No. 24-297

IN THE

Supreme Court of the United States

TAMER MAHMOUD, *et al.*,

Petitioners,

v.

THOMAS W. TAYLOR, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Circuit correctly concluded, consistent with every other court of appeals to have considered the question, that parents' free exercise of religion is not burdened by their children's exposure as part of a public-school curriculum to material that the parents oppose on religious grounds, absent any evidence that the parents or their children were coerced to change their beliefs or act contrary to their religious faith.

PARTIES TO THE PROCEEDING

Petitioners Tamer Mahmoud and Enas Barakat; Jeff and Svitlana Roman; Chris and Melissa Persak, in their individual capacities and on behalf of their minor children, are plaintiffs below and were parties to the preliminary-injunction proceeding below.

Petitioner Kids First, an unincorporated association, is a plaintiff below. Kids First did not join the preliminary-injunction motion and thus, as the Fourth Circuit recognized, Kids First was not a proper participant on appeal. Pet.App.16a-17a n.4.

Respondent Thomas W. Taylor, in his official capacity as Superintendent of Montgomery County Public Schools, is a defendant below. He was substituted under Fed. R. Civ. P. 25 for his predecessor in office Monifa B. McKnight, who was a defendant and a party to the preliminary-injunction proceeding below.

Respondent Montgomery County Board of Education is a defendant below and was a party to the preliminary-injunction proceeding below.

Respondents Shebra Evans, Lynne Harris, Grace Rivera-Oven, Karla Silvestre, Rebecca Smondrowski, Brenda Wolff, and Julie Yang, in their official capacities as members of the Montgomery County Board of Education, are defendants below and were parties to the preliminary-injunction proceeding below.

DIRECTLY RELATED PROCEEDINGS

There are no related proceedings.

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INTRODUCTION

Petitioners seek to unsettle a decades-old consensus that parents who choose to send their children to public school are not deprived of their right to freely exercise their religion simply because their children are exposed to curricular materials the parents find offensive. The Fourth Circuit's straightforward application of this Court's precedent to the limited evidence petitioners offered in support of their motion for preliminary relief does not warrant this Court's intervention.

Montgomery County Public Schools (MCPS), Maryland's largest school district, serves more than 160,000 students. Every day, these students read and discuss books as part of MCPS's language-arts curriculum. These reading materials have not always reflected the diversity of the community MCPS serves. In recent years, the school district has worked to change that by incorporating new books to better represent MCPS students and families. These books now include characters, families, and historical figures from a range of cultural, racial, ethnic, and religious backgrounds.

As part of this effort, at the start of the 2022-2023 school year, MCPS approved a handful of storybooks featuring lesbian, gay, bisexual, transgender, or queer characters for use in the language-arts curriculum, alongside the many books already in the curriculum that feature heterosexual characters in traditional gender roles. Like all other books in the language-arts curriculum, these storybooks impart critical reading skills through engaging, age-appropriate stories. MCPS adheres to a careful, public, participatory selection process to ensure those criteria are met. That process, followed here, welcomes and incorporates parent feedback.

From the beginning, MCPS's goal has been for students to engage with these storybooks as they engage with any other book in the language-arts curriculum. The storybooks are not used in any lessons related to gender and sexuality. Nor is any student asked or expected to change his or her views about his or her own, or any other student's, sexual orientation or gender identity. Instead, the books are made available for individual reading, classroom read-alouds, and other educational activities designed to foster and enhance literacy skills.

Petitioners include three sets of parents who asked MCPS to notify them, excuse their children from class, and arrange alternate lessons whenever the storybooks are read. After MCPS announced in March 2023 that it would not permit any parents to opt their children out of language-arts instruction involving the storybooks, for any reason, petitioners sued. Petitioners also moved for a preliminary injunction requiring notice and opt outs, arguing that their children's "exposure" to the storybooks "necessarily establishes the existence of a burden" on their right to freely exercise their religion. Pet.App.37a. The district court denied the motion.

The Fourth Circuit affirmed, concluding that petitioners were not entitled to preliminary injunctive relief based on the "scant record" before it. Pet.App.9a. Applying a standard drawn straight from this Court's free-exercise precedent, and in line with every relevant court of appeals decision, the Fourth Circuit explained that a cognizable burden on religious exercise requires coercion, direct or indirect, to believe or act contrary to one's religious views. Petitioners failed to demonstrate a likelihood of success on their free-exercise claim, as they offered "no evidence" of such coercion. Pet.App.34a.

Specifically, petitioners advanced no evidence that MCPS pressured their children to affirm or disavow particular views, compelled their children to act in violation of their religious beliefs, influenced what petitioners could teach their own children, or denied petitioners access to public benefits. Pet.App.34a-48a. This "absence of proof" doomed petitioners' request for emergency relief.

There is no circuit split on this issue. Every single court of appeals that has considered the question has held that mere exposure to controversial issues in a public-school curriculum does not burden the free religious exercise of parents or students. Nor is there any conflict between the Fourth Circuit's holding and this Court's free-exercise decisions, which the Fourth Circuit faithfully applied and petitioners misconstrue. And there is no pressing question raised by the Fourth Circuit's conclusion in a preliminary-injunction posture that petitioners' free-exercise claim was not likely to succeed absent any evidence of coercion that could constitute a burden on religious free exercise. Under the Fourth Circuit's decision, parents who can demonstrate a likelihood of success in showing religious coercion in a public school that does not survive scrutiny may obtain preliminary relief. Parents who cannot make that showing, but who can plausibly allege facts suggesting such unjustified coercion, will proceed to discovery. And if the facts bear out those allegations, they will obtain permanent relief. There is no pressing question here.

The petition should be denied.

