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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TAMER MAHMOUD, ET AL.,)

4 Petitioners,)

5 v.) No. 24-297

6 THOMAS W. TAYLOR, ET AL.,)

7 Respondents.)

8 - - - - -

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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1 P R O C E E D I N G S

2 (10:08 a.m.)

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

6 Mr. Baxter.

7 ORAL ARGUMENT OF ERIC S. BAXTER

8 ON BEHALF OF THE PETITIONERS

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

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

22 Forcing Petitioners to submit their
23 children to such instruction violates their
24 religious beliefs and directly interferes with
25 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. 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's --

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,
25 the parents say: I don't want my child to be

1 there 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 straightforward answer. I appreciate that.

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

1 religious principles, that would be enough?

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

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

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

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

24 So too parents have objected to
25 teachers reading books featuring divorce,

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

4 Are these all coercive?

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

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

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

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

25 MR. BAXTER: And no one here is

1 raising a -- a burden in that situation. We're
2 far beyond that where our indoctrination --

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

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

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

10 MR. BAXTER: The --

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

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

24 CHIEF JUSTICE ROBERTS: You may, yes.

25 MR. BAXTER: Your Honor, even under

1 Yoder -- without Yoder, under a Smith regime,
2 and, here, those things would trigger strict
3 scrutiny.

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

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

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

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

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

25 MR. BAXTER: That's correct. There

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

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

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas?

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

25 MR. BAXTER: Thank you, Your Honor.

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

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

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

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

25 MR. BAXTER: Thank you, Your Honor.

1 We have named children, but for the preliminary
2 injunction, which, again, was filed two years
3 ago, we have raised the -- the rights of the
4 parents.

5 CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

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

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

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

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

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

22 JUSTICE ALITO: And one final factor
23 that may distinguish this particular case from
24 some of the others that you have been asked to
25 express a view about, and you did touch on this,

1 is the fact that it concerns sex and gender and
2 that the -- the Maryland legislature itself has
3 recognized these subjects raise special concerns
4 and has provided for an opt-out from the health
5 classes where these matters are discussed.

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

11 JUSTICE ALITO: All right. Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor?

14 JUSTICE SOTOMAYOR: Counsel, a couple
15 of questions to clarify things.

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

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

24 JUSTICE SOTOMAYOR: I'm asking you to
25 answer my question. It wasn't that she was

1 objecting to gay marriage qua gay marriage,
2 period. She was objecting to having her uncle's
3 time taken by someone else?

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

7 JUSTICE SOTOMAYOR: Then now we --
8 now --

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

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

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

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

21 Do you want a special rule for
22 children between kindergarten and sixth grade?

23 MR. BAXTER: Well, if the Court wanted
24 to go there, that certainly would make common
25 sense. Parents everywhere know that children

1 are especially vulnerable when exposed --

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

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

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

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

23 JUSTICE SOTOMAYOR: So, if none of
24 the -- all of the parents -- many of the
25 affidavits that the parents put here said they

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

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

11 JUSTICE SOTOMAYOR: We can look at the
12 record --

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

16 JUSTICE SOTOMAYOR: We can look to the
17 record for that, correct?

18 MR. BAXTER: I'm sorry?

19 JUSTICE SOTOMAYOR: We can look to the
20 record for it?

21 MR. BAXTER: That's correct.

22 JUSTICE SOTOMAYOR: All right. Thank
23 you.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: I want to take you

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

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

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

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

9 And then, on the strict scrutiny side,
10 there are also --

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

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

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

25 And on the Yoder side, if this Court

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

5 And now putting those kinds of
6 issues --

7 JUSTICE KAGAN: Okay. So those --

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

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

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

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

22 MR. BAXTER: And that's the rule that
23 schools everywhere in the country are -- are --
24 are working under right now. By their own
25 choice, that was Montgomery County's own rule

1 before this lawsuit came in. And there were
2 never these kinds of problems until it really
3 introduced a -- a curriculum that was clearly
4 indoctrinating students in things that the
5 principal said was introducing things as fact
6 that aren't fact.

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

13 MR. BAXTER: Well --

14 JUSTICE KAGAN: -- it will be like,
15 you know, opt-outs for everyone.

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

20 We heard these arguments in Hobby
21 Lobby, where there was a lot of concerns about
22 what would happen, in O Centro, what would
23 happen with drugs. And -- and, in reality, we
24 didn't see those kinds of -- of floods happen.
25 And when they have, the courts have managed to

1 deal with them without any significant
2 difficulty.

3 JUSTICE KAGAN: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch?

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

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

22 JUSTICE GORSUCH: For constitutional
23 Article III purposes?

24 MR. BAXTER: Exactly.

25 JUSTICE GORSUCH: But do you have to

1 show a substantial burden, or is -- is that law
2 that is not neutral, that discriminates against
3 religion auto -- does that go straight to --

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

10 Yet they also say -- and this is at
11 674 of the appendix -- that you can opt out of
12 choir or band if you object to the religious
13 songs, even -- and if -- is that curricular or
14 extracurricular?

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

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

25 So there's this discrimination where

1 you get -- some religious reasons get opted out,
2 some don't. There is these labels about
3 curricular, extracurricular, English and
4 language arts versus health, but in the end,
5 it's the same -- the same thing.

6 And some students are getting
7 opt-outs, and that -- and some aren't. That
8 discrimination alone is the burden that gets us
9 to strict scrutiny.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

12 JUSTICE KAVANAUGH: A few questions.

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

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

1 for, you know -- you know, unisex bathrooms.

2 It's -- it's teaching inclusivity without
3 those -- that indoctrination.

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

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

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

21 MR. BAXTER: That's correct.

22 JUSTICE KAVANAUGH: The term
23 "coercive," I think, has been used in some of
24 the colloquy, but the right term is "burden,"
25 isn't that correct?

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

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

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

1 religious beliefs as I understand our case law.

2 MR. BAXTER: That's right, Your Honor.

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

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

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

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

25 And what happened is -- we're not even

1 entirely sure because, for the entire first
2 year, the Board promised in multiple places,
3 on -- on Fox News and other media, that parents
4 would be -- be notified and then they would be
5 opted out.

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

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

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

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

25 JUSTICE KAVANAUGH: But then

1 complaints were raised, right?

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

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

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

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

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

25 So Justice Sotomayor's questions, I

1 think, track what the Fourth Circuit said, which
2 is that compulsion is required.

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

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

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

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

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

24 And I think we satisfy any one of
25 those tests.

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

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

10 Because it seems to me that, you know,
11 the questions that you're getting are about line
12 drawing -- I mean, Justice Kagan was making this
13 point.

