No. 24-297

In the Supreme Court of the United States

TAMER MAHMOUD, ET AL., *Petitioners*,

v.

THOMAS W. TAYLOR, ET AL.

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

BRIEF OF 66 MEMBERS OF CONGRESS AS *AMICI CURIAE* SUPPORTING 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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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

The issue in this case is central to the vitality of a fundamental First Amendment right, namely, the right of parents to ensure that their children's education is consistent with the parents' religious and moral views. And this case provides the Court with a much-needed opportunity to guarantee that this right can be meaningfully exercised by all parents.

For a century, the Court has deemed fundamental the right of parents to "direct the upbringing and education of children under their control." *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925). And the Court supplemented that protection in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), correctly emphasizing that parental primacy "in the upbringing of their children is now established beyond debate as an enduring American tradition"—such that, "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests." *Id.* at 215, 232.

The overriding question here is whether that "enduring American tradition" yields when a parent participates in public schooling. Or, in other words, may the State condition a child's participation in public schooling on the child's parents' ceding to the government the right to indoctrinate the child on contested moral and religious issues—even when such

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *Amici* or their counsel has made a monetary contribution toward the brief's preparation or submission.

teaching violates the parents' moral and religious commitments?

The answer to both questions—as Congress has long recognized in its legislation—is no. Indeed, federal law has consistently protected parental rights in the educational arena. What the parents in this case seek for free exercise reasons is very much in keeping with this congressional tradition.

This issue is particularly important to *Amici*—a group of 66 members of Congress whose names are included in the Appendix. *Amici* worry about the harm that the decision below, and others of its ilk, will inflict on religious and non-religious parents alike. *Amici* share the conviction that the Nation's continued commitment to parental autonomy over the education of children—particularly on matters of obvious moral or religious significance—is essential to our Nation's scheme of ordered liberty. And they agree with Petitioners that the decision below, which declined to even find a free-exercise burden from forced education on issues of sex and gender, flouts the "strong history and tradition" of "parental deference when it comes to instruction on gender and sexuality." Pet. Br. 31.

Indeed, Congress has long recognized in crafting legislation that parents are key players in education. And governments implicate the Free Exercise Clause when they impose educational requirements related to sex and gender on children without first giving parents with moral or religious concerns notice or an opportunity to opt out of such curricula. To continue the long tradition of protecting parental rights in education, the Court should reverse.

STATEMENT

At the start of the 2022 school year, the Montgomery County Board of Education announced over twenty new books for its "inclusivity" curriculum for students starting in pre-K and continuing to eighth grade. Pet.App.78a, 620a. These books pushed pronoun preferences, pride parades, and gender transitioning for kids as young as three. Pet.App.254a-271a.

In response to concerns from hundreds of parents, the Board promised to provide notification when the books would be read and to allow parents to opt their kids out. Pet.App.533a-534a, 540a, 544a-545a, 185a-187a, 497a-498a. But a few months later the Board informed parents that no notification would be provided and opt-out requests would not be honored. As one Board member declared, to say that these books "offend[] your religious rights or your family values or your core beliefs is just telling [your] kid, '[H]ere's another reason to hate another person.'" Pet.App.104a. Petitioners, parents of various faiths, brought this action in response.

The district court ruled against the parents. Pet.App.77a. On appeal, the Fourth Circuit affirmed, holding that, because there was no evidence of either coercion or a direct penalty on Petitioners' religious faith if their children were required to participate in these one-sided portrayals of sexuality and gender, Petitioners' First Amendment free-exercise right was not even burdened. Pet.App.31a-50a.

SUMMARY OF ARGUMENT

As Petitioners show, the Court should reverse because the Board burdened their First Amendment rights when it denied notice and an opportunity to opt out of the Board's "inclusivity" curricula. *Amici* note two additional points.

