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

REPLY BRIEF FOR PETITIONERS

ERIC S. BAXTER
Counsel of Record
WILLIAM J. HAUN
MICHAEL J. O'BRIEN
COLTEN L. STANBERRY
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW, Suite 400
Washington, D.C. 20006
(202) 955-0095
ebaxter@becketfund.org

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

REPLY BRIEF

The Board's response is a fantasy version of the law and facts. Instead of responding to Petitioners' brief, the Board dissembles.

The Board devotes its entire brief to a fiction, rebutting strawman arguments about mere "exposure." But this case has always been about compelled instruction—particularly the fact that religious parents are pressured to have their children's "either/or thinking" on sex and gender be "disrupt[ed]" as the price for attending public school. *Yoder* says this pressure violates the Free Exercise Clause. But the Board fails even to address *Yoder* until the end of its brief. Resp.Br.38. And when it does, it misrepresents both *Yoder*'s holding and its implications.

Similarly, the Board cannot seriously dispute that stripping notice and opt-out rights imposed a burden that was neither neutral nor generally applicable under *Lukumi*. Instead, the Board baselessly claims those inquiries are "not before the Court." But this Court already rejected this argument at the certiorari stage, where neutrality and general applicability were addressed alongside burden—just as this Court always does. And neutrality and general applicability are sorely lacking—for reasons the Board cannot escape.

Unable to prevail under *Yoder* or *Lukumi*, the Board concocts a new test—"cognizable" coercion. That newly minted test rewrites 60 years of precedent to exclude "pressure" as one form of coercion. To replace the actual caselaw, Respondents retreat to anti-canon: 19th century anti-Catholic bigotry, public schools upholding racial segregation, and (without saying so

aloud) *Gobitis*. If embraced, the resulting Free Exercise Clause would not apply even if public schools taught "porn literacy," "sex play with friends," nudity, and even simulated sexual acts. Tellingly, the Board never claims otherwise.

On the facts, the Board chooses its own adventure, plucking a handful of scattered statements to claim no students are asked to change their beliefs and to claim there is no evidence of coercion (however defined). But it never addresses its own directive to "disrupt" "cisnormativity" and students' "either/or thinking." The Board doesn't dispute that it adopted these books for "Everyone" to read and to combat the "dominant culture." It doesn't meaningfully engage the books' instruction that gender identity need not "make sense," that pronouns change "like the weather," that "blush[ing] hot" at a classmate is an appropriate topic for classroom discussion, or that children should "rewrite the norms" on sex and gender and choose whichever bathroom is most "comfy" for them.

With neither law nor facts on its side, the Board pleads for a remand. That is inconsistent with *Fulton*, *Carson*, and common sense. In *Fulton* and *Carson*, this Court applied strict scrutiny in the first instance. That makes sense where, as here, Petitioners have long been illegally deprived of their rights and the Court can resolve the merits of the dispute rather than let it fester. The Board has fully briefed strict scrutiny in both courts below. That standard should be applied to reverse the ruling below.

I. Petitioners' free exercise is burdened.

A. Petitioners are burdened under *Yoder*.

The "rights of parents to direct the religious upbringing of their children" have deep roots in the Free Exercise Clause. *Wisconsin* v. *Yoder*, 406 U.S. 205, 233 (1972); Pet.Br.24-28. Here, Petitioners have a sacred obligation to shape and safeguard their children's understanding of gender and sexuality. Pet.App.530a; Pet.App.536a-537a; Pet.App.543a. But the Board compels instruction designed to disrupt their beliefs on these religiously sensitive topics—and at a shockingly young and formative age. By "substantially interfering" with Petitioners' ability to direct their children's religious upbringing in a sharp break from our national traditions, the Board's actions trigger strict scrutiny. *Yoder*, 406 U.S. at 215, 218; Pet.Br.28-33

The Board's counter-arguments fail.

1. The Board gives the facts a rewrite, repeating 36 times that Petitioners complain about "exposure." But Petitioners object to compelled *instruction*—the reading and discussion of books expressly designed to interfere with and "disrupt" parents' religious guidance. See Pet.i ("compel * * * instruction"); Pet.22,33 ("compelled instruction"). In a case where the Board itself recognizes that children "may come away from [this] instruction with a new perspective not easily contravened by their parents," J.A.46, that standard is easily met.

