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 *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Foundation for Moral Law ("the Foundation") is a 501(c)(3) non-profit, national public interest organization based in Alabama, dedicated to defending religious liberty, God's moral foundation upon which this country was founded, and the strict interpretation of the Constitution as intended by its Framers who sought to enshrine both. To those ends, the Foundation directly assists or files *amicus* briefs in cases concerning religious freedom, the sanctity of life, and other issues that implicate the God-given freedoms enshrined in our Bill of Rights. The brief's principal author, Jeffrey Tuomala, is a constitutional scholar and professor of law at Liberty University School of Law. His career has been dedicated to teaching and restoring the moral foundations of law.

The Foundation has an interest in this case because the it believes the Montgomery County Board of Education has placed a substantial burden on parental rights and the free exercise of religion. The Foundation believes that the root cause of these infringements is tax-funded education writ large, which necessarily promotes the establishment of religion, be it secularism or otherwise. However, to the extent that tax-funded education is public policy, it cannot discriminate against religion.

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The focus of attention in this case is whether the Montgomery County Board of Education (Board of Education) placed a substantial burden on parental and free exercise rights when it denied requests to opt out of religiously objectionable instruction. There are many good reasons for arguing that the Board of Education has substantially burdened those rights, but this brief focuses on two of them. The first reason is that tax-funded education constitutes an establishment of religion. Few state actions can impose a greater burden on the free exercise of religion than a tax-funded church or school with mandatory attendance. The second reason is that the Board of Education's words and actions, and the circumstances in which it denied requests for notice and opt-out, demonstrate a hostility toward parents who objected to the use of books promoting an LGBTQ agenda.

This case is emblematic of a clash of worldviews taking place generally in America but particularly in public schools. This state of affairs is so troubling that two eminent American jurists—former Attorney General William Barr and Professor Phillip Hamburger—have concluded that compulsory public schooling as it now operates is unconstitutional. [2] They believe that those

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[2] William Barr, Speech May 20, 2021, Alliance Defense Fund Awards Banquet. Philip Hamburger, Is the Public School System Constitutional? Wall Street Journal, Oct. 23-24, 2021, at A13.

infirmities can be remedied by providing equal funding for all educational preferences.

This brief argues that tax-funded education is itself unconstitutional regardless of how it is operated. The failure to recognize this fact derives from three problems that the Court's religious liberty jurisprudence has failed to resolve. The first problem is that the Court has never provided a carefully articulated and satisfactory definition of "religion." The second and third problems are closely related to the failure to resolve the first. The second problem is that, although the Court often claims that religion and nonreligion must be treated neutrally, it usually approves of more favorable treatment of nonreligion. Third, the Court falsely bifurcates reality between the "secular" and "religious," most notably in its formulation of the *Lemon* test, without defining either term. This bifurcation is used to justify the states' prescription of an orthodoxy of secular opinions through compulsory attendance at tax-funded public schools.

The term *religion* is defined in the Virginia Declaration of Rights, and that definition provides the foundation for the Virginia Statute Establishing Religious Freedom (Virginia Statute), which the *Everson* Court recognized as encapsulating the same objective and protection as the First Amendment. The Virginia definition draws a jurisdictional line between civil government and religion. Matters that are properly governed by "force or violence" are within the jurisdiction of civil government. All other matters are governed exclusively by conscience because they are within the jurisdiction of religion. The Virginia Statute identifies two fundamental

principles of liberty. The first is that "God has created the mind free" and the second is that it is "sinful and tyrannical" to tax a person for the "propagation of opinions which he disbelieves." Compulsory attendance at tax-funded public schools violates both principles, but the Court has been inconsistent in acknowledging and applying these fundamental principles of liberty.

This inconsistency has created an environment wherein hostility towards religious belief, such as Board of Education's in this case, can fester and place a substantial burden on parental and free exercise rights.

ARGUMENT

I. The Montgomery County Schools constitute an establishment of religion that places a substantial burden on the free exercise of religion.

The Montgomery County Board of Education has refused to provide parents notice and opportunity to opt their elementary school children out of religiously objectionable instruction involving matters of sex and gender. The critical issue is whether the state's refusal constitutes a substantial burden on parental rights and the free exercise of religion. The assumption is that finding a substantial burden will trigger a heightened scrutiny standard of review.

The most impactful and pervasive burden on free exercise is a state establishment of religion. Tax-funded education, including public schools, constitutes a religious establishment. The Fourth

Circuit failed to address or even identify this burden on the rights of parents and children. *Mahmoud v. McKnight*, 102 F.4th 191 (4th Cir. 2024). This failure is due in large measure to the fact that the Court has failed to give serious attention to providing a cohesive definition of religion. Just as compulsory attendance at tax-funded churches constitutes a prohibited establishment of religion, compulsory attendance at tax-funded schools constitutes a prohibited establishment of religion.

