No. 24-297

In the Supreme Court of the United States

TAMER MAHMOUD, *et al.*,

Petitioners,

v.

THOMAS W. TAYLOR, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE STATE OF WEST VIRGINIA, COMMONWEALTH OF VIRGINIA, AND 23 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

PATRICK MORRISEY
Attorney General
MICHAEL R. WILLIAMS
Solicitor General
Counsel of Record

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
(304) 558-2021
mwilliams@wvago.gov

JASON S. MIYARES
Attorney General
ERIKA L. MALEY
Solicitor General
KEVIN M. GALLAGHER
Princ. Dep. Solicitor General
MEREDITH BAKER
Assistant Solicitor General

OFFICE OF THE VIRGINIA
ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071
emaley@oag.state.va.us

Counsel for State of West Virginia & Commonwealth of Virginia

(Additional Counsel listed on Signature Page)

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are the State of West Virginia, the Commonwealth of Virginia, the States of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, and Kansas, the Commonwealth of Kentucky, and the States of Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming (collectively, the *Amici* States). Many *Amici* States have laws providing parents with notice and the right to opt their children out of instruction on human sexuality. The School Board's contrary policy in this case—imposing a categorical ban on opt-outs for the Pride Storybooks—violates the federal Constitution. *Amici* States have a compelling interest in ensuring that their political subdivisions and school boards respect their citizens' constitutional rights.

States should be zealous in enforcing laws meant to protect their citizens' First Amendment rights and parents' rights to direct the education of their children. But here, the School Board's policy requires children to participate in sex education even where they or their families object on religious grounds, infringing on their constitutional rights. As *Amici* States explain below, the Fourth Circuit was incorrect in holding that the School Board's policy of refusing parent requests to opt their young children out of the reading of Pride Storybooks does not burden the religious exercise of Montgomery County students or parents.

Amici States write separately to explain how the practice in the vast majority of Maryland's sister States confirms that the School Board lacks a

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[1] Under Supreme Court Rule 37.2(a), *amici curiae* notified counsel of record of their intent to file this brief at least 10 days prior to the due date for the brief.

compelling interest and the School Board's policy is not the least restrictive means of furthering any governmental interest.

INTRODUCTION AND SUMMARY OF ARGUMENT

For decades, courts have recognized that students in elementary schools are "impressionable," *Edwards* v. *Aguillard*, 482 U.S. 578, 584 (1987), "vulnerable," *Brown* v. *Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994), and particularly sensitive when it comes to matters of morality, religion, and belief, *Gruenke* v. *Seip*, 225 F.3d 290, 307 (3d Cir. 2000). But in this case, a divided panel of the Fourth Circuit showed little regard for these long-standing, commonsense notions. Instead, the majority signed off on a school policy that permits a local school district to impose its preferred ideology on these young, impressionable minds—*over* their parents' religious objections. That simply won't do.

Cases like this one—that is, cases that concern how to raise our smallest citizens—implicate fundamental constitutional rights. Parents have a right to guide their children's education. They also have a right to decide their children's religious upbringing. And in a situation like this one, both those rights work together to empower parents. At least without some substantial countervailing state interest, parents must therefore have at least a right to opt-out from exposing their young children to sex education that violates their religion.

For reasons like these, States have long stepped up to protect parents' rights. A substantial majority of States have enshrined protections for parental choice in matters of sex education—in other words, matters exactly like these—into law. That long tradition

directly undermines any claim by the School Board that opt-outs are not feasible alternatives. But the Fourth Circuit ignored that tradition.

Indeed, the Fourth Circuit failed to take even the initial step of applying the right level of scrutiny to the School Board's burdensome policy. Instead, the lower court waved the problem away entirely, insisting that forced participation in an educational program over the parents' religious objection was really no burden at all. But as Petitioners well explained, the circuit courts are split on that very question. And ultimately, the Fourth Circuit (and the courts that stand with it) have gotten the answer wrong. This Court's review is urgently needed.

The Court should grant the Petition to remind courts that strict scrutiny applies in these instances, and requires schools to provide opt-out rights. Only then will our youngest, our most vulnerable, and our most impressionable citizens receive the protections that they deserve—and the Constitution demands.