With carefully qualified phrases, the Board now tries to obfuscate how the books are used, stating that teachers "are not required to use any of the storybooks *in any given lesson*" and "were not provided any asso-

ciated *mandatory* discussion points." Resp.Br.9 (emphases added). But ultimately, the Board must concede that teachers "are expected to incorporate the storybooks into the curriculum." Resp.Br.9. The record is unequivocal that "there is an expectation that teachers use the LGBTQ-Inclusive Books *as part of instruction*" and that teachers "*cannot* * * * elect not to use" them. Pet.App.605a (emphases added). The Board stated the "learning" about "diversified gender and sexuality identity" required by the books "will happen," Pet.App.636a, and that "there will be discussion that ensues." Pet.App.642a. It further stated its "expectation that teachers utilize the texts * * * to create more inclusive classrooms." Pet.App.487a. And it has confirmed that reading the books "is not optional." Pet.App.489a. After all, the Board has conceded that the storybook instruction was adopted specifically to avoid "the opt-out right in Maryland." J.A.49-50.

Similar evidence confirms the Board's intention of "[d]isrupt[ing] [children's] either/or thinking" about gender. Pet.App.629a, 633a. In addition to its mandates discussed above, the Board's teacher guidance rejects the notion that elementary school children are "too young to be learning about gender and sexual identity." Pet.App.637a. Instead, by promoting "learning about the diversity of gender," the Board seeks to promote "curious exploration" and "creat[e] more space" for children to "learn about" new "identities that might relate to their families or even themselves." Pet.App.637a, 623a. The schools will engage in "[t]eaching about LGBTQ+" precisely "to show that there is no one 'right' or 'normal' way to be"—that is, "that there is no single way to be a boy, girl, or any other gender." Pet.App.638a. In short, far from merely

"defin[ing] words that are new and unfamiliar," Resp.Br.26, the Board admits that teachers' instruction will "[d]isrupt [students'] either/or thinking." Pet.App.629a, 633a.

Thus, it is irrelevant that teachers use "their professional judgment and experience" when "incorporat[ing]" the books in their instruction. Resp.Br.9. What matters is that the books *must* be used, that the Board endorses and promotes their use, and that the books are in fact used in instruction. Pet.App.273a ("part of a professional development workshop for MCPS staff"); see also Pet.App.277a; Pet.App.511a. Indeed, several MCPS teachers are quoted in a brief below, with one explaining that reading *My Rainbow* to her class was a way of "validat[ing]" one student's "tender truths" about gender ideology. J.A.54-56. When such compelled instruction is taking place, it is irrelevant that the books may also be placed "on a shelf for students to find on their own"—*i.e.*, what the Board calls "exposure." See Resp.Br.17.[1]

2. The Board next complains (20 times) that the record contains insufficient evidence of coercion. But it

---

[1] This is not to say "exposure" could never be enough. Indeed, the Board itself attempts to distinguish forced "exposure to ideas that clash with * * * religion" (for which it denies opt-outs) and forced "exposure to 'images of the Prophet Mohammad'" (for which it would allow opt-outs). Resp.25 n.7. But perhaps the Muslim Petitioners themselves should have the final say on whether both aren't religiously problematic. And even under the Board's capricious standard, it seems unlikely parents would be entirely without recourse if their children were intentionally exposed to pornography, extreme graphic violence, or other such material, especially at a young age. But the Court need not reach this question here, as the Board has gone far beyond exposure to deliberate indoctrination.

is undisputed that the parents are compelled by threat of criminal fines or the expense of alternative schooling—unattainable for most—to place their children into classroom instruction against their religious obligations. Thus, as Judge Quattlebaum observed, Petitioners have easily "met their burden," having produced "books that no one disputes will be used to instruct their K-5 children"; "declarations explaining in detail why the books conflict with their religious beliefs"; and "the board's own internal documents" detailing efforts to disrupt students' beliefs. Pet.App.62a.

The Board whistles past the voluminous evidence of ideological instruction. It offers no real response to the teacher guidance discussed above, or even to the books' contents. Pet.App.323a (normalizing gender-neutral bathroom use); Pet.App.435a-436a ("blush[ing] hot" classmate romance); Pet.App.465a, (stating gender identity is about "love" and doesn't "*need*[] to make sense"); Pet.App.458a-461a, 470a (teaching that children can choose their own sex); Pet.App.279a-306a, 390a-428a (romanticizing same-sex relationships). These are not mere "retellings" of books like "*Rapunzel*, *Cinderella*, and *Goldilocks*." Resp.Br.7. Rather, as the Board's own principals protested, the books have plots that "center around sexual orientation and gender identity." Pet.App.616a. And they were adopted by the Board to combat the "dominance, superiority, and entitlement" of the "dominant culture." Pet.App.517a.

