

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 MARYLAND, MASSACHUSETTS,
SIXTEEN OTHER STATES, AND THE
DISTRICT OF COLUMBIA AS AMICI CURIAE
SUPPORTING RESPONDENTS**

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INTERESTS OF AMICI CURIAE

Maryland, Massachusetts, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawai'i, Illinois, Maine, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington file this brief in support of respondents because we share sovereign and compelling interests in upholding the traditional primary role of state and local authorities in setting school curricula and in making schools safe and supportive places for all students. Like other school authorities around the country, the Montgomery County Board of Education ("the County") has responsibility for one of government's most important functions: nurturing children into capable citizens of a diverse but unified nation. Recognizing the importance of this responsibility, this Court has long afforded state and local governments significant discretion to craft school policies to best serve this goal, so long as they act within the constraints of state and federal law.

Amici States respectfully submit this brief because the County's incorporation of LGBTQ-inclusive books into its language arts curriculum falls well within state and local governments' broad discretion to shape their curricula and raises no constitutional concerns. At the same time, mandating that state or local governments allow opt-outs from any school instruction that parents deem religiously objectionable would interfere with schools' ability not only to design curricula, but also to balance particular families' desires against the need to provide a safe and supportive learning environment for all students.

SUMMARY OF ARGUMENT

1. Public education lies at the heart of state and local governments' responsibility to their citizens, and this Court has repeatedly emphasized their broad discretion in shaping its contours. That discretion encompasses not only what schools teach, but also how they create an environment conducive to educating their students. The County's incorporation of LGBTQ-inclusive books into school language arts curricula, without providing a right to opt out, falls well within this broad educational discretion. LGBTQ students face disproportionate levels of stereotyping, discrimination, and even violence, with profound psychological and educational consequences. The books at issue here confront these serious problems by promoting tolerance of, and respect for, people who are LGBTQ. They are no more "sex education" than are curricular materials that portray heterosexual families and relationships.

2. Petitioners have not established a cognizable burden on their religious exercise. Because of its preliminary posture, the record in this case permits no conclusion regarding how any of the books have been used in classrooms, how students may have reacted to the books, or how teachers may have responded to students' questions. Petitioners' case therefore depends on the notion that mere exposure to ideas can unconstitutionally burden religious exercise. This Court's precedents do not support that theory. Moreover, such a theory could not be cabined to circumstances such as these. Instead, parents would seemingly have an unfettered constitutional entitlement to opt their children out (and presumably receive prior notice) of *any* part of a school curriculum. The First Amendment does not require that result. But

if the Court does conclude that petitioners have established a free exercise burden, this case does not present the question of what level of scrutiny applies—much less whether it has been satisfied in this case—and the Court accordingly should allow the court of appeals to address that question in the first instance.

ARGUMENT

I. THE COUNTY’S EFFORTS TO PROMOTE RESPECT AND TOLERANCE FOR LGBTQ PEOPLE FALL WITHIN STATE AND LOCAL GOVERNMENTS’ BROAD DISCRETION TO SHAPE PUBLIC EDUCATION.

This Court has repeatedly recognized both the important role of public education and the broad discretion that state and local governments possess to shape its content. Policies such as the County’s, which seek to ensure safe and supportive learning environments for LGBTQ students, come well within this authority.

A. State and Local Governments Possess Broad Discretion in How They Educate Students.

Public schools play a foundational role in American society. For decades, courts have recognized that these institutions serve as States’ primary tool in raising successive generations of citizens, enabling them to lead fulfilled lives, and creating the building blocks of broader societal cohesion. In *Brown v. Board of Education*, for instance, this Court observed that public schools are “a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” 347 U.S. 483, 493

(1954). Indeed, *Brown* noted, the public school system is “the very foundation of good citizenship” and of central “importance . . . to our democratic society.” *Id.*

Since *Brown*, the Court has repeatedly noted its “historic dedication to public education,” “express[ed] an abiding respect for the vital role of education in a free society,” and recognized “the grave significance of education both to the individual and to our society.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (collecting cases). The Court has emphasized “[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests.” *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). Public education, the Court observed, “inculcat[es] fundamental values necessary to the maintenance of a democratic political system.” *Id.* at 77.

