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 NC VALUES INSTITUTE AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

TAMI FITZGERALD
NC VALUES INSTITUTE
9650 Strickland Rd.
Suite 103-226
Raleigh, NC 27615

John W. Whitehead
William E. Winters
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911

DEBORAH J. DEWART
Counsel of Record
111 Magnolia Lane
Hubert, NC 28539
(910) 326-4554
lawyerdeborah@outlook.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae respectfully urge this Court to reverse the decision of the Fourth Circuit.

NC Values Institute ("NCVI") is a North Carolina nonprofit organization that exists to preserve and promote faith, family, and freedom through public policies that protect constitutional liberties, including the right to live and work according to conscience and faith, and the fundamental right of parents to control the education and upbringing of their children. See https://ncvi.org. NCVI has submitted many amicus briefs to this Court and federal circuits courts around the country.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights

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[1] *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

guaranteed by the Constitution and laws of the United States.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In October 2022, the Montgomery School Board announced its approval of certain "LGBTQ-Inclusive Books" (the "Storybooks") for use in the English Language Arts Curriculum. *Mahmoud v. McKnight*, 102 F.4th 191, 197 (4th Cir. 2024). These Storybooks "portray[] homosexual, transgender, and non-binary characters in various situations." *Id.* at 198. The Board also provided school personnel with "access to additional materials" to use "in responding to inquiries about the Storybooks' contents." *Ibid.* A multitude of questions and objections arose, leading to litigation in federal court.

The "crux" of the parents' claim in this case is their "fundamental right to direct the religious and educational upbringing of their children, which the Board has violated by denying them a right to notice" and an opportunity to opt out of "classroom instruction on such sensitive religious and ideological issues." *Mahmoud*, 102 F.4th at 201-202. Indeed, the parents claim not only a *right* but a religious *duty* "to train their children in accord with their faiths on what it means to be male and female; the institution of marriage; human sexuality; and related themes." *Id.* at 201.

These parents do not stand alone. When the Storybooks were initially adopted for the 2022-2023

Montgomery County school year, complaints abounded, as "numerous teachers, administrators, and parents began voicing concerns about their efficacy and age appropriateness." *Mahmoud*, 102 F.4th at 199. "Some complaints were based on religious grounds, but many were not." *Ibid*.

ARGUMENT

I. PARENTAL RIGHTS ARE INALIENABLE AND FUNDAMENTAL, AS RECOGNIZED BY DECADES OF FEDERAL AND STATE JURISPRUDENCE.

Parental rights to the care, custody, and control of their children are not created by statute or by any federal or state constitution but are natural, inalienable rights uniformly recognized by federal and state courts throughout American history. There is such "extensive precedent" on point that it cannot possibly be doubted that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Due process rights to life, liberty, and property encompass "not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and bring up children, to worship God . . . ." *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). These rights to establish a family are "essential." *Ibid*.; *see Troxel*, 530 U.S. at 65. A parent's "right to the care, custody, management and companionship" of his or her children is a "right[] more precious . . . than property rights"—even more

important than financial support from a former spouse. *May v. Anderson*, 345 U.S. 528, 533 (1953). Choices about raising children "are among associational rights . . . sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). These rights are ranked as "of basic importance in our society." *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971).

Parental rights fit comfortably within judicial definitions of "fundamental" rights. "Marriage and procreation are fundamental to the *very existence and survival* of the race." *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942) (emphasis added). In *Skinner*, this Court struck down a sterilization requirement, stressing the potentially "far-reaching and devastating effects" of depriving the individual of "a basic liberty." *Ibid*. The often repeated language used to recognize fundamental rights is easily applied to the rights of parents—"deeply rooted in this Nation's history and tradition," *Moore v. East Cleveland,* 431 U.S. 494, 503 (1977) (plurality opinion); "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). *See Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1977) (discussing the criteria to recognize fundamental rights beyond those enumerated in the Bill of Rights).

Even in upholding a child labor law, explaining that "the family itself is not beyond regulation in the public interest," this Court affirmed the paramount importance of parental rights: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944).