14 And one place where some of that line
15 drawing might happen is in the definition of
16 "burden." So I think the definition of "burden"
17 is important.

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

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

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

6 MR. BAXTER: Correct.

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

10 MR. BAXTER: That's correct.

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

15 MR. BAXTER: Correct.

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

22 MR. BAXTER: Yeah, I think we're
23 bringing all of them. We think, in Smith, the
24 Court said that Yoder fell outside of its rule.
25 Excuse me. And -- and so we think that that's a

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

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

23 MR. BAXTER: I don't think so, Your
24 Honor. This Court, as recently as in Espinoza,
25 recognized Yoder as a case being about the free

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

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

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

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

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

22 So that's exposure, though, to those
23 ideas. It's not just exposure to the pictures
24 of, you know, the two men getting married. It's
25 exposure to the ideas.

1 MR. BAXTER: That's correct.

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

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

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

17 MR. BAXTER: Correct.

18 JUSTICE BARRETT: Could another parent
19 bring that claim?

20 MR. BAXTER: I -- I suppose they
21 could, but then you would -- I mean, again, we
22 don't see these kinds of claims happening, but
23 they would almost certainly lose because it
24 would -- it would -- strict scrutiny would
25 easily be satisfied if every student were

1 allowed to say I want this book or not that
2 book. I mean, no -- no student has the right to
3 tell the school which books to choose or what
4 curriculum to teach or what other students will
5 have to learn.

6 And so we think that would easily --
7 those would easily fail under strict scrutiny.

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

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

22 And so that's -- that's what
23 they're -- and, you know, the Mahmoud family,
24 they also have an objection to any kind of
25 discussion for young children outside of their

1 family circle, as do many families, as the
2 Court's noted.

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

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

18 MR. BAXTER: Right.

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

25 So is public benefit the right way to

1 think about this?

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

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

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

1 model for this case.

2 JUSTICE BARRETT: Okay. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Jackson?

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

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

1 happening in this case?

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

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

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

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

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

1 things and so really want to be careful about
2 making the pronouncement that relates to this.

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

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

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

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

22 JUSTICE JACKSON: No, I understand
23 that.

24 MR. BAXTER: -- of the teachers'
25 instructions that the Board's not disputed.

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

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

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

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

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

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

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

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

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

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

22 JUSTICE JACKSON: But I guess I don't
23 understand that given your argument. I mean,
24 so, you know, Example 1, we have a gay teacher
25 in the classroom and they have a -- a wedding

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

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

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

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

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

24 JUSTICE JACKSON: What if -- what
25 if --

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

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

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

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

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

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

1 part of the school?

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

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

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

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

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

25 MR. BAXTER: No. And we've never said

1 that there is an independent right to be -- for
2 schools to anticipate what parents might object
3 to. But, when parents know something, there
4 could be a sincere religious burden, but,
5 again --

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

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

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

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

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

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

23 I had understood that the way in which
24 this Court analyzed burden in these kinds of
25 cases is to look to coercion. So they really

1 aren't a separate thing.

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

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

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

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

23 And I think, in that situation, you
24 would have a pretty strong argument that it
25 burdens a parent's religious exercise if the

1 public school teaches children things that
2 contradict the parent's religious beliefs.

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

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

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

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

23 MR. BAXTER: Well, Your Honor, the
24 world we live in in this case is that most
25 parents don't have that option. They have two

1 working parents. They can't afford to send to
2 private school.

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

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

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

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

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

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

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

23 And what I guess I'm worried about is
24 a world in which, when there is an option to
25 send your kid somewhere else, it seems to me

1 that these parents would be dictating what this
2 school does in the way that you say our cases
3 say they can't do, right?

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

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

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

15 JUSTICE JACKSON: Thank you.

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

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Ms. Harris.

21 ORAL ARGUMENT OF SARAH M. HARRIS

22 FOR THE UNITED STATES, AS AMICUS CURIAE,

23 SUPPORTING THE PETITIONERS

24 MS. HARRIS: Mr. Chief Justice, and
25 may it please the Court:

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

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

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

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

1 I welcome the Court's questions.

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

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

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

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

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

24 MS. HARRIS: Yoder is a textbook
25 example of parents being forced to choose

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

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

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

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

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

24 Thomas, I think, is this Court's sort
25 of canonical description of what it entails.

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

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

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

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

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

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

1 coercing a student to write a certain passage or
2 do a certain thing that's contrary to their
3 religious beliefs.

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

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

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

1 actually 14 that matters for their faith to
2 shield people.

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

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

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

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

25 MS. HARRIS: Separate --

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

4 MS. HARRIS: Right.

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

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

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

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

24 MS. HARRIS: Well, no. I think the
25 school could win in a couple of ways. One is,

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

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

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

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

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

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

23 MS. HARRIS: It doesn't.

24 JUSTICE KAGAN: -- there the opt-out
25 is necessary, you know, whatever you might think

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

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

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

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

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

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

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

9 JUSTICE KAGAN: So --

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

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

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

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

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

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

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

14 JUSTICE GORSUCH: Ms. --

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

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

1 saying I have a sort of right -- a state law
2 action to, like, a -- not have this particular
3 opt-out operate that way.

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

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

16 CHIEF JUSTICE ROBERTS: Thank --

17 MR. HARRIS: -- even in --

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas, anything further?

21 Justice Alito?

22 Justice Sotomayor?

23 JUSTICE SOTOMAYOR: The injunction
24 here sought by defendants asks for two things:
25 parents' notice and an opportunity to opt their

1 children out of reading, listening to, or
2 discussing the Pride storybooks.

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

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

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

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

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

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

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

25 MS. HARRIS: We're -- we don't

1 understand that to be the claim here.

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

9 Is that an enforceable injunction?

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

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

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

17 JUSTICE SOTOMAYOR: Interracial
18 couples.

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

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

25 MS. HARRIS: I think, regardless of

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

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

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

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

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

1 Would that be another way to approach this case?

2 MS. HARRIS: It absolutely could be.

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

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

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

25 JUSTICE GORSUCH: Oh, I'm sorry.

1 CHIEF JUSTICE ROBERTS: Sure.

2 JUSTICE GORSUCH: I have one other
3 question. Some -- some lower courts have taken
4 the view that even if you have a discrimination
5 against religion, so you fail the Smith test,
6 that you still have to show a burden, a
7 substantial burden, in addition to that.

8 And one might read a footnote in the
9 Fourth Circuit's opinion to suggest that.

10 Do you have thoughts about that?

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

18 JUSTICE GORSUCH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh?

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

1 children to be forced to remain in the
2 classroom, correct?

