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 MUSLIM PARENTS, SHEIKHS, AND IMAMS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Do public schools burden parents' religious exercise when they compel elementary school children to participate in instruction on gender and sexuality against their parents' religious convictions and without notice or opportunity to opt out?

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INTEREST OF *AMICI*[1]

Amici are Muslim parents, scholars, and religious leaders who seek to protect the ability of Muslim families to practice their faith. They believe no opt-out provision in public schools forces Muslim parents to expose their children to teachings that conflict with core religious beliefs, undermining their ability to raise their children in accordance with Islamic obligations. *Amici* are identified in the Appendix.

Amici recognize that parents have a religious duty to raise their children in accord with moral habits and Islamic teachings. The Qur'an imposes a duty on parents to educate their children: "God advises you regarding your children," QUR'AN 4:11, and "Save yourselves and your families from the hellfire, whose fuel is people and stones," QUR'AN 66:6.

Both father and mother bear this responsibility equally, and the obligation is of utmost importance. "No servant of God who is given an obligation and flouts it is saved from the hellfire. The leader of the community is a servant and is responsible to serve his community. A wife/mother in her household is a servant and is responsible for her house." SAHIH AL-BUKHARI, HADITH NO. 7138.

Amici also believe that some of the content at issue, if internalized by children, would violate their parental duties. *See, e.g.*, QUR'AN 24:19.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. All parties have received timely notice of the filing of this brief.

SUMMARY OF ARGUMENT

This brief places the dispute in this case within the broader cultural context of public schools in a religiously pluralistic society. How much religion the Constitution allows in public schools is a question of utmost importance in a society as religiously diverse as the United States. Despite all the disagreements related to the religion clauses, this Court's interpretation of them has struck a workable balance by ensuring that students and their families are not barred from exercising their religion after passing through the schoolhouse doors. The Fourth Circuit's reasoning would disrupt that balance and should be reversed.

For decades, this Court has maintained a delicate equilibrium in our public schools: The Establishment Clause prevents teachers and administrators from coercing religion on students, while the Free Exercise Clause, the Free Speech Clause, and the Equal Access Act ensure students can bring their religious beliefs, identities, and practices onto campus. *See Kennedy v. Bremerton School District*, 597 U.S. 507 (2022). This balance ensures religion is present in public schools without allowing government actors to coerce religion or irreligion on students.

The parents here seek modest relief. They do not demand that a school change its curriculum; they merely request notice and the ability to opt-out of certain religiously intolerable lessons. The Establishment Clause allows the "adjustment of [students'] schedules to accommodate the religious needs of the people." *Zorach v. Clauson*, 343 U.S. 306, 315 (1952). And the First Amendment can require schools to opt students out from specific activities objectionable to

their religion—even the Pledge of Allegiance. *See Barnette v. West Virginia*, 319 U.S. 624 (1943). This allows students of very different religious beliefs to participate in America's public school system.

The opinion below disrupts the balance.

It greatly expands the internal affairs doctrine, under which the Government, when dealing with its own internal affairs, need not "behave in ways that the individual believes will further his or her spiritual development." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). The panel opinion considers elementary school instruction a governmental internal affair beyond the scope of the Free Exercise Clause. But public school instruction is not an internal government affair; it is how the state directly instills information, values, and beliefs to its citizens.

The result of the panel's decision is to banish families of certain faiths from the nation's public schools. *Amici*—Muslim parents and faith leaders—believe in an *obligation* to raise their children in accordance with divine commands. The objectionable classroom instruction makes that impossible. Parents are thus "put to a choice between fidelity to religious belief" or receiving the free public education offered to all other citizens. That dilemma is a well-established burden under this Court's precedent. *See Thomas v. Review Bd. of Indiana*, 450 U.S. 707, 717 (1981).

Amici have witnessed the impact this burden has placed on Muslim families. Private Islamic schools experience lengthy waitlists that they attribute directly to moral standards in public schools. Parents who can afford it may even send their children abroad.

The result of certain faiths fleeing our public

schools is a forced homogeneity, where our schools no longer reflect the religious pluralism of American society. Accommodations that make space for families of all religious beliefs in public schools ensure that government cannot foist "unanimity of religious opinion on everyone." Steven T. Collis, *Public Employees as a Reflection of a Religiously Diverse Culture*, 99 NOTRE DAME L. REV. REFLECTION 229, 239 (2024).

The outcome below is bad for society and unmoored from the constitutional text. The panel opinion applied the so-called "substantial burden" test, a relative of the internal affairs doctrine, articulated in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). That opinion reasoned from the premise that "the crucial word in the constitutional text is 'prohibit'" to the conclusion that the Free Exercise Clause does not protect government actions that might "make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* at 450–51.

Lyng did not purport to ground itself in the original public meaning of the Free Exercise Clause. If it had, it would have acknowledged that "prohibit" at the founding, as now, meant not only "to forbid" but also "to hinder." *See, e.g.* 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755).

This Court has never reaffirmed *Lyng*'s restrictive "substantial burden" rule. The decision is hard to square with subsequent developments. *See, e.g.*, *Trinity Lutheran v. Comer*, 582 U.S. 449, 450 (2017). Meanwhile, it confuses lower courts, in the First Amendment context and beyond. *See, e.g.*, *Priests For*

Life v. HHS, 772 F.3d 229, 246 (D.C. Cir. 2014) (applying *Lyng* to hold there was no substantial burden in ACA contraception mandate), *vacated and remanded sub nom. Zubik v. Burwell*, 578 U.S. 403 (2016).

