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 FOR PETITIONERS

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QUESTION PRESENTED

Do public schools burden parents' religious exercise when they compel elementary school children to participate in instruction on gender and sexuality against their parents' religious convictions and without notice or opportunity to opt out?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners Tamer Mahmoud and Enas Barakat, Jeff and Svitlana Roman, and Chris and Melissa Persak are parents of elementary-age children in Montgomery County, Maryland. They are plaintiffs below.

Petitioners Chris and Melissa Persak are also acting *ex rel.* their minor children, who are plaintiffs below.

Petitioner Kids First is an unincorporated association and is a plaintiff below. It does not have a parent corporation or issue stock.

Respondent Thomas W. Taylor is the Montgomery County Superintendent of public schools. He is sued in his official capacity. His predecessor, Monifa B. McKnight, was a defendant below in her official capacity.

The Montgomery County Board of Education is a defendant below.

Laura Stewart, Rita Montoya, Grace Rivera-Oven, Karla Silvestre, Natalie Zimmerman, Brenda Wolff, and Julie Yang are members of the Board of Education and are defendants in their official capacities.*

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* Per Rule 35.3 of the Rules of this Court, Laura Stewart, Rita Montoya, and Natalie Zimmerman have been automatically substituted for Shebra Evans, Lynne Harris, and Rebecca Smondrowski, respectively.

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INTRODUCTION

Over fifty years ago, *Wisconsin* v. *Yoder* recognized as "beyond debate" the First Amendment right of parents "to guide the religious future and education of their children." The question here is whether that right is infringed when a public school compels elementary schoolchildren as young as three to participate in instruction on gender and sexuality in violation of their parents' religious beliefs—without notifying their parents or allowing them to opt out.

To ask that question is to answer it. Public schools have long recognized the primacy of parents in instructing their children on sensitive matters of gender and sexuality. If public schools have offered such instruction at all—a recent trend—they have almost uniformly notified parents and allowed them to opt their children out. Respondents here—the Montgomery County Board of Education and its officials (the Board)—were no exception. They long allowed notice and opt-outs for any "instruction related to family life and human sexuality," along with any "classroom discussions or activities that [parents or students] believe would impose a substantial burden on their religious beliefs."

But in 2022, the Board introduced a series of controversial "LGBTQ-inclusive" storybooks to be read and discussed with students in pre-K through fifth grade. When hundreds of parents raised religious objections, the Board for the first time eliminated notice and opt-outs—directing administrators and teachers that parents could no longer be notified when the books were taught or be allowed to opt their children out. The Board's own documents reveal that its goal in compelling children to participate in this instruction is

to "disrupt" their "either/or thinking" on gender and sexuality. And the Board concedes that children may "come away from [such] instruction with a new perspective not easily contravened by their parents."

Yoder forbids this result. Under the Free Exercise Clause, parents have the right to opt their children out of public school instruction that would "substantially interfere with their religious development." That test is easily met here. No one disputes that gender and sexuality are topics of enormous religious importance, that children are uniquely impressionable and vulnerable on such matters, and that decisions related to these topics can have life-changing and lifelong impacts. Nor can they dispute that, for elementary school children in particular, "comprehensive" sex education is a newcomer to public education and has overwhelmingly been structured to facilitate parental choice. As in *Yoder*, this history and tradition compel the conclusion that forced instruction on such religiously sensitive matters would "substantially interfere" with children's religious formation and their parents' own religious exercise of guiding that development.

The Board's policy separately triggers strict scrutiny because it lacks neutrality and general applicability under *Lukumi*. The program is shot through with discretionary and ad hoc exemptions that allow students to opt out of various types of instruction, including sex education during health class, while forcing pre-kindergarteners to participate in discussions about sexuality and gender identity during English class. That inexplicable double standard fails general applicability. Indeed, the Board's initial policy allowed Petitioners to opt out of LGBTQ-inclusive instruction because it imposed a "substantial burden"—effectively

acknowledging that the burden test is met. Amending that policy in response to parents' religious objections further evinced a lack of general applicability—and non-neutrality too. When parents protested the policy change, the Board responded with a slew of hateful comments comparing the (religiously and racially diverse) Petitioners to "white supremacists" and "xenophobes." That is the opposite of government neutrality towards religion.

The Board responds that *Smith* forecloses relief under *Yoder* and that any lack of general applicability and neutrality under *Lukumi* is not enough—with "enough" being an ever-evolving standard in the lower courts. Under the Board's view, Petitioners' right to direct their children's religious upbringing ends at the schoolhouse doors, with no limit on what their children may be taught within. But if that is what *Smith* allows, then *Smith* is in direct conflict with free-exercise guarantees and should be overruled.

Finally, although the Fourth Circuit did not address whether strict scrutiny is met, the trial court did. This Court should as well. The same history and tradition that upholds parents' control over their children's sex education forecloses a compelling interest in forced instruction on such religiously fraught matters. Any contrary answer would break the bond between parent and child on matters that strike at the heart of parental authority. That is incompatible with the Free Exercise Clause's guarantee that parents' right to control the religious upbringing of their children is "beyond debate."

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * ." U.S. Const. Amend. I.

Maryland Code of Regulations 13A.04.18.01(D)(2) provides:

(e) Student Opt-Out.

(i) The local school system shall establish policies, guidelines, and/or procedures for student opt-out regarding instruction related to family life and human sexuality objectives.

Maryland Code of Regulations 13A.01.06 provides:

The purpose of this chapter is to establish as a matter of policy and priority that:

* * *

.01(B) Each local school system's procedures and practices provide for educational equity and ensure that there are no obstacles to accessing educational opportunities for any student; and

* * *

.03(B)(2) "Educational equity" means that every student has access to the opportunities, resources, and educational rigor they need throughout their educa-

tional career to maximize academic success and social/emotional well-being and to view each student's individual characteristics as valuable.

.03(B)(5) "Individual characteristics" means the characteristics of each individual student, which include but are not limited to:

* * *

(d) Gender identity and expression; [and]

* * *

(j) Sexual orientation[.]

STATEMENT OF THE CASE

A. There is a national consensus respecting parental control over instruction on gender and sexuality.

Montgomery County, Maryland is the most religiously diverse county in the nation.[1] For years, the Board honored that diversity by "follow[ing] the best of our traditions": "respect[ing] the religious nature of our people and accommodat[ing] the public service to their spiritual needs." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). The Board effectuated that respect through its Religious Diversity Guidelines ("Guidelines").

These Guidelines were in place through the end of the 2022-2023 school year. So long as requests did not become "too frequent or too burdensome," the Guidelines provided opt-outs from any "classroom discussions or activities that [parents or students] believe[d] would impose a substantial burden on their religious beliefs." Pet.App.221a. Further still, the Guidelines committed the Board to "accommodate objections from students or their parents/guardians to a particular reading assignment on religious grounds." Pet.App.221a. Students could also receive excused absences for religious holidays—with a "case-by-case" approach to whether they would have to make up missed assignments. Pet.App.217a. And opt-outs were also allowed from any "activities" such as "birthdays," "Halloween" or "Valentine's day" that might be "viewed by others as having religious overtones."

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[1] Aleja Hertzler-McCain, *Montgomery County, Maryland, was most religiously diverse US county in 2023*, *Religion News Service*, Aug. 30, 2024, https://perma.cc/86PU-3QLA.

Pet.App.223a. Regarding other "instructional activities," the Board's Guidelines "expect[ed]" them "to be fair, objective, and not demean any religious or nonreligious beliefs." Pet.App.673a.

These Guidelines augmented Maryland law, which requires all local school districts to "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). Maryland is not alone in this regard. All fifty states and the District of Columbia require or permit some aspects of sex education.[2] And 47 states and the District of Columbia allow for parental opt-outs—or require parental opt-ins—before students may participate in sex education.[3] Only three states (Delaware and the Dakotas) are silent on the matter. No state has gone so far as to bar opt-outs entirely.

