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 OF THE STATE OF WEST VIRGINIA, COMMONWEALTH OF VIRGINIA, AND 24 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Amici curiae are the State of West Virginia, the Commonwealth of Virginia, the State of Alabama, the State of Alaska, the State of Arkansas, the State of Florida, the State of Georgia, the State of Idaho, the State of Indiana, the State of Iowa, the State of Kansas, the Commonwealth of Kentucky, the State of Louisiana, the State of Mississippi, the State of Missouri, the State of Montana, the State of Nebraska, the State of North Dakota, the State of Ohio, the State of Oklahoma, the Commonwealth of Pennsylvania the State of South Carolina, the State of South Dakota, the State of Texas, the State of Utah, and the State of Wyoming (collectively, the *Amici* States). *Amici* States have a compelling interest in ensuring that their political subdivisions and school boards respect their citizens' constitutional rights. Many *Amici* States have ensured that respect by passing laws that provide parents with notice and the right to opt their children out of instruction on human sexuality. But the School Board of Montgomery County, Maryland took the *opposite* approach—it categorically will not allow opt-outs for students whose parents object to the School Board's "Pride Storybooks." This flat ban on parental discretion violates the federal Constitution.

Amici States believe that governments should be zealous in enforcing laws meant to protect their citizens' First Amendment rights and parents' rights to direct the education of their children. But the School Board's policy here shows no such concern, instead requiring children to participate in sex education even where they or their families object on religious grounds. As *Amici* States explain, the Fourth Circuit was wrong in its evaluation of the School Board's policy; refusing parent requests to opt their young children out of reading Pride Storybooks burdens those

parents' and students' religious exercise. What's more, the sheer prevalence of opt-out policies nationwide confirms that the School Board lacks a compelling interest in opposing one. At a minimum, the School Board's policy is not the least restrictive means of furthering any governmental interest.

INTRODUCTION AND SUMMARY OF ARGUMENT

For decades, courts have recognized that students in elementary schools are "impressionable," *Edwards* v. *Aguillard*, 482 U.S. 578, 584 (1987), "vulnerable," *Brown* v. *Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994), and particularly sensitive when it comes to matters of morality, religion, and belief, *Gruenke* v. *Seip*, 225 F.3d 290, 307 (3d Cir. 2000). So it's no wonder that cases like this one—that is, cases that concern how to raise our smallest citizens—implicate fundamental constitutional rights. Parents have a right to guide their children's education. They also have a right to decide their children's religious upbringing. Both those rights work together to empower parents because sexual education "constitute[s] [an] important pillar[] of a religious faith." Helen M. Alvaré, *Families, Schools, and Religious Freedom*, 54 LOY. U. CHI. L.J. 579, 639 (2022). At least without some substantial countervailing state interest, parents must therefore have, at minimum, a right to opt out from exposing their young children to sex education that violates their religion.

For reasons like these, States have long stepped up to protect parents' rights. A substantial majority of States have enshrined protections for parental choice in matters of sex education—in other words, matters exactly like those involved here—into law. That long tradition directly undermines any claim by the School

Board that opt-outs are not feasible alternatives. And indeed, much suggests that "the state's claimed interests are either ineffectively promoted by the sexual content they are promoting, or possibly *better* promoted by the religious norms the state opposes." Alvaré, *supra*, at 638.

This Court should hold that strict scrutiny applies to this infringement on two fundamental constitutional rights and accordingly require schools to provide opt-out rights. Only then will our youngest, our most vulnerable, and our most impressionable citizens receive the protections that they deserve—and the Constitution demands. Respondents ask this Court to sign off on a school policy that permits a local school district to impose its preferred ideology on young, impressionable minds—*over* their parents' religious objections. But that would wave the problem away, insisting that forced participation in an educational program over the parents' religious objection is no burden at all. This view is wrong.

The Court should reverse the Fourth Circuit's judgment.

ARGUMENT

I. Laws authorizing students to opt out of sex education protect essential free-exercise and parental-autonomy rights.

The First Amendment right to religious freedom is "essential," *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 524 (1993), especially combined with another fundamental liberty: parents' right to direct their children's education. The Fourth Circuit's decision endangers both those key interests. The Court should, therefore, reverse the judgment below.