The restrictive "substantial burden" standard laid out in *Lyng* and applied below has become a constitutional outlier. This Court should take the opportunity to clarify, if not overrule, that mistaken doctrine and reaffirm that government action substantially burdens religious exercise when it forbids *or* hinders it. If left unchecked, *Lyng*'s substantial burden test, like the internal affairs doctrine, threatens to swallow the Free Exercise Clause in public schools.

ARGUMENT

I. The Fourth Circuit's opinion disrupts the careful balance the law strikes regarding religion in public schools.

Since the 1940's, commentators protective of anti-establishment interests have worried that free exercise rights would swallow the Establishment Clause. Commentators protective of free exercise have stressed about the opposite. This Court's decisions and related laws, meanwhile, have struck a careful balance between both antiestablishment and free exercise rights in public schools.

Whatever disagreements justices and academics have had about the scope of each clause, one principle has remained clear: just as public schools may not coerce religion upon students, so also they may not coerce irreligion upon students.

The Establishment Clause, the Free Exercise Clause, the Free Speech Clause, and the Equal Access Act have helped achieve that balance. The Establishment Clause limits how much teachers and administrators may coerce religion onto students. *See, e.g., Engel v. Vitale*, 370 U.S. 421 (1962); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Lee v. Weisman*, 505 U.S. 577 (1992); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022). The Free Exercise and Speech Clauses and the Equal Access Act ensure that students and their families maintain a robust right to exercise their religion while at school. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Widmar v. Vincent*, 454 U.S. 263 (1981); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943); 20 U.S.C. §§ 4071–74 (ensuring equal access for religious

groups in secondary schools).

That careful balance is what keeps public schools from becoming churches, on the one hand, or antireligious Temples of Reason, on the other. The Fourth Circuit's decision, if allowed to stand, would disrupt the equilibrium.

A. The law protects, and the Establishment Clause does not forbid, students' religious exercise in public schools.

Since *Everson v. Board of Education*, the Establishment Clause has limited how much public school employees may coerce religion upon students. *See, e.g., McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (allowing religious teachings from private religious groups at public schools during instructional hours violated the Establishment Clause); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (beginning the school day with Bible reading violated the Establishment Clause); *Lee*, 505 U.S. 577 (inviting clergy to pray at public school graduations violates the Establishment Clause). That limitation, however, never resulted in excising religion from public schools. The Free Exercise and Speech Clauses and, later, the Equal Access Act in secondary schools have counterweighed Establishment Clause limitations with the right of students to bring their own religious exercise and identities into the school atmosphere.

1. The Free Exercise and Speech Clauses and the Equal Access Act protect students' religious exercise and expression even when in school.

Our constitutional order ensures public schools do

not become places of irreligious indoctrination by protecting the right of students, their families, and even employees acting in their private capacity to exercise their religion while inside the schoolhouse gates.

This Court has long noted that neither students nor teachers shed their constitutional rights when entering public schools. *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Public employees privately exercising their religion may do so. *Kennedy*, 597 U.S. at 542 (2022). Students may also engage in religious exercise on campus, including religious speech. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 251 (1990) (although possibility of student peer pressure exists in student-only religious meetings, "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate"). And the Equal Access Act, 20 U.S.C. §§ 4071–74, ensures that students in secondary schools may form religious clubs on equal terms with other extracurricular groups. *See Mergens*, 496 U.S. at 248–49 (upholding the Equal Access Act against Establishment Clause challenges).

This protection extends to many student-led activities that take place on school grounds. Distribution of religious materials, prayer, proselytization, creation of religious clubs, religious meetings outside of instructional time, wearing of religious garb, conversions, scripture study—all receive protection. *See, e.g.*, *Morgan v. Swanson*, 659 F.3d 359, 382 (5th Cir. 2011) (en banc) (prohibiting student's distribution of religious pencils to classmates violates the First Amendment); *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 277 (3d Cir. 2003) (prohibiting a

Bible club from meeting during noninstructional time violates the Equal Access Act and First Amendment); *Prince v. Jacoby*, 303 F.3d 1074, 1094 (9th Cir. 2002) (refusing to allow a Bible club the same benefits as other student clubs violates the First Amendment and Equal Access Act).

Religious groups may not be treated *worse* because they are religious, both in elementary and secondary schools. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102 (2001) (excluding a Christian club from elementary school facilities provided to secular groups violated the First Amendment); Equal Access Act, 20 U.S.C. § 4071 ("It shall be unlawful for any public secondary school . . . to deny equal access or a fair opportunity to, or discriminate against any students who wish to conduct a meeting within that limited open forum on the basis of the religious . . . content of the speech at such meetings."). But students also enjoy robust rights irrespective of how schools treat others. *See, e.g.*, *Barnette*, 319 U.S. at 642 (allowing students to forgo the pledge of allegiance for religious reasons).

All of this has led to an outcome that is both sensible and consistent with constitutional text: religion may enter public schools, but it does so through private actors who are reflective of this country's diverse religious population. This right enriches the school environment and the broader community, by weaving America's many religious traditions into the fabric of campus life.

The Court's cases have been careful to ensure that students of all faiths feel welcome in public schools.