Concern for parental rights is also reflected in the introduction and growth of sex education throughout the United States. Although modern public education has its roots in the nineteenth century, sex education

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[2] Pet.6 n.4.

[3] Of these jurisdictions, 38 require parental opt-outs. Pet.6 n.5; see also Cal. Educ. Code § 51240; Conn. Gen. Stat. § 10-19(b); Mich. Comp. Laws §§ 380.1170(3), 380.1506, 380.1507a; Neb. Rev. Stat. § 79-531; Ohio Rev. Code § 3313.473(B)(1), (E), (G)(5) (effective Apr. 9, 2025); Okla. Stat. tit. 70, § 11-105.1(A); Okla. Stat. tit. 25, § 2003(A)(2)-(5); Okla. Admin. Code § 210:10-2-3(a). Four more states go still further, requiring a parental opt-in before children receive instruction. Pet.7 n.6. And another six states feature a combination of opt-out and opt-in rights. Pet.7 n.7; see also Ariz. Rev. Stat. § 15-102(A)(4); Ind. Code § 20-30-5-9(d).

in public schools is a more recent development. Chicago public schools became "the first to implement formal sex education in schools with 'personal purity' talks" in 1913; but that was abandoned following parental backlash.[4] After World War I, some high schools and colleges implemented basic sexual health education focused on "supporting marriage and family."[5] But public schools did not begin implementing sex education as part of their health curriculum until the 1970s,[6] and sex education extending beyond physiology, hygiene, and disease prevention was not formulated until the 1990s.[7] Even today, only three states—Oregon, California, and Washington[8]—mandate "com-

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[4] Brooke D'Amore Bradley, *Sex Education after* Dobbs*: A Case for Comprehensive Sex Education*, 39 Berkeley J. Gender, L. & Just. 121, 126 (2024).

[5] Nicole D. Katapodis, *LGBTQ-Inclusive Sex Education: Lessons the United States Can Learn from the United Kingdom*, 51 Ga. J. Int'l & Compar. L. 817, 820 (2023); Naomi Rivkind Shatz, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 Yale J.L. & Feminism 495, 496 (2008).

[6] Kristen S. Rufo, *Public Policy vs. Parent Policy: States Battle over Whether Public Schools Can Provide Condoms to Minors Without Parental Consent*, 13 N.Y.L. Sch. J. Hum. Rts. 589, 591-592 (1997).

[7] Jessica Fillak, *The History of Sexuality Education in the United States*, *Sexual Health Alliance,* June 8, 2021, https://perma.cc/BRL8-MSH3**.**

[8] See Or. Rev. Stat. § 336.455 (2009 law); Cal. Educ. Code § 51934 (2016 law); Wash. Rev. Code § 28A.300.475 (2020 law); see also *State Profiles*, SIECUS, https://perma.cc/V5QL-9MNG (only three states that "require comprehensive sex education to be taught in all schools").

prehensive" sex education that seeks to explore "feelings, values, and attitudes" regarding "one's own sexual orientation, * * * gender identities," and "sexuality,"[9] and those mandates were all adopted in recent years (2009, 2016, and 2020, respectively). Even so, like the long consensus, those states still allow parental opt-outs or opt-ins. Giving parents the final say on such matters is a nationwide tradition.

B. The Board introduces "LGBTQ-inclusive" instruction.

In 2019, Maryland enacted regulations seeking to promote "educational equity," which it defined as "view[ing] each student's" "gender identity and expression," "sexual orientation," and other specified "individual characteristics as valuable." Md. Code Regs. §§ 13A.01.06.01(B), 13A.01.06.03(B). As one aspect of implementing this regulation, in November 2022, the Board introduced "LGBTQ-inclusive" storybooks for instructing students in elementary school, along with corresponding guidance for teachers. Pet.App.272a; see also Pet.App.273a-275a. In deciding which books to adopt into its curriculum, the Board said it would review options through an "LGBTQ+ Lens" and ask whether books "reinforced or disrupted" "stereotypes," "cisnormativity," and "power hierarchies." Pet.App.622a.

One of the selected books, *Pride Puppy*, is a picture book directed at three- and four-year-olds. Pet.App.234a. It describes a Pride parade and what a child might find there. Pet.App.254a-271a. The book invites students barely old enough to tie their own

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[9] *Guidelines for Comprehensive Sexuality Education* at 13, 16, SIECUS (3d ed. 2004), https://perma.cc/2QZB-9SS9.

shoes to search for images of "underwear," "leather," "lip ring," "[drag] king" and "[drag] queen," and "Marsha P. Johnson," a controversial LGBTQ activist and sex worker. Pet.App.270a (brackets in original).

My Rainbow, a picture book for all elementary ages, Pet.App.237a, tells the story of an autistic boy who identifies as a transgender girl. Pet.App.358a-389a. When his mother points to her own short hair, he responds: "People don't care if cisgender girls like you have short hair. But it's different for transgender girls. I *need* long hair!" Pet.App.371a. The mother decides that her child knows best and sews him a rainbow-colored wig. Pet.App.382a-385a.

Intersection Allies is a picture book intended for "Kindergarten through Grade 5." Pet.App.236a. It invites children to ponder what it means to be "transgender" or "non-binary" and asks "[w]hat pronouns fit you?" Pet.App.350a. By "standing together," the book claims, we will "rewrite the norms." Pet.App.345a.

In another book, *What Are Your Words?*, Pet.App.548a, an uncle visits "their" niece/nephew, whose pronouns are "like the weather. They change depending on how I feel." Pet.App.552a. The child spends the day agonizing over the right pronouns. Pet.App.553a-561a. Only at the end of the day, while watching fireworks, does the child finally conclude that "I'm like fireworks! * * * My words finally found me! *They* and *them* feel warm and snug to me." Pet.App.562a. At least for "today." Pet.App.564a.

Another—*Love, Violet*—also for "Kindergarten through Grade 5," Pet.App.239a, is about two young girls and their same-sex playground romance.

Pet.App.429a-447a. One of the girls "blush[es] hot" when pressed about her "SPECIAL" valentine. Pet.App.435a. Teachers are encouraged to have a "think aloud" moment to ask students how it feels when they "don't just 'like'" but "like like" someone. Pet.App.275a.

Born Ready, for all elementary ages, Pet.App.240a, tells the story of a biological girl named Penelope who identifies as a boy. Pet.App.448a-482a. When Penelope's brother questions how someone can "become" a boy, his mother chides him that "[n]ot everything *needs* to make sense. *This is about love*." Pet.App.465a. Teachers are told to instruct students that, at birth, doctors "guess about our gender," but "[w]e know ourselves best." Pet.App.630a-631a, 276a.

Finally, *Jacob's Room to Choose* is about two young children who identify as transgender. Pet.App.565a-580a. Their teacher uses a game to persuade their classmates to support gender-free bathrooms. Pet.App.572a-576a. After relabeling the bathroom doors to welcome multiple genders, the children parade with placards that proclaim "Bathrooms Are For Every Bunny" and "[choose] the bathroom that is comfy." Pet.App.578a.[10]

Along with the storybooks, the Board issued guidance for teachers to direct instruction. Drawing on

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[10] Before filing its brief in opposition with this Court, and after more than a year of using the storybooks in schools, the Board pulled two—*Pride Puppy* and *My Rainbow*—over "concerns about the content." Nicole Asbury, *Montgomery schools stopped using two LGBTQ-inclusive books amid legal battle*, *Washington Post*, Oct. 23, 2024, https://perma.cc/EPR7-AXBB.

sources like "Correcting Kids' Stereotypes" and "Gender Spectrum," Pet.App.635a, the guidance tells teachers how they should respond to various student questions. They are directed to explain that "people of any gender can like whoever they like" and to interrogate students over whether they "think it's fair for people to decide for us who we can and can't like?" Pet.App.629a. Teachers are encouraged to follow-up with an "example," like "My best friend is a woman and she is married to another woman." Pet.App.630a. If students say it's "weird" for a girl to claim being "a boy if he was born a girl," the teacher is to emphasize that "not everyone is a boy or girl" and that "[s]ome people identify with both, sometimes one more than the other and sometimes neither," so students "shouldn't" "guess" but instead solicit others' "pronouns." Pet.App.630a-632a. When it comes to "what their gender is," teachers are to tell students that "they are the experts on themselves" and that "[s]ometimes people feel like a boy or a girl, sometimes they feel like both, sometimes they feel like neither." Pet.App.631a. Teachers are told to frame disagreement with these ideas as "hurtful," Pet.App.630a, 634a, and to counter with examples of "[m]en who paint their nails" or "wear[] dresses," Pet.App.633a-634a.