A. Parental rights sweep broadly, encompassing education generally and religion specifically.

Parental rights extend to a wide spectrum of public and private life—custody, education, religion, associations, medical care. Judicial precedent touches all of these topics. "The law's concept of the family rests on the presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Parham v. J. R.,* 442 U.S. 584, 602 (1979). Historically, American jurisprudence "reflects Western civilization concepts of the family as a unit with broad parental authority over minor children" and "cases have consistently followed that course." *Ibid*. It is difficult to imagine a more critical application of parental rights than basic decisions about the content and viewpoint of a young child's education on topics like sexuality that are inextricably linked with religious faith.

Religion and education are key areas of life within the sphere of parental rights. The "liberty of parents

and guardians" includes the right "to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters,* 268 U.S. 510, 534-535 (1925). Reasoning that a child is "not the mere creature of the state," this Court explained that "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id*. at 534-535. Accordingly, *Pierce* upheld the right of parents to place their children in private school rather than "forcing them to accept instruction from public teachers only," a practice designed to "standardize" them. *Id*. at 535. The state may not "standardize its children . . . by completely foreclosing the opportunity" for parents to choose a different path of education. *Parents for Priv. v. Barr*, 949 F.3d 1210, 1229 (9th Cir. 2020), citing *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005) (internal quotation marks omitted).

The parents who filed this case "claim their faiths—Islam, Roman Catholicism and Ukrainian Orthodox—dictate that they, and not the Montgomery County schools, teach their children about sex, human sexuality, gender and family life." *Mahmoud*, 102 F.4th at 219 (Quattlebaum, J., dissenting). Parental rights to control the upbringing of their children, including education generally and religious training specifically, were addressed at length in the landmark *Wisconsin v. Yoder* ruling. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their

children is now established beyond debate as an enduring American tradition." 406 U.S. 205, 232 (1972). The government's "interest in universal education," important as it may be, "is not totally free from a balancing process when it impinges on fundamental rights" such as the "traditional interest of parents with respect to the religious upbringing of their children." *Id*. at 214. *Yoder*'s rationale applies here, where the sensitive matters involved implicate fundamental moral and religious values. The Fourth Circuit blithely cast *Yoder* aside as a "limited holding" restricted to the "unique record established concerning the Amish faith's rejection of formal secondary education as a whole." *Id*. at 211. But this Court has consistently characterized parental rights as "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65. Even in dissenting from the analysis of the other justices in *Troxel*, Justice Scalia vigorously affirmed that the "right of parents to direct the upbringing of their children is among the unalienable Rights' with which the Declaration of Independence proclaims all Men . . . are endowed by their Creator." *Id*., at 91 (Scalia, J., dissenting) (internal quotation marks omitted).

B. Parental rights are increasingly threatened by public school policies.

LGBT rights are often exalted at the expense of those who reject the underlying ideology. This trend is nowhere more evident than in public school policies demanding the use of a minor child's preferred name and pronouns—often without parental consent or

even knowledge, and sometimes requiring that school personnel actively lie to parents. With the increase in these alarming policies, including secret sex transitions that deliberately deceive parents and irreparably harm children, it is more critical than ever to guard parental rights to control what their children are learning in public school about these sensitive topics. The policies at issue in this case thwart the ability of parents to exercise basic parental and religious liberty rights.

There are many legal challenges around the country, including several recent circuit court decisions and petitions filed in this Court. Indeed, this case is not the first time the Fourth Circuit has stonewalled parental rights. Parents in Montgomery County, Maryland sued the Board of Education over the emerging issue of public schools secretly socially transitioning minor children to alternate gender identities and deliberately withholding that information from parents. The School Board had adopted "Gender Identity" guidelines specifically providing that parents were *not to be informed* when their children announced that they identified as transgender. Furthermore, school personnel were required to take affirmative steps to hide from parents that their child was exhibiting as transgender at school by reverting to given names when communicating with them. This official deception is eerily comparable to the policy at stake here—and as in this case, the Fourth Circuit held that the parents did not establish sufficient injuries. *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 78 F.4th 622 (4th Cir. 2023), *cert. denied* 144 S.Ct. 2560 (May

20, 2024). In that case, the Fourth Circuit held that the parents lacked standing. *Id*. at 626. Here, the court found the record insufficient to warrant a preliminary injunction. Either way, the court is requiring that *a child be harmed* before a dangerous policy can be corrected.