ARGUMENT

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

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

A. Parental rights existed well before the Founding. They derive from both common law and natural law. "The history and culture of Western civilization

reflect a strong tradition of parental concern for the nurture and upbringing of their children." *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972). Not only are these rights "older than the Bill of Rights," but they originate in "intrinsic human rights." *Smith* v. *Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977). As William Blackstone recognized, parental rights emanate from natural law and "the most universal relation in nature." 1 WILLIAM BLACKSTONE, COMMENTARIES *446 (1752). So drawing from that long tradition, English common law recognized that children need parental direction and authority. *Id.* at *450–51. Parents, after all, have "maturity, experience, and capacity for judgment" that their children lack. *Id.* at *447. The law has thus long protected parental rights primarily for the child's sake—not to hand parents more power at the children's expense.

The Constitution and the cases construing it reflect these early legal principles. Since the Founding, American parents have enjoyed a right to direct their children's education. And this Court has held parental rights are a "fundamental liberty interest" under the Fourteenth Amendment. *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982). Indeed, parents' role in shaping their children's formation "is now established beyond debate as an enduring American tradition." *Yoder*, 406 U.S. at 232. To that end, "the liberty specially protected by the Due Process Clause includes [this parental] right[] . . . to direct the education and upbringing of one's children." *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997) (cleaned up); accord *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944). Especially as to education, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects [this] fundamental right." *Troxel* v. *Granville*, 530 U.S. 57,66 (2000) (plurality op.). Again, the right

reflects the commonsense notion "that natural bonds of affection lead parents to act in the best interests of their children." *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979).

This Court has repeatedly affirmed the breadth of the parent's right "to give his children education suitable to their station in life" because its conservation has "long [been] recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U.S. 390, 399–400 (1923). The Court has safeguarded this right on many occasions—stepping in to protect private education, ensuring Amish families can homeschool their children, and striking down prohibitions against education in a foreign language. See *id.* at 400; *Farrington* v. *Tokushige*, 273 U.S. 284, 298–99 (1927); *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Yoder*, 406 U.S. at 234.

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

because the State would be replacing the parent's leadership. *Pierce*, 268 U.S. at 535.

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

Here again, the First Amendment enshrined law protecting religious freedom and conscience rights cherished long before the Constitution came to be. Colonies recognized the fundamental importance of freedom of religion and conscience well before the Founding *because of* their religious diversity. See, *e.g.*, *Abbo* v. *Briskin*, 660 So. 2d 1157, 1159 (Fla. Dist. Ct. App. 1995) ("By the time of our revolutionary war, religious diversity was a fact of colonial life."). Early Americans believed religion provided a venue for conscience to take root in man's heart, and the Framers viewed conscience as "most sacred." James Madison, *Property* (Mar. 29, 1792), *in* 1 THE FOUNDERS' CONSTITUTION 598, 598 (Philip B. Kurland & Ralph Lerner eds., 1987). "[T]he founding generation . . . defend[ed] religious freedom for all peaceable faiths, and wove multiple principles of religious freedom into the new state and federal constitutions of 1776 to 1791." John Witte, Jr. & Joel A. Nichols, *"Come Now Let Us Reason Together": Restoring Religious Freedom in America and Abroad*, 92 NOTRE DAME L. REV. 427, 436 (2016). And "the embodiment" of religious liberty in these constitutions "was simply writing colonial experience into the fundamental law of the land." WILLIAM WARREN SWEET, RELIGION IN COLONIAL AMERICA 339 (1965).

Robust religious freedom protections arose from this tradition, grounded in the Free Exercise Clause and the Establishment Clause (and applied to the States through the Fourteenth Amendment). U.S.

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

C. This case brings these two sets of rights—parental rights and free-exercise rights—together. Policies like the one here go directly to the "inculcation of moral standards" and "religious beliefs" of children. *Yoder*, 406 U.S. at 233. Thankfully for all Americans, any state action infringing on the "rights of parents to direct 'the religious upbringing' of their children" violates the Free Exercise Clause. *Espinoza*, 591 U.S. at 486 (quoting *Yoder*, 406 U.S. at 213–14). While States also have a "deeply rooted commitment to education," our religious liberties become "meaningless" if they must yield to the State's interest in education. *People* v. *DeJonge*, 501 N.W.2d 127, 138–39 (Mich. 1993).

When educational and religious freedom interests clash, courts need to scrutinize the effect of granting an exemption on the state's interest in education to ensure religious liberty receives constitutional protection in schools. *Id.* at 140.

