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 RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations that share a commitment to the free exercise of religion and the separation of religion and government. *Amici* believe that the Free Exercise Clause limits the government's ability to directly or indirectly coerce individuals to perform acts in violation of their religious beliefs, or to refrain from acts required by their religious beliefs. But *amici* oppose an expansion of the Free Exercise Clause that would allow challenges to secular, religion-neutral government conduct that neither pressures nor prohibits religious exercise. Such a transformation would, in effect, require the government to conform its own conduct in service of particular religious views, and it would harm religious freedom, especially for religious minorities.

The *amici* are:

- Alliance of Baptists;
- Americans United for Separation of Church and State;
- Bend the Arc: A Jewish Partnership for Justice;
- Central Atlantic Conference United Church of Christ;

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission.

- Global Justice Institute;
- Hindu American Foundation;
- Methodist Federation for Social Action;
- Muslims for Progressive Values;
- National Council of Jewish Women;
- Reconstructionist Rabbinical Association;
- Sikh Coalition;
  and
- Tanenbaum Center for Interreligious Understanding.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long held that the Free Exercise Clause limits government coercion of religion. See, *e.g.*, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 463 (2017); *Bowen* v. *Roy*, 476 U.S. 693, 700 (1986); *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 223 (1963). Absent a showing of coercion—meaning that the government has directly or indirectly required the claimant to do something prohibited by their religion, or to refrain from doing something required by their religion—secular government action does not impose a cognizable burden under the Free Exercise Clause. See *Schempp*, 374 U.S. at 223; *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988).

In this case, Petitioners challenge the inclusion of materials they find religiously offensive in the Montgomery County Public Schools (MCPS) curriculum. But MCPS's curriculum, while containing secular materials that Petitioners have sincere religious disagreements with, does not pressure or require Petitioners or their children to do anything in violation of their religious beliefs, or forbid them from doing something required by their religious beliefs. Instead, Petitioners argue that they have suffered a free-exercise burden because their children will be exposed to ideas they religiously oppose. See Pet. Br. 21, 28-29.

Petitioners seek a vast expansion of the Free Exercise Clause's scope that would, for the first time, "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." *Bowen*, 476 U.S. at 699. This expansion of the Free Exercise

Clause would run contrary to this Court's precedents, which have consistently found cognizable free-exercise burdens only where the claimant has established government coercion. See *Lyng*, 485 U.S. at 449. And it would turn the Free Exercise Clause on its head, transforming it from a shield to protect religious adherents from government coercion into a sword to attack any government action that does not conform to Petitioners' preferred religious dogma. Such a transformation would fly in the face of the First Amendment's text and, in a pluralistic country, endanger the basic functioning of our government.

In the public-school context, the harm of Petitioners' proposed free-exercise expansion would be most acutely felt by those, like *amici*, who are religious minorities or who have no religious affiliation. A religiously segmented curriculum of the kind that Petitioners advocate for would ensure that no student is ever exposed to ideas that they religiously disagree with. Public-school students would never learn to peacefully coexist with or tolerate opposing views—a skillset that, in broader society, serves to protect religious minorities, whose views are most likely to be outside the mainstream. What's more, most schools would not be able to administer Petitioners' proposed opt-out system at all; instead, schools would be forced to remove the offending materials from the curriculum altogether. Religious parents would thus be able to impose their beliefs on *all* children at the school, even those whose parents hold opposing views. Such an outcome would hurt, not help, religious freedom.

ARGUMENT

I. Finding that Petitioners have demonstrated a cognizable free-exercise burden would contravene this Court's precedents.

This Court has repeatedly affirmed that the Free Exercise Clause limits government coercion of religion. See, *e.g.*, *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 223 (1963); *Bowen* v. *Roy*, 476 U.S. 693, 700 (1986). This means that the government will be subject to judicial scrutiny if it requires individuals to "perform acts" that violate their religious beliefs, *Wisconsin* v. *Yoder*, 406 U.S. 205, 218 (1972), or makes the performance of those acts a condition of receiving government benefits, see *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 532 (2021), or otherwise pressures religious adherents to renounce their religious beliefs, see *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 478 (2020). This Court, however, has never held that the Free Exercise Clause is implicated merely because a secular government action is offensive to a particular religious belief. See *Bowen*, 476 U.S. at 700. Holding that religion-based disagreement with secular government conduct constitutes a cognizable burden would contravene this Court's precedents and the plain text of the First Amendment. Such an expansion of the Free Exercise Clause would pervert its meaning, requiring the government to comport itself in service of religious claimants' personal beliefs.