STATEMENT

A. The Storybooks

At the start of the 2022-2023 school year, MCPS introduced into its pre-K through twelfth grade language-arts curriculum several storybooks featuring lesbian, gay, bisexual, transgender, and queer characters. Pet.App.603a-604a. The storybooks were added as part of MCPS's commitment to "provid[ing] a culturally responsive … curriculum that promotes equity, respect, and civility." Pet.App.589a. MCPS believes that "[r]epresentation in the curriculum creates and normalizes a fully inclusive environment for all students" and "supports a student's ability to empathize, connect, and collaborate with diverse peers and encourages respect for all." Pet.App.603a. The language-arts curriculum therefore seeks to ensure that students can "[s]elect[] from a range of diverse texts to understand and appreciate multiple perspectives." Pet.App.599a. As part of this effort, MCPS had previously made similar efforts to update the language-arts curriculum with books featuring people and characters from different backgrounds. Some examples include the *March* trilogy, which recounts the life of civil rights icon Congressman John Lewis, and *The Leavers*, which tells the story of an Asian-American immigrant family. Pet.App.602a-603a. In a similar vein, MCPS updated its social-studies curriculum with new instructional materials about local history. *Id.*

The storybooks were approved for instructional use pursuant to MCPS's written policy for selecting new instructional materials. Pet.App.600a-601a, 603a-604a; CAJA513-514. Under that policy, MCPS seeks to ensure that the materials are "age/grade appropriate[]," "support … student achievement toward MCPS curriculum standards," and are "relevant to and reflective of the

multicultural society and global community." Pet.App.600a-601a; CAJA513-514, 521, 523. Before selecting the storybooks, a committee of six reading and instructional specialists participated in multiple rounds of evaluations to determine that each book would be a suitable addition to the curriculum based on these criteria. CAJA513; *see also* Pet.App.603a-604a. This process included an opportunity for parents to review the storybooks and provide feedback, and all such feedback was considered before any storybook was approved. Pet.App.601a.

The storybooks tell everyday tales of characters who experience adventure, confront new emotions, and struggle to make themselves heard. They include a story about a family attending a Pride parade, a niece meeting her uncle's husband-to-be, a prince falling in love with a knight as they battle a dragon in a mythical kingdom, a girl feeling nervous about giving a valentine to her crush, and a transgender boy sharing his gender identity with his family. Pet.App.254a-271a, 279a-306a, 390a-428a, 429a-447a, 448a-482a. These are archetypal stories that touch on the same themes introduced to children in such classic books as Snow White, Cinderella, and Peter Pan. In addition to helping students explore sentence structure, word choice, and style, the storybooks support students' ability to empathize, connect, and collaborate with peers and encourage respect for all. Pet.App.603a, 605a-606a.

The storybooks are, moreover, "a small subset of many books used in the MCPS [language-arts] curriculum." Pet.App.132a. Teachers are expected to fold them into the curriculum as they would any other book: They can put the storybooks on shelves for students to find themselves, recommend a particular storybook to a

student who would enjoy it, read the storybooks aloud, or offer them as an option for reading groups. Pet.App.604a-605a.

MCPS made clear to teachers that using the storybooks involves no instruction on sexual orientation or gender identity. Pet.App.605a, 636a-641a. Some challenged books simply include LGBTQ characters. Others highlight the importance of kindness to others. None takes a side in any religious or scientific debate surrounding gender or sexuality. And teachers are not permitted to use the storybooks to enforce a particular viewpoint. Indeed, a guidance document for teachers states that "[n]o child who does not agree with or understand another student's gender, expression, or their sexual identity is asked to change how they feel about it." Pet.App.640a. MCPS prepared teachers to use the storybooks by offering a professional-development session as well as sample responses to potential student questions; these optional "suggested responses focus[ed] on tolerance, empathy, and respect for different views." Pet.App.89a-95a.[1]

B. The No-Opt-Out Policy

After the storybooks were introduced, some parents requested that their children be excused from class when the storybooks were read or discussed. Pet.App.606a. Some opt-out requests were religion-based and others were not. Some parents opposed a

[1] Contrary to Petitioners' assertion, this guidance did not "direct[] teachers to frame disagreement with" the storybooks "as 'hurtful.'" Pet.13. The guidance instead suggested that if a student describes another person as "weird," a teacher could respond, "That comment is hurtful; we shouldn't use negative words to talk about people's identities." Pet.App.94a.

perceived effort to teach students about sex or gender identity or believed the materials were age-inappropriate. *Id.*

At first, teachers and principals sought to accommodate these requests by excusing students when the books were read in class. Pet.App.606a-607a. The growing number of opt-out requests, however, gave rise to three related concerns: high student absenteeism, the infeasibility of administering opt-outs across classrooms and schools, and the risk of exposing students who believe the storybooks represent them and their families to social stigma and isolation. Pet.App.96a-99a, 606a-608a. These consequences would defeat MCPS's "efforts to ensure a classroom environment that is safe and conducive to learning for all students" and risk putting MCPS out of compliance with nondiscrimination laws. Pet.App.98a-99a, 607a-608a.

MCPS therefore determined that permitting opt-outs was not feasible or consistent with its curricular goals. Pet.App.608a. It announced in March 2023 that no opt-outs from instruction using the storybooks would be granted "for any reason." *Id.*

C. Proceedings Below

In May 2023, petitioners sued the Montgomery County Board of Education, its members, and the Superintendent of Schools, asserting violations of the federal Free Exercise, Free Speech, and Due Process Clauses and a violation of Maryland law. Pet.App.107a-108a. Petitioners then moved for a preliminary injunction on their free-exercise and due-process claims, seeking to require MCPS to provide them notice and opt-out opportunities whenever the storybooks are read or discussed. Pet.App.76a-77a. In July 2023, petitioners amended their complaint to add plaintiff Kids First.

Pet.App.162a-163a. The district court denied the preliminary-injunction motion in August 2023. The Fourth Circuit denied petitioners' motion for an injunction pending appeal and, in May 2024, affirmed the denial of a preliminary injunction.