Three unresolved problems make it impossible to decide cases under the religion clauses in a coherent and consistent manner. The first problem is the Court's failure to adequately define the term "religion" as it is used in the First Amendment. The second problem is the Court's failure to ensure neutrality or even-handed treatment of "religion" and "nonreligion." The third problem is the false bifurcation of reality that the Court draws between matters "secular" and matters "religious." The second and third problems arise from the failure to define religion.

A. The Virginia Declaration of Rights provides an objective definition of religion that is incorporated into the First Amendment.

On June 12, 1776, Virginia adopted its Declaration of Rights, which includes a provision guaranteeing religious liberty:

> Sec. 16. That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and

> therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.[3]

This definition of religion became a focal point around which the Virginia establishment controversy culminated in 1786 with the enactment of the Virginia for Statute Establishing Religious Freedom.[4] In *Everson v. Board of Education*, the Court identified the Virginia Statute as the progenitor of the First Amendment Establishment Clause. U.S. Const. Amend I.

> This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective, and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.[5]

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[3] Richard L. Perry (ed.), Sources of our Liberties 312 (American Bar Foundation 1978).

[4] *See generally* Jeffrey C. Tuomala, Is Tax-Funded Education Unconstitutional?, 18 Liberty U. L. Rev. 1009, 1016-38 (2024) for a survey of the key persons, events, and documents involved in the Virginia establishment controversy.

[5] In *Davis v. Beason*, the Court gave a longer explanation of the term "religion" but cited neither Madison nor Jefferson. The *Davis* Court's definition of religion does not address the implications for education. 133 U.S. at 342.

390 U.S. 1, 13 (1947) (citing *Reynolds v. United States*, 98 U. S. 145, 164 (1878); *Davis v. Beason*, 133 U. S. 333, 342 (1890)).

Although the *Everson* Court did not offer a definition of religion, it did cite *Reynolds v. United States*, which quoted part of the definition provided in section 16 of the Virginia Declaration of Rights. 98 U.S. at 163. The *Everson* Court also cited Madison's famous Memorial and Remonstrance against Religious Assessments (Remonstrance) in support of its decision. 390 U.S. at 12, n.12. Justice Rutledge's dissent, agreeing with the importance of the Remonstrance, attached it as an appendix to his opinion. *Id.* at 63. The Remonstrance begins by quoting the definition of religion from section 16 of the Virginia Declaration of Rights. In large measure, Madison's Remonstrance is an extended explication of that definition of religion. Tuomala at 1029-34.

The most important point is that Virginia defines religion by drawing a jurisdictional line between matters belonging to the state and those belonging to religion. Matters properly within the jurisdiction of the state may be directed by "force or violence." Those belonging to religion may be directed only by "reason and conviction." Once a matter is determined to be outside the jurisdiction of the state and within the jurisdiction of religion, a person's words and actions are governed solely by the individual's conscience.[6] The individual conscience

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[6] For good reason, religious liberty has been called the

does not determine what falls within the jurisdiction of religion. Tuomala at 1024-26.

Certainly, a parent's decision whether to read *Curious George*, the *Bible*, or even *Pride Puppy* to his or her child is governed by conscience, not by "force or violence." In other words, it is a matter within the jurisdiction of religion, not civil government. The state has no jurisdiction over the mind of the parent or the child; thus, the state may not use force or violence to decide what they may read or listen to. Education is within the jurisdiction of religion; therefore, all tax-funded education constitutes an establishment of religion.

Maryland mistakenly believes that reading *Pride Puppy* to school children is within the jurisdiction of civil government and that it may therefore compel children to attend school, force them to listen to their teachers read religiously objectionable books, and pressure them to discuss the materials with the teacher and classmates. Maryland even taxes the parents to fund the very instruction to which they object. Parents may opt their children out of instruction only if they can afford tuition at a private school or forfeit one parent's income to homeschool. The Fourth Circuit justified this as government

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"fundamental liberty upon which all other forms of civil liberty depend." John Ragosta, Religious Freedom: Jefferson's Legacy, America's Creed 125 (University of Virginia Press, 2013). The reason all other forms of liberty depend on religious liberty is that it draws a jurisdictional line between those matters that are properly governed by the state and those matters that are governed exclusively by individual conscience.

conduct of its own internal affairs. *Mahmoud,* 102 F.4th at 205, 212. In other words, it analogizes the operation of public schools to the operation of prisons, the military, and other governmental agencies.

The immediate flash point for the Virginia establishment controversy was the proposal for tax-funded education to counter the breakdown of public morals. Patrick Henry introduced "A Bill Establishing a Provision for Teachers of the Christian Religion,"[7] which if enacted, would have established a voucher system for instruction in morals. Taxpayers would direct payment to the "society of Christians" of their choice or to a fund for the establishment of public schools. Henry's Bill shared a purpose like the Montgomery County schools, which is to promote moral values at taxpayer expense. One key difference with Henry's Bill is that it would have given parents freedom to choose which school to send their children and taxes to. Tuomala at 1026-28.