First, in the courts below, the Board improperly hid behind federal anti-discrimination law in justifying its unconstitutional policy. That emperor has no clothes: Neither Title IX nor this Court's decision in *Bostock* v. *Clayton County*, 590 U.S. 644 (2020), required the Board's policy. Indeed, no reading of either the statutory text or this Court's precedent remotely requires it.

Second, far from supporting the Board's policy, the history of congressional action in this area shows that Congress has long sought to protect parental rights in education. What Petitioners seek follows that long practice. And federal law shows how the Board can provide the moral and religious accommodation Petitioners seek. Indeed, that the Board provides complex carve-outs to its curricular programs for ordinary *secular* reasons (special educational needs) but refuses to provide the much simpler accommodations Petitioners requested for *moral and religious* reasons is constitutionally troubling.

This Court should reverse the decision below—and prevent the harms highlighted by Petitioners—secure in the knowledge that recognizing and vindicating parental rights in this important context will be consistent with longstanding congressional practice.

ARGUMENT

I. Federal Law Does Not Require the Board's Policy and Cannot Provide the Board a Compelling Interest Supporting the Policy.

The Board argued below that Title IX of the Educational Amendments of 1972 required it to refuse to provide notice or the right to opt out. See Br. of Defs.-Appellees at 51-52, *Mahmoud* v. *McKnight,* 102 F.4th 191 (4th Cir. 2024) (No. 23-1890), ECF No. 93 ("Board 4th Cir. Br."). And it grounded that view in the belief—shared with the Fourth Circuit in the *Grimm* case—that this Court's decision in *Bostock* v. *Clayton County*, 590 U.S. 644 (2020), controlled Title IX's interpretation as well. *Ibid.* (citing *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020)). But neither the statute's text nor this Court's precedent support that claim.

A. Title IX does not require the Board's unconstitutional policy.

Before the Fourth Circuit below, the Board argued that "Title IX[] obligate[d] [the Board] to ensure that its students are not 'treat[ed] * * * worse than others' based on sexual orientation or gender identity." Board 4th Cir. Br. at 51-52 (quoting *Grimm*, 972 F.3d at 618). But invoking Title IX to support the Board's policy is absurd. Allowing parents to opt their own children out of certain lessons does not constitute maltreatment of children whose parents make a different choice.

Indeed, it is so absurd that the Board failed to quote or even cite a single provision of Title IX for its claim. Nor could it. The statute's plain language

makes clear that a school's duty is to not *itself* discriminate. See 20 U.S.C. §1681(a). And this Court has read the statute that way: "Title IX focuses * * * on protecting individuals from discriminatory practices carried out by recipients of federal funds." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (cleaned up). In *Gebser*, this Court clarified that a school district is only liable for damages under Title IX when an "official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Id.* at 290. The Board has not pointed to any actual discrimination that it or school employees are engaging in. Nor has it shown that it would have engaged in such discrimination if it had offered Petitioners notice or the opportunity to opt out.

And the notion that allowing *some* students to opt out constitutes harassment of those who remain would not meet Title IX's burden in any event. Even for alleged student-on-student harassment, the standard is extremely high. Liability exists "only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities." *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). And such liability "will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Ibid.* *Davis*, moreover, labeled as a "mischaracteriz[ation]" a reading of its opinion that "require[d] funding recipients to remedy peer harassment" and "to ensure

that students conform their conduct to certain rules." *Id.* at 648 (cleaned up).

Here the Board has not demonstrated that parental opt out of some students constitutes harassment at all, much less provided evidence of such "severe, pervasive, and objectively offensive" harassment that has "effectively bar[red]" any LGBTQ student's "access to an educational opportunity or benefit" in its schools. *Id.* at 633. Nor, under *Davis*, is it clear that Title IX requires the Board to "'remedy' peer harassment" if it did exist, much less if it does not. *Id.* at 648. And it flouts *Davis* to argue that Title IX required that the Board "ensure that students conform their conduct" to any particular gender ideology. *Ibid.* (cleaned up). In short, the Board's argument that its hands were forced by Title IX is belied by decades of this Court's precedent.