The guidance documents also instruct teachers—twice—to "[d]isrupt the either/or thinking" of elementary students about biological sex. Pet.App.629a, 633a. And teachers are instructed not to suggest there could be reasonable disagreement. Rather, they are to say that "[s]ometimes when we learn information that's different from what we always thought, it can be confusing and hard to process." Pet.App.630a.

The Board's own elementary school principals objected to the storybook instruction. Pet.App.614a-621a. They expressed concern that the books were "designed to spark curiosity about [gender and sexuality], as opposed to * * * inclusivity." Pet.App.620a. The principals also found it "problematic to portray elementary school age children falling in love with other children, regardless of sexual preferences." Pet.App.617a. And they further objected that the books "support the explicit teaching of gender and sexual identi[t]y"; invite "shaming comment[s]" toward students who disagree; "[s]tate[ ] as * * * fact" things that "[s]ome would not agree" are facts; and are "dismissive of religious beliefs." Pet.App.619a-621a.

The Board "do[es]n't dispute" that at least "one" of the books must be read each year and that "there will be discussion that ensues." Pet.App.642a. Rather, "there is an expectation that teachers use the LGBTQ-Inclusive Books as part of instruction." Pet.App.605a; see also Pet.App.137a n.12. And the Board acknowledges that "[a]ny child * * * may come away from [the storybook] instruction" with "a new perspective not easily contravened by their parents." J.A.46. As stated on a slide presentation about the storybooks, the Board maintains that "Everyone Needs These Books" to combat the "dominance, superiority and entitlement" of the "dominant culture." Pet.App.517a.

C. The Board breaks with the consensus and bans notice and opt-outs.

After the Board adopted the storybook lessons in 2022, it initially honored parental opt-outs in accordance with its own Guidelines and Maryland law. Pet.App.533a-534a, 540a, 544a-545a, 185a-187a, 497a-498a. This reflected the numerous questions and

concerns parents raised when the storybooks were introduced. At public meetings dedicated to discussing the "LGBTQ+ Inclusive Picture Books," Pet.App.499a, parents asked the Board to "[p]lease address how a Halloween parade was cancelled because of religious or personal beliefs of 25-30 students and how do you compare these topics to that?" Pet.App.504a. Or simply, "how is this appropriate?" Pet.App.504a.

On March 22, 2023, the Board issued a public statement making clear that "[i]f a parent chooses to opt out, a teacher can find a substitute text for that student that * * * aligns with curriculum." Pet.App.184a. But the very next day, the Board reversed course. Without explanation, it announced that beginning with the 2023-2024 school year, "[s]tudents and families may not choose to opt out" and will not be informed when "books are read." Pet.App.185a, 657a. The statement affirmed, however, that high school students could continue to opt out of sex education. Pet.App.185a, 657a. And because of the Religious Diversity Guidelines, students could still opt out of any other instruction that "would impose a substantial burden on their religious beliefs." Pet.App.220a-221a. Only religious objections to the LGBTQ-inclusive instruction were left unprotected.

Within weeks of the Board's reversal, over 1,000 parents signed a petition asking the Board to restore their notice and opt-out rights.[11] Hundreds of them—

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[11] Ismail Allison, *Over 1,000 Maryland Parents, Community Members Urge MCPS to Restore Curriculum Opt-Out Option and Parental Notice, Dialogue with Families*, *Council on American-Islamic Relations*, Apr. 17, 2023, https://perma.cc/JH3S-LQKG.

"largely * * * Muslim and Ethiopian Orthodox parents"—some with their children, crowded into Board meetings to express concern that "the school system is violating their [First Amendment] rights."[12] Board members responded by publicly condemning students for "parroting" their parents' "dogma," accusing the parents of promoting "hate," and comparing them to "white supremacists" and "xenophobes." Pet.App.103a, 106a-107a, 187a; see also Pet.App.514a (stating that objecting to books as "inappropriate" is a "dehumanizing form of erasure").

Months later, in response to this lawsuit, the Board revised its Religious Diversity Guidelines to limit opt-outs to "noncurricular activities" or "free-time events" that "conflict with a family's religious, and/or other, practices." Pet.App.672a. The new Guidelines state that the Board "cannot accommodate" opt-outs from "required curricular instruction or the use of curricular instructional materials based on religious, and/or other, objections." Pet.App.672a. Counsel for the Board explained that the books involving gender and sexuality were mandated "precisely * * * to fight against" the notion that such material belongs in "a special curriculum from which people may have the opt-out right in Maryland." J.A.49-50.

Under Maryland law, parents are required to keep their elementary-age children in public school, unless they have capacity to provide an alternative adequate education, Md. Code Educ. § 7-301(a)(3), (a-1)(1)—for

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[12] Nicole Asbury & Katie Shepherd, *Hundreds of Maryland parents protest lessons they say offend their faith, Washington Post,* June 27, 2023, https://perma.cc/MJ2Q-BXTW.

example, by sending them to private school or home-schooling them. Any parent who fails to comply "is guilty of a misdemeanor" and may be subjected to fines and imprisonment. *Id.* § 7-301(e)(2).

D. Petitioners cannot maintain their religious exercise.

Petitioners Tamer Mahmoud and Enas Barakat reside in Montgomery County, Maryland, with one son in elementary school. Pet.App.529a. Respect for "God's wisdom in creation" lies at the heart of their Muslim faith. Pet.App.531a. This includes a religious conviction that "'gender' cannot be unwoven from biological 'sex'" without "rejecting the dignity" God has "bestowed on humanity." Pet.App.530a. They believe children "attain their fullest God-given potential by embracing their biological sex." Pet.App.531a.

For Mahmoud and Barakat, this is a sacred obligation. It underlies their beliefs regarding the importance of marriage and sexuality for "creating children"—"not only to build a loving family but also to serve as an example of righteousness for society at large." Pet.App.530a (citing *Surah Al-Furqan* 25:74). To avoid confusion, their faith forbids them from "exposing [their] impressionable, elementary-aged son to activities and curriculum on sex, sexuality, and gender that undermine Islamic teaching." Pet.App.532a (citing *Surah Al-An'am* 6:68-69). They believe there would be "detrimental spiritual consequences" from subjecting their son to instruction "concerning sexual and gender ethics that contravene well-established Islamic teachings." Pet.App.532a. Thus, after being told no future opt-outs would be allowed, they were religiously compelled to send their son to private school at significant financial sacrifice.

Petitioners Melissa and Chris Persak are Roman Catholic and have two elementary-age daughters in public school. Pet.App.542a. They believe that "a person's biological sex is a gift bestowed by God that is both unchanging and integral to that person's being." Pet.App.543a. They have a religious obligation to teach their children about the "immutable sexual differences between males and females, the biblical way to properly express romantic and sexual desires, and the role of parents to love one another unconditionally and sacrificially within the confines of biblical marriage." Pet.App.543a.

These beliefs are foundational to the Persaks' religious understanding of the importance of "creat[ing] and sustain[ing] a family," which is "not only necessary for raising the next generation of children" but also for "human flourishing and happiness." Pet.App.543a (citing *Genesis* 1:28; *John* 8:51, 14:21, 15:10). Because elementary-age children "are highly impressionable," their faith forbids them from subjecting their children to instruction that undermines their religious beliefs on gender and sexuality. Pet.App.544a.