Madison wrote his Remonstrance, successfully rallying support to defeat Henry's voucher Bill. Not only did Madison defeat Henry's Bill, but he also persuaded the Virginia legislature to enact the Virginia Statute for Establishing Religious Freedom. That Statute, which the *Everson* Court

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[7] *Id.* at 13. Justice Rutledge's dissenting opinion appended Madison's Memorial and Remonstrance and Henry's Bill for Establishing a Provision for Teachers. *Id.* at 63, 72 (Rutledge, J., dissenting).

identified as particularly significant, articulated two principles of fundamental importance. The first is that "Almighty God has created the mind free," and the second is "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." The Virginia Statute makes explicit what is implied in the definition of religion: the imposition of a tax for educational purposes constitutes unlawful force or violence, which seeks to shape the conscience. The conscience can be directed only by reason and conviction and not by force or violence. The entire state educational venture constitutes an establishment of religion regardless of whether it promotes a particular theological or philosophical perspective, or many perspectives. Tuomala at 1034-38.

The Montgomery County Board of Education has staked its case on the propositions that the mind is not created free and that the state may legitimately tax people to propagate ideas that they don't believe or even find antithetical to their beliefs. Parents are forced to pay the salaries of those state officials who are determined to impose an alien system of beliefs on their children. In other words, the role of the state becomes that of imposing an orthodoxy of beliefs on citizens, whom they treat more as subjects than citizens. In a republic it is the people who should school their officials. It is not the officials who should school the people.

B. This Court has affirmed the fundamental principles of religious liberty in numerous cases.

In all fairness to the parties and counsel involved in this case, it must be noted that the Court has not only failed to adequately define religion, but it has also sent mixed signals regarding the freedom of the mind, the power of the government to impose taxes for the propagation of opinions, and the imposition of state-favored orthodoxies of opinion.

Often the Court has affirmed the principle that God has created the mind free and that the state has no jurisdiction to impose an orthodoxy of opinion or belief through force or violence. An oft quoted and celebrated statement of these principles comes from the Court's opinion in *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943):[8]

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters

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[8] *See, e.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1, 12–13 (1947); *id.* at 22 (Jackson, J., dissenting); *Schware v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 244 n.15 (1957); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205, 220–21 (2013); *Wallace v. Jaffree*, 472 U.S. 38, 51–52, 55 (1985); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Texas v. Johnson*, 491 U.S. 397, 415 (1989); *Lee v. Weisman*, 505 U.S. 577, 638–39 (1992) (Scalia, J., dissenting); *Beilan v. Bd. of Pub. Educ.*, 357 U.S. 399, 413 (1958) (Douglas, J., dissenting); *First Unitarian Church of L.A. v. Cnty. of Los Angeles*, 357 U.S. 545, 548 (1958) (Douglas, J., concurring).

> of opinion or force citizens to confess by word or act their faith therein.

In *Wooley v. Maynard*, the Court affirmed the proposition that the First Amendment secures "the right of freedom of thought." 430 U.S. 705, 714 (1977).[9] The *Wooley* Court recognized the right as extending equally to "religious, political, and ideological causes." The rights to speak and refrain from speaking "are complementary components of the broader concept of 'individual freedom of mind.'" *Id.*[10]

The Board of Education has so much as acknowledged that it set out to establish an orthodoxy of opinion about an ideological cause—the LGBTQ agenda on matters of human sexuality—beginning with pre-K children. Teachers are given instruction on how to "disrupt the either/or thinking" of children that boys should only like girls and girls only like boys. 102 F.4th at 199 (quoting JA 595). Teachers may tell students that sometimes people make mistakes assigning gender "based on our body parts" and "Our body parts do not decide our gender. Our gender comes from our inside." *Id.* (quoting JA 596). Teachers are also given instruction on how to counter parents' concerns that the books read in school counter the values they are instilling at home. *Id.* (citing JA 601). The fact that children are expected to listen and interact with the stories is clear from the instructions given to the teachers.

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[9] Citing *Barnette*, 319 U.S. at 633-34.
[10] Citing *Barnette*, 319 U.S. at 637.

In *Va. Bd of Pharmacy v. Virginia Citizens of Consumer Council*, 425 U.S. 748 (1976), the Court made it clear that the freedom of speech includes the right to receive information. If the right to speak includes the right not to speak, then surely the right to hear the speech of others must include the right not to hear unwanted speech. Does a child compelled to leave his home have the freedom not to listen to unwanted speech when restricted to a classroom? Can a person really maintain freedom of thought while being forced to listen to someone else's politically, religiously, or ideologically offensive speech?