This Court has also made clear that public education benefits both individuals and the fabric of society. In *Bethel School District No. 403 v. Fraser*, the Court observed that public schools “prepare pupils for citizenship in the Republic” by “inculcat[ing] the habits and manners of civility as values in themselves conducive to happiness” and recognized that such values are “indispensable to the practice of self-government in the community and the nation.” 478 U.S. 675, 681 (1986) (citation omitted). Oft-cited concurrences have emphasized this same principle. See *McColum v. Board of Ed. of Sch. Dist. No. 71*, 333 U.S. 203, 216, 231 (1948) (Frankfurter, J., concurring) (observing that public schools are “perhaps the most powerful agency for promoting cohesion among a heterogenous democratic people” and are “at once the symbol of our democracy and the most pervasive means for promoting our common destiny”); *School*

Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 241-42 (1963) (Brennan, J., concurring) (observing that a “public secular education” serves “uniquely democratic values”). Public schools thus lie at the heart of States’ obligation to provide people with the skills they need as citizens, as well as States’ opportunity to contribute to the orderly functioning of a democratic society.

State and local governments possess broad latitude to shape the public school environment according to the priorities and values of the communities students are being prepared to join as fully fledged citizens (subject, of course, to constitutional and other federal and state law constraints). *See, e.g., Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863-64 (1982) (noting that “local school boards have broad discretion in the management of school affairs” and that “local school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values” (internal quotation marks omitted)). This Court has underscored that “States and local school boards are generally afforded considerable discretion in operating public schools.” *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987); *see also, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (“[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“By and large, public education in our Nation is committed to the control of state and local authorities.”). And the Court has firmly grounded this discretion in the States’ paramount interest in providing their citizens with an education. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“There is no doubt as

to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.”).

B. States’ and Schools’ Broad Educational Discretion Encompasses Policies That Protect LGBTQ Students from Harm.

This Court has recognized that States’ responsibility to provide public education encompasses the duty to “protect[]” students from harm. *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 189 (2021). Similarly, governmental institutions¹ and medical and educational organizations² have recognized that physically and psychologically safe schools are indispensable to educating students. Research has emphasized the importance of physical and psychological safety and security.³ Indeed, a school’s educational environment influences many facets of a child’s development, including social-emotional and academic learning.⁴ Safe and supportive school environments allow students to develop positive relationships, regulate their emotions and behavior, and maintain physical and psychological well-being—thus bolstering their

¹ See, e.g., Off. of Elementary and Secondary Educ., U.S. Dep’t of Educ., *Safe and Supportive Schools* (2023), <https://perma.cc/3UK5-Y9ZQ>; Nat’l Ctr. on Safe Supportive Learning Environments, *About* (2022), <https://perma.cc/3WES-WPL4>.

² See, e.g., Am. Psych. Ass’n, *Safe and Supportive Schools Project* (2014), <https://tinyurl.com/4utzz8kp>.

³ Jenna Howard Terrell, *Conceptualizing and Measuring Safe and Supportive Schools*, 24 *Contemp. Sch. Psych.* 327-29 (Aug. 2020), <https://tinyurl.com/bd5tt93x>.

⁴ See Linda Darling-Hammond et al., *Implications for Educational Practice of the Science of Learning and Development*, 24 *Applied Dev. Sci.* 97-98 (Feb. 17, 2019), <https://tinyurl.com/yc4jvr9m>.

prospects for academic and non-academic success.⁵ By contrast, fear and anxiety weaken children's cognitive capacity, disrupt the learning process, and impede students' ability to learn at a physiological level.⁶

Providing a safe school environment is especially important for LGBTQ youth, who experience disproportionately high levels of discrimination and violence.⁷ In one 2022 study, 68% of LGBTQ students reported feeling unsafe at school because of their sexual orientation or gender identity, and nearly all reported hearing homophobic language used by their peers.⁸ In a 2023 mental health survey, 60% of LGBTQ youth respondents reported being discriminated against because of their sexual orientation or gender identity.⁹ Indeed, a majority of LGBTQ youth in this survey reported experiencing verbal harassment, and significant fractions reported being disciplined for standing up to bullies or being subjected to unwanted sexual contact because of their LGBTQ status.¹⁰ Additionally, LGBTQ students of color and students with disabilities face compounded levels of discrimination.¹¹ Discrimination, violence, and harassment

⁵ Mass. Gen. Laws ch. 69, § 1P(a).