A. Under this Court's decisions, a cognizable burden on free-exercise rights occurs when there is direct or indirect government coercion to act contrary to religious beliefs.

The Free Exercise Clause of the First Amendment provides that the government "shall make no law * * * prohibiting the free exercise" of religion. U.S. Const. Amend. I. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990). But the Clause also "protect[s] the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through 'the performance of (or abstention from) physical acts.'" *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022) (quoting *Smith*, 494 U.S. at 877).

To make out a cognizable free-exercise claim, a claimant must first make a threshold showing that the government action in question "actually burdens the claimant's freedom to exercise religious rights." *Tony & Susan Alamo Found.* v. *Secretary of Lab.*, 471 U.S. 290, 303 (1985). Only once the plaintiff has satisfied his burden of "demonstrat[ing] an infringement of his rights under the Free Exercise [Clause]" does the "focus * * * shift[ ] to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law." *Kennedy*, 597 U.S. at 524.

A burden on free-exercise rights occurs only when there is some element of government coercion. See *Schempp*, 374 U.S. at 223 ("[I]t is necessary in a free exercise case for one to show the coercive effect of the

enactment as it operates against him in the practice of his religion."); *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962) (explaining that the type of government "encroachment" prohibited by the Free Exercise Clause "depend[s] upon [a] showing of * * * governmental compulsion"). The most obvious matters constituting a free-exercise burden involve direct coercion of religion. "The government," for example, "may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, [or] impose special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 877 (internal citations omitted). Nor may the government target for special restrictions religiously motivated "physical acts," such as "assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, [and] abstaining from certain foods or certain modes of transportation." *Ibid.*

The Free Exercise Clause also protects against "indirect coercion or penalties on the free exercise of religion." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 463 (2017) (quoting *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). Indirect coercion occurs when the government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas* v. *Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717-718 (1981). For example, if the government conditions receipt of a public benefit on the recipient's willingness to forego a "practice of her religion," *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963), or to "disavow [his] religious character" altogether, *Trinity Lutheran*, 582 U.S. at 462-463, that establishes a cognizable burden on religious practice that leads to further scrutiny under the Free Exercise Clause.

When evaluating coercion, there is a distinction between government action that is itself religious—such as school prayer—and secular government action that has a tangential effect on religious practice. Where the government's action is religious in itself, as opposed to secular in nature, then it is inherently coercive. See *Engel*, 370 U.S. at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."). Thus, the government may not "lend its power to one or the other side in controversies over religious authority or dogma," *Smith*, 494 U.S. at 877, or "favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause." *McCreary Cnty.* v. *ACLU of Ky.*, 545 U.S. 844, 875-876 (2005).

But where the government action is secular, it is not coercive merely because it is inconsistent with the claimant's religious belief or practice. "[I]ncidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," do not trigger any free-exercise scrutiny. *Lyng*, 485 U.S. at 450-451. To establish a free-exercise burden when the government's action is secular, the claimant must show that the government is actually requiring or substantially pressuring the claimant to do something forbidden by their religion, or to refrain from doing something required by their religion. See *ibid.*

This Court's decision in *Bowen* v. *Roy*, 476 U.S. 693 (1986), is instructive. In *Bowen*, the Court considered a challenge by Native American parents to the

use of Social Security numbers in welfare benefits programs. *Id.* at 695. The parents believed that a Social Security number would "rob the spirit" of their child "and prevent her from attaining greater spiritual power." *Id.* at 696. The parents contested two aspects of the welfare program: (1) the state welfare agency's use of Social Security numbers to administer the program, and (2) the requirement that applicants must provide a Social Security number as a condition of receiving benefits. *Id.* at 699.