3. In truth, the Board's claim of insufficient evidence is a plea to adopt a more demanding legal standard—one that finds no purchase in *Yoder* or anywhere else. The children in *Yoder* were never "in

fact * * * asked to affirm views contrary to their own" or "to disavow views * * * that their religion espouses." Resp.Br.32. Rather, the Court found a burden because the parents were pressured to send their children to school despite their contrary religious obligations. So too here—Petitioners' children are required to participate in the challenged instruction and have been denied an opt-out. That the denial is a *deliberate* effort to pressure Petitioners to put their children in an environment where they will be pressured to abandon their religious beliefs makes this an *a fortiori* case. Cf. *Yoder*, 406 U.S. at 211, 218.

The evidence is overwhelming that Petitioners' children are "compelled or pressured to act or believe contrary to their or their parents' religious views." Resp.Br.32. Indeed, the Board ignores its professional educators' own warnings that the storybooks and accompanying guidance are "not appropriate for the intended age group," Pet.App.616a, 618a; "[s]tate[] as fact" what "[s]ome would not agree [is] a fact," Pet.App.620a; and are "shaming" toward children who disagree, Pet.App.620a, and "dismissive" of religious beliefs, Pet.App.619a. It is no wonder that parents with contrary religious beliefs feel religiously obligated to opt their children out of such instruction.

The Board responds that, in *Yoder*, children were "*not only*" exposed to a hostile environment "*but also*" taken "away from their community, physically and emotionally, during the crucial and formative adolescent period of life." Resp.Br.38-39; *Yoder*, 406 U.S. at 211. But so too here: Petitioners' children are away from their parents for an entire school day, and at a much younger and more impressionable age. And con-

trary to the Board's arguments, Resp.Br.39, the parents in *Yoder* were just as "free to impart their religion at home" after school as Petitioners are here. This Court has properly rejected the suggestion that the possibility of rebuilding religious faith at home can excuse the government's efforts to disrupt students' faith while at school. *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 637, 641-642 (1943); contra *id.* at 664 (Frankfurter, J., dissenting) (no restrictions on other "channels * * * open to both children and parents").

Finally, nothing in *Yoder* suggests its burden analysis applies only when the accommodation sought is completely skipping the last two years of high school as opposed to opting out of discrete "elements" of the curriculum. Resp.Br.39-40 (emphasis removed). The question of the appropriate remedy in *Yoder* became relevant only on strict scrutiny. *Yoder*, 406 U.S. at 235-236. Even then, three Justices described the accommodation required as "relatively slight." *Id.* at 238 (White, J., concurring). Here, even if the scope of the accommodation had some bearing on the burden analysis (it doesn't), restoring notice and opt-outs to books that were not even in the curriculum until the fall of 2022—and for which opt-outs existed through the spring of 2023—is far more "slight."[2]

---

[2] The "convincing showing" the *Yoder* plaintiffs made "through voluminous 'trial testimony,'" Resp.Br.39 n.11, was a direct reference to "their alternative mode of continuing informal vocational education," *Yoder*, 406 U.S. at 235. Because opting out of the storybooks does not impede the government's core interest in a "self-supporting" and "responsib[le]" citizenry, no such showing is required here. *Id.* at 234; see also *id.* at 225-226 & n.14.

4. Rather than engaging *Yoder* on its own terms, Respondents argue that *Lyng* walked back *Yoder*'s holding. See Resp.Br.20 (quoting *Lyng* to "explain[]" *Yoder*). *Lyng* can't bear that weight. For one, *Lyng* turned on the "laws in question" being "neutral and generally applicable without regard to religion." *Trinity Lutheran Church of Columbia* v. *Comer*, 582 U.S. 449, 460 (2017). To the extent *Lyng* speaks to what constitutes a burden, it simply reaffirms that the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988); see also *Trinity Lutheran*, 582 U.S. at 450-451 (quoting *Lyng*'s "indirect coercion" language); *Carson* v. *Makin*, 596 U.S. 767, 778 (2022) (same). If requiring elementary-age children to participate in prohibited instruction on sexuality and gender against their parents' faith—on threat of truancy or losing access to a free education—does not constitute at least "indirect coercion," what does? Pet.Br.44-45.

Respondents rely on *Lyng*'s characterization of *Yoder* as involving a statute that "directly compel[led]" action. Resp.Br.38. But wherever the line lies between direct and indirect coercion, the pressure here is highly analogous to that in *Yoder*. Here, Parents are compelled to leave their children in religiously prohibited instruction under threat of criminal penalties or the financial burden of sending them to private school or homeschooling. Similarly, in *Yoder*, the parents were compelled by threat of criminal penalties or the cost of establishing independent schools, as had been done in other states. See Laycock.Br.20-21. In both

cases, the compulsory education requirement "substantially interfer[ed] with the religious development of the * * * child and his integration into the way of life of the [relevant] faith community." 406 U.S. at 218. This finding, in both cases, is "support[ed]" by the children's impressionability, Pet.Br.27-28, and "the values and programs of the modern * * * school," 406 U.S. at 217-218; Pet.Br.29-33. Regardless of faith tradition, compelled instruction over the parents' religious obligations is a free-exercise burden triggering strict scrutiny.