A. Parental rights existed well before the Founding. They derive from both common law and natural law. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children." *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972). Not only are these rights "older than the Bill of Rights," but they originate in "intrinsic" human rights. *Smith* v. *Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977) (quotation marks omitted). As William Blackstone recognized, parental rights emanate from natural law and "the most universal relation in nature." 1 WILLIAM BLACKSTONE, COMMENTARIES, *446 (1752). Drawing from that long tradition, English common law recognized that children need parental direction and authority. *Id.* at *450–51. Parents, after all, have "maturity, experience, and capacity for judgment" that their children lack. *Id.* at *447. The law has thus long protected parental rights primarily for the child's sake—not to hand parents more power at the children's expense. In fact, parental rights serve to enhance children's ability meaningfully to exercise their liberties once they are properly developed by the care of their parents. *Bellotti* v. *Baird*, 443 U.S. 622, 638–39 (1979) ("Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.").

At the Founding, parents had control over what their children observed and heard. See *Brown* v. *Entertainment Merchs. Ass'n*, 564 U.S. 786, 825 (2011) (Thomas, J., dissenting). They had the "right and duty to 'fill [their] children's minds with knowledge'" and to forbid them from encountering corrupting ideas to ensure their proper development. *Id.* at 823–24

(quoting EDMUND S. MORGAN, THE PURITAN FAMILY: RELIGION AND DOMESTIC RELATIONS IN SEVENTEENTH CENTURY NEW ENGLAND 97 (rev. ed. 1966)) (cleaned up); see also COTTON MATHER, A FAMILY WELL-ORDERED 38 (1699). This idea manifested particularly in control over what children read. *Brown*, 564 U.S. at 823–24 (Thomas, J., dissenting). And with these rights came the societal expectation that parents would "close[ly] monitor[]" their children to ensure their proper development. *Id.* at 823–27; see BERNARD WISHY, THE CHILD AND THE REPUBLIC 24–25 (1968).

"The concept of total parental control over children's lives extended into the schools." *Brown*, 564 U.S. at 830 (Thomas, J., dissenting) (citing Noah Webster, *On the Education of Youth in America* (1790) *in* ESSAYS ON EDUCATION IN THE EARLY REPUBLIC 57–58 (Frederick Rudolph ed. 1965)). Through the doctrine of *in loco parentis*, "teachers assumed the sacred duty of parents . . . to train up and qualify their children." *Ibid.* (cleaned up). But the schoolteacher had authority to do only what the parent allowed him to do—by virtue of the parent's delegation of his own duties and his consent to the teacher's work. *Mahanoy Area Sch. Dist.* v. *B.L. ex rel. Levy*, 594 U.S. 180, 198–99 (2021) (Alito, J., concurring). Parents and society at large watched schoolteachers "with the most scrupulous attention." *Brown*, 564 U.S. at 830 (Thomas, J., dissenting). And the laws "reflected these concerns and often supported parental authority with the coercive power of the state," *id.* at 835, because the parents ultimately remained the primary formator, *B.L.*, 594 U.S. at 201–02 (Alito, J., concurring).

The Constitution and the cases construing it reflect these early legal principles. Since the Founding, American parents have enjoyed a right to direct their

children's education. And this Court has held that parental rights are a "fundamental liberty interest" under the Fourteenth Amendment. *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982). Indeed, parents' role in shaping their children's formation through education "is now established beyond debate as an enduring American tradition." *Yoder*, 406 U.S. at 232; see also *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503–04 (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."); *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights.'" (cleaned up)). To that end, "the liberty specially protected by the Due Process Clause includes [this parental] right . . . to direct the education and upbringing of one's children." *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997) (cleaned up); accord *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944). Especially as to education, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects [this] fundamental right." *Troxel* v. *Granville*, 530 U.S. 57, 65–66 (2000) (plurality op.). Again, the right reflects the commonsense notion "that natural bonds of affection lead parents to act in the best interests of their children." *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979).

This Court has repeatedly affirmed the breadth of the parent's right "to give his children education suitable to their station in life," because its conservation has "long [been] recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U.S. 390, 399–400 (1923). The Court has safeguarded this right on many occasions—

stepping in to protect private education, ensuring Amish families can homeschool their children, and striking down prohibitions against education in a foreign language. See *id.* at 400; *Farrington* v. *Tokushige*, 273 U.S. 284, 289–99 (1927); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534–35 (1925); *Yoder*, 406 U.S. at 234.