3 MS. HARRIS: Exactly.

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

8 MS. HARRIS: Two sets of reasons.

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

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

1 classroom components.

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

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

13 How -- how would you answer that?

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

22 I mean, think -- if you think about
23 Fulton, the way in which the Court thought about
24 case-by-case discretion in that case, if you
25 have a decisionmaker who can just say: I'm

1 going to, in my discretion, reverse course,
2 decide to give you a one-off opt-out or a
3 categorical opt-out tomorrow, it seems hard to
4 see why that would be generally applicable.

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

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

10 MS. HARRIS: No.

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

14 MS. HARRIS: Yes.

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

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

1 granting the exemptions.

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

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

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

22 MS. HARRIS: We aren't. I can't vouch
23 for it not happening. But I think, more
24 relevantly, we're aware of many, many states and
25 school districts that take the opposite tack and

1 allow opt-outs far beyond any kind of
2 constitutional rule that would be adopted in
3 this case.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

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

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

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

1 was transgender -- when the teacher was
2 transgender. Same for a student in the
3 classroom.

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

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

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

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

22 So take the hypothetical of parents
23 want to opt out from school for a month to take
24 their kids on a religious pilgrimage. If your
25 faith is indifferent to doing so in September

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

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

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

19 JUSTICE BARRETT: Speech.

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

1 getting litigated out in the lower courts right
2 now.

3 JUSTICE BARRETT: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

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

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

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

23 As Petitioners note, you could also
24 have questions with respect to the student's
25 free exercise rights. I think that's a

1 particular question.

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

7 MS. HARRIS: I mean, I think, even
8 under Respondents' view, that that would, in
9 fact, constitute a burden on religious exercise.

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

8 One is that actually shows the burden
9 because you're being forced to forego the
10 benefit of a public education and pay for a
11 private school.

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

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

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

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

25 JUSTICE JACKSON: All right. Well --

1 MS. HARRIS: -- because Barnette too,
2 I think, had that same choice.

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

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

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

23 MS. HARRIS: Yeah, I would just add
24 caveats with respect to, like, how the
25 government's speech inquiry would -- would sort

1 of cash out in that context and what kinds of
2 challenges you can bring to transit.

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

11 MS. HARRIS: Okay.

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

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

1 about that context.

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

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

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

25 It would be one thing if the state in

1 my hypothetical said everybody has to ride this
2 bus, just like the state used to say everybody
3 has to go to public school, the Amish have to go
4 to public school --

5 MS. HARRIS: Okay.

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

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

1 religiously objectionable to different faiths, I
2 think it would be the same setup. It wouldn't
3 matter that it's unemployment benefits versus a
4 school context.

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

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Schoenfeld.

23 ORAL ARGUMENT OF ALAN E. SCHOENFELD
24 ON BEHALF OF THE RESPONDENTS

25 MR. SCHOENFELD: Mr. Chief Justice,

1 and may it please the Court:

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

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

1 environment.

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

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

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

24 I welcome the Court's questions.

25 JUSTICE THOMAS: Couldn't you solve

1 those differences simply by restoring the
2 opt-out?

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

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

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

25 Yoder was a very clear application of

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

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

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

24 Meyer, Pierce, and Yoder are all very
25 clear that they are not offering any opinion on

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

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

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

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

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

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

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

1 the parent.

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

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

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

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

1 find people with beliefs different from our own,
2 and that's okay. We can still show them
3 respect.

4 That's exactly --

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

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

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

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

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

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

1 JUSTICE GORSUCH: Uh-huh.

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

5 JUSTICE GORSUCH: So --

6 MR. SCHOENFELD: -- so when --

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

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

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

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

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

24 Being required to view the depiction
25 of the Prophet Muhammad, in contravention of a

1 religious objection, is being required to engage
2 in conduct --

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

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

9 JUSTICE GORSUCH: Yes.

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

13 JUSTICE GORSUCH: Okay.

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

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

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

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

23 MR. SCHOENFELD: Okay.

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

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

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

12 MR. SCHOENFELD: So two points on
13 that, Your Honor.

14 The first is that the record is
15 seriously underdeveloped on whether and how
16 these support materials are used. These were
17 recommended potential answers for questions that
18 students might pose. There's nothing in the
19 record about whether any teacher --

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

24 MR. SCHOENFELD: I think that as Your
25 Honor has recited it, it is exposure to

1 particular ideas and teaching students to be
2 civil in the classroom.

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

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

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

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

1 I didn't see you directly address
2 those comments in your brief, and I -- I just
3 want to give you an opportunity to do so here
4 and ask you: Does that suggest a hostility
5 toward religion akin to what we found in
6 Masterpiece? And why wouldn't that be enough to
7 trigger strict scrutiny on its own?

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

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

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

25 So, as the question comes before the

1 Court on how you define the burden, I think that
2 still needs to be answered before you get into
3 any of the anterior parts of --

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

10 MR. SCHOENFELD: Correct. I think
11 that there is a prerequisite for any --

12 JUSTICE GORSUCH: Okay. Let -- let --
13 I got your answer. I appreciate that.

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

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

24 It tried that. It failed. It was not
25 able to accommodate the number of opt-outs at

1 issue. It then adopted an entirely neutral
2 policy where no opt-outs were permitted.

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

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

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

18 JUSTICE GORSUCH: Do you have context
19 you wish to give them?

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

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

3 JUSTICE BARRETT: Oh, no, no, that --
4 finish your answer.

5 MR. SCHOENFELD: No. Please go ahead.

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

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

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

1 the way that any book is read in a third- or
2 second-grade classroom.

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

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

14 All of that is in the record, right?

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

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

1 JUSTICE BARRETT: So it seems to me
2 then that, really, the -- the lack of a record
3 matters most if compulsion is the standard,
4 right?

5 MR. SCHOENFELD: Absolutely.

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

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

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

25 There is a set of facts where the

1 presentation of the material in the classroom
2 might give rise to coercion.

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

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

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

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

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

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

25 Is that -- I mean, that -- that --

1 that's more than exposure, I think, under your
2 theory.

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

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

13 MR. SCHOENFELD: I don't because I
14 think the parent's right to shield their
15 children from offensive curriculum materials is
16 no greater than the child's right to be free
17 from offensive curriculum materials. And if, on
18 our theory of the case, children have no right
19 to be shielded from offensive curricular
20 materials that share a view that conflicts with
21 their religious belief, parents don't have a
22 greater right then to shield their children from
23 --

24 JUSTICE KAVANAUGH: Counsel, can I --

25 JUSTICE BARRETT: Can I ask you --

1 CHIEF JUSTICE ROBERTS: Justice Alito?

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

4 CHIEF JUSTICE ROBERTS: Go ahead.

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

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

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

1 one factor among others.