Petitioners Svitlana and Jeff Roman are Ukrainian Orthodox and Roman Catholic, respectively. They reside in Montgomery County with their elementary-age son. They believe that gender and biological sex are "intertwined and inseparable," Pet.App.535a-537a, and "an integral part of God's design," Pet.App.536a (citing 1 *Thessalonians* 5:23; Catechism of the Catholic Church, cc. 362-368). They have a religious obligation to help their son "accept [his] own body as it was created" and to "attain [his] fullest God-given potential by embracing [his] biological sex." Pet.App.537a-538a.

The Romans accept Catholic teaching that during "'the years of innocence' from about five years of age until puberty," children "must never be disturbed by unnecessary information about sex." Pet.App.539a (quoting The Pontifical Council for the Family, *The Truth and Meaning of Human Sexuality: Guidelines for Education within the Family*, 78 (Dec. 8, 1995)). Especially while their young son inherently "loves" and "implicitly trusts" his teachers, the Romans have a religious duty to direct when and how he is taught "principles about sexuality or gender identity." Pet.App.541a. Failing this duty would be "spiritually and emotionally harmful to his well-being." Pet.App.541a. Thus, after the Board withdrew notice and opt-outs, they too were religiously compelled to send their son to private school, at significant expense.

Petitioner Kids First is an unincorporated association formed to protect parental opt-out rights in Montgomery County schools. Its members include hundreds of parents of diverse faiths, all of whom—like the named families—have a religious obligation not to expose their young children to instruction on gender and sexuality that violates their religious beliefs. Pet.App.163a, 168a.

One of those parents is Grace Morrison. She and her husband adopted their youngest daughter, who has Down Syndrome and Attention Deficit Disorder, from Ukraine. Pet.App.624a. Because of her disabilities, their daughter's ability to make independent judgments is impaired, making her particularly impressionable. Pet.App.626a-627a. Before the end of the 2022-2023 school year, Grace heard from others about the LGBTQ-storybook curriculum and emailed her daughter's teacher to request an opt-out.

Pet.App.626a. The request was denied. Pet.App.626a. At the beginning of the following school year, Grace asked her daughter's teacher for a schedule so she could know when the storybook instruction would take place. Pet.App.648a. Again, she was refused. Pet.App.648a. Grace and her husband were then religiously compelled to remove their daughter from school, at a cost of $25,000 a year in "therapy and * * * academic services and supplies" that she previously accessed through the public system. Pet.App.648a-649a.

E. Petitioners sue.

Stripped of their notice and opt-out rights, Petitioners sued and moved for a preliminary injunction. They argued that denial of notice and opt-outs violated the Free Exercise Clause by overriding their freedom to direct the religious upbringing of their children and by burdening their religious exercise via policies that are not neutral or generally applicable.

The district court denied the motion, holding that Petitioners could not show "that the no-opt-out policy burdens their religious exercise." Pet.App.114a. After thus finding no likelihood of success on the merits, the district court concluded that the remaining injunctive factors also favored the Board. Pet.App.152a-154a.

Petitioners immediately sought an injunction pending appeal from the Fourth Circuit. The court denied that motion but ordered expedited briefing on the merits. Following oral argument, a divided panel affirmed the district court's ruling. The majority found no free-exercise burden because there was "no evidence at present" that Petitioners were "compel[led] * * * to *change* their religious beliefs or

[their] conduct" or "what they teach their own children." Pet.App.34a. Nor were they "asked to affirm views contrary to their own" or to "change how they feel about" gender and sexuality. Pet.App.34a. Petitioners, the court reasoned, remained "free[]" to "discuss[] the topics raised in the [s]torybooks with their children" and to "teach[] their children as they wish." Pet.App.35a. The majority also found *Yoder* inapplicable, because "[i]n the decades since [it] was decided," circuit courts have given it a "limited holding" based on its "unique record." Pet.App.38a.

Judge Quattlebaum dissented. He concluded that "burdening the exercise of religion is not limited to direct coercion." Pet.App.59a. Rather, religious liberty "may be infringed by the denial of or placing of conditions upon a benefit or privilege." Pet.App.60a. Because the no-opt-out policy forced Petitioners "to either live out their faith or forgo the public benefit," their religious exercise was burdened. Pet.App.66a n3. Judge Quattlebaum also concluded that this approach was not neutral or generally applicable because the Board had "discretion to grant religious opt-out requests" and because Maryland law requires "notice and opt-out procedures for all 'family life and human sexuality' instruction." Pet.App.68a, 70a n.4. The Board could not avoid that obligation "just by adding instruction [on gender and sexuality] to other classes." Pet.App.70a n.4. Concluding that strict scrutiny could not be met, Pet.App.72a-73a, Judge Quattlebaum would have granted a preliminary injunction. Pet.App.75a.

Without addressing any of the case law discussed by Judge Quattlebaum, the majority remanded for further proceedings. In the district court, the Board

moved to dismiss on the ground that the complaint fails to allege any students have been coerced to change, or act against, their religious beliefs. The district court stayed the matter pending appeal.

SUMMARY OF ARGUMENT

The First Amendment places high value on the right of parents to convey their religious beliefs and practices to their children. For Petitioners, that right has special significance as they seek to instill religious beliefs on gender and sexuality—beliefs crucial for their children's ability to fulfill religious aspirations concerning marriage and family. By compelling instruction designed to indoctrinate Petitioners' children against their religious beliefs—all without notice or opportunity to opt out—the Board has put Petitioners to an impossible choice. They must subject their children to instruction intended to disrupt their religious beliefs or forgo the benefits of a public education at the sizeable cost of either paying for private school, homeschooling, or facing government fines and penalties. That obvious burden on Petitioners' free exercise is constitutionally impermissible for at least two reasons.

First, the Free Exercise Clause prohibits government schools from "substantially interfering with the right of parents to direct the religious upbringing of their children." *Wisconsin* v. *Yoder*, 406 U.S. 205, 218, 232 (1972). Children in elementary school are at the most formative stage of their lives and are highly impressionable and vulnerable to peer pressure—especially on such potent and religiously laden topics as gender and sexuality. In *Yoder*, the Court held that subjecting high schoolers to an educational environment that incidentally conflicted with their religious

beliefs justified parents withdrawing them from public school entirely. Petitioners' much narrower request to opt their children out from discrete instruction that deliberately seeks to confound their religious values compels the same result. The longstanding consensus of states deferring to parents on when and how their children will receive sex education confirms that compelled instruction against their religious beliefs substantially interferes with Petitioners' free exercise right.

Second, the Board's ban on notice and opt-outs fails the Free Exercise Clause's minimum requirement of general applicability and neutrality under *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). Suspending notice and opt-outs created topsy-turvy categorizations that allow a fourteen-year-old to be excused from instruction on gender and sexuality during sex education, while a four-year-old must sit through the same instruction during English class. The policy also lacks general applicability because the Board has total discretion over when the policy applies. The original Guidelines allowed opt-outs unless requests became "too frequent" or "too burdensome." And when the Board first cancelled opt-outs, the cancellation applied solely to the storybook instruction. Even then the Board said it would honor any opt-outs already granted through the end of the school year. This maneuvering alone demonstrates the Board's retained discretion over when it can infringe Petitioners' religious direction over their children.

The Board's more recent amendment to the Guidelines, which bans all "curricular" opt-outs, doesn't solve the problem. The surviving opt-outs for "noncur-

ricular" activities undermine the Board's asserted interests in the same way. Moreover, the Board's decision to level-down was a targeted response to parents' religious objections. Any doubt was removed by Board members' explicit religious hostility—which has never been disavowed—in accusing objecting parents of aligning with "white supremacists" and "xenophobes" and criticizing their children for "parroting" their parents' "dogma." The non-neutrality compounds the lack of general applicability.