Put differently, this case presents a "hybrid situation," wherein "the Free Exercise Clause" is "in conjunction with . . . the right of parents . . . to direct the education of their children." *Smith*, 494 U.S. at 881–82. In these hybrid situations, the parental right and the free exercise right are "incorporated together to provide a specific bite to the free exercise claim." Michael E. Lechliter, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209, 2215 (2005). "The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters." *Prince*, 321 U.S. at 165.

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

*4 (N.D. Tex. Sept. 6, 2024) (cleaned up). The Fourth Circuit lost sight of those basic principles here.

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

A. The state constitutional provisions protecting religious freedom predated and led to the federal constitution's Religion Clauses. See generally John Dinan, *The State Constitutional Tradition and the Formation of Virtuous Citizens*, 72 TEMP. L. REV. 619 (1999). By 1789, all States but one had constitutional protection for religious freedom and understood it to be an unalienable right. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1455–56 (1990). And today, "religious freedom" is still accorded a "special status" in state constitutions. *Coulee Cath. Sch.* v. *Lab. & Indust. Rev. Comm'n*, 768 N.W.2d 868, 891–92 (Wis. 2009). State constitutions continue to value religious freedom as an "unalienable right." McConnell, *supra*, at 1455–56.

State constitutions often "provide greater protection to the free exercise of religion . . . than is now provided under the United States Constitution." *Swanner* v. *Anchorage Equal Rts. Comm'n,* 874 P.2d 274, 280 (Alaska 1994). For example, West Virginia's constitutional protections for religious freedom are much "broader" than the First Amendment. *State* v. *Everly*, 146 S.E.2d 705, 707 (W. Va. 1966); see W. VA. CONST. art. III, § 15. Virginia also played a central role in securing religious freedom, and its constitution likewise has a "vitality independent of the Federal Constitution." 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 303 (1974); see also

Vlaming v. *W. Point Sch. Bd.*, 895 S.E.2d 705, 716 (Va. 2023) ("Given Virginia's historic role in the protection of religious liberties, the provisions in the Constitution of Virginia have a vitality independent of the Federal Constitution." (cleaned up). James Madison and Thomas Jefferson advocated for Virginia laws that ensured citizens would not "suffer on account of [their] religious opinions or belief." *Everson* v. *Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 13 (1947). Virginia then emerged as the archetype for how States would treat religious liberty—with the utmost respect and care.

State courts have also steered federal courts towards important religious liberty principles. A West Virginia court, for instance, paved the way for an axiomatic rule declared by this Court. In *West Virginia State Board of Education* v. *Barnette,* this Court said "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. 624, 642 (1943). One year earlier, a state court in West Virginia decided a case like *Barnette* that dealt with five Jehovah's Witnesses indicted for not saluting the American flag. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 164 (2008) (quoting Mem. Op., *State* v. *Mercante* (W. Va. Cir. Ct. June 1, 1942)) (cleaned up). Citing the state constitution, the judge wrote "freedom of religion" requires that "unpopular minorities may hold views unreasonable in the opinion of majorities," charting the path for *Barnette*'s analysis. *Id.*

B. The same reverence States have for religious freedom is on display in their parental rights laws. States have "an interest in not undermining [the

family] unit." *Wynn* v. *Carey*, 582 F.2d 1375, 1385 (7th Cir. 1978). That interest starts with protecting parental rights—the foundation of the parent-child relationship, the first societal unit. They are among the "oldest of the fundamental liberty interests" recognized by the States. *In re Adoption of O.R.*, 16 N.E.3d 965, 972 (Ind. 2014) (quoting *Troxel*, 530 U.S. at 65).

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

These parental rights are especially relevant in the realm of sex education. Few topics more directly implicate a parents' fundamental right to direct the "inculcation of moral standards" and "religious beliefs" of their children. *Yoder*, 406 U.S. at 233; see also *Unitarian Church W.* v. *McConnell*, 337 F. Supp. 1252, 1258 (E.D. Wisc. 1972), aff'd, 474 F.2d 1351 (7th Cir. 1973), vacated and remanded on other grounds, 416 U.S. 932 (1974). But all States either require or authorize public schools to provide some instruction in human

sexuality.[2] As set forth in more detail below, States prevent such instruction from conflicting with parental and religious rights by allowing parents to opt their children out—or providing that the instruction will be given only if parents opt their children in. See Section III, *infra*.

