No. 24-297

In the Supreme Court of the United States

TAMER MAHMOUD, ET. AL.

Petitioners,

v.

THOMAS W. TAYLOR, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, AGUDATH ISRAEL OF AMERICA, FIRST LIBERTY INSTITUTE, FOCUS ON THE FAMILY, THE NATIONAL ASSOCIATION OF EVANGELICALS, AND THE ISLAM AND RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases–Continued

Cases–Continued

Statutes & Rules

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

Christian Legal Society ("CLS") is a nonprofit, non-denominational association of Christian attorneys, law students, and law professors with members in every state and chapters on over 140 law school campuses. CLS believes that parents of any faith have no higher right and responsibility than to oversee the education and protection of their children; therefore, CLS has filed amicus briefs in many of this Court's cases cited herein.

Agudath Israel of America is a 103-year-old national Orthodox Jewish organization, headquartered in New York with offices and constituents across the United States. Among its other activities, Agudath Israel advocates for the right of parents to direct the educational upbringing of their children, particularly the religious upbringing of their children.

The **Association of Christian Schools International** (ACSI) is a nonprofit association providing support services to 24,000 Christian schools in over 100 countries. ACSI directly serves over 5,300 member schools worldwide, including 2,200 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States; 160 Christian international schools; and over 3,000 Christian global schools. Member schools educate some 5.5 million children around the world. ACSI accredits Protestant pre-K-12 schools, provides

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[1] Pursuant to Rule 37.6, no counsel for any party in this case wrote any part of this amici brief, and no person except amici contributed to the costs of its preparation.

professional development and teacher certification, and offers member schools high-quality curricula, student testing, and a wide range of student activities. ACSI members advance the common good by providing quality education and spiritual formation to their students. Our calling relies upon a vibrant Christian faith that embraces every aspect of life. This gives ACSI an interest in ensuring expansive religious freedom with strong protection from government attempts to restrict it.

First Liberty Institute is a nonprofit, public interest law firm dedicated to defending religious freedom for all Americans. It has argued several religious freedom cases before this Court, including *Groff v. DeJoy*, 600 U.S. 447 (2023); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022); *Carson v. Makin*, 596 U.S. 767 (2022); and *American Legion v. American Humanist Ass'n*, 588 U.S. 29 (2019). First Liberty represents parents across the country who seek to opt their children out of teaching and curriculum that violate their sincerely held religious beliefs, and the resolution of the issues here directly impact them.

Focus on the Family is a global Christian ministry dedicated to helping families thrive by providing resources to parents as they raise their children according to morals and values grounded in biblical principles. Focus on the Family believes parents have the right to exercise oversight over what their children are taught in schools about issues of gender and sexuality, including a right to opt out of teaching or curriculum that may violate their sincerely held religious beliefs.

The **National Association of Evangelicals** is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, mission social-service charities, refugee and humanitarian aid agencies, colleges, seminaries, and independent churches.

The **Islam and Religious Freedom Action Team of the Religious Freedom Institute** explores and supports religious freedom from within the traditions of Islam and also partners in advocacy with other action teams within the Religious Freedom Institute (RFI). RFI is committed to achieving broad acceptance of religious freedom as a fundamental human right. RFI Action Teams have a presence on the ground in each region to build coalitions and work toward making religious freedom a priority for governments, civil society, religious communities, businesses, and the general public.

SUMMARY OF ARGUMENT

The court of appeals framed its approach to the issues in this case around two decisions of this Court: *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), and *Bowen v. Roy*, 476 U.S. 693 (1986). *See* Pet. App. 25a-26a. This framing is both startling and sweeping. It is startling in its choice of two cases setting forth free exercise standards for a narrow category of cases involving a type of government action that does not even apply here. And it is sweeping in the far-reaching effects such an approach will have in foreclosing future claims

involving even the most severe burdens on religious exercise.

Lyng and *Roy* involved Free Exercise Clause challenges to a very specific set of government actions, namely government acting as proprietor of real property and government conducting its internal operations in a way that someone takes issue with on religious grounds. This arose with real property in *Lyng*, where Native Americans objected on religious grounds to construction of a road on U.S. Forest Service land. In *Roy*, it arose regarding internal governmental operations addressing the government's use of social security numbers to identify benefit recipients.