B. *Bostock* does not require the Board's unconstitutional policy.

Nor can the Board claim this Court "made them do it" by blaming *Bostock* for its unconstitutional policy. In *Bostock*, this Court made clear the limited nature of its inquiry into employment discrimination under Title VII—and nothing more. See *Bostock*, 590 U.S. at 681 ("The *only* question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'" (emphasis added)). Indeed, *Bostock*'s majority went out of its way to note that it did "not purport to address bathrooms, locker rooms, [dress codes,] or anything else of the kind." *Ibid.* In other words, *Bostock* was silent about

educational contexts. Thus, this Court bluntly declared that "none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today." *Ibid.*

In fact, the *Bostock* majority indicated not only that its holding applies only to Title VII, but also that the holding may not even control in cases involving other provisions of Title VII. See also *ibid.* ("Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.").

Furthermore, the *Bostock* Court noted its angst over contexts like this case where religious liberty may be trampled. See *ibid.* ("We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society."). In short, there is no plausible way to read *Bostock* as mandating the School Board's unconstitutional policy.

Many lower courts have received *Bostock*'s message loud and clear.[2] For example, *Adams ex rel*

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[2] The lower court in this case—the Fourth Circuit—has not. See *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618-619 (4th Cir. 2020) (relying on *Bostock*'s definition of sex discrimination to hold that prohibiting a girl who identified as a boy from using the boys' restroom violated Title IX); *B.P.J. ex rel Jackson* v. *West Virginia State Bd. of Educ.*, 98 F.4th 542, 563-564 (4th Cir. 2024) (importing *Bostock*'s reasoning to find that a law that prevented boys who identified as girls from playing on girls' athletics teams violated Title IX), *cert denied sub nom. West*

Kasper v. *School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022) (en banc), concerned whether a school bathroom policy prohibiting a biological female from using the boys' restroom at a county high school violated, among other things, Title IX. See *id*. at 796-797. Holding that the policy did not violate Title IX, the Eleventh Circuit, sitting en banc, rejected a *Bostock*-based argument on the grounds that *Bostock* expressly limited itself to workplace discrimination. See *id*. at 808 ("[T]he instant appeal is about schools and children—and the school is not the workplace." (citations omitted)).

Nor is the Eleventh Circuit alone, as the Sixth Circuit has reached the same correct conclusion. See, *e.g.*, *Pelcha* v. *MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (explaining "the rule in *Bostock* extends no further than Title VII"); *L.W. ex rel. Williams* v. *Skrmetti*, 83 F.4th 460, 484 (6th Cir. 2023) (Sutton, C.J.) (explaining that *Bostock*'s "reasoning applies only to Title VII, as *Bostock* itself and many subsequent cases make clear" (collecting cases)). Cf. *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("Title VII, however, is a vastly different statute from Title IX.").

In short, the Board cannot hide its unconstitutional policy behind *Bostock*.

Virginia Secondary Sch. Activities Comm'n v. *B.P.J. ex rel Jackson,* 145 S. Ct. 568 (2024) (mem.). If this Court only reaches the issue of whether the Petitioners' free exercise was burdened, it should clarify for the lower courts applying strict scrutiny on remand that *Bostock* provides the Board no harbor.

C. The Board lacks a compelling interest in complying with its absurd understanding of federal law.

Given that neither Title IX nor *Bostock* provides any cover for the Board's constitutional violation, it is pure fantasy for the Board to argue that complying with egregiously erroneous readings of either can be elevated to the lofty realm of a compelling government interest, as the Board argued in the Fourth Circuit. See Board 4th Cir. Br. at 51-52.

To qualify as a rarified compelling government interest, the Board's policy must "advance interests of the highest order[.]" *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993) (cleaned up). But the policy fails that exacting standard in at least two ways.