B. The Board's no-opt-out policy imposes a religious burden and is not neutral or generally applicable under *Sherbert* and *Lukumi*.

Apart from *Yoder's* substantial interference analysis, the Board's actions burden Petitioners' free-exercise rights by forcing Petitioners to choose between shielding their children from religiously-prohibited instruction and accessing the public schools. *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) ("force[d] * * * to choose"); *Thomas* v. *Review Bd.*, 450 U.S. 707, 717 (1981) ("put to a choice"); Pet.Br.16-19. Under *Lukumi*, this triggers strict scrutiny because the pressure results from an opt-out policy that isn't neutral or generally applicable. *Id.* at 43-45.[3]

---

[3] The Board waves off neutrality and general applicability as "a separate inquiry" "not before the Court." Resp.Br.43. It made the same argument at the certiorari stage. BIO.26 ("not even before the Court"). But "it was clear from the petition and from petitioner[s'] other filings in this Court (and in the courts below)" that *Lukumi*'s standard was understood as "'fairly included'

1. The Board flunks general applicability because it allows opt-outs from inclusivity instruction during health class while denying opt-outs from analogous story-time instruction, Pet.Br.36, and because it has exercised discretion to "decide which reasons" for opting out "are worthy of solicitude," Pet.Br.38 (quoting *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 537 (2021)). Either triggers strict scrutiny. *Ibid.*

Categorical exceptions. "A government policy will fail the general applicability requirement if it 'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.'" *Kennedy*, 597 U.S. at 526 (quoting *Fulton*, 593 U.S. at 534). Comparability is "judged against" the "government interest that justifies the regulation at issue." *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021).

Here, the Board asserts the same "equity" interest to justify both the elementary school storybooks and its high school health classes. Pet.Br.36-37. Yet the

---

within the question[] presented." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 381 n.3 (1992); see also Sup. Ct. R. 14.1(a); Pet.29-30 (discussing *Lukumi*); Cert.Reply.Br.9-10 (same). Indeed, the Court typically addresses neutrality and general applicability alongside the burden analysis. See, *e.g.*, *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) (plaintiff can establish free exercise violation "by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable'"); see also *Fulton*, 593 U.S. at 532-533; *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532, 543 (1993). While some courts have held that lack of neutrality and general applicability is itself a burden, see Laycock.Br.24-28, the Court need not reach that issue here.

Board provides notice and secular opt-outs for the health classes but not the storybooks. *Ibid.*

Crucially, the Board never disputes that the same "equity" interest underlies its curricular content in both sets of classes. Pet.Br.36-37. Nor could it. The very same "Equity Regulation" that led the Board to adopt the storybooks also led to updated "inclusivity" instruction in the "Family Life and Human Sexuality" segment of health classes. *Ibid.* There, every student from pre-K to high school now learns about gender identity, and every student from fourth grade onward learns about sexual orientation. J.A.68-72, 80. Yet opt-outs to that gender identity and sexuality instruction are allowed only from health classes, not English-Language Arts, where the storybooks teach both beginning in pre-K. That is not general applicability. Pet.Br.36-38.

Abandoning equity, the Board now says its insistence on the storybook instruction is justified by "absenteeism and administrability." Resp.Br.46. But for purposes of general applicability, the relevant government interest is the interest underlying adoption of the inclusivity curriculum. *See Fulton*, 593 U.S. at 534, 541-542. As one of the asserted reasons for withdrawing notice and opt-outs, absenteeism is relevant to strict scrutiny. But the "LGBTQ+-inclusive" books were adopted to promote inclusivity, not to combat absenteeism. Absenteeism thus plays no role under general applicability.

The Board's response also flouts *Tandon*, claiming there isn't discrimination in denying religious opt-outs from the storybooks because it denies all "secular" opt-outs. Resp.Br.45-46. But the same was true in *Tandon*. There, California "adopted a blanket restriction on at-

home gatherings of all kinds, religious and secular alike." 593 U.S. at 65 (Kagan, J., dissenting). Yet as the Court held, treating everyone equally "poorly" is "no answer" to giving "*any* comparable secular activity more favorabl[e]" treatment "than religious exercise." *Id.* at 62 (per curiam); see also CLS.Br.20-21. Allowing secular opt-outs (from health classes) while banning all religious and secular opt-outs (from the storybooks) undermines the shared "equity" interest and thus negates general applicability. Pet.Br.37-38; Laycock.Br.26-27; U.S.Br.32-33.