One sex transition policy emerged in Iowa's Linn-Marr School District. Like many of these policies, it combined the worst of two worlds in constitutional law—compelled speech and viewpoint discrimination. A challenge to the policy reached the Eighth Circuit, which found that intervening legislation (Iowa Code § 279.78 (2023)) had provided the relief sought on one claim, but the court allowed a second claim (based on the First Amendment) to proceed. *Parents Defending Educ.*[2] *v. Linn-Marr Sch. Dist*., 83 F.4th 658, 665 (8th Cir. 2023).

In Florida, the Leon County Schools LGBTQ+ Critical Support Guide jeopardizes First Amendment rights by demanding the use of a minor child's preferred name and pronouns, not only without parental consent or knowledge—but under an official policy that authorizes and directs school personnel to deceive a child's parents if they do not affirm the *child*'s life-altering decision to transition to the opposite sex. *Littlejohn v. Sch. Bd. of Leon Cnty*., 647 F. Supp. 3d 1271 (N.D. Fla. 2022), appeal pending, Eleventh Circuit Case No. 23-10385.

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[2] https://defendinged.org. There are numerous indoctrination policies around the country and many ongoing legal challenges in process.

In another variation on this theme, the Olentangy School District in Ohio adopted a policy demanding that *students* affirm the idea that gender is fluid and refrain from "misgendering" other *students*, even contrary to their own (or their parents') religious convictions. The Sixth Circuit affirmed the district court's denial of a request for preliminary injunction, over a long dissent by Judge Batchelder that acknowledged the presence of both compelled speech and viewpoint discrimination. *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 109 F.4th 453 (6th Cir. 2024).[3]

In pursuing its alleged goal to respect and support all students, including transgender students, the Brownsburg Community School Corporation in Indiana adopted a policy providing that if a student, the student's parents, and a health care provider asked that the student be called by a preferred name, teachers would be required to call the student by that name regardless of conscientious objections. The court held that a religious accommodation would be "detrimental not only to transgender students' well-being, but also to the learning environment for other students and faculty." *Kluge v. Brownsburg Cmty. Sch. Corp.*, 732 F. Supp. 3d 943, 945 (S.D. Ind. 2024).[4] Parental consent of the transitioning student is required (unlike many policies), but that leaves the parents of fellow students with no options.

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[3] A Petition for En Banc Rehearing (Case No. 23-3630) was granted and the case is set for oral argument on March 19, 2025.

[4] Appeal filed May 31, 2024 (7th Circuit Case No. 24-1942).

In a Petition recently denied by this Court, the Eau Claire Area School District in Wisconsin adopted "Administrative Guidance for Gender Identity Support" that initiates a process for school staff to create a "Gender Support Plan" with a student. The Policy purports to offer parents limited rights to participation and information but nevertheless erodes parental rights and attacks the religious convictions of concerned parents. *Parents Protecting Our Child. v. Eau Claire Area Sch. Dist.*, 95 F.4th 501, 504 (7th Cir. 2024), *cert. denied* 220 L.Ed.2d 265 (Dec. 9, 2024).

II. THE SCHOOL BOARD EFFECTIVELY DECLARES A MANDATORY RELIGIOUS ORTHODOXY, CONTRARY TO THE FIRST AMENDMENT AND THIS COURT'S PRECEDENT.