Overall, the Court's treatment of the claims reflected its understanding that "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the [government's] conduct." *Bowen*, 476 U.S. at 700. The Court thus distinguished between coercive government action, which constitutes a free-exercise burden, and secular government action that merely offends religious beliefs, which does not impose a burden. See *id.* at 699-700. The government's use of Social Security numbers fell into the second category: although the government's use of Social Security numbers *offended* the parent-appellees' religious beliefs, it did not "place[ ] any restriction on what [the parents] may believe or what [they] may do." *Id.* at 699. Thus, the Court determined, there was no cognizable burden. *Id.* at 700-701. On the other hand, the requirement that the parents furnish their daughter's Social Security number to obtain benefits *did* constitute a burden. See *id.* at 704. That was because the requirement coerced the parents to perform an act—fill in their daughter's Social Security number on forms—that violated their

religious beliefs.[2] See *ibid.*; *id.* at 727 (O'Connor, J., concurring) (explaining that because "the law at issue here involves governmental compulsion," "the Free Exercise Clause is therefore clearly implicated in this case").

The reason for the government-coercion requirement is primarily textual: "The crucial word in the constitutional text is 'prohibit.'" *Lyng*, 485 U.S. at 451. If secular action by the government is not "prohibiting" anything—whether through direct or indirect means—then the Free Exercise Clause is not implicated. *Ibid.*; cf. *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring) ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."). But, as *Bowen* indicates, the understanding of the Free Exercise Clause as limiting coercion is also grounded in practical concerns.

Without a coercion requirement, religious claimants could use the Free Exercise Clause to raise objections to any secular government action they disagree with, regardless of whether the government is compelling, pressuring, or preventing any conduct or belief. That would mean that the Free Exercise Clause could be weaponized to challenge the government's use of Social Security numbers to administer its programs, or even, as this Court warned, "the size or color of the Government's filing cabinets." *Bowen*, 476 U.S. at 700.

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[2] "Not all burdens on religion are unconstitutional." *Bowen*, 476 U.S. at 702. Thus, finding a burden on the parents' free-exercise rights was the beginning, not the end, of the Court's analysis. See *id.* at 701-712. The Court ultimately concluded that although the requirement burdened the parents' free-exercise rights, it was not unconstitutional. See *id.* at 711-712.

This would, in effect, allow free-exercise claimants "to require the Government to conduct its own internal affairs in ways that comport with [claimants'] religious beliefs." *Ibid.*

Given the immense diversity of religious belief in this country, such an expansion of the Free Exercise Clause would quickly give way to chaos. In a pluralistic society, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng*, 485 U.S. at 452. "The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours." *Ibid.*; cf. *United States* v. *Lee*, 455 U.S. 252, 259 (1982) ("Religious beliefs can be accommodated, but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.'" (internal citations omitted) (quoting *Braunfeld* v. *Brown*, 366 U.S. 599, 606 (1961))).

B. The MCPS curriculum does not directly or indirectly coerce Petitioners or their children to act contrary to their religious views.

Petitioners assert that by exposing their children to ideas contrary to their religious beliefs, the MCPS curriculum violates their rights under the Free Exercise Clause. See Pet. Br. 28-29. As explained above, however, the Free Exercise Clause only protects against government coercion of religion, not mere religious disagreement with secular government actions. In this case, the record does not establish that there is any actual direct or indirect government

coercion. And the cases cited by the Petitioners are all distinguishable.

First, there is no indication that the MCPS curriculum is coercive. This is not a case where, for example, the government is presenting religious teachings in a proselytizing way, see *Schempp*, 374 U.S. at 223, displaying religious symbols, see *Stone* v. *Graham*, 449 U.S. 39, 42 (1980), or taking sides in religious matters, see *Smith*, 494 U.S. at 877. There is no dispute that the MCPS curricular materials challenged here are decidedly secular.

Nor have Petitioners established that the MCPS curriculum directly or indirectly requires Petitioners or their children to do anything prohibited by their faith, or to refrain from doing anything mandated by their faith. Although Petitioners possess sincere religious beliefs about gender and sexuality that conflict with some materials in the curriculum, nothing in the record suggests that MCPS is forcing Petitioners' children to renounce those beliefs, affirm any messages contained in the materials, engage in conduct that their religion bars, or not take action that their religion requires. See Pet. App. 34a.