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

9 JUSTICE BARRETT: So it --

10 CHIEF JUSTICE ROBERTS: Justice --
11 Justice -- oh.

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

16 MR. SCHOENFELD: For purposes of the
17 analysis, correct.

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

1 to be disqualified from benefits because of your
2 religious beliefs.

3 Is that the universe? Those are the
4 three situations in which there's coercion?

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

10 So, for example, in the --

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

24 Now, what if -- what if that is what
25 the teacher -- the school teaches students?

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

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

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

19 MR. SCHOENFELD: Yes.

20 JUSTICE ALITO: They can't opt out?

21 MR. SCHOENFELD: That -- that does not
22 burden free exercise. There is no
23 constitutional requirement of completeness in
24 these contexts. A school could easily teach
25 that evolution is one theory and it is the

1 correct theory. And I don't think there's any
2 constitutional problem with that.

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

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

21 If you go beyond that, is it still
22 exposure?

23 MR. SCHOENFELD: It depends on the
24 context. I mean, I think Uncle Bobby's Wedding
25 is teaching third graders or second graders

1 precisely that. It's telling it through a
2 story. And the fact that in that case, it's
3 Uncle Bobby and Jamie, rather than -- in Uncle
4 Peter's Chinese American wedding, it's Uncle
5 Peter and his wife.

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

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

17 "Mommy, said Chloe, I don't
18 understand, why is Uncle Bobby getting married.
19 Bobby and Jamie love each other, said Mommy.
20 When" -- people -- "When grownup people love
21 each other that much, sometimes they get
22 married."

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

25 MR. SCHOENFELD: I think that's a way

1 of a mother consoling her daughter who's annoyed
2 that they are favorite uncle is distracted and
3 doesn't have time for her. But even if the
4 message were some people are gay, some people
5 get married, I don't think there's anything
6 impermissibly normative about that.

7 It is a story that is being used to
8 teach students that, just as in the 99 of the
9 100 books that we read about couples, it's a man
10 and a woman, there also may be a man and a man.

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

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

24 There is obviously an incidental
25 message in some of these books that these life

1 choices and these life styles are worthy of
2 respect. I don't know how you can teach
3 students to respect each other without teaching
4 that. If the book were about, you know, Uncle
5 Bobby's wedding, they get married, and the rest
6 of it is that was awful, then there would be a
7 serious equal protection violation in the
8 presentation of that curriculum.

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

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

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

1 JUSTICE ALITO: Well, why is it not
2 administrable? You have -- they are able to opt
3 out of the health class, right?

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

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

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

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

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

23 JUSTICE ALITO: There's nothing --
24 what is infeasible about doing that?

25 MR. SCHOENFELD: So, again, I think

1 the experience of the schools with respect to
2 these five books show that it was infeasible.
3 And let me give you an example. Let's say the
4 school, a -- an exquisitely competent and
5 well-resourced school, is able to say on Tuesday
6 at 9 o'clock we're going to read Uncle Bobby's
7 Wedding, we're going to make arrangements for
8 alternative space, we're going to give suitable
9 supervision for our six-year-olds, and we're
10 going to give them an alternative assignment
11 that accomplishes the same ELA goals. Let's say
12 that happens. Right?

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

21 JUSTICE ALITO: Well, I -- I -- I
22 don't think you're really answering my question.
23 Why can't this all be put -- we're going to read
24 Uncle Bobby's Wedding and these other books, but
25 we're going to read it during a period of time

1 that includes the health class, and children are
2 already able to opt-out of that so they can opt
3 out of reading these books.

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

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

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

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

1 average size of a -- of an elementary school in
2 Montgomery County is 700 students. So each
3 grade has 125. If you have dozens of students
4 walking out, making arrangements for those
5 students to have adequate space and supervision
6 and alternative instruction, I think, is -- is
7 infeasible. And that's --

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

10 MR. SCHOENFELD: They don't do it for
11 all sorts of other opt-outs. There's a limited
12 universe of things that students can opt out
13 from.

14 The family life and healthy sexuality
15 curriculum stands alone. It is mandated by the
16 state. It is something where you're able to
17 predict precisely when the curriculum is going
18 to be deployed. There's a four --

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

22 I guess I'm not understanding why
23 Montgomery County School Board stands alone, I
24 think, in the country. You can tell me if
25 there's another school board that's done

1 something like this in both --

2 MR. SCHOENFELD: I -- I don't -- I
3 apologize.

4 JUSTICE KAVANAUGH: -- in both the
5 kind of books that are being used and
6 prohibiting opt-outs.

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

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

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

25 MR. SCHOENFELD: I understand, Your

1 Honor. And there may well be circumstances
2 where a school can -- or a school district can
3 engineer the win/win.

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

9 JUSTICE JACKSON: Mr. Schoenfeld, what
10 is that purpose?

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

17 So it wasn't as though the books were
18 being introduced for the purpose of enhancing
19 the gender and sexuality component --

20 MR. SCHOENFELD: Absolutely.

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

23 It was that we're talking about
24 English here. And, in addition to the other
25 kinds of picture books we have on the shelf and

1 we talk about in class, we're going to introduce
2 these books as well.

3 I think that seems pretty infeasible
4 in English, when you're talking about reading
5 instruction, that every time this particular
6 kind of book comes out, we have to start letting
7 people leave the classroom.

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

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

21 JUSTICE KAVANAUGH: I don't think --

22 JUSTICE GORSUCH: Counsel --

23 JUSTICE KAVANAUGH: -- they're talking
24 about anything student on student.

25 JUSTICE GORSUCH: Yeah.

1 JUSTICE KAVANAUGH: So I --

2 MR. SCHOENFELD: So --

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Justice Alito?

2 JUSTICE ALITO: Well, we've had a
3 discussion of many different tests and
4 precedents and hypotheticals, but let me just
5 draw back to what's going on in this particular
6 case and -- and get your reaction to this.

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

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

22 And what's your response to that?
23 Your response to that is just: Well, it's too
24 bad, all right? This is the public school and
25 the public school can teach what the public

1 school wants. And you don't like that. Well,
2 you can take your -- you can send your -- your
3 children to private schools.

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

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

17 MR. SCHOENFELD: I think my answer --

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

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

11 And just to draw an analogy to another
12 case from this Court, in Bowen versus Roy, there
13 was no dispute that the assignment of a Social
14 Security number would rob Little Bird of the
15 Snow of her spirit.