In an opinion written by Judge Agee and joined by Judge Benjamin, the court of appeals agreed with the district court that petitioners had not demonstrated a likelihood of success on the merits given their "broad claims, the very high burden required to obtain a preliminary injunction, and the scant record before [it]." Pet.App.9a. The court recognized that the Free Exercise Clause protects against government action that directly or indirectly compels religious belief or threatens the ability to act in accordance with one's faith. Pet.App.24a-25a. The court thus explained that, "to show a cognizable burden" on religious exercise, petitioners were required to "show that the absence of an opt-out opportunity coerces them or their children to *believe* or *act* contrary to their religious views." Pet.App.31a. That coercion could be "direct or indirect." *Id.*

Applying those familiar principles, the Fourth Circuit rejected petitioners' theory that "the lack of an across-the-board notice and an opt-out opportunity relating to the Storybooks, in and of itself, coerces them and their children in the free exercise of their religion." Pet.App.33a-34a. The court held that petitioners put forward "no evidence" that the no-opt-out policy compelled them or their children "to *change* their religious beliefs or conduct, either at school or elsewhere" or "affect[ed] what they teach their own children." Pet.App.34a. Nor did the record suggest that petitioners or their children were coerced to "affirm views

contrary to their own," "disavow views … that their religion espouses," or "otherwise affirmatively act in violation of their religious beliefs." *Id.*

In reaching this conclusion, the Fourth Circuit agreed with the consistent understanding of the courts of appeals that "simply hearing about other views does not necessarily exert pressure to believe or act differently than one's religious faith requires." Pet.App.35a-36a. It rejected petitioners' principal argument that "compelled presence or exposure" to different views in a public school "necessarily establishes the existence of a burden" on religious exercise, holding that this view "relies on too expansive a reading" of *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). Pet.App.36a-37a; *see also* Pet.App.38a-40a. And it held that the no-opt-out policy did not deny petitioners access to a public benefit based on religion because MCPS remained "open to all students" regardless of their faith; petitioners were not pressured to "disavow their religious views before they [could] send their children to public school." Pet.App.46a. That petitioners might face "additional costs" if they chose to exercise their religion by "pursuing an alternative to public schooling" did not establish a free-exercise burden. Pet.App.47a-48a. Finally, the Fourth Circuit rejected the "hybrid" due-process claim Petitioners had asserted (but do not raise here). Pet.App.50a-51a. Without deciding "the validity of the hybrid-rights approach," the court determined that a hybrid claim could not succeed on the merits where the standalone free-exercise claim was likely to fail. *Id.*

Judge Quattlebaum dissented. The dissent did not dispute the majority's conclusion that "mere exposure to objectionable viewpoints" fails to establish a free-exercise burden. Pet.App.64a-65a. Indeed, the dissent

recognized that "it is generally true that the First Amendment provides no guarantee that students will not be exposed to views they (or their parents) disagree with in public schools." Pet.App.64a. The dissent also conceded that "use of the books in instructing K-5 children does not coerce or require the parents or their children to change their religious views," and that petitioners remained free to "teach their religious beliefs at home." Pet.App.63a. In the dissent's view, though, the no-opt-out policy nonetheless likely burdened petitioners' religious exercise by requiring them to choose between "adher[ing] to their faith or receiv[ing] a free public education for their children." Pet.App.62a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CIRCUIT SPLIT

No court of appeals has ever endorsed petitioners' theory here: that parents who choose to send their children to public school necessarily suffer a burden on their exercise of religion by virtue of their children's "expos[ure] … to instruction" in public school, Pet.11; *see also* Pet.9, 10, 29. Petitioners incorrectly assert that the circuits are "split 5-1" over whether such exposure—absent any "compulsion" or "coercion" of religious belief or conduct—"is sufficient to create a free-exercise burden." Pet.19. In reality, the score is 6-0 against petitioners.

A. Courts Of Appeals Have Uniformly Held That Mere Exposure In Public School To Ideas That Contradict Religious Beliefs Does Not Burden Parents' Religious Exercise

The decision below agreed with every other court of appeals to have considered whether students' exposure in public school to material that contradicts their parents' religious faith in and of itself constitutes a

cognizable burden on the parents' free-exercise rights. As both the district court and the court of appeals observed, "[e]very court that has addressed th[is] question" has answered it in the negative. Pet.App.117a; *see also* Pet.App.39a.

Specifically, as petitioners correctly acknowledge, the decision below accords with:

- the First Circuit's holding in *Parker* v. *Hurley*, 514 F.3d 87 (1st Cir. 2008), that parents "whose religious beliefs [were] offended by gay marriage and homosexuality" were not entitled under the Free Exercise Clause to "prior notice by the school and the opportunity to exempt their young children from exposure to books they f[ou]nd religiously repugnant," *id.* at 90;
- the Second Circuit's holding in *Leebaert* v. *Harrington*, 332 F.3d 134 (2d Cir. 2003), that a father was not entitled under the Free Exercise Clause "to excuse his minor son" from a public school's "mandatory health curriculum [that] conflict[ed] with his [religious] belief" regarding "sex before marriage," *id.* at 135, 144-145;
- the Sixth Circuit's holding in *Mozert* v. *Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987), that "requiring mere exposure [of public-school students] to materials that offend [their parents'] religious beliefs" does not subject the "objecting parents" to "an unconstitutional burden on the free exercise of religion," *id.* at 1059, 1067; and
- the Seventh Circuit's holding in *Fleischfresser* v. *Directors of School District 200*, 15 F.3d 680 (7th Cir. 1994), rejecting a claim by "[p]arents of

> [public-school] students enrolled in grades Kindergarten through Five" that "the use of [a particular book] series interfere[d] with the free exercise of their religion," *id.* at 683, 689.