Quite the opposite: MCPS instructs teachers confronted with student religious objections to affirm students' belief systems while emphasizing respect for differing views. For example, if a student were to say "[b]eing _____ (gay, lesbian, queer, etc) is wrong and not allowed in my religion," MCPS suggests that teachers respond by saying, "I understand that is what you believe, but not everyone believes that[.] * * * In any community, we'll always find people with beliefs different from our own and that is okay—we can still show them respect." Pet. App. 628a. And in

response to potential parent concerns that the new books "go against the values [they] are instilling in [their] child at home," MCPS suggests that teachers reiterate that "[i]f a child does not agree with or understand another student's gender identity or expression or their sexuality identity, they do not have to change how they feel about it." Pet. App. 638a. Thus, while the MCPS curriculum may expose students to ideas they and their parents disagree with on religious grounds, there is no evidence to suggest that MCPS is "plac[ing] any restriction on what [they] may believe or what [they] may do." *Bowen*, 476 U.S. at 699.

These facts set Petitioners' claims far apart from those in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). In *Yoder*, this Court found that a Wisconsin compulsory high school education law imposed a "severe" and "inescapable" burden on Amish parents' free-exercise rights. *Id.* at 218, 236. The law required Amish children to attend school until the age of sixteen, even though the Amish religion requires adherents to focus on manual labor and acquiring other unique skills during the "formative adolescent period of life." *Id.* at 207, 211. The compulsory education law thus coerced Amish parents by "prohibit[ing them], on pain of criminal prosecution, from providing their children with the kind of education required by the Amish religion." *Lyng*, 485 U.S. at 456-457.

Petitioners rely on *Yoder* to argue that children's mere exposure to ideas contrary to their parents' religious beliefs is a cognizable free-exercise burden, see Pet. Br. 28-29, but *Yoder* said no such thing. Rather, *Yoder* held that a law that "*affirmatively compels* [religious adherents], under threat of criminal sanction, to *perform acts* undeniably at odds with fundamental

tenets of their religious beliefs" burdens the adherents' free-exercise rights. 406 U.S. at 218 (emphasis added). Applying this standard, the *Yoder* Court held that the plaintiffs suffered a cognizable burden not because secondary education exposed Amish children to ideas contrary to their religion, but because Amish parents were being "affirmatively compel[led]," under threat of criminal prosecution, "to perform acts"—*i.e.*, enroll their children in school—that violated their religious beliefs. *Ibid.*

By contrast, in this case, there is no "severe" or "inescapable" burden on Petitioners' free-exercise rights. *Yoder*, 406 U.S. at 218. Indeed, there is no burden at all. The compulsory education law in *Yoder* forced the Amish plaintiffs to enroll their children in school in violation of their religious beliefs. *Ibid.* Here, Petitioners and their children are not being forced to do anything in violation of their religion. MCPS welcomes students of all religious backgrounds and protects their "right to express their religious and nonreligious beliefs and practices." Pet. App. 210a-211a. MCPS allows students to voice religious disagreement with curricular materials and teachers are instructed to respect students' views. Pet. App. 628a, 640a. More broadly, and again in contrast to *Yoder*, there is no threat of criminal sanction if Petitioners do not want their children to be exposed to the MCPS curriculum; they remain free to place their children in private school or to educate them at home—options that were not available to the *Yoder* plaintiffs because any type of state-mandated secondary education permitted under the law interfered with their religious practice. See *Yoder*, 406 U.S. at 208 n.3, 209. In short, unlike in *Yoder*, there is no coercion here.

Petitioners' attempt to repackage their exposure-as-coercion argument in terms of parental rights is equally unavailing. See Pet. Br. 21. While this Court has "long recognized the rights of parents to direct 'the religious upbringing' of their children," *Espinoza*, 591 U.S. at 486, it has never held that religious parents may dictate what public schools teach. Rather, this Court has been careful to specify that its recognition of parental rights over children's religious upbringing would not impact "the state's power to prescribe a curriculum for institutions which it supports." *Meyer* v. *Nebraska*, 262 U.S. 390, 402 (1923); see also *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925) ("No question is raised concerning the power of the state reasonably to regulate all schools, * * * [and] to require * * * that certain studies plainly essential to good citizenship must be taught.").