The throughline in these cases is simple—parents need wide latitude when making difficult educational decisions, and "[n]either state officials nor federal courts are equipped to review" those decisions. *Parham*, 442 U.S. at 604. "The child is not the mere creature of the state," *Pierce*, 268 U.S. at 535, and the risks of child-rearing choices do "not automatically transfer the power to make that decision" to the government, *Parham*, 442 U.S. at 603. Rather, "the state's responsibility for children's well-being is a subsidiary one which ought to be carried out in a subsidiary way[,] i.e., by *assisting* parents to discharge their obligations." Ryan Bangert, *Parental Rights in the Age of Gender Ideology*, 27 TEX. REV. L. & POL. 715, 719 (2023) (cleaned up). As a result, the State lacks "any general power . . . to standardize its children by forcing them to accept instruction from public teachers only," because the State would be replacing the parent's leadership. *Pierce*, 268 U.S. at 535.

To be sure, parental rights are not absolute. The State has a strong interest in stepping in to protect children from abuse and neglect. See *Parham*, 442 U.S. at 602–04; accord *New York* v. *Ferber*, 458 U.S. 747, 756–57 (1982) (noting the state's "compelling" "interest in safeguarding the physical and psychological well-being of a minor" (quotation marks omitted)). The State's right to do so remains even if the parental right implicates a religious concern. Parents, for

instance, do not have the right to obtain reasonably banned medical treatments for their children—even when the parents' religious conviction is at odds with the State's choice. *Parham*, 442 U.S. at 603–04 ("[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."). So parental rights—religious in nature or not—cannot include such misconduct. *Ibid.*

This notion that the prohibition of child abuse may trump even religious liberty tracks the broader principle that injuries to public safety "may override free exercise claims." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1505 (1990); see also *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963) ("The [religious] conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order."). States historically asked whether "the natural tendency of [the religious exercise] is to produce practices inconsistent with the public safety or tranquility." McConnell, *supra*, at 1505; see also *Vlaming* v. *West Point Sch. Bd.*, 895 S.E.2d 705, 721 (Va. 2023) (holding that, in the Commonwealth of Virginia, the constitutional right of free exercise of religion is "among the 'natural and unalienable rights of mankind' and that 'overt acts against peace and good order' correctly defines the limiting principle for this right and establishes the duty of government to accommodate religious liberties that do not transgress these limits" (citations omitted)). Nine States at the Founding limited Free Exercise to actions considered "peaceable" or that would not disturb "safety." McConnell, *supra*, at 1461.

But these safeguards directed at fundamental physical wellbeing do not alter the default presumption that parents act in the best interests of their children. McConnell, *supra*, at 1461. "[O]nly the gravest abuses" ought to limit First Amendment rights. *Sherbert*, 374 U.S. at 406 (quotation marks omitted). And "[s]imply because the decision of a parent . . . involves risks does not automatically transfer the power to make that decision to . . . the state." *Parham*, 442 U.S. at 603.

B. These parental rights work hand in hand with another centuries-old right: the right to the free exercise of religion.

Here again, the First Amendment enshrined law protecting religious freedom and conscience rights cherished long before the Constitution came to be. Colonies recognized the fundamental importance of freedom of religion and conscience well before the Founding *because of* their religious diversity. See, *e.g.*, *Abbo* v. *Briskin*, 660 So. 2d 1157, 1159 (Fla. Dist. Ct. App. 1995) ("By the time of our revolutionary war, religious diversity was a fact of colonial life."). Early Americans believed religion provided a venue for conscience to take root in man's heart, and the Framers viewed conscience as "most sacred." James Madison, *Property* (Mar. 29, 1792) *in* 1 THE FOUNDERS' CONSTITUTION 598, 598 (Philip B. Kurland & Ralph Lerner eds., 1987). "[T]he founding generation . . . defend[ed] religious freedom for all peaceable faiths, and wove multiple principles of religious freedom into the new state and federal constitutions of 1776 to 1791." John Witte, Jr. & Joel A. Nichols, *"Come Now Let Us Reason Together": Restoring Religious Freedom in America and Abroad*, 92 NOTRE DAME L. REV. 427, 436 (2016). And "the embodiment" of religious liberty in

these constitutions "was simply writing colonial experience into the fundamental law of the land." WILLIAM WARREN SWEET, RELIGION IN COLONIAL AMERICA (1965).

Robust religious freedom protections arose from this tradition, grounded in the Free Exercise Clause and the Establishment Clause (and applied to the States through the Fourteenth Amendment). U.S. Const. amend. I.; *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940). And now, "[r]eligious freedom is guaranteed everywhere throughout the United States." *Reynolds* v. *United States*, 98 U.S. 145, 162 (1878). The Religion Clauses are broad in scope—in proper proportion to their importance. The First Amendment guarantees Americans religious freedom no matter who they are or where they are. See *Follett* v. *Town of McCormick*, 321 U.S. 573, 577 (1944). And the Free Exercise Clause "does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life." *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022) (citing *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990)). Thus, "upon even slight suspicion that" state action "stem[s] from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *City of Hialeah*, 508 U.S. at 547. Coercion—even indirect coercion from an unfair choice between free exercise and reception of a public benefit—violates the First Amendment. *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 475–76 (2020).

