

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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TAMER MAHMOUD, ET AL.,)
 Petitioners,)
 v.) No. 24-297
THOMAS W. TAYLOR, ET AL.,)
 Respondents.)
- - - - -

Pages: 1 through 180
Place: Washington, D.C.
Date: April 22, 2025

HERITAGE REPORTING CORPORATION
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9
10 Washington, D.C.
11 Tuesday, April 22, 2025

12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:08 a.m.

16
17 APPEARANCES:

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19 of the Petitioners.

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22 United States, as amicus curiae, supporting the
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25 behalf of the Respondents.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 24-297, Mahmoud versus Taylor.

Mr. Baxter.

ORAL ARGUMENT OF ERIC S. BAXTER

ON BEHALF OF THE PETITIONERS

MR. BAXTER: Mr. Chief Justice, and may it please the Court:

Parents everywhere care about how their young children are taught sexuality and gender identity. That's why nearly every public school in the country that provides sexuality education requires parental consent first. But Montgomery County is an extreme outlier, insisting that every elementary school student must be instructed that, among other controversial matters, doctors guessed at their sex when they were born and that anyone who disagrees is hurtful and unfair.

Forcing Petitioners to submit their children to such instruction violates their religious beliefs and directly interferes with their ability to direct the religious upbringing

1 of their children.

2 The Board claims this straightforward
3 burden analysis will invite chaos. But schools
4 nationwide have long applied expansive opt-out
5 policies without significant difficulty,
6 including the Board itself, which stills allows
7 opt-outs for choir students who object to
8 singing religious songs or students who object
9 to certain storybooks, such as one that portrays
10 an image of the Prophet Muhammad. Exempting
11 students for some religious reasons but not
12 others cannot be squared with the First
13 Amendment.

14 Nowhere else to go, the Board pleads
15 for remand on strict scrutiny. But Petitioners
16 have been seeking preliminary relief for two
17 years already at significant personal expense.
18 One family moved in with grandparents to afford
19 private school. Another is home-schooling at
20 the loss of \$25,000 a year in special services
21 the school provided their daughter with Down
22 syndrome. Most have no alternatives.

23 Petitioners deserve complete
24 preliminary relief. In a system where thousands
25 of students are daily opted in and out of the

1 class for multiple reasons, there's no basis for
2 denying opt-outs for religious reasons.

3 The Board does not dispute that under
4 its theory, it could compel instruction using
5 pornography and parents would have no rights.
6 The First Amendment demands more. Parents, not
7 school boards, should have the final say on such
8 religious matters.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Could you spend a
11 minute or two to explain how the -- why the
12 record shows that the children are more than
13 merely exposed to the -- these sorts of things
14 in the storybooks?

15 MR. BAXTER: Yes, Your Honor. I would
16 start with the books themselves. The books
17 themselves teach, for example, that children --

18 JUSTICE THOMAS: No, I mean, what I'm
19 talking about is not necessarily what the books
20 say, but, rather, is that -- are the books just
21 there and no more, or are they actually being
22 taught out of the books?

23 MR. BAXTER: No. We know that the --
24 the teachers are required to use the books.
25 When the books were first introduced in August

1 of 2022, the Board suggested they be used five
2 times before the end of the year. That's in
3 the -- that's at 273a in the cert appendix. One
4 of the schools, the Sherwood School, in June,
5 for Pride Month, said that they were going to
6 read one book each day to celebrate Pride Month.
7 The Board's own testimony through Superintendent
8 Hazel said that the books must be used as part
9 of the instruction and that, at 650 -- 642 in
10 the appendix, that discussion will ensue.

11 That was the entire point of
12 withdrawing the opt-outs and removing even
13 notifying parents. They're not even allowed to
14 know. The Board said in that statement it was
15 so that every student would be taught from the
16 inclusivity storybooks. And also, the district
17 court transcript at 63 has counsel's admission
18 that there have -- some of the books have to be
19 used and it can be more.

20 CHIEF JUSTICE ROBERTS: The school
21 board alleges that the opt-out system became
22 unworkable. Is that a -- is that a factor we
23 should take into account in deciding whether it
24 could be required?

25 MR. BAXTER: Certainly, there --

1 CHIEF JUSTICE ROBERTS: Does it have
2 to be required?

3 MR. BAXTER: -- there could be
4 situations where it could be unworkable. The
5 Board never raised that until after this
6 litigation commenced. When they announced the
7 withdrawal, they said it was because every
8 student needed to read the inclusivity books.
9 When they produced documents in response to an
10 open records request, there was no mention of it
11 not being workable.

12 When parents met with the
13 superintendents -- this is at the -- in the
14 Hisham Garti declaration at JA 44 -- the reason
15 given there was inclusivity. There was no
16 mention of administrability until we get to --
17 until the litigation's been filed, and even
18 then, all the Board was able to come up with was
19 the argument that in -- in one instance in one
20 school, there were dozens of students who opted
21 out, where, if the average school size in
22 Montgomery County is 700 students across at
23 least a dozen classrooms, you're talking maybe
24 one student per classroom. That hardly compares
25 with the one in eight students who are opted out

1 for individual education programs, students --
2 15 percent of students in Montgomery County who
3 are taking English for speakers of a second
4 language, the Board's own opt-outs that are
5 required from the same instruction, required by
6 state law to be opted out when the -- when the
7 same books are read in health class.

8 JUSTICE SOTOMAYOR: Counsel, that
9 wasn't the basis of the circuit's -- the
10 district court or the circuit court's denial of
11 preliminary injunction. They never reached the
12 issue of whether or not there was disruption or
13 what the motive was for taking away the opt-out.
14 What they decided was that there wasn't coercion
15 here, that it was mere exposure.

16 I understood from the record that all
17 that was required is that the be -- books be put
18 on the bookshelf. If that's all that's
19 required, is that coercion?

20 MR. BAXTER: Well, that's not what's
21 required here. We know it's undisputed --

22 JUSTICE SOTOMAYOR: Please answer my
23 question.

24 MR. BAXTER: If -- if all that's
25 required is exposure, our clients are not

1 contesting that that would be -- are not saying
2 that would be a burden in that case.

3 JUSTICE SOTOMAYOR: All right. Then
4 let's go to the second step. Let's see -- let's
5 say there's compulsion to read the book out
6 loud. Is merely being exposed to the reading of
7 book -- of the book out loud coercion?

8 MR. BAXTER: Well, even the Board
9 admits that some -- that exposure could be a
10 burden. And, for example, they say at 25 Note 7
11 of their brief that if they were exposed to
12 pictures of Muhammad, that that would be a
13 burden that they would allow an opt-out for.

14 And, certainly, whether there's a
15 burden --

16 JUSTICE SOTOMAYOR: Let's go back. Is
17 it generally that the mere exposure -- haven't
18 we made very clear that the mere exposure to
19 things that you object to is not coercion?

20 MR. BAXTER: It would really depend on
21 the individual religious beliefs. Here, for
22 example, our Catholic clients --

23 JUSTICE SOTOMAYOR: So what you're
24 saying is that the exposure of children to the
25 fact that two people are getting married is

1 coercion? That two people of the same sex are
2 getting married is coercion?

3 MR. BAXTER: So our clients have not
4 raised that objection. I suppose someone --

5 JUSTICE SOTOMAYOR: So then let's --

6 MR. BAXTER: -- could raise that,
7 but --

8 JUSTICE SOTOMAYOR: -- let's talk
9 about what in the portrayals so that the mere
10 reading or looking at the pictures, like looking
11 at an image of Muhammad, would be coercion,
12 because I'm looking at the books. I've looked
13 through all of them. They have two men, Little
14 Bob's -- Bobby's Wedding, where they're getting
15 married. One is black and one is white in this
16 rendition of the book. I had one with mice.
17 The two male mice looked identical to me.

18 Is looking at two men getting
19 married -- is that the religious objection?

20 MR. BAXTER: Again, it would depend on
21 the individual beliefs of the clients. For
22 example, many parents would object to their
23 child being exposed to something like
24 pornography or extreme violence.

25 JUSTICE SOTOMAYOR: I --

1 MR. BAXTER: It would vary from --
2 from --

3 JUSTICE SOTOMAYOR: We're not going
4 there, counsel.

5 JUSTICE KAGAN: So, Mr. Baxter -- I'm
6 sorry.

7 JUSTICE SOTOMAYOR: I'm sorry. Let me
8 just finish this line.

9 JUSTICE KAGAN: Sure.

10 JUSTICE SOTOMAYOR: So just answer my
11 question. Is looking at the pictures -- is
12 there any affidavit from any parent that merely
13 looking at people getting married, holding
14 hands -- none of them are even kissing in any of
15 these books; the most they're doing is holding
16 hands -- that mere exposure to that is coercion?

17 MR. BAXTER: Our parents would object
18 to that. They follow --

19 JUSTICE SOTOMAYOR: All right. Now --
20 so let's move to what I think your objection is.
21 I think your objection is to the student
22 guidance, correct?

23 MR. BAXTER: Our objections would be
24 even to reading books that violate our -- our
25 clients' religious beliefs. They've been --

1 their -- their faith teaches, for example, they
2 shouldn't be exposed to information about sex
3 during their years of innocence without being
4 accompanied by moral principles.

5 And, here, we have both books that
6 violate their moral principles and instruction
7 that tells them that, for example, they can pick
8 their pronouns based on the way they feel, not
9 even just for -- based on their gender but how
10 they feel from moment to moment.

11 JUSTICE ALITO: But, Mr. Baxter --

12 JUSTICE KAGAN: But, Mr. Baxter --

13 JUSTICE ALITO: -- before we -- before
14 we move away from the book that Justice
15 Sotomayor was referring to, Uncle Bobby's
16 Wedding, I've read that book as well as a lot of
17 these other books. Do you think it's fair to
18 say that all that is done in Uncle Bobby's
19 Wedding is to expose children to the fact that
20 there are men who marry other men?

21 MR. BAXTER: No, Your Honor. And this
22 Court in Obergefell promised that parents would
23 be able to continue to teach what this Court
24 called decent and honorable beliefs, that same
25 sex marriage is immoral according to their

1 beliefs.

2 And it's a far stretch from that for
3 schools to compel students to attend. Parents
4 are paying taxes that they have to pay at threat
5 of -- of criminal fines or penalties or the
6 expense of private school.

7 And then to have teachers telling them
8 things that are directly contrary to their
9 religious beliefs or outside their beliefs --

10 JUSTICE ALITO: Yeah, the book has --
11 the book has a clear message, and a lot of
12 people think it's a good message, and maybe it
13 is a good message, but it's a message that a lot
14 of people who hold on to traditional religious
15 beliefs don't agree with.

16 I don't think anybody can read that
17 and say, well, this is just telling children
18 that there are occasions when men marry other
19 men, that Uncle Bobby gets married to his
20 boyfriend, Jamie, and everybody's happy and
21 everything is -- you know, it portrays this --
22 everyone accepts this except for the little
23 girl, Chloe, who has reservations about it. But
24 her mother corrects her: No, you shouldn't have
25 any reservations about this.

1 As I said, it has a clear moral
2 message. There may be --

3 JUSTICE SOTOMAYOR: Wait a minute.
4 The reservation is about --

5 JUSTICE ALITO: Can I finish, please?

6 CHIEF JUSTICE ROBERTS: Counsel.
7 Yeah.

8 JUSTICE ALITO: It has a clear moral
9 message. And it may be a good message. It's
10 just a message that a lot of religious people
11 disagree with.

12 MR. BAXTER: And when you add to that,
13 Your Honor, instruction that if -- if a student
14 disagrees, teachers are supposed to say things
15 like: Well, I have friends in that situation,
16 do you think it's really fair for you to agree
17 or to suggest that it's hurtful for students who
18 disagree, and that --

19 JUSTICE KAGAN: Mr. Baxter, I -- I
20 guess I'm interested in what the nature of the
21 rule you're asking for is. I mean, when you
22 started, it was -- it was about, you know,
23 matters pertaining to sex.

24 But, as you've answered some of these
25 questions, you've basically said: Well, you

1 know, my clients have religious principles that
2 conflict with what is being taught.

3 And is -- does it go that far? In
4 other words, you know, does it matter what the
5 subject matter is? Does it matter what the age
6 of the child is? Does it matter what the nature
7 of the instruction is? If so, how does it
8 matter?

9 Or, in the end, is what you're saying:
10 When a religious person confronts anything in a
11 classroom that conflicts with her religious
12 beliefs or her parents' that -- that the parent
13 can then demand an opt-out?

14 MR. BAXTER: It's really the latter,
15 Your Honor. And that's exactly what Montgomery
16 County allowed in its own religious diversity
17 guidelines. Anything that violated a
18 student's -- or imposed a substantial burden, in
19 their language, on a student's religious or
20 parent's religious beliefs, they had the right
21 to opt out. And that was --

22 JUSTICE KAGAN: So this is a rule that
23 applies as well to a 16-year-old in biology
24 class saying, you know, I don't -- you know, the
25 parents say: I don't want my child to be there

1 for the classes on evolution or on other
2 biological matters which conflict with my
3 religion? It would apply just as well to that?

4 MR. BAXTER: We know that those don't
5 happen very often because countries -- or
6 schools --

7 JUSTICE KAGAN: But it would if there
8 were?

9 MR. BAXTER: Certainly. And schools
10 have -- there are laws, for example, in states
11 that allow students to opt out of dissection
12 because they don't want to participate in that.

13 And there are schools that allow --
14 there are schools across the country -- Hawaii,
15 which has a school district about the same size
16 as Montgomery County, which allows --

17 JUSTICE KAGAN: And if that's the --
18 if -- so that's a pretty broad rule. If that's
19 the -- let me ask what the next step of that is.

20 Suppose there are things that, you
21 know, students opt out of, and then, you know,
22 the parents think it's just not really fair that
23 my student -- that my kid has to leave the
24 classroom or has to put on, you know, headphones
25 or, you know, has to otherwise be made to feel

1 isolated. So the next challenge is really the
2 class can't do this either.

3 Would -- what would your position be
4 on that?

5 MR. BAXTER: Well, no student, Your
6 Honor, has the right to tell the school what to
7 teach or to tell other students what they have
8 to learn. You would clearly run into problems
9 in that situation where --

10 JUSTICE KAGAN: But, to the extent
11 that this is a rule about people being able to
12 access public education in a sort of equal
13 manner, the parent might say: My child is not
14 being able to access education in that equal
15 manner because, you know, he's made to leave the
16 classroom or he's made to, you know, do
17 something else that isolates him from the class.

18 I mean, certainly, that's an argument
19 that we've often heard with respect to prayer
20 and that people have accepted with respect to
21 prayer -- accepted with respect to prayer, that
22 it's kind of like not a sufficient answer to
23 just say: Don't worry, the prayer can go on,
24 you don't have to be part of it.

25 So I'm just wondering whether that's

1 the next step here.

2 MR. BAXTER: No, Your Honor, I don't
3 think so, because the -- of course, under the
4 Establishment Clause, there are different rules,
5 but under the Free Exercise Clause, we think
6 that the -- on strict scrutiny, those parents
7 would -- would always lose if they're trying to
8 direct the school what to teach or tell other
9 students what they must teach.

10 We know also that these --

11 JUSTICE KAGAN: Okay. But you are
12 suggesting -- okay. So that's a -- that's a --
13 a -- a straightforward answer. I appreciate
14 that.

15 But just to go back -- and this was
16 also a straightforward answer, which I
17 appreciate. But, in terms of opt-out, you're
18 basically saying opt out for anything. It's --
19 it's really the parents that get to decide --
20 you know, assuming that their beliefs are
21 sincere, right, it's really the parent that gets
22 to decide. It doesn't matter the kid's age,
23 doesn't matter sex, not sex. Doesn't -- doesn't
24 really matter this whole idea, I suppose, of
25 pressure or coercion. You know, if, like, just

1 looking at a book would be in conflict with
2 religious principles, that would be enough?

3 MR. BAXTER: Well, I would -- just to
4 be clear, under Yoder, the Court left open what
5 would happen if there were kids who objected.

6 But we know that these things -- you
7 know, schools around the country already have
8 these very broad opt-out policies across the
9 curriculum: in Hawaii for anything
10 controversial; in Arizona for anything that
11 parents find -- deem harmful.

12 And we just don't find these kinds of
13 cases or these kinds of burdens where parents
14 are bringing extreme examples. You know,
15 parents with kids really don't have a lot of
16 time to be suing the school board, and they're
17 looking for a reasonable compromise.

18 JUSTICE SOTOMAYOR: I'm sorry, I -- I
19 have a whole list of cases where parents have
20 objected to "biographical" -- I'm quoting --
21 "biographical material about women who have been
22 recognized for achievements outside of their
23 home" because some people believe women should
24 not work.

25 So too parents have objected to

1 teachers reading books featuring divorce,
2 interfaith marriage, or immodest dress. Forget
3 about the evolution because that's come too,
4 you've just said.

5 Are these all coercive?

6 MR. BAXTER: Well, again, it's whether
7 they -- whatever "coercive" means, they do
8 violate -- they do -- could create a burden.
9 This Court has defined "burden" very simply that
10 if someone is trying to exercise a sincere
11 religious belief and the government is
12 prohibiting or inhibiting their ability to
13 exercise, that creates a burden.

14 JUSTICE SOTOMAYOR: Just say if
15 someone's prohibiting just looking at something
16 that they object to, that that's burdening their
17 religion?

18 MR. BAXTER: Again, we don't see these
19 cases arise in -- in reality. And -- and --

20 JUSTICE SOTOMAYOR: For reality's
21 sake, you see interfaith couples all the time
22 walking around. You see interracial couples
23 walking -- walking around. You see women on
24 this Court in positions of work outside the
25 home.

1 MR. BAXTER: And no one here is
2 raising a -- a burden in that situation. We're
3 far beyond that where our indoctrination --

4 JUSTICE SOTOMAYOR: But people are
5 in -- but there are cases to that effect in
6 schools.

7 MR. BAXTER: And those cases, you
8 know, in --

9 JUSTICE SOTOMAYOR: So tell me where
10 you're going to draw the line --

11 MR. BAXTER: The --

12 JUSTICE SOTOMAYOR: -- other than
13 saying that if anyone objects to a book -- well,
14 you want more than that because the request here
15 is to instruct the school to tell you its
16 curricula, to guess at what you might find
17 offensive, and then let you opt out, because
18 that's the injunction you're asking for, isn't
19 it? You're asking for the ability for schools
20 to provide you with information about what's
21 being taught and, if you object to it on
22 religious grounds, to opt out.

23 MR. BAXTER: Your Honor, I see my
24 light is on. May I answer that question?

25 CHIEF JUSTICE ROBERTS: You may, yes.

1 MR. BAXTER: Your Honor, even under
2 Yoder -- without Yoder, under a Smith regime,
3 and, here, those things would trigger strict
4 scrutiny.

5 If you're in a regime where there's
6 direct discrimination, like we have here -- we
7 have students who are being told that they can
8 opt out for certain religious reasons but not
9 other religious reasons -- then that's always
10 going to get you to strict scrutiny.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 As far as simply looking at something,
14 looking at the image of Muhammad is a serious
15 matter for someone who follows that faith,
16 right?

17 MR. BAXTER: That's correct, Your
18 Honor. And Barnette already helps -- provides
19 some guidance on this, that forcing people to do
20 things that directly violate their -- their
21 faith violates the -- the Free Exercise Clause.

22 CHIEF JUSTICE ROBERTS: I don't know
23 how often it comes up in the schools, but our
24 religious -- religion clause jurisprudence does
25 have the element of sincerity.

1 MR. BAXTER: That's correct. There
2 has to be a religious belief. It can't be just
3 something that you disagree with for political
4 or philosophical reasons. It must be sincere.
5 There's also a substantiality requirement that
6 depends on the objective pressure that the
7 government's putting on you.

8 All of those things provide a
9 significant screen. And just we know from
10 history, from common sense and looking at what's
11 happened in schools that have these broad
12 opt-out policies, like Montgomery County itself
13 had prior to this lawsuit, anything that
14 violated your -- your beliefs, you could opt
15 out, and we didn't see these kinds of -- and
16 when they have come up, courts have dealt with
17 them in reasonable ways.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas?

21 JUSTICE THOMAS: I think you mentioned
22 Yoder a couple of times. Would you spend a
23 minute on how you -- Yoder would -- role it
24 would play in your -- in our analysis or should
25 play?

1 MR. BAXTER: Thank you, Your Honor.
2 Yoder looked in significant part at the
3 coerce -- unique coercive environment of the
4 public schools. It referred to the hydraulic
5 insistence on conformity that you find in
6 schools and removing parent -- children from
7 their parents for eight hours a day.

8 Here, we have a situation that's even
9 more egregious than in Yoder, where you have
10 children of an extremely young age being
11 indoctrinated in a topic that's known to be
12 sensitive -- every school in the country allows
13 opt-outs since sex ed has been introduced --
14 unique because of its capacity to evoke
15 curiosity in children, and a curriculum that's
16 designed to disrupt students' either/or thinking
17 on -- on sexuality and gender identity.