The Board has implicitly made a declaration of religious orthodoxy that defies the Constitution, "view[ing] the parents' religious objections to the texts as less important than the board's goals to improve inclusivity for the LGBTQ+ community." *Mahmoud*, 102 F.4th at 224 (Quattlebaum, J., dissenting). And that is "*precisely* the sort of value judgment about parents' religious claims" that neither a school board nor a court may make. *Ibid.*

There is "probably no deeper division" than a conflict provoked by the choice of "what doctrine and whose program public educational officials shall compel youth to unite in embracing." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943). This case demonstrates the particularly

contentious divisions over what public schools should teach about sexuality. This Court has acknowledged the broad discretion of local school boards in managing curriculum. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863 (1982). But "that deference is not absolute" and must comply with the "transcendent imperatives of the First Amendment." *Mahmoud*, 102 F.4th at 217-218 (Quattlebaum, J., dissenting), citing *Pico,* 457 U.S. at 863-864. The Board's mandatory use of the Storybooks, over strong parental objections, darkens the "fixed star in our constitutional constellation" that no government official may "prescribe what shall be orthodox in . . . religion." *Barnette*, 319 U.S. at 642.

The Board is on thin ice with its suggested responses to objections, e.g., advising personnel to "[d]isrupt the either/or thinking" of a student who questions same-sex attractions. *Mahmoud*, 102 F.4th at 199. Questions about transgenderism are to be answered by "explaining" that "people make a guess about our gender" at birth, but "[o]ur body parts do not decide our gender . . . gender comes from the inside." *Ibid.* Such responses attack the moral convictions of many religious traditions and reveal that "schools will advocate for the themes and values in the texts and against any opposition to them . . . forc[ing] parents to make a choice—either adhere to their faith or receive a free public education for their children." *Id.* at 222 (Quattlebaum, J., dissenting). They cannot do both.

A. The Board's "religious orthodoxy" interferes with the ability of parents to control the religious upbringing of their children.

"Religious liberty is indelibly embedded in American history and the U.S. Constitution." *Mahmoud*, 102 F.4th at 203-304, citing *School Dist. v. Schempp*, 374 U.S. 203, 212-14 (1963). Protection for religious liberty "requires government respect for, and *noninterference* with, the religious beliefs and practices of our Nation's people." *Mahmoud*, 102 F.4th at 204, quoting *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). The Storybooks do interfere with the ability of parents to teach their children religious values and beliefs because their content conflicts with the religious convictions of many, including the families involved in this case and others involved in public education.

The "exalted" place of religion in our nation has been "achieved through a long tradition of reliance on the home, the church, and the inviolable citadel of the individual heart and mind." *Schempp*, 374 U.S. at 226. The government may not "invade that citadel" by imposing religious *requirements* in public education, as this Court has held in *Schempp* and other cases. But it is equally improper to "invade th[e] citadel . . . to oppose" (*ibid.*) a family's religious convictions, as the Board does when it mandates the Storybooks and explicitly denies parents the opportunity to opt out. The Constitution "does not require"—or even allow—the state to be the "adversary" of religion. "State power is no more to be used so as to handicap religions

than it is to favor them." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

The Fourth Circuit laments "the absence of a record supporting the Parents' assertions that their children's religious training would be compromised" from exposure to the Storybooks. *Mahmoud*, 102 F.4th at 213. The court claimed that "the record is threadbare" and declined to find coercion "to *change* their religious beliefs or conduct." *Id.* at 209. The court demanded a more developed record of the harm and evidence of specific coercion, complaining that the declarations submitted fail to show how school personnel have "actually used any of the Storybooks in the Parents' children's classrooms." *Id.* at 208.

But *why* must a young child be confused or otherwise harmed before his or her parents can vindicate their rights to object to teachings that explicitly attack their religious faith? That is an unreasonable burden imposed by the Fourth Circuit. The court requires proof of actual irreparable harm rather than the likelihood of such harm, which defeats the purpose of a preliminary injunction to prevent irreparable harm *before* it occurs. The court noted that the declaration of the Associate Superintendent stated "'[t]eachers cannot . . . elect not to use the [Storybooks] at all,'" *id.* at 198 (alteration in original), and the dissent observed that the parents "have produced the books that no one disputes will be used to instruct their K-5 children," *id.* at 222 (Quattlebaum, J., dissenting). Additionally, the parents submitted "a Montgomery County elementary school newsletter from June 2023

announcing that as part of Pride Month, each day in June, classrooms will read an inclusive, LGBTQ+ friendly book followed by a community circle discussion." *Id.* at 208 n.13 (quotation marks omitted). Thus, there is no question that these books will be used, and the parents have clearly claimed that using these books to teach their children burdens the parents' own religious exercise and convictions even if the teaching does not ultimately change their children's beliefs or perspectives. *Id.* at 208 (listing excerpts from parents' declarations); *id.* at 223 (Quattlebaum, J., dissenting) ("These parents' faith dictates that they—not others—teach their children about sex, human sexuality, gender and family life. Their faiths dictate that they shield their children from teachings that contradict and undermine their religious views on those topics.").