C. This case brings these two sets of rights—parental rights and free-exercise rights—together. Policies like the one here go directly to the "inculcation of

moral standards" and "religious beliefs" of children. *Yoder*, 406 U.S. at 233. Thankfully for all Americans, most state action infringing on the "rights of parents to direct 'the religious upbringing' of their children" violates the Free Exercise Clause. *Espinoza*, 591 U.S. at 486 (quoting *Yoder*, 406 U.S. at 213–14). While States also have a "deeply rooted commitment to education," our religious liberties become "meaningless" if they must yield to the State's interest in education. *People* v. *DeJonge*, 501 N.W.2d 127, 138–39 (Mich. 1993). When educational and religious freedom interests clash, courts need to scrutinize the effect of granting an exemption on the state's interest in education to ensure religious liberty receives constitutional protection in schools. *Id.* at 140.

Put differently, this case presents a "hybrid situation," wherein "the Free Exercise Clause" is "in conjunction with . . . the right of parents . . . to direct the education of their children." *Smith*, 494 U.S. at 881–82 (cleaned up). In these hybrid situations, the parental right and the free exercise right are "incorporated together to provide a specific bite to the free exercise claim." Michael E. Lechliter, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209, 2215 (2005). "The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters." *Prince*, 321 U.S. at 165. After all, "[t]he State may not put its citizens to . . . a Hobson's choice" of either "following . . . religious beliefs and forfeiting [a] diploma" or "abandoning . . . religious beliefs" and receiving one. *Spence* v. *Bailey*, 465 F.2d 797, 800 (6th Cir. 1972).

Altogether, "[t]he right of parents to make moral and religious choices concerning curricular offerings in the public schools—within the limits necessary to serve truly compelling state interests—is central to the preservation of liberty." Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting* Mozert *After 20 Years*, 38 J.L. & EDUC. 83, 127 (2009). "Combined, the Fourteenth Amendment's Due Process Clause, the First Amendment's Free Exercise Clause," and certain state constitutions and statutes "do indeed protect parents and children who (1) opt out of public education entirely or (2) opt out of educational content that violates sincerely held religious or conscience-based beliefs." *Nelson* v. *Nazareth Indep. Sch. Dist.*, No. 2:24-CV-177-Z, 2024 WL 4116495, at *4 (N.D. Tex. Sept. 6, 2024) (cleaned up). The Fourth Circuit lost sight of those basic principles here.

II. Laws authorizing students to opt out of sex education are longstanding, widespread, and respectful of parental rights and religious freedom.

A. The state constitutional provisions protecting religious freedom predated and led to the federal constitution's Religion Clauses. See generally John Dinan, *The State Constitutional Tradition and the Formation of Virtuous Citizens*, 72 TEMP. L. REV. 619 (1999). By 1789, all States but one had constitutional protection for religious freedom and understood it to be an unalienable right. McConnell, *supra*, at 1455–56. And today, "religious freedom" is still accorded a "special status" in state constitutions. *Coulee Cath. Sch.* v. *Labor & Indus. Rev. Comm'n*, 768 N.W.2d 868, 891–92 (Wis. 2009). State constitutions continue to value religious freedom as an "unalienable right." McConnell, *supra*, at 1455–56.

State constitutions often "provide greater protection to the free exercise of religion . . . than is now provided under the United States Constitution." *Swanner* v. *Anchorage Equal Rts. Comm'n,* 874 P.2d 274, 280 (Alaska 1994). For example, West Virginia's constitutional protections for religious freedom are "broader" than the First Amendment. *State* v. *Everly*, 146 S.E.2d 705, 707 (W. Va. 1966); see W. VA. CONST. art. III, § 15. Virginia also played a central role in securing religious freedom, and its constitution likewise has a "vitality independent of the Federal Constitution." 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 303 (1974); see also *Vlaming*, 895 S.E.2d at 716 ("Given Virginia's historic role in the protection of religious liberties, the provisions in the Constitution of Virginia have a vitality independent of the Federal Constitution." (cleaned up)). James Madison and Thomas Jefferson advocated for Virginia laws that ensured citizens would not "suffer on account of [their] religious opinions or belief." *Everson* v. *Board of Educ. of Ewing Twp.*, 330 U.S. 1, 13 (1947). Virginia then emerged as the archetype for how States would treat religious liberty: with the utmost respect and care.