None of this can survive strict scrutiny. The same national consensus on parental deference that demonstrates substantial interference also demonstrates there is no compelling interest in withholding notice and opt-outs. And the Board's generic concerns about disruption, stigma, and compliance with unspecified civil rights laws fail the "more precise" analysis demanded by the First Amendment. Finally, in its slapdash blitz to eliminate opt-outs and exclude parents, the Board did not even bother to consider obvious less restrictive means. Strict scrutiny demands far more.

* * *

Breaking the bond between parent and child to develop the state's view of the "ideal citizen[]" has no root in the "ideas * * * upon which our institutions rest." *Meyer* v. *Nebraska*, 262 U.S. 390, 627-628 (1923). The Court should reverse.

ARGUMENT

I. The Board has burdened Petitioners' free exercise.

Petitioners may "prov[e] a free exercise violation in various ways." *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022). Here, there are at least two.

A. The Board's actions substantially interfere with Petitioners' rights under *Yoder* to direct the religious upbringing of their children.

This case falls squarely within *Yoder*, triggering Petitioners' rights under the Free Exercise Clause.

1. The Court has "long recognized the rights of parents to direct 'the religious upbringing' of their children." *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 486 (2020). In *Meyer* v. *Nebraska*—decided before the Free Exercise Clause was incorporated against the states—a teacher at a Lutheran parochial school was tried and convicted for teaching students German, which was prohibited by a state law enacted during World War I. 262 U.S. 390, 396-397 (1923). "The text book used for such teaching was a book of biblical stories." *Meyer* v. *State*, 187 N.W. 100, 101 (Neb. 1922). The defendant argued that "in teaching the German language in this book he was giving religious instruction." *Ibid.* In reviewing his conviction, this Court upheld the right of parents to "establish a home and bring up children" and to "control [their] education," including in teaching a foreign language. *Meyer*, 262 U.S. at 399, 401. No law could restrict this right "without doing violence to both letter and spirit of the Constitution." *Id.* at 402.

Two years later, the Court reinforced this ruling in *Pierce* v. *Society of Sisters of the Holy Names of Jesus & Mary,* 268 U.S. 510 (1925). *Pierce* addressed a law that "the Ku Klux Klan and other Nativist groups pushed through * * * requiring all children to attend public schools; the effect would have been to close the Catholic schools." Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221, 223 (1993). On review, this Court found it "entirely plain" that a law mandating public education violated "the right of parents to choose" for their children an "appropriate mental and religious training" in a private religious school. *Pierce*, 268 U.S. at 532, 535. Parents "have the right, coupled with the high duty, to recognize and prepare" their children for "obligations" beyond duties owed the state. *Id.* at 535. Thus, even though the Oregon law was "expected to have general application," *Pierce* rejected "any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." *Ibid.*

After incorporating the Free Exercise Clause against the states, the Court extended this free exercise right into public schools in *West Virginia State Board of Education* v. *Barnette*. There, to foster the "spirit of Americanism," and as part of its "instruction in history" and "civics," the West Virginia Board of Education required public school students to salute and pledge allegiance to the flag. 319 U.S. 624, 625-626 (1943). Participation was "not optional." *Id.* at 632. Jehovah's Witness parents objected to this requirement, which violated their religious beliefs, and sued under the Free Exercise Clause to opt their children out. *Id.* at 629.

There was no evidence that the West Virginia school board required children to "become unwilling converts" or "forgo any contrary convictions." *Barnette*, 319 U.S. at 633. This Court nonetheless held that compelling the pledge "invades the sphere of intellect and spirit" that the First Amendment guards "from all official control." *Id.* at 642. Justices Black and Douglas provided the deciding votes, emphasizing that "compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation" "fails to accord full scope to the freedom of religion secured * * * by the First and Fourteenth Amendments." *Id.* at 643-644 (Black, J., and Douglas, J., concurring); see also *id.* at 645 (Murphy, J., concurring) (pledge requirement violates the "freedom to believe [and] freedom to worship one's Maker according to the dictates of one's conscience").

The Court rejected the argument that the pledge requirement was justified by the government's interest in "National unity [a]s the basis of National security." *Barnette*, 319 U.S. at 640. That interest was insufficient to overcome the "freedom" to be "spiritually diverse"—to differ not just as to "things that do not matter much," but also "as to things that touch the heart of the existing order." *Id.* at 641-642. The Court also rejected the argument that policing the "functions of educational officers * * * would in effect make [it] the school board for the country." *Id.* at 637. The First Amendment "protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." *Ibid.*

Wisconsin v. *Yoder* further rooted the right recognized by *Pierce, Meyer,* and *Barnette* in the Free Exercise Clause. In a claimed effort to "protect children

from ignorance" and to prepare them to "be self-reliant and self-sufficient participants in society," Wisconsin mandated public school attendance for children up to the age of 16. *Wisconsin* v. *Yoder*, 406 U.S. 205, 221-222 (1972). A group of Amish parents who believed secular education beyond the eighth grade "would not only expose themselves to the danger of the censure of the church community, but * * * also endanger their own salvation and that of their children," refused to comply with the statute and challenged its application on free exercise grounds. *Id.* at 209.

In ruling for the parents, the Court recognized the "fundamental interest of parents" to guide their children's religious future and education, which was "established beyond debate as an enduring American tradition." *Yoder*, 406 U.S. at 232; see also *Espinoza*, 591 U.S. at 486 ("[d]rawing on" this tradition); *id*. at 525 (Breyer, J., dissenting) ("The Free Exercise Clause draws upon a history that places great value upon the freedom of parents to teach their children the tenets of their faith."); see also *Our Lady of Guadalupe Sch.* v. *Morrisey-Berru*, 591 U.S. 732, 754-756 (2020) (highlighting the "central importance" for religious believers in "educating the young in the faith"). Considering this enduring interest, the Court agreed that secondary schooling would, in fact, burden the parents' free exercise rights "by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community." *Yoder*, 406 U.S. at 218.

To support this conclusion, the Court repeatedly emphasized that children entering high school are at a "crucial adolescent stage of development," including a "crucial * * * period of religious development."

Yoder, 406 U.S. at 218, 223; see also *id*. at 211-212. For Amish children, high school was a turning point, with increased emphasis on "intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students"—values that were "hostile to Amish beliefs." *Id*. at 211. All this, along with "teachers who are not of the Amish faith—and may even be hostile to it—interpose[d] a serious barrier to the integration of the Amish child into the Amish religious community." *Id*. at 211-212.

Having found a free exercise burden, the Court proceeded to strict scrutiny. That analysis focused on the state's interest in education. Although "[p]roviding public schools ranks at the very apex of the function of a State," the Court recognized that "[t]he requirement for compulsory education beyond the eighth grade [was] a relatively recent development." *Yoder*, 406 U.S. at 213, 226. The state's core interest was in "protect[ing] children from ignorance" and preparing them to "be self-reliant and self-sufficient participants in society." *Id*. at 221, 222. The nation's "fundamental theory of liberty" excluded "any general power of the State to standardize its children." *Id*. at 233.

2. The principles in *Yoder* distilled from *Meyer*, *Pierce*, and *Barnette* control the result here. There is no dispute that Petitioners sincerely believe that subjecting their children to instruction contrary to their religious beliefs could "endanger their own" standing before God "and that of their children." *Yoder*, 406 U.S. at 208; Pet.App.532a ("detrimental spiritual consequences"); Pet.App.541a ("spiritually and emotionally harmful"); Pet.App.543a-544a (serious "risk" to "flourishing and happiness"). And it is also undisputed that,

in response to Petitioners' requests to opt their children out for religious reasons, the Board ultimately prohibited that religious exercise. Pet.App.533a-534a, 540a, 544a-545a. Petitioners could no longer direct their children away from religiously objectionable instruction on gender and sexuality. They weren't even allowed to know when the instruction would take place. Pet.App.648a, 657a. By any definition, that constitutes "substantial interference" with Petitioners' religious development of their children. *Yoder*, 406 U.S. at 213 ("compelling attendance * * * unreasonably interfere[s] with the interest of parents in directing the rearing of their off-spring").