⁶ Darling-Hammond et al., *supra* note 4, at 102.

⁷ Joseph G. Kosciw et al., GLSEN, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation's Schools* xv-xvii, 83, 93 (2022), <https://tinyurl.com/mtsva2nd>.

⁸ *Id.* at xv-xvi.

⁹ The Trevor Project, *2023 National Survey on the Mental Health of LGBTQ Young People* (2023), <https://tinyurl.com/3nwfmr9>.

¹⁰ *Id.*

¹¹ See, e.g., Nhan L. Truong et al., GLSEN, *Erasure and Resilience: The Experiences of LGBTQ Students of Color—Black*

reduce LGBTQ students' sense of belonging to their school communities.¹²

Negative treatment based on sexual orientation or gender identity and expression in educational settings can result in severe health consequences, too. As a result of societal stigma and mistreatment, majorities of LGBTQ youth report experiencing depression and anxiety.¹³ One recent survey found that 41% of LGBTQ youth had seriously considered suicide in the past year, with 14% actually attempting suicide—and these figures rise for transgender or nonbinary youth and for LGBTQ youth of color.¹⁴ Negative school environments exacerbate these problems, as LGBTQ students who report experiencing victimization or discrimination at school are likelier to have low self-esteem or to suffer from depression.¹⁵ Indeed, research has established direct connections between victimization of LGBTQ youth at school and the development of depressive symptoms and other significant mental health issues.¹⁶ And research has also connected peer victimization and lower levels of school belonging to increased suicidality among LGBTQ youth.¹⁷

LGBTQ Youth in U.S. Schools (2020), <https://tinyurl.com/ynhf9zxb>.

¹² Kosciw et al., *supra* note 7, at xix-xx.

¹³ The Trevor Project, *supra* note 9.

¹⁴ *Id.*

¹⁵ Kosciw et al., *supra* note 7, at xviii-xx.

¹⁶ Tyler Hatchel et al., *Sexual Harassment Victimization, School Belonging, and Depressive Symptoms Among LGBTQ Adolescents: Temporal Insights*, 88(4) *Am. J. Orthopsychiatry* 422, 426-27 (2018), <https://tinyurl.com/26ynk3yv>.

¹⁷ Tyler Hatchel et al., *Peer Victimization and Suicidality Among LGBTQ Youth: The Roles of School Belonging, Self-*

Discrimination, harassment, and stigma based on sexual orientation or gender identity also detrimentally impact LGBTQ students' academic outcomes. LGBTQ students who experience high levels of victimization or who experience discrimination are significantly more likely to miss school, have lower GPAs, and report feeling less connected to their school communities.¹⁸ Close to 80% of LGBTQ youth report avoiding school functions or extracurricular activities because they feel unsafe or uncomfortable at school.¹⁹ These negative outcomes echo throughout students' lives; LGBTQ students who experience high levels of victimization because of their sexual orientation or gender identity are only half as likely to report plans to pursue post-secondary education like college or trade school.²⁰

Conversely, LGBTQ students who experience increased affirmation and acceptance at school enjoy significantly improved mental health and academic outcomes. One survey found that LGBTQ students who have access to supportive school staff, gay-straight alliances, inclusive school policies, and (as especially relevant here) curricula that included LGBTQ topics heard fewer homophobic remarks at school, experienced less discrimination, were less likely to miss school, reported a better sense of belonging and connection in school, and had more plans to pursue post-secondary education.²¹ Moreover,

Compassion, and Parental Support, 16(2) J. LGBT Youth 134, 147-48 (2019), <https://tinyurl.com/5n8m8ypp>.

¹⁸ Kosciw et al., *supra* note 7, at xviii-xx.

¹⁹ *Id.* at xv.

²⁰ *Id.* at xix.