At bottom, the Board asks the Court to approve its own shifting and self-serving "categories of selection." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542 (1993). But "the substance of free exercise protections" do not turn "on the presence or absence of magic words." *Carson*, 596 U.S. at 785. A government policy that allows opt-outs from some gender identity and sexual orientation instruction, but denies them for others, is not generally applicable.

Discretionary exceptions. The Board's discretion to accommodate religious claimants also triggers strict scrutiny. See *Fulton*, 593 U.S. at 535, 537; Pet.Br.38-40. The Board does not dispute that it allowed opt-outs for storybook instruction on a discretionary basis through March 22, 2023. Pet.Br.38. It also does not dispute that it reassured parents that opt-outs would continue—the day before revoking them. *Ibid.* It also does not dispute that this fly-by-night reversal was itself discretionary. *Id.* at 38-39; Laycock.Br.26-27. And it does not dispute that even after revoking notice and opt-outs on March 23, it exercised further discretion by selectively continuing opt-outs for the remainder of

the school year if "schools already had granted accommodation requests." Pet.Br.39 (quoting Pet.App.608a). All this confirms what triggered strict scrutiny in *Fulton*: the government actor has discretion but "made clear that [it] has no intention of granting an exception" to religious claimants. 593 U.S. at 535 (cleaned up).

The Board's response to *Fulton's* discretion analysis misses the point. It does not matter if the Board never exercised its discretion to "den[y] any opt-out requests" or never evaluated "the particular reasons" for the requests "before adopting a blanket no-opt-out policy." Resp.Br.46-47. Discretion—the *power* to make an exception—defeats general applicability even where its holder "has no intention of granting an exception" and "has never granted one." *Fulton*, 593 U.S. at 535, 537; Pet.App.70a (Quattlebaum, J., dissenting) ("value judgements" not required). Indeed, even now, the Board allows opt-outs for other reasons. Pet.Br.39-40; Pet.App.672a-674a (opt-outs for "teaching," "religious holidays," any "noncurricular activities," "[e]ven birthdays" and "Halloween and Valentine's Day"); but see Pet.Br.10-11 (no opt-out for "blush[ing] hot," same-sex playground romance on Valentine's Day in *Love, Violet*). And the Board has retained the "inherently discretionary" power to abruptly change course. Laycock.Br.26-27 (quoting Pet.App.69a (Quattlebaum, J., dissenting)).

The Board says individual "schools" lack discretion to reintroduce opt-outs, Resp.Br.47, but does not dispute that *the Board itself* has reserved discretion to shift course as it pleases. Pet.Br.39-40. Indeed, the Board acknowledges that it unilaterally eliminated most curricular-related religious accommodations "in

2023." Resp.Br.4 n.1. And the Board omits that it apparently made this change in closed session, and in response to "a federal litigation matter." Memorandum from Monifa B. McKnight, Superintendent of Schools, to Members of the Board of Education, *Resolution for Today's Closed Session* (July 20, 2023), https://perma.cc/3EVR-CF3D; see also Pet.App.669a-675a (revised 2023-2024 religious diversity guidelines).

2. The Board's policy also isn't neutral. Pet.Br.40-43. Conceding that Petitioners requested opt-outs for religious reasons, the Board relies on a single sentence from an employee declaration to claim that, because there were some non-religious opt-outs, there is no evidence of religious targeting. Resp.Br.47 (citing Pet.App.606a). But the Free Exercise Clause prohibits "religious gerrymanders," and they can be shown by "adverse impact." *Lukumi*, 508 U.S. at 534-535. The overwhelming response of religious families protesting the Board's decision makes that impact plain. Pet.Br.41-42. And if the Board wasn't targeting religious opt-outs, it had no need to gut the Religious Diversity Guidelines during this case. Resp.Br.4 n.1.

The Board members' animus-laden accusations are another problem the Board tries to avoid, claiming they are "nothing more than" religion-neutral statements "opposing all opt-outs." Resp.Br.47-48. That squinting-blind claim cannot be squared with the board members' scoldings, including one accusing a Muslim child of "parroting" her parents' "dogma." Pet.App.106a; Em Espey, *Parents, students, doctors react to MCPS lawsuit targeting LGBTQ+ storybooks*, *MoCo360*, June 2, 2023, https://perma.cc/5GD9-2YVQ. Or another accusing parents asserting "religious

rights" of "telling [their] kid, 'here's another reason to hate another person.'" Pet.App.104a. When "'official expressions of hostility' to religion accompany laws or policies burdening religious exercise," those laws or policies "are set aside without further inquiry." *Kennedy*, 597 U.S. at 525 n.1 (quoting *Masterpiece Cakeshop, Ltd.* v. *Colorado C.R. Comm'n*, 584 U.S. 617, 639 (2018)). At a minimum, the "strictest scrutiny" should follow. *Carson*, 596 U.S. at 780.