Petitioners omit yet another case that follows the consensus view: the Ninth Circuit's decision in *California Parents for the Equalization of Educational Materials* v. *Torlakson*, 973 F.3d 1010 (9th Cir. 2020), which rejected a free-exercise claim by parents challenging a "public school curriculum" that "contain[ed] material … offensive to their religious beliefs," *id.* at 1013, 1020. Petitioners' omission is surprising given that this case was cited by both the district court (Pet.App.118a) and the court of appeals (Pet.App.35a). Indeed, petitioners themselves cite the case in another portion of their petition, where they characterize it as "decided under the Due Process Clause," Pet.31 n.13, and fail to mention that it also rejected the same "Free Exercise clause argument" that petitioners pursue here, *Torlakson*, 973 F.3d at 1020.

This consistency across circuits follows ineluctably from this Court's precedent that "it is necessary in a free exercise case … to show the coercive effect of the" challenged action, *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 223 (1963); *accord Carson* v. *Makin*, 596 U.S. 767, 778 (2022).[2]

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[2] The uniform court-of-appeals decisions on this issue are also consistent with this Court's recognition that exposure to new and even "offensive content" in school "is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Lee* v. *Weisman*, 505 U.S. 577, 590 (1992).

As elaborated further below, *see infra* Part II, Petitioners' position—that their free-exercise claim may succeed based *purely* on their children's exposure to religiously offensive material, "absent a 'coercive effect'" on "religious beliefs or conduct," Pet.22—would be contrary to this Court's precedent and thus finds no support in any circuit.

B. No Decision Conflicts With The Decision Below

Contrary to Petitioners' assertion (Pet.22), the Eighth Circuit has never split from the judicial consensus just discussed.

Petitioners seize on the Eighth Circuit's statement in *Florey* v. *Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir. 1980), that "forcing any person to participate in an activity that offends his religious or nonreligious beliefs will generally contravene the Free Exercise Clause," *id.* at 1318-1319. That statement is both perfectly consistent with the Fourth Circuit's decision in this case (and with the decisions of every other court of appeals to have addressed the issue), and in any event was dicta because, as petitioners acknowledge, "[t]he court found no [free-exercise] violation in that case," Pet.22.

In *Florey*, a Sioux Falls public school in 1977 held a Christmas assembly in which kindergartners were required to "memorize[] and then perform[] for parents a Christmas assembly which was replete with religious content," including a call and response that required students to answer "Jesus" when asked "Of whom did heav'nly angels sing, And news about His birthday bring?" *Florey* v. *Sioux Falls Sch. Dist. 49-5*, 464 F. Supp. 911, 912 (D.S.D. 1979). A parent complained, and the district developed a set of rules outlining the

permissible role religious materials might play in public school. *Florey*, 619 F.2d at 1313. The rules provided, among other things, that "students and staff members should be excused from *participating in practices* which are contrary to their religious beliefs unless there are clear issues of overriding concern that would prevent it." *Id.* at 1319 (emphasis added). Parents challenged those rules as violating the Establishment Clause, and then added a Free Exercise Clause argument on appeal "as an afterthought." *Id.* at 1318 n.7.

The Eighth Circuit rejected the free-exercise challenge. It recognized that "public schools are not required to delete from the curriculum all materials that may offend any religious sensibility," and that "inevitable conflicts with the individual beliefs of some students or their parents … do not necessarily require the prohibition of a school activity." *Florey*, 619 F.2d at 1318. To be sure, the court also recognized that "forcing any person to participate in an activity that offends his religious or nonreligious beliefs will generally contravene the Free Exercise Clause," *id.* at 1318-1319. But that sentence does not support Petitioners. Everyone agrees that a public school generally cannot force a student to actively "participate in an activity" that violates the student's religion. *Florey*, *id.* at 1318. For example, a public school cannot require students to recognize "Jesus" as "Christ, the blessed Saviour[]," *Florey*, 464 F. Supp. at 912, as in the Christmas assemblies that led to the policies challenged in *Florey*. Nor can public schools require a student who keeps kosher to eat pork or a Jehovah's Witness to participate in a birthday party. As the Fourth Circuit put it, public schools cannot require students to "affirmatively act in violation of their religious beliefs." Pet.App.34a. But this case does not involve any such requirement. It involves only "curriculum …

materials that may offend [Petitioner's] religious sensibility." *Florey*, 619 F.2d at 1318.[3]

In any event, as noted, the single sentence on which petitioners seize was plainly dicta. The court found no free-exercise violation, and the language petitioners cite was not "necessary to that result." *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 67 (1996). And because "[d]ictum settles nothing, even in the court that utters it," *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 352 n.12 (2005), "dicta does not a circuit split make," *Pacific Coast Supply, LLC* v. *NLRB*, 801 F.3d 321, 334 n.10 (D.C. Cir. 2015).

Even if certain dicta *could* signal a circuit divide warranting this Court's attention, the dicta Petitioners identify certainly does not. Recognizing that "[a] passage unnecessary to the outcome may not be fully considered," *Torres* v. *Madrid*, 592 U.S. 306, 329 (2021) (Gorsuch, J., dissenting), this Court declines to assign "legal weight" to "dicta" on an issue that "was not … fully argued," *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013). As the Eighth Circuit explained,

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[3] Moreover, *Florey* held that the plaintiffs' free-exercise claim could not succeed in light of the defendant school's policy that "students and staff members should be excused from participating in practices which are contrary to their religious beliefs *unless there are clear issues of overriding concern that would prevent it.*" *Florey*, 619 F.2d at 1317 n.6 (quoting school's policy) (emphasis added). That is the situation here: As noted, *see supra* p.7, MCPS accommodated opt-out requests until it was prevented from doing so by overriding concerns regarding "absenteeism," "the infeasibility of managing numerous opt-outs," and the "risk [of] putting MCPS out of compliance with state and federal nondiscrimination laws," Pet.App.98a. Any fact-bound dispute about the weight of those interests in this narrow circumstance—particularly in this preliminary posture—does not merit review by this Court.