²¹ *Id.* at xx-xxiv.

these students enjoyed better psychological well-being, reporting higher self-esteem and lower rates of depression or suicidality.²² Analyses of differences in policies and outcomes across various school systems have similarly revealed that LGBTQ students at schools with supportive policies concerning sexual orientation and gender identity had more positive experiences, better perceptions of the school environment, and reduced truancy.²³

C. Policies Such as the County’s Fall Within State and Local Educational Discretion.

Particularly given the need to create safe and supportive environments for LGBTQ students, policies like the County’s fall well within state and local discretion. Incorporating LGBTQ-inclusive books into the language arts curriculum helps students develop respect and tolerance for students who are LGBTQ. And declining to allow opt-outs reflects a determination that, whatever one’s views about whether being LGBTQ is “right” or “wrong,” students must learn to treat LGBTQ people with respect and dignity—consistent with public education’s role in bringing together “diverse and conflicting elements in our society” and thus furthering “fundamental values

²² *Id.*; see also, e.g., Wojciech Kaczowski et al., *Examining the Relationship Between LGBTQ-Supportive School Health Policies and Practices and Psychosocial Health Outcomes of Lesbian, Gay, Bisexual, and Heterosexual Students*, 9(1) *LGBT Health* 43-53 (Jan. 2022), <https://tinyurl.com/34m5fvu5>.

²³ Jack K. Day et al., *Safe and Supportive Schools for LGBT Youth: Addressing Educational Inequities Through Inclusive Policies and Practices*, 74 *J. Sch. Psych.* 29-43 (June 2019), <https://tinyurl.com/4e9zydk4>.

necessary to the maintenance of a democratic political system.” *Ambach*, 441 U.S. at 77.

Indeed, efforts such as these often reflect policies of nondiscrimination enshrined in state law. Cognizant of the importance of education to our communities’ youth, as well as the broad negative effects of discrimination, many of our States (as well as other jurisdictions) have protected LGBTQ students by codifying prohibitions against discrimination on the basis of sexual orientation or gender identity.²⁴ In Maryland, for instance, local school systems are required to have policies and regulations “designed to create and maintain environments that are equitable, fair, safe, diverse, and inclusive.” Md. Code Regs. (“COMAR”) 13A.01.06.04C(1). Further, public prekindergarten, primary, and secondary schools, as well as nonpublic schools that receive funds from the State, are prohibited from discriminating against current or prospective students on the basis of, among other things, sexual orientation or gender identity. Md. Code Ann., Educ. § 26-704 (LexisNexis 2022).

Endeavors like the County’s are consistent with our States’ efforts to address bullying, too. Maryland law, for instance, requires each school system to establish a policy prohibiting bullying, harassment, or intimidation based on a statewide model policy. *Id.* § 7-424.1.²⁵ “Bullying, harassment, or intimidation” is defined to include certain conduct motivated by, among other

²⁴ See, e.g., Mass. Gen. Laws ch. 76, § 5; Movement Advancement Project, *Equality Maps: Safe Schools Laws* (2022), <https://tinyurl.com/4bubd64k> (“nondiscrimination” tab) (compiling laws of all States).

²⁵ See also Md. State Dep’t of Educ., *Model Policy: Bullying, Harassment, or Intimidation* (2021), <https://tinyurl.com/2c4wvtvj>.

things, a student’s sexual orientation or gender identity. *Id.* § 7-424. As this definition reflects, bullying can be rooted in animus. By fostering respect for, and familiarity with, LGBTQ people, LGBTQ-inclusive books can help prevent bullying from occurring at all.

Parents who disagree with a school’s approach to any of this have ample recourse. In Maryland, beyond attending school board meetings, they are free to raise their concerns with the county school superintendent, whose decision can then be appealed to the county school board. *Id.* § 4-205(c)(2). The county school board’s decision, in turn, can be appealed to the State Board of Education, *id.* §§ 2-205(e), 4-205(c)(3), whose decision is subject to judicial review in the same manner as any other agency decision, COMAR 13A.01.05.11. Although parents may not always agree with the outcome, the availability of processes such as these helps ensure that school boards can “transmit community values.” *Board of Educ., Island Trees Union Free Sch. Dist. No. 26*, 457 U.S. at 864.