C. Respondents' "cognizable" coercion theory of burden would eviscerate the Free Exercise Clause.

Sherbert's burden analysis is straightforward: forcing someone to "choose between following the precepts of [their] religion" and accessing a government benefit imposes a free-exercise burden. 374 U.S. at 404. Petitioners' religious beliefs require them to shield their children from instruction on sex and gender that violates their religious beliefs. By impeding that exercise, the Board has imposed a religious burden.

Still, the Board and Fourth Circuit demand more: they say Petitioners or their children must actually be "compel[led] * * * to *change* their religious beliefs or conduct" or "asked to affirm * * * views contrary to [their] faith." Pet.App.34a; Resp.Br.1, 9-10, 32. The Board calls this "cognizable" coercion. Resp.Br.17, 22-23, 27, 30. In all but name, this demand reduces the Free Exercise Clause to prohibiting only an extreme form of direct coercion—just like the "court-of-appeals decisions" from where the Board "confirmed" its cramped rule. Resp.Br.28. Embracing this extremism would eviscerate 60 years of precedent, credit disreputable history, and provide no real limit on public

schools' compelled instruction over parents' sincere religious exercise.

1. The Board's "cognizable" coercion test has no basis in any of this Court's free-exercise decisions. Burdening the exercise of religion is not limited to direct coercion; rather, religious exercise "may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert*, 374 U.S. at 404. Unconstitutional conditions can take "many forms," U.S.Br.13, but the through line is that the religious claimant is "force[d] * * * to choose" between the public benefit and one's religion. *Sherbert*, 374 U.S. at 404, 406; see also, *e.g.*, *Fulton*, 593 U.S. at 532 ("putting it to the choice"); *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 480 (2020) ("putting the school to a choice" and "put[ting] families to a choice"); *Trinity Lutheran*, 582 U.S. at 462 ("the Department's policy puts Trinity Lutheran to a choice"); *Thomas*, 450 U.S. at 716 ("compelled to choose"). These forced choices "put[] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718; see also Pet.Br.43-45.

As Petitioners explained, this burden standard accords with *Yoder*'s "substantial interference" inquiry for compelled instruction, as well as the original meaning of "prohibit" in the Free Exercise Clause—which extends to government actions that "hinder[]" religious practice, see Pet.Br.43-44; see also *Fulton*, 593 U.S. at 567 (Alito, J., concurring in judgment); U.S.Br.17-24. Petitioners have satisfied this burden standard. That is, they were put to the choice of either subjecting their children to compelled instruction and abandoning their religious beliefs or forgoing public

education. Pet.Br.28-33, 43-44; Pet.App.61a-62a; U.S.Br.24-26.

The Board cannot reasonably argue that Petitioners failed to show substantial pressure. So instead, the Board grafts its "cognizable" coercion test onto the Court's precedent. The Board's new rule is wrong. While "outright prohibitions" on religious exercise are obviously sufficient to show a free-exercise burden, that does not make them necessary. *Carson*, 596 U.S. at 778. Rather, a free-exercise burden is also shown when government action "operate[s], whatever [its] purpose, * * * to *inhibit or deter* the exercise of First Amendment freedoms." *Sherbert*, 374 U.S. at 405 (emphasis added); *Espinoza*, 591 U.S. at 478 (accord); see also *Carson*, 596 U.S. at 789 ("Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise.").

Take *Fulton*, which the Board concedes involved a "plain" burden. Resp.Br.44. There, Catholic Social Services ("CSS") wanted an opt-out from certifying same-sex couples as foster parents. 593 U.S. at 530-531. Philadelphia refused to opt CSS out of that certification requirement, claiming all CSS was being asked to do was "satisfy the statutory criteria," not "endorse[]" same-sex relationships. *id.* at 532. But this put CSS "to the choice of curtailing its mission or approving relationships inconsistent with its beliefs," thereby triggering the Free Exercise Clause. *Ibid.*; see also U.S.Br.21-24 (other examples). So too here. Pet.Br.43-45.