Consider *Zorach v. Clauson*, 343 U.S. 306 (1952). Taxpayers challenged New York City's program, which permitted "public schools to release students during the school day so that they may leave the . . . school grounds and go to religious centers for religious instruction or devotional exercises." *Id.* at 308. Children were released to receive religious instruction at these religious centers upon the "written requests of [their] parents." *Id.* Students whose parents did not release them for religious instruction did not leave the classroom. *Id*. The Supreme Court ruled that the program did not violate the Establishment Clause, as the "public schools do no more than accommodate their schedules to a program of outside religious instruction." *Id.* at 315. The case boiled down to allowing "adjustment of [students'] schedules to accommodate the religious needs of the people." *Id*. That outcome allowed religious students to attend public schools without sacrificing their religious duties and identities. It ensured that students were still able to bring a variety of religions into the schools even as government actors were limited in doing so.

Or consider *Barnette*, which ensured that Jehovah's Witnesses could bring their distinctive religious identities into public schools. 319 U.S. at 642. Schools made the choice to require all students to recite the Pledge of Allegiance at the beginning of each school day. *Id.* at 629. This Court ruled that the First Amendment required the schools to allow Jehovah's Witnesses, who could pledge allegiance only to God, to opt out without punishment. *Id.* at 642.

The accommodating model of *Zorach* and *Barnette* is a mirror-image contrast to the uncooperative approach of Montgomery public schools. Similar to the

parents of the students in *Zorach* and *Barnette*, the parents of the students in this case seek the option to remove their children from the classroom while teachers push ideas that contradict their religious beliefs. In *Zorach*, *Barnette*, and here, religious families ask for accommodation for their religious beliefs at no cost to students of other (or no) faiths. *See Zorach*, 343 U.S. at 309–10; *Barnette*, 319 U.S. at 627–28. As in *Zorach* and *Barnette*, the opt-out option and a notice requirement for parents would not cost taxpayers any additional money, nor would it provide preferential treatment to one religion over another. *See Zorach*, 343 U.S. at 314; *Barnette*, 319 U.S. at 639–42.

Instead, like the program in *Zorach*, it would enable parents to take advantage of the benefit of public schools without sacrificing their families' religious identities. This has long been the textual command of both the religion clauses and the Equal Access Act.

2. The Establishment Clause does not prevent students from engaging in religious exercise in school.

Allowing private religious exercise—both by students and staff—to enrich the school environment does not violate the Establishment Clause. The Court recently clarified this in *Kennedy v. Bremerton*. The Court held that teachers or coaches privately exercising their religion does not violate the Establishment Clause unless they coerce students to join them. *Kennedy*, 597 U.S. at 541.

Student religious expression is even less likely to create an Establishment Clause concern. The Clause has never "'compel[led] the government to purge from

the public sphere all that in any way partakes of religi[on]." *Van Orden v. Perry*, 545 U.S. 677, 699 (2005). Yet time and again, schools censor such activity, under the mistaken impression that the Establishment Clause requires it. *See, e.g., Rosenberger v. Rector*, 515 U.S. 819, 845 (university believed, improperly, that the Establishment Clause required not funding a Christian student publication); *Good News Club*, 533 U.S. at 102 (school prohibited religious group from using the school's facilities to avoid incorrectly perceived Establishment Clause violation); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (holding that the Establishment Clause does not bar "the extension of general benefits to religious groups").

That is not, nor has it ever been, what the Establishment Clause requires.

B. The Fourth Circuit's application of the internal affairs doctrine destroys the balance in public schools by discouraging religious families from attending.

1. The Fourth Circuit improperly applied and expanded the internal affairs doctrine.

The internal affairs doctrine provides that the First Amendment does not require the Government, when dealing with its own internal affairs, "to behave in ways that the individual believes will further his or her spiritual development." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). In *Bowen*, that meant allowing the government to assign and use social security numbers even for those who objected on religious grounds. *Id.* at 711–12.

The Fourth Circuit greatly expanded the internal affairs doctrine to government action that is targeted at, and directly affects, the conduct of students. Under the panel's logic, claims for notice and opt-outs of certain school instruction "tend to fall outside the scope of the Free Exercise Clause because they seek to 'require the Government to conduct its own internal affairs'—here, public school curriculum choices—'in ways that comport with the religious beliefs of particular citizens." *Mahmoud v. McKnight*, 102 F.4th 191, 212 (4th Cir. 2024) (quoting *Bowen*, 476 U.S. at 699). Yet even in *Bowen*, five Justices distinguished the *government's* use of the plaintiff's SSN from the government *requiring the plaintiff* to use it. *See Bowen*, 476 U.S. at 728 (1986) (O'Connor, J., concurring in part and dissenting in part) (concluding that compelling someone to use a social security number is a burden on religious exercise).

The reasoning below is flawed and dangerous. It is flawed because it mischaracterizes what the Plaintiffs have asked. The Plaintiffs here are not trying to use a free exercise challenge to change school curricula; they are asserting that government forcing their children to sit through certain lessons without notice to the parents and without an opportunity to opt out burdens their religious exercise.

And that leads to the danger. Characterizing a parental request to remove students from a classroom when their religious exercise is burdened as affecting the internal affairs of the school would expand the internal affairs doctrine to cover almost everything that happens in a public school classroom. It would upend

nearly a century of established law, starting with *West Virginia v. Barnette*, arguably the foundational case allowing religious diversity in public schools. The Jehovah's Witnesses who wanted to opt out of the Pledge of Allegiance would lose, because, according to the Fourth Circuit, it is the school's internal affair to decide whether or not students participate in the Pledge.