The court of appeals seized on the basic holdings of these two cases; namely, that the government, as a general matter, does not impose a redressable constitutional injury when third parties object to how the government manages its real property or conducts its internal operations. It then applied these principles to craft a rule for a very different scenario: public school students and their parents who allege that certain curricular materials will cause them religious harm and seek notice and an opt-out when those objectionable materials are taught. Analogizing public school students seeking to avoid the direct imposition of religiously harmful material upon them to third parties' objection to the government's internal operations and to use by the government of government land is an astounding leap.

First, the decision evades a long line of holdings regarding the religious rights of parents to direct the upbringing of their children. While *Pierce v. Soc'y of*

Sisters, 268 U.S. 510, 535 (1925), acknowledged the fundamental principle that "[t]he child is not the mere creature of the state," the court of appeals' ruling necessarily implies, whether it recognized it or not, that with respect to what happens in public school classrooms during instructional time, children are exactly that.

Second, the decision's characterization of public schooling as the government doing as it wishes with its own property and internal operations could apply equally to many of the Court's recent free exercise decisions. Money is of course a form of property, and government programs are a form of government operations. If, as the court of appeals held, the government is free to utilize its resources as it wishes without regard to free exercise impacts, then *Carson v. Makin*, 596 U.S. 767 (2022), and *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464 (2020), would have come out the other way. In *Carson*, after all, Maine insisted that it was trying to offer the equivalent of a public education, 596 U.S. at 782-85, and in *Espinoza*, the state asserted fealty to its constitution and the state's chosen way of handling government educational funds with regard to religious institutions. 591 U.S. at 484-86. But this Court rejected such arguments, along with similar ones in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017). Indeed, even seminal free exercise decisions like *Sherbert v. Verner*, 374 U.S. 398 (1963), could not stand under the court of appeals' reasoning. After all, what was *Sherbert* but a case of the government operating a social welfare program and limiting unemployment benefits in the way it

deemed best, namely limiting payment to those who would accept any work available?

A third error of the court of appeals was its rejection of Petitioners' argument that strict scrutiny applies under the Free Exercise Clause because Respondents reserve for themselves the discretion to supply notice and an opt-out for sex education but no notice and opt-out for its LGBTQ curriculum. This is a mechanism of selective exemptions, and it represents a value judgment that persons with religious and non-religious objections to sex education deserve such consideration, but parents who object to the LGBTQ curriculum do not. This selectivity triggers strict scrutiny under both *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020). Some families of faith may believe that older children learning about sexual activity, venereal diseases and their prevention, and contraception in sex education is more of an imposition on their religion than teaching younger children that gender is purely a choice and discussing same-sex relationships. For other families, however, the opposite will be true. But the government is not permitted to favor some religious beliefs over others without satisfying strict scrutiny.

For these reasons, the Court should reverse the decision of the court of appeals.

ARGUMENT

I. This Case Falls Squarely Within This Court's Parental Rights Decisions.

The court of appeals framed this case as one involving not government infringement upon parents' fundamental right to guide the religious upbringing of their children, but rather as one of parents trying to alter a school curriculum to fit their religious views. This fundamental misconception led the court to erroneously apply this Court's precedents dealing with challenges to the government's own operations. Citing *Roy*, the court of appeals stated that the Free Exercise Clause is "written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." Pet. App. 25a (quoting *Roy*, 476 U.S. at 700). Petitioners here, however, seek nothing from the government other than the ability to exempt their children from a curriculum that violates their religious beliefs.

The court of appeals also twice quoted language from *Roy* stating that the Free Exercise Clause does not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." Pet. App. 25a, 39a (quoting *Roy*, 476 U.S. at 699). It viewed the present case as one, like *Roy*, focused on how the government "conduct[s] its own internal affairs." Pet. App. 40a (quoting *Roy*, 476 U.S. at 699). The court of appeals likewise cited *Lyng* for the proposition that free exercise rights do not extend to "the legitimate conduct by government of its own

affairs." Pet. App. 25a (quoting *Lyng*, 485 U.S. at 451).[2]