The Board is also wrong to claim that indirect coercion "*would*" only exist if the Board "adopted a rule that parents cannot send their children to MCPS

schools if they provide religious education to their children that conflicts with lessons that MCPS provides." Resp.Br.41. Undoubtedly, that would be direct coercion, but for indirect coercion "[a] total religious bar is not required." Laycock.Br.18-22.

Nor does the Board's "cognizable" coercion test find any help in *Bowen* v. *Roy*, 476 U.S. 693 (1986). The Board claims that *Bowen* rejects a child's "interaction" with the government being "a burden on a parent's free exercise." Resp.Br.37. To the contrary, five justices in *Bowen* agreed it would be a burden on religious parents to provide their child's Social Security number as a condition of receiving benefits. See U.S.Br.22 n.5. So too here, it is a burden on Petitioners to hand their children over for compelled instruction as the price of public education. Pet.Br.16-19.

Finally, the Board argues that no burden exists because the coercion here is not the same as what is required to show an establishment of religion. Resp.Br.21, 24. But free-exercise analysis focuses on government hindrance of "sincerely motivated religious exercise," not what satisfies the "hallmarks of religious establishments." See *Kennedy*, 597 U.S. at 525, 537. Here, Petitioners are not trying to invalidate a curriculum as beyond the school's power to adopt (as in an Establishment Clause case). Rather, they are trying to restore their notice and opt-out rights to guard against the burden of interference with their religious instruction.

2. With no basis in precedent, the Board looks to root "cognizable" coercion in "history and tradition," citing a handful of cases upholding schools' authority to compel instruction. Resp.Br.42. Its lead example,

Donahoe v. *Richards*, upheld a Catholic child's expulsion for refusing to read the King James Version of the Bible, citing the "[l]arge masses of foreign population [that] are among us, weak in the midst of our strength." 38 Me. 379, 413 (1854). The court concluded such foreigners could become "citizens in fact as well as in name" only by forcing them to "imbibe the liberal spirit of our laws and institutions." *Ibid.* Another of the Board's cases that "followed suit," Resp.Br.43, appealed to public school authority to uphold racially segregated schools. See *Andrews* v. *Webber*, 8 N.E. 708, 712-713 (Ind. 1886) (citing, *inter alia*, *Roberts* v. *City of Boston*, 59 Mass. 198, 209 (1849)). But history and tradition are meant to illuminate—not violate—the Free Exercise Clause's "basic principle[s]." See *Espinoza*, 591 U.S. at 475, 480-482.

In contrast, providing opt-outs to enable parental control is part of the "enduring American tradition" to which *Pierce*, *Meyer*, and *Yoder* appealed. See Walton.Br.6-25; Laycock.Br.9-28. Indeed, sexuality and gender identity education "have no historical pedigree," have always been accompanied by parental control, and to this day—even beyond the ubiquitous requirement for parental approval for student participation in sexuality education—many states provide broad, cross-curricula opt-outs for *any* potentially objectionable instruction. See AFL.Br.5-28; see also States.Br.20-21. Here, by stripping Petitioners of those guarantees, the Board upends this longstanding tradition. Pet.Br.31-33. This disruption "compound[s]" Petitioners' burden, *Sherbert*, 374 U.S. at 406, and makes this case "particularly straightforward," U.S.Br.26.

3. Finally, the Board's reliance on Justice Jackson in *McCollum* v. *Board of Education* to argue that "[c]rediting petitioners burden theory" would "leave public education in shreds," Resp.Br.2, is based on a misreading of the case. Justice Jackson warned against schools "sift[ing] out of their teaching everything inconsistent with [a religious claimant's] doctrines"—*i.e.*, curricular challenges—not against upholding religious opt-outs. *McCollum* v. *Board of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring); see also Resp.Br.2, 29 (citing *McCollum*).

The Board's conflation has its roots in *Gobitis*. See also Pet.Br.45-46. And under the Board's "cognizable" coercion standard, it is the Free Exercise Clause that would be left in "shreds." In protecting its power to the nth degree, the Board ignores its own extremism. Under its proposed standard, "coercion" would not be "cognizable" for compelling instruction in *pornography*—so long as the Board is not muzzling the parents at home too. Perhaps that's why the Board doesn't dispute that accepting its arguments would grant public schools the power to impose non-binary pronouns, books with nudity, furries, or BDSM attire, "porn literacy" classes, and lessons on "sex play with friends." Pet.Br.34-35. Indeed, the lower-court case the Board cites twice for its "cognizable" coercion rule—*Parker* v. *Hurley* (Resp.Br.23, 33)—not only confined the Free Exercise Clause to "direct coercion," 514 F.3d 87, 105 (1st Cir. 2008), but also built on the facts of *Brown* v. *Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 529 (1st Cir. 1995). There, parents sued over a mandatory school assembly that "had a male minor lick an oversized condom" and "encouraged a male minor to display his 'orgasm face' * * * for the camera." 68 F.3d

at 529. The Board views this as just "part of the compromise" of attending public schools. C.A. Oral Arg. 24:57-26:15. Once in school, religious parents are "not entitled to a federal judicial remedy," only a political one. *Parker*, 514 F.3d at 107 (citing *Employment Div.* v. *Smith*, 494 U.S. 872, 890 (1990)). The Free Exercise Clause says otherwise.