This radical expansion of the internal affairs doctrine misstates *Bowen*. In *Bowen*, the plaintiffs challenged the government assigning and using a social security number for an individual. *Bowen*, 476 U.S. at 695. They argued that, according to their religion, government creating a social security number for their daughter would rob her spirit by removing the uniqueness of her person. *Id.* at 696. There was no direct, observable effect on the plaintiff from the government action; everything was internal to the government.

In contrast, classroom instruction directly affects students. That is the whole point. Extending *Bowen* to this situation would fundamentally alter the Free Exercise Clause's application in public schools and permit almost everything in the classroom to evade constitutional scrutiny. Public school instruction is not an internal government affair; it is how the state directly instills information, values, and beliefs to its citizens.

Applying the internal affairs doctrine in this context upsets both antiestablishment and free exercise rights. If essentially everything in the classroom is an internal affair, then there can be no religious claims

made against any instruction. Instead of the Establishment Clause searching for public, coercive speech and the Free Exercise Clause ensuring students have the right to express their religion on campus, the internal affairs doctrine cuts through that balance and places all public classroom instruction beyond constitutional restraints.

This does more than disrupt the balance between antiestablishment and free exercise rights; it obliterates both.

2. Applying the internal affairs doctrine to public school instruction will drive people of certain religions out of public schools.

Students are largely the means for ensuring public schools are a reflection of our religiously diverse culture. They do that by bringing their religious identities, practices, and beliefs with them to school. For some, that is only possible if they can opt out of certain activities and lessons.

Jehovah's Witnesses must be able to opt out of the Pledge of Allegiance. *Barnette*, 319 U.S. at 629. Some Amish must be able to opt their children out of public schools after a certain age. *Yoder*, 406 U.S. at 218. Latter-day Saints, Jews, and others often request opting their children out of some instructional time for release-time programs. *Zorach*, 343 U.S. at 683.

By refusing to allow such opt outs, the Fourth Circuit's rule ensures people of certain faiths will take one of two steps. Those with the financial means will remove their children from public schools and move them into private schools. *See, e.g.,* DAVID O'BRIEN, PUBLIC CATHOLICISM 44–45 (1989) (explaining that

Catholics began their own schools in response to public schools requiring readings from certain versions of the Bible); JOHN MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY 42 (2003) (describing Catholics' desire to start their own schools to avoid hostility in public schools). Those children who cannot afford to attend private schools will instead bury their religious identities.

Many of the *amici* signed onto this brief have faced and witnessed this exact dilemma. In Austin, Texas, one private Muslim school has seen a recent surge in demand caused by public school instruction. "[M]ore and more Muslim parents are growing concerned with the shifting moral standards in public schools and this is leading them to seek for safer environments for their children. *These…forces have driven demand for Islamic education so high, that we are at a point where we have 200+ students on our school's waiting list!*"[2]

Some Muslim families are forced to educate their children abroad, fearing the coercive environment of public schools.[3] Amici have also witnessed the strain "being put to the choice" places on families, with divorces resulting from the agonizing decision over whether to subject a family's children to objectionable content. As a whole, no opportunity for notice and opt-out undermines many Muslim families' trust in public

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[2] Renaissance Academy, *FAQ, 19-Acre Campus: Shaping a Brighter Future Together*, https://racademy.org/newcampus/ (last visited March 4, 2025).

[3] *See* J. MARK HALSTEAD, ISLAMIC EDUCATION IN THE WEST AND ITS CHALLENGES 262 *in* Handbook of Contemporary Islam and Muslim Lives (Lukens-Bull and Woodward, eds. 2021) ("As a last resort, some Muslim parents send their children abroad for education, often to Pakistan . . . .").

education.

The result will be schools in which the rich religious diversity of the United States is absent. Left behind will be a cold and empty caricature of our culture, one in which many religions are unseen and those that are present are homogeneous in their beliefs.

That outcome has no basis in the text of the Constitution or in the Equal Access Act.

C. Driving religious families from public schools fails to prepare all students to live in our religiously diverse society.

One of the goals of the states' public education systems is to train students to participate in a pluralistic democracy. The balance between free exercise and antiestablishment rights in public schools serves that end. By ensuring religion—the diverse beliefs and nonbeliefs of all students—has a healthy presence in public schools, those institutions prepare students to enter the most religiously diverse society on earth.

The Court emphasized this point in *Kennedy* when it confirmed that public employees need not shed their religious identities in their places of employment:

> Naturally, Mr. Kennedy's proposal to pray quietly by himself on the field would have meant some people would have seen his religious exercise. Those close at hand might have heard him too. But learning how to tolerate speech or prayer of all kinds is part of learning how to live in a pluralistic society, a trait of character essential to a tolerant citizenry.

597 U.S. at 538 (citations and quotations omitted).

Allowing religious families a place in public schools ensures government cannot foist "unanimity of religious opinion on everyone," even in public institutions. Steven T. Collis, *Public Employees as a Reflection of a Religiously Diverse Culture*, 99 Notre Dame L. Rev. Reflection 229, 239 (2024). Exposing children in public schools to religious beliefs that may be different from their own encourages mutual respect and tolerance in our pluralistic society. *Id.* at 238.