In *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 629, 642 (1943), for example, the Court struck down a state law requiring school children to recite the pledge of allegiance and salute the American flag or face expulsion. But the Court clarified that it was the "compulsion of students to declare a belief" that raised constitutional concerns, "not merely" that they were being "made acquainted with the flag salute so that they may be informed as to what it is or even what it means." *Id.* at 631. Although public schools may not coerce students to affirm certain secular values, the Court explained, schools may nonetheless attempt to inculcate those values through their curricula. See *ibid.* Thus, while the government cannot force parents to send their children to secular public schools, see *Pierce*, 268 U.S. at 532-535, or require students to salute the American flag over their parents' religious objections, see *Barnette*, 319 U.S. at

630, 642, there is no general parental right to control what children are exposed to in a public school's secular curriculum.

Petitioners also put misplaced reliance on *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and its progeny to argue that they have suffered a cognizable burden based on the denial of a public benefit. See Pet. Br. 44-45. In *Sherbert*, a Seventh-day Adventist sued under the Free Exercise Clause after she was denied unemployment benefits because of her refusal to work on Saturday, "the Sabbath Day of her faith." 374 U.S. at 399. Although "the consequences of such a disqualification to religious principles and practices may be only an indirect result" of the law, the Court nonetheless determined that a burden on free-exercise rights had occurred. *Id.* at 403. That was because the benefit eligibility requirement affirmatively compelled the plaintiff to perform an act—work on Saturdays—in violation of her religion, or else forfeit benefits. See *id.* at 404.

This Court reiterated *Sherbert*'s holding in *Thomas* v. *Review Board of Indiana*, 450 U.S. 707 (1981). There, a Jehovah's Witness whose "religious beliefs forbade participation in the production of armaments" was denied unemployment benefits after he quit his job producing turrets for military tanks. *Id.* at 709-710. As in *Sherbert*, the Court rejected the state's argument that there was no free-exercise issue because the benefit eligibility requirement only indirectly burdened religion. *Id.* at 717-718. "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, * * * thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Ibid.* The Jehovah's Witness plaintiff

suffered such a burden because the government conditioned receipt of unemployment benefits on his willingness to actively participate in the production of weapons, conduct that directly violated his religious beliefs. See *ibid.*[3]

More recently, in *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 532 (2021), this Court once again affirmed that indirect government coercion, whereby a claimant is forced to choose between conduct that violates their religious beliefs or forgoing a government benefit, is a cognizable free-exercise burden. In that case, Philadelphia refused to renew its contract with a Catholic foster-care agency unless the agency agreed to certify same-sex couples as prospective foster parents—an act that the agency said would violate its religious views on marriage. *Id.* at 530. The Court ruled that "by putting [the agency] to the choice of" forgoing a valuable government contract "or approving relationships inconsistent with its beliefs," Philadelphia burdened the agency's free-exercise rights. *Id.* at 532.

Petitioners assert that they have suffered a cognizable indirect burden under *Sherbert* and its related cases because the MCPS curriculum forces them to choose between forgoing public education, a public benefit, or violating their religious beliefs. Pet. Br. 44-

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[3] *Sherbert* and *Thomas* were pre-*Smith* cases, and thus did not apply the standard articulated in *Smith* for determining the applicable tier of scrutiny under the Free Exercise Clause. In *Smith*, while noting that the challenged laws in both cases contained a "mechanism for individualized exemptions," this Court limited *Sherbert* and *Thomas*'s application of strict scrutiny to the "unemployment compensation field." *Smith*, 494 U.S. at 884 (citation omitted). *Smith*, however, did not change the standard for what constitutes a free-exercise burden.

45. But these cases are inapposite. Unlike the eligibility requirements at issue in *Sherbert*, *Thomas*, and *Fulton*, which required the plaintiffs to *perform acts* in violation of their religious beliefs or else forgo a benefit, the MCPS curriculum does not compel parents or their children to do anything. Rather, the choice here is between mere exposure to views Petitioners disagree with and forgoing public education.