But the parents in this case are not asking the government to remove materials from its curriculum or add new materials that the parents think would be better. They are asking only that certain materials, which they believe interfere with their children's religious upbringing, not be imposed on their children and that they be given notice and an opportunity to opt out of exposure to materials they believe are religiously harmful. Just as the Amish families in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), did not ask for the public schools to change how they conducted their educational programs to conform to the Amish educational way, but rather asked to be able to opt out after eighth grade, so, too, do these parents not seek to change anything about what the Respondents'

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[2] *Lyng* has faced criticism that it did not fully address the problems inherent in the facts of that case: whether the land could be deemed wholly the government's to do with as it wished in light of the current and traditional use of the land in question by Native Americans for religious purposes, as well as the special relationship of Native Americans to the federal government. The plaintiffs in *Lyng* thus arguably had a specific claim of injury from the construction of the road, and many have called for it to be revisited. *See*, *e.g.*, Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise under* Smith *and after* Smith, 2020 CATO SUP. CT. REV. 33, 58-59 (2020-2021); Michael W. McConnell, *Religious Participation in Public Programs—Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 125-26, 170-71 (1992); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 945-46, 973-76 (1989). An example that does not have this factual complexity would be a citizen objecting to an Army office building being constructed in the shape of a five-pointed star on the ground that this can be an occult symbol and impacts her faith in some way.

schools are teaching, but rather ask that their children be able to opt out of those things that interfere with their exercise of their faith.

The court of appeals minimized the relevance of *Yoder*, saying that *Yoder* "has been markedly circumscribed within free exercise precedent in the decades since it was decided." Pet. App. 37a. *See also id.* at 39a. ("[I]n *Yoder*, the Supreme Court applied a narrower principle to a singular set of facts."). While some—but not all—lower courts have declined to apply *Yoder* to cases like this one (see Pet. at 19-23), in *this* Court's jurisprudence *Yoder* has never been "markedly circumscribed." Rather, it remains a strong and frequently cited statement of the fundamental right of parents to direct the religious upbringing of their children. As this Court held recently in *Espinoza*: "Drawing on 'enduring American tradition,' we have long recognized the rights of parents to direct 'the religious upbringing' of their children." 591 U.S. at 486 (quoting *Yoder*, 406 U.S. at 213-14, 232). Similarly, this Court, in *Troxel v. Granville*, 530 U.S. 57, 65 (2000), citing *Yoder* and other cases, stated that "the interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court." The Court explained that the Due Process Clause protects "the right of parents to 'establish a home and bring up children' and 'to control the education of their own.'" *Id.* at 65 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923)).

This Court's grounding of this right in both the Free Exercise Clause and the Due Process Clause has its roots in *Meyer*, addressing a ban on foreign

language instruction, and in *Pierce*, which invalidated an Oregon law requiring all parents to send their children to public school. *Pierce* (like *Meyer*) was decided before the incorporation of the Free Exercise Clause and was thus decided only under the Due Process Clause, but it nonetheless is a holding with strong religious elements, underscoring that parents have the right to inculcate values such as religion, which are outside the province of the state: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce*, 268 U.S. at 535. The Court's reference to "additional obligations" would appear to be a reference to higher duties such as religious duties. See, *e.g.,* James Madison, *Memorial and Remonstrance Against Religious Assessments*, [ca. 20 June] 1785, *Founders Online,* National Archives, http://founders.archives.gov/documents/Madison/01-08-02-0163 ("It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.").

The Court in *Yoder* drew extensively on *Pierce*, holding that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Yoder*, 406 U.S. at 213-14. Indeed, the Court concluded that

> only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free

> exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.

Id. at 215.

This Court, in *Emp't Div. v. Smith*, 494 U.S. 872 (1990), while describing *Yoder* as an exception to the general rule regarding neutral and generally applicable laws, nonetheless described in very broad terms the untouched exception to the general rule of when the state interferes with parents' religious upbringing of their children, citing both *Pierce* and *Yoder*:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents, acknowledged in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), to direct the education of their children, see *Wisconsin v. Yoder,* 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).

494 U.S. at 881. This Court, far from "markedly circumscrib[ing]" the holding of *Yoder* as the court of appeals believed, in fact has continually situated *Yoder* within the line of free exercise and due process fundamental rights cases running from *Meyer* and *Pierce* through *Troxel* and *Espinoza*.