On numerous occasions the Court or individual justices have quoted or cited the Virgina Statute for Establishing Religious Freedom's maxim that it is "sinful and tyrannical" to tax a person for the "propagation of opinions which he disbelieves."[11] For example, in *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps*, 585 U.S. 878 (2018), the Court ruled that public employees can't be forced to fund any category of labor union speech. In support of that holding, the Court quoted the celebrated statement in *Barnette* "that no official, high or petty, can

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[11] *See, e.g.*, *Everson*, 330 U.S. at 12–13 *id.* at 45 (Rutledge, J., dissenting); *Chi. Tchrs. Union v. Hudson*, 475 U.S. 292, 305 (1986); *Keller v. State Bar of Cal.*, 496 U.S. 1, 10 (1990); *McGowan v. Maryland*, 366 U.S. 420, 465 (1961) (Frankfurter, J., separate opinion); *Int'l Ass'n of Machinists v. Street.*, 367 U.S. 740, 791 (1961) (Black, J., dissenting); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 869–71 (1995) (Souter, J., dissenting); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 572 (2005) (Souter, J., dissenting); *Zelman v. Simmons-Harris*, 536 U.S. 639, 689 (2002).

prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion." *Id*. at 892 (quoting *Barnette*, 319 U.S. at 642). The *Janus* Court then quoted Jefferson's Bill[12]: "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." *Janus*, 585 U.S. at 893. The Court drove its point further home by citing Jefferson's Bill a second time. *Id*. at 905.

Assume that Janus had been a public-school teacher who was required to pay union agency fees. It would be "sinful and tyrannical" to force him to pay those fees. How much more sinful and tyrannical is it to force taxpayers to pay a teacher's salary to indoctrinate very young children in any number of matters that taxpayers disapprove of? To label compulsory union fees sinful and tyrannical, but not taxes for public schools as sinful and tyrannical, constitutes a classic case of "straining out a gnat but swallowing a camel." *Matthew* 23:24 (NIV).

C. This Court has not consistently upheld the fundamental principles of religious liberty in other cases.

Contrary to the Court's protections for freedom of the mind in some cases, passages from opinions in other cases can be cited for the proposition that one of the high purposes of civil government is to tell citizens what they should think and what they

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[12] Note that Jefferson's Bill, with minor changes, was enacted by the Virginia legislature as the Virginia Statute for Establishing Religious Freedom.

should value. The Court in *Pleasant Grove City v. Summum* stated that "[I]t is the very business of government to favor and disfavor points of view." 555 U.S. 460, 468 (2009) (quoting Scalia, J. concurring opinion in *National Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998)).

Although the Court has never held that people have a constitutional right to a tax-funded education that the states must provide, it has stated that the establishment of public schools is instrumental for inculcating proper values and political beliefs in citizens. In *Brown v. Bd of Educ.*, the Court in dicta touted what it considered to be the importance of compulsory attendance at public schools for "our democratic society": "It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values." 347 U.S. 483, 493 (1954). The mind is created free, but the state has the power to prescribe what children shall believe and value regarding politics?

In *Plyler v. Doe*, the Court made similar claims about the importance of public schools for imposing a system of acceptable political values:

> We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," and as the primary vehicle for transmitting "the values on which our society rests." . . . And these historic "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social

> scientists." . . . In sum, education has a fundamental role in maintaining the fabric of our society.

457 U.S. 202, 221 (1982).

Both *Brown* and *Plyler* contain odes to the power and importance of public schools as a means of imposing an orthodoxy of opinions, beliefs, and values on children. Even though public schools were virtually nonexistent at the time of the founding of this nation and could not have been essential for creating the fabric of our society, those schools are apparently necessary for maintaining it.[13]

These inconsistencies stem in part from the attempt to compartmentalize reality into separate realms of *secular* and *religious*. This leaves the state free to establish an orthodoxy of secular beliefs in public schools and to prohibit teaching from a perspective based on the authority of the Christian faith or any other disapproved faith or ideology. This bifurcation has been especially evident in Establishment Clause cases. Although the Court has strongly hinted at the death of the *Lemon* test, it will not be able cast aside the secular-religious bifurcation without a major shift in its thinking.

The Court's profession of neutrality between religion and nonreligion is another variation on the secular-religious bifurcation. It is this bifurcation that allows the Court to profess neutrality between religion and nonreligion while giving secular or non-

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[13] *See* Nathan Chapman & Michael W. McConnell, Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience 146 (2023).

religious speech a privileged status in public schools. Religious freedom in public schools is restricted to little islets of liberty in the vast sea of secular orthodoxy.[14] Those little islets may include afterhours *Bible* clubs inside the schoolhouse or private prayer on the 50-yard line after a high school football game. These two problems—the lack of neutrality between religion and nonreligion and the false bifurcation of secular and religious—are the subjects of the next two sections.

II. The Court has stated in numerous decisions that the state must be neutral in its treatment of religion and nonreligion.