The "Religion Clauses are grounded in [this] principle of pluralism." *Id.* at 238. At the founding, advocates of the clauses included "the most ardent and enthusiastic religionists at the time"; however, instead of wanting "government entanglement with religion … they wanted no one to interfere" with their religious practices. *Id.* at 239.

They envisioned "a world in which all of them could live alongside one another in peace." *Id.* The Religion Clauses and the Equal Access Act have helped turn their vision of the future into reality. In a society as religiously diverse as ours, the balance they bring ensures students are exposed early to almost every religious belief and tradition in their community. This happens as students and their families bring their religions with them into public schools and the government actors in those schools remain as neutral as possible about all those religious beliefs and identities.

The Fourth Circuit's doctrine would annihilate that benefit of a public education by forcing particular faiths out of the public schools.

II. The substantial burden test stated in *Lyng* and applied by the panel is atextual and at odds with the original public meaning of the Free Exercise Clause.

Banishing particular faiths from our public schools is not only harmful to our civil society. It is also wrong on the law.

As explained above, the panel opinion erred by applying the internal affairs doctrine to public school instruction. It also erred by relying on another mistake that emerged from a false understanding of the internal affairs doctrine: the so-called substantial burden test as articulated in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

That test is at odds with the original public meaning of the Free Exercise Clause and was wrong the day it was decided. This court should take the opportunity to overrule, or at least clarify, that government action "substantially burdens" religious exercise when it "forbids it by law" or "hinders" it.

A. The Free Exercise Clause is implicated when government "forbids by law" or "hinders" the free exercise of religion.

1. *Lyng*'s substantial burden test does not even purport to accord with the original public meaning of the Free Exercise Clause.

The substantial burden test has had a number of permutations since the 1960s, when the idea was first explored.[4] But the doctrine severely strayed from the

[4] While not explicitly set forth in *Sherbert v. Verner*, that case

constitutional text in *Lyng*. There, the Court considered whether the Free Exercise Clause prevented the government from constructing a road and harvesting timber from a portion of land that was used by Indigenous tribes for religious purposes. *Id.* at 441–42. The Court concluded that even though the Indigenous tribe's members were sincere in their religious beliefs and the project would make the practice of these beliefs impossible, the government was still not prevented from constructing the road and harvesting timber. *Id*. at 447.

This Court reasoned that because the plaintiffs were neither "coerced by the Government[] ... into violating their religious beliefs[] nor would ... [they be] penalize[d] [for their] religious activity," they were not burdened by the government action. *Id*. at 449. The Court's rationale focused on the word "prohibit" in the Free Exercise Clause: "The crucial word in the constitutional text is 'prohibit'[.]" *Id*. at 451. This means, the Court reasoned, that the Free Exercise Clause "does not … require government to bring forward a compelling justification for … actions" that

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laid the groundwork for what would come to be known as the substantial burden test. 374 U.S. 398, 405–06 (1963); *see* Eric H. Wang, *To Prohibit Free Exercise: A Proposal for Judging Substantial Burdens on Religion*, 72 EMORY L.J. 723, 729–36 (2023) (tracing the history of the substantial burden test from *Sherbert* on); *Fulton v. Philadelphia*, 593 U.S. 522, 556 (2021) (Alito, J., concurring in the judgment) ("The test distilled from *Sherbert*—that a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest—was the governing rule for the next 27 years.").

might "make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* at 450–51.

The Court concluded that as long as government conduct did not have a "tendency to coerce individuals into acting contrary to their religious beliefs," or to "penal[ize]" its free exercise, or to "deny[] any person an equal share of the rights, benefits, and privileges enjoyed by other citizens[,]" then the conduct could not violate the Free Exercise Clause. *Id.* at 449–50. Of course, if "prohibit" is the crucial word, the last category would seem to fit more aptly with the Equal Protection Clause than the right to free exercise of religion. The *Lyng* Court never acknowledged this logical inconsistency.

In any event, lower courts have understood this requirement as the 'substantial burden' test. *See, e.g.*, *Apache Stronghold v. United States*, 101 F.4th 1036, 1051–52 (9th Cir. 2024) (citing *Lyng*). Purporting to ground itself in the word "prohibit," this cramped reading of the text helped contort the meaning of the Free Exercise Clause.

The Court's conclusion in *Lyng* does not purport to come from the original public meaning of the Free Exercise Clause. It does not grapple with any founding era evidence on the topic. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, HARV. L. REV. 1409, 1486 (1990). It merely asserts that "prohibit" is the key word in the Free Exercise Clause, then proceeds

to exclude one of the dictionary definitions of the term.

Courts that have endeavored to interpret the plain meaning of the text have come out differently. In statutory federal and state RFRA cases, judges relying on the plain dictionary meaning of the phrase "substantially burden" have reached a broader understanding of the term than *Lyng*. *See, e.g.*, *Barr v. City of Sinton*, 295 S.W.3d 287, 301–02 (Tex. 2009) (using Webster's Third New International Dictionary to interpret "substantially burden" in state RFRA); *Apache Stronghold*, 101 F.4th at 1136 (Murguia, J., dissenting) (using Webster's Third New International Dictionary, Black's Law Dictionary, and the Oxford English Dictionary to interpret "substantially burden" in federal RFRA). This plain meaning approach also accords with the original public meaning of the term "prohibit," by including the broader idea of "hindering" conduct.