The Board's intentionality confirms the burden's substantiality. As the Board acknowledges, its curriculum was *designed* to "[d]isrupt" children's "cisnormativity" and "either/or thinking." Pet.App.622a, 629a, 633a; cf. *Barnette*, 319 U.S. at 633 (goal to instill certain "attitude of mind"). Its teacher guides do not focus on "sentence structure, word choice, and style." BIO.5. They *anticipate* a religious burden, providing teachers party-line responses to what students "might say" when their religious beliefs have been predictably confounded by the storybook instruction. Pet.App.628a-635a. The Board encourages teachers to rectify students' questions with ideological, value-laden responses that imply that students are not being "fair," Pet.App.629a, are out of touch ("Harry Styles wears dresses"), Pet.App.633a, or are being "hurtful" or are "confus[ed]" in asking questions such as "How can someone be both a boy and a girl or neither?" Pet.App.630a-631a. The source-books for responding to student questions expose the aim: "Correcting Kids' Stereotypes;" "Responding to Sexism, Homophobia and Transphobia;" "Anti-Bias Education for Young

Children and Ourselves;" and "Gender Spectrum." Pet.App.635a.

The Board foresaw the inevitable burden on parents too, feeding teachers similarly dismissive boilerplate. Pet.App.636a-641a. For parents asking why children should "learn about gender and sexuality identity at school," the Board condescends: "A School is where children are taught to respect one another * * * [and] [l]earning about * * * gender diversity and sexuality identity diversity is part of that work." Pet.App.636a. For parents worried that their children are "too young" to have the gender binary disrupted, the Board imparts armchair sociology: "Children are already learning about it and mostly see 'straight' and 'cisgender' representations around them," so "[i]t is never too early." Pet.App.637a-638a. And for parents concerned that such instruction would undermine "the values" they seek to "instill[ ] in [their] child[ren]," the Board assures: "Teaching about LGBTQ+ is not about making students think a certain way; it is to show that there is no one 'right' or 'normal' way to be." Pet.App.638a. This is relativistic dogma masquerading as tolerance.

Not even Montgomery County's own elementary school principals were fooled. In private correspondence from November 2022, they warned the Board that the storybooks, guidance for teachers, and overall "messaging" were age-inappropriate, misleading, and "dismissive of religious beliefs." Pet.App.614a-615a, 617a, 619a.

It's no mystery why these concerns went unheeded. The storybooks were deliberately selected "to actualize" the Board's "sexual" and "gender identity guidelines." Pet.App.640a-641a. The Board wants students

to "come away from [the storybook] instruction with a new perspective not easily contravened by their parents." J.A.46; Pet.App.657a. That's why it accused objecting parents of aligning with "white supremacists" and "xenophobes" and scorned objecting students for "parroting" their parents' "dogma." Pet.App.106a-107a. If the Board doesn't intend to disrupt students' religious beliefs, there is no reason to deny notice of when the books will be read. The entire point of the exercise is to achieve what burdens Petitioners: substantial interference with their ability to direct the religious education of their children on matters concerning gender and sexuality. The Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Department of Com.* v. *New York*, 588 U.S. 752, 785 (2019) (quoting *United States* v. *Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)). "[M]odest estimates" of judicial competence in "such specialties as public education" are not a Bill of Rights bypass. *Barnette*, 319 U.S. at 640.

3. As in *Yoder*, Petitioners' showing of substantial interference is buttressed by a strong history and tradition—here, one of parental deference when it comes to instruction on gender and sexuality. As "any parent knows," children and adolescents "lack maturity," are prone to "impetuous and ill-considered actions and decisions," and are especially susceptible to outside "influences" and "pressures, including peer pressure." *Roper* v. *Simmons*, 543 U.S. 551, 569 (2005); see also *Yoder*, 406 U.S. at 211. This is especially concerning when it comes to "issue[s] as sensitive and important as [child] sexuality" and gender. *Bowen* v. *Kendrick*, 487 U.S. 589, 612 (1988). Such instruction implicates "fundamental elements of religious doctrine." *Ibid.* And sex education in "group settings, such as public

schools, where confident and authoritative leaders endorse particular beliefs and conduct, will have significant influence upon minor students." Helen M. Alvaré, *Families, Schools, and Religious Freedom*, 54 Loy. U. Chi. L.J. 579, 600 (2023); see also Pet.App.40a-41a (acknowledging "heightened concern[]" in light of Petitioners' children's "young ages and impressionability"); Pet.App.616-617a (principals' concerns that materials not age-appropriate). Thus, even when protecting sexual minorities, this Court has promised First Amendment protection for "religious * * * persons" as they "seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." *Obergefell* v. *Hodges*, 576 U.S. 644, 679-680 (2015).

Deference to parental authority on such matters is further reflected in the development of sex education. It did not become a standard part of public school curriculum until the 1970s and, even then, was focused mainly on physiology, hygiene, and disease prevention. *Supra* 8. More "comprehensive" sex education was not a standard aspect of public high school instruction until the 1990s. *Supra* 8. And discussion of human sexuality and gender identity in *pre-kindergarten* is—to put it mildly—a "relatively recent development." *Yoder*, 406 U.S. at 226.

Even as public school instruction on human sexuality has expanded, it has almost always been accompanied by parental notice and requirements for either parental opt-outs or opt-ins. *Supra* 7. Only three states have no such requirement, and they are silent on the matter. *Supra* 7. No state has ever affirmatively denied parents access to information and opportunity

to opt-their child out from instruction on gender and sexuality. This pattern reinforces Petitioners' "convincing showing" that compelled instruction on gender and sexuality "substantially interfer[es] with the religious development" of their children. *Yoder*, 406 U.S. at 218, 235-236.

4. The Fourth Circuit dismissed all this, summarily concluding that *Yoder* has been "markedly circumscribed" and "limited" to the "unique record" established by the Amish. Pet.App.37a, 38a. But this Court has never suggested that *Yoder's* holding is so restricted. See, *e.g.*, *Espinoza*, 591 U.S. at 486 (relying on the "enduring American tradition" affirmed by *Yoder*). And *Yoder* itself derived its holding from "[t]he history and culture of Western civilization" and "[t]he fundamental theory of liberty upon which all governments in this Union repose." *Yoder*, 406 U.S. at 232, 233. The right of parents to direct the religious education of their children was "specifically and firmly fixed" in the First Amendment, "[l]ong before there was general acknowledgment of the need for universal formal [sex] education." *Id*. at 214; see also *Barnette*, 319 U.S. at 638 ("very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy").

The Fourth Circuit's view that Petitioners could experience no religious burden absent evidence that students were being compelled "to *change* their religious beliefs," Pet.App.34a, is similarly foreign to *Yoder*. The Amish parents were not required to wait until their children "ha[d] in fact been asked" to "disavow" the Amish way of life. Pet.App.34a. Nor did the Court have any objective measure for determining whether—after eight years in the public schools, *Yoder*, 406 U.S. at

207 & n.1—staying just one or two more really would have pushed Amish children beyond the point of no religious return. Rather, based on the student's age, the realities of adolescent development, and the nature of the high school environment, the Court accepted the parents' religious judgment that further "exposing [their] children to worldly influences" would "substantially interfer[e] with the religious development of [their] child." *Yoder*, 406 U.S. at 218. Petitioners have made the same showings—only further bolstered by undisputed evidence that the storybook curriculum is actively hostile to their religious beliefs and by a long and deep national consensus protecting parental direction on gender and sexuality. Thus, a holding of "substantial interference" here fits easily within *Yoder's* reasoning.