State courts have also steered federal courts towards important religious liberty principles. A West Virginia court, for instance, paved the way for an axiomatic rule declared by this Court. In *West Virginia State Board of Education* v. *Barnette,* this Court said "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. 624, 642 (1943). One year earlier, a state court in West Virginia decided a case like *Barnette* that dealt with five Jehovah's Witnesses indicted for not saluting the

American flag. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 164 (2008) (citing Mem. Op., *State* v. *Mercante* (W. Va. Cir. Ct. June 1, 1942)). Citing the state constitution, the judge wrote that "freedom of religion" requires that "unpopular minorities may hold views unreasonable in the opinion of majorities," charting the path for *Barnette*. *Ibid.* (cleaned up).

B. The same reverence States have for religious freedom is on display in their parental rights laws. States have "an interest in not undermining [the family] unit." *Wynn* v. *Carey*, 582 F.2d 1375, 1385 (7th Cir. 1978). That interest starts with protecting parental rights—the foundation of the parent-child relationship, the first societal unit. They are among the "oldest of the fundamental liberty interests" recognized by the States. *In re Adoption of O.R.*, 16 N.E.3d 965, 972 (Ind. 2014) (quoting *Troxel*, 530 U.S. at 65).

State courts routinely highlight the rights given to parents in state laws. For instance, a Kentucky court said a "court must presume that a parent is acting in the child's best interest." *Walker* v. *Blair*, 382 S.W.3d 862, 873 (Ky. 2012). A North Carolina court similarly did not allow the State to strip a parent of custody under the guise of a "best interest of the child" standard which substituted the judgment of the State for the judgment of the parents, unless the parent's conduct was "inconsistent with his or her constitutionally protected status." *Owenby* v. *Young*, 579 S.E.2d 264, 266–67 (N.C. 2003) (quotation marks omitted). And a Nebraska court acknowledged the "fundamental nature of . . . parental rights" by writing they warranted "a strict scrutiny level of analysis." *Hamit* v. *Hamit*, 715 N.W.2d 512, 527 (Neb. 2006).

These parental rights are especially relevant in the realm of sex education. Few topics more directly implicate parents' fundamental right to direct the "inculcation of moral standards" and "religious beliefs" of their children. *Yoder*, 406 U.S. at 233. But all States either require or authorize public schools to provide some instruction in human sexuality.[1] As set forth in more detail below, States prevent such instruction from conflicting with parental and religious rights by allowing parents to opt their children out—or providing that the instruction will be given only if parents opt their children in. See Section III, *infra*.

States' broad protection of parental and religious rights—and their near-universal adoption of broad parental opt-in or opt-out policies for purposes of sexual health instruction—reflects a time-honored tradition of state recognition of parental rights and religious freedom.

III. Because of this nationwide history and practice, the School Board cannot satisfy strict scrutiny.

As Judge Quattlebaum highlighted in his dissent, indirect coercion on religious individuals is subject to

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[1] SIECUS, SEX ED STATE LAW AND POLICY CHART, (July 2022), https://tinyurl.com/yddu4t74 (recording 46 States and the District of Columbia as requiring some type of sexual health education); IDAHO CODE ANN. § 33-1608 (the "local school board" may decide "whether or not any program in family life and sex education is to be introduced in the schools"); LA. STAT. ANN. § 17:281(A)(1)(a) (giving school boards authority to decide whether to offer sex education); S.D. CODIFIED LAWS § 13-33-6.1 (requiring "character development instruction" including "sexual abstinence" unless the appropriate body chooses otherwise); WYO. DEP'T OF EDUC., 2023 HEALTH AND SAFETY WYOMING CONTENT & PERFORMANCE STANDARDS (effective July 17, 2024) (suggesting human sexuality as a topic of instruction).

strict scrutiny under the First Amendment. Respondents cannot meet this standard. See Pet. App. 52a–75a.

This Court has long held that requiring claimants to choose between violating their religious beliefs and accepting government benefits burdens the free exercise of religion. See *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 532 (2021) ("[I]t is plain that the City's actions have burdened [the plaintiff's] religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs."); *Sherbert*, 374 U.S. at 404 ("Governmental imposition" of a choice "between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand," puts an impermissible "burden upon the free exercise of religion").