18 In Yoder, you had incidental
19 encounters with values that were contrary to
20 those of the Amish. And so, in many ways, this
21 case is easier than Yoder.

22 JUSTICE THOMAS: Whose interests are
23 we concerned with here? Is it the interests of
24 the children, or is it the interests of the
25 parents?

1 MR. BAXTER: Thank you, Your Honor.
2 We have named children, but for the preliminary
3 injunction, which, again, was filed two years
4 ago, we have raised the -- the rights of the
5 parents.

6 CHIEF JUSTICE ROBERTS: Justice Alito?

7 JUSTICE ALITO: You've made a very
8 broad argument here at times, and it might be
9 good, it might not be good, but let's focus on
10 what's actually at issue in this particular
11 case.

12 What are the ages of the children who
13 are involved here?

14 MR. BAXTER: These books were approved
15 for pre-K, which in Montgomery County can start
16 as early as 3 if they're going to turn 4 that
17 fall.

18 JUSTICE ALITO: And it goes up to
19 what?

20 MR. BAXTER: The -- the books that
21 we've all talked about go through grade 6.

22 JUSTICE ALITO: All right. So you're
23 talking about children maybe in the age of 5 to
24 11 or 4 to 11. Now would you agree that at a
25 certain age -- at that -- at a certain age,

1 students are capable of understanding this
2 point, which probably is not a point that can be
3 understood by a four- or five-year old, and that
4 is that my teacher, who is generally telling me
5 that certain things are right and that certain
6 things are wrong, isn't necessarily going to be
7 correct on everything? It is possible for me to
8 disagree with him or her on certain subjects?
9 Would you agree that there comes a point when a
10 student is able to make that distinction?

11 MR. BAXTER: That's right. And many
12 of our clients' objections would be diminished
13 as their children got older. But, here, we're
14 in a situation where Montgomery County's own
15 principals objected that these books were
16 inappropriate for the age, that they were
17 dismissive of religion and shaming toward
18 children who disagree. The Board itself
19 withdrew two of the books for what it said were
20 content concerns because it finally agreed that
21 what parents and petition -- and its own
22 principals were saying was accurate.

23 JUSTICE ALITO: Yeah. And one final
24 factor that may distinguish this particular case
25 from some of the others that you have been asked

1 to express a view about, and you did touch on
2 this, is the fact that it concerns sex and --
3 and gender and that the -- the Maryland
4 legislature itself has recognized these subjects
5 raise special concerns and has provided for an
6 opt-out from the health classes where these
7 matters are discussed.

8 MR. BAXTER: That's right. And,
9 currently, from -- in Montgomery County, you can
10 opt out from the very same instruction during
11 health class, but then you're required to stay
12 during -- during story time.

13 JUSTICE ALITO: All right. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor?

16 JUSTICE SOTOMAYOR: Counsel, a couple
17 of questions to clarify things.

18 Uncle Bob's Wedding, the character,
19 the child character, wasn't objecting to
20 same-sex marriage. She was objecting to the
21 fact that marriage would take her uncle away
22 from spending more time with her, correct?

23 MR. BAXTER: Again, it would be -- you
24 know, courts would be engaged in religious
25 discrimination entanglement if they --

1 JUSTICE SOTOMAYOR: I'm asking you to
2 answer my question. It wasn't that she was
3 objecting to gay marriage qua gay marriage,
4 period. She was objecting to having her uncle's
5 time taken by someone else?

6 MR. BAXTER: I'm not sure that's
7 correct, Your Honor. I think, for a child of
8 that age --

9 JUSTICE SOTOMAYOR: Then now we --
10 now --

11 MR. BAXTER: -- it's hard to express
12 what their actual concerns are.

13 JUSTICE SOTOMAYOR: Well, when the
14 character says "he'll have less time for me," it
15 seems self-evident, isn't it?

16 MR. BAXTER: You know, Your Honor,
17 I -- again, Montgomery County's own principals
18 objected to this --

19 JUSTICE SOTOMAYOR: All right. Now
20 let's go back to this question of age, okay,
21 and -- and what teachers are saying or not
22 saying.

23 Do you want a special rule for
24 children between kindergarten and sixth grade?

25 MR. BAXTER: Well, if the Court wanted

1 to go there, that certainly would make common
2 sense. Parents everywhere know that children
3 are especially vulnerable when exposed --

4 JUSTICE SOTOMAYOR: Where in our case
5 law would you see that as just mere age is
6 coercion -- exposure is mere coercion of a
7 certain age?

8 MR. BAXTER: Well, this Court has
9 frequently, you know, recognized that, for
10 example, children lack the maturity to make
11 decisions to discern sometimes between truth and
12 error, to weigh what their parents are saying
13 versus what their teachers are saying.

14 JUSTICE SOTOMAYOR: So, if some of
15 this objection -- you said you don't have an
16 objection to showing an interracial marriage.
17 You don't have an objection qua objection to
18 merely gay couples shown to -- to marrying as
19 long as you don't have approval of that? Is
20 that what you would object to?

21 MR. BAXTER: Well, Your Honor, again,
22 it would depend on the individual's beliefs.
23 And this Court has already held, for example, in
24 Bob Jones that the burden --

25 JUSTICE SOTOMAYOR: So, if none of

1 the -- all of the parents -- many of the
2 affidavits that the parents put here said they
3 don't mind teaching respect and kindness towards
4 people who are different. The objections appear
5 to be with some of the teacher instructions, the
6 ones having to do with altering the mind-set of
7 children or the ones talking about gender being
8 a guess at birth. Those were the things that I
9 saw the parents objecting to.

10 MR. BAXTER: The parents object to the
11 books and to the instructions. There's no
12 question that together --

13 JUSTICE SOTOMAYOR: We can look at the
14 record --

15 MR. BAXTER: -- and even separately
16 the books go to indoctrination more than
17 exposure.

18 JUSTICE SOTOMAYOR: We can look to the
19 record for that, correct?

20 MR. BAXTER: I'm sorry?

21 JUSTICE SOTOMAYOR: We can look to the
22 record for it?

23 MR. BAXTER: That's correct.

24 JUSTICE SOTOMAYOR: All right. Thank
25 you.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: I want to take you
3 back to some of the questions that Justice Alito
4 was asking because I too was struck by these
5 are, you know, young kids' picture books, and on
6 matters concerning sexuality, I suspect there
7 are a lot of non-religious parents who weren't
8 all that thrilled about this, and then you, you
9 know, add in religion, and -- and that's, you
10 know, even more serious.

11 But I guess I'm searching for what in
12 your legal arguments would allow us to draw
13 lines in this area, and I'm -- I'm -- I'm kind
14 of not finding it from what you were saying to
15 me in our earlier -- or -- or what you said to
16 Justice Alito because, when Justice Alito said
17 how about that 17-year-old, you said, well, many
18 parents' objections would decrease.

19 But that still indicates that if
20 that -- if a parent said no even with respect to
21 that 17-year-old, I still care about this, I
22 want an opt-out, you're not giving anything that
23 would allow lines to be drawn. And I'm just
24 curious if you think lines can be drawn and
25 where they would be drawn and on the basis of

1 what First Amendment doctrine they would be
2 drawn.

3 MR. BAXTER: We think there are lines
4 that can be drawn there, the same lines that
5 this Court has drawn in every other free
6 exercise case. And the burden -- a -- a
7 plaintiff has to show that its beliefs are
8 religious, that they are sincere, they have --
9 there has to be a substantial infringement
10 and -- or burden or pressure.

11 And then, on the strict scrutiny side,
12 there are also --

13 JUSTICE KAGAN: But I'm -- I'm -- I'm
14 hearing you saying that the burden that you're
15 saying -- and, of course, we're just assuming
16 that all these people have sincere religious
17 beliefs. Let's just assume that.

18 But what I'm hearing you saying is the
19 burden is basically up to the parent to decide
20 this conflicts with my religious beliefs, I want
21 an opt-out. Is that correct?

22 MR. BAXTER: Yes. And on the Sherbert
23 side, under strict scrutiny, they would have to
24 first show that there is a law that's not
25 neutral or generally applicable, so there's a

1 limit there.

2 And on the Yoder side, if this Court
3 didn't want to go all the way to address the
4 issues that aren't present in this case, it
5 could rely on the uniquely coercive environment
6 of -- environment of the schools.

7 And now putting those kinds of
8 issues --

9 JUSTICE KAGAN: Okay. So those --

10 MR. BAXTER: -- on the burden side --

11 JUSTICE KAGAN: -- those still, it's
12 like just pretty -- I mean, you're -- I'm really
13 searching for something, and I can -- I know
14 that you realize that, and you're still not
15 giving me anything other than, if it's in a
16 school and a sincere religious parent has an
17 objection, that objection is always going to
18 result in an opt-out --

19 MR. BAXTER: That's the first --

20 JUSTICE KAGAN: -- no matter how -- no
21 matter what the instruction is like, no matter
22 what the materials are, no matter how old the
23 kids are.

24 MR. BAXTER: And that's the rule that
25 schools everywhere in the country are -- are --

1 are working under right now. By their own
2 choice, that was Montgomery County's own rule
3 before this lawsuit came in. And there were
4 never these kinds of problems until it really
5 introduced a doc -- a curriculum that was
6 clearly indoctrinating students in things that
7 the principal said was introducing things as
8 fact that aren't fact.

9 JUSTICE KAGAN: Yeah, but once we
10 articulate a rule like that, you're going to
11 have a lot of parents, it seems to me -- I don't
12 think you can say just because it hasn't
13 happened, once we say something like what you're
14 asking us to say --

15 MR. BAXTER: Well --

16 JUSTICE KAGAN: -- it'll be like, you
17 know, opt-outs for everyone.

18 MR. BAXTER: Well, certainly, the
19 government always wants to put these things on
20 the burden side instead of the strict scrutiny
21 side.

22 We heard these arguments in Hobby
23 Lobby, where there was a lot of concerns about
24 what would happen, in O Centro, what would
25 happen with drugs. And -- and, in reality, we

1 didn't see those kinds of -- of floods happen.
2 And when they have, the courts have managed to
3 deal with them without any significant
4 difficulty.

5 JUSTICE KAGAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 JUSTICE GORSUCH: You've spoken a
9 little bit about Yoder today. I'd like to hear
10 your thoughts about the Smith side of the
11 argument and the Fourth Circuit's suggestion --
12 I think it's a fair reading of the footnote but
13 maybe not -- I'd like both sides to think about
14 this -- whether, if -- if you fail Smith's
15 neutral and generally applicable rule, whether a
16 plaintiff still has to show a substantial burden
17 or whether you go straight to strict scrutiny.

18 MR. BAXTER: I think you would just
19 have to go -- I mean, I think, at that point, if
20 you've shown lack of neutrality and general
21 applicability, you would still have to have an
22 injury, maybe something --

23 JUSTICE GORSUCH: For constitutional
24 Article III purposes?

25 MR. BAXTER: Exactly.

1 JUSTICE GORSUCH: But do you have to
2 show a substantial burden, or is -- is that law
3 that is not neutral, that discriminates against
4 religion auto -- does that go straight to
5 strict --

6 MR. BAXTER: I think the standing
7 injury would be sufficient, and here's an
8 example why. If you look at the Board's, for
9 example, revised diversity guidelines, they try
10 to draw a line between curricular activities and
11 extracurricular activities.

12 Yet they also say -- and this is at
13 674 of the appendix -- that you can opt out of
14 choir or band if you object to the religious
15 songs, even -- and if -- is that curricular or
16 extracurricular?

17 They also say on the extracurricular
18 side you can opt out from things like
19 Valentine's Day if you don't like the religious
20 overtones of that holiday.

21 But, when the -- when Sherwood
22 Elementary School announced that it was going to
23 read one book of the inclusivity books every day
24 in June for the month of moon -- for the month
25 of June to celebrate Pride Month, you couldn't

1 opt out.

2 So there's this discrimination where
3 you get -- some religious reasons get opted out,
4 some don't. There is these labels about
5 curricular, extracurricular, English and
6 language arts versus health. But, in the end,
7 it's the same -- the same thing, and some
8 students are getting opt-outs, and that -- and
9 some aren't. That discrimination alone is a
10 burden that gets us to strict scrutiny.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?

13 JUSTICE KAVANAUGH: A few questions.

14 What's your understanding of how the
15 surrounding counties are dealing with this,
16 Frederick County, Howard County, Prince George's
17 County, Anne Arundel County, and the like?

18 MR. BAXTER: Yeah, Carroll County, for
19 example, has taken the position that it will
20 teach inclusivity without indoctrinating
21 students. And so it's not introducing inform --
22 this ideology -- extreme ideology about gender,
23 whether your body says anything about your
24 gender, whether doctors guessed at your sex,
25 whether your pronouns change day to day based on

1 the weather or not, whether you should petition
2 for, you know -- you know, unisex bathrooms.
3 It's -- it's teaching inclusivity without
4 those -- that indoctrination.

5 And -- and our clients agree, every
6 student deserves to be respected and loved,
7 and -- and nobody disagrees with that. But you
8 don't do that by forcing others -- in fact,
9 religion is another one of the categories in the
10 equity regulation that is required to be
11 respected.

12 The principals, when they first
13 responded to this -- this curriculum, their
14 concern was for the religious students, that
15 they were going to be dismissed and shamed for
16 their beliefs.

17 JUSTICE KAVANAUGH: And I think you
18 just said this, but you're not seeking to
19 prohibit instruction in the classroom, you're
20 just seeking not to be forced to participate in
21 that instruction?

22 MR. BAXTER: That's correct.

23 JUSTICE KAVANAUGH: The term
24 "coercive," I think, has been used in some of
25 the colloquy, but the right term is "burden,"

1 isn't that correct?

2 MR. BAXTER: That's correct, Your
3 Honor. And -- and if you think about their
4 example of saying, like, the court -- the Fourth
5 Circuit said that, you know, the students were
6 never asked to change their religious beliefs.
7 Is it enough if you just ask them: Will you
8 change your religious beliefs? Or does there
9 have to be something more? I mean, that is
10 really not a workable standard.

11 And I -- you know, schools should not
12 be treated differently than any other government
13 entity as far as what their obligation is. And
14 it somewhat flips the Bill of Rights on its head
15 if we're worried more about extreme examples
16 that don't happen to protect the government from
17 the parents as opposed to parent -- protecting
18 the parents' fundamental rights to direct the
19 religious upbringing of their children.

20 JUSTICE KAVANAUGH: And then, in terms
21 of sincerity, in other words, if you're lying
22 about your religious belief, that can be
23 inquired into, but not the legitimacy, the
24 reasonableness, the acceptability, the
25 consistency. None of that -- a court has no

1 business questioning any of that about someone's
2 religious beliefs as I understand our case law.

3 MR. BAXTER: That's right, Your Honor.
4 In this case, again, the fact that the Board has
5 admitted that they would give opt-outs to
6 Muslims who object to their children viewing an
7 image of the Prophet Muhammad but not our Muslim
8 clients who object to their students reading
9 these books shows that that kind of analysis
10 would entangle courts in religious questions and
11 invite religious discrimination.

12 JUSTICE KAVANAUGH: And then I guess I
13 am a bit mystified as a life-long resident of
14 the county how it came to this.

15 Can you just tell us what happened
16 when -- in March of '23, you know, what -- what
17 happened in terms of the objections and how the
18 School Board responded to give us a little
19 bit --

20 MR. BAXTER: Well, I share your
21 concern. My kids graduated -- two of my kids
22 graduated from MoCo and were opted out when
23 they -- when they asked on their own accord to
24 opt out of some instruction on -- on sex
25 education.

1 And what happened is -- we're not even
2 entirely sure because, for the entire first
3 year, the Board promised in multiple places,
4 on -- on Fox News and other media, that parents
5 would be -- be notified and then they would be
6 opted out.

7 The last notice happened on March 22,
8 2023. The very next day, overnight, with no
9 explanation, the Board came out and said: We're
10 changing the rule because we -- because we want
11 every -- all students to be instructed on
12 inclusivity. That's at 547 in the appendix,
13 that emphasis on all students have to receive
14 this instruction, nothing about
15 administrability.

16 And then, from there on -- even then,
17 they said: If we've already told you you can
18 opt out, we'll let you do that, but new -- more
19 parents can't ask.

20 And then it wasn't until later in the
21 year when they actually revised their
22 guidelines, which still allow certain religious
23 opt-outs and just not others.

24 So this was clearly targeted at
25 religious parents objecting --

1 JUSTICE KAVANAUGH: But then
2 complaints were raised, right?

3 MR. BAXTER: That's right. Hundreds
4 of parents complained. These were mostly --
5 according to news articles, mostly families from
6 Muslim faith and Ethiopian Orthodox who were
7 objecting.

8 When they -- when they spoke to the
9 Board, the Board accused them of using their
10 religious beliefs as another reason to hate,
11 accused a young Muslim girl of parroting her
12 parents' dogma, and then accused the parents of
13 aligning with racist xenophobes and white
14 supremacists.

15 And so, again, there's no question in
16 this case that there is a burden, that it was
17 imposed with animosity, and that it's
18 discriminating against our clients because of
19 their religious beliefs.

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett?

23 JUSTICE BARRETT: So, counsel, we've
24 talked a lot about burden, and I'd like to get a
25 definition.

1 So Justice Sotomayor's questions, I
2 think, track what the Fourth Circuit said, which
3 is that compulsion is required.

4 That's not your position, that
5 compulsion is too far, right? So can you
6 precisely define for me what it means to have a
7 burden?

8 MR. BAXTER: Yes. I think there's
9 three main ways this Court has reviewed that.

10 Under Yoder, it would be: Is there
11 substantial interference with the parents'
12 ability to direct the religious upbringing of
13 their children? We think we've shown that here.

14 Under cases like Sherbert that have
15 continued through to Fulton, it's: Are the
16 parents being pressured to abandon or modify
17 their religious beliefs in order to access a --
18 a public benefit, like public education?

19 And then I think we also have what I
20 think Justice Gorsuch may have been suggesting,
21 just if there's straight-up discrimination,
22 where some religious students are opted out and
23 others aren't, then that itself would also be a
24 burden.

25 And I think we satisfy any one of

1 those tests.

2 JUSTICE BARRETT: Okay. I have
3 questions for you about those tests, but I'm
4 going to bracket them to just follow up on the
5 burden question.

6 Substantial interference from Yoder,
7 so would you say you could root it in that
8 because it's rooted in the case? Is it somehow
9 rooted in the definition of "prohibit" in the
10 First Amendment?

11 Because it seems to me that, you know,
12 the questions that you're getting are about line
13 drawing. I mean, Justice Kagan was making this
14 point. And one place where some of that line
15 drawing might happen is in the definition of
16 "burden."

17 So I think the definition of "burden"
18 is important, and, really, that's the -- the
19 main thing that's before us. The question of
20 whether you get an op-out -- opt-out really goes
21 to the Smith analysis or strict scrutiny under
22 Yoder. We don't even have to decide that,
23 right? We don't have to decide whether you get
24 the opt-out. We just have to decide if the
25 Fourth Circuit accurately defined what a burden

1 is.

2 MR. BAXTER: I mean, the Court doesn't
3 have to, it's true. I think there are multiple
4 reasons why this Court should.

5 JUSTICE BARRETT: I know you want us
6 to. But we don't have to.

7 MR. BAXTER: Correct.

8 JUSTICE BARRETT: Really, what we have
9 to do is nail down what it means to burden the
10 right, right?

11 MR. BAXTER: That's correct.

12 JUSTICE BARRETT: Okay. So
13 unreasonable interference, and you would root
14 that primarily in -- in Yoder for that strain of
15 the doctrine?

16 MR. BAXTER: Correct.

17 JUSTICE BARRETT: Okay. Now what kind
18 of a claim are you bringing? Are you bringing a
19 hybrid rights claim for purposes of Yoder? Are
20 you kind of bringing all of them, like a
21 straight-up free exercise claim, a Smith claim?
22 I mean, it's a little bit hard to pin down.

23 MR. BAXTER: Yeah, I think we're
24 bringing all of them. We think, in Smith, the
25 Court said that Yoder fell outside of its rule.

1 Excuse me. And -- and so we think that that's a
2 separate track. And whatever -- whatever the
3 Court meant by hybrid rights or other rights
4 that were at issue in -- in Yoder, we have those
5 same here, however you define that. This is
6 almost exactly the same situation where parents
7 are concerned about what their children are
8 being taught in the highly coercive environment
9 of the public schools. And -- and, here, we
10 have even more egregiously the curriculum
11 designed -- the Board said, when you select
12 these books, we want you to select books that
13 will disrupt cis-normativity, disrupt
14 hetero-normativity. And so we think that
15 whatever -- whatever Smith meant by hybrid
16 rights that were -- may have been at issue in --
17 in Yoder, we -- we meet that definition.

18 JUSTICE BARRETT: Do we have to
19 embrace the hybrid rights theory in order to --
20 to analyze your claim or your -- your definition
21 of burden for purposes of Yoder? Do we have to
22 say Yoder is about hybrid rights and -- and this
23 is why you satisfy that definition?