In contrast, under the Board's rule, there is no limit to what schools could teach children about gender and sexuality. This February, parents in New York were ignored by their school board after they objected that the book "The Rainbow Parade"—which "includes depictions of a naked person shown from behind, furries, and a gay couple outfitted in leather BDSM * * * attire"—was read to their elementary school children ages five to eleven.[13] Starting in the 2025-2026 school year, Minnesota third-graders will be required to use "non-binary gender pronouns" if they want to meet writing benchmarks.[14] As long as

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[13] Shane Galvin, *NY school board meeting descends into chaos over 'LGBTQIA+' book as large group of fuming parents takes over*, *N.Y. Post*, Feb. 12, 2025, https://perma.cc/3DHP-SEJD.

[14] *2020 Minnesota K-12 Academic Standards in English Language Arts (ELA)* at 37, Minn. Dep't of Educ. (Feb. 2024), https://perma.cc/84LN-7B3E.

it's done in English class, schools could teach children of any age that "[s]ex play with friends of the same gender is not uncommon during early adolescence,"[15] subject them to porn literacy lessons,[16] or even ask them to participate in graphic and sexually explicit sex simulations.[17] To the Board, "once you enroll your children in public schools, you have to recognize that they may be exposed to this material." C.A. Oral Arg. 48:30-48:36, http://bit.ly/4iepRQw; see also *id.* at 25:57-26:15 ("part of the compromise"). When it comes to instruction on gender and sexuality, such "hydraulic insistence on conformity to majoritarian standards" makes the First Amendment burden on religion "inescapable." *Yoder*, 406 U.S. at 217-218.

B. The Board's actions are not generally applicable or neutral under *Lukumi*.

Even if *Yoder* didn't apply, *Smith's* residual rule, as increasingly clarified by the Court beginning in *Lukumi*, proves a First Amendment violation. That is because the ban on notice and opt-outs is neither generally applicable nor neutral.

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[15] Compl. at 10, *Citizens for a Responsible Curriculum* v. *Montgomery Cnty. Pub. Schs.*, No. 8:05-cv-1194 (D. Md. May 3, 2005), https://perma.cc/68QW-MXLE.

[16] Justin Sherman & Taylor Mooney, *"Porn literacy" class picks up where standard sex ed leaves off*, *CBS News*, Nov. 17, 2019, https://perma.cc/ZTR6-G6LC.

[17] *Brown* v. *Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 529 (1st Cir. 1995) (mandatory assembly where instructor "had a male minor lick an oversized condom with her" and "encouraged a male minor to display his 'orgasm face' with her for the camera").

1. A government restriction burdening religion is not "generally applicable" when it includes categorical exceptions that treat religious requests for accommodation differently than "comparable" secular requests. *Kennedy*, 597 U.S. at 526-527, 543-544. The existence of a "formal mechanism for granting exceptions" also "renders a policy not generally applicable." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 537 (2021). Here, the Board's policy trips both wires—each triggering strict scrutiny.

Categorical exceptions. Strict scrutiny applies whenever the government treats "*any* comparable secular activity more favorably than religious exercise." *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021). Comparability turns not on the facial similarity between one activity and another, but rather, on how each activity impacts the government's underlying "interest that justifies the regulation at issue." *Ibid.* This ensures that courts do not miss disparate treatment by focusing on the government's own, possibly self-serving, "categorizations." *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14, 17 (2020).

Here, the Board relies on superficial categories to deny opt-outs to preschoolers while permitting opt-outs for children in junior high and high school. It classifies the storybooks as "English Language Arts" curriculum (no opt-outs) while classifying discussion of sexuality in later grades as health class (opt-outs permitted). J.A.73-75. The Court rejects such strategic categorizing. See, *e.g.*, *Tandon*, 593 U.S. at 63-64.

Even on their own terms, the Board's categories are gossamer-thin. That is because both sets of lessons were created to further the same "LGBTQ-Inclusive" interest. Pet.App.234a. The Board concedes that the

storybook curriculum was adopted pursuant to Maryland's 2019 "Equity Regulation," J.A.2, which seeks to ensure "educational equity" around "[g]ender identity" and "[s]exual orientation." Md. Code Regs. §§ 13A.01.06.01(B), 13A.01.06.03(B)(2), (5). That same regulation also spurred "[i]nclusiv[ity]" updates to the "Family Life and Human Sexuality" unit of the statewide health curriculum. J.A.59-61, J.A.62; see also J.A.65 ("updated" to "implement the [2019 equity] regulation"). Thus, beyond what is taught through the storybooks, "Gender identity and expression" is also taught during health class beginning in "Prekindergarten" through high school, along with "Sexual orientation and identity" beginning in "Grade 4" through high school. J.A.68-72, 80.

Though justified by the same interest as the storybook lessons, the Board admits that when inclusivity instruction is presented in health class, "students are permitted to opt out for any reason." BIO.22; see also J.A.3; Pet.App.662a. But "families may not choose to opt out of engaging with" and cannot even be "inform[ed] * * * when [the] inclusive books are read." Pet.App.662a. The Board's own principals seized on this precise *Tandon* problem, noting that, "[f]or example, family life isn't taught until fifth grade, but a second grade book uses terminology such as *cisgender* or *transgender*." Pet.App.618a.

"Only by adjusting the dials *just right* * * * can you engineer" such an absurd conclusion. *Masterpiece Cakeshop, Ltd.* v. *Colorado C.R. Comm'n*, 584 U.S. 617 (2018) (Gorsuch, J., concurring). And "[i]t is no answer that [the government] treats some comparable secular [opt-out requests] as poorly as or even less favorably than the religious [opt-outs] at issue." *Tandon*, 593

U.S. at 62. Allowing all secular opt-outs (from the health curriculum) while banning all religious opt-outs (from the storybooks) shows that the government's underlying interest (in "LGBTQ-inclus[ivity]") is not generally applicable.

Discretionary exceptions. The Board's patchwork scheme is also rife with—and the result of—the Board's "sole discretion." *Fulton*, 593 U.S. at 535. Under *Fulton*, strict scrutiny is triggered when the government has "a mechanism for individualized exemptions," because it "'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id.* at 533, 535, 537 (quoting *Employment Div.* v. *Smith*, 494 U.S. 872, 884 (1990)). And such discretion means that burdens imposed by the government are the opposite of the "incidental" burdens *Smith* envisioned. 494 U.S. at 878.

The Board's shifting policies are shot through with discretion. Consider first the history of the Board's actions. For almost the entire 2022-2023 school year, notice of storybook instruction was provided and opt-outs were permitted. Pet.App.185a-187a, 497a-498a, 533a-534a, 540a, 544a-545a. These opt-outs themselves were granted on a discretionary basis. Pet.App.220a-221a ("When possible, schools should try"; parents and students "have the right to ask"; "it may be feasible to accommodate"). The Board publicly reiterated on March 22, 2023, that "[i]f a parent chooses to opt out, a teacher can find a substitute text for that student that * * * aligns with curriculum." Pet.App.184a, 662a.

But overnight, and without explanation, the Board posted on its webpage that it was withdrawing notice and opt-outs—for the storybook instruction alone.

Pet.App.185a, 662a. This discretion-laden ad hocery triggers strict scrutiny. *Fulton*, 593 U.S. at 537-538.

Discretion runs through the Board's Religious Diversity Guidelines as well. Under the 2022-2023 Guidelines, the Board claimed discretion to deny accommodations if the requests became "too frequent" or "too burdensome." Pet.App.221a. With respect to the storybook discussions, on March 23, 2023, the Board withdrew notice and opt-outs wholesale in a purported exercise of that discretion, Pet.App.605a-608a, 662a, but retained discretion to change course or adopt a more targeted approach, Pet.App.221a. The Board exercised that retained discretion immediately, choosing to continue opt-outs for the remainder of the school year if "schools already had granted accommodation requests." Pet.App.608a. In general applicability terms, that created *another* "mechanism for individualized exemptions," *Fulton*, 593 U.S. at 533, this time freezing the clock for select schools until "after the 2022-2023 school year ended." Pet.App.608a. If oscillating grace periods aren't discretionary, nothing is.