The Fourth Circuit rejected this historical understanding. The court held that the School Board did not require the parents or their children to disavow their beliefs to benefit from public schools. See Pet. App. 46a. But as the dissent noted, the Fourth Circuit's view cannot be squared with this Court's precedent: *Sherbert*, 374 U.S. 398; *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981); or *Fulton*, 593 U.S. 522. See Pet. App. 66a n.3 (Quattlebaum, J., dissenting). The relevant question is not whether there is a "total barrier to the public benefit." *Ibid.* Rather, the question is whether the state policy puts individuals to the difficult choice between living out their faith or obtaining the benefit. See *ibid.*; accord *Fulton*, 593 U.S. at 532; *Sherbert*, 374 U.S. at 404.

The Fourth Circuit's holding incorrectly diminishes the First Amendment rights of schoolchildren, requiring parents and students to make a threshold showing of a burden that is greater than the showing required outside the school context. In *Ramirez* v. *Collier*, for instance, the State rightfully conceded that any burden was substantial when the State refused to allow a prisoner's pastor to lay hands on the prisoner and audibly pray during the prisoner's execution—notwithstanding that the State's policy did not affirmatively prohibit the prisoner himself from praying out loud or otherwise practicing his religion. 595 U.S. 411, 420, 426 (2022). The lack of accommodation was itself a substantial burden. See *ibid.* And in *Holt* v. *Hobbs*, this Court clarified that "the availability of alternative means of practicing religion" does not alleviate a substantial burden on one aspect of a prisoner's religious practice. 574 U.S. 352, 361–62 (2015).[2]

It cannot be that a burden on religion is inconsequential because it occurs in a school rather than a prison. The Fourth Circuit pointed out that parents can choose other forms of education. Pet. App. 46a. But "the availability of alternative[s]" does not make a burden insubstantial. See *Holt*, 574 U.S. at 361–62. And "[m]ost parents, realistically, have no choice but to send their children to a public school." *Morse* v. *Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring). Petitioners here have been put to the choice of violating their religious beliefs by subjecting their

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[2] In both *Ramirez* and *Holt*, this Court applied the Religious Land Use and Institutionalized Persons Act, not the Free Exercise Clause, but the inquiry under both similarly asks whether the government has burdened, or substantially burdened, the claimant's religious exercise. See *Ramirez*, 595 U.S. at 416, 424–25; *Holt*, 574 U.S. at 356; *Fulton*, 593 U.S. at 532; *Kennedy*, 597 U.S. at 525.

young children to teaching contrary to their religion or forgoing the benefit of public education. Under *Fulton*, this choice is a burden on free exercise. See 593 U.S. at 532. Strict scrutiny is therefore the appropriate standard to review the School Board's decision to deny opt-outs. See Pet. App. 66a–71a; accord *Tatel* v. *Mt. Lebanon Sch. Dist.*, No. CV 22-837, 2024 WL 4362459, at *41 (W.D. Pa. Sept. 30, 2024) (holding that strict scrutiny applied to no-opt-out policy as to transgender-related instruction in elementary schools).

To withstand strict scrutiny, government action "must advance a compelling state interest by the least restrictive means available." *Bernal* v. *Fainter*, 467 U.S. 216, 219 (1984). The School Board cannot establish a compelling state interest in a categorical ban on opt-outs given the long history and continued practice of providing such opt-outs to parents. Given the obvious potential clash between sex education programs and the fundamental constitutional rights of parents, the vast majority of States—including Maryland—"recognize the controversial nature of the issue" of sex education and "provide either 'opt-out' or 'opt-in' provisions" in their laws regulating sex education.[3] Melody Alemansour, et al., Sex Education in Schools, 20 GEO. J. GENDER & L. 467, 477 (2019).

Maryland law provides that local school systems "shall establish policies, guidelines, and/or procedures for student opt-out regarding instruction related to

[3] "Opt-out provisions allow parents to remove their children from the classroom during sex education instruction for religious, moral, or family reasons." Alemansour, et al., *supra*, at 477. By contrast, opt-in provisions "require affirmative parental consent, such as a permission slip, before children can participate in a sex education program." *Ibid.*

family life and human sexuality objectives." MD. CODE REGS. § 13A.04.18.01(D)(2)(e)(i). It joins nearly forty other States in providing such opt-outs.[4] Several other States require that parents opt in before schools provide instruction on human sexuality to children.[5] All told, about ninety percent of the States provide opt-out or opt-in rights to ensure that parents may exercise their fundamental rights to direct the education of their children when it comes to the incredibly sensitive topic of sex education. And these laws are longstanding: some States have had laws authorizing parents to opt their children out of sexual health