The lower court seemed to be aware that "[t]o be eligible for a preliminary injunction, plaintiffs must show that . . . (2) they are '*likely* to suffer irreparable harm in the absence of preliminary relief,'" *id.* at 203 (emphasis added), and that "the 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,'" *id.* at 228 (Quattlebaum, J., dissenting) (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020)).

The Fourth Circuit's reasoning raises the same concern recently expressed by Justice Alito "that some federal courts are succumbing to the temptation to use the doctrine of Article III standing"—or, as here, a similar requirement to show a cognizable

burden on religious practice—"as a way of avoiding some particularly contentious constitutional questions," but it is important "that [the courts] carry out their virtually unflagging obligation to exercise the jurisdiction given them." *Parents Protecting Our Child.*, 220 L.Ed.2d 265, 266 (2024) (Alito, J., dissenting from the denial of certiorari) (cleaned up). And, as in *Parents Protecting Our Child.*, the parents here "are merely taking the school district at its word" that it will indeed use these books just as it has said "without parental knowledge or consent." *See ibid.* (Alito, J., dissenting from the denial of certiorari). But the burden on religious exercise in this case is much clearer than the plaintiffs' risk of injury in *Parents Protecting Our Child.* where "the Seventh Circuit suggested that a parent could not challenge the district's policy unless the parent could show that his or her child is transitioning or considering a transition," *ibid.* (Alito, J., dissenting from the denial of certiorari), because in this case there is no doubt that these Storybooks will be used by the school and that the use of the Storybooks burdens the parents' religious convictions and practice.

This burden and irreparable harm are avoidable because the schools "have discretion to grant religious opt-out requests" that are "reasonable" and "feasible." *Mahmoud*, 102 F.4th at 225 (Quattlebaum, J., dissenting). Indeed, the overnight "flip-flop" in the allowance of opt-outs was "purely discretionary." *Id.* at 226 (Quattlebaum, J., dissenting). The policy change did not entirely eliminate opt-outs, but "carved away only a sliver of those able to request opt-outs—those opposed for *religious* reasons to the

instruction of their K-5 children with the texts," allowing *other* types of religious opt-outs but just not those opposed to the content of the objectionable Storybooks. *Ibid.* (emphasis added). The Board's action demonstrates the "callous indifference" to religion forbidden by the Constitution. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

B. This case implicates young impressionable preschool children.

The Storybooks are used in curriculum with children as young as 3 and 4 years old, with the addition of suggested answers to objections and questions from parents or students. *Mahmoud*, 102 F.4th at 218 (Quattlebaum, J., dissenting). In the Establishment Clause context, this Court has found elementary schoolchildren "more likely to be impressionable than teenagers and adults." *Id.* at 212, citing *Lee v. Weisman*, 505 U.S. 577, 592 (1992). In *Lee*, this Court found indirect coercion at a high school graduation—where the students were much older than the preschoolers exposed to the Storybooks—based on mere exposure to a short prayer. "[Y]oung graduates who object [were] induced to conform." *Id.* at 99. If *high school* students experience indirect coercion by quietly listening to a one-time prayer, then surely *preschool* children, repeatedly exposed to the Storybooks' content, experience pressure to adopt the viewpoint of these texts. The court does not need any further "[p]roof that discussions are pressuring students to recast their own religious views." *Mahmoud*, 102 F.4th at 213.