2. The Original Public Meaning of "Prohibit" Includes "Hinder."

Founding-era dictionaries define "prohibit" to mean "forbid" by law. *See, e.g.*, NATHAN BAILEY, UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (22d ed. 1770) (defining "prohibit" as "to forbid, to bar, to keep from"). *Lyng* did recognize this meaning—but "prohibit" has also long carried a broader sense: to "hinder."

Dr. Samuel Johnson's *Dictionary of the English Language* defined "to prohibit" as: (1) "to forbid; to interdict by authority," and (2) "to debar; to hinder." 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH

LANGUAGE (1755). So did other founding-era dictionaries. *See, e.g.*, THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (14th ed. 1771) ("to forbid, bar, hinder, or keep from any thing"); 2 JOHNSON (6th ed. 1785) ("1. To forbid, to interdict by authority. . . . 2. To debar; to hinder"); 2 JOHN ASH, THE NEW & COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1795) ("To forbid, to interdict by authority; to debar, to hinder"); 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("1. To forbid; to interdict by authority; . . . 2. To hinder; to debar; to prevent; to preclude"); 2 JOHN BOAG, THE IMPERIAL LEXICON OF THE ENGLISH LANGUAGE 275 (1850) ("To forbid; to interdict by authority. To hinder; to debar; to prevent; to preclude"). *See generally Fulton v. City of Philadelphia*, 593 U.S. 522, 566 (2021) (Alito, J. concurring in the judgment) (discussing the original public meaning of the term "prohibiting").

This broader sense of prohibit as "to hinder" was a familiar English usage. In *Paradise Lost*, the gates of Hell "prohibit" egress in this second sense:

> [L]ong is the way
> And hard, that out of Hell leads up to light;
> Our prison strong, this huge convex of fire,
> Outrageous to devour, immures us round
> Ninefold, and gates of burning adamant
> Barred over us, prohibit all egress.

JOHN MILTON, PARADISE LOST, 35 (John Leonard, ed., Penguin Classics 2003) (1667).

Three Justices of this Court relied on founding-era dictionaries to conclude that to "prohibit" free exercise

includes government acts that "hinder" religious practice. *Fulton*, 593 U.S. at 566. While that case was concerned with *Employment Division v. Smith*, 494 U.S. 872 (1990), the same ordinary meaning of "prohibit" applies to the issue surrounding *Lyng*'s use of the term. *Id.* The Free Exercise Clause was historically understood to prevent government actions that substantially interfered with religious observance, even if those actions did not directly compel or coerce belief. *Fulton*, 593 U.S. at 567 (Alito, J., concurring in the judgment). Simply put, "the ordinary meaning of 'prohibiting the free exercise of religion' was (and still is) forbidding or hindering unrestrained religious practices or worship." *Id.*

This broader understanding of "prohibit" does not require the Court to resolve the question of strict scrutiny versus rational basis review. *Cf. Fulton*, 593 U.S. at 543–44 (Barrett, J. concurring) (expressing concerns about analyzing Free Exercise claims should *Smith* be overruled). Confirming that the right is implicated is a more modest step. It ensures that courts properly assess the burden on religious exercise instead of prematurely narrowing the Clause's scope.

The Free Exercise Clause forbids government action that "prohibits the free exercise" of religion. U.S. CONST. amend. I. That includes express bans *and* actions that hinder religious practice. *Lyng* erred by failing to account for this broader, historically supported meaning of "prohibit." *Cf. Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.) ("[A] burden on a religious exercise rises to the level of being "substantial" when (at the very least) the government (1) requires the plaintiff to participate in an

activity prohibited by a sincerely held religious belief, (2) prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief, or (3) places considerable pressure on the plaintiff to violate a sincerely held religious belief—for example, by presenting an illusory or Hobson's choice where the only realistically possible course of action available to the plaintiff trenches on sincere religious exercise.").

3. The Panel Opinion Misconstrues the Free Exercise Clause and the Original Public Meaning of "Prohibit."

The panel opinion's application of *Lyng* improperly narrows the Free Exercise Clause's protections in public schools. Relying on *Thomas v. Review Board*, it held:

> To recap briefly, 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. This coercion can be both direct or indirect, meaning that a burden exists whenever government conduct either "compel[s] a violation of conscience" or "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs."

Mahmoud, 102 F.4th, at 208 (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981)).

Although the panel quoted the right language from *Thomas*, it misunderstood it. The *Thomas* court did not hold that "substantial pressure" is a burden only when it results in an actual renunciation of faith.

Thomas, 450 U.S. at 718; *contra Mahmoud*, 102 F.4th at 209 (faulting evidentiary record because it did not show "that the Parents or their children have in fact been asked to affirm views contrary to their own views on gender or sexuality"). *Thomas* does not require outright compulsion. *Thomas*, 450 U.S. at 718. Instead, it acknowledges that governmental actions that put "substantial pressure on an adherent to modify his behavior and to violate his beliefs" impose a burden upon religion. *Id.* But the panel opinion reduces substantial pressure to government acts that actually compel believers. By focusing solely on acts of coercion, the panel reads *Thomas* too narrowly and disregards the broader protections the Free Exercise Clause provides.