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[4] See ARK. CODE ANN. § 6-16-1006(b), (c); CAL. EDUC. CODE §§ 51937, 51938; COLO. REV. STAT. §§ 22-25-104(6)(d), 22-1-128(3)(a), (4), (5); CONN. GEN. STAT. ANN. § 10-16e; FLA. STAT. ANN. § 1003.42(5); GA. CODE ANN. § 20-2-143(d); HAW. STATE DEP'T OF EDUC., SEXUAL HEALTH EDUC. POL'Y 103-5 (2016); IDAHO CODE ANN. § 33-1611; 105 ILL. COMP. STAT. ANN. 5/27-9.1a(d); Ind. Code § 20-30-5-17(c), (d); IOWA CODE ANN. § 256.11(6)(a); KAN. ADMIN. REGS. § 91-31-35(a)(6); LA. STAT. ANN. § 17:281(D); MASS. GEN. LAWS ANN. ch. 71, § 32A; ME. REV. STAT. ANN. tit. 22, § 1911; MICH. COMP. LAWS. § 380.1507(4); MINN. STAT. ANN. § 120B.20; MO. ANN. STAT. § 170.015(5)(2); MONT. CODE ANN. § 20-7-120(1); N.C. GEN. STAT. § 115C-81.30(b), (c); N.H. REV. STAT. ANN. § 186:11(IX-b); N.J. STAT. ANN. § 18A:35-4.7; N.M. CODE R. § 6.29.6.11; N.Y. COMP. CODES R. & REGS. tit. 8, § 135.3; OHIO REV. CODE ANN. § 3313.60(A)(5)(c); OKLA. STAT. ANN. tit. 70, §§ 11-103.3(C), 11-105.1(A); OR. REV. STAT. § 336.465(1)(b); 22 PA. CODE § 4.29(c); 16 R.I. GEN. LAWS §§ 16-22-17(c), 16-22-18(c); S.C. CODE ANN. § 59-32-50; TENN. CODE ANN. § 49-6-1305; TEX. CODE ANN. § 28.004(i)(3); VA. CODE ANN. § 22.1-207.2; VT. STAT. ANN. tit. 16, § 134; WASH. REV. CODE ANN. § 28A.230.070(4); W. VA. CODE ANN. § 18-2-9(c); WIS. STAT. § 118.019(3), (4); D.C. MUN. REGS. tit. 5, § E2305.5; see also NEB. REV. ST. § 79-531(1)(b), -532(1)(c).

[5] See ARIZ. REV. STAT. ANN. § 15-102(A)(5), (6); KY. REV. STAT. ANN. § 158.1415(1)(e); MISS. CODE ANN. § 37-13-173; NEV. REV. STAT. ANN. § 389.036(4); UTAH CODE ANN. § 53G-10-403(2); WYO. STAT. ANN. § 21-3-135(a)(v).

instruction for decades. E.g., IDAHO CODE ANN. § 33-1611 (1970); CONN. GEN. STAT. ANN. § 10-16e (1979); N.J. STAT. ANN. § 18A:35-4.7 (effective 1980).

Many States have explicitly made clear that their opt outs extend beyond the sex education classroom; rather, they recognize a broad opt-out right that covers *all* subject areas. For example, Arizona permits parents to withdraw their children from "any learning material or activity" they deem "harmful." ARIZ. REV. STAT. ANN. § 15-102. And Utah allows parents to "waive" their children's "participation in any aspect of school that violates" the parents' or children's "religious belief or right of conscience." UTAH CODE. ANN. § 53G-10-205(4) (West).[6] Other States give parents the opportunity to opt-out of any instruction on sexual education, sexual orientation, or gender identity, no matter what class the material appears in.[7] And these broad-opt rights have salutary benefits for the States. "Parents [are] more likely to send their children to public schools when [S]tates allow parents to opt-out," which avoids "negative consequences for public

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[6] See also *Parent Opt-out for Child*, HAW. STATE DEP'T OF EDUC., https://tinyurl.com/34skssuy (last accessed Mar. 6, 2025) (providing an opt-out right for controversial issues); MINN. STAT. § 120B.20; OKLA. STAT. tit. 25, § 2003; 22 PA. CODE § 4.4(d)(3) (providing for opt-outs based on religious beliefs); TEX. EDUC. CODE ANN. § 26.010(a) (allowing parents to opt-out of "a class or other school activity that conflicts with the parent's religious or moral beliefs," provided the opt-out cannot apply to the entire semester or be used to avoid testing).