III. THE SCHOOL BOARD IMPOSES A SUBSTANTIAL BURDEN ON THE RELIGIOUS LIBERTY OF PARENTS.

For the 2022-2023 school year, Montgomery County adopted "Guidelines for Respecting Religious Diversity" to encourage "reasonable and feasible" accommodations when parents asked that a child "be excused from specific classroom discussions or activities that [parents or students] believe would impose a *substantial burden* on their religious beliefs." *Mahmoud*, 102 F.4th at 199-200 (emphasis added); *id.* at 219 (Quattlebaum, J., dissenting). The Board evades these Guidelines, "without explanation," by repealing and flatly prohibiting opportunities for notice and opt-outs. *Id.* at 200. Although citing concerns about the feasibility of accommodating a growing number of opt-out requests (*ibid.*), the Board's action not only violated the Guidelines but also Maryland law. Schools must "establish procedures for notice and opt-out procedures for all 'family life and human sexuality' instruction regardless of whether they are sought for a religious reason," and the Storybooks "involve issues of family life and human sexuality" although "not taught in a sex-ed class." *Id.* at 226 n. 4 (Quattlebaum, J., dissenting), citing Md. Code Regs. 13A.04.18.01(D)(2)(e).

As the majority and dissent both observe, the Free Exercise Clause protects not only "the right to harbor religious beliefs inwardly and secretly," but also "to live out their faiths in daily life through 'the performance of (or abstention from) physical acts.'"

Mahmoud, 102 F.4th at 204, *id*. at 220 (Quattlebaum, J., dissenting), quoting *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022) (quoting *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990)).

Generally, the First Amendment is "written in terms of *what the government cannot do* to the individual, not in terms of *what the individual can extract from the government*." *Bowen v. Roy*, 476 U.S. 693, 700 (1986), quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring). *Mahmoud*, 102 F.4th at 205 (emphasis added). Here, what public schools cannot "do to" individual parents is coerce them to expose their children to teachings that directly attack their deepest religious and moral convictions. Although an exemption may require that "inclusion in the program actually burdens" the parents' religious rights (*ibid*., quoting *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985)), a substantial burden does exist here and judicial relief is warranted.

A. The Board imposes a Hobson's choice on parents who hold conscientious objections to the Storybooks.

The Fourth Circuit reasoned that the Constitution protects the Parents' constitutional right "to avoid exposing their children to any religiously objectionable materials *by protecting their right to choose alternatives such as a private school*." *Mahmoud*, 102 F.4th at 215, citing *Runyon v. McCrary*, 427 U.S. 160, 178 (1976) (emphasis added).

If Maryland had a universal voucher program, with accessible, affordable educational alternatives, this would make perfect sense. The parents could easily exercise their rights. But alternatives to public education are entirely out of reach for many families.

The cost of private schools may be insurmountable. Homeschooling may be impossible for single parents or families where both parents must work to make ends meet. To access the free public education available to all children and to comply with compulsory attendance laws, parents must bow to the "religious orthodoxy" set by the government concerning sensitive, religiously tainted topics related to sexual morality. As Justice Alito described it—and the Fourth Circuit acknowledged—"[m]ost parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school." *Mahmoud*, 102 F.4th at 215, quoting *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring). The cost to exercise a constitutional right does not always create a burden. *Mahmoud*, 102 F.4th at 215, citing *Braunfeld v. Brown*, 366 U.S. 599, 605-06 (1961). But here, the cost of private education would effectively bar many families from removing their children from public school to protect them from highly objectionable materials.

The Board's denial of opt-out provisions forces parents to choose between "compromising their religious beliefs or foregoing a public education for their children." *Mahmoud*, 102 F.4th at 221 (Quattlebaum, J., dissenting). This means parents

must relinquish their fundamental right to control the religious upbringing of their young children or "incur[] the costs of alternatives" (*Mahmoud*, 102 F.4th at 207-208)—which may be impossible. Even though "parents could still . . . teach their children the tenants of their religion outside of school," imposing such conditions on an "important benefit" places substantial pressure on the parents to violate their faith. *Id.* at 221 (Quattlebaum, J., dissenting), citing *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717-18 (1981). "For decades," this Court has made it clear that such action infringes religious liberty. *Mahmoud*, 102 F.4th at 221 (Quattlebaum, J., dissenting), citing *Sherbert*, 374 U.S. at 404.