Petitioners are wrong to point to purported inequity between the County’s policy and the common practice of allowing students to opt out of sex education classes, including in Maryland. *See* Pet’r Br. 36-37. Stated simply, the books at issue are not sex education. Maryland’s regulations do require school systems to establish procedures allowing students to opt out of “instruction related to family life and human sexuality objectives.” COMAR 13A.04.18.01D(2)(e)(i). That requirement refers specifically to the “Family Life and Human Sexuality” component of the State’s comprehensive health education program, COMAR 13A.04.18.01C(1)(c), whose principal objective is to “help students adopt and maintain healthy behaviors and skills that contribute directly to a student’s ability to successfully

practice behaviors that protect and promote health and avoid or reduce health risks,” COMAR 13A.04.18.01B(1). To that end, the regulation outlining “comprehensive health education standards” provides that “[s]tudents will comprehend concepts related to health promotion and disease prevention to enhance health,” then enumerates those concepts to include family life and human sexuality alongside mental and emotional health, substance abuse prevention, safety and violence prevention, healthy eating, and disease prevention and control. COMAR 13A.04.18.01C(1). Thus, the “instruction regarding family life and human sexuality objectives” from which students may opt out is instruction directed toward promoting students’ health as part of the overall required health curriculum.

Efforts like those at issue here are a different matter altogether. *Cf. Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (prescribing inquiry into whether government regulations treat “*comparable* secular activity more favorably than religious exercise” (emphasis added)); *id.* (explaining that “whether two activities are comparable for purposes of the Free Exercise Clause must be judged “against the asserted government interest that justifies the regulation at issue”). The books in question are designed to foster tolerance and acceptance by underscoring, for all students, that LGBTQ people exist and deserve to be treated with dignity and respect. They are not meant as sex education; they do not discuss physical intimacy; and they are not otherwise meant to “help students adopt and maintain healthy behaviors and skills that contribute directly to a student’s ability to successfully practice behaviors that protect and promote health and avoid or reduce health risks,” COMAR 13A.04.18.01B(1). Indeed, the notion that books featuring LGBTQ characters are by definition “sex

education” would mean that books featuring heterosexual romantic or family relationships are also “sex education” and likewise trigger opt-out rights.²⁶ Thus, that schools allow opt-outs for sex education does not suggest that the County is obligated to allow opt-outs here—whether as a matter of state law or as a matter of free exercise—any more than it would be obligated to allow opt-outs from other non-sex-education instruction, such as math or geography.

**II. PETITIONERS HAVE FAILED TO ESTABLISH A
CONSTITUTIONAL BURDEN ON THE MINIMAL
RECORD AT THIS PRELIMINARY PHASE.**

The Fourth Circuit correctly concluded that the “threadbare record developed to date” in this case “does not support th[e] conclusion” that the use of the books at issue will go beyond “mere exposure” and veer into “direct or indirect pressure to abandon religious beliefs or affirmatively act contrary to those beliefs.” Pet. App. 35a-36a & n.14. While petitioners suggest that teachers *might* be pressuring students or stifling disagreement about the books, *see, e.g.*, Pet’r Br. 11-12, there is no evidence that this actually has occurred. This case therefore does not present the question whether such pressure, if it existed, would burden petitioners’ free exercise rights. Rather, the scant record here permits consideration of only a much broader claim: that petitioners’ free exercise rights are

²⁶ For example, the children’s book *Pat the Bunny* features characters called “Mummy” and “Daddy,” and at one point says that “Paul,” a child, “can put his finger through Mummy’s ring.” Dorothy Kunhardt, *Pat the Bunny* 15 (1940). Because the book involves a heterosexual marital relationship that apparently has produced children, under petitioners’ theory it would seem to constitute sex education.

burdened by their children’s mere *exposure* to concepts at odds with their religious beliefs. Nothing in this Court’s precedent suggests such a dangerously expansive principle, and the Court should reject it.