First, the premise that efforts to eradicate all forms of discrimination qualify as a compelling government interest has not been recognized by this Court. *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), is illustrative. There, facing an anti-discrimination law that infringed First Amendment rights, the Court observed that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the freedom of expressive association." *Id.* at 642.[3] It is difficult to

[3] See also Kristina Campbell, *Will "Equal" Again Mean Equal?: Understanding* Ricci v. DeStefano, 14 Tex. Rev. L. & Pol. 385, 411 (2010) ("[T]he Court has *never* recognized a compelling interest in avoiding unintentional racial disparities or societal discrimination, and little authority exists to suggest that compliance with a federal antidiscrimination law is itself a compelling interest." (footnote omitted)).

see how the Board's policy serves an interest of a higher order than the New Jersey law when the latter was dealing with actual, intentional discrimination and the former is merely a prophylactic against speculative, future harassment by minors.

Second, even if an effort to eradicate discrimination could be a compelling interest in some settings, it cannot play that role here. Granted, this Court has, in two limited circumstances, recognized that eradicating (1) *intentional* (2) *discrimination* based on a (3) *protected class* was a compelling government interest. See *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983) ("The governmental interest at stake here is compelling. * * * [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education[.]"); *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."). But the *Bob Jones* Court clarified that the government's fundamental interest in eradicating *racial* discrimination was grounded in the Nation's unique history of officially approving such discrimination in education. 461 U.S. at 604. Here, both the elements *Bob Jones* identified and the unique history that gave weight to the government's interest in that case are absent.

For example, there is no evidence of *intentional discrimination* by minors in the schools to which the Board's policy applies—and *unintentional* child-on-child *harassment* is a far cry from the intentional

organizational discrimination this Court identified in *Bob Jones* and *Roberts*. Further, this Court has not recognized LGBTQ individuals per se as a protected class.

Additionally, should this Court agree—as Justice Scalia recognized was possible—that "compliance with federal antidiscrimination laws *can* be a compelling state interest," see *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in part) (emphasis added), it would not provide the Board a compelling interest here for at least two reasons. First, *League of United Latin American Citizens*, and the two cases Justice Scalia cited for his proposition, *ibid.*, *Miller* v. *Johnson*, 515 U.S. 900 (1995), and *Shaw* v. *Hunt*, 517 U.S. 899 (1996), were all voting rights cases. And—as far as *Amici* are aware—the principle that compliance with federal anti-discrimination law can provide a State—or, as here, the Board—with a compelling interest, to the extent it exists, has not been extended beyond that context.

To the contrary, time and again, when nondiscrimination laws have conflicted with First Amendment rights, this Court has protected those First Amendment rights in part because the strength of those rights outweighed the government's asserted interest. See *Dale*, 530 U.S. at 641-642; *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 577-578 (1995); *Masterpiece Cakeshop* v. *Colorado C.R. Comm'n,* 584 U.S. 617, 639-640 (2018); *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 542 (2021); *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 584-587 (2023).

Second, even if the Court expanded the principle such that compliance with *any* anti-discrimination law can be a compelling state interest, such an interest would necessarily fail if the federal law does not require what the State says it requires. Here, as noted above, federal discrimination law does not require the Board's policy. Thus, the Board's policy fails to qualify as an interest of the highest order.

II. Many Statutes Reflect Congress's Agreement with Petitioners' View of Parental Rights and Show How to Protect Those Rights.

Further refuting the Board's claim that its actions were required by federal law is Congress's long practice of protecting parental rights by statute. Indeed, even a cursory review of legislation passed in the last few decades reveals that Congress is not only acutely aware of parental rights, but that it is also sympathetic to them. These statutes, particularly the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, show how easily the Board could accommodate Petitioners and parents like them. And the fact that the Board refuses moral and religious accommodations, but allows ordinary secular ones—for things such as special education services—places its policy on shaky constitutional grounds.