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

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

As Judge Quattlebaum highlighted in his dissent, indirect coercion on religious individuals is subject to strict scrutiny under the First Amendment. Respondents cannot meet this standard. *See* Pet. App. 52a–75a.

This Court has long held that requiring claimants to choose between violating their religious beliefs and accepting government benefits burdens the free

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

exercise of religion. See *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 532 (2021) ("[I]t is plain that the City's actions have burdened [the plaintiff's] religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs."); *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) ("Governmental imposition" of a choice "between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand," puts an impermissible "burden upon the free exercise of religion").

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

The Fourth Circuit's holding incorrectly diminishes the First Amendment rights of schoolchildren, requiring parents and students to make a threshold showing of a burden that is greater than the showing required outside the school context. In *Ramirez* v. *Collier*, for instance, the State rightfully conceded that any burden was substantial when the State refused to

allow a prisoner's pastor to lay hands on the prisoner and audibly pray during the prisoner's execution—notwithstanding that the State's policy did not affirmatively prohibit the prisoner himself from praying out loud or otherwise practicing his religion. 595 U.S. 411, 420, 426 (2022). The lack of accommodation was itself a substantial burden. See *id.* And in *Holt* v. *Hobbs*, this Court clarified that "the availability of alternative means of practicing religion" does not alleviate a substantial burden on one aspect of a prisoner's religious practice. 574 U.S. 352, 361–62 (2015).[3]

It cannot be that a burden on religion is inconsequential because it occurs in a school rather than a prison. The Fourth Circuit pointed out that parents can choose other forms of education. Pet.App.46a. But "the availability of alternative[s]" does not make a burden insubstantial. See *Holt*, 574 U.S. at 361–62. And "[m]ost parents, realistically, have no choice but to send their children to a public school." *Morse* v. *Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring). Plaintiffs here have been put to the choice of violating their religious beliefs by subjecting their young children to teaching contrary to their religion or forgoing the benefit of public education. Under *Fulton*, this choice is a burden on free exercise. See 593 U.S. at 532. Strict scrutiny is therefore the appropriate standard to review the School Board's decision to deny opt-outs. See Pet.App.66a–71a; accord *Tatel* v. *Mt. Lebanon Sch. Dist.*, No. CV 22-837, 2024 WL

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

4362459, at *41 (W.D. Pa. Sept. 30, 2024) (finding that strict scrutiny applied to no-opt-out policy as to transgender-related instruction in elementary schools).

To withstand strict scrutiny, government action "must advance a compelling state interest by the least restrictive means available." *Bernal* v. *Fainter*, 467 U.S. 216, 219 (1984). The School Board cannot establish a compelling state interest in a categorical ban on opt-outs given the long history and continued practice of providing such opt-outs to parents. Given the obvious potential clash between sex education programs and the fundamental constitutional rights of parents, the vast majority of States—including Maryland—"recognize the controversial nature of the issue" of sex education and "provide either 'opt-out' or 'opt-in' provisions" in their laws regulating sex education.[4] Melody Alemansour, *et al.*, *Sex Education in Schools*, 20 GEO. J. GENDER & L. 467, 477 (2019).

Maryland is one of those States. Maryland law provides that local school systems "shall establish policies, guidelines, and/or procedures for student opt-out regarding instruction related to family life and human sexuality objectives." MD. CODE REGS. § 13A.04.18.01(D)(2)(e)(i). It joins nearly forty other States in providing such opt-outs.[5] Several other

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

[5] See ARK. CODE ANN. § 6-16-1006(b), (c); CAL. EDUC. CODE §§ 51937, 51938; COLO. REV. STAT. §§ 22-25-104(6)(d), 22-1-128(3)(a), (4), (5); CONN. GEN. STAT. ANN. § 10-16e; FLA. STAT.

States require that parents opt *in* before schools provide instruction on human sexuality to children.[6] All told, about 90 percent of the States in the Union provide opt-out or opt-in rights to ensure that parents may exercise their fundamental rights to direct the education of their children when it comes to the incredibly sensitive topic of sex education. And these laws are longstanding: some States have had laws authorizing parents to opt their children out of sexual health instruction for decades. *E.g.*, IDAHO CODE ANN. § 33-1611 (1970); CONN. GEN. STAT. ANN. § 10-16e (1979); N.J. STAT. ANN. § 18A:35-4.7 (effective 1980).