24 MR. BAXTER: I don't think so, Your
25 Honor. This Court, as recently as in Espinoza,

1 recognized Yoder as a case being about the free
2 exercise right of parents. The questions
3 presented in Yoder were all about free exercise.
4 And so I don't think that any side statements
5 that were made in Smith have to govern how this
6 Court treats that rule here.

7 JUSTICE BARRETT: Okay. And now let
8 me ask you about the burden in this case.

9 So there's been a lot of talk about
10 exposure. The Fourth Circuit said this is just
11 about exposure. You've pointed out, you know,
12 that in cases like, you know,
13 IntersectionAllies, there's actually in the
14 book -- you know, it -- it presents a world
15 view, right?

16 MR. BAXTER: And it says let's disrupt
17 the norms, that book.

18 JUSTICE BARRETT: Let's disrupt the
19 norms. And -- and -- and many of the books,
20 it's not just pictures; it's actually the text
21 is -- you know, it's talking about there are not
22 just two genders, embracing, you know,
23 non-binary and -- and pronouns, et cetera.

24 So that's exposure, though, to those
25 ideas. It's not just exposure to the pictures

1 of, you know, the two men getting married. It's
2 exposure to the ideas.

3 MR. BAXTER: That's correct.

4 JUSTICE BARRETT: But, to clarify,
5 what are your clients objecting to? Are they
6 objecting only to exposure, or are they
7 objecting to what they're calling
8 indoctrination?

9 MR. BAXTER: If, by exposure, you mean
10 having the books read to them, they do object to
11 that. They're not objecting to the books being
12 on the shelf or available in the library without
13 a teacher requiring them to read it or reading
14 it to them.

15 JUSTICE BARRETT: So you would not be
16 making the same claim based on your clients'
17 religious beliefs if they were just on the
18 shelves or just in the library?

19 MR. BAXTER: Correct.

20 JUSTICE BARRETT: Could another parent
21 bring that claim?

22 MR. BAXTER: I -- I suppose they
23 could, but then you would -- I mean, again, we
24 don't see these kinds of claims happening, but
25 they would almost certainly lose because it

1 would -- it would -- strict scrutiny would
2 easily be satisfied if every student were
3 allowed to say I want this book or not that
4 book. I mean, no -- no student has the right to
5 tell the school which books to choose or what
6 curriculum to teach or what other students will
7 have to learn.

8 And so we think that would easily --
9 those would easily fail under strict scrutiny.

10 JUSTICE BARRETT: Okay. So it's not
11 about exposure. It's not about books on the
12 shelf. It's not about books in the library.
13 It's about actually reading the books with the
14 text that communicates the ideas that are
15 contrary to your clients' sincerely held
16 religious beliefs?

17 MR. BAXTER: Right. Their beliefs --
18 they follow, for example, the papal exhortation
19 under Familiaris Consortio that they shouldn't
20 expose their children during their -- during
21 their innocent years to instruction on sex
22 that's disconnected or disassociated from moral
23 principles.

24 And so that's -- that's what
25 they're -- and, you know, the Mahmoud family,

1 they also have an objection to any kind of
2 discussion for young children outside of their
3 family circle, as do many families, as the
4 Court's noted.

5 JUSTICE BARRETT: Okay. And so I want
6 to talk about the public benefit analysis. So
7 the government frames this in terms of public
8 education as a public benefit, and your friends
9 on the other side do too.

10 And I'm just trying to figure out if
11 that's the right way to think about this
12 because, in Maryland, you're compelled to send
13 your children to public schools, and it's a
14 misdemeanor if you don't and you're fined if you
15 don't. And it's true that the statute gives you
16 an exemption to that compulsion if you choose
17 home-schooling or private school and, you know,
18 what is it, like, thorough and comparable --

19 MR. BAXTER: Right.

20 JUSTICE BARRETT: -- instruction?

21 But this isn't like a public benefit
22 like we apply for, you know, rubber tires for
23 our playground or, you know, we apply for a
24 license to engage in some kind of activity.
25 There's actually a compulsion here.

1 So is public benefit the right way to
2 think about this?

3 MR. BAXTER: Well, I think, if you --
4 if the Court does think about it in that
5 context, it's a much more valuable benefit than
6 just getting access to rubber tires or some of
7 the other things this Court has found burdened
8 religion. And so -- but also, I think the
9 coercive element is -- is adequate for this
10 Court to reach a conclusion in favor of my
11 client.

12 JUSTICE BARRETT: Well, which way do
13 you think it fits better? I mean, you're
14 compelled to send your child to public school on
15 pain of fine unless you take advantage of an
16 exemption. So it's just hard for me to see how
17 it's a public benefit in the same way that some
18 of our cases have talked about public benefit.
19 So which model -- I mean, I understand you don't
20 want to disclaim public benefit, but which way
21 do you think it fits best?

22 MR. BAXTER: Well, I think, certainly,
23 the Barnette example is a very good example of
24 where you're actually compelling children to do
25 things that are against their beliefs, and I

1 think that would be -- that's a very fitting
2 model for this case.

3 JUSTICE BARRETT: Okay. Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: So I guess I -- your
7 colloquy with Justice Barrett makes me wonder
8 whether this case is really the right vehicle to
9 evaluate any of these issues. I mean, how can
10 we say that you meet any definition of the
11 burdens -- Justice Barrett went over several
12 different versions of them -- when we don't even
13 know how these books are actually being used in
14 the classroom? I mean, this was what I
15 understood the Fourth Circuit's primary holding
16 to be, that the record is thread-bare. It
17 contains no information about how any teacher or
18 school employee has actually used any of the
19 books or what any child has been taught in
20 conjunction with their use.

21 And it seems that aspects of your
22 argument are turning on whether the books are
23 just on the shelves or whether students are
24 being taught. And so why wouldn't we wait until
25 we have a record regarding those things before

1 we make any legal pronouncements about what's
2 happening in this case?

3 MR. BAXTER: Well, two responses, Your
4 Honor. First, this is a preliminary injunction,
5 but if you think about the case, for example,
6 Brown versus, you know, Hot, Sexy, and Safe, is
7 that -- and I don't even want to describe what
8 happened in that case, but should that kind of
9 graphic sex simulation between -- with a
10 student --

11 JUSTICE JACKSON: No. I -- I --
12 but --

13 MR. BAXTER: -- and a teacher have to
14 happen before you bring a claim?

15 JUSTICE JACKSON: But I need you to
16 focus on my question. You -- this is -- this is
17 a preliminary injunction. I appreciate that.
18 When you seek a preliminary injunction, you
19 actually have to have a factual record that is
20 the basis for the court to make a determination
21 in your favor that some conduct that you're
22 complaining about needs to be enjoined.

23 And what's confusing to me and hard,
24 really hard, in this situation is that we have a
25 lot of sincerely held beliefs and concerns and

1 children and principals, and I see all of those
2 things and so really want to be careful about
3 making the pronouncement that relates to this.

4 I don't understand how we can do it on
5 this record because we can't know -- we don't --
6 we don't at this moment, based on the record
7 you've provided, know that these books aren't
8 just sitting on the shelves. And you've said
9 that if that's the case, that's not going to be
10 enough.

11 MR. BAXTER: I disagree, Your Honor.
12 The record is undisputed. And I again will
13 refer you to the district court transcript at
14 63, where counsel said that --

15 JUSTICE JACKSON: So you're saying the
16 Fourth Circuit is wrong when it says, "We don't
17 have any information about how any teacher or
18 school employee has actually used any of the
19 books?"

20 MR. BAXTER: The -- the -- the -- the
21 court of appeals did not dispute that some of
22 the books have to be used. And we have all --

23 JUSTICE JACKSON: No, I understand
24 that.

25 MR. BAXTER: -- of the teachers'

1 instructions that the Board's not disputed.

2 JUSTICE JACKSON: I understand that,
3 but the Fourth Circuit made a ruling that we
4 don't know "what any child has been taught in
5 conjunction with their use."

6 So are you saying that you do have
7 affidavits and information about teachers in the
8 classroom and what they've taught children of
9 different ages about these books?

10 MR. BAXTER: Yes, we do. The -- all
11 of our clients have -- in their declarations,
12 they describe which books are going to be read
13 to their children and why they asked it --

14 JUSTICE JACKSON: Were the clients in
15 the classroom?

16 MR. BAXTER: They were not in the
17 classroom, but they know -- in the end, we don't
18 have to wait until the injury has happened to
19 get relief. The point of a preliminary
20 injunction is that we can -- when -- when the
21 injury is imminent, we can seek relief --

22 JUSTICE JACKSON: All right. Let me
23 ask you another --

24 MR. BAXTER: -- to stop it from
25 happening before our children's innocence is

1 destroyed.

2 JUSTICE JACKSON: Let me ask you --
3 let me ask you another series of questions
4 because I'm just trying to understand the
5 implications of the rule that you want us to
6 reach on this record where we -- we're not
7 really sure what's going on.

8 Is your argument actually confined to
9 the content of the school's curriculum? I mean,
10 I appreciate that you say we're in the public
11 school, this is a uniquely coercive environment,
12 but what -- what if we have a teacher who is gay
13 and has a photo of a wedding on her desk? Is a
14 parent able or could they opt out of having
15 their student be in that classroom?

16 MR. BAXTER: Well, we think no because
17 the student -- you know, the student may have --
18 may claim a burden and that -- but the -- on the
19 question of -- the student doesn't have the
20 right to tell a teacher what to say. The
21 teacher has speech rights that would go again to
22 all those things --

23 JUSTICE JACKSON: But I guess I don't
24 understand that given your argument. I mean,
25 so, you know, Example 1, we have a gay teacher

1 in the classroom and they have a -- a wedding
2 photo on their desk, and the children are
3 exposed then to the same kinds of picture that
4 you say is in the book that you don't want
5 children to be exposed to.

6 What -- what about the parent -- the
7 teacher showing pictures from the wedding or the
8 teacher goes off to get married and comes back
9 and talks about their spouse? Do we have
10 opt-out provisions for children in that
11 situation?

12 MR. BAXTER: Again, we think the same
13 rules would apply. And if you were in a system
14 where --

15 JUSTICE JACKSON: The same rules would
16 apply. So this is not just about books. This
17 is about exposure to people of different sexual
18 orientations and the objection, the sincerely
19 held objection, that children shouldn't be
20 exposed to this?

21 MR. BAXTER: Again, our clients are
22 not raising those. And we know that these kinds
23 of objections aren't happening. Here, the Board
24 is imposing indoctrination on children --

25 JUSTICE JACKSON: What if -- what

1 if --

2 MR. BAXTER: -- that violates their
3 religious beliefs.

4 JUSTICE JACKSON: -- what if a student
5 group puts up "Love is Love" posters around the
6 school featuring same-sex couples or trans
7 youth? May parents -- do parents have to have
8 notice of this and the ability to opt their
9 children out of going into the parts of the
10 school where these posters are?

11 MR. BAXTER: Again, we don't think
12 that any child has the right to dictate what the
13 school does or what other students say on
14 campus.

15 JUSTICE JACKSON: No, they're not
16 dictating. They just want an opt-out. They
17 don't want their children walking in the --

18 MR. BAXTER: We think they would lose
19 on that -- in that situation.

20 JUSTICE JACKSON: Why? What -- what
21 about your principle does not also mean that if
22 we have a section of the school with "Love is
23 Love" posters and, you know, children who have
24 to go through there, what about your principle
25 says that a religious parent shouldn't be able

1 to say: I don't want my kid walking in that
2 part of the school?

3 MR. BAXTER: Well, they would lose
4 because the strict scrutiny analysis would favor
5 the Board in that situation, because it would be
6 impossible for the Board to have -- to satisfy
7 every student's needs about what's on the board.

8 Now, if you're in a situation where --

9 JUSTICE JACKSON: I'm sorry. It would
10 be impossible for them to -- to actually
11 implement an opt-out in that situation?

12 MR. BAXTER: That's right. So, if --
13 if -- if the request, for example, is so broad,
14 like it was in Yoder, that the only -- the only
15 option is for the students to be removed from
16 the school entirely, that would be then the
17 least restrictive means available. And so,
18 under normal strict scrutiny analysis, these
19 things would sort out in favor of the schools.

20 JUSTICE JACKSON: Can I give you one
21 more? What about a trans student in the
22 classroom? There's a student who's in the
23 class. Must the teacher notify the parents of
24 the student's existence and give them an opt-out
25 to not be in the same classroom with this child?

1 MR. BAXTER: No. And we've never said
2 that there is an independent right to be
3 notice -- for schools to anticipate what parents
4 might object to. But, when parents know
5 something, there could be a sincere religious
6 burden, but, again --

7 JUSTICE JACKSON: Yes, a parent knows.
8 A parent -- the child comes home and says there
9 is a trans -- a transgender child in my
10 classroom, and I know what you've taught me in
11 terms of religious teachings, I object to that.

12 Parent knows. Can a parent insist
13 that the school --

14 MR. BAXTER: Again, we think the
15 parent --

16 JUSTICE JACKSON: -- allow the child
17 to sit out?

18 MR. BAXTER: Again, we think the
19 parents would lose in that context.

20 JUSTICE JACKSON: All right. Let me
21 ask you one other set of questions about
22 coercion because Justice Kavanaugh points out
23 that -- that, you know, the test is burden.

24 I had understood that the way in which
25 this Court analyzed burden in these kinds of

1 cases is to look to coercion. So they really
2 aren't a separate thing.

3 And I guess what I'm really puzzling
4 over is that it seems to me that coercion in
5 this context is actually operating at two
6 different levels and that we have to kind of
7 really focus on that in order to understand
8 what's happening.

9 One is to the students in the
10 classroom, the coercion of being forced to be
11 exposed to these kinds of materials or these
12 kinds of things, or can they opt out.

13 But I think there's another coercion,
14 and you've touched on it a little bit, and that
15 is: Assuming that there's no opt-out in this
16 environment, are students being coerced into
17 being in that school at all?

18 And I think those two different ways
19 are really, really important. I mean, as I read
20 our cases, we could have set up a constitutional
21 framework in which all students are required to
22 attend public school. They have to go to public
23 school.

24 And I think, in that situation, you
25 would have a pretty strong argument that it

1 burdens a parent's religious exercise if the
2 public school teaches children things that
3 contradict the parent's religious beliefs.

4 Here I am, I'm a religious parent, I
5 have to put my kid in this school. And when my
6 kid goes there, it -- he's learning all sorts of
7 things that I'm saying against my religious
8 belief.

9 I -- I -- I get that. But what do we
10 do about the world that we're actually in, which
11 is where Pierce says that the parent can choose
12 to put their kid elsewhere, that you don't have
13 to send your kid to public school?

14 In that situation, I guess I'm
15 struggling to see how it burdens a parent's
16 religious exercise if the school teaches
17 something that the parent disagrees with. You
18 have a choice. You don't have to send your kid
19 to that school. You can put them in another
20 situation. You can home-school them.

21 How is it a burden on the parent if
22 they have the option to send their kid
23 elsewhere?

24 MR. BAXTER: Well, Your Honor, the
25 world we live in in this case is that most

1 parents don't have that option. They have two
2 working parents. They can't afford to send to
3 private school.

4 JUSTICE JACKSON: Yes, as a matter of
5 practicality, absolutely.

6 MR. BAXTER: And that's the reality
7 for our parents.

8 JUSTICE JACKSON: I understand. But,
9 in so many other constitutional doctrines, we
10 don't focus on whether people actually can
11 afford to protect their rights.

12 MR. BAXTER: Well, here, they're
13 forced --

14 JUSTICE JACKSON: In so many other
15 doctrines --

16 MR. BAXTER: -- they're forced to pay
17 for the public schooling.

18 JUSTICE JACKSON: No, I understand.
19 But, usually, we set aside and we say: But you
20 still have the right to get an attorney in a
21 civil case even if you can't afford it, right?
22 So we don't focus on whether or not they can
23 actually do it. They have an option.

24 And what I guess I'm worried about is
25 a world in which, when there is an option to

1 send your kid somewhere else, it seems to me
2 that these parents would be dictating what this
3 school does in the way that you say our cases
4 say they can't do, right?

5 MR. BAXTER: In Carson versus Fulton,
6 this Court never required coercion. The parents
7 were already paying tuition to go to the school.

8 In -- in -- in -- in all those cases,
9 Lukumi, the schools didn't really need tires.
10 They weren't being coerced to do anything.

11 This Court has always -- since
12 Sherbert -- Adele Sherbert, Thomas, they weren't
13 being coerced to do anything. They just were
14 being pressured to violate the religious
15 beliefs --

16 JUSTICE JACKSON: Thank you.

17 MR. BAXTER: -- in order to access a
18 benefit that's much less value than education.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Ms. Harris.

22 ORAL ARGUMENT OF SARAH M. HARRIS
23 FOR THE UNITED STATES, AS AMICUS CURIAE,
24 SUPPORTING THE PETITIONERS

25 MS. HARRIS: Mr. Chief Justice, and

1 may it please the Court:

2 When the government forces people to
3 choose between violating sincerely held
4 religious beliefs or foregoing a public benefit,
5 that burdens religious exercise.

6 In *Fulton*, offering foster care
7 contracts only to groups that would certify
8 same-sex couples burdened groups that believe
9 marriage is only between a man and a woman. In
10 *Sherbert*, offering unemployment benefits only to
11 people willing to work Saturdays burdened those
12 for whom Saturday is the Sabbath.

13 Here, Montgomery County offers a free
14 public education to parents only if their
15 children use books featuring same-sex
16 relationships and transgender issues. That
17 burdens parents of multiple faiths whose
18 religious duty is to shield their young children
19 from such content.

20 Public schools routinely accommodate
21 those burdens with opt-outs, which respect
22 families of many faiths and backgrounds.
23 Several states allow opt-outs from any learning
24 material on religious grounds. Montgomery
25 County allows many other opt-outs, just not

1 here.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Ms. Harris, is there
4 any daylight between your argument and
5 Petitioners' argument?

6 MS. HARRIS: Only as a matter of
7 emphasis. I think they're making a more varied
8 range of arguments with respect to sort of
9 parental rights as potentially a separate
10 strain.

11 Here, I think we all agree that,
12 certainly, one framework and the framework we're
13 advocating for is to view this as putting a
14 price on a public benefit of public education at
15 the expense of foregoing your religious beliefs.
16 Petitioners agree with that.

17 And we agree with Petitioners that the
18 fact that there is a long history of parents
19 controlling the religious upbringing of their
20 children in the school context is -- if
21 anything, just illustrates exactly why there's
22 an obvious burden here.

23 JUSTICE THOMAS: What role does Yoder
24 play in your analysis?

25 MS. HARRIS: Yoder is a textbook

1 example of parents being forced to choose
2 between paying a price, which is having to face
3 severe sanctions, potential sanctions for not
4 sending their children to school, or being able
5 to exercise their faith by preserving their
6 children -- their teenagers from being exposed
7 to worldly influences.

8 And, again, that was contrary to the
9 Amish faith, which prescribed that at ages 14
10 and older, that's the critical time for children
11 to be closer to home and not be exposed to the
12 worldly influences of high school.

13 So I think we're on all fours with
14 Yoder. If -- you know, the idea that we're just
15 talking about mere exposure here that is not
16 something that would be cognizable just sort of
17 runs flat in the face of that decision.

18 CHIEF JUSTICE ROBERTS: Your approach
19 focuses on, as articulated, sincere religious
20 beliefs. How -- how do you measure whether a
21 belief is sincere or not?

22 MS. HARRIS: Based on this Court's
23 cases, it's whether someone is expressing their
24 understanding of what their religion entails.

25 Thomas, I think, is this Court's sort

1 of canonical description of what it entails.
2 You don't ask: Does a majority of people of
3 your faith agree with you? You're just saying:
4 Does someone, based on their understanding of
5 what their religion is, believe this? And
6 they're not -- you know, they're not making
7 false representations.

8 And I think that's how this Court has
9 consistently applied the sincerely held
10 religious beliefs test. And there's no question
11 in this case that Petitioners would qualify. I
12 don't think anyone has challenged the sincerity
13 of their views.

14 CHIEF JUSTICE ROBERTS: Is there an
15 example in this particular case of a articulated
16 religious belief being rejected as insincere?

17 MS. HARRIS: In this particular case?
18 No, I don't -- I don't think there is an example
19 of that.

20 JUSTICE GORSUCH: Ms. Harris, you --
21 you've heard the discussion so far, and it's
22 focused in part on what qualifies as a
23 substantial burden.

24 At one end, you know, you might
25 imagine a book being in the library. At the

1 extreme other end, you might imagine a teacher
2 coercing a student to write a certain passage or
3 do a certain thing that's contrary to their
4 religious beliefs.

5 Where -- where in that spectrum do you
6 fall?

7 MS. HARRIS: We might not even fall in
8 the spectrum because I think the question is
9 not: Are you objectively looking at the world
10 and asking how does a child of a particular age
11 or outlook feel about a particular encounter
12 with a teacher or particular material?