As the Fourth Circuit recognized, the record, at this early phase of litigation, contains no evidence as to how the challenged books are used in Montgomery County. See Pet. App. 33a (noting lack of clarity regarding “how any teacher or school employee has actually used any of the Storybooks in the Parents’ children’s classrooms, how often the Storybooks are actually being used, what any child has been taught in conjunction with their use, or what conversations have ensued about their themes”). And while petitioners cite to County teacher guidance that suggests answers to students’ questions, Pet’r Br. 11-12, there is no evidence that this guidance has ever been used. Pet. App. 43a. This paucity of information is a result of petitioners’ own strategy of seeking this Court’s review of the denial of a preliminary injunction rather than developing the record further through fact discovery. Justices of this Court have rightly been wary of adjudicating constitutional issues in similar circumstances. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 55 (2005) (O’Connor, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (noting that relevant “[f]acts . . . may be developed in litigation,” but that “in part because this case comes to us from the grant of a preliminary injunction, there has been no such development”); *Thornburgh v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 815 (1986) (O’Connor, J., joined by Rehnquist, J., dissenting) (objecting to “prematurely decid[ing] serious constitutional questions on an inadequate record, in contravention of settled principles of constitutional adjudication and procedural fairness” where “[t]here has been no trial

on the merits, and appellants have had no opportunity to develop facts that might have a bearing on the constitutionality of the statute” at issue); *O’Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773, 803 n.10 (1980) (Blackmun, J., concurring) (questioning whether constitutional issue was “properly presented” where case arose “from the refusal to extend a preliminary injunction—an order preceded by limited development of the record and not guided by focused presentation of legal arguments”).

Without evidence about how, if at all, teachers talk about the books in question—apart from simply reading them—the record cannot support a conclusion that students are being coerced either to adopt a particular view or to abandon any previously held views. The Fourth Circuit therefore correctly concluded that petitioners cannot meet the preliminary injunction standard with respect to any free exercise claim based on students being coerced to change their religious beliefs. Pet. App. 34a; see *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (a preliminary injunction is an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief”). Petitioners’ only remaining claim on this record is that their free exercise rights are burdened simply by the exposure of their children to instruction inconsistent with petitioners’ religious beliefs.

The First Amendment does not extend so far. Although petitioners rely heavily on this Court’s decisions in *Yoder* and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), those cases do not support their claim. If anything, both decisions confirm that mere exposure to contrary views, as

opposed to coercion to affirm or adopt such views, cannot constitute a burden on free exercise.

In *Yoder*, the constitutional problem was not exposure to instruction contrary to plaintiffs' Amish beliefs. Rather, the Court found, based on a well-developed factual record including detailed expert testimony, that the law burdened plaintiffs' free exercise rights because attending high school *itself* was antithetical to their religious beliefs, and that mandatory school attendance posed an existential threat to their religious community. *See Yoder*, 406 U.S. at 209 (describing expert testimony about "the relationship of the Amish belief concerning school *attendance* to the more general tenets of their religion," and "the impact that compulsory high school *attendance* could have on the continued survival of Amish communities" (emphasis added)); *id.* at 211 ("Formal high school education beyond the eighth grade is contrary to Amish beliefs not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life."). The Court emphasized that the plaintiffs had presented an exceedingly detailed record regarding "the inter-relationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement" of the compulsory schooling statute. *Id.* at 235.

Yoder made clear that its holding had a narrow reach. The Court opined that “probably few other religious groups or sects could make” the showing the Amish had made. *Id.* at 235-36. Neither that conclusion nor the Court’s detailed discussion of the existential threat posed to the Amish community by mandatory “attend[ance],” *id.* at 207, would have made sense if plaintiffs could have demonstrated a free exercise burden simply by pointing to instruction contrary to their religious beliefs.

The inconsistency between *Barnette* and petitioners’ theory is even clearer. In *Barnette*, a West Virginia law compelled students to salute and pledge allegiance to the United States flag. 319 U.S. at 629. A group of Jehovah’s Witnesses sued, stating that they considered the flag a graven image and that saluting it violated their religious beliefs. *Id.* In finding a First Amendment violation, this Court emphasized that the mandatory flag salute and pledge of allegiance constituted “a compulsion of students to declare a belief,” *id.* at 631, and that the law “requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks,” *id.* at 633. At the same time, the Court distinguished making students “acquainted with the flag salute so that they may be informed as to what it is or even what it means,” *id.* at 631. Thus, simply instructing plaintiffs on material contrary to their religious beliefs was permissible, even though “requir[ing] the individual to communicate by word and sign his acceptance of the political ideas” was not. *Id.* at 633; see also *Bowen v. Roy*, 476 U.S. 693, 704-705 (1986) (describing *Barnette* as “rel[ying] on the showing that compulsion of certain activity with religious significance was involved”). Petitioners’ “exposure”

theory cannot be squared with that understanding of the First Amendment.