In this way, the panel misinterprets the original meaning of "prohibit" and weakens the crucial constitutional protections granted by the First Amendment. *Lyng*'s substantial burden test, as applied here, misreads the Free Exercise Clause's text and the history that shows the meaning of "prohibit" includes "hinder." An appropriate inquiry centers on whether government actions, direct or indirect, hinder religious exercise. Because that interpretation is consistent with the original public meaning of the word "prohibit," this Court should confirm it is the inquiry in which lower courts must engage.

B. This Court has not applied *Lyng's* substantial burden rule since it was decided, while other cases from this Court have undermined it.

Given how far *Lyng* strayed from the original public meaning of the Free Exercise Clause, it is not surprising that this Court, for many decades, has not treated

it as influential precedent.

Stare decisis, "the idea that today's Court should stand by yesterday's decisions—is "a foundation stone of the rule of law." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) (quoting *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014)). But *stare decisis* "is at its weakest when we interpret the Constitution . . . And stare decisis applies with perhaps *least force of all to decisions that wrongly denied First Amendment rights*: This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." *Janus v. Am. Fed'n of State, Cnty.*, 585 U.S. 878, 917 (2018). (emphasis added).

In *Janus*, this Court looked to five important factors for overruling a past decision, including: "the quality of [the case's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id*. As explained *supra* II.A.1–2, *Lyng* is poorly reasoned and unmoored from the original public meaning of the text. The other *Janus* factors also tip against *Lyng* and in favor of the Free Exercise clause's original public meaning.

1. Lyng*'s inconsistency with related decisions*. While *Lyng* looks to direct or "indirect coercion or penalties on the free exercise of religion" it does not quantify the amount of penalty required to burden one's religion. *Lyng*, 485 U.S. at 450. This is somewhat bizarre for a test premised on the burden being "substantial."

And it ignores this Court's holding that government burdened an Amish family's free exercise of religion by fining them merely $5 when they declined to send their children to public school beyond the eighth grade in accordance with their Amish values. *Yoder*, 406 U.S. at 234. If even a penalty of $5 can be considered a substantial burden, surely Parents faced with paying hundreds of dollars in fines and fees for their child being disciplined for truancy violations or spending thousands of dollars for having to switch to private school would be enough. *Id.*; s*ee* Appellants' Reply Brief at 1, *Mahmoud v. McKnight*, 102 F.4th 191 (4th Cir. 2024) (No. 23-1890) 2023 WL 7326987 (asserting that "forcing children—on threat of criminal fines or cost of private education—to participate in instruction against their faith . . . violates every relevant Supreme Court ruling.").

2. Lyng*'s unworkability.* This Court has consistently held that denial of a public benefit is a burden on religious exercise, yet *Lyng*'s atextual approach would reject that conclusion. As stated *supra*, *Lyng* held narrowly, "[t]he crucial word in the constitutional text is 'prohibit.'" *Lyng*, 485 U.S. at 451. It then concluded that government programs "which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not burden religion. *Id.* at 450.

If that is the holding of *Lyng*, it would undermine all of the Court's recent decisions in *Carson v. Makin*, 596 U.S. 767 (2022); *Espinoza v. Montana Depart-*

ment of Revenue, 591 U.S. 464 (2020); and *Trinity Lutheran v. Comer*, 582 U.S. 449, 450 (2017). In each, the Court found that discriminating against religious institutions in funding burdens religion. Yet under *Lyng*'s formulation, because the discrimination in funding did not coerce a change in behavior, no burden would exist.

Such an outcome is unworkable because it would undermine the vast majority of religious accommodations cases.

3. *There is little to no doctrinal reliance on* Lyng. This Court has not imported *Lyng's* substantial burden test to Congress's core religious freedom statutes, the Religious Freedom Restoration Act ("RFRA") and the Religious Land Use and Institutionalized Persons Act ("RLUIPA").

In 1993, in response to *Smith*, Congress passed RFRA, which provides that "[g]overnment shall not *substantially burden* a person's exercise of religion." 42 U.S.C. § 2000bb–1 (emphasis added). Later, in 2000, Congress passed RLUIPA, providing, "No government shall *impose a substantial burden* on the religious exercise of a person" in both land use and prison contexts. 42 U.S.C. § 2000cc–1 (emphasis added).

Both statutes expanded religious liberty protections after *Smith*. *See Holt v. Hobbs*, 574 U.S. 352, 358 (2015) (interpreting RLUIPA as "expansive protection for religious liberty" since "Congress defined 'religious exercise' capaciously to include 'any exercise of reli-

gion, whether or not compelled by, or central to, a system of religious belief.'"); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 682 (2014) (holding that "as amended by . . . [RLUIPA], RFRA covers 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'").

Although both statutes include "substantial burden" language, they do not define it. 42 U.S.C. § 2000bb-2; 42 U.S.C. § 2000cc-5. Yet this Court has declined to adopt *Lyng*'s interpretation of the phrase despite ample opportunity to do so.

To the extent lower courts *have* imported *Lyng*, it has caused doctrinal error and confusion. For instance, multiple courts of appeals applied *Lyng* to post-*Hobby Lobby* challenges to the Affordable Care Act's contraception mandate, holding there was no substantial burden on religious objectors. *See, e.g. Priests For Life v. U.S. Dep't of Health & Human Services*, 772 F.3d 229, 246 (D.C. Cir. 2014) (applying *Lyng*); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Services*, 778 F.3d 422, 442 (3d Cir. 2015) (applying *Lyng*); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 457 (5th Cir. 2015) (applying *Lyng*). This court ultimately granted, vacated and remanded those cases. *See Zubik v. Burwell*, 578 U.S. 403 (2016). If *Lyng* were overturned today, it would clarify the law, not disrupt it.