13 It is, in the first instance, do
14 parents have a sincerely held religious belief
15 that their faith obligates them to shield
16 children from particular material? And I think
17 that's important because, if you take the
18 opposite approach and say, you know, people
19 should get in the business of thinking about are
20 four-year-olds more susceptible, are
21 16-year-olds sort of insulated, you start
22 slicing and dicing among different faiths. You
23 say that faiths that believe that four-year-olds
24 must be shielded might have a better right or
25 better -- better free exercise right than the

1 Amish, who believe, for instance, that it's
2 actually 14 that matters for their faith to
3 shield people.

4 And so I think that the concern with
5 religious discrimination is really, really
6 important in terms of the first step of defining
7 what a burden is.

8 JUSTICE KAGAN: But, if it's -- if --
9 if it's all about a sincerely religious parent
10 wanting to shield her child, then to take what I
11 think might be thought on some views as -- as
12 one end of the spectrum, you know, a book in the
13 library, right, and they say, well, my kid is
14 not shielded from this book because, you know,
15 there's library free time, and she could find
16 this book on the library shelves. What would
17 you do with that?

18 MS. HARRIS: Right. So what we do
19 with this is twofold. One is I think you have a
20 threshold state action question with respect to,
21 like, whether it's the child finding it, whether
22 it's the school making it available.

23 But, even setting that aside --

24 JUSTICE KAGAN: The school is making
25 it available.

1 MS. HARRIS: Separate --

2 JUSTICE KAGAN: The school is, like,
3 you know, deciding how to spend their money and
4 which books to buy and --

5 MS. HARRIS: Right.

6 JUSTICE KAGAN: -- put it on the
7 shelves.

8 MS. HARRIS: So I'll spot you that.
9 Just setting that aside, I think those kinds of
10 questions do cash out, as Petitioners are
11 saying, with respect to, if you get past Smith,
12 you end up in Smith -- assuming that you are in
13 strict scrutiny world, depending on the nature
14 of, like, whether the library allows opt-outs or
15 not, I think it does cash out on strict scrutiny
16 because we agree with Petitioners --

17 JUSTICE KAGAN: So you would get to
18 strict scrutiny, that sort of counts just
19 because you find some kind of conflict, a
20 religious parent saying no, I don't -- I -- my
21 kid would not be shielded from something that is
22 in conflict with my religion.

23 And so the only way for a school to
24 win that is in strict scrutiny land?

25 MS. HARRIS: Well, no. I think the

1 school could win in a couple of ways. One is,
2 if they have a generally applicable policy, they
3 don't allow opt-outs for anything, obviously,
4 they could be outside of -- they could be in
5 Smith world. But, assuming we're in strict
6 scrutiny world, this is how things work.

7 I think the way that it works is: Are
8 you saying that children -- that schools have to
9 operate as sort of policemen to make sure that
10 there's no child at any point in the day who
11 might run into a book or pages of a book that
12 violate their parents' religious obligations?
13 And I think then you're just in the same
14 territory as United States versus Lee or in
15 Fulton or in other cases that say, at the point
16 where you have a combination of -- you're
17 essentially forcing the school or the
18 institution to shoulder the burdens of reworking
19 the institution for -- and essentially giving
20 that one person a right to restructure it for
21 everyone else, that's not the kind of
22 accommodation that is permissible under strict
23 scrutiny. United States v. Lee is a good
24 example where, for the income tax --

25 JUSTICE KAGAN: Well -- I'm sorry. Go

1 ahead.

2 MS. HARRIS: Sorry. Income tax,
3 everyone accepted that the Amish carpenter at
4 issue in Lee had a sincerely held religion --
5 religious objection to Social Security taxes,
6 not part of their faith. But the Court said no,
7 you can't just say that you get to ensure that
8 everyone else doesn't pay their taxes or that
9 you get to essentially rewrite the income tax as
10 to everyone because you can't have a sort of
11 system like that.

12 Now we're in the opposite of that
13 world here because opt-outs with respect to
14 pieces of instruction, the entire curriculum,
15 with respect to extracurriculars, with respect
16 to everything else, are a sort of very
17 traditional feature of public schools and,
18 indeed, the means by which --

19 JUSTICE KAGAN: So, with respect to
20 all of those things that you just said --
21 curricular instruction, extracurriculars, blah,
22 blah, blah -- that does not raise the Lee issue
23 in your mind? You know, there --

24 MS. HARRIS: It doesn't.

25 JUSTICE KAGAN: -- there the opt-out

1 is necessary, you know, whatever you might think
2 about, you know, this is -- about the kids' age,
3 about the nature of the instruction, about
4 anything else?

5 MS. HARRIS: That's where we think we
6 draw the line, and I guess that would also --

7 JUSTICE KAGAN: I mean, there is no
8 line then?

9 MS. HARRIS: No, no, I think there
10 absolutely is a line. I mean, I think you --
11 we've heard hypotheticals with respect to can
12 you essentially veto someone else's children
13 being in a classroom? Can you veto a teacher
14 being in the classroom? Can you make sure that
15 no one else is being taught a particular book?

16 And those, in our view, again, Fulton
17 is a good example. Barnette too.

18 JUSTICE KAGAN: What -- what -- what
19 would happen if, like, an eight-year-old -- you
20 know, there's a -- a -- a -- a -- a part of the
21 school day where people show and tell and talk
22 about things that matter to them and to their
23 families, and an eight-year-old says: I want to
24 talk about, you know, having two moms? Would --
25 would another student be able to say: I'd like

1 to exercise my opt-out now?

2 MS. HARRIS: I don't think so because,
3 in that particular context, what you're talking
4 about is other students talking. Just as if
5 there's a lunchtime conversation among students
6 that raises various issues, schools do not
7 have -- schools and teachers and the board are
8 not engaged in state action just by not policing
9 everything that any student --

10 JUSTICE KAGAN: So --

11 MS. HARRIS: -- in the school says in
12 any part of the day.

13 JUSTICE KAGAN: Yeah. So it's just --
14 it's just what the teacher says?

15 MS. HARRIS: It's what the teacher
16 says, and, again, I guess I'd take it yet a
17 further level. So there's teacher liability,
18 and then, for the Board, of course, to be
19 liable, you have Monell issues with respect to
20 whether it's a policy. And just how this works
21 out practically, teachers --

22 JUSTICE KAGAN: And do you think it's
23 okay -- Mr. Baxter's answer to one of my
24 questions, he said, you know, he has no
25 objection to the fact that, you know, the school

1 would say, well, you know, you should leave the
2 room. And then, if the next thing is I don't
3 want to leave the room, I want to be in the
4 room, you know, the same way as everybody else
5 is, I just don't want them to be talking about
6 that, does that -- is that a claim?

7 MS. HARRIS: We agree with Petitioners
8 that would be -- that's just the same version of
9 the veto that we already talked about. That's
10 not a permissible -- that would fail under
11 strict scrutiny. That's not how opt-out works,
12 and I think it's very telling if --

13 JUSTICE KAGAN: Because the person
14 could say --

15 JUSTICE GORSUCH: Ms. --

16 JUSTICE KAGAN: -- like, I'm not
17 getting the same education, the same public
18 good, as everybody else is because I have to
19 leave the room.

20 MS. HARRIS: And I don't think that
21 happens as a matter of practice, and the reason
22 is, again, you have five states ranging from
23 Pennsylvania to Arizona, Utah, Hawaii,
24 Minnesota, that have very broad opt-outs, even
25 broader than any sort of constitutional rule

1 being proposed here, and you don't see people
2 saying I have a sort of right -- a state law
3 action to, like, a -- not have this particular
4 opt-out operate that way.

5 The way these have always worked is
6 you either are sort of -- sort of outside for a
7 brief period of time or you're offered some --
8 some sort of alternative. And, again, this is
9 not something that's hard for schools. It's
10 something that schools have done for a long
11 time. It is not a sea change.

12 And Respondents have the same problem,
13 which is, if you accept that it is some sort of
14 level of compulsion that triggers it, they're
15 accepting the same whole series of opt-outs and
16 alternatives too --

17 CHIEF JUSTICE ROBERTS: Thank --

18 MR. HARRIS: -- even in --

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas, anything further?

22 Justice Alito?

23 Justice Sotomayor?

24 JUSTICE SOTOMAYOR: The injunction
25 here sought by defendants asks for two things:

1 parents' notice and an opportunity to opt their
2 children out of reading, listening to, or
3 discussing the Pride storybooks.

4 The injunction presumably would
5 require what you say is not required, to take
6 the books off the shelf, correct?

7 MS. HARRIS: No, I don't think that's
8 what they're requesting at all. And Petitioners
9 seem to have disclaimed that. Petitioners are
10 saying they would like the ability to -- they
11 basically want the status quo ante.

12 JUSTICE SOTOMAYOR: To opt out from
13 forcing the child to read the book?

14 MS. HARRIS: So they want the child to
15 be --

16 JUSTICE SOTOMAYOR: But that's not the
17 words used here.

18 MS. HARRIS: Yes. They want the child
19 to be outside of the classroom if they -- if
20 they are exposed to the book. They want the
21 status quo ante that Montgomery County
22 previously offered.

23 JUSTICE SOTOMAYOR: All right. So --
24 but you're not objecting either to having the
25 books on the bookshelf in the classroom?

1 MS. HARRIS: We're -- we don't
2 understand that to be the claim here.

3 JUSTICE SOTOMAYOR: All right. Now
4 they also asked the court to "enjoin defendants
5 from denying them advance notice and opportunity
6 to opt their children out of any other
7 instruction related to family life or human
8 sexuality that violates the parents' or their
9 children's religious beliefs."

10 Is that an enforceable injunction?

11 MS. HARRIS: Is that an enforceable
12 injunction? I --

13 JUSTICE SOTOMAYOR: I don't know what
14 "related to family life" would mean. It could
15 be any picture, any book that talks about people
16 getting married.

17 MS. HARRIS: I -- I take it --

18 JUSTICE SOTOMAYOR: Interracial
19 couples.

20 MS. HARRIS: I think it's defined by
21 the contours of their particular claim and by
22 the way in which Montgomery County and the State
23 of Maryland have defined the topics.

24 JUSTICE SOTOMAYOR: We require
25 injunctions to be more precise than that.

1 MS. HARRIS: I think, regardless of
2 how the Court feels with respect to the
3 specificity of this injunction, it seems pretty
4 definite in the context of the case. And with
5 respect to the question presented, whether there
6 is a burden if parents are not able to have the
7 advance notice of opt-out of the material that
8 the religious obligations prohibit, that's a
9 clear burden.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?
11 Justice Gorsuch?

12 JUSTICE GORSUCH: The way you --
13 you've briefed the case, the government's
14 briefed the case, is as a public benefit case,
15 as you discussed.

16 Another way to think about the case,
17 as Justice Barrett was discussing with your
18 colleague, was through the lens of Smith and
19 whether the county's acted neutrally pursuant to
20 a generally applicable rule.

21 What are your thoughts about that? We
22 have some statements that Justice Kavanaugh
23 referenced from Board members to parents and
24 children, and we have opt-outs for all manner of
25 other kinds of considerations, for Valentine's

1 Day and Halloween and -- and other things.
2 Would that be another way to approach this case?

3 MS. HARRIS: It absolutely could be.
4 I think that the way it would work would be you
5 would find discrimination on the basis of
6 religion, not just that there was not a
7 generally applicable policy. So, obviously,
8 non-generality would be enough to get you out of
9 Smith.

10 But I take the Petitioners to be going
11 further and saying there's evidence in the
12 record of more like a Lukumi-like animus-type
13 claim where there is sort of the -- the only
14 explanation for the Board's shift is they did
15 not like the religious objections, they have
16 expressed hostility in various comments to
17 religion. So that is absolutely another pathway
18 the Court could go down.

19 And, again, we chose the public
20 benefits path because, on this particular
21 record, it seems particularly sort of clear that
22 parents have a sincerely held religious
23 obligation that is being denied in this context,
24 that would suffice to get to strict scrutiny and
25 sort of go through the rest.

1 JUSTICE GORSUCH: Oh, I'm sorry.

2 CHIEF JUSTICE ROBERTS: Sure.

3 JUSTICE GORSUCH: I have one other
4 question. Some -- some lower courts have taken
5 the view that even if you have a discrimination
6 against religion, so you fail the Smith test,
7 that you still have to show a burden, a
8 substantial burden, in addition to that. And
9 one might read a footnote in the Fourth
10 Circuit's opinion to suggest that.

11 Do you have thoughts about that?

12 MS. HARRIS: This Court has held in
13 cases, certainly, most recently in the Trinity
14 Lutheran -- Trinity that discrimination on the
15 basis of religion, if you are treating people of
16 faith worse or a particular religion worse or
17 discriminating in the Lukumi sense, that
18 triggers strict scrutiny.

19 JUSTICE GORSUCH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 JUSTICE KAVANAUGH: Just to be clear,
23 your position in this case is that you're not
24 seeking to alter the instruction in the
25 classroom or what's the content of the

1 classroom, you're only seeking not for this --
2 these children to be forced to remain in the
3 classroom, correct?

4 MS. HARRIS: Exactly.

5 JUSTICE KAVANAUGH: And then, if there
6 is a substantial burden, you get to the next
7 step of the analysis. Why do you think that
8 this is not generally applicable?

9 MS. HARRIS: Two sets of reasons.

10 One is that it's discretionary. So,
11 by definition, it's not generally applicable.
12 The Board can turn on a dime and change who gets
13 exemptions, what kinds of exemptions are
14 covered. And that's, in fact, the record here,
15 that they changed overnight as to what kinds of
16 exemptions they would allow.

17 And two, in terms of lack of general
18 applicability, is the patchwork of exemptions
19 they currently allow. They allow exemptions for
20 musical performances. They allow -- I think
21 they allow exemptions for dissection. They
22 allow exemptions for Halloween, for birthdays,
23 for any kind of religious observances on
24 Saturdays or Sundays that might interfere with
25 extracurriculars. The one thing they -- they

1 allow exemptions for sexual education in the
2 classroom components.

3 The one thing they don't allow is the
4 exemptions for the storybooks, and that is sort
5 of the hallmark of something that is not a
6 generally applicable policy.

7 JUSTICE KAVANAUGH: On your first
8 point there, the alternative one about changing
9 the policy, couldn't that be said about every
10 policy that exists, even one that has no
11 exemptions at all? Oh, well, they could change
12 it tomorrow, therefore, it's discretionary,
13 therefore, strict scrutiny?

14 How -- how would you answer that?

15 MS. HARRIS: I would answer that by
16 saying that the Court has looked at sort of
17 legislation and other sort of binding -- things
18 that are binding differently and said, you know,
19 if you have a law that says there's no
20 exceptions, it's a different situation from if
21 a -- if the decisionmaker tomorrow just retains
22 flexibility.

23 I mean, think -- if you think about
24 Fulton, the way in which the Court thought about
25 case-by-case discretion in that case, if you

1 have a decisionmaker who can just say: I'm
2 going to, in my discretion, reverse course,
3 decide to give you a one-off opt-out or a
4 categorical opt-out tomorrow, it seems hard to
5 see why that would be generally applicable.

6 And, again, the fact that the Board
7 did something similar to that here seems to
8 suggest --

9 JUSTICE KAVANAUGH: We don't need to
10 suggest that here, I suppose --

11 MS. HARRIS: No.

12 JUSTICE KAVANAUGH: -- because of the
13 exemptions that exist for other things makes it
14 not generally applicable in your view?

15 MS. HARRIS: Yes.

16 JUSTICE KAVANAUGH: And then, on
17 strict scrutiny, why does the county fail strict
18 scrutiny?

19 MS. HARRIS: The county fails strict
20 scrutiny because the question is whether the
21 county has a compelling interest. Here, their
22 asserted interest appears to, first and
23 foremost, be in administrability and not
24 granting opt-outs to the Petitioners. That's
25 the way the courts framed the burden analysis in

1 Fulton and Yoder, and so it's key to sort of not
2 granting the exemptions.

3 And it is very, very hard even on this
4 sort of preliminary injunction record to
5 understand why it is not administrable to offer
6 the opt-outs in this particular context that
7 they used to offer but offer a host of opt-outs
8 for virtually everything else under the sun and
9 not have all the same concerns flooding forward,
10 especially given that they have, in addition to
11 the things that they have identified in their
12 policy, conceded that they would need opt-outs
13 for things like exposure to images of the
14 Prophet Muhammad or any instances where
15 classroom instruction rose to the level of
16 compulsion under their view.

17 And so I think their line-drawing
18 problems really would doom any kind of attempt
19 to satisfy strict scrutiny.

20 JUSTICE KAVANAUGH: Is the United
21 States aware of any other school board in the
22 country that's done something like this?

23 MS. HARRIS: We aren't. I can't vouch
24 for it not happening. But I think, more
25 relevantly, we're aware of many, many states and

1 school districts that take the opposite tack and
2 allow opt-outs far beyond any kind of
3 constitutional rule that would be adopted in
4 this case.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 JUSTICE BARRETT: Ms. Harris, so
9 there's a lot of concern about line drawing and
10 what this would mean, and maybe some of that
11 would be handled under strict scrutiny or
12 under -- or under Smith. I mean, it's not
13 saying that anybody wins or loses if we're just
14 talking about initial steps.

15 But, to the point of line drawing, is
16 there a way -- let's imagine that the Court
17 decided that there was a burden here, that a
18 free exercise right was triggered, that the
19 government thinks we should be careful about to
20 not implicate other things.

21 I'm thinking about what if a teacher
22 was transgender and the student was very
23 respectful to the teacher but didn't want to use
24 the pronouns and the parents didn't want the
25 child to use the pronouns. Like, say, you know,

1 call the teacher "Mister," you know, when she
2 was transgender -- when the teacher was
3 transgender. Same for a student in the
4 classroom.

5 You know, those might present
6 different -- different issues that would be more
7 difficult. So is there something that the
8 government has in mind that would be some
9 limiting principle?

10 MS. HARRIS: Yes. So just to take the
11 limiting principle first and then your pronoun
12 hypothetical second.

13 With respect to the limiting principle
14 on what a burden is, I think it's almost -- this
15 is the easy case because you have parents'
16 religious obligations, and the obligations
17 encompass being exposed to material and it's
18 just an outright prohibition.

19 But I think Professor Girgis's article
20 is actually a very good guide to different kinds
21 of burdens that might arise in this context or
22 or others that wouldn't qualify.

23 So take the hypothetical of parents
24 want to opt out from school for a month to take
25 their kids on a religious pilgrimage. If your

1 faith is indifferent to doing so in September
2 versus during, like, spring break or summer
3 recess, you don't have a burden on your
4 religious exercise because you have equally
5 available or alternative means of doing your
6 religious exercise that don't require the
7 opt-out and don't require -- don't really put
8 you to the choice that we're talking about.

9 So, when you're thinking about things
10 that aren't sort of the prohibition on exposure
11 things, I think there are real teeth in this
12 doctrine. And there's a lot of hypotheticals
13 that you can think of in the school context that
14 would implicate that.

15 With respect to your pronouns
16 hypothetical, I actually think that's a case
17 that raises even more concerns in the sense that
18 you also have -- and this is what the court of
19 appeals cases bear out -- compelling --

20 JUSTICE BARRETT: Speech.

21 MS. HARRIS: -- potential compelled
22 speech concerns with respect to you're requiring
23 everyone else in the classroom -- first of all,
24 free exercise issues, but also compelled speech
25 issues -- to refer to a particular person by

1 pronouns. That's how the cases are kind of
2 getting litigated out in the lower courts right
3 now.

4 JUSTICE BARRETT: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: I guess, in
8 following up on that, I'm just not sure I
9 understand your answer.

10 So is it a burden for a religious
11 student who is being taught at home and through
12 their religion that gender is not a situation
13 that can be changed, people should not be in a
14 transgender circumstance, is it a burden for
15 them to be in a public school classroom where
16 the teacher is referring to another student by
17 what this student believes is the wrong pronoun
18 or whatever?

19 MS. HARRIS: Well, I think the
20 relevant burden there would be the parents'
21 religious exercise, as we have conceived of,
22 like, the -- the -- the -- the -- the nature of
23 the religious beliefs in this particular case.

24 As Petitioners note, you could also
25 have questions with respect to the student's

1 free exercise rights. I think that's a
2 particular question.

3 JUSTICE JACKSON: Right. So is it a
4 burden on the parent to have their child in a
5 classroom with a transgender student and the
6 teacher is referring to them by pronouns that
7 the parent thinks is inappropriate?

8 MS. HARRIS: I mean, I think, even
9 under Respondents' view, that that would, in
10 fact, constitute a burden on religious exercise,
11 and here's why. It is a burden on religious
12 exercise in the parents' view because you are --
13 because not only do they have a religious
14 obligation to ensure that their children are not
15 sort of exposed to the idea that you must sort
16 of recognize people's pronouns in that
17 particular way, but I think, even under
18 Respondents' view, there's a level of compulsion
19 or affirmation of a particular view of -- of how
20 someone's pronouns should -- should work.

21 JUSTICE JACKSON: And it doesn't
22 matter that the parent could send their kid to a
23 different school because they don't like this
24 environment?