16 And this Court made the judgment in
17 that case that, fully crediting the sincerity of
18 that belief and fully crediting what the parents
19 described as the imposition on their daughter,
20 there was still some breathing room that the
21 government needed to be given to operate in that
22 case.

23 JUSTICE ALITO: And you think that
24 providing a -- an opt-out under these
25 circumstances, where you already allow opt-outs

1 from the health class and opt-outs for other
2 things, is comparable to what the plaintiffs
3 were asking for in that case?

4 MR. SCHOENFELD: I don't think it's
5 comparable in terms of what the plaintiffs were
6 asking for in that case.

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

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

1 concerned?

2 MR. SCHOENFELD: I -- I don't agree
3 with the second part of your answer. I don't
4 think it's true that the public schools can do
5 whatever they want. There are clear lines to be
6 drawn. This Court has drawn them in cases like
7 Kennedy and Barnette and Town of Greece in a
8 different context.

9 But I -- I -- I certainly don't think
10 it's true that public schools --

11 JUSTICE ALITO: All right. One -- one
12 last question. You -- you say that history
13 is -- is on your side.

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

18 MR. SCHOENFELD: Correct.

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

23 MR. SCHOENFELD: Correct.

24 JUSTICE ALITO: And what was involved
25 in that case?

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

4 JUSTICE ALITO: She was expelled.

5 MR. SCHOENFELD: And she was expelled.
6 And I fully credit that that was -- that reeks
7 of anti-Catholic bias, as this Court has
8 recognized in other contexts. The point in that
9 case --

10 JUSTICE ALITO: I -- I understand, but
11 why did you cite that as support for the history
12 that you think supports you?

13 MR. SCHOENFELD: Because --

14 JUSTICE ALITO: The history is that --
15 that public schools did all sorts of things that
16 might violate the Constitution today.

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

21 JUSTICE ALITO: All right. Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 JUSTICE SOTOMAYOR: Mr. Schoenfeld,
25 you talked about the review process for parents.

1 They don't have to run for the school board.
2 It's a fairly complicated four levels of review
3 if a parent objects, correct?

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

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

24 MR. SCHOENFELD: I -- I don't know
25 where they were in the appeal process, but they

1 were removed from the curriculum as part of the
2 ordinary review process, correct.

3 JUSTICE SOTOMAYOR: All right. Now
4 Justice Alito didn't -- I'd like you to address
5 Justice Gorsuch's point. Justice Barrett
6 questioned whether this is really a public
7 benefit because attendance is coerced.

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

13 MR. SCHOENFELD: Correct.

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

20 But there has to be a difference of
21 some meaning. Is it your point that this is not
22 being treated differently?

23 MR. SCHOENFELD: So I don't think that
24 there's any facial or non-facial discrimination
25 here. The opt-out applied to all -- to all

1 aspects of the curriculum previously, and then
2 there are no opt-out rights for any aspect of
3 the curriculum. The things that people are able
4 to opt out of are non-curricular, like
5 Valentine's Day or Halloween parties, or they
6 fall within the family life and human sexuality.
7 So there's --

8 JUSTICE SOTOMAYOR: Is that
9 distinction alone -- there are some who would
10 argue that that distinction alone is not
11 neutrally applicable?

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

20 There's nothing intrinsically
21 religious about these opt-outs. Many of them
22 were taken for non-religious reasons. So, under
23 any of the Court's tests, including Master P
24 Cake -- Masterpiece Cakeshop, I don't think
25 there's anything that gives rise to even an

1 inference of discrimination that would trigger
2 some distinct analysis that might not require a
3 burden.

4 JUSTICE SOTOMAYOR: Why is this
5 different than Masterpiece? In Masterpiece, it
6 was a board member.

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

18 JUSTICE SOTOMAYOR: If we rely on the
19 statements of isolated board members, we're in a
20 real pickle, aren't we?

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

1 rely on the individual statements of
2 legislators.

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

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

17 JUSTICE SOTOMAYOR: And it was
18 disruption that that board member was
19 concentrating on.

20 MR. SCHOENFELD: Correct.

21 JUSTICE SOTOMAYOR: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 JUSTICE KAGAN: Mr. Schoenfeld, I
24 think it would be fair to say that Mr. Baxter
25 and Ms. Harris did not want to draw lines, that,

1 you know, if there was material and it was being
2 used in instruction in whatever way it was being
3 used to whatever age kids with respect to
4 whatever subject matter, if there was a parent
5 who had some sincere religious objection to
6 that, that that parent would be allowed to opt
7 out.

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

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

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

18 JUSTICE KAGAN: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch?

21 JUSTICE GORSUCH: I just want to make
22 sure I understand a few thing -- fact things and
23 then a law question.

24 What age do you in Montgomery County
25 teach students normally about human sexuality?

1 MR. SCHOENFELD: I think that it
2 begins in either fourth or fifth grade.

3 JUSTICE GORSUCH: The human sexuality
4 class?

5 MR. SCHOENFELD: That family life and
6 human sexuality curriculum.

7 JUSTICE GORSUCH: Okay.

8 MR. SCHOENFELD: I'm not entirely
9 sure.

10 JUSTICE GORSUCH: Starts in fourth or
11 fifth grade, you think?

12 MR. SCHOENFELD: I think so.

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

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

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

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

23 JUSTICE GORSUCH: No, I appreciate
24 that. I -- I went to second grade too.

25 (Laughter.)

1 MR. SCHOENFELD: Yeah.

2 JUSTICE GORSUCH: But -- but -- but
3 it's -- it's part of the English curriculum that
4 these books are being used in? That's -- I
5 thought that was clear.

6 MR. SCHOENFELD: Yeah. I'm not -- I'm
7 not fighting the premise. I'm just saying that
8 the lines are --

9 JUSTICE GORSUCH: It's not the math
10 class.

11 MR. SCHOENFELD: It is not the --

12 JUSTICE GORSUCH: It's not the human
13 sexuality class. It's -- it's the English
14 class.

15 MR. SCHOENFELD: It's certainly not
16 the human sexuality class.

17 JUSTICE GORSUCH: Yeah.

18 MR. SCHOENFELD: I'm just sort of
19 fighting the premise that there's a neat
20 distinction.

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

24 MR. SCHOENFELD: So Pride Puppy was
25 the book that was used for the prekindergarten

1 curriculum. That's no longer in the curriculum.

2 JUSTICE GORSUCH: That's the one where

3 they are supposed to look for the leather and

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

5 MR. SCHOENFELD: It's not bondage.

6 JUSTICE GORSUCH: A sex worker?

7 MR. SCHOENFELD: It's a woman in a

8 leather --

9 JUSTICE GORSUCH: Sex worker, right?

10 MR. SCHOENFELD: No.

11 JUSTICE GORSUCH: No?

12 MR. SCHOENFELD: That's not correct.

13 No.

14 JUSTICE GORSUCH: I thought -- I --

15 gosh, I -- I read it.