A. Many statutes reflect Congress's broad agreement with Petitioners on the importance of parental rights.

Over the past half century, Congress has repeatedly sought to protect parental rights in the educational context.

For example, the Protection of Pupil Rights Amendment (PPRA) of the General Education Provisions Act, Pub. L. No. 93-380, 88 Stat. 484 (1974), requires all programs that receive Department of Education Funds to make "[a]ll instructional materials * * * available for inspection by the parents or guardians[.]" 20 U.S.C. §1232h(a). PPRA also protects the right of parents to receive notice and opt their children out of surveys that reveal information concerning "sex behavior or attitudes." *Id.* §§1232h(b)(3), (c)(2). These are the very rights parents seek in this case—notice, which would then potentially allow them to inspect the materials on their own, and the opportunity to opt out.

Of even older pedigree than the PPRA, the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, as amended by the Every Student Succeeds Act of 2015, Pub. L. No. 114-95, §1010, 129 Stat. 1802, requires schools to, "at a minimum," ensure things like "regular two-way, meaningful communication between family members and school staff," annual parent-teacher conferences, and "frequent reports to parents on their children's progress." 20 U.S.C. §6318(d)(2). Here again, the request for notice of the parents in this case tracks this statutory requirement.

Relatedly, the Family Education Rights and Privacy Act (FERPA), Pub. L. No. 93-380, §438, 88 Stat. 484 (1974), mandates that "[n]o funds shall be made available * * * to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance * * * the right to inspect

and review the education records of their children." 20 U.S.C. §1232g(a)(1)(A). Petitioners' request for information about their children's education also analogizes easily to FERPA's requirement.

More generally, in passing the Department of Education Organization Act of 1979, Pub. L. No. 96-88, §101, 93 Stat. 668, Congress boldly declared that "parents have the primary responsibility for the education of their children, and States, localities, and private institutions have the primary responsibility for supporting that parental role." 20 U.S.C. §3401(3).

Additionally, the Every Student Succeeds Act of 2015 (ESSA), Pub. L. No. 114-95, §1010, 129 Stat. 1802, 1868, conditions funding to local educational agencies "only if such agency conducts outreach to all parents and family members and implements programs, activities, and procedures for the involvement of parents and family members in programs assisted under this part consistent with this section." 20 U.S.C. §6318(a)(1). And it specifies that "[s]uch programs, activities, and procedures shall be planned and implemented with meaningful consultation with parents of participating children." *Ibid*. And the Act requires agencies to "involve parents and family members in jointly developing the local educational plan[.]" *Id*. §6318(a)(2)(A). Here again, involvement and a degree of control over their own children's participation such as those provided by ESSA are all the Petitioners are asking for.

More granularly, the Children's Online Privacy Protection Act of 1998 (COPPA), Pub. L. No. 105-277, 112 Stat. 2681, which applies to online services used

at home and at school, gives parents control of what information online is collected from their children that are 13 years old and younger. See 15 U.S.C. §6502(b); 15 U.S.C. §6501(1) (defining "child"). As with other legislation discussed in this section, Petitioners' request for notice and opt-out opportunities is also consistent with COPPA's federal mandate.

This consistent pattern demonstrates Congress's commitment to safeguarding parental rights in the educational sphere, including those related to religious liberty, and thus shows that a majority of Congress over the past half century would support the broad, First Amendment-based parental rights that Petitioners advance in this case.

B. Courts have regularly applied the Religious Freedom Restoration Act to protect parental rights.

Along with the federal statutes explored above, parents have also relied on the Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993) to protect parental rights in the free exercise context in claims brought both against the federal government and, before *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), against state and local governments.