The court of appeals also sought to minimize the harm to Petitioners, saying that exposing their children to these materials is not equivalent to the harm in *Yoder*, where, without an opt-out, the Amish families were forced to send their children to school against their wills. This is wrong on two grounds. First, the court of appeals enmeshed itself in religious value judgments, finding the imposition on the religion of the Amish to be qualitatively different from the imposition on the religion of these Petitioners. The Petitioners in this case have set forth in detail how they and their children are injured by the government's actions. Petitioners Mahmoud and Barakat, who are Muslim, presented evidence that their faith forbids them from "[i]ntentionally exposing [their] young, impressionable, elementary-age son to activities and curriculum on sex, sexuality, and gender that undermine Islamic teachings," Pet. App. 532a, and removed their son from public school after the district court rejected their claim. Pet. at 9. Likewise, the Persaks, who are Roman Catholic, believe that exposing their "elementary-aged daughters to viewpoints on sex, sexuality, and gender that contradict Catholic teaching on these subjects is inappropriate and conflicts with [their] religious duty to raise [their] children in accordance with Catholic teaching." Pet. App. 544a. Petitioners Jeff and

Svitlana Roman, who are Roman Catholic and Ukrainian Orthodox, respectively, believe in the teaching of the Roman Catholic Church on sexuality and sexual identity and believe they have a "sacred obligation to teach these principles to [their] son and to encourage him at appropriate times to embrace these principles and [their] religious way of life." *Id.* at 538a. They also removed their son from public school because of the district court denying a preliminary injunction. Pet. at 10. Likewise, one of the members of Petitioner Kids First removed their disabled child from the public school because of the Pride storybooks, incurring costs of $25,000 per year. Pet. App. 648a-649a.

There is no indication in the record that these Petitioners are insincere in their religious beliefs. Further, this Court has been clear over many decades that courts are not to judge the centrality or validity of plaintiffs' religious beliefs. Rather, sincere assertions of religious beliefs, and the nature of the burdens upon them that a plaintiff articulates, must be accepted. "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *see also Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 681 (2020) (when religious beliefs are sincerely held, the government cannot "tell the plaintiffs that their beliefs are flawed"); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 685-86 (2014) (question was whether government "imposes a substantial burden on the ability of the objecting party to conduct business in

accordance with *their religious beliefs*. . . . [O]ur narrow function in this context is to determine whether the plaintiffs' line drawing reflects an honest conviction.") (cleaned up). As the dissent in the court of appeals described it:

> These parents' faith dictates that they—not others—teach their children about sex, human sexuality, gender and family life. Their faiths dictate that they shield their children from teachings that contradict and undermine their religious views on those topics. And no matter how you slice it, the board's decision to deny religious opt-outs prevents the parents from exercising these aspects of their faith if they want their children to obtain a public education.

Pet. App. 63a. The court of appeals majority's parsing and weighing of the parents' religious beliefs, and concluding that this is less of an imposition on religion than making an Amish child go to school after the eighth grade, is at odds with this Court's repeated instruction that courts not make such religious determinations.

Second, the actions of Respondents are objectively coercive under this Court's precedents. This Court has stressed that grade-school teachers have a powerful influence on children that raises concerns when that influence conflicts with faith and conscience. As the Court stated in *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987): "The State exerts great authority and coercive power through mandatory attendance

requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." Likewise, the Court observed in *Lee v. Weisman*, 505 U.S. 577, 592 (1992), that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *See also West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 632, 637 (1943) (recognizing the coercive pressure of elementary school classrooms, where "attendance is not optional," and thus school officials must exercise "scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source").

Here, the written materials in the LGBTQ curriculum, and the accompanying instructional materials for teachers, are specifically designed to change the thinking of students. The book "Intersection Allies," designed for "Kindergarten through Grade 5," Pet. App. 236a, tells children about being non-binary and transgender, *id*. at 350a, and declares "standing together, we'll rewrite the norms." *Id*. at 345a. The book "Born Ready," also for K-5, Pet. App. 240a, features a biological girl who identifies as a boy. When her brother says that this doesn't make sense, his mother corrects him and says "[n]ot everything *needs* to make sense. *This is about love*." *Id*. at 465a. The teachers' guide instructs that teachers can respond to questions as follows: "Our body parts do not decide our gender. Our gender comes from our inside—we might feel different than what people tell us we are. We know ourselves best." App. 630a-631a. As the dissent below in this case also points out, another instruction document advises

teachers to "[d]isrupt the either/or thinking by saying something like: actually, people of any gender can like whoever they like. . . . Do you think it is fair for people to decide for us who we can and can't like?" *Id*. at 62a. Another training sheet asks: "Is heternonormitivity reinforced or disrupted?" and "Is cisnormativity reinforced or disrupted?" *Id*. at 622a. Religious parents can accurately read these materials as comprising a deliberate program to counter the religious teachings their children receive at home about sexuality and gender.