"[t]he free-exercise issue" in *Florey* was "added to the appellants' appeal brief as an afterthought" and "[n]either the complaint, the trial briefs, nor the district court opinion mention[ed] the Free Exercise Clause." *Florey*, 619 F.2d at 1318 n.7. The Eighth Circuit's dicta on that subject thus was not fully considered and cannot bear the "legal weight" petitioners assign it, *Kirtsaeng*, 568 U.S. at 548.

Although not the basis of their claimed circuit-split, petitioners identify three other decisions they suggest are in tension with the Fourth Circuit's decision here. *See* Pet.22-23 n.11. None is. Petitioners first point to *C.N.* v. *Ridgewood Board of Education*, 430 F.3d 159 (3d Cir. 2005), in which the Third Circuit declined to adopt a "categorical approach" under which parents lack any due-process rights regarding their children's experience in public school, *id.* at 185 n.26. Even putting aside that that case concerned due process rather than free exercise, the Third Circuit's rejection of such a "categorical approach," *id.*, is consistent with the judicial consensus that *mere exposure* in public school to ideas that contradict religious beliefs does not burden the religious exercise of objecting parents. Indeed, the Third Circuit *rejected* the parents' exposure-based due-process claim in *C.N.*, on the ground that "[a] parent whose … child is exposed to sensitive topics" in school "remains free to discuss th[o]se matters and to place them in the family's moral or religious context, or to supplement the information with more appropriate materials." *Id.* at 185. The same is true here.

Next, petitioners point to *Tatel* v. *Mt. Lebanon School District*, 675 F. Supp. 3d 551 (W.D. Pa. 2023). That district-court decision only illustrates what is missing here: any allegation (much less evidence) of coercive

conduct that could amount to a cognizable burden on religious exercise. *Tatel* involved allegations that a teacher "pursued her own non-curricular agenda … to inculcate in the first-grade children in her class the teacher's beliefs about a child's gender identity," including by "target[ing] one child for repeated approaches about gender dysphoria despite, or because of, the parents' beliefs," all while "telling the children to keep the teacher's discussions about gender topics secret from their parents." *Id.* at 558-559, 566. There are no such allegations of non-curricular instruction, targeting, or secrecy here, and there is certainly no evidence of such coercion in this preliminary-injunction posture. As the district court in this case concluded, "[t]he students" in *Tatel* "were not just exposed to ideas"; "[t]hey were being pressured by their teacher to change their religious views on gender identity." Pet.App.131a. *Tatel*, in other words, rested on coercive elements absent here.

Finally, petitioners assert that before the Sixth Circuit's decision in *Mozert* (which, as noted, petitioners acknowledge accords with the Fourth Circuit's decision here), "the Sixth Circuit originally landed on [the other] side of the split" with its decision in *Spence* v. *Bailey*, 465 F.2d 797 (6th Cir. 1972). Pet.23 n.11. That too is wrong. The Sixth Circuit explained in *Mozert* why its decision there (and thus the Fourth Circuit's decision here) is distinguishable from *Spence*: namely, the student in *Spence* "was being compelled *to engage* in military training, not being exposed to the fact that others do so," *Mozert*, 827 F.2d at 1065 (emphasis in original). *Spence* is thus perfectly consistent with rejecting Petitioners' theory here

that mere "expos[ure] … to instruction" is enough to support a free-exercise claim, Pet.11.[4]

II. THE FOURTH CIRCUIT CORRECTLY APPLIED THIS COURT'S FREE-EXERCISE CASES

This Court's free-exercise precedents set out a clear rule that the Fourth Circuit correctly applied in this case: the government burdens religious exercise only when it coerces someone, either directly or indirectly, to believe or act contrary to their religious views. Petitioners misrepresent both law and facts in an effort to fabricate a conflict.

A. The Fourth Circuit Correctly Applied *Yoder*

As the Fourth Circuit explained, petitioners' argument that the no-opt-out policy burdens their religious exercise "relies on too expansive a reading of *Yoder*." Pet.App.37a. In *Yoder*, Amish parents developed an evidentiary record establishing that "attendance at high school, public or private, was contrary to the Amish religion and way of life" and would "result in the destruction" of their religious community. 406 U.S. at 209, 212. Surveying that record, this Court held that a compulsory school attendance law violated the Amish parents' free-exercise rights because it "affirmatively compel[ed]

[4] Not even the dissent below agreed with Petitioners' claim that "mere exposure to objectionable viewpoints" is enough to establish a burden on free exercise. Pet.App.64a-65a. Instead, it attempts (unpersuasively) to distinguish *Mozert* and other cases on factual grounds. *See* Pet.App.65a n.2. Nor is Petitioners' position supported by recent district-court dicta stating that students may "opt out of educational content that violates sincerely held religious or conscience-based beliefs," *Nelson* v. *Nazareth Independent School District*, 2024 WL 4116495, at *4 (N.D. Tex. Sept. 6, 2024) (cited at W.Va.Br.8-9), as that dicta rested in substantial part on the Texas Constitution and Texas statutes not implicated here, *see id.*

them … to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218. The Fourth Circuit faithfully applied that standard here and found that on the preliminary-injunction record, petitioners had not established that their children were affirmatively compelled to perform acts contrary to their religious beliefs. Pet.App.39a; *see also* Pet.App.34a-35a. For its part, the dissent showed no interest in petitioners' argument that *Yoder* commanded a different result. Pet.App.71a n.5.

Petitioners' and their amici's counterarguments fail for several related reasons.