Although States can set curricula in public schools, States also recognize that parents—not

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

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

governments—have the right to direct the education of children. States often allow parents to exclude their children from sexual health instruction for any grounds (or no grounds) whatsoever. *E.g.*, MD. CODE REGS. § 13A.04.18.01(D)(2)(e)(i); N.C. GEN. STAT. § 115C-81.30(b); VA. CODE. ANN. § 22.1-207.2. Some States permit opt-outs only if the educational program would conflict with the student's or family's religious beliefs. *E.g.*, IOWA CODE ANN. § 256.11(6)(a) ("pupil's religious belief"); KAN. ADMIN. REGS. § 91-31-35(a)(6) ("religious teachings of the pupil"); S.C. CODE. ANN. § 59-32-50 ("family's beliefs"). But in many States, a simple written notification by a parent or guardian satisfies the opt-out criteria.

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

Here, there is a "historic[] and routine[]" consensus on allowing parental opt-outs from sex education, *Ramirez*, 595 U.S. at 429: Ninety percent of the States provide parents with notice and opt-outs for instruction on human sexuality (or only have instruction on an opt-*in* basis). There is thus no compelling interest in asserting "a categorical ban" on religious exercise that is upheld by "longstanding [regulatory] practice." *Ramirez*, 595 U.S. at 430, 435.

Indeed, the School Board's policy conflicts not only with the longstanding consensus of the States, but also with the law of its *own* State. Maryland has long required public schools to allow opt-outs from *any* instruction on "family life and human sexuality." MD. CODE REGS. § 13A.04.18.01(D)(2)(e)(i). The School Board cannot have a compelling interest in violating Maryland law. See *Nation* v. *San Juan Cnty.*, 150 F. Supp. 3d 1253, 1269 (D. Utah 2015), aff'd sub nom. *Navajo Nation* v. *San Juan Cnty.*, 929 F.3d 1270 (10th Cir. 2019) (A "local governing body cannot have a legitimate governmental interest in violating state law.").

This longstanding tradition also means that the School Board cannot establish that its ban is the least restrictive means available—a less restrictive means has been implemented in over 90% of the States, including Maryland. "[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 541. The School Board cannot meet the least restrictive means test unless it can explain why its "system is so different" from the dozens of other jurisdictions that accommodate religious exercise through parental opt-outs. *Holt*, 574 U.S. at 367. The School Board cannot show "why the vast majority of States" permit opt outs, "but it cannot." *Id.* at 368.

CONCLUSION

This Court should grant the Petition.

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Respectfully submitted,

PATRICK MORRISEY
Attorney General
of West Virginia

MICHAEL R. WILLIAMS
Solicitor General
Counsel of Record

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
(304) 558-2021
mwilliams@wvago.gov

JASON S. MIYARES
Attorney General
of Virginia

ERIKA L. MALEY
Solicitor General

KEVIN M. GALLAGHER
Principal Deputy Solicitor General

MEREDITH BAKER
Assistant Solicitor General

OFFICE OF THE VIRGINIA
ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071
emaley@oag.state.va.us

Counsel for Amici Curiae
the State of West Virginia and
the Commonwealth of Virginia

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

TREG TAYLOR
Attorney General
State of Alaska

TIM GRIFFIN
Attorney General
State of Arkansas

ASHLEY MOODY
Attorney General
State of Florida

CHRISTOPHER M. CARR
Attorney General
State of Georgia

RAÚL R. LABRADOR
Attorney General
State of Idaho

THEODORE E. ROKITA
Attorney General
State of Indiana

BRENNA BIRD
Attorney General
State of Iowa

KRIS KOBACH
Attorney General
State of Kansas

RUSSELL COLEMAN
Attorney General
Commonwealth of Kentucky

LIZ MURRILL
Attorney General
State of Louisiana

LYNN FITCH
Attorney General
State of Mississippi

ANDREW BAILEY
Attorney General
State of Missouri

AUSTIN KNUDSEN
Attorney General
State of Montana

MICHAEL T. HILGERS
Attorney General
State of Nebraska

DREW WRIGLEY
Attorney General
State of North Dakota

DAVE YOST
Attorney General
State of Ohio

GENTNER DRUMMOND
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

MARTY J. JACKLEY
Attorney General
State of South Dakota

KEN PAXTON
Attorney General
State of Texas

SEAN REYES
Attorney General
State of Utah

BRIDGET HILL
Attorney General
State of Wyoming