16 JUSTICE BARRETT: It's a drag queen in

17 drag.

18 JUSTICE GORSUCH: Drag -- drag queen

19 in -- a drag queen.

20 MR. SCHOENFELD: So -- correct. The

21 leather that they're pointing to is a woman in a

22 leather jacket, and one of the words is drag

23 queen in this --

24 JUSTICE GORSUCH: And they're supposed

25 to look for those?

1 MR. SCHOENFELD: It is an option at
2 the end of the book, correct.

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

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

14 JUSTICE GORSUCH: Whatever, but to
15 influence them.

16 MR. SCHOENFELD: In the manner that I
17 just mentioned, yes.

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

22 MR. SCHOENFELD: I -- I don't know
23 that those were responding to parents who were
24 concerned. This was after the fact for most of
25 these comments. And this was in a very public

1 setting which obviously got heated and some
2 intemperate comments were used, certainly.

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

10 I think, in response to Justice
11 Sotomayor, you were trying to give some context
12 to that.

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

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

24 If -- if state actors intentionally
25 discriminate against religion, what secular

1 purpose, valid secular purpose could that serve?

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

3 MR. SCHOENFELD: So I -- I don't know

4 -- I mean, it depends on the hypothetical, what

5 the state is doing and whether there is a

6 secular purpose. That's hard to imagine one.

7 But if the state is discriminating --

8 JUSTICE GORSUCH: Against Muslims or

9 Catholics or Protestants or whatever.

10 MR. SCHOENFELD: I think this Court

11 has recognized that when an enactment that

12 discriminates on its face or has recognized with

13 respect to an enactment that discriminates on

14 its face it is intrinsically coercive. That's

15 how the Court has performed the burden 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 --

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 in
12 instruction, which was precisely one of the
13 things that the Barnettes objected to in being
14 present for the flag ceremony. But I think it
15 is analogous to Kennedy, right?

16 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. Is that not your
5 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 Petitioner's counsel to reflect is
17 that there is no way to draw a line, once you
18 are relying on the Petitioner's --

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 Although, 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,
11 democratically-controlled, and being on the
12 school board is a hard job, so, you know, we all
13 respect that. But, you know, that can't be the
14 end of it, right?

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

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

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

1 participating even in the curriculum selection
2 process.

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

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

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

24 And Montgomery County has been a
25 beacon of that religious liberty for all these

1 years with a strong Catholic population, a
2 substantial Jewish population, lots of different
3 Protestant. You drive down any -- any --
4 Connecticut Avenue or Georgia Avenue, and, you
5 know, you see religious building after religious
6 building.

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

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

21 There may be different ways to handle
22 this under other circumstances. Montgomery
23 County did its best under these circumstances,
24 given their curricular goals. That seems to me
25 a fundamentally different question. And it's an

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

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

8 MR. SCHOENFELD: Thanks, Your Honor.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

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

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

23 I understood them to be more focused
24 on things like, you know, this is an instruction
25 to the teacher, "If a student observes that a

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

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

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

20 What is your take on that and how we
21 think about this, whether this really is just
22 about exposure and civility and learning to
23 function in a multi-cultural and diverse society
24 and how much of it is about influence or as
25 Petitioners would say indoctrination?

1 MR. SCHOENFELD: Certainly. I think
2 what you have quoted, Your Honor, are suggested
3 responses or proposed responses for
4 age-appropriate ways to respond to questions
5 that may arise in response to these texts or
6 otherwise.

7 The same response about disrupt the
8 either/or thinking is given when someone says
9 dresses are for girls, boys can't paint their
10 nails, those are boy toys. These are simply
11 ways of contextualizing the information that's
12 being learned and to give students the
13 predicates for being able to respect each other.

14 The school -- the -- the express
15 directive from the school is you don't need to
16 understand your peers, you don't need to agree
17 with them, you don't need to affirm with them,
18 but you do need to treat them with respect.

19 When ensuring that that goal is met in
20 the classroom, has the incidental sort of
21 implication of answering a direct question about
22 what it means to be transgender, that's an
23 option that's offered to a teacher. There are
24 certainly under certain circumstances where use
25 of these materials or different comments if a

1 teacher were to say something pejorative or
2 negative or begin to treat students differently
3 in terms -- in terms of allocation of sort of
4 resources in the classroom based on how they
5 responded to that, that's a coercion claim, but
6 simply explaining to students what fundamental
7 concepts are so that they can treat each other
8 with respect, I think is no different than --

9 JUSTICE BARRETT: Well, but those
10 things that I read were more than about respect.
11 It was more about kind of what I was talking
12 with you about before, like 2 plus 2 is 4.
13 Like, this is how it is. You know, gender is
14 not something that can be identified at birth,
15 for example.

16 So, I mean, I guess that is one way of
17 teaching -- teaching respect because it's
18 saying, you know, it's validating the other
19 world view here, the one that's different from
20 Petitioners by saying no, no, no, this is right.
21 This is how we should understand that. And so
22 that is why you should respect and treat with
23 kindness or one could say I understand -- and --
24 and some of the instructional materials did
25 frame it this way -- the way I'm about to say --

1 which is, you might not agree or this might be
2 different, but we have to respect and --

3 MR. SCHOENFELD: Certainly.

4 JUSTICE BARRETT: -- and treat
5 everyone with kindness. So I don't understand
6 Petitioners to be objecting to the latter kinds
7 of statements. I understand them to be
8 objecting to the "this is the way it is" kind of
9 statements.

10 MR. SCHOENFELD: I understand them to
11 be objecting to all of it.

12 JUSTICE BARRETT: To all of it?

13 MR. SCHOENFELD: Including just using
14 the books with none of those materials. The
15 only --

16 JUSTICE BARRETT: Yeah, I -- I -- I
17 agree, sorry. I'm just talking about the
18 instruction.

19 MR. SCHOENFELD: Yeah. So, I'm sorry.
20 So I think you and I see it the same way.

21 JUSTICE BARRETT: Yeah.

22 MR. SCHOENFELD: With respect to the
23 instructional materials, though, if we are in a
24 world where you and I are parsing which of these
25 materials are impermissible or give rise to a

1 burden on the impermissible side of the line
2 from the others, the record is woefully
3 underdeveloped on that point.

4 These books were in use for nine
5 months before Petitioners sued. There is not a
6 single factual statement in any of these
7 declarations or anything else that explains how
8 these supporting materials were used. It may
9 well be the case that no second grade teacher
10 ever uttered the words that you just quoted.