The Court often states that the religion clauses require the government to maintain neutrality of treatment between religion and nonreligion. *See e.g. McCreary Cnty v. Am. Civil Liberties Union of Ky*., 545 U.S. 844, 860 (2005). It's not clear whether "neutrality" means impartiality, equality of treatment, or something else. For separationists on the Court, neutrality allows tax-funding for secular (non-religious) education but not for religious education. For non-preferentialists on the Court, neutrality has meant that the state may fund at least the secular component of religious schools, but it is not required to provide any funding for personnel, material, or services support at all. *See* Tuomala, at 1079-1082.

Both separationists and non-preferentialists advocate very strange notions of neutrality. The

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[14] *See* Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 1 (2004).

state taxes everyone and provides so-called non-religious education that is free, but the parent who is motivated by conscience to provide his or her children with a religious education must pay both taxes and tuition. The Court's more recent Establishment Clause jurisprudence allows for amelioration of this lack of neutrality and disparity of treatment to some degree, especially in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (vouchers can be used in non-religious and religious private schools). The Court's Free Exercise Clause jurisprudence also allows for amelioration of this lack of neutrality and disparity of treatment to some degree, in particular in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), and *Carson ex rel. O.C. v. Makin*, 596 U.S. 767 (2022), (requiring equal treatment of religion and nonreligion under certain circumstances).

Although the parents are asking for very little in this case—exemption from forced instruction in values that undermine their own religious values—they are not asking for equal treatment of religious and non-religious ideology, nor are they asking for equal funding of religion and nonreligion. But there is an even greater principle at stake here than equality of treatment. It is the freedom from a state-established orthodoxy of opinion and belief.

A. The Montgomery County Schools have not treated religion and nonreligion neutrally.

The disparity of treatment between religion and nonreligion can be illustrated by comparing the treatment of two different selections for teaching morals during storybook hours. The first story is *Pride Puppy*. The second is the biblical story of the "Good Samaritan."

Pride Puppy is used here as representative of the array of books that the Montgomery County schools read to preschoolers portraying homosexual conduct, homosexual "marriage," and transgenderism in a very favorable light with the aim of shaping the values and belief systems of school children. These books are purportedly read to teach students a variety of moral values that in the abstract no one would reasonably find objectionable. These values include "provid[ing] a culturally responsive . . . curriculum that promotes equity, respect, and civility." The curriculum is designed to support "a student's ability to empathize, connect, and collaborate with diverse peers and encourages respect for all." To help achieve these goals the books feature "people and characters from different backgrounds." Brief in Opposition to Pet.4.[15]

The "Parable of the Good Samaritan" is a time-honored story found in *Luke* 10:25-37 of the *Bible*. It involves a crime victim whose religion and ethnicity are not identified but is presumably Jewish, a priest and a Levite who are obviously Jewish, and a Samaritan whose race and ethnicity differ from that of the others. For centuries this parable has been used to teach the moral values of empathy, kindness,

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[15] Citing Pet. App. 589a, 599a, 602a-604a.

and respect for our "neighbors," meaning all other human beings despite ethnic, religious, or other differences. It teaches that we should provide this treatment despite the risk to ourselves, financial cost, and demand upon our time. Is there any question how this Court would rule if the school were challenged for reading the Parable of the Good Samaritan to students from the *Bible*? *See Abington School District v, Schempp*, 374 U.S. 203 (1963) (invalidated a state law that required reading ten *Bible* verses to start each public-school day). The parents would not have to request an opt-out from reading the Good Samaritan. The school could not even allow parents and students to opt-in.

What explains the likely difference in treatment between *Pride Puppy* and the "Good Samaritan"? The answer is the source of authority to which the stories point. The school may not tell a child that he or she must obey the lessons of the Good Samaritan because Jesus tells us to. For young children, the public-school teacher, hired by the state to serve as its representative, becomes the source of authority in the classroom and beyond. This is not neutrality between religion and nonreligion.

If pressed to identify a higher source of authority than itself, the school might point to this Court's opinions in the homosexual rights cases. The Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), said that it was not "blind . . . to certain truths" that were previously unknown, but it never identified the source of that truth. *Id*. at 579. Is the source of truth the evolving collective conscience of the American people as mediated by the Court? For originalist Justices looking to history and tradition, is it the

collective conscience of the American people in 1791 or 1868?

Children are impressionable, they want to emulate and please their teachers, and they are subject to peer pressure, but this is true regardless of the perspective from which they are taught. There is no neutrality of treatment between religion and nonreligion when children can receive a free non-religious public-school education but must pay tuition to receive a religious education. Even if the Court grants the parents in this case an opt-out of storybook hour, the state will not be treating religion and nonreligion in anything approximating neutrality or equality of treatment. Mandating as much as thirteen years of education in which religious authority is censored sends a very powerful message that religion is irrelevant for life in a democracy. Separationists on the Court have expressed moral indignation that "religious" speech they disagree with should be supported by their taxes. They claim it is a violation of their consciences, and they are right, but their empathy for the violation of the consciences of others is lacking. *See e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 715 (2002) (Souter, J. Dissenting).