4. *Developments since* Lyng *undermine its reasoning*. *Lyng*'s understanding of "substantial burden" does not cover many obvious substantial burdens

on religious exercise. For instance, this Court's opinion in *Tanzin v. Tanvir*, 592 U.S. 43, 46 (2020), assumed a substantial burden when the government destroys religious property or desecrates a dead body. *See id.* at 51 (citing *Yang v. Sturner*, 728 F.Supp. 845 (DRI 1990), *opinion withdrawn* 750 F.Supp. 558 (DRI 1990), involving the "autopsy of [a] son that violated Hmong beliefs"); (also citing *DeMarco v. Davis*, 914 F.3d 383, 389 (5th Cir. 2019), involving the confiscation and destruction of a prisoner's Bible).

In those cases, no one was pressured to "change [his] views or act contrary to [his] faith," yet the Court still assumed religious exercise was burdened because government action hindered the exercise of religion. *Contra Mahmoud*, 102 F.4th at 213. These developments since *Lyng* recognize that more varied and indirect burdens on religious exercise are possible and occur in the real world.

In sum, *Lyng* is "an outlier among our First Amendment cases." *Janus*, 585 U.S. at 924. A better interpretation of the Free Exercise Clause reads "prohibit" to include "hinder," as understood in the original public meaning. *Lyng*, 485 U.S. at 450–51.

C. Even under *Lyng*'s faulty analysis, Parents have shown a substantial burden here.

Even if this Court chooses not to discard *Lyng*, the Parents have met their burden of proving a substantial burden on their religious exercise.

This case is governed by *Yoder*. The panel opinion's

attempt to distinguish it rested on improper theological comparisons. "[W]e have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. Courts must not "[j]udg[e] the centrality of different religious practices." *Id.* This is consistent with RFRA's and RLUIPA's statutory scheme, which restored *Yoder's* compelling interest test. 42 U.S.C. § 2000bb(b)(1); 42 U.S.C. § 2000cc(a).

Yet the Fourth Circuit's analysis of *Yoder* consisted of a theological comparison of the Parents' religious beliefs with Amish beliefs. *Mahmoud*, 102 F.4th at 210. The panel opinion distinguishes *Yoder* on the basis that Amish faith is "singular" in its separation from modern life, and so "few sects could make a similar showing." *Id.* But the substantial burden analysis does not involve measuring the theological centrality of beliefs of different faiths; it involves analyzing the detrimental effects the government places on those who follow their faith. *See Hobby Lobby*, 573 U.S. at 720 (describing "economic consequences" if plaintiffs failed to "engage in conduct that seriously violates their religious beliefs").

By grounding its opinion in theological importance, instead of the real-world burdens that government action places on adherents, the Fourth Circuit's decision holds that the Amish's religious values have more constitutional value than Muslim, Roman Catholic, and Ukrainian Orthodox beliefs.

But such theological judgments are "not within the

judicial function and judicial competence" in a country where "[c]ourts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. The Parents' "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 714. And they certainly need not be compared to other religious traditions to determine their importance.

The Parents and *amici* are substantially burdened because they are put to the choice of (1) remaining true to their religion and forgoing their children's benefit of attending public school or (2) abandoning their religious beliefs and attaining the public benefit. This is a classic example of a religious burden. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.").

It is true that in many situations society may require "some financial sacrifice in order to observe their religious beliefs." *Mahmoud*, 102 F.4th at 215 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 605–06 (1961)). Yet the panel opinion fails to recognize that being "put to a choice between fidelity to religious belief" or receiving a public benefit is itself a well-established religious burden. *See Thomas*, 450 U.S. at 717.

When the "State . . . expressly requires [a family] to renounce its religious character to participate in an otherwise generally available public benefit program, for which [they are] fully qualified . . . [o]ur cases

make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the 'most rigorous' scrutiny." *Trinity Lutheran*, 582 U.S. at 466.

The Fourth Circuit contends that "the existing record does not show that mere exposure to the Storybooks is 'affirmatively compel[ling]' the Parents or their children 'to perform acts undeniably at odds with' their religious views." *Mahmoud*, 102 F.4th at 211. But the act of *sending* their child to a school where students are instructed in materials contrary to their religious beliefs *is* "perform[ing] acts undeniably at odds with fundamental tenets of [parents'] religious beliefs." *Yoder,* 406 U.S. at 218.

Parents' religious exercise is substantially burdened when "governmental action penalize[s] [their] religious activity by denying [them] an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449. The substantial burden here is clear.

CONCLUSION

The Court should overturn the judgment below and hold that refusing to allow parents to opt-out from certain instruction violates the Free Exercise Clause.

Respectfully submitted,

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APPENDIX

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APPENDIX

Further Identifying the *Amici*

Amici include:

Dr. Ahmad Atif Ahmad, Professor of Religious Studies at the University of California, Santa Barbara.

Ismail Elfath, parent at private Islamic school in Austin, Texas.

Sheikh Atiyah Emarah, Senior Imam and Educator in Austin, Texas.

Imam Dawood Yasin, Imam of the Islamic Center of Greater Austin.

Dr. Ahmed Arafat, Resident Scholar at the Mecca Center of Willowbrook, Illinois.