25 MS. WILSON: I mean --

1 JUSTICE JACKSON: I mean, they're --
2 they're being -- they're -- they're not -- you
3 agree that they're not being compelled to
4 actually go to that school where this sort of
5 thing is happening that they disagree with?

6 MS. HARRIS: I think two points on
7 that. One is that actually shows the burden
8 because you're being forced to forego the
9 benefit of a public education and pay for a
10 private school.

11 JUSTICE JACKSON: Well, we'll get to
12 that. I'm just trying to understand --

13 MS. WILSON: Yeah, I think that's a
14 problem.

15 JUSTICE JACKSON: I'm trying to
16 understand. So you're saying, even -- even if
17 the parent has a choice to put their kid in
18 another environment that doesn't do the kind of
19 thing that they object to, it's still a burden
20 if they opt to put their parent -- their child
21 in this environment?

22 MS. HARRIS: Absolutely, unless you
23 want to overturn Barnette --

24 JUSTICE JACKSON: All right. Well --

25 MS. HARRIS: -- because Barnette too,

1 I think, had that same choice.

2 JUSTICE JACKSON: -- let me ask you
3 about -- this is following up on that choice.
4 So is it really confined to the public school
5 context?

6 So, in that same scenario about
7 foregoing a benefit, what -- what if the
8 government puts up ads on public transportation
9 that informs the public that the clerk's
10 office -- the government's clerk's office
11 performs and certifies gay marriages? And this
12 is on a bus. This is on the subway. And
13 children can see these ads that are talking
14 about state-sponsored gay marriages.

15 And what I guess I'm trying to
16 understand from your argument is whether it
17 substantially burdens the religious exercise of
18 parents whose religions teach that marriage is
19 between a man and a woman to ride on those -- to
20 have those ads displayed on public
21 transportation.

22 MS. HARRIS: Yeah, I would just add
23 caveats with respect to, like, how the
24 government's speech inquiry would -- would sort
25 of cash out in that context and what kinds of

1 challenges you can bring to transit.

2 But I would just say, as a more
3 general matter, our position is not limited to
4 the idea that if there are other contexts -- I
5 mean, if there are other contexts, like, take
6 Bowen, where you're being forced to use Social
7 Security numbers by the government and that
8 violates --

9 JUSTICE JACKSON: No, I want this
10 context. I want the answer to --

11 MS. HARRIS: Okay. But I'm just
12 saying, like, the answer's going to be yes in
13 terms of, like --

14 JUSTICE JACKSON: The answer's going
15 to be yes. So -- so the --

16 MS. HARRIS: In terms of it applies in
17 the government context.

18 JUSTICE JACKSON: So I don't -- I
19 guess I don't understand how that -- how that
20 squares with our cases about not making the
21 government change its position or do things just
22 because of your religion.

23 I mean, we have a public bus, and the
24 person can choose not to ride the bus if they
25 don't want their children exposed to the ads

1 that are on the bus.

2 But you seem to be saying that because
3 the bus is a public good, the religious parent
4 has the right to tell the bus people and the
5 state that they have to take those ads down --

6 MS. HARRIS: Sorry.

7 JUSTICE JACKSON: -- because they
8 don't want their children to be exposed to them.

9 MS. HARRIS: I need to be more precise
10 in terms of how I'm answering the
11 hypothetical --

12 JUSTICE JACKSON: Yes.

13 MS. HARRIS: -- versus the general
14 extension of the cases outside the school
15 context. We obviously think that the range of
16 you can't be forced to forego a public benefit
17 extends beyond the school context because the
18 Respondents are asking for the reverse, to
19 confine it to everywhere except for the school
20 context.

21 With respect to your hypothetical, I
22 think you're getting into the question of how
23 far does, like, the Lyng decision extend with
24 respect to government property. Can you force
25 people --

1 JUSTICE JACKSON: No. I just want --
2 I'm just trying to find a public benefit. You
3 have schools, you say, is a public benefit that
4 parents are being forced in a way -- they're --
5 they're to give up if they want to have an
6 environment that their children --

7 MS. HARRIS: Right.

8 JUSTICE JACKSON: -- is not exposed to
9 these sorts of ideas. I'm just trying to find
10 an analogous public --

11 MS. HARRIS: Okay.

12 JUSTICE JACKSON: -- benefit outside of
13 the school context and ask you whether your
14 position is that it substantially burdens the
15 rights of religious parents if there are
16 advertisements on a public bus that say things
17 that they don't want their children exposed to.

18 MS. HARRIS: So, again, I think, at
19 the first stage of the burden inquiry, it
20 depends on whether you're in a Lyng category of
21 cases where you're saying I'm essentially
22 burdened by something that's on government
23 property or you're in the sort of stage here,
24 where we're -- where we're -- we're not talking
25 about that context.

1 But just to abstract out -- outside of
2 that, there are obviously going to be contexts
3 besides the school context in which we would
4 agree that there is a burden. Again, I think
5 Bowen is really the best example, where parents
6 would be -- if -- if you take the Bowen
7 hypothetical that was reserved, parents are
8 forced to use Social Security numbers to get
9 benefits, right, to apply for various things.
10 That burdens their religious exercise.

11 So, yes, it applies in those contexts,
12 but I think that is a -- that's sort of a
13 feature of this Court's jurisprudence because
14 this Court has not said that public benefits
15 can't be burdened at the price of --

16 JUSTICE JACKSON: But isn't a feature
17 of our jurisprudence that we haven't said before
18 that mere exposure to these sorts of things
19 create burdens? I mean, I understand that most
20 of our jurisprudence in this area is about
21 forcing people to affirm, you know, the pledge
22 of allegiance, forcing people to go to the
23 public school.

24 It would be one thing if the state in
25 my hypothetical said everybody has to ride this

1 bus, just like the state used to say everybody
2 has to go to public school, the Amish have to go
3 to public school --

4 MS. HARRIS: Okay.

5 JUSTICE JACKSON: -- past 16, but if
6 you have an option to do something else, I guess
7 I'm just worried about suggesting that exposure
8 to things you disagree with in a situation in
9 which you have an option not to expose yourself
10 to that because you can do something else counts
11 from the standpoint of substantial burden.

12 MS. HARRIS: So two points. One is I
13 think -- because there's two concepts in here.
14 One is with respect to the concept of, like,
15 "mere exposure" versus beliefs. I think that
16 line is not a line that can be held without
17 discriminating on the basis of religion. I
18 think, if you had a situation where, let's say,
19 Ms. Sherbert believed that she couldn't view
20 images of the Prophet Muhammad, that the only
21 options for her Saturday employment for whatever
22 reason involved seeing that or involved
23 employment that would have violated her -- her
24 obligation not to view other things that are
25 religiously objectionable to different faiths, I

1 think it would be the same setup. It wouldn't
2 matter that it's unemployment benefits versus a
3 school context.

4 Now second issue with respect to can
5 you avoid it through other means, I think this
6 Court in Fulton confronted a very similar
7 situation. The Court did not say, Catholic
8 Social Services, you have a mission that's
9 religiously motivated of making sure you provide
10 for the needy of Philadelphia. Instead of doing
11 so through foster care placements, you have lots
12 of other ways to serve those children, so go off
13 and do so, even though the -- the only means of
14 serving foster care children through
15 Philadelphia required violating their sincerely
16 held religious beliefs in terms of performing
17 same-sex marriages.

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Schoenfeld.

22 ORAL ARGUMENT OF ALAN E. SCHOENFELD

23 ON BEHALF OF THE RESPONDENTS

24 MR. SCHOENFELD: Mr. Chief Justice,
25 and may it please the Court:

1 Every day in public elementary school
2 classrooms across the country, children are
3 taught ideas that conflict with their family's
4 religious beliefs. Children encounter real and
5 fictional women who forego motherhood and work
6 outside the home. Children read books
7 valorizing our nation's veterans who fought in
8 violent wars. And children in Montgomery County
9 read books introducing them to LGBT characters.
10 Each of these things is deeply offensive to some
11 people of faith, but learning about them is not
12 a legally cognizable burden on free exercise.

13 Adopting Petitioners' view of the case
14 would conscript courts into playing the role of
15 school board, a task for which this Court has
16 recognized they are ill suited. And a
17 constitutional requirement to provide opt-outs
18 from anything someone finds religiously
19 offensive would mean public schools must find
20 alternative classrooms, supervision for young
21 students, and substitute lessons each time a
22 potentially offensive topic arises. That is not
23 what the Constitution requires, particularly
24 given the special characteristics of the school
25 environment.

1 This Court has made clear that
2 exposure to offensive ideas does not burden free
3 exercise, and it has held that the government is
4 not required to do its daily work in ways that
5 make it easier for parents to raise their
6 children in the faith.

7 Given the diversity of religious
8 beliefs in America, Petitioners' rule would
9 require courts to adjudicate an infinite variety
10 of curriculum challenges brought by parents with
11 different religious beliefs. That is not
12 hypothetical, as 40 years of litigation on these
13 issues makes clear.

14 The books at issue here, five among
15 hundreds in the curriculum, are meant to foster
16 mutual respect in a pluralistic school
17 community. MCPS makes explicitly clear that
18 students do not need to accept, agree with, or
19 affirm anything they read or anything about
20 their classmates' beliefs or lives. The lesson
21 is that students should treat their peers with
22 respect.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: Couldn't you solve
25 those differences simply by restoring the

1 opt-out?

2 MR. SCHOENFELD: Your Honor, I -- I
3 think, in this case, the record makes clear that
4 the school district did try to honor the
5 opt-out, and at some point, it became
6 infeasible. Certainly, there are circumstances
7 where the right decision a school board might
8 make in view of the particular needs of a
9 community is to offer the opt-out. It's a
10 different question from whether it's
11 constitutionally required.

12 JUSTICE THOMAS: How would you
13 distinguish your case, this case, from Yoder?

14 MR. SCHOENFELD: I think Yoder
15 involved a religious obligation that adherents
16 remove themselves physically from society. So
17 what was at issue there was the conflict between
18 the Yoders' sincerely held religious beliefs
19 that they needed to remove their children from
20 society in order to provide them with the
21 vocational training that the religion required,
22 and that conflicted with Wisconsin's criminal
23 compulsory education law.

24 Yoder was a very clear application of
25 Meyer and Pierce that simply went to the

1 parents' right to determine where their children
2 would be execute -- educated and not anything
3 about what would go on in the schools. And
4 Yoder, in fact, makes clear that it wasn't
5 opining on the question of parent -- of whether
6 parents have any prerogative to dictate the
7 discrete aspects of the curriculum, a
8 clarification both Meyer and Pierce before Yoder
9 themselves made.

10 JUSTICE THOMAS: So the -- so Yoder is
11 a complete withdrawal of the students from
12 school. And you say that's not as drastic as
13 picking and choosing certain messages that the
14 parents don't think their kids should hear?

15 MR. SCHOENFELD: Precisely. And,
16 again, I think Yoder was a direct application of
17 Meyer and Pierce. Meyer and Pierce said 50
18 years before that parents get to decide whether
19 to enroll their children in public schools. And
20 Yoder simply recognized the right of the old
21 order Amish to withdraw their children from
22 school at age 18.

23 Meyer, Pierce, and Yoder are all very
24 clear that they are not offering any opinion on
25 what the rights of parents are once they enroll

1 their children in public schools for precisely
2 that reason. It becomes infinitely more
3 complicated to honor parents' individual
4 religious beliefs once they're in the public
5 school environment.

6 JUSTICE THOMAS: Well, why wouldn't
7 you -- why wouldn't a parent argue that the
8 opt-out is a more specific version of Yoder
9 because you're simply opting them out of
10 specific programs as opposed to the entire
11 school program?

12 MR. SCHOENFELD: It may be for one
13 parent that that is a more narrowly tailored
14 approach. But the question presented here is
15 whether it constitutes a burden to be exposed to
16 this sort of instruction. And when parents have
17 a right to invoke the Free Exercise Clause to
18 shield their children from all manner of
19 offensive curriculum, I think it becomes
20 infinitely more complicated.

21 CHIEF JUSTICE ROBERTS: Counsel, you
22 said that nothing in the policy requires
23 students to affirm what's being taught or what's
24 being presented in the books.

25 Is that a realistic concept when

1 you're talking about a five-year-old? I mean,
2 do you -- do you want to say you don't have to
3 follow the teacher's instructions, you don't
4 have to agree with the teacher? I mean, that
5 may be a more dangerous message than some of the
6 other things.

7 MR. SCHOENFELD: Well, there -- there
8 are express directives in the support materials
9 that Montgomery County provided along exactly
10 those lines. But, Your Honor, I would point the
11 Court to Barnette, where the kids were young,
12 they were 8 and 10, and the Court made a
13 distinction between being required to pledge
14 allegiance and affirm a belief in a graven image
15 in that case and merely being required to remain
16 passive during the pledge ceremony and being
17 instructed on what the pledge was, what the flag
18 was, and what it meant.

19 CHIEF JUSTICE ROBERTS: Well, that's a
20 particular ceremony, which I think I would sort
21 of put aside when we're talking about the basic
22 instruction here, you know, read this or this is
23 what it -- what it shows on an issue that
24 presents serious religious objections for -- for
25 the parent.

1 So, I mean, I understand the idea when
2 you're talking about a sophomore, a junior,
3 whatever, in high school, you know, where the
4 point is you want to -- to sort of push back on
5 some of this. But I'm not sure that same
6 qualifying factor applies when you're talking
7 about five-year-olds.

8 MR. SCHOENFELD: Well, so, if that's
9 relevant to the question, Your Honor, then I
10 think that the line that we advocate between
11 exposure and coercion is the relevant one. And
12 there may be circumstances where, given the age
13 of the student or given the particular
14 presentation of information in the classroom, a
15 plaintiff may be able to make out a case that
16 their child is being coerced.

17 But the Court, I think, has to accept
18 what Montgomery -- what Montgomery County sort
19 of represents as the basis for the presentation
20 of this curriculum.

21 And what's in the record are
22 directives to say, for example: I understand
23 that is what you believe, but not everyone
24 believes it. In any community, we'll always
25 find people with beliefs different from our own,

1 and that's okay. We can still show them
2 respect.

3 That's exactly --

4 JUSTICE GORSUCH: Counsel -- counsel,
5 on -- on -- on that score, the exposure line --
6 versus coercion line that you asked us to draw,
7 how does that play out in -- in the case of the
8 Muhammad image for a Muslim student? I didn't
9 see you answer that in your brief.

10 MR. SCHOENFELD: So -- so I -- I think
11 we do answer it in the brief. But, to answer
12 the question directly, assuming that the
13 prohibition is on viewing a visual depiction of
14 the Prophet Muhammad, in those circumstances,
15 the school is coercing an individual to act
16 contrary to a religious belief.

17 JUSTICE GORSUCH: Even though just
18 being exposed to the image?

19 MR. SCHOENFELD: The -- the -- the
20 exposure --

21 JUSTICE GORSUCH: So the exposure
22 there is coercion in your view?

23 MR. SCHOENFELD: I think it's the
24 difference between exposure to ideas --

25 JUSTICE GORSUCH: Uh-huh.

1 MR. SCHOENFELD: -- and activity that
2 coerces you to engage in -- in -- in conduct
3 that is in violation of your belief.

4 JUSTICE GORSUCH: So --

5 MR. SCHOENFELD: So when --

6 JUSTICE GORSUCH: -- the idea is the
7 image of the Prophet --

8 MR. SCHOENFELD: I think the image is
9 the image. In other words, if there were a
10 book --

11 JUSTICE GORSUCH: So it's an image
12 that makes the difference rather than an idea?

13 MR. SCHOENFELD: I think it's conduct
14 that makes the difference. And I think this is
15 an important distinction.

16 So, if there were a book that
17 described someone drawing an image of the
18 Prophet Muhammad, I don't think a parent would
19 have the ability to object even given the
20 religious prohibition at issue on simply being
21 exposed to the idea that people might depict the
22 image of the Prophet Muhammad.

23 Being required to view the depiction
24 of the Prophet Muhammad, in contravention of a
25 religious objection, is being required to engage

1 in conduct --

2 JUSTICE GORSUCH: Well, the child is
3 sitting passively and the teacher's just reading
4 a -- a storybook.

5 MR. SCHOENFELD: I -- I think, if the
6 storybook features the depiction of the Prophet
7 Muhammad --

8 JUSTICE GORSUCH: Yes.

9 MR. SCHOENFELD: -- that is a
10 compulsion to engage in conduct that violates
11 your religious belief.

12 JUSTICE GORSUCH: Okay.

13 MR. SCHOENFELD: Now, again, I think
14 what's important here is that this goes simply
15 to the question of whether the right is being
16 burdened. It's very hard --

17 JUSTICE GORSUCH: No, I -- I
18 understand that. Okay.

19 MR. SCHOENFELD: But it's very --

20 JUSTICE GORSUCH: Counsel, I do
21 understand that.

22 MR. SCHOENFELD: Okay.

23 JUSTICE GORSUCH: I have a slightly
24 different question.

25 And -- and you say this is only about

1 exposure, but we also have in the record some
2 guidance materials for teachers and one of which
3 is, if a student says that a boy can't be a girl
4 because he was born -- born a boy, a teacher is
5 to respond: That comment is hurtful, and we
6 shouldn't use negative words to talk about
7 people's identities.

8 Is that just -- is that exposure, or
9 is that something else for a three- to
10 five-year-old?

11 MR. SCHOENFELD: So two points on
12 that, Your Honor. The first is that the record
13 is seriously underdeveloped on whether and how
14 these support materials are used. These were
15 recommended potential answers for questions that
16 students might pose. There's nothing in the
17 record about whether any teacher --

18 JUSTICE GORSUCH: Okay. Let's say a
19 teacher does as instructed, though, and -- and
20 uses that. Is that exposure, or is that
21 coercion in your world?

22 MR. SCHOENFELD: I think that as Your
23 Honor has recited it, it is exposure to
24 particular ideas and teaching students to be
25 civil in the classroom.

1 There are certainly circumstances
2 where use of that script in a particular context
3 could give rise to a claim of coercion.

4 If, for example -- and, again, I think
5 the distinction between exposure and coercion is
6 one that's quite familiar to the Court. The
7 Court undertook precisely that analysis in
8 Kennedy and in Town of Greece versus Galloway.

9 JUSTICE GORSUCH: I'd like to talk
10 about Kennedy and -- and -- and maybe
11 Masterpiece a little bit too, where -- forget
12 about Yoder and substantial burden -- the Court
13 focused on, in -- particularly in Masterpiece,
14 the -- the statements of those involved in --
15 in -- in the policy.

16 And -- and, here, we have some
17 statements from Board members suggesting the
18 students were parenting their -- their
19 parents' -- parroting their parents' dogma,
20 suggesting that some parents might be promoting
21 hate and suggesting that it was unfortunate that
22 they were taking a view endorsed by white
23 supremacists and -- and xenophobes.

24 I didn't see you directly address
25 those comments in your brief, and I -- I just

1 want to give you an opportunity to do so here
2 and ask you: Does that suggest a hostility
3 toward religion akin to what we found in
4 Masterpiece? And why wouldn't that be enough to
5 trigger strict scrutiny on its own?

6 MR. SCHOENFELD: In the first place,
7 the question of whether there's a burden, I
8 think, is a relevant starting point, and so I
9 don't think we get to Smith or strict scrutiny.

10 JUSTICE GORSUCH: Well, we found in
11 Smith and -- you know, in Smith, if you're not
12 neutral, if you're expressing discrimination
13 towards religion, and in Masterpiece, if you're
14 expressing this kind of hostility toward
15 religion, you go to strict scrutiny. And we
16 don't need to get into all the rest of these
17 coercion versus exposure and -- and dog -- and
18 doctrine about what constitutes a substantial
19 burden.

20 MR. SCHOENFELD: Respectfully, I think
21 those cases, there -- there was a clear burden
22 in each of those cases.

23 So, as the question comes before the
24 Court on how you define the burden, I think that
25 still needs to be answered before you get into

1 any of the anterior parts of --

2 JUSTICE GORSUCH: So you take the view
3 that even if you have a non-neutral policy, and
4 even if it was motivated by hostility toward
5 religion, and even though the parents claim a
6 burden, you still have to somehow meet an
7 additional objective substantial burden test?

8 MR. SCHOENFELD: Correct. I think
9 that there is a prerequisite for any --

10 JUSTICE GORSUCH: Okay. Let -- let --
11 I got your answer. I appreciate that.

12 Do you -- do you want to comment about
13 those remarks and -- and -- and -- and -- and
14 what they represent?

15 MR. SCHOENFELD: Certainly. I think
16 the position of the Board with respect to this
17 policy is clear. The Board adopted neutral
18 policies where it allowed opt-outs for all
19 reasons, including religious reasons, in a
20 sincere effort to accommodate the viewpoints of
21 all of the members of the community.

22 It tried that. It failed. It was not
23 able to accommodate the number of opt-outs at
24 issue. It then adopted an entirely neutral
25 policy where no opt-outs were permitted.