II. The Board has no strict scrutiny defense.

The Board urges this Court not to apply strict scrutiny. Resp.Br.49-50. The Court should reject this gambit, as it has before.

Philadelphia tried a similar maneuver in *Fulton* (also in a preliminary injunction posture). In that case, neither the Third Circuit nor the district court reached strict scrutiny in assessing CSS's free-exercise claims. *Fulton* v. *City of Philadelphia*, 922 F.3d 140, 156, 159 (3d Cir. 2019); *Fulton* v. *City of Philadelphia*, 320 F.Supp.3d 661, 690 (E.D. Pa. 2018) ("strict scrutiny is inapplicable in this case"). Nor was strict scrutiny mentioned in the question presented. Pet. at i, *Fulton*, 593 U.S. 522 (No. 19-123). Moreover, as here, Philadelphia's merits brief argued against applying "strict scrutiny in the context presented" and devoted only a paragraph to its application. Phila.Br. at 47, *Fulton*, 593 U.S. 522 (No. 19-123). Nevertheless, after holding that CSS had evidence sufficient to show the Free Exercise Clause applied, the Court applied strict scrutiny rather than remand. See *Fulton*, 593 U.S. at 541.

Even more recently, *Carson* applied strict scrutiny when the lower courts had not. The First Circuit was "not persuaded" to apply it, *Carson* v. *Makin*, 979 F.3d 21, 41 (1st Cir. 2020), while the district court didn't even mention it, *Carson* v. *Makin*, 401 F.Supp.3d 207

(D. Me. 2019). Nor did the question presented. Pet. at i, *Carson*, 596 U.S. 767 (No. 20-1088). Nevertheless, after finding the Free Exercise Clause triggered, this Court analyzed strict scrutiny in the first instance, rather than remand. *Carson*, 596 U.S. 767.

Analyzing strict scrutiny is even more appropriate here. Below, the Board provided lengthy reasons as to why its withdrawal of notice and opt-outs "satisfies strict scrutiny." Def.Opp.Prelim.Inj.25-27, No. 8:23-cv-1380 (D. Md. July 12, 2023), ECF No. 42; see also Resp.C.A.Br.16-17, 49-55. That is why the dissent below reached the issue. Pet.App.71a-73a.

The Board's plea for remand is an attempt to compensate for its failure to carry its burden. See Pet.Br.47-52. As to administrability, Resp.Br.49, the Board ignores its long history of accommodating opt-outs. In the IDEA context alone, the Board accommodates about "one out of every eight students." Members.Congress.Br.18-19. What is more, the Board had—and used—its opportunity to provide evidence to support its defense. See Pet.App.597a (Hazel Declaration). With that opportunity, the Board identified "one instance" of "dozens of students" seeking opt-outs. Pet.Br.48 (quoting Pet.App.607a). There is no explanation as to why that alone—in a school district with over 160,000 students, Pet.App.77a—triggers an interest of the highest order. Cf. *McCullen* v. *Coakley*, 573 U.S. 464, 493 (2014).

Instead, the Board closes with its "interest in an environment 'conducive to learning for all students,'" Resp.Br.49 (quoting Pet.App.607a-608a). That's the tell. Consulting the quoted passage confirms that what the Board's "conducive to learning" interest really

means is avoiding the perceived "social stigma and isolation" that it believes will follow from opt-outs. Pet.App.607a-608a. The Board admitted, however, that there is "nothing in the record" to suggest that opt-outs enable bullying or harassment. J.A.50. Nor has the Board come forward with any evidence that opt-outs from the storybooks resulted in "stigma," whether the opt-out was for religion, IDEA, or any other reason.

Preliminary injunctions ought to be entered before relief "might well be useless." *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). After two years of no opt-outs, it is past time for Petitioners to have their rights protected.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

ERIC S. BAXTER
Counsel of Record
WILLIAM J. HAUN
MICHAEL J. O'BRIEN
COLTEN L. STANBERRY
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW,
Suite 400
Washington, D.C. 20006
(202) 955-0095
ebaxter@becketfund.org

Counsel for Petitioners

APRIL 2025