. at 534.

4. Coercion

A free exercise plaintiff must show coercion to establish a claim. That coercion could be requiring the plaintiff to do something their religion forbids, or forbidding them from doing something their religion

requires. In *Lukumi Babalu*, this Court held it unconstitutional for the City of Hialeah to criminalize the ritualistic slaughter of animals required by the Santeria faith. 508 U.S. at 547 ("Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices."); *see also Goldman v. Weinberger*, 475 U.S. 503, 510 (Air Force officer wearing yarmulke with uniform implicated Free Exercise Clause but Air Force regulation prohibiting the wearing of headgear held to "reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity.")

More recently, the Court has held in several cases that a free exercise violation need not be based on interference with a religious practice, such as animal slaughter or wearing a yarmulke. Coercion can take the form of denying a church playground participation in a safety program that is available to other playgrounds or denying a scholarship to a student who wants to use it for a religious school. See *Trinity Lutheran,* 582 U.S. at 467 (playground); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 478 ("The Free Exercise Clause protects against even indirect coercion, and a State punishes the free exercise of religion by disqualifying the religious from government aid as Montana did here.") (cleaned up).

In this case, the plaintiffs have argued that the school board's inclusion of stories in the district's curriculum that portray gay, transgender, and non-binary characters without notice that those stories would be included and an opportunity to opt out

violated their free exercise rights. *Mahmoud*, 102 F.4th at 201. The court considered the parents' argument that "exposure" to the stories constituted sufficient coercion and acknowledged this Court's precedent that the Free Exercise Clause "protects against indirect coercion or penalties on the free exercise of religion." *Id.* at 204 (citing *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). The court held that at the preliminary injunction stage, the plaintiffs did not show coercion that would give them a likelihood of success on the merits on their free exercise claim. *Mahmoud*, 102 F.4th at 216. The question of what constitutes "coercion" as part of a free exercise claim can be the lynchpin of that claim.

In *Bauchman v. West High School*, a Jewish high school student participated in a school choir and objected that it performed Christian devotional music. *Bauchman v. West High Sch.*, 132 F.3d 542, 546 (10th Cir. 1997). The choir teacher allowed her to opt out of the Christian songs and assured her that her grade would not be affected by her limited participation. *Id.* at 557. The court held that the school did not coerce her to violate her religious beliefs. *Id.* at 558. In *California Parents for the Equalization of Educational Materials v. Torlakson*, the Ninth Circuit found no coercion under the Free Exercise Clause because plaintiffs, who alleged students were being graded on their ability to affirm material they found offensive about their religion, did not allege "specific *religious conduct* that was affected by the Defendants' actions." 973 F.3d at 1019 (emphasis added) (quoting district court decision with approval).

CAPEEM submits that when students are tested on material relating to their religion that is part of the school curriculum, and their grades are determined by how well they demonstrate their understanding of that material, they are being coerced to conform to the school's portrayal of their religion. In particular, the standard for what constitutes coercion should be a low bar when it comes to teaching *about religion*. For example, if schools tested students on material about how Jews believe Moses was a prophet who was given the Ten Commandments from God, written on stone tablets, and that later, the Roman emperor Constantine "created" Christianity, without mentioning that Christians believe Jesus was the son of God, that should constitute coercion of Christians that would support a free exercise claim. One court has erroneously held that requiring students to learn their school's secularized portrayal of their religion as "truth" on which they are tested means nothing more than students finding it offensive. *See Torlakson*, 973 F.3d at 1020 ("Offensive [curriculum] content that does not penalize, interfere with, or otherwise burden religious exercise does not violate Free Exercise rights."). It is coercion to require students to adopt that portrayal under penalty of lower grades.

CAPEEM further submits that schools be given greater latitude when teaching on subjects other than religion, such as teaching the theory of evolution as part of biology class (as opposed to during a class on world religions). When teaching an array of stories or literature designed to expose students to ideas or experiences that are not taught in the context of religion, there is little or no coercion by the school.

CONCLUSION

This case provides an important opportunity for the Court to clarify the law for free exercise challenges to school curricula. The four-part test proposed by CAPEEM gives students, parents, school boards, and lower courts with the guidance they need to protect the free exercise rights we cherish as a country. CAPEEM urges the Court to consider adopting the test proposed in this brief.

Respectfully submitted,

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March 10, 2025