For similar reasons, *Espinoza* v. *Montana Department of Revenue*, 591 U.S. 464 (2020), does not support the finding of a cognizable free-exercise burden here. In *Espinoza*, this Court held that the exclusion of religious schools from a state's tuition assistance program violated the Free Exercise Clause. *Id.* at 476, 488-489. Under the program, schools had to choose "between being religious or receiving government benefits." *Id.* at 480. Putting schools to this choice—in other words, conditioning a government benefit on recipients' willingness to renounce their religion—constituted the very type of "indirect coercion" the Free Exercise Clause protects against. *Id.* at 478.

Unlike in *Espinoza*, Petitioners here are not being required to renounce their religion to access a public benefit. Whereas the tuition assistance program in *Espinoza* barred participants based on religion, MCPS welcomes families of all religious faiths and none and permits students to voice religious disagreement with curricular materials. Pet. App. 210a-211a, 628a, 640a.

In sum, the challenged materials in the MCPS curriculum are secular; they are not presenting expressly religious content or otherwise taking sides in religious matters. Nor is MCPS directly or indirectly requiring Petitioners or their children to do anything prohibited by their faith, or to refrain from doing

anything required by their faith. At most, Petitioners have shown that they are religiously offended by some of the secular content in the MCPS curriculum. This is not enough to show a free-exercise burden. Individuals may be religiously offended by any number of secular government actions, from the books read aloud in schools "to the size or color of the Government's filing cabinets." *Bowen*, 476 U.S. at 700. But absent a showing of government coercion—that is, a showing that the challenged secular government action substantially pressures, see *Thomas*, 450 U.S. at 718, or "affirmatively compels [the claimants] * * * to perform acts undeniably at odds" with their religious beliefs, *Yoder*, 406 U.S. at 218—the Free Exercise Clause does not apply.

II. Religious freedom is harmed when students are opted out of instruction they disagree with.

The constitutionally mandated opt-out system sought by Petitioners would harm religious freedom in at least three ways. First, it would undermine public schools' ability to foster tolerance, ultimately leading to a less tolerant citizenry. Second, it would stigmatize the children who are not opted out and serve to divide students along religious lines. Third, it would force many schools to tailor their curricula to the religious views of some parents.

As an initial matter, a mandatory opt-out system would harm public schools' ability to foster religious tolerance. Over 80% of children in America attend public schools. Katherine Schaeffer, *U.S. Public, Private and Charter Schools in 5 Charts*, Pew Rsch. Ctr. (June 6, 2024), http://bit.ly/3FwCnMT. These children

come from a wide array of faith and non-faith backgrounds—and public schools are open to all of them.

In a country comprised of such a broad selection of religious faiths, it is inevitable that some families' beliefs will sometimes come into conflict with a secular aspect of their school's curriculum. But this is a feature, not a bug, of public schools. A central purpose of our nation's system of public education is to prepare young people for life as citizens of this country. See *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments. * * * It is the very foundation of good citizenship."); *Schempp*, 374 U.S. at 230 (Brennan, J., concurring) ("[P]ublic schools [are] a most vital civic institution for the preservation of a democratic system of government."); *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982) ("[E]ducation has a fundamental role in maintaining the fabric of our society.").

It is because of their religious diversity that public schools play a critical role in American society, serving as key sites for the development of civility, tolerance, and respect. As Justice Frankfurter put it, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny." *Illinois ex rel. McCollum* v. *Board of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring). And exposure to, and peaceful coexistence with, people and ideas that one vehemently disagrees with is essential preparation for adult life in our country.[4] "To endure the speech of false ideas or offensive

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[4] Of course, the Constitution does not permit public schools to present particular religious texts or doctrines in a proselytizing

content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Lee* v. *Weisman*, 505 U.S. 577, 590 (1992).

MCPS attempts to fulfill its role in inculcating democratic values through its curriculum. While MCPS works to protect students' "right to express their religious or nonreligious beliefs and practices, free from discrimination, bullying, or harassment," it does not shield students from ideas different from their own. Pet. App. 211a. "Respecting students' differing beliefs," MCPS states, "is an essential element of a pluralistic society." Pet. App. 222a. The MCPS curriculum, which presents a broad array of viewpoints and experiences, thus "supports a student's ability to empathize, connect, and collaborate with diverse peers and encourage respect for all." Pet. App. 603a.