III. This Court operates on a false bifurcation of reality between the secular and religious as most notably articulated in the *Lemon* test.

How can this lack of neutrality and equality of treatment be justified even though the Court frequently claims that the state must be neutral

between religion and nonreligion? If pressed for an answer, it would likely be that *Pride Puppy* is secular literature, and the Good Samaritan is religious literature. That doesn't solve the problem of inequality of treatment between religion and nonreligion; it just changes the nomenclature. Stated another way, a false bifurcation of reality is utilized to justify viewpoint discrimination against religion. The likely response to this inconsistency is that education can't be conducted without engaging in subject matter and viewpoint discrimination. This is true, and for that reason the Court should recognize that education is outside the jurisdiction of the state because the state has no lawful power to prescribe what shall be orthodox in any matter of opinion.

The Court has attempted to base its religious liberty jurisprudence on the false bifurcation of reality between the secular and religious. This is most clearly illustrated in the Court's *Lemon* test as applied in cases challenging tax-funding for religious schools. This includes funding given either directly to a school or indirectly through aid to children attending religious schools or to their parents. Prong one of *Lemon* requires a secular purpose, and prong two prohibits state action that has a primary effect of advancing or inhibiting religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). But just as the Court has not defined what religion means in the First Amendment, it has not defined what secular means in *Lemon*. Even though the death of *Lemon* is rumored, not until members of the Court shift their worldview paradigm, will the

false bifurcation between secular and religious be dissolved.

A. The Court has implicitly defined *religion* subjectively.

As in this case, the problem of defining religion is usually not obviously in issue. Here all parties have simply assumed that the objection to listening to *Pride Puppy* is contrary to the parents' sincerely held religious beliefs. If a claimant says, "these are my religious beliefs," and if a court believes that they are sincerely held, those beliefs are deemed religious. In other words, the definition of religion is treated as subjective in nature and thus varies from individual to individual. *See* Tuomala at 1038-53 (addressing the problem of defining religion subjectively).

But if the appellants' views are based on religion, then how can the state require reading these stories to anyone? That would constitute an establishment of religion. If something constitutes religion under the Free Exercise Clause, how can it not constitute religion under the Establishment Clause? Professor Tribe suggested a possible fix—give religion a broad definition under the Free Exercise Clause but a narrow definition under the Establishment Clause. Laurence H. Tribe, *American Constitutional Law* 826-28 (1978). If religion has no objective meaning under the Establishment Clause, who is the authority, i.e., whose subjective conscience, that gives it meaning? It must be the collective subjective conscience of the American people in 1791 or 1868 for the originalist and the ever-evolving collective

conscience of the American people for the non-originalist.

The Virginia definition of religion as addressed above points to an objective standard for defining the respective jurisdictions of civil government and religion. That is, “religion” is not defined subjectively by individual conscience or the collective conscience. Individual conscience governs thought, speech, and action falling outside the jurisdiction of the state and within the jurisdiction of religion, but the individual conscience does not determine what falls outside the jurisdiction of civil government. *See* Tuomala at 1040-1053 (addresses the Court’s attempt to provide a subjective definition of “religious” beliefs in several Vietnam War era conscientious objector cases and Congress’s implicitly subjective definition of religion in the Restoration of Religious Freedom Act).

In his Remonstrance, Madison identified the objective standard by which to determine the respective jurisdictions of civil government and individual conscience. He invoked “our Creator,” or “Universal Sovereign” who governs by “the light of Christianity,” “the light of revelation,” and “Truth.” Remonstrance paras. 1, 12. In other words, it is the Christian faith based most clearly and authoritatively in the *Bible* that places jurisdictional limits on the state, thus guaranteeing the freedom of conscience for those matters falling within the jurisdiction of religion. The Declaration of Independence likewise recognizes the distinction between the Creator and the creature, thus providing the only possible basis for objective

standards of law and jurisdictional restrictions on state power that guarantee religious liberty.

B. The Court has failed to define *secular*.

Historically, "secular" meant the temporal order. In Christianity, the temporal or earthly order is governed by God and His law. Most of the *Bible* addresses how we are to live in the temporal, i.e., secular order, not how we will live in the eternal or heavenly order. This is evident from the fact that it is the "secular priest" who in the Catholic Church has his primary ministry among the laity. *See* Tuomala at 1075-79. The false distinction between the realms of knowledge (secular) and faith (religion) is rooted in the philosophy of Immanuel Kant and has been adopted by modernist Protestant and Catholic theologies over the past two centuries. *Id.* at 1092-98. The reason for drawing this false distinction is to ensure that the public sphere is governed by no authority other than the collective conscience of society while permitting people to conduct their private affairs according to their personal religious beliefs.