The parental rights cases on which petitioners rely do not support their exposure theory, either. *See Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters of Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Espinoza v. Montana Dep’t of Revenue*, 591 U.S. 464 (2020). In *Meyer*, the Court held that a teacher’s due process rights were violated when he was prosecuted for teaching German, 262 U.S. at 396-97, 402, and in *Pierce*, the Court struck down a law that required children to attend public school, 268 U.S. at 530, 534-35. While both decisions recognized the “liberty of parents and guardians to direct the upbringing and education of children,” *id.* at 534-35, neither suggested that parents could demand that the government shield their children from simply hearing contrary ideas. Indeed, this Court has interpreted *Meyer* and *Pierce* narrowly. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 177 (1976) (emphasizing that *Pierce* “‘held simply that while a State may posit (educational) standards, it may not pre-empt the educational process by requiring children to attend public schools’” (quoting *Yoder*, 406 U.S. at 239 (White, J., concurring))); *id.* (explaining that “*Meyer* and its progeny,” including *Pierce* and *Yoder*, “entitle [petitioner private schools] to no more” than to “remain presumptively free to inculcate whatever values and standards they deem desirable”); *Norwood v. Harrison*, 413 U.S. 455, 461 (1973) (recognizing the “limited scope of *Pierce*,” which “affirmed the right of private schools to exist and to operate”). Similarly, *Espinoza* reiterated “the rights of parents to direct ‘the religious upbringing’ of children,” 591 U.S. at 485 (quoting *Yoder*, 406 U.S. at 213-14), but nowhere suggested a right to avoid exposure to contrary ideas. Indeed, that case

addressed a wholly unrelated question: whether Montana’s prohibition on providing tuition assistance to parents who send their children to religious schools violated the Free Exercise Clause. *Id.* at 468.

Furthermore, the breadth of the rule petitioners propose is astonishing. Under petitioners’ theory that they can control precisely what their children hear in school, there is no principled way to distinguish the books at issue from any other part of a school’s curriculum, nor petitioners’ particular objections to LGBTQ-themed content from any other religiously based reason parents might want their children opted out of exposure to certain content. Petitioners thus assert the right to opt out of *any part of a school curriculum* on religious grounds. Because topics implicating religious belief could arise in almost any class covering almost any subject—from the Reformation to the civil rights movement, from the Big Bang to dinosaurs, from *Macbeth* to *Beloved*—petitioners’ theory could require schools to provide parents with detailed advance notice of nearly every topic to be covered every day in every classroom, along with a corresponding opportunity to opt out. Such a regime would significantly interfere with the well-recognized authority and responsibility of state and local governments, beholden to their citizens through elections, to set educational parameters for their communities. *See* discussion at pages 3-6 above. It also would saddle schools with significant logistical burdens, as the record in this case reflects. *See, e.g.,* Pet. App. 607a (school administrator’s declaration that “individual principals and teachers could not accommodate the growing number of opt out requests without causing significant disruptions to the classroom environment”). This Court should thus reject petitioners’ expansive exposure theory of free exercise.

If this Court does conclude that petitioners' free exercise rights were burdened, however, it should not, at this preliminary stage, decide what level of scrutiny applies, much less whether that level of scrutiny is satisfied here. Since the court of appeals affirmed the denial of the preliminary injunction motion on the ground that petitioner had not established a burden, it did not address any further constitutional question. The question presented, in turn, encompasses only whether a burden exists. Pet. i; *see* Sup. Ct. R. 14.1(a). Thus, in the event that the Court finds a free exercise burden here, it should remand to allow the Fourth Circuit to consider the scrutiny-related questions in the first instance.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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