These, and other examples cited by the Petitioners, see Pet. at 11-14, reveal a steady stream of books and instructional materials for teachers designed to profoundly impact the beliefs of the students. It is no answer that parents can still teach their faith at home, as the district court and Petitioners aver. *See Mahmoud v. McKnight*, 688 F.Supp.3d 265, 299 (D. Md. 2023) ("The parents still may instruct their children on their religious beliefs regarding sexuality, marriage, and gender, and each family may place contrary views in its religious context."); *id*. ("No government action prevents the parents from freely discussing the topics raised in the storybooks with their children or teaching their children as they wish."); Pet. App. 136a-137a (quoting former Montgomery School Superintendent Monifa McKnight stating: "Every day, when our children go home, then they have the lessons that are taught in their home that is reflective of culture, religion, and all of those pieces.").

This Court briefly considered and then resoundingly rejected such a parental mitigation

defense to mandatory indoctrination in public schools. In *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 599, (1940), one reason the Court gave for upholding compulsory pledges of allegiance was that "the state is normally at a disadvantage in competing with the parent's authority, so long—and this is the vital aspect of religious toleration—as parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state's educational system is seeking to promote." This Court wisely rejected such a proposition and reversed *Gobitis* three years later in *Barnette*.

The freedom of Montgomery County parents to teach their children their faith at home simply does not justify the state using the kind of coercive power at work here. See Pet. at 14 (citing lower court briefing in which counsel for Respondents states that students "may come away from [the] instruction *with a new perspective not easily contravened by their parents*.") (emphasis added).

Regardless of how objectively coercive these materials are, these parents have presented unchallenged evidence that they sincerely believe these materials interfere with their religious upbringing of their children and cause their children religious harm. That is the dispositive question that this Court has emphasized is the test, and it is easily met here.

II. Respondents Have Conditioned Receipt of a Valuable Government Benefit on Forfeiting Religious Exercise.

In addition to trying to distinguish *Yoder* based on the nature and degree of religious harm involved, Pet. App. 36a-40a, the court of appeals also dismissed Petitioners' argument that the Respondents improperly pressured Petitioners to violate their religious beliefs as a condition of receiving the benefit of a public education. *Id.* at 44a-48a. The court of appeals concluded that "government coercion does not exist merely because an individual may incur increased costs as a consequence of deciding to exercise their religious faith in a particular way." *Id.* at 47a.

A review of this Court's free exercise jurisprudence, however, reveals the very opposite. It is true, as the court of appeals noted, that in *Yoder* the parents were "affirmatively compelled . . . under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 39a (quoting *Yoder*, 406 U.S. at 218). Thus, in *Yoder*, the challenged government action was forcing, on pain of criminal sanction, the conduct that was religiously injurious. But such incidents of government forcing conduct are far less common in free exercise cases than government conditioning a benefit on abandoning one's religious beliefs or practices. In *Sherbert*, the government did not force the plaintiff to work on Saturdays, her Sabbath. Rather, the government required this as a condition of receiving unemployment benefits. The same is true for this Court's free exercise

unemployment cases. The free exercise of religion in these cases is "infringed by the denial of or placing of conditions upon a benefit or privilege," *Sherbert*, 374 U.S. at 404, "substantial pressure" to modify religious practices, *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981), and by being "forced to choose between fidelity to religious belief" and "the forfeiture of [public] benefits." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987).