1 I think some of those comments have
2 been taken out of context. I think many of them
3 post-date the actual withdrawal of the opt-out
4 right by the School Board. And --

5 JUSTICE GORSUCH: So I understand that
6 some of them were in response to a parents
7 meeting after the withdrawal. So do you want to
8 defend them at all or -- or have any explanation
9 for them, that it isn't based on hostility
10 toward sincerely held religious beliefs?

11 MR. SCHOENFELD: Your Honor, my -- my
12 answer is that I think the statements speak for
13 themselves. They are taken largely out of
14 context, I think, in Petitioners' brief.
15 They're certainly --

16 JUSTICE GORSUCH: Do you have context
17 you wish to give them?

18 MR. SCHOENFELD: I -- they are
19 intemperate statements. I don't deny that. I
20 think the question of whether they motivated the
21 School Board to adopt a policy that
22 discriminates against people on the basis of
23 religion is not borne out by the record.

24 And, finally, I'd just point out that
25 in -- I -- I apologize, Justice Barrett.

1 JUSTICE BARRETT: Oh, no, no, that --
2 finish your answer.

3 MR. SCHOENFELD: No. Please go ahead.

4 JUSTICE BARRETT: Okay. I -- I just
5 wanted to ask: So there's been some question
6 about the record and whether these were just
7 books on the shelf or whether they were actually
8 used in the classroom.

9 How could it be that the opt-out
10 policy became unmanageable if they weren't part
11 of the instruction? Because, if they were just
12 on the shelf and the parents sought an
13 injunction saying we don't want to be taught,
14 then, presumably, that's no big deal. You'd
15 say: Okay, fine, you don't -- you're not going
16 to be taught. There's nothing to opt out of
17 because they're just on the shelf.

18 MR. SCHOENFELD: Certainly. There
19 were certainly classrooms in the -- there were
20 certainly classrooms where the books were read
21 out loud, where they were pulled off the shelf
22 by a student and the student read it with a peer
23 or many peers. They were used in the classroom
24 the way that any book is read in a third- or
25 second-grade classroom.

1 JUSTICE BARRETT: And so that -- that
2 is in the record, that they were used in the
3 classroom.

4 And it is in the record that the
5 teachers had this discussion material in -- in
6 the, you know, IntersectionAllies, you know, the
7 discussion guide is actually part of the book.
8 You know, the explanations about gender and --
9 and -- and all of that sort of thing are not
10 even part of the separate instructional
11 materials but part of the book itself.

12 All of that is in the record, right?

13 MR. SCHOENFELD: Absolutely. So, with
14 respect to how the supporting materials, even
15 the ones that are an adjunct to the book, like
16 IntersectionAllies, absolutely in the record.

17 What's also in the record in the -- in
18 the Hazel declaration is that some use of the
19 books was required. Do I know how it was
20 actually used in all of the classrooms in 130
21 elementary schools? No. But the expectation is
22 that they're going to be used just as any other
23 curriculum material is used.

24 JUSTICE BARRETT: So it seems to me
25 then that, really, the -- the lack of a record

1 matters most if compulsion is the standard,
2 right?

3 MR. SCHOENFELD: Absolutely.

4 JUSTICE BARRETT: Because, if
5 compulsion is the standard, then I can see why
6 we would need more in the record about, you
7 know, if -- if it really is required that the
8 teacher would have to ask a student to renounce
9 beliefs or to abandon beliefs in some way, then
10 we would want to see record evidence.

11 But, if it's not compulsion, if it's
12 interference in the way that your friend on the
13 other side has articulated it, then it seems to
14 me we have that in the record because we have
15 the books being read in the classroom. It's not
16 mere exposure.

17 MR. SCHOENFELD: So I think exposure
18 to ideas in the classroom, whether they come in
19 the form of a teacher reading a book to a
20 student or a student reading a book to a fellow
21 student, that is certainly on our side of the
22 line between exposure and coercion.

23 There is a set of facts where the
24 presentation of the material in the classroom
25 might give rise to coercion.

1 JUSTICE BARRETT: Well, it's not just
2 exposure to the idea, right? If it's
3 exposure -- if it's presentation of the idea as
4 fact, that's different, right?

5 MR. SCHOENFELD: I -- I don't --

6 JUSTICE BARRETT: It's not just some
7 people think. That's -- that's exposure. Some
8 people think X. Some people think Y.

9 It's saying: This is the right view
10 of the world. This is how we think about
11 things. This is how you should think about
12 things. This is like 2 plus 2 is 4.

13 MR. SCHOENFELD: I disagree with that
14 characterization of the record. So I think that
15 in --

16 JUSTICE GORSUCH: Well, let's --
17 let's -- let's say that is in the record, okay?
18 Let's say it's not just some people think X,
19 other people think Y; we live in a pluralistic
20 society, period. Let's say it is some people
21 think X, and X is wrong and hurtful and
22 negative.

23 Is that -- I mean, that -- that --
24 that's more than exposure, I think, on your
25 theory.

1 MR. SCHOENFELD: That is more -- more
2 than exposure, and those facts may well be
3 relevant to a coercion claim. I don't think
4 that is what the record bears out.

5 JUSTICE BARRETT: But, if it's not
6 coercion -- you know, let's say that I think
7 it's something less than coercion. You -- you
8 concede that that would show, you know,
9 interference with, hindering of a parent's right
10 to --

11 MR. SCHOENFELD: I don't because I
12 think the parent's right to shield their
13 children from offensive curricular materials is
14 no greater than the child's right to be free
15 from offensive curricular materials. And if, on
16 our theory of the case, children have no right
17 to be shielded from offensive curricular
18 materials that share a view that conflicts with
19 their religious belief, parents don't have a
20 greater right then to shield their children
21 from --

22 JUSTICE KAVANAUGH: Counsel, can I --

23 JUSTICE ALITO: Can I ask you --

24 JUSTICE BARRETT: Can I ask you --

25 CHIEF JUSTICE ROBERTS: Justice Alito?

1 JUSTICE BARRETT: I just -- I just
2 have -- oh, sorry.

3 CHIEF JUSTICE ROBERTS: Go ahead.

4 JUSTICE BARRETT: I just have one
5 question to follow up. I just wanted to ask you
6 quickly about this idea of whether this is a
7 public benefit or compulsion given the
8 compulsory attendance law.

9 Is it kind of your position that
10 because parents have the right to send their
11 children to private school or to home-school
12 that that in and of itself is the opt-out?

13 MR. SCHOENFELD: No, that's not a
14 position we've taken here. I do -- the
15 compulsory education analysis has always been
16 part of this Court's coercion inquiry. So, in
17 Lee versus Weisman and Santa Fe, the fact that
18 the children who were enrolled in this public
19 school were required to be there for the
20 graduation ceremony, and there's a lot of
21 discussion about whether it is or is not, I
22 think the compulsory nature of public education,
23 where a student is enrolled in public school, is
24 relevant to whether there is coercion. It is
25 one factor among others.

1 The fact that a student who is
2 enrolled in a public school and needs to be
3 there is exposed to offensive ideas simply goes
4 to the question of whether we're right that
5 exposure to ideas, regardless of whether they
6 conflict with religious belief, constitutes a
7 burden on free exercise.

8 JUSTICE BARRETT: So it --

9 CHIEF JUSTICE ROBERTS: Justice -- oh.

10 JUSTICE BARRETT: -- doesn't matter to
11 you that you could go to a religious school or
12 private school or home-school for purposes of
13 the analysis, the legal analysis?

14 MR. SCHOENFELD: For purposes of the
15 analysis, correct.

16 JUSTICE ALITO: Mr. Schoenfeld, could
17 I make sure I understand what you mean by
18 coercion? You say in your brief that there are
19 three things that cannot be done. The state
20 cannot say you can't go to a private school or a
21 religious school. The state cannot say you must
22 affirm certain beliefs. And the state cannot
23 say that unless you -- that -- that you're going
24 to be disqualified from benefits because of your
25 religious beliefs.

1 Is that the universe? Those are the
2 three situations in which there's coercion?

3 MR. SCHOENFELD: No, Your Honor. I
4 think the -- what this Court said in Lyng is
5 that coercion is found when there's a tendency
6 to coerce individuals into acting contrary to
7 their religious beliefs.

8 So, for example, in the --

9 JUSTICE ALITO: So it -- it goes
10 further -- it goes further than that. So
11 suppose a school says we're going to talk about
12 same-sex marriage and same-sex marriage is legal
13 in Maryland and it's a good thing, it's moral,
14 it makes people happy, same-sex couples form
15 good families, they raise children. Now there
16 are those who disagree with that. Catholics,
17 for example, they disagree with that. They
18 think that it's not moral, but they're wrong and
19 they're bad, and anybody who doesn't accept that
20 same-sex marriage is normal and just as good as
21 opposite-sex marriage is not a good person.

22 Now what if -- what if that is what
23 the teacher -- the school teaches students?

24 MR. SCHOENFELD: I think that's
25 absolutely coercion. I think where I -- where I

1 found the line between exposure and coercion in
2 your presentation, Justice Alito, was this is
3 the state of the law in Maryland and elsewhere
4 in the United States. People can fall in love,
5 get married, even same-sex couples. Some people
6 believe in it. Catholics don't believe in it.

7 And then it stopped. And then it was
8 directly derogatory of a particular set of
9 religious beliefs. It was avowedly so, and that
10 I think under any fair reading would -- would
11 give rise to a coercion or a discrimination
12 claim.

13 JUSTICE ALITO: So you can -- the
14 school can teach students certain moral
15 principles that are highly objectionable to
16 parents and that's okay?

17 MR. SCHOENFELD: Yes.

18 JUSTICE ALITO: They can't opt out?

19 MR. SCHOENFELD: That -- that does not
20 burden their free exercise. There's no
21 constitutional requirement of completeness in
22 these contexts. A school could easily teach
23 that evolution is one theory and it is the
24 correct theory, and I don't think there's any
25 constitutional problem with that.

1 Certainly, if a student taking a test
2 said you've taught me about evolution, here are
3 the principles of evolution, I'm reciting them
4 to you, but I don't agree with that and my faith
5 teaches me differently, no teacher would
6 penalize the student for saying that, and if the
7 teacher did, that would certainly give rise to a
8 coercion claim.

9 JUSTICE ALITO: Now let me -- the
10 opposite end of your spectrum of possibilities
11 is exposure, which you talk about over and over.
12 What does that mean? I would think that
13 exposure -- and we can take the example of
14 same-sex marriage again. Exposure is telling
15 the students that there are a lot of people who
16 marry a person of the opposite sex, there are
17 also people who marry a person of the same sex.
18 Period. Leave it at that. That's exposure.

19 If you go beyond that, is it still
20 exposure?

21 MR. SCHOENFELD: It depends on the
22 context. I mean, I think Uncle Bobby's Wedding
23 is teaching third graders or second graders
24 precisely that. It's telling it through a
25 story. And the fact that in that case it's

1 Uncle Bobby and Jamie rather than, in Uncle
2 Peter's Chinese American wedding, it's Uncle
3 Peter and his wife --

4 JUSTICE ALITO: Well, don't you
5 think -- and Justice Sotomayor and I were
6 discussing this before, and we could have a --
7 you know, we could have a book club and have a
8 debate about how Uncle Bobby's marriage should
9 be understood.

10 But I think it clearly goes beyond
11 that. It just -- it doesn't just say that Uncle
12 Bobby and Jamie are getting married. It
13 expresses the idea subtly, but it expresses the
14 idea this is a good thing.

15 "Mommy, said Chloe, I don't
16 understand, why is Uncle Bobby getting married."

17 "Bobby and Jamie love each other, said
18 Mommy. When people" -- "When grownup people
19 love each other that much, sometimes they get
20 married."

21 I mean, that's not sending -- subtly
22 sending the message this is a good thing?

23 MR. SCHOENFELD: I think that's a way
24 of a mother consoling her daughter who's annoyed
25 that her favorite uncle is distracted and

1 doesn't have time for her. But, even if the
2 message were some people are gay, some people
3 get married, I don't think there's anything
4 impermissibly normative about that.

5 It is a story that is being used to
6 teach students that, just as in the 99 of the
7 100 books that we read about couples, it's a man
8 and a woman, there also may be a man and a man.

9 JUSTICE ALITO: I mean, why -- why is
10 the Montgomery County Board of Education in this
11 argument running away from what they clearly
12 want to say? They have a view that they want to
13 express on these subjects, and maybe it's a very
14 good view, but they have a definite view, and
15 that's the whole point of this curriculum, is it
16 not?

17 MR. SCHOENFELD: I -- I -- I'm not
18 running away from anything the Board has used to
19 defend this. I think what's in the record is
20 that the Board wants to teach civility and
21 respect for difference in the classroom.

22 There is obviously an incidental
23 message in some of these books that these life
24 choices and these lifestyles are worthy of
25 respect. I don't know how you can teach

1 students to respect each other without teaching
2 that. If the book were about, you know, Uncle
3 Bobby's wedding, they get married, and the rest
4 of it is that was awful, then there would be a
5 serious equal protection violation in the
6 presentation of that curriculum.

7 So the incidental message that these
8 things ought to be normalized and treated with
9 respect, I think, is simply part of the work
10 that the school is doing in cultivating respect
11 in a pluralistic school.

12 JUSTICE ALITO: Well, the -- the
13 plaintiffs here are not asking the school to
14 change its curriculum. They're just saying,
15 look, we want out. Why isn't that feasible?
16 What is the big deal about allowing them to opt
17 out of this?

18 MR. SCHOENFELD: So a couple of
19 answers. I think, on the facts of this case, we
20 have the natural experiment of the schools
21 permitting these opt-outs and then finding that
22 it was not administrable. It wasn't true in
23 every school.

24 JUSTICE ALITO: Well, why is it not
25 administrable? You have -- they're able to opt

1 out of the health class, right?

2 MR. SCHOENFELD: The health class is
3 taught discretely. There's -- there's a --
4 there's a meeting, mandatory meeting, for all
5 parents where they are told exactly what's going
6 to be taught in it and they're given the option
7 of opting out of the unit of instruction, not
8 the particular --

9 JUSTICE ALITO: Well, that's how you
10 define the unit of -- of instruction. You could
11 define the unit of instruction to include the
12 reading of these storybooks.

13 MR. SCHOENFELD: And that's not
14 compelled as a matter of Maryland state law.
15 The Maryland state --

16 JUSTICE ALITO: It's not compelled as
17 a matter of state law, but why should it not be
18 compelled as a matter of the -- the Free
19 Exercise Clause of the First Amendment?

20 MR. SCHOENFELD: I don't think --

21 JUSTICE ALITO: There's nothing --
22 what is infeasible about doing that?

23 MR. SCHOENFELD: So, again, I think
24 the experience of the schools with respect to
25 these five books show that it was infeasible.

1 And let me give you an example. Let's say the
2 school, a -- an exquisitely competent and
3 well-resourced school, is able to say on Tuesday
4 at 9:00 we're going to read Uncle Bobby's
5 Wedding, we're going to make arrangements for
6 alternative space, we're going to give suitable
7 supervision for our six-year-olds, and we're
8 going to give them an alternative assignment
9 that accomplishes the same ELA goals. Let's say
10 that happens, right? That they were able to
11 pull off.

12 The next week, someone says: That was
13 my favorite book ever. I'm going to pull it off
14 the shelf and I'm going ask Alan to sit down and
15 read it with me. What happens then? The
16 teacher can't simply summon a librarian to come
17 to the school, say those were the kids who opted
18 out of that lesson last week --

19 JUSTICE ALITO: Well, I -- I -- I
20 don't think you're really answering my question.
21 Why can't this all be put -- we're going to read
22 Uncle Bobby's Wedding and these other books, but
23 we're going to read it during a period of time
24 that includes the health class, and children are
25 already able to opt out of that, so they can opt

1 out of reading these books.

2 MR. SCHOENFELD: I think there's no
3 constitutional obligation to treat these books
4 that introduce people to LGBT characters in a
5 curriculum that is meant to teach about
6 different matters.

7 JUSTICE KAVANAUGH: I'm not
8 understanding why it's not feasible. The county
9 had an opt-out. You said every other school
10 board in the country has opt-outs for all sorts
11 of things. The county has opt-outs for all
12 sorts of things. The other Maryland counties
13 have opt-outs for all sorts of things.

14 And yet, for this one thing, they
15 changed in mid -- midyear and say no more
16 opt-outs. I'm just not understanding
17 feasibility.

18 MR. SCHOENFELD: So, again, I think
19 what's in the record is that with respect to
20 these books as they were deployed in the
21 classroom, there was high absenteeism in some
22 schools, for example, dozens of students being
23 opted out in -- I think Mr. Baxter said the
24 average size of a -- of an elementary school in
25 Montgomery County is 700 students. So each

1 grade has 125. If you have dozens of students
2 walking out, making arrangements for those
3 students to have adequate space and supervision
4 and alternative instruction, I think, is -- is
5 infeasible. And that's --

6 JUSTICE KAVANAUGH: But then they do
7 it for all sorts of other opt-outs.

8 MR. SCHOENFELD: They don't do it for
9 all sorts of other opt-outs. There's a limited
10 universe of things that students can opt out
11 from. The family life and healthy sexuality
12 curriculum stands alone. It is mandated by the
13 state. It is something where you're able to
14 predict precisely when the curriculum is going
15 to be deployed. There's a four --

16 JUSTICE KAVANAUGH: It's the most
17 similar substantively to what we have here, and
18 there's an opt-out allowed there.

19 I guess I'm not understanding why
20 Montgomery County School Board stands alone, I
21 think, in the country. You can tell me if
22 there's another school board that's done
23 something like this in both --

24 MR. SCHOENFELD: I -- I don't -- I
25 apologize.

1 JUSTICE KAVANAUGH: -- in both the
2 kind of books that are being used and
3 prohibiting opt-outs.

4 And I guess I'm just not
5 understanding. The whole goal, I think, of some
6 of our religion precedents is to look for the
7 win/win, to look for the situation where you can
8 respect the religious beliefs and accommodate
9 the religious beliefs while the state or city or
10 whatever it may be can pursue its goals.

11 And, here, they're not asking you to
12 change what's taught in the classroom. They're
13 not asking you to change that at all. A lot of
14 the rhetoric suggests that they might have --
15 that -- that they were trying to do that, but
16 that's not what they're trying to do.

17 They're only seeking to be able to
18 walk out so that they don't have -- so the
19 parents don't have their children exposed to
20 these things that are contrary to their own
21 beliefs.

22 MR. SCHOENFELD: I understand, Your
23 Honor. And there may well be circumstances
24 where a school can -- or a school district can
25 engineer the win/win.

1 Montgomery County schools tried to
2 accomplish an educational goal of introducing
3 these books for a particular purpose. They then
4 attempted to accommodate religious opt-outs in
5 the school, and they weren't able.

6 JUSTICE JACKSON: Mr. Schoenfeld, what
7 is that purpose?

8 I mean, I thought the answer to
9 Justice Kavanaugh's question was that the School
10 Board was explicit that the books were to be
11 used only to supplement the English language
12 arts curriculum as reading instruction and not
13 to teach about gender or sexuality.

14 So it wasn't as though the books were
15 being introduced for the purpose of enhancing
16 the gender and sexuality component --

17 MR. SCHOENFELD: Absolutely.

18 JUSTICE JACKSON: -- and, therefore,
19 people can opt out of that whole thing.

20 It was that we're talking about
21 English here. And, in addition to the other
22 kinds of picture books we have on the shelf and
23 we talk about in class, we're going to introduce
24 these books as well.

25 I think that seems pretty infeasible

1 in English, when you're talking about reading
2 instruction, that every time this particular
3 kind of book comes out, we have to start letting
4 people leave the classroom.

5 MR. SCHOENFELD: I agree with you.
6 And I think it goes beyond the readings of the
7 book because -- as Justice Sotomayor quoted the
8 language sought in the injunction.

9 I do think that in the context of a
10 classroom, where one student is having a
11 discussion with another, or a student comes in
12 from the playground and asks the teacher to
13 define a particular concept, or someone said my
14 brother's transgender, what does that mean, I
15 think those are all within the scope of the
16 right that the Petitioners are urging here and
17 would require the sort of accommodation that
18 they want --

19 JUSTICE KAVANAUGH: I don't think --

20 JUSTICE GORSUCH: Counsel --

21 JUSTICE KAVANAUGH: -- they're talking
22 about anything student on student.

23 JUSTICE GORSUCH: Yeah.

24 JUSTICE KAVANAUGH: So I --

25 MR. SCHOENFELD: So --

1 JUSTICE KAVANAUGH: -- I disagree with
2 what you just said, that that's within the
3 scope.

4 MR. SCHOENFELD: -- I -- I disagree
5 with you. I understand why there -- they might
6 read it that way, but I think in -- if you think
7 about the way a third-grade classroom operates
8 and you think about the fact that there are some
9 students sitting in the corner and they say:
10 This is a great book, I'm going to take it off
11 the shelf, and three and then five and then nine
12 students gather around to read it, and they say:
13 Teacher, I want you to come over and watch us
14 doing that, all of those things, I think, fall
15 within the definition of "curriculum" at that
16 lower grades.