[7] See ARK. CODE ANN. § 6-16-1006(b), (c); MONT. CODE ANN. § 20-7-120(1), (6); OHIO REV. CODE ANN. § 3313.473(B)(1)(b), (G)(5) (West) (effective April 9, 2025); TENN. CODE ANN. §§ 49-6-1305, 6-1307, 6-1308 (providing that parents must opt-in for children to receive sexual orientation or gender identity instruction and that parents may opt out of family life instruction).

schools" and promotes "the goal of providing every child with a civic education." Darryn Cathryn Beckstrom, *Balancing Civic Values and Parents' Free Exercise Rights*, 45 GONZ. L. REV. 149, 161 (2010).

Although States can set curricula in public schools, States also recognize that parents—not governments—have the right to direct the education of children. States thus often allow parents to exclude their children from sexual health instruction for any grounds (or no grounds) whatsoever. E.g., MD. CODE REGS. § 13A.04.18.01(D)(2)(e)(i); N.C. GEN. STAT. § 115C-81.30(b); VA. CODE ANN. § 22.1-207.2. Some States permit opt-outs only if the educational program would conflict with the student's or family's religious beliefs. E.g., IOWA CODE ANN. § 256.11(6)(a) ("pupil's religious belief"); KAN. ADMIN. REGS. § 91-31-35(a)(6) ("religious teachings of the pupil"); S.C. CODE ANN. § 59-32-50 ("family's beliefs"). But in many States, a simple written notification by a parent or guardian satisfies the opt-out criteria.

Compelling interests—especially ones invoked to support "relatively recent" regulations of longstanding religious exercise—must have historical analogues. See, *e.g.*, *Yoder*, 406 U.S. at 226–30 (analyzing the "historical origin" of "compulsory education and child labor laws"). These analogues must establish a "historic and substantial" tradition that is analogous to the restriction at issue. *Espinoza*, 591 U.S. at 480 (quotation marks omitted). When, by contrast, there is a "long history" and "continue[d]" practice of other States providing less restrictive alternatives, there is no "basis for deference" to a government's policy. *Ramirez*, 595 U.S. at 428–29.

Here, there is a "historic[] and routine[]" consensus on allowing parental opt-outs from sex education,

Ramirez, 595 U.S. at 429: Ninety percent of the States provide parents with notice and opt-outs for instruction on human sexuality, or only have instruction on an opt-in basis. And these policies are being implemented in large school districts around the country. For instance, in Pennsylvania's North Penn School District, parents "have the right to have their children excused from specific instruction that conflicts with their religious beliefs." North Penn Sch. Dist., *Board Policy 105.2*, *available at* https://tinyurl.com/drnc8vdx. In Utah's Alpine School District, parents can opt their children out of any "portion of the curriculum" or "activity" that would "require the student to affirm or deny a religious belief or right of conscience or engage or refrain from engaging in a practice forbidden or required in the exercise of a religious right or right of conscience." Alpine Sch. Dist., *Policy No. 6161 - Procedures 6.8*, *available at* https://tinyurl.com/3ybu8cp8. And in Wisconsin's Oshkosh Area School District, a school "will honor a written request" for a child to be excused "from particular class periods" if a parent "indicates to the school that either the content or activities conflict with his/her religious beliefs or value system." Oshkosh Area Sch. Dist., *Policy Manual Code po2270*, *available at* https://tinyurl.com/bddswfb8. There is thus no compelling interest in asserting "a categorical ban" on religious exercise that is upheld by "longstanding [regulatory] practice." *Ramirez*, 595 U.S. at 430, 435.

Indeed, the School Board's policy conflicts not only with the longstanding consensus of the States, but also with the law of its own State. Maryland has long required public schools to allow opt-outs from any instruction on "family life and human sexuality." MD. CODE REGS. § 13A.04.18.01(D)(2)(e)(i). The School Board cannot have a compelling interest in violating

Maryland law. See *Nation* v. *San Juan Cnty.*, 150 F. Supp. 3d 1253, 1269 (D. Utah 2015), aff'd sub nom. *Navajo Nation* v. *San Juan Cnty.*, 929 F.3d 1270 (10th Cir. 2019) (A "local governing body cannot have a legitimate governmental interest in violating state law.").

This longstanding tradition also means that the School Board cannot establish that its ban is the least restrictive means available—a less restrictive means has been implemented in over ninety percent of the States, including Maryland. Indeed, several States give parents opt-out rights that extend beyond sexual education. "[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 541. The School Board cannot meet the least restrictive means test unless it can explain why its "system is so different" from the dozens of other jurisdictions that accommodate religious exercise through parental opt-outs. *Holt*, 574 U.S. at 367. The School Board cannot show "why the vast majority of States" permit opt outs, "but it cannot." *Id.* at 368.

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

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