11 JUSTICE BARRETT: But I think what
12 Petitioners said in their argument is that we're
13 at the preliminary injunction stage, and the
14 instructional materials were given to the
15 teachers, and I think the instructional
16 materials reflect what the Board hoped to
17 accomplish by introducing these books into the
18 classroom.

19 And so what they're saying is before
20 -- we don't want to wait for the teacher to say
21 this to our child. Our whole point is we know
22 that this is part of the Board's curricular
23 choice, we know that these are the instructional
24 materials that are given to the teachers, and we
25 don't want our child to be exposed to that.

1 And so, frankly, if they got the
2 injunction they were asking inform are, you
3 know, then they wouldn't -- would never be
4 uttered.

5 MR. SCHOENFELD: Yeah. I -- I don't
6 dispute anything you're saying. I think the
7 relevant inquiry takes account of that temporal
8 dimension --

9 JUSTICE BARRETT: Yeah.

10 MR. SCHOENFELD: -- for something --
11 essentially a pre-enforcement challenge here.
12 It would not have been difficult if this was
13 being used rampantly and impermissibly in
14 classrooms for them to find a -- a declarant who
15 didn't need to be a Petitioner to say this is
16 what's going on in this classroom. There are
17 hundreds --

18 JUSTICE BARRETT: But they didn't have
19 to have that for a PI --

20 MR. SCHOENFELD: They have to show a
21 --

22 JUSTICE BARRETT: -- right?

23 MR. SCHOENFELD: -- a reasonable
24 likelihood of success on the merits. And to
25 say --

1 JUSTICE BARRETT: And it's not a
2 reasonable likelihood of success or that this is
3 -- this injury is imminent, to say this is what
4 teachers have been given as a suggested
5 discussion guide?

6 MR. SCHOENFELD: This was distributed
7 to 130 teachers in August of 2022 for teachers
8 who voluntarily attended one of these materials
9 and was otherwise made generally available.
10 It's not a script. You're not required to
11 answer that particular question, if it arises,
12 with that particular verbatim response. I don't
13 know any second grade teacher who could.

14 So I do think some more particularized
15 showing is required for someone to prevail, even
16 at the preliminary injunction stage.

17 JUSTICE BARRETT: So, last question,
18 do you agree that it was the purpose of the
19 Board to try to disrupt students' thinking and
20 -- and make them see -- to disrupt their
21 thinking and have them not see gender as binary
22 and to accept, you know -- basically accept
23 LGBTQ relationships and ideas in -- in this way,
24 kind of the ways that I -- I just read?

25 MR. SCHOENFELD: I think the goal -- I

1 want to answer your question directly.

2 JUSTICE BARRETT: Yeah.

3 MR. SCHOENFELD: I think the goal was
4 to teach mutual respect. I think, to the extent
5 that students were unable to display mutual
6 respect for their peers without having some
7 further understanding that boys can play with
8 girls' toys, for example, then that was
9 absolutely part of the curriculum.

10 JUSTICE BARRETT: So it was part of
11 the curriculum to teach them that boys can be
12 girls or boys can -- or that your pronouns can
13 change depending on how you feel one day to the
14 next? That was part of the goal?

15 MR. SCHOENFELD: So I think you're
16 quoting from a book that was not part of the
17 curriculum, but let me just set that aside.

18 JUSTICE BARRETT: I thought that was
19 an inter- -- I -- I might be -- they might be
20 blending --

21 MR. SCHOENFELD: They blend together.
22 Yeah.

23 JUSTICE BARRETT: -- together in my
24 mind. I thought that was from inter- -- I
25 thought that was from the allies book.

1 MR. SCHOENFELD: I don't think --
2 JUSTICE BARRETT: Intersection Allies?
3 MR. SCHOENFELD: I don't think so.
4 JUSTICE BARRETT: No?
5 MR. SCHOENFELD: I think there may be
6 a quotation from --
7 JUSTICE BARRETT: Penelope's --
8 MR. SCHOENFELD: -- the teachers's
9 user guide at the end.
10 JUSTICE BARRETT: Okay. Oh, at the
11 end of Intersection Allies?
12 MR. SCHOENFELD: Yeah.
13 JUSTICE BARRETT: Oh.
14 MR. SCHOENFELD: It may be, though I
15 -- I -- I recall it being a quote from another.
16 It doesn't matter.
17 JUSTICE BARRETT: Yeah.
18 MR. SCHOENFELD: So I think the way
19 that these support materials are framed are to
20 help a teacher answer a student's question when
21 he says, in this book, there's a boy who says
22 that he's a girl; how can you be a girl when you
23 were are born a boy? And it's one resource to
24 provide teachers with an answer to that
25 question.

1 The alternative was to provide nothing
2 to the teachers, which I think would abdicate
3 the School Board's responsibility to ensure that
4 their teachers are equipped to do their job.

5 JUSTICE BARRETT: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Jackson?

8 JUSTICE JACKSON: So two quick final
9 points. For those of us who are trying to get a
10 handle on the potential administrative
11 challenges of notice and opt-out rights, would
12 you be recommending that we look at the student
13 -- the School Superintendents Association amicus
14 brief? Because I thought that's what they were
15 focusing on, that here are actual potential
16 administrative challenges. Is that --

17 MR. SCHOENFELD: Yeah. I think --

18 JUSTICE JACKSON: -- one of the
19 resources?

20 MR. SCHOENFELD: That's a -- that
21 resource is well worthwhile, I think, for two
22 reasons. The first is it goes through 40 years
23 of litigation on this going back to Mozert, and
24 it has I think a bulleted list of all of the
25 things that parents have raised even under the

1 sort of ancien régime where these were not
2 treated as burdens. And, second, I think it
3 makes a persuasive case about the
4 adminnistrability of the isolated family life
5 and health education options.

6 JUSTICE JACKSON: All right. And,
7 finally, as I understand your response to
8 Justice Alito's question about what religious
9 parents are supposed to do, I understood you to
10 say that parents with religious objections can
11 vote for members of the school board, they can
12 go to school board meetings, they can object to
13 the curriculum. Maybe the school board will
14 agree with them, at which point we don't have a
15 problem, or maybe they won't. And if they don't
16 agree, those parents in Montgomery County at
17 least can pull their students out of school and
18 home school them or send them somewhere else.

19 But under Petitioners' rule, as I
20 understand it, parents who lose through the
21 democratic process, who are not able to get the
22 curriculum tailored in their local school boards
23 the way that they would like, would have another
24 option. And that option would be to go to
25 federal court. And so instead of having

1 democratically elected representatives and
2 experts in the field making the decision about
3 which books should be taught to kids in the
4 classroom, you have federal judges flipping
5 through the picture books and deciding whether
6 these are appropriate for five-year-olds.