An opt-out system would severely undermine MCPS and other public schools' ability to prepare students for good citizenship and democratic participation in a philosophically and religiously diverse country. In the real world, of course, there is no "opting out." Exposure to contrary ideas, even ones we vehemently disagree with, is simply a fact of life in a pluralistic society. But, if Petitioners succeed, public-school students would never be exposed to ideas they disagree with—instead, they could simply be pulled out of classrooms anytime a conflict arose.

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or preferential way or to display specific religious symbols—then the government is taking sides on religious matters, which is itself intolerant. See *Engel*, 370 U.S. at 431.

Far from learning to become part of a "tolerant citizenry," *Lee*, 505 U.S. at 590, students in such an environment would learn to have zero tolerance toward any ideas that do not align with their world view. And children who are not taught tolerance become intolerant adults. The harms stemming from a constitutionally mandated opt-out system to public-school curricula would fall most squarely on the shoulders of religious minorities. After all, religious minorities are among the groups most likely to have views outside the mainstream and thus a group for whom tolerance is most critical.

An opt-out system would also serve to stigmatize minority views. This is what occurred at MCPS: when parents were permitted to opt their children out of instruction using LGBTQ-inclusive books, the students left in the classroom were "exposed to social stigma and isolation." Pet. App. 608a. This stigmatization effect could be particularly damaging for students from minority religious backgrounds. Imagine, for example, a high school world history class in a majority-Christian school district that covers the history of various religions, including Islam, in an objective and non-proselytizing way.[5] Under Petitioners' view, the Christian parents at this school would be able to opt their children out of any segments of the class discussing Islam because they hold different religious views. On the days when Islam was set to be discussed, a large group of children would be whisked out of the classroom to avoid exposure to the "offensive" content.

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[5] If the instruction on Islam was not "presented objectively as part of a secular program of education" that did not favor any faith, then it would not be permissible under the First Amendment. See S*chempp*, 374 U.S. at 225.

Being left in the classroom itself would become a mark of difference, driving a wedge between those left in the classroom and those who are opted out.

Finally, the opt-out system sought by Petitioners would, in many cases, force public schools to tailor their curricula to the religious beliefs of some parents. While Petitioners frame this lawsuit as merely one for individual opt-outs for objecting students, the reality is that most schools wouldn't be able to manage an opt-out system at all. MCPS, for instance, found that administering an opt-out system was "infeasib[le]" because teachers and other instructors would be expected to "track and accommodate" multiple individual opt-out requests across different classrooms. Pet. App. 607a.

If Petitioners succeed, they will not just obtain an opt-out for their own children; they will most likely force MCPS to remove the offending books from its curriculum altogether. Religious parents will thus be allowed to dictate the contents of the curriculum, for all children in the school system, in service of their own religious beliefs.[6] The threat to religious freedom, particularly the freedom of religious minorities, that

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[6] The removal of objectionable secular content from public-school curricula would also go against some religious beliefs. Some Muslims, for example, believe that exposure to, and discourse with, perspectives that differ from Islamic values strengthens faith and bolsters critical thinking. See Surah An-Nahl (16:125); Surah Az-Zumar (39:18). Similarly, some members of the Jewish faith follow the concept of "Machloket L'shem Shamayim," or "argument for the sake of heaven," which emphasizes the importance of respectful debate with those with competing perspectives. See Pirkei Avot (5:17).

occurs when public schools "tailor[ ] [their curricula] to the principles or prohibitions of any religious sect or dogma" cannot be overstated. *Epperson* v. *Arkansas*, 393 U.S. 97, 106 (1968). For "[w]hen government * * * allies itself with one particular form of religion, the inevitable result is that it incurs 'the hatred, disrespect and even contempt of those who h[o]ld contrary beliefs.'" *Schempp*, 374 U.S. at 221-222 (quoting *Engel*, 370 U.S. at 431).

CONCLUSION

The judgment of the Fourth Circuit should be affirmed.

Respectfully submitted.

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