For instance, in *Sabra ex rel. Baby M* v. *Pompeo*, 453 F. Supp. 3d 291 (D.D.C. 2020), two United States citizens applied for a Consular Report of Birth Abroad and a U.S. passport for their baby at the nearest U.S. Embassy in the Middle East. See *id.* at 297-298. Because of the wife's "advanced age," the Embassy requested evidence demonstrating that the wife was

actually the baby's mother. *Ibid*. When no such evidence was produced, the Embassy denied the applications. See *id*. at 298. The couple, who were Muslim, sued, alleging that some of the requested evidence—a DNA test and photos of the wife during pregnancy—"conflict with [the couple's] already articulated sincerely held religious beliefs." *Id*. at 326. Ruling on a motion for summary judgment by the federal government, the court concluded that the request for this specific evidence "constitutes a 'substantial burden' under RFRA." *Id*. at 331. And, given a genuine dispute over whether the Embassy's evidentiary request "served a compelling interest by the least restrictive means," the rest of the RFRA test, the court denied summary judgment as to this claim. *Ibid*.

Or consider *In re Marriage of Weiss*, 42 Cal. App. 4th 106 (1996). Decided when RFRA still applied to the States, the case involved whether a mother, following a divorce, could legally be prevented from involving her minor child in religious activities when the child's father objected to those activities. *Id*. at 109-110, 116-117. The activities at issue included attending Sunday School, Wednesday night church activities, and summer church camp. *Id*. at 117. Noting RFRA's strict scrutiny standard, the state appellate court determined that "prevention of harm to the child * * * is a compelling state interest," but that there was no evidence that the child was "being harmed by the religious activity in issue." *Id*. at 116-117. Thus, the court upheld the trial court's refusal "to enjoin [the mother] from involving the minor in religious activity." *Id*. at 117.

Hence, even when not *directly* protecting parental rights, through RFRA, Congress has indirectly provided parents with a powerful tool when parental rights and religious liberty intersect.

C. The IDEA provides a comparable secular analog to the relief sought and shows how opt-outs can easily function in public schools.

Besides showing Congress's willingness to protect parental rights when it comes to education, at least one statute—the IDEA—negates one of the arguments the Board will no doubt make to this Court. Specifically, the Board's "argument [will] echo[] the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006). Likewise, no doubt, the Board will contend that making exceptions for the students implicated in this case is too cumbersome, disruptive, and resource-intensive to work.

But thanks to the IDEA, the Board, like school boards and districts around the country, is particularly good at making numerous exceptions in another context: students requiring special education services. For instance, in the 2022-2023 school year, 20,223 students in the Montgomery County School District received special education services.[4] That is

[4] See Montgomery Cnty. Pub. Schs., *2022-2023 Special Education at a Glance* 219 (2023), https://tinyurl.com/yfpuxe72.

approximately one out of every eight students.[5] And "[e]ach public school child who receives special education and related services must have an Individualized Education Program (IEP)."[6]

IEPs, of course, offer important protections to many of the Nation's students. But creating and maintaining an IEP is a labor-intensive process. It requires first evaluating a child,[7] then forming an IEP team, consisting of the student (if appropriate), the student's parents, regular education teacher(s), special education teacher(s) or provider(s), a school system representative, transition services agency representative(s), a person who can interpret the evaluation results, and perhaps others with knowledge or special expertise about the child.[8]

The team then meets and creates an IEP.[9] The IEP then must be implemented by providing the individualized services required by the plan,

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[5] See *About Us*, Montgomery Cnty. Pub. Schs., https://tinyurl.com/muudfbps (last visited Mar. 8, 2025) (listing current enrollment in the district as just under 160,000 students).

[6] Off. of Special Educ. & Rehab. Servs., U.S. Dep't of Educ., *A Guide to the Individualized Education Program* 1 (July 2000) [hereinafter, "*IEP Guide*"], https://tinyurl.com/38ybp2k8.

[7] See *id.* at 2.

[8] See *id.* at 7-10; see also 20 U.S.C. §1414(d)(1)(B)(i) (providing parents with a right to be involved in the development of their child's IEP).