First, the Fourth Circuit in no way "denigrat[ed]" *Yoder* (Pet.24), but instead faithfully applied its clear holding. In *Yoder*, the parents came forward with evidence showing that they believed the mere act of "sending their children to high school" would "endanger their own salvation and that of their children." 406 U.S. at 209. The challenged law therefore would force them to either "abandon belief and be assimilated into society" or "migrate to some other and more tolerant region." *Id.* at 218. Compulsory attendance thus "would gravely endanger if not destroy the free exercise of respondents' religious beliefs." *Id.* at 219. That is coercion—coercion the Fourth Circuit did not find in the preliminary-injunction record below. As the district court explained, the question is "whether the facts involve government coercion to violate religious beliefs. In *Yoder*, they did; here, they do not." Pet.App.142a n.13. That preliminary, fact-bound decision does not merit this Court's review.

Second, the coercion standard that *Yoder* prescribes and the Fourth Circuit applied does not risk "denominational favoritism." Pet.25. That is because, as the district court recognized, the required analysis "does not

turn on religious doctrine." Pet.App.142a n.13. It turns on the presence or absence of coercion to change or act contrary to one's religious beliefs.

The Fourth Circuit is not alone in holding that the parents in *Yoder* could demonstrate coercion not found here. As the First Circuit explained, compulsory schooling in *Yoder* threatened to destroy a "distinct community and life style" that was "fundamentally incompatible with *any* schooling system." *Parker*, 514 F.3d at 100. In the words of the Sixth Circuit, "*Yoder* was decided in large part on the impossibility of reconciling the goals of public education with the religious requirement of the Amish that their children be prepared for life in a separated community." *Mozert*, 827 F.2d at 1067; *accord Leebaert*, 332 F.3d at 144.

The substance of a plaintiff's religious beliefs may be relevant to whether there is coercion, and, as this Court recognized in *Yoder*, a showing that attending public school at all amounts to coercion is "one that probably few other religious groups or sects could make." 406 U.S. at 235-236. But the legal test is the same across the board. The concern about "denominational favoritism" raised in *Carson*, 596 U.S. at 786-787, which petitioners quote out of context, was with state laws that denied public funds to religious schools based on a subjective assessment of whether those funds were used to promote religion. No such concern is present here.

Third, petitioners are wrong to suggest (Pet.26-27) that the Fourth Circuit required them to await actual injury before seeking relief—an argument that in any event has nothing to do with *Yoder*. The Fourth Circuit properly applied this Court's preliminary-injunction standard by requiring petitioners to establish a likelihood of success on the merits. Pet.App.21a-22a. To

obtain injunctive relief, petitioners had to show that they were likely to experience "direct or indirect coercion arising out of the exposure" of their children to the storybooks. Pet.App.41a. They did not do so because they failed to introduce any evidence that coercion would necessarily result from exposure to the storybooks or that storybooks were actually being used in classrooms in a way that was likely to coerce. Pet.App.33-35a, 41a-43a. Petitioners seem to suggest that the Fourth Circuit should have lowered the "exceedingly high burden" faced by litigants seeking a preliminary injunction. Pet.App.21a. But as this Court has emphasized, "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). That demanding standard applies to free-exercise claims. *See, e.g.*, *Does 1-3* v. *Mills*, 142 S.Ct. 17, 18 (2021); *see also Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14, 16 (2020).

Fourth, petitioners confusingly rely on a footnote in *Yoder* that quoted a letter from Thomas Jefferson, although neither that section of *Yoder* nor the referenced writings of Thomas Jefferson have anything to do with whether a given policy burdens free exercise. Pet.24. In rejecting the argument that "a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process," the Court referenced in passing Thomas Jefferson's professed "reluctan[ce] to directly force instruction of children 'in opposition to the will of the parent,'" *Yoder*, 406 U.S. at 226 n.14 (quoting 17 *Writings of Thomas Jefferson* 417, 423-424 (Mem. ed. 1904)), at least "beyond a basic education," *id.* at 225. This has nothing to do with whether mere exposure to language-arts storybooks, in a public school to which parents have

chosen to send their child, is inherently coercive in violation of the Free Exercise Clause.

Fifth, petitioners' and amici's claim of a "national consensus that [sex education] instruction should not proceed absent parental permission," Pet.24-25; *see also* W.Va.Br.12-18, is likewise irrelevant. Such a purported contemporary policy consensus would have nothing to do with whether a no-opt-out policy burdens religious exercise. Nor did the Fourth Circuit apply any "deference" to the Board's justifications for the challenged policy (Pet.25)—the court never reached that issue because the preliminary-injunction record contained no evidence of coercion, so there was no burden for the Board to justify.[5] Moreover, as the Fourth Circuit recognized, the preliminary-injunction record confirmed that the storybooks were to be used only as part of the language-arts curriculum and would *not* be part of "instruction on gender identity and sexual orientation." Pet.App.11a. That same record established that the storybooks were not approved for the sex education curriculum, which has its own approval process for instructional materials, CAJA515, and from which students are permitted to opt out for any reason, Pet.App.608a.

Finally, amici (and only amici) devote many pages to the irrelevant argument that a "hybrid" free-exercise and due-process claim could succeed against a policy that prohibited parents from opting their children out of sex

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[5] Petitioners cite *Ramirez* v. *Collier*, 595 U.S. 411 (2022) (Pet.25), which held only that after a burden has been established, the Court may consider whether a practice has been "historically and routinely allowed" when determining whether a government policy prohibiting the practice is narrowly tailored to a compelling interest, *id.* at 428-429. Again, because petitioners failed to establish a burden, the courts below did not consider narrow tailoring.

education. W.Va.Br.3-9. Petitioners have not asked this Court to consider their likelihood of success on a "hybrid" claim, or urged this Court to reverse the Fourth Circuit's holding on their due-process claim. And as explained above, there is no evidence in the record that MCPS has denied opt-outs from the sex education unit. *Supra* p.22.