Acknowledging God as the source of authority for the state, for law, and religious liberty does not constitute a religious establishment. In fact, there is no other basis for a belief in the rule of law or rights of any kind. This proposition is well-stated as a rhetorical question:

> What happens when the positive laws of the state lose all touch with the higher law and come to be seen as nothing more than the outcomes of a power struggle? Can the ideals of autonomy and generality in law survive the

> demise of the religious beliefs that presided over their birth?[16]

The answer is obviously "No!"

What the state may not do is set up institutions, be they churches, schools, or media, for the purpose of establishing an orthodoxy of opinion which should be governed solely by one's conscience as directed by reason and conviction rather than force or violence.

C. The Court must resolve the false bifurcation of secular and religious.

The factual contexts in which both *Janus* and *Barnette*, and the principles stated in those opinions, implicitly undermine the false bifurcation of secular and religious and of nonreligion and religion. The speech in *Janus* was "secular" in most peoples' minds, but it was protected by principles set out in the Virginia Statute for Establishing Religious Freedom. *Barnette* made no distinction between religious and other kinds of speech when it denied the state the power to establish an orthodoxy of opinion. The principle of the freedom of the mind, and the fact that the state has no jurisdiction over the mind, applies to all ideologies regardless of any theological or philosophical characterization. The Virginia Statute places even "opinions in physics and geometry" within the Statute's protection.

False distinctions between secular and religious, or knowledge and faith, force an alien belief system on those who hold to biblically based orthodox

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[16] Roberto M. Unger, Law in Modern Society 83 (The Free Press 1976).

Christianity. *See* Tuomala at 1101-1109. For the Christian, education begins with a proper orientation toward God—"The fear of the Lord is the beginning of knowledge." *Proverbs* 1:7 (NIV). The entire curriculum must be based on the truth that "all the treasures of wisdom and knowledge" are hidden in Christ (*Colossians* 2:3 (NIV)) to whom the Chrisitan must make every thought captive (*2 Corinthians* 10:5 (NIV)). In fact, the only basis for the unity of all knowledge and for the objectivity of truth, including truth about the law, is the fact that through Christ all things were created, and in Him all things hold together. *Colossians* 1:16-17 (NIV).[17]

IV. The school's hostility toward religious beliefs places a substantial burden on parental and free exercise rights.

The remainder of this brief draws attention to a connection between the Court's opinions regarding homosexual rights and marriage and the attitude and actions of the Board of Education in denying requests for excusal from certain instruction based on religious beliefs. The similarity between the heavy handedness of government officials in waging the culture war in *Masterpiece Cakeshop Ltd. v. Colo Civil Rights Comm'n*, 584 U.S. 617 (2018) and the treatment of parents and children in the Montgomery County Schools belies an innocence of motive in refusing opt-outs.

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[17] *See* Jeffrey C. Tuomala, Christian Legal Education: From Bologna to Lynchburg and Beyond, 19 Liberty U. L. Rev. 60-65 (2024).

A. Justice Scalia warned the Court to not take sides in the culture war.

Justice Scalia's dissents in *Romer v. Evans*, 517 U.S. 620, 652 (1996), and *Lawrence v. Texas*, 539 U.S. 558, 602 (2003), warned the Court against taking sides in the culture war. The *Romer* Court, ostensibly applying minimal scrutiny, could find no conceivable legitimate state interest in what it considered to be discriminatory treatment of homosexuals. The Court wrote that the Colorado law "seems inexplicable by anything but animus" toward homosexuals and implied that it was motivated by a "bare . . . desire to harm" them. *Romer* at 632, 634. Similarly, the *Lawrence* Court could find no conceivable legitimate state interest in criminalizing sodomy, despite the well-known worldwide AIDS epidemic that was spread largely by male homosexual sodomy. The *Lawrence* Court said that moral disapproval, like "a bare desire to harm," is not a legitimate government interest. *Lawrence* at 582.

In *United States v. Windsor*, 570 U.S. 744 (2013), the Court ruled that the federal Defense of Marriage Act (DOMA), which recognized only heterosexual marriage, violated the equal protection principle of the Fifth Amendment Due Process Clause. Congress had no legitimate interest in discriminating against homosexual "marriage." The *Windsor* opinion spoke of DOMA in very derogatory terms. The Court faulted Congress with seeking to "injure" homosexuals, of having a "bare . . . desire to harm," as being motivated by "an improper animus or purpose," of engaging in "'discriminations of an unusual character,'" of having the purpose of

imposing "a disadvantage, a separate status, and so a stigma" on same-sex marriages. *Id.* at 770. The Court accused Congress of expressing "'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.'" *Id.* at 771. Lastly, DOMA's "purpose and effect [was] to disparage and to injure" same-sex couples. *Id.* at 775.