The availability of feasible alternatives is a factor also used to analyze liberties in other contexts. "[A]n alternative is adequate if it allows people to pursue the interests served by that liberty to the same degree and at no greater cost." Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 Va. L. Rev. 1759, 1762 (2022). Content-neutral time-place-manner restrictions on free speech must leave open "ample alternatives channels for communication." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Religious land use cases often consider whether reasonable alternatives are available to accomplish an organization's religious mission. *See, e.g.*, *Catholic Healthcare Int'l, Inc. v. Genoa Charter Twp.*, 82 F.4th 442, 453 (6th Cir. 2023) ("[n]o other feasible alternative location ha[d] been identified" for the religious mission at issue). Similarly, many families

lack feasible, reasonably affordable educational alternatives to public education.

B. The Board imposes substantial *indirect* coercion.

The Fourth Circuit insists the parents must show coercion on "them or their children to *believe* or *act* contrary to their religious views." *Mahmoud*, 102 F.4th at 208. That coercion may admittedly be either direct *or indirect*, including a "violation of conscience" or "substantial pressure . . . to modify [their] behavior and to violate [their] beliefs." *Ibid.*, citing *Thomas v. Rev. Bd.*, 450 U.S. at 717-18 (emphasis omitted). "Importantly, interfering or burdening the exercise of religion is *not limited to direct coercion*." *Mahmoud*, 102 F.4th at 220 (Quattlebaum, J., dissenting) (emphasis added), citing *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988). Here, the faiths of the parents "dictate that they shield their children from teachings that contradict and undermine their religious views on those topics." *Mahmoud*, 102 F.4th at 223 (Quattlebaum, J., dissenting). The Board prevents them from fulfilling this critical religious *duty*, except at a cost few can afford.

The Fourth Circuit, aligning with the Board, contends that "mere exposure" is insufficient to establish a substantial burden on faith, because exposure does not "affirmatively compel" either parents or children "to perform acts undeniably at odds with" their religious views. *Mahmoud*, 102 F.4th at 211, citing *Yoder*, 406 U.S. at 218. This contention

seriously underestimates the "mere exposure" to objectionable material present in this case. This is not a case that seeks to "require the Government to conduct its own internal affairs"—here, public school curriculum choices—"in ways that comport with the religious beliefs of particular citizens." *Mahmoud*, 102 F.4th at 212, citing *Bowen*, 476 U.S. at 699. Curriculum is not an inherently *internal* government affair—it impacts the community in a *public* manner. Compulsory education laws compel parents to send their children to school, and even though that can be accomplished through private education or homeschooling, the reality is that many (perhaps most) families cannot afford either of these options. And while not all *exposure* to other viewpoints is objectionable, this case involves more than "mere exposure" to very young, impressionable children, and the context is much different than university students ready to explore the "marketplace of ideas." At this early stage of life, allowable "mere exposure" might be students simply having a teacher who is gay or transgender but who does not actively promote or teach pro-LGBTQ+ values as part of the curriculum.[5] Beyond such limited situations, parents have the right to decide when their children are ready for exposure on sensitive topics and viewpoints that undermine their religious convictions and burden their religious practice. These religious beliefs and

[5] Similarly, children may observe practices outside their own faith community, e.g., a teacher wearing religious attire such as a cross necklace, a yarmulke, or headscarf. Such exposure would not violate the Establishment Clause. *See Bremerton*, 142 S. Ct. at 2425, 2431.

practices are not simply social values, but core rights protected by the First Amendment.

CONCLUSION

This Court should reverse the Fourth Circuit ruling.

Respectfully,

Deborah J. Dewart
Counsel of Record
111 Magnolia Lane
Hubert, NC 28539
lawyerdeborah@outlook.com
(910) 326-4554

Tami Fitzgerald
NC VALUES INSTITUTE
9650 Strickland Rd.
Ste. 103-226
Raleigh, NC 27615

John W. Whitehead
William E. Winters
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911

Counsel for Amici Curiae
NC Values Institute
The Rutherford Institute