17 It's -- it's mayhem. And the ability
18 of teachers to manage the line between what is
19 curriculum content coming directly from the
20 teacher and coming indirectly from the sort of
21 socialization in the classroom, I think, is very
22 hard to draw.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 JUSTICE THOMAS: You -- in -- in, I
2 think, chatting with Justice Kavanaugh, you
3 mentioned that the opt-out was unworkable
4 because there were so many students who opted
5 out. What did you mean by that?

6 MR. SCHOENFELD: So the -- the record
7 is limited on this point, but the Hazel
8 declaration talks about the fact that principals
9 reported to the School Board that there was high
10 absenteeism and gave the example of one school
11 where dozens of students were opting out.

12 JUSTICE THOMAS: Was that because they
13 found the materials objectionable or -- for
14 religious reasons or what?

15 MR. SCHOENFELD: So there are two
16 different paragraphs of her declaration that
17 speak to this fact.

18 In that paragraph, it doesn't specify.
19 Elsewhere in the declaration it makes clear that
20 many of the opt-out requests were not religious
21 in nature and parents objected, for example, to
22 the age-appropriateness of materials, have
23 nothing to do with religious prohibitions.

24 CHIEF JUSTICE ROBERTS: Justice Alito?

25 JUSTICE ALITO: Well, we've had a

1 discussion of many different tests and
2 precedents and hypotheticals, but let me just
3 draw back to what's going on in this particular
4 case and -- and get your reaction to this.

5 So you have a case where some of the
6 plaintiffs are devout Muslims. They say: We
7 have a solemn religious obligation to raise our
8 children as Muslims, and that involves certain
9 moral principles that we want to instill in our
10 children, and the school is teaching our
11 children moral principles that are in conflict
12 with ours.

13 And we pay taxes to support the public
14 schools, but we don't have enough money to send
15 our children to private schools. And one of us
16 can't stay home and provide home-schooling. So
17 we just want to be able to take our children out
18 of the part of the instruction that we find
19 objectionable.

20 And what's your response to that?
21 Your response to that is just: Well, it's too
22 bad, all right? This is the public school and
23 the public school can teach what the public
24 school wants. And you don't like that. Well,
25 you can take your -- you can send your -- your

1 children to private schools.

2 MR. SCHOENFELD: There's no
3 indifference to the religious beliefs of the
4 Petitioners in this case. The school did what
5 it could to accommodate those views. There are
6 simply circumstances in which what the
7 Petitioner or what any plaintiff recognizes that
8 a burden on their religious belief is not a
9 legally cognizable one given legal and practical
10 justifications.

11 JUSTICE ALITO: Well, it's nice that
12 you say that they respect the parents' religious
13 beliefs, but, basically, your answer is it's
14 just too bad.

15 MR. SCHOENFELD: I think my answer --

16 JUSTICE ALITO: You've got to send
17 your school -- your children to school. You
18 can't afford to send them to any place except a
19 public school, unlike, you know, most of the
20 lawyers who argue cases here, they can send
21 their children to -- to private schools, and
22 they think that that's the way most of the world
23 is. But it's not. It's just too bad.

24 MR. SCHOENFELD: My answer is that
25 public schools are democratically controlled for

1 a reason. The School Board here is
2 democratically elected. The entire process of
3 adopting this curriculum is open and
4 transparent. These books are on review for 30
5 days before they're even made part of the
6 curriculum. There is then a multi-level appeal
7 process. There is plenty of opportunity for
8 parental insight.

9 And just to draw an analogy to another
10 case from this Court, in *Bowen versus Roy*, there
11 was no dispute that the assignment of a Social
12 Security number would rob Little Bird of the
13 Snow of her spirit. And this Court made the
14 judgment in that case that, fully crediting the
15 sincerity of that belief and fully crediting
16 what the parents described as the imposition on
17 their daughter, there was still some breathing
18 room that the government needed to be given to
19 operate in that case.

20 JUSTICE ALITO: And you think that
21 providing a -- an opt-out under these
22 circumstances, where you already allow opt-outs
23 from the health class and opt-outs for other
24 things, is comparable to what the plaintiffs
25 were asking for in that case?

1 MR. SCHOENFELD: I don't think it's
2 comparable in terms of what the plaintiffs were
3 asking for in that case.

4 I do think that under a doctrine where
5 you can't question the sincerity of the
6 beliefs -- and so, in that case, there was the
7 most dire consequence for Little Bird of the
8 Snow. There is simply no way for -- for the
9 government feasibly to honor the -- the
10 consequences of treating each person's
11 individual religious belief, no matter how
12 sincere, no matter how serious, as a burden that
13 triggers the entire scrutiny apparatus that
14 comes after it.

15 JUSTICE ALITO: So your answer to the
16 parents that I -- I talked about, which are real
17 parents here, is just, well, if you -- you don't
18 like this, you've got to get involved in
19 politics and run for the school board and change
20 it through politics. But, basically, the public
21 schools can do pretty much whatever they think
22 is correct as far as the curriculum is
23 concerned?

24 MR. SCHOENFELD: I -- I don't agree
25 with the second part of your answer. I don't

1 think it's true that the public schools can do
2 whatever they want. There are clear lines to be
3 drawn. This Court has drawn them in cases like
4 Kennedy and Barnette and Town of Greece in a
5 different context.

6 But I -- I -- I certainly don't think
7 it's true that public schools --

8 JUSTICE ALITO: All right. One -- one
9 last question. You -- you say that history
10 is -- is on your side.

11 History and tradition include not only
12 the -- it stretches back to the dawn of American
13 public education that parents can't get
14 opt-outs, right? That's what history shows us?

15 MR. SCHOENFELD: Correct.

16 JUSTICE ALITO: And you -- and one of
17 the cases you cite to support that is a decision
18 by the Maryland -- the Maine Supreme Court,
19 Donahoe versus Richards, decided in 1854?

20 MR. SCHOENFELD: Correct.

21 JUSTICE ALITO: And what was involved
22 in that case?

23 MR. SCHOENFELD: That case involved a
24 Catholic student who did not want to be required
25 to read the King James Bible. I fully credit --

1 JUSTICE ALITO: She was expelled.

2 MR. SCHOENFELD: And she was expelled.
3 And I fully credit that that was -- that reeks
4 of anti-Catholic bias, as this Court has
5 recognized in other contexts.

6 The point in that case --

7 JUSTICE ALITO: I -- I understand, but
8 why did you cite that as support for the history
9 that you think supports you?

10 MR. SCHOENFELD: Because --

11 JUSTICE ALITO: The history is that --
12 that public schools did all sorts of things that
13 might violate the Constitution today.

14 MR. SCHOENFELD: The point was in
15 response to Petitioners' invocation of a much
16 more recent history about opt-outs from sex
17 education.

18 JUSTICE ALITO: All right. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 JUSTICE SOTOMAYOR: Mr. Schoenfeld,
22 you talked about the review parent -- process
23 for parents. They don't have to run for the
24 school board. It's a fairly complicated four
25 levels of review if a parent objects, correct?

1 MR. SCHOENFELD: Correct. There's a
2 process for adopting curriculum as part of the
3 school materials as instructional materials at
4 the beginning, and then, if parents don't like
5 it, either at that point in time or at some
6 later point in time given how it's being used,
7 they can appeal it to the school -- the deputy
8 superintendent for instruction, the
9 superintendent, the school board, the -- the
10 Maryland State School Board. And, in fact, we
11 cite a case in our papers where the parents
12 objected to the classification of these
13 materials outside of the family life and -- and
14 human sexuality unit, and that case went through
15 the state school board and is now working its
16 way through the Maryland state courts.

17 JUSTICE SOTOMAYOR: Now at least two
18 of the books, it was represented, were removed
19 from the curricula as a result of this appeal
20 process?

21 MR. SCHOENFELD: I -- I don't know
22 where they were in the appeal process, but they
23 were removed from the curriculum as part of the
24 ordinary review process, correct.

25 JUSTICE SOTOMAYOR: All right. Now

1 Justice Alito didn't -- I'd like you to address
2 Justice Gorsuch's point. Justice Barrett
3 questioned whether this is really a public
4 benefit because attendance is coerced.

5 So, if it's not a public benefit, that
6 leaves us, in part, with discrimination. And I
7 think you said to Justice Gorsuch that you still
8 need a burden even if you treat people
9 differently because of their religion?

10 MR. SCHOENFELD: Correct.

11 JUSTICE SOTOMAYOR: There is a line or
12 circuit split -- there was recently -- on that
13 very issue whether a de minimis burden qualifies
14 or doesn't. And we said no, a de minimis burden
15 doesn't qualify -- doesn't eliminate the
16 discrimination.

17 But there has to be a difference of
18 some meaning. Is it your point that this is not
19 being treated differently?

20 MR. SCHOENFELD: So I don't think that
21 there's any facial or non-facial discrimination
22 here. The opt-out applied to all -- to all
23 aspects of the curriculum previously, and then
24 there are no opt-out rights for any aspect of
25 the curriculum. The things that people are able

1 to opt out of are non-curricular, like
2 Valentine's Day or Halloween parties, or they
3 fall within the family life and human sexuality.
4 So there's --

5 JUSTICE SOTOMAYOR: Is that
6 distinction alone -- there are some who would
7 argue that that distinction alone is not
8 neutrally applicable?

9 MR. SCHOENFELD: I think, under
10 Tandon, it is neutral and generally applicable.
11 The question in Tandon is whether any secular
12 activity is being treated better than any
13 comparable religious activity. And there's
14 nothing like that here. There's no distinction
15 being made in either version of the policy
16 between secular and religious.

17 There's nothing intrinsically
18 religious about these opt-outs. Many of them
19 were taken for non-religious reasons. So, under
20 any of the Court's tests, including Master P
21 Cake -- Masterpiece Cakeshop, I don't think
22 there's anything that gives rise to even an
23 inference of discrimination that would trigger
24 some distinct analysis that might not require a
25 burden.

1 JUSTICE SOTOMAYOR: Why is this
2 different than Masterpiece? In Masterpiece, it
3 was a board member.

4 MR. SCHOENFELD: Well, in Masterpiece
5 Cakeshop, it was an adjudicative context. And
6 the Court made very clear in that context that
7 it was addressing the question of whether a
8 party whose case is being decided by the
9 adjudicative body had been discriminated against
10 and, therefore, had been pressured or coerced
11 into adopting a religious belief. The Court is
12 explicitly clear in Masterpiece that it was not
13 opining on whether that analysis is appropriate
14 in the legislative or executive context.

15 JUSTICE SOTOMAYOR: If we rely on the
16 statements of isolated board members, we're in a
17 real pickle, aren't we?

18 MR. SCHOENFELD: Yeah, and I think
19 that that's what Justice -- Justice Scalia
20 pointed out in Lukumi and other cases, where he
21 said it's folly to try to identify individual
22 statements made in the democratic process and
23 rely on the individual statements of
24 legislators.

25 JUSTICE SOTOMAYOR: You called the

1 statements by that one board member that Justice
2 Gorsuch read as intemperate. There were some.
3 But the examples that were provided about
4 xenophobes or white racists were in the concept
5 of the extent of public disruption that would
6 occur if an exemption was given to everyone for
7 any reason, correct?

8 MR. SCHOENFELD: Certainly, the prompt
9 for it was not anything about a particular
10 religious person or a particular set of
11 religious beliefs. It was in the context of a
12 discussion about whether opt-outs should be
13 allowed at all for any reason.

14 JUSTICE SOTOMAYOR: And it was
15 disruption that that board member was
16 concentrating?

17 MR. SCHOENFELD: Correct.

18 JUSTICE SOTOMAYOR: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: Mr. Schoenfeld, I
21 think it would be fair to say that Mr. Baxter
22 and Ms. Harris did not want to draw lines, that,
23 you know, if there was material and it was being
24 used in instruction in whatever way it was being
25 used to whatever age kids with respect to

1 whatever subject matter, if there was a parent
2 who had some sincere religious objection to
3 that, that that parent would be allowed to opt
4 out.

5 And when I pushed Mr. Baxter a little
6 bit on that as to the consequences of it, he
7 said, you know, like, I don't want to draw lines
8 for you, but, really, the problems, the problems
9 here, the places we see objections are in a much
10 more limited set of cases. We don't -- we don't
11 see a lot of objections in high schools. We
12 don't see a lot of objections about evolution
13 classes. You know, we -- is that true? And
14 should we count on it being true? And how can
15 we tell if it's true?

16 MR. SCHOENFELD: So two answers,
17 Justice Kagan. The first is I don't think you
18 can count on it being true for exactly the
19 reason Your Honor gave, which is, once this
20 Court constitutionalizes that prerogative,
21 you're in a completely different world in terms
22 of parents' willingness or ability to invoke it.

23 And with respect to the question of
24 whether it is empirically true, the best data
25 point is the last 40 years of litigation on

1 these topics. And I think the Superintendents'
2 brief in support of neither party, Professor
3 Lupu's brief, and also the NEA brief just
4 recount for you the dozens of cases to all
5 aspects of the curriculum that have been brought
6 over the last 40 years. And the way that courts
7 have controlled for the volume of those cases is
8 to stop the inquiry at the burden stage and hold
9 consistently in those cases while fully
10 acknowledging that there may be circumstances
11 that give rise to coercion, fully recognizing
12 that exposure to ideas, even if they offend
13 religious beliefs, do not qualify as a burden
14 for free exercise purposes.

15 JUSTICE KAGAN: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?

18 JUSTICE GORSUCH: I just want to make
19 sure I understand a few thing -- fact things and
20 then a law question.

21 What age do you in Montgomery County
22 teach students normally about human sexuality?

23 MR. SCHOENFELD: I think that it
24 begins in either fourth or fifth grade.

25 JUSTICE GORSUCH: The human sexuality

1 class?

2 MR. SCHOENFELD: That family life and
3 human sexuality curriculum.

4 JUSTICE GORSUCH: Okay.

5 MR. SCHOENFELD: I'm not entirely
6 sure.

7 JUSTICE GORSUCH: Starts in fourth or
8 fifth grade, you think?

9 MR. SCHOENFELD: I think so.

10 JUSTICE GORSUCH: Is there anything
11 you can point us to in the record on that?

12 MR. SCHOENFELD: I don't think so.

13 JUSTICE GORSUCH: Okay. And, second,
14 these books are being used in English class?

15 MR. SCHOENFELD: The division between
16 English class and other things in a second grade
17 classroom doesn't really exist. You're sort of
18 in a room with a teacher and some kids are in
19 a --

20 JUSTICE GORSUCH: No, I appreciate
21 that. I -- I went to second grade too.

22 (Laughter.)

23 MR. SCHOENFELD: Yeah.

24 JUSTICE GORSUCH: But -- but -- but
25 it's -- it's part of the English curriculum that

1 these books are being used in? That's -- I
2 thought that was clear.

3 MR. SCHOENFELD: Yeah. I'm not -- I'm
4 not fighting the premise. I'm just saying that
5 the lines are --

6 JUSTICE GORSUCH: It's not the math
7 class.

8 MR. SCHOENFELD: It is not the --

9 JUSTICE GORSUCH: It's not the human
10 sexuality class. It's -- it's the English
11 class.

12 MR. SCHOENFELD: It's certainly not
13 the human sexuality class.

14 JUSTICE GORSUCH: Yeah.

15 MR. SCHOENFELD: I'm just sort of
16 fighting the premise that there's a neat
17 distinction.

18 JUSTICE GORSUCH: Okay. And they're
19 being used in -- in English language instruction
20 at age 3, some of them?

21 MR. SCHOENFELD: So Pride Puppy was
22 the book that was used for the prekindergarten
23 curriculum. That's no longer in the curriculum.

24 JUSTICE GORSUCH: That's the one where
25 they are supposed to look for the leather and

1 things -- and bondage, things like that, right?

2 MR. SCHOENFELD: It's not bondage.

3 JUSTICE GORSUCH: A sex --

4 MR. SCHOENFELD: It's a woman in a
5 leather --

6 JUSTICE GORSUCH: -- sex worker,
7 right?

8 MR. SCHOENFELD: No.

9 JUSTICE GORSUCH: No?

10 MR. SCHOENFELD: That's not correct.
11 No.

12 JUSTICE GORSUCH: I thought -- I
13 thought -- gosh, I -- I read it.

14 JUSTICE BARRETT: It's a drag queen in
15 drag.

16 JUSTICE GORSUCH: Drag -- drag queen
17 in -- a drag queen.

18 MR. SCHOENFELD: So -- correct. The
19 leather that they're pointing to is a woman in a
20 leather jacket, and one of the words is drag
21 queen in this --

22 JUSTICE GORSUCH: And they're supposed
23 to look for those?

24 MR. SCHOENFELD: It is an option at
25 the end of the book, correct.

1 JUSTICE GORSUCH: Yeah. Okay. And
2 your -- you've included these in the English
3 language curriculum rather than the human
4 sexuality curriculum to influence students, is
5 that fair? That's what the district court
6 found. Do you agree with that?

7 MR. SCHOENFELD: I think, to the
8 extent the district court found that it was to
9 influence, it was to influence them towards
10 civility, the natural consequence of being
11 exposed to --

12 JUSTICE GORSUCH: Whatever, but to
13 influence them.

14 MR. SCHOENFELD: In the manner that I
15 just mentioned, yes.

16 JUSTICE GORSUCH: Okay. And
17 responding to parents who are concerned, you
18 agree that this -- there was some intemperate
19 language used?

20 MR. SCHOENFELD: I -- I don't know
21 that those were responding to parents who were
22 concerned. This was after the fact for most of
23 these comments. And this was in a very public
24 setting which obviously got heated and some
25 intemperate comments were used, certainly.

1 JUSTICE GORSUCH: Yeah. And -- and I
2 wanted to understand your -- your -- your --
3 your context that you were giving about the
4 statement that some Muslim families -- it's
5 unfortunate that this -- that this issue puts
6 some Muslim families on the same side of an
7 issue as white supremacists and outright bigots.

8 I think, in response to Justice
9 Sotomayor, you were trying to give some context
10 to that?

11 MR. SCHOENFELD: I don't think I was
12 speaking directly about that comment. I think
13 that comment was given or was made in June,
14 which was several months after the decision to
15 withdraw the opt-outs was made. I don't have
16 context for that statement, no.

17 JUSTICE GORSUCH: Okay. And then the
18 legal question. Why isn't discrimination
19 against religion a burden on religion? If --
20 if -- if -- if a state -- now this is
21 hypothetical, not -- moving away from the
22 record.

23 If -- if state actors intentionally
24 discriminate against religion, what secular
25 purpose, valid secular purpose could that serve?

1 And how -- how wouldn't that be a burden?

2 MR. SCHOENFELD: So I -- I don't
3 know -- I mean, it depends on the hypothetical,
4 what the state is doing and whether there is a
5 secular purpose. It's hard to imagine one.
6 But, if the state is discriminating --

7 JUSTICE GORSUCH: Against Muslims or
8 Catholics or Protestants or whatever.

9 MR. SCHOENFELD: I think this Court
10 has recognized that when an enactment that
11 discriminates on its face -- or has recognized
12 with respect to an enactment that discriminates
13 on its face, it is intrinsically coercive.
14 That's how the Court has performed the burden
15 inquiry.

16 If you are privileging one religion
17 over another, you are coercing people to
18 subscribe to that particular set of beliefs in
19 order to get --

20 JUSTICE GORSUCH: So that's a burden.

21 MR. SCHOENFELD: Yeah. Absolutely.

22 JUSTICE GORSUCH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Kavanaugh?

25 JUSTICE KAVANAUGH: A few things.

1 On exposure, you've used that term, I
2 believe, to include not just exposure in the
3 sense of the book on the shelf but also the
4 communication of those ideas by the teacher in
5 the classroom.

6 MR. SCHOENFELD: Correct.

7 JUSTICE KAVANAUGH: And that's not
8 usually, I think, what we think of as exposure
9 as opposed to instruction, but --

10 MR. SCHOENFELD: Well, the -- the
11 question presented is about participation and
12 instruction, which was precisely one of the
13 things that the Barnettes objected to in being
14 present for the flag ceremony.

15 But I think it's analogous to Kennedy,
16 right? The question there was whether people
17 were merely exposed to Coach Kennedy's prayer,
18 even though the Court acknowledged that people
19 might see it, people might hear it, and people
20 might be offended by the content of it.

21 JUSTICE KAVANAUGH: Okay. And on
22 Justice Kagan's question about the no lines, I
23 took that to be the position of Petitioners and
24 the United States with respect to burden in the
25 sense that you can have substantial -- you can

1 claim a religious objection or burden to lots of
2 different things, and people do, but that the
3 line-drawing occurs when you do the strict
4 scrutiny analysis.

5 Is that not your understanding?

6 MR. SCHOENFELD: I don't know what
7 you're asking if it's my understanding of, but
8 let me try to answer it this way.

9 JUSTICE KAVANAUGH: Is that your
10 understanding of their position? In other
11 words, that they do draw lines, but it's at the
12 strict scrutiny stage?