Likewise, this pressure to modify religious beliefs and practice is a prominent feature of this Court's most recent free exercise cases. Public education is an extremely valuable benefit and, for those who cannot afford private school or whose personal circumstances do not permit homeschooling, it is more than just a benefit, but an unavoidable requirement. "Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school." *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring). But even for parents who have options, "[t]he Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Carson*, 596 U.S. at 778 (quoting *Lyng*, 485 U.S. at 450). The Court in *Carson* invalidated the state of Maine's exclusion of religious (but not other private) schools from its tuition program for students without a public school in their district over the state's objection that it was merely trying to finance the equivalent of public-school instruction. 596 U.S. at 782-85. Similarly, the Court in *Espinoza* struck down the exclusion of religious schools from a scholarship program. The Court held that "[p]lacing such a

condition on benefits or privileges 'inevitably deters or discourages the exercise of First Amendment rights.'" 591 U.S. at 478 (quoting *Trinity Lutheran*, 582 U.S. at 463); *cf. Hobby Lobby*, 573 U.S. at 720-22 (substantial burden under Religious Freedom Restoration Act created by financial penalties for not providing contraceptive coverage).

As this Court held more than 60 years ago, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert,* 374 U.S. at 404; *see also McDaniel v. Paty,* 435 U.S. 618, 633 (1978) (Brennan, J., concurring in judgment) (The "proposition—that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment—is . . . squarely rejected by precedent.").

Here, as the dissent below observed, "[t]he board's refusal to grant the parents' requests for religious opt-outs to instruction . . . forces the parents to make a choice—either adhere to their faith or receive a free public education for their children. They cannot do both." Pet. App. 62a. Under this Court's precedents, that is a burden under the Free Exercise Clause that triggers strict scrutiny.

III. Respondents' Notice and Opt-Out Policy Is Not Generally Applicable and Thus Strict Scrutiny Applies.

The court of appeals rejected Petitioners' claim that strict scrutiny review was required because Respondents were infringing Petitioners' religious

exercise through imposition of a rule that is not generally applicable. Pet. App. 19a, 29a-30a. But under this Court's precedents, the Respondents' refusal to grant notice and opt-outs to these parents was a non-generally applicable action for two reasons.

First, the Respondents reserve for themselves discretion on when to provide parents with curricular opt-outs and when not to. They originally permitted opt-outs for the LGBTQ curriculum but then reversed course. *Id.* at 185a, 657a. As the dissent explained, the schools "have discretion to grant religious opt-out requests. A school decides on a case-by-case basis if the requested religious accommodation is 'reasonable' and 'feasible.'" *Id.* at 68a. The government's decision to reserve such discretion to itself triggers strict scrutiny review when such discretion is withheld from a religious objector. *Fulton*, 593 U.S. at 533-38.

Second, Respondents' actions constitute governmental value judgments favoring opt-outs for certain categories of reasons and refusing to provide opt-outs for these parents' religious reasons. The Respondents provided, and continue to provide, notice and opt-outs for parents objecting to sex education, but refuse to provide opt-outs for Petitioners' sincere religious objections to the LGBTQ curriculum. This conflicts with this Court's decisions in *Roman Catholic Diocese of Brooklyn v. Cuomo,* 592 U.S. 14 (2020), and *Tandon v. Newsom*, 593 U.S. 61 (2021), in which the government's favored treatment for various categories of places where people assemble triggered strict scrutiny under the Free Exercise Clause when similar treatment was denied for religious assemblies. Certain things that some people object to exposing

their children to—the content of sex-ed curriculum—are favored with opt-outs, while Petitioners' religious objections to the LGBTQ curriculum are disfavored. This triggers strict scrutiny under *Diocese of Brooklyn* and *Tandon*.

It is no answer that many of the favored objectors to the sex-ed curriculum likely have religious objections. It is surely more of a free exercise violation, not less, if certain religions or religious beliefs receive favorable treatment over others. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228 (1982) (singling out for disfavored treatment religious groups that solicited door-to-door was unconstitutional denominational preference).

It is likewise no answer that the state of Maryland requires Respondents to establish procedures for sex-ed opt-outs. *See* MD. CODE REGS. §§13A.04.18.01(D)(2)(e)(i) & (ii). The Respondents are governmental actors, whose power and authority ultimately comes from the state of Maryland. The bottom line is that those who object to learning about sexual activity, contraception, venereal disease, and similar subjects are favored and are given opt-outs by the Respondents, but those objecting to the LGBTQ curriculum based on their sincere religious beliefs are disfavored and denied opt-outs by Respondents. This disparate treatment is only permissible if Respondents can meet strict scrutiny.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court of appeals.

Respectfully submitted,

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