[9] See *IEP Guide*, *supra* note 6, at 3; see also 20 U.S.C. §1414(d)(1)(B)(i); 20 U.S.C. §1414(e) (each providing parents the right to participate in meetings related to the evaluation, identification, and educational placement of their child).

measuring the student's progress, reporting said progress to the parents, annually reviewing the IEP, and reevaluating the student every three years.[10]

Specifically, each child's IEP must contain "[a] statement of the special education and related services and supplementary aids and services, * * * to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided[.]" 34 C.F.R. §300.320(a)(4). This results in "an individualized curriculum that is *different* from that of same-age, nondisabled peers," "the *same* (general) curriculum as that for nondisabled peers, with adaptations or modifications made for the student," or some combination of both.[11]

In asking for notice and an opportunity to opt out of the Board's gender ideology curriculum, Petitioners are not asking for anything nearly as onerous as an IEP. Nor would anywhere near one in eight children in the district seek this type of religious accommodation. The relief Petitioners seek is thus a much easier lift than other accommodations which the Board is already accustomed to offering its students.

But even if Petitioners were seeking an exemption as burdensome as an IEP, it would be constitutionally troubling, to say the least, for the Board to accommodate an ordinary secular reason for

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[10] See *IEP Guide*, *supra* note 6, at 4.

[11] *Special Education*, Ctr. for Parent Info. & Res. (Mar. 2017), https://tinyurl.com/3z3x2yb9.

curricular adjustments (such as a special educational need) but not a moral or religious reason.

That is because, as this Court has explained, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021) (per curiam) (citation omitted). And "[i]t is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Ibid.* (citation omitted).

Here, Petitioners are asking for something far less burdensome than an IEP for their children—the ability to learn about and opt their children out of an exceedingly small portion of the curriculum. To deny that request grounded in free exercise, while granting elaborate IEPs for ordinary secular reasons, raises serious constitutional questions—and is yet another reason to rule for Petitioners.

CONCLUSION

Congress has long protected parental rights in federal law. What Petitioners seek here follows that time-honored congressional legislative tradition. And, despite the Board's protests to the contrary, federal anti-discrimination law does not require the unconstitutional policy under review. To ensure that religious liberty does not become a second-class right in our Nation's public schools, this Court should reverse the Fourth Circuit's decision.

Respectfully submitted,

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List of *Amici Curiae*

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Sen. Steve Daines (MT)
Sen. Chuck Grassley (IA)
Sen. Josh Hawley (MO)
Sen. Jim Justice (WV)
Sen. James Lankford (OK)
Sen. Mike Lee (UT)
Sen. Ashley Moody (FL)
Sen. Markwayne Mullin (OK)
Sen. Pete Ricketts (NE)
Sen. Tim Scott (SC)
Sen. Tim Sheehy (MT)
Sen. Tommy Tuberville (AL)
Sen. Roger Wicker (MS)

United States Representatives

Rep. Robert B. Aderholt (AL-4)
House Maj. Leader Rep. Steve Scalise (LA-1)
Rep. Rick Allen (GA-12)
Rep. Jodey Arrington (TX-19)
Rep. Brian Babin (TX-36)
Rep. Sheri Biggs (SC-3)
Rep. Josh Brecheen (OK-2)
Rep. Michael Cloud (TX-27)
Rep. Andrew Clyde (GA-9)
Rep. Warren Davidson (OH-8)
Rep. Troy Downing (MT-2)
Rep. Jake Ellzey (TX-6)
Rep. Chuck Fleischmann (TN-3)

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Rep. Brandon Gill (TX-26)
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Rep. Morgan Griffith (VA-9)
Rep. Glenn Grothman (WI-6)
Rep. Michael Guest (MS-3)
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Rep. Dusty Johnson (SD-At Large)
Rep. Doug LaMalfa (CA-1)
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Rep. Mary Miller (IL-15)
Rep. John Moolenaar (MI-2)
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Rep. Troy Nehls (TX-22)
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Rep. Glenn “GT” Thompson (PA-15)
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