Perhaps seeing the implications of its own language regarding traditional Judeo-Christian morality in *Windsor*, the Court tempered its language in *Obergefell v. Hodges*, 576 U.S. 644 (2015). The Court stated that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises and neither they nor their beliefs are disparaged here." *Id.* at 672. But the Court said that the state could not place its imprimatur on personal views opposing same-sex "marriage" as it would result in an "exclusion that soon demeans or stigmatizes [homosexual couples] . . . and it would disparage their choices and diminish their personhood to deny them that right." Those views have led to "a long history of disapproval of their relationships" . . . that "works a grave and continuing harm. . . . and serves to disrespect and subordinate them." *Id.*[18]

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[18] Actually, it is the Christian belief that all people are created in the image of God that is the only basis for full personhood. The Court has insisted that only a view of life that supports a diminished view of personhood may be taught in public schools. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

The Court in *Masterpiece Cakeshop*, may have been surprised that the Colorado Human Rights Commission called Jack Phillips' refusal to decorate wedding cakes with a pro-homosexual marriage message out of religious conviction, as akin to "defenses of slavery and the Holocaust." 584 U.S. at 635. A Commissioner described Phillips' defense as "one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others." *Id*. 635. The Commission's hostility toward Phillips at his hearing violated his free exercise rights. The Court faulted the Colorado court, stating that it is "not . . . the role of the State or its officials to prescribe what shall be offensive." *Id*. 638. The Colorado court erred in its attempt to justify disparate treatment of Phillips, as compared to pro-same sex marriage bakers, because it elevated "one view of what is offensive over another" and sent "a signal of official disapproval of Phillips' religious beliefs." *Id*. at 638.

The Board of Education failed to wage its war with a benign facade. Some opponents of the LGBTQ agenda may be motivated by animus and a bare desire to harm, but they should not be called despicable or compared to proponents of slavery and the Holocaust. Nevertheless, some Board members, in a display of animus, accused opponents of *Pride Puppy* and other books as exhibiting hatred comparable to "white supremacists" and "xenophobes." Pet.2. The Board of Education hostility toward parents in this case, and the disparate treatment it gave them, constitutes a substantial burden on their free exercise rights.

B. The Montgomery County Schools have taken sides in the culture war.

Usually in war, children suffer as unintended collateral damage. Those opposing the normalization of homosexual conduct and same sex marriage frequently warned that families and children would be the collateral damage of its normalization. The Board of Education has made children the intentional target of attack, not just collateral damage in the culture war. It has conscripted children into service without their parents' consent and refused to exempt them as conscientious objectors. In this case the school has demanded unconditional surrender from the parents.

As Justice Scalia saw it, the *Lawrence* Court had taken sides in the culture war. It is often stated that the first casualty of war is truth. The Court claimed that it was able to see "certain truths" that prior generations were blinded to, but it didn't identify the source of the truth that it had recently discovered. The Court's first foray into the First Amendment freedom of speech arose out of censorship efforts during World War I. *Schenck v. United States*, 249 U.S. 47 (1919). Justice Holmes authored the *Schenck* opinion approving of censorship, but he eventually changed his mind and dissented in *Abrams v. United States*, 250 U.S. 616 (1919). He famously wrote, "that the best test of the truth is the power of the thought to get itself accepted in the competition of the market." *Id*. at 630.

A more effective method of ensuring a conformity of thought during wartime than censorship may be

a government-fueled propaganda mechanism. That can be effected through utilization of a compliant press or other existing institutions. The government has a ready-made extensive propaganda mechanism in place—the public school system—through which it prescribes an orthodoxy of opinion on all manner of opinion. By no stretch of imagination can compulsory attendance at tax-funded schools be described as a free marketplace of ideas.

CONCLUSION

Because all education is a matter of conscience—in fact, it is the critical endeavor of molding and developing the conscience itself—it is by nature a matter of belief, and as such, a matter of religion. This is especially clear when looking at how the Founders understood and defined "religion" vis a vis "secular." This leads to the unavoidable (and albeit perhaps for some uncomfortable) truth that all tax-payer funded education constitutes an establishment of religion. Understanding this forgotten element of education's fundamental nature is what has allowed public schools to become active battlegrounds in the culture war as competing ideologies battle for the minds and souls of America's children.

To truly put an end to tax-payer funding of the culture war in schools, the Court should state that the tax-funded Montgomery County Schools constitute an establishment of religion that places a substantial burden on parental and free exercise rights. Because establishment of religion is unconstitutional per se, it cannot be saved through

the application of any form of heightened scrutiny standard of review.

Barring such a decision based on first principles, the Court should at minimum: 1) order the Board of Education to allow parents to opt their children out of objectionable instruction whether objections are denominated religious or non-religious since all education falls within the definition of religion as used in the First Amendment, and 2) rule that the Board of Education's hostility toward parents and their beliefs constitute a substantial burden on religion and unconstitutional discrimination in its treatment of religion and nonreligion.

For either decision, the Court should base the recommended rulings above on an adoption of the Virginia definition set out in this brief, ensuring equal treatment of all belief systems, whether they be denominated religious or secular, and abandoning the false bifurcation of reality between the secular and religious.

Respectfully submitted,

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