B. The Fourth Circuit Correctly Applied This Court's Remaining Free-Exercise Precedents

Petitioners fare no better in their attempts to manufacture a conflict between the Fourth Circuit's decision and this Court's other free-exercise decisions. Each case petitioners cite confirms that a free-exercise violation requires evidence of direct or indirect coercion—evidence absent from the limited preliminary-injunction record here.

1. The Fourth Circuit's decision does not conflict with this Court's cases holding that States may not condition access to public benefits on requirements that prospective recipients change or forgo their religious beliefs or conduct. *See* Pet.26-27, 28-29. Again, each case on which petitioners rely had precisely what the Fourth Circuit found is missing from the preliminary-injunction record below: requirements or coercion to change or act contrary to one's religious beliefs.

Sherbert involved a Seventh-day Adventist denied unemployment benefits after she lost her job for being unwilling to work on Saturday. *Sherbert* v. *Verner*, 374 U.S. 398, 399 (1963). The plaintiff was "force[d] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404. Likewise in *Thomas*, a Jehovah's Witness was denied unemployment benefits

after he was transferred to a department manufacturing "turrets for military tanks," which he refused to do because his religious beliefs did not allow him to "participat[e] in the production of war materials." *Thomas* v. *Review Board*, 450 U.S. 707, 709 (1981). There, "as in *Sherbert*, the employee was put to a choice between fidelity to religious belief or cessation of work; the coercive impact on Thomas is indistinguishable from *Sherbert*." *Id.* at 717. Finally, in *Espinoza*, the Montana Supreme Court held that Montana's constitution precluded giving religious private schools (and their students) otherwise generally available public subsidies for private education. *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 475 (2020). This was "status-based discrimination" and put schools and students to a similar choice as in *Sherbert* and *Thomas*: to receive aid, "a school must divorce itself from any religious control or affiliation." *Id.* at 478.

Not so here. The evidence in the preliminary-injunction record confirms that the no opt-out policy does not require any students to shed their religious beliefs or forgo any religious conduct at all, much less as a condition of receiving a public education. Pet.App.45a-46a. MCPS remains "open to all students" without regard to their "religious affiliation or beliefs." Pet.App.46a. Again, mere exposure to ideas that parents find offensive is not coercion that implicates the Free Exercise Clause; there is no equivalent here to requiring a Seventh-Day Adventist to work on Saturday, a Jehovah's Witness to build weapons of war, or religious private schools to become secular. The no-opt out policy does not require children to take any position on the religious permissibility or impermissibility of any person's identity, nor does it require students to engage in any

conduct to which petitioners object on religious grounds. It just requires students to be in class when books are read.

2. Petitioner's reliance on *Bowen* v. *Roy*, 476 U.S. 693 (1986), fails for similar reasons. Pet.27-28. In *Bowen*, eight members of the Court held that the Free Exercise Clause did not preclude government agencies from using a Social Security number to identify the petitioner's daughter, as the "Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." 476 U.S. at 699. The Fourth Circuit cited this portion of *Bowen*, and numerous other courts of appeals that reached the same conclusion, as support for its holding that exposure to "content deemed to be religiously objectionable … will not ordinarily pose a burden on an individual's free exercise of religion because it lacks the requisite compulsion or pressure on an individual's religious beliefs or conduct." Pet.App.39a-40a. To accept the contrary proposition would require public schools to tailor their curricula to the religious objections of parents—here, by creating separate lesson plans for students whose parents opt them out of the storybooks. *See* Pet.App.186a-187a

Petitioners argue (Pet.28) that this case presents a question more akin to the separate claim in *Bowen* that "being forced to cooperate actively with the Government by themselves providing their daughter's social security number on benefit applications" violated the plaintiffs' free exercise rights. *Bowen*, 476 U.S. at 714 (Blackmun, J., concurring in part). That is wrong twice over. First, the preliminary-injunction record in this case had no evidence of any compulsion to do or believe anything

contrary to petitioners' religious beliefs, so there is no analog in this case to the requirement that the plaintiffs in *Bowen* affirmatively "provide a Social Security number to the Government before receiving benefits." 476 U.S. at 727 (O'Connor, J., concurring in part and dissenting in part). Second, petitioners are incorrect that only an effort to eliminate the storybooks from the classroom altogether would intrude on the government's "internal affairs." Pet.28. Telling public school teachers what to teach and not to teach—whether to the entire class or to a particular student—is "to require the Government itself to behave" in certain ways. *Bowen*, 476 U.S. at 699. By shepherding students out of the room whenever objectionable material is read, the government refashions the curriculum for those students. The "Free Exercise Clause affords an individual protection from certain forms of governmental *compulsion*; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 700 (emphasis added).

3. Finally, the Fourth Circuit's decision does not conflict with *Kennedy* v. *Bremerton School District*, 597 U.S. 507 (2022). Petitioners suggest that, under *Kennedy*, the Fourth Circuit should have held that the no-opt-out policy was not neutral or generally applicable. Pet.29-30. As an initial matter, that question is not even before the Court. The Fourth Circuit did not reach this question because it concluded correctly that Petitioners were required to show "*a* burden" on religious exercise before the court could consider whether the no-opt-out policy was neutral or generally applicable. Pet.App.30a. A plaintiff's "failure to show that a challenged government action constitutes *any* burden on his religious conduct makes it unnecessary to proceed further in the analysis by determining or applying the appropriate level of

scrutiny." Pet.App.29a-30a n.12. Petitioners do not explain how the Fourth Circuit erred by not conducting a tiers-of-scrutiny analysis after concluding that Plaintiffs had not established any burden on their free exercise.