7 I mean, I don't know how we would even
8 go about that. It seems pretty troubling
9 because, ordinarily, public education has been
10 the subject of local control. We typically lack
11 the specialized knowledge and experience to know
12 what, you know, should be taught to kids and how
13 and to look at the instruction manual and say,
14 is this a proper response?

15 So that's kind of a concern, I think.
16 And I also think it's a concern that these
17 questions don't always have one answer. Maybe,
18 maybe, in one community, one set of values,
19 these books are fine, but in another community
20 with a different set of values, they're not.

21 And it's sort of the local process
22 that allows that to cash out where people live,
23 that allow their values to get expressed in the
24 context of schools. And if we constitutionalize
25 that, I wonder if we're going to have a real

1 problem in terms of people with different values
2 not being able to have a say in their local
3 community as to what their kids learn.

4 MR. SCHOENFELD: I agree with all of
5 that, and I think it goes back to Justice
6 Kagan's point earlier where I think you
7 described it as a sort of hydraulic pressure,
8 which is once you constitutionalize it, I think
9 you'll see an entirely different generation of
10 challenges to school curriculum.

11 So the last 40 years are the natural
12 experiment, where courts used burden as a
13 meaningful filtering system for mere exposure to
14 offensive ideas in the classroom versus where
15 the presentation of the curriculum was becoming
16 impermissibly coercive.

17 I grant that there are limits on what
18 schools can do with their time when students are
19 in the classroom. But exposing them to
20 different ideas, even ideas that offend their
21 family's religious beliefs or make it more
22 difficult for their families to raise them in
23 the faith, simply doesn't qualify as a burden
24 for purposes -- for the purposes in front of us.

25 And I think that that burden analysis

1 always has to be carried out in light of the
2 special characteristics of the school
3 environment, which I think, Justice Jackson, is
4 precisely what you're getting at. A very
5 important part of the special characteristics of
6 the school environment are the fact that federal
7 courts are not meant to sit as school boards in
8 deciding these curriculum disputes.

9 And I think my colloquy with Justice
10 Alito illustrates that. If the question really
11 turns on whether one reads Uncle Bobby's Wedding
12 one way versus the other way, courts are going
13 to be enmeshed in the most-fine-grained disputes
14 about how to treat curricular materials.

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Rebuttal, Mr. Baxter.

19 REBUTTAL ARGUMENT OF ERIC S. BAXTER

20 ON BEHALF OF THE PETITIONERS

21 MR. BAXTER: I'd like to start with
22 four corrections to the record. First, the book
23 What Are Your Words is the book where the
24 children are told that their pronouns can change
25 day to day. At 80 -- and this is in the

1 district court's opinion. At 80a in the Cert
2 Appendix, note 1, the district court found that
3 this book and others were recommended. There
4 are certain books that were part of this
5 curriculum, but there are potentially hundreds
6 of others that the Board says you can use as
7 part of this.

8 There was a question about why this --
9 you know, why isn't there more evidence from
10 early on? Because there were opt-outs and the
11 Board insisted over and over that there were
12 opt-outs. We also know that the principal's
13 letter didn't come in until November of 2022
14 saying that teachers were uncomfortable
15 presenting this material, it was
16 age-inappropriate, they didn't want to be
17 talking about romance between two kids on the
18 playground regardless of their sexual
19 orientation.

20 On the question of use, I refer to C
21 -- or 605 in the Cert Appendix where Hazel, the
22 Board's representative, said that they have to
23 be used as part of instruction. 657 when they
24 announced they were blocking the opt-outs, they
25 said teachers must utilize with all students.

1 These books are definitely being read by the
2 teachers as part of the curriculum. And it's
3 also at 63 at the district court transcript.

4 And then also a question about when
5 sex ed starts. The Board's and the -- the
6 State's mandated regulation is in the record.
7 It's at pages 62 through 83 of the Joint
8 Appendix. There you start in pre-K with
9 instruction that parents can -- or families can
10 come in all different forms with all different
11 kinds of parents, different kinds of gender
12 identities and expressions. The same things
13 that are being taught through the school --
14 schoolbooks, you can opt out when it comes up
15 during health class but not during story time,
16 which -- in which there's no instruction about
17 how to use these -- these books to develop
18 characters, narrative art, or anything else you
19 would expect in an English class.

20 This was not a democratic process.
21 Withdrawing these overnight, comparing parents
22 to xenophobes and white supremacists, this can't
23 be part of the -- of the democratic process.

24 The line drawing problem is on the
25 Board's side. I'm -- I'm confused now about

1 what exposure is. If you can -- are you being
2 exposed to the Prophet Mohammad, that's not
3 okay, but being instructed something derogatory
4 about him, that is -- you can't get an opt-out?
5 Is it -- what does it mean to be derogatory to
6 someone who is in the third grade?

7 And the 40-year issue of litigation I
8 think proves the exact opposite point. If you
9 look at those cases in, for example, the NEA
10 brief, those are Establishment Clause cases.
11 They are curriculum challenges, where we agree
12 that the Plaintiffs should lose. There are
13 cases where people got -- got a -- got relief
14 and still sued. And a lot of them were resolved
15 under strict scrutiny.

16 So -- and half the circuits have never
17 even addressed this question. This is a
18 question of first impression in the Fourth
19 Circuit. So there's no sense that these issues
20 are going to create lots of kinds of problems.

21 As far as feasibility, counsel made
22 lots of arguments that are not in the record.
23 This was their burden. The evidence was in
24 their control. They could have put it into the
25 record. It's not there. On a preliminary

1 injunction, they should be held to their burden.

2 We've been doing this for two years.

3 Our clients are making great sacrifice to send

4 their kids to private schools, to homeschool.

5 They've moved out of the county. They're not

6 knowing what their kids are being taught.

7 CHIEF JUSTICE ROBERTS: Thank you,

8 counsel.

9 MR. BAXTER: If -- if the First

10 Amendment means that --

11 CHIEF JUSTICE ROBERTS: Thank you.

12 MR. BAXTER: -- you are going to be

13 forced to pay, coerced to attend, indoctrinated,

14 and then --

15 CHIEF JUSTICE ROBERTS: Thank you,

16 counsel.

17 MR. BAXTER: Thank you.

18 CHIEF JUSTICE ROBERTS: The case is

19 submitted.

20 (Whereupon, at 12:37 p.m., the case

21 was submitted.)

22

23

24

25

Official - Subject to Final Review

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