13 MR. SCHOENFELD: Well, the question
14 presented to the Court is obviously limited to
15 burden, and what I understood Justice Kagan's
16 exchange with Petitioners' counsel to reflect is
17 that there is no way to draw a line once you are
18 relying on the Petitioners' --

19 JUSTICE KAVANAUGH: As to substantial
20 burden, but once you get to strict scrutiny, as
21 some of our cases reveal, Social Security
22 numbers, et cetera, there are -- there is
23 line-drawing once you do that.

24 In other words, just because you have
25 a religious objection to something doesn't mean

1 you win. You agree with that, I think, in our
2 case law?

3 MR. SCHOENFELD: Yeah, absolutely,
4 though, in Bowen, the Court stopped at the
5 burden inquiry at least with respect to the
6 government's own use of the Social Security
7 number.

8 JUSTICE KAVANAUGH: And you've
9 mentioned a few times that the school board was
10 democratically elected, democratically
11 controlled, and being on the school board's a
12 hard job, so, you know, we all respect that.
13 But, you know, that can't be the end of it,
14 right?

15 MR. SCHOENFELD: Absolutely not, no.
16 And I -- I didn't mean to --

17 JUSTICE KAVANAUGH: Liberty --
18 we're -- we're -- we're here to protect the
19 liberty under the Constitution from the
20 democratic excess.

21 MR. SCHOENFELD: Absolutely. And so
22 that was not my intention at all. It was to
23 respond to a specific question about what
24 options parents have. And among them, I think,
25 is wresting control of the school board,

1 implementing their preferred policies, or
2 participating even in the curriculum selection
3 process.

4 JUSTICE KAVANAUGH: And then I don't
5 think you answered this or maybe we got past it
6 last time. Do you -- are you aware of any other
7 county or city school board that has something
8 similar to what's going on here?

9 MR. SCHOENFELD: I'm not, but I think
10 that the other side of the ledger is overstated
11 because what is described in the amicus briefs
12 about what other school boards and other states
13 do is limited to what we traditionally consider
14 health education. So I'm not -- I'm not certain
15 that there is a large number of other states or
16 county school boards that allow opt-outs from
17 any curriculum for any reason.

18 JUSTICE KAVANAUGH: And then, last
19 point, just to comment, and you can respond to
20 it as you want, but Maryland was founded on
21 religious liberty and religious tolerance, a
22 haven for Catholics escaping persecution in
23 England going back to 1649. I'm sure you're
24 aware of this history.

25 And Montgomery County has been a

1 beacon of that religious liberty for all these
2 years with a strong Catholic population, a
3 substantial Jewish population, lots of different
4 Protestant. I mean, you drive down any --
5 any -- Connecticut Avenue or Georgia Avenue, you
6 know, you see religious building after religious
7 building.

8 And I guess I'm surprised given that
9 this is, you know, this is the hill we're going
10 to die on in terms of not respecting religious
11 liberty given that history. And so history
12 comes up. I just want to give you a chance to
13 respond to how you situate that in Maryland and
14 Montgomery County's history.

15 MR. SCHOENFELD: Every school board
16 walks a tightrope, as this Court has recognized
17 and other courts have recognized. It's a
18 difficult job balancing the interests of a
19 diverse community. Montgomery County Public
20 Schools are the most religiously diverse in the
21 country.

22 There may be different ways to handle
23 this under other circumstances. Montgomery
24 County did its best under these circumstances
25 given their curricular goals. That seems to me

1 a fundamentally different question and it's an
2 important one, but it is a fundamentally
3 different question about whether there's a
4 constitutional right to opt your child out of
5 curriculum that you deem religiously offensive.

6 JUSTICE KAVANAUGH: Thank you. This
7 is a tough case to argue. I appreciate it.
8 Thank you.

9 MR. SCHOENFELD: Thanks, Your Honor.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 JUSTICE BARRETT: I just want to ask
13 you a couple questions about the instructional
14 materials. So part of the conversation today
15 has been about exposure and whether this is
16 about teaching civility, and so I just wanted to
17 read you a couple things from the instructional
18 materials to get your reaction of how, if at
19 all, this plays into the analysis.

20 So I don't understand Petitioners to
21 be arguing that, you know, there was an
22 objection to being taught respect and kindness
23 to those who have different beliefs.

24 I understood them to be more focused
25 on things like, you know, this is an instruction

1 to the teacher, "If a student observes that a
2 girl can only like boys because she's a girl,
3 the Board suggested that the teacher disrupt the
4 student's either/or thinking by saying something
5 like: Actually, people of any gender can like
6 whoever they like."

7 You know, or, on the transgender
8 issue, "When we're born, people make a guess
9 about our gender and label us boy or girl based
10 on our body parts. Sometimes they're right;
11 sometimes they're wrong. When someone's
12 transgender, they guess wrong. When someone's
13 cisgender, they guessed right."

14 So, you know, it's kind of along those
15 things, which seem to be more about influence,
16 right, and shaping of ideas and less about
17 communicating respect because it's less about
18 communicating respect for those, you know, who
19 are transgender, who are gay, and more about how
20 to think about sexuality.

21 What is your take on that and how we
22 think about this, whether this really is just
23 about exposure and civility and learning to
24 function in a multicultural and diverse society
25 and how much of it is about influence or, as

1 Petitioners would say, indoctrination?

2 MR. SCHOENFELD: Certainly. I think
3 what you quoted, Your Honor, are suggested
4 responses or proposed responses for
5 age-appropriate ways to respond to questions
6 that may arise in response to these texts or
7 otherwise.

8 The same response about disrupt the
9 either/or thinking is given when someone says
10 dresses are for girls, boys can't paint their
11 nails, those are boy toys. These are simply
12 ways of contextualizing the information that's
13 being learned and to give students the
14 predicates for being able to respect each other.

15 The school -- the -- the express
16 directive from the school is you don't need to
17 understand your peers, you don't need to agree
18 with them, you don't need to affirm with them,
19 but you do need to treat them with respect.

20 When ensuring that that goal is met in
21 the classroom has the incidental sort of
22 implication of answering a direct question about
23 what it means to be transgender, that's an
24 option that's offered to a teacher. There are
25 certainly under certain circumstances where use

1 of these materials or different comments if a
2 teacher were to say something pejorative or
3 negative or begin to treat students differently
4 in terms -- in terms of allocation of sort of
5 resources in the classroom based on how they
6 responded to that, that's a coercion claim, but
7 simply explaining to students what fundamental
8 concepts are so that they can treat each other
9 with respect, I think, is no different than --

10 JUSTICE BARRETT: Well, but those
11 things that I read were more than about respect.
12 It was more about kind of what I was talking
13 with you about before, like 2 plus 2 is 4.
14 Like, this is how it is. You know, gender is
15 not something that can be identified at birth,
16 for example.

17 So, I mean, I guess that that is one
18 way of teaching -- teaching respect because it's
19 saying, you know, it's validating the other
20 world view here, the one that's different from
21 Petitioners, by saying no, no, no, this is
22 right. This is how we should understand that.
23 And so that is why you should respect and treat
24 with kindness or one could say I understand --
25 and -- and some of the instructional materials

1 did frame it this way, the way I'm about to
2 say -- which is you might not agree or this
3 might be different, but we have to respect
4 and -- and --

5 MR. SCHOENFELD: Certainly.

6 JUSTICE BARRETT: -- and treat
7 everyone with kindness. So I don't understand
8 Petitioners to be objecting to the latter kinds
9 of statements. I understand them to be
10 objecting to the "this is the way it is" kind of
11 statements.

12 MR. SCHOENFELD: I understand them to
13 be objecting to all of it --

14 JUSTICE BARRETT: To all of it?

15 MR. SCHOENFELD: -- including just
16 using the books with none of those materials.
17 The only --

18 JUSTICE BARRETT: Yeah, I -- I -- I
19 agree, sorry.

20 MR. SCHOENFELD: Yeah.

21 JUSTICE BARRETT: I'm just talking
22 about the instruction.

23 MR. SCHOENFELD: Oh, I'm sorry.

24 JUSTICE BARRETT: Yeah, yeah.

25 MR. SCHOENFELD: So I think you and I

1 see it the same way.

2 JUSTICE BARRETT: Yeah.

3 MR. SCHOENFELD: With respect to the
4 instructional materials, though, if we are in a
5 world where you and I are parsing which of these
6 materials are impermissible or give rise to a
7 burden on the impermissible side of the line
8 from the others, the record is woefully
9 underdeveloped on that point.

10 These books were in use for nine
11 months before Petitioners sued. There's not a
12 single factual statement in any of these
13 declarations or anything else that explains how
14 these supporting materials were used. It may
15 well be the case that no second grade teacher
16 ever uttered the words that you just quoted.

17 JUSTICE BARRETT: But I think what
18 Petitioners said in their argument is that we're
19 at the preliminary injunction stage, and the
20 instructional materials were given to the
21 teachers, and I think the instructional
22 materials reflect what the Board hoped to
23 accomplish by introducing these books into the
24 classroom.

25 And so what they're saying is

1 before -- we don't want to wait for the teacher
2 to say this to our child. Our whole point is we
3 know that this is part of the Board's curricular
4 choice, we know that these are the instructional
5 materials that are given to the teachers, and we
6 don't want our child to be exposed to that.

7 And so, frankly, if they got the
8 injunction they were asking for, you know, then
9 they would -- would never be uttered.

10 MR. SCHOENFELD: Yeah. I -- I don't
11 dispute anything you're saying. I think the
12 relevant inquiry takes account of that temporal
13 dimension --

14 JUSTICE BARRETT: Yeah.

15 MR. SCHOENFELD: -- for something --
16 essentially a pre-enforcement challenge here.
17 It would not have been difficult if this was
18 being used rampantly and impermissibly in
19 classrooms for them to find a -- a declarant who
20 didn't need to be a Petitioner to say this is
21 what's going on in this classroom. There are
22 hundreds --

23 JUSTICE BARRETT: But they didn't have
24 to have that for a PI --

25 MR. SCHOENFELD: They have to show --

1 JUSTICE BARRETT: -- right?

2 MR. SCHOENFELD: -- a reasonable
3 likelihood of success on the merits. And to
4 say --

5 JUSTICE BARRETT: And it's not a
6 reasonable likelihood of success or that this
7 is -- this injury is imminent to say this is
8 what teachers have been given as a suggested
9 discussion guide?

10 MR. SCHOENFELD: This was distributed
11 to 130 teachers in August of 2022 for teachers
12 who voluntarily attended one of these materials
13 and was otherwise made generally available.
14 It's not a script. You're not required to
15 answer that particular question if it arises
16 with that particular verbatim response. I don't
17 know any second grade teacher who could.

18 So I do think some more particularized
19 showing is required for someone to prevail even
20 at the preliminary injunction stage.

21 JUSTICE BARRETT: So, last question,
22 do you agree that it was the purpose of the
23 Board to try to disrupt students' thinking
24 and -- and make them see -- to disrupt their
25 thinking and have them not see gender as binary

1 and to accept, you know -- basically accept
2 LGBTQ relationships and ideas in -- in this way,
3 kind of the ways that I -- I just read?

4 MR. SCHOENFELD: I think the goal -- I
5 want to answer your question directly.

6 JUSTICE BARRETT: Yeah.

7 MR. SCHOENFELD: I think the goal was
8 to teach mutual respect. I think, to the extent
9 that students were unable to display mutual
10 respect for their peers without having some
11 further understanding that boys can play with
12 girls' toys, for example, then that was
13 absolutely part of the curriculum.

14 JUSTICE BARRETT: So it was part of
15 the curriculum to teach them that boys can be
16 girls or boys can -- or that your pronouns can
17 change depending on how you feel one day to the
18 next? That was part of the goal?

19 MR. SCHOENFELD: So I think you're
20 quoting from a book that was not part of the
21 curriculum, but let me just set that aside.

22 JUSTICE BARRETT: Well, I thought that
23 was an Inter- -- I -- I might -- they might be
24 blending --

25 MR. SCHOENFELD: They blend together.

1 Yeah.

2 JUSTICE BARRETT: -- together in my
3 mind. I thought that was from Inter- -- I
4 thought that was from the Allies book.

5 MR. SCHOENFELD: I don't think --

6 JUSTICE BARRETT: The
7 IntersectionAllies?

8 MR. SCHOENFELD: I don't think so.

9 JUSTICE BARRETT: No?

10 MR. SCHOENFELD: I think there may be
11 a quotation from the --

12 JUSTICE BARRETT: Penelope's --

13 MR. SCHOENFELD: -- teachers' user
14 guide at the end, but --

15 JUSTICE BARRETT: Okay. Oh, at the
16 end of IntersectionAllies?

17 MR. SCHOENFELD: Yeah.

18 JUSTICE BARRETT: Oh.

19 MR. SCHOENFELD: It may be, though
20 I -- I recall it being a quote from another. It
21 doesn't matter.

22 JUSTICE BARRETT: Yeah.

23 MR. SCHOENFELD: So I think the way
24 that these support materials are framed are to
25 help a teacher answer a student's question when

1 he says, in this book, there's a boy who says
2 that he's a girl; how can you be a girl when you
3 were born a boy? And it's one resource to
4 provide teachers with an answer to that
5 question.

6 The alternative was to provide nothing
7 to the teachers, which I think would abdicate
8 the School Board's responsibility to ensure that
9 their teachers are equipped to do their job.

10 JUSTICE BARRETT: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

13 JUSTICE JACKSON: So two quick final
14 points. For those of us who are trying to get a
15 handle on the potential administrative
16 challenges of notice and opt-out rights, would
17 you be recommending that we look at the
18 student -- the School Superintendents
19 Association amicus brief? Because I thought
20 that's what they were focusing on, that here are
21 actual potential administrative challenges. Is
22 that --

23 MR. SCHOENFELD: Yeah. I think that's
24 a --

25 JUSTICE JACKSON: -- one of the

1 resources?

2 MR. SCHOENFELD: -- that's a -- that
3 resource is well worthwhile, I think, for two
4 reasons. The first is it goes through 40 years
5 of litigation on this going back to Mozert, and
6 it has I think a bulleted list of all of the
7 things that parents have raised even under the
8 sort of ancien régime where these were not
9 treated as burdens. And, second, I think it
10 makes a persuasive case about the
11 administrability of the isolated family life and
12 health education options.

13 JUSTICE JACKSON: All right. And,
14 finally, as I understand your response to
15 Justice Alito's question about what religious
16 parents are supposed to do, I understood you to
17 say that parents with religious objections can
18 vote for members of the school board, they can
19 go to school board meetings, they can object to
20 the curriculum. Maybe the school board will
21 agree with them, at which point we don't have a
22 problem, or maybe they won't. And if they don't
23 agree, those parents in Montgomery County at
24 least can pull their students out of school and
25 home-school them or send them somewhere else.

1 But, under Petitioners' rule, as I
2 understand it, parents who lose through the
3 democratic process, who are not able to get the
4 curriculum tailored in their local school boards
5 the way that they would like, would have another
6 option, and that option would be to go to
7 federal court. And so, instead of having
8 democratically elected representatives and
9 experts in the field making the decision about
10 which books should be taught to kids in the
11 classroom, you have federal judges flipping
12 through the picture books and deciding whether
13 these are appropriate for five-year-olds.

14 I mean, I don't know how we would even
15 go about that. It seems pretty troubling
16 because, ordinarily, public education has been
17 the subject of local control. We typically lack
18 the specialized knowledge and experience to know
19 what, you know, should be taught to kids and how
20 and to look at the instruction manual and say,
21 is this a proper response?

22 So that's kind of a concern, I think.
23 And I also think it's a concern that these
24 questions don't always have one answer. Maybe,
25 maybe, in one community, one set of values,

1 these books are fine, but in another community
2 with a different set of values, they're not.

3 And it's sort of the local process
4 that allows that to cash out where people live,
5 that allow their values to get expressed in the
6 context of schools. And if we constitutionalize
7 that, I wonder if we're going to have a real
8 problem in terms of people with different values
9 not being able to have a say in their local
10 community as to what their kids learn.

11 MR. SCHOENFELD: I agree with all of
12 that, and I think it goes back to Justice
13 Kagan's point earlier where I think you
14 described it as a sort of hydraulic pressure,
15 which is, once you constitutionalize it, I think
16 you'll see an entirely different generation of
17 challenges to school curriculum.

18 So the last 40 years are the natural
19 experiment, where courts used burden as a
20 meaningful filtering system for mere exposure to
21 offensive ideas in the classroom versus where
22 the presentation of the curriculum was becoming
23 impermissibly coercive.

24 I grant that there are limits on what
25 schools can do with their time when students are

1 in the classroom. But exposing them to
2 different ideas, even ideas that offend their
3 family's religious beliefs or make it more
4 difficult for their families to raise them in
5 the faith, simply doesn't qualify as a burden
6 for purposes -- for the purposes in front of us.

7 And I think that that burden analysis
8 always has to be carried out in light of the
9 special characteristics of the school
10 environment, which I think, Justice Jackson, is
11 precisely what you're getting at. A very
12 important part of the special characteristics of
13 the school environment are the fact that federal
14 courts are not meant to sit as school boards in
15 deciding these curriculum disputes.

16 And I think my colloquy with Justice
17 Alito illustrates that. If the question really
18 turns on whether one reads Uncle Bobby's Wedding
19 one way versus the other way, courts are going
20 to be enmeshed in the most fine-grained disputes
21 about how to treat curricular materials.

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Rebuttal, Mr. Baxter.

1 REBUTTAL ARGUMENT OF ERIC S. BAXTER

2 ON BEHALF OF THE PETITIONERS

3 MR. BAXTER: I'd like to start with
4 four corrections to the record. First, the book
5 What Are Your Words is the book where the
6 children are told that their pronouns can change
7 day to day. At 80 -- and this is in the
8 district court's opinion. At 80a in the Cert
9 Appendix, note 1, the district court found that
10 this book and others were recommended. There
11 are certain books that were part of this
12 curriculum, but there are potentially hundreds
13 of others that the Board says you can use as
14 part of this.

15 There was a question about why this --
16 you know, why isn't there more evidence from
17 early on? Because there were opt-outs and the
18 Board insisted over and over that there were
19 opt-outs. We also know that the principals'
20 letter didn't come in 'til November of 2022
21 saying that teachers were uncomfortable
22 presenting this material, it was
23 age-inappropriate, they didn't want to be
24 talking about romance between two kids on the
25 playground regardless of their sexual

1 orientation.

2 On the question of use, I would refer
3 to C05 -- or 605 in the Cert Appendix, where
4 Hazel, the Board's representative, said that
5 they have to be used as part of instruction.
6 657 when they announced they were blocking the
7 opt-outs, they said teachers must utilize with
8 all students. These books are definitely being
9 read by the teachers as part of the curriculum.
10 And it's also at 63 of the district court
11 transcript.

12 And then also a question about when
13 sex ed starts. The Board's and the -- the
14 state's mandated regulation is in the record.
15 It's at pages 62 through 83 of the Joint
16 Appendix. There, you start in pre-K with
17 instruction that parents can -- or families can
18 come in all different forms with all different
19 kinds of parents, different kinds of gender
20 identities and expressions. The same things
21 that are being taught through the school --
22 schoolbooks, you can opt out when it comes up
23 during health class but not during story time,
24 which -- in which there's no instruction about
25 how to use these -- these books to develop

1 characters, a narrative arc, or anything else
2 that you would expect in an English class.

3 This was not a democratic process.
4 Withdrawing these overnight, comparing parents
5 to xenophobes and white supremacists, this can't
6 be part of the -- of the democratic process.

7 The line-drawing problem is on the
8 Board's side. I'm -- I'm confused now about
9 what exposure is. If you can -- are you being
10 exposed to the Prophet Muhammad, that's not
11 okay, but if you're being instructed something
12 derogatory about him, that is -- you can't get
13 an opt-out? Is it -- what does it mean to be
14 derogatory to someone who is in the third grade?

15 And the 40-year issue of litigation I
16 think proves the exact opposite point. If you
17 look at those cases in, for example, the NEA
18 brief, those are Establishment Clause cases.
19 They are curriculum challenges, where we agree
20 that the Plaintiffs should lose. There are
21 cases where people got -- got a -- got relief
22 and still sued. And a lot of them were resolved
23 under strict scrutiny.

24 So -- and half the circuits have never
25 even addressed this question. This is a

1 question of first impression in the Fourth
2 Circuit. So there's no sense that these issues
3 are going to create lots of kinds of problems.

4 As far as feasibility, counsel made
5 lots of arguments that are not in the record.
6 This was their burden. The evidence was in
7 their control. They could have put it into the
8 record. It's not there. On a preliminary
9 injunction, they should be held to their burden.

10 We've been doing this for two years.
11 Our clients are making great sacrifice to send
12 their kids to private school, to home-school.
13 They've moved out of the county. They're not
14 knowing what their kids are being taught.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 MR. BAXTER: If -- if the First
18 Amendment means that --

19 CHIEF JUSTICE ROBERTS: Thank you.

20 MR. BAXTER: -- you are going to be
21 forced to pay, coerced to attend, indoctrinated,
22 and then told your --

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 MR. BAXTER: Thank you.

1 CHIEF JUSTICE ROBERTS: The case is
2 submitted.

3 (Whereupon, at 12:37 p.m., the case
4 was submitted.)

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