Moreover, the evidence in the preliminary-injunction record does not support petitioners' allegations that the no-opt-out policy is not neutral and generally applicable. In any event, that sort of fact-bound disagreement in a preliminary-injunction posture does not merit this Court's review—a point petitioners effectively concede by offering less than a page of vague discussion on the topic.

III. THE DENIAL OF PRELIMINARY RELIEF ON A CLAIM UNIVERSALLY REJECTED BY THE COURTS OF APPEALS PRESENTS NO PRESSING ISSUE OF NATIONAL IMPORTANCE

This petition does not raise a pressing issue of national importance. At the preliminary-injunction stage, the Fourth Circuit applied this Court's free-exercise precedents to reject a "broad claim," already rejected by every other appeals court to consider it, on a necessarily "limited record." Pet.App.34a.

A. Contrary to petitioners' claim (Pet.30), the decision below "upends" nothing. As explained *supra* Part I, the Fourth Circuit's holding that "simply hearing about other views" in public school does not necessarily burden religious exercise, Pet.App.35a, aligns with decisions of the First, Second, Sixth, Seventh, and Ninth Circuits. Nor does the Fourth Circuit's decision threaten parents' right to direct the religious upbringing of their children (Pet.31). It instead recognizes that the way to ensure that parents can "avoid exposing their children to any religiously objectionable materials" in a public-

school curriculum is to "protect[] their right to choose alternatives such as a private school." Pet.App.46a.

Nor is there "enduring disarray" (Pet.34) over whether mere exposure to conflicting views as part of a public-school curriculum burdens religious exercise. The two law review articles petitioners cite for that proposition instead analyze what might be required to show a "substantial burden" on religious exercise if the Court were to overrule *Employment Division* v. *Smith*, 494 U.S. 872 (1990)—relief petitioners do not seek here. *See* Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 Va. L. Rev. 1759, 1761 (2022); Helfand, *Substantial Burdens as Civil Penalties*, 108 Iowa L. Rev. 2189, 2193 (2023).[6]

B. Petitioners and amici urge this Court to intervene on the false pretense that parents have been denied a right to opt their children out of sex education. *See* Pet.32; W.Va.Br.2-3, 12-18. But as explained above, the record before the Fourth Circuit made clear that the storybooks are part of language-arts instruction, not sex education. CAJA515; Pet.App.608a; *supra* p.22-23. The storybooks are no more sex education than stories like Cinderella and Snow White, which feature romance between men and women. And the record contains no evidence that petitioners, or any other parents, have been

[6] To the extent Petitioners suggest (Pet.34) that this petition raises the same questions under the Free Exercise Clause as *Apache Stronghold* v. *United States*, 101 F.4th 1036 (9th Cir. 2024), they are wrong. As the petition in *Apache Stronghold* makes clear, that case involves a completely different type of burden, asking whether plaintiffs opposing the destruction of a religious site on federal land establish a "substantial burden" on religious exercise. *See* Pet. 32, *Apache Stronghold* v. *United States*, No. 24-291 (Sept. 11, 2024).

denied the opportunity to opt their children out of sex education, a separate unit of instruction with specialized procedures for selecting and using instructional materials. *See supra* p.22-23. Certainly, the Fourth Circuit did not hold that parents should be denied "the primary role" in sex education instruction (Pet.32). Petitioners try to twist a statement by counsel for MCPS into a request for unthinking judicial deference (Pet. 32). But their selective quotation elides the point counsel was making: that MCPS does not make these curricular choices behind closed doors; it instead evaluates the appropriateness of instructional materials through an "open and participatory" process that welcomes parent involvement. Pet.App.643a; *see also supra* p.5.

C. Despite petitioners' repeated claims (Pet.32-34), Justice Alito's concurrence in *Morse* v. *Frederick*, 551 U.S. 393 (2007), does not suggest that this petition presents a pressing question. Justice Alito argued that public schools could not cite broad "educational mission[s]" as "a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed." *Id.* at 423 (Alito, J., concurring). This petition, by contrast, concerns no claim that petitioners or their children are being censored—and the record contains no evidence to suggest they are.

Nor did Justice Alito argue that families are in danger of suffering free-exercise burdens due to the costs of attending private religious school. His *Morse* concurrence instead observed that public schools do not "stand in the shoes of the student's parents," and thus cannot claim total power to control student speech merely because parents, who may have limited choices, decide to send their children there. 551 U.S. at 424. No court has ever accepted the argument that petitioners seek to

draw from *Morse* (Pet.30-31): that the cost of religious schooling means that public schools must adapt their curricula to the religious goals of every parent to avoid burdening religious exercise. As the Fourth Circuit explained, this Court has in fact recognized that "government coercion does not exist merely because an individual may incur increased costs as a consequence of deciding to exercise their religious faith in a particular way." Pet.App.47a (citing *Braunfeld* v. *Brown*, 366 U.S. 599, 605-606 (1961)). Amici cite *Holt* v. *Hobbs*, a case concerning the Religious Land Use and Institutionalized Persons Act, for the proposition that a burden exists despite "the availability of alternative[s]" to preferred religious practice (W.Va.Br.14), conveniently eliding this Court's explanation that, in free-exercise cases, such "alternative[s]"—like religious schooling here—*are* a "relevant consideration," 574 U.S. 352, 361 (2015).

D. Finally, the Fourth Circuit's decision does not require free-exercise plaintiffs to make a greater showing when challenging decisions of public schools than when challenging the decisions of other government agencies (Pet.31-32). Here, the Fourth Circuit applied the same test that controls outside the context of public education: whether government action directly or indirectly coerces the plaintiff to believe or act contrary to his religious views. Pet.App.31a; *see Sherbert*, 374 U.S. at 404; *Thomas*, 450 U.S. at 718-719. Despite petitioners' repeated cries of unwarranted "deference to public school policymaking" (Pet.32; Pet.33-34), they identify no such deference in the Fourth Circuit's opinion.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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