This wasn't the end of the Board's discretionary tinkering. Months later and in response to this lawsuit, the Board formally revised the Guidelines to state that the Board will no longer "accommodate requests for exemptions from required curricular instruction or the use of curricular instructional materials based on religious, and/or other, objections." Pet.App.672a. But the new Guidelines still include an exception, providing that students "may" opt-out for "noncurricular activities" or "free-time events" that "conflict with a family's religious, and/or other, practices." Pet.App.672a. And under both the prior and current iterations of the Guidelines, the Board retains

discretion to excuse students "who do not want to participate" in instruction about religious holidays presented "in a factual manner" or holiday activities ("[e]ven birthdays") that "may be viewed by others as having religious overtones." Pet.App.222a-223a, 673a-674a. The Board's mid-litigation withdrawal of two of the storybooks from the curriculum over "concerns about the content" further demonstrates the Board's ongoing discretion over when and how it can violate Petitioners' religious direction of their children. *Supra* 11 n.10. The haphazard quality of the Board's line-drawing is a tell: reserved discretion "invite[s]" the Board "to decide which reasons" for opting out "are worthy of solicitude." *Fulton*, 593 U.S. at 537. That alone "renders [the] policy not generally applicable." *Ibid.*

2. The removal of notice and opt-outs is also not neutral. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 593 U.S. at 533. Doing so is a *de jure* burden on Free Exercise that requires the government action to be set aside without any consideration of the government's interest. *Masterpiece*, 584 U.S. at 638-639.

There are "many ways of demonstrating that the object or purpose" of government action is "the suppression of religion or religious conduct." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993). One is to look at the text of the government's law, regulation, or policy. *Ibid.* But "[f]acial neutrality is not determinative." *Id.* at 534. The Free Exercise Clause also prohibits "masked" discrimination. *Ibid.* Masked discrimination can be shown

through "the effect," "design," and "net result" of a government policy. *Id*. at 535-536.

Alternatively, "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members" can also evidence discriminatory object or purpose. *Masterpiece*, 584 U.S. at 639. "[O]fficial expressions of hostility to religion," especially when "not disavowed" by the decisionmaker "at any point in the proceedings," are also "inconsistent with what the Free Exercise Clause requires." *Ibid*.

Here, by allowing notice and opt-outs, then—after parents raised religious objections—withdrawing them for storybook instruction only, the Board unlawfully "target[ed] religious conduct for distinctive treatment" in at least two ways. *Lukumi*, 508 U.S. at 534.

First, "the effect," "design," and "net result" of the Board's rescission evinces a religiously discriminatory object. The Board has long granted parental opt-outs from a wide variety of school activities, including those involving books, band, and Halloween. Pet.App.221a-223a. Per Maryland law, this has also included opt-outs from "instruction related to family life and human sexuality objectives." Md. Code Regs. § 13A.04.18.01(D)(2)(e)(i); Stephanie Ramirez, *MCPS revises policy on LGBTQ-friendly books*, *Fox 5 DC*, Mar. 24, 2023, https://perma.cc/8L5G-XQ9X. Yet after receiving religious opt-out requests, the Board decided overnight to withdraw notice and opt-outs in one—and only one—area: the religiously objectionable storybook lessons. The obvious "burden" of the Board's decision fell predominately on religious families. *Lukumi*, 508

U.S. at 535-536. Indeed, the withdrawal of notice and opt-outs required the Board to depart from its Religious Diversity Guidelines—and resulted in hundreds of people, "largely * * * Muslim and Ethiopian Orthodox parents," attending Board meetings in protest. Asbury & Shepherd, *Hundreds of Maryland parents protest,* https://perma.cc/MJ2Q-BXTW.

Effectively, the Board designed a regime where there was no notice or opt-outs only for discussions involving these storybooks—an area of curriculum that it knew was laden with religious import. The obvious religious significance explains why, after this case commenced, the Board leveled down its Guidelines to match the lack of notice and opt-outs for the storybook lessons. Amending the Guidelines during this case is only further evidence that the notice and opt-out withdrawal was a "religious gerrymander." *Lukumi*, 508 U.S. at 535. This is "not neutral * * * and therefore trigger[s] strict scrutiny under the Free Exercise Clause." *Tandon*, 593 U.S. at 62.

Second, in justifying the no-opt-out policy, multiple Board members expressed hostility to religion and the viewpoints of dissenting parents and students. See *Masterpiece*, 584 U.S. at 639. Board member Harris accused one student supporting opt-outs of "parroting" his parents' "dogma," Pet.App.106a, and compared a group of mostly Muslim and Ethiopian Orthodox parents to "white supremacists" and "xenophobes." Pet.App.106a-107a; Em Espey, *Parents, students, doctors react to MCPS lawsuit targeting LGBTQ+ storybooks*, *MoCo360*, June 2, 2023, https://perma.cc/5GD9-2YVQ. She also accused the Parents of finding "another reason to hate another person." Pet.App.187a. A

presentation on the storybook lessons echoed these remarks, accusing parents of promoting a "dehumanizing form of erasure." Pet.App.187a, 514a. Another Board member added that, "[y]es, ignorance and hate does exist in our community." Pet.App.184a.

In over a year-and-a-half of litigation, no Board members have disavowed these statements, confirming that the Board did not provide "neutral and respectful consideration." *Masterpiece*, 584 U.S. at 634. In the face of such government hostility, a policy must be "'set aside' * * * without further inquiry"—that is, without strict scrutiny. *Kennedy*, 597 U.S. at 525 n.1 (quoting *Masterpiece*, 584 U.S. at 639).

3. The Fourth Circuit never reached *Lukumi's* neutrality and general applicability standards, concluding that coerced instruction imposed no burden until Petitioners were actually "compel[led] * * * to *change* their religious beliefs," their "conduct," or "what they teach their own children." Pet.App.34a. The Board similarly argues that "this Court's cases" require "coercion to change or act contrary to one's religious beliefs." BIO.23. These arguments are wrong for at least two reasons.

First, the Board has burdened Petitioners' free exercise under "the ordinary meaning" of the Free Exercise Clause. *Fulton*, 593 U.S. at 567 (Alito, J., concurring in judgment). The Board's actions "prohibit[]" their religious exercise by "forbidding or hindering" their religious practice of directing the education of their children on religiously sensitive subjects concerning gender and sexuality. *Ibid.*; see also *Kennedy*, 597 U.S. at 525 (assessing burden in a like manner). Inhibiting this "traditional interest of parents with respect to the religious upbringing of their children" is

sufficient to trigger both the "substantial interference" analysis under *Yoder* and principles of neutrality and general applicability under *Lukumi*. *Yoder*, 406 U.S. at 214; *Kennedy*, 597 U.S. at 525.

Second, in cases from *Sherbert* to *Carson*, the Court has long rejected the Fourth Circuit's standard of "actual coercion" to change one's beliefs. In *Sherbert*, for example, the plaintiff was denied state unemployment for failure to "accept available suitable work" after she was "discharged" for not being available to "work on Saturday"—her sabbath. *Sherbert* v. *Verner*, 374 U.S. 398, 399-401, 399 n.2 (1963). The Court held that being "force[d] * * * to choose" between benefits and her faith was a "substantial infringement" of her "First Amendment right." *Id.* at 404, 406. It was sufficient that the condition on benefits "inevitably deterred or discouraged the exercise of First Amendment rights." *Id*. at 405.

Similarly, in *Trinity Lutheran*, the state had barred a religious school from participating in a playground refurbishment program. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 454-456 (2017). The state argued that "declining to extend" a subsidy did not "burden" the church's religious exercise, because it did "not *prohibit* the Church from engaging in any religious conduct or otherwise exercising its religious rights." *Id*. at 462-463. But the Court rejected that argument, concluding it was "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id*. at 463. "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith * * * a

burden upon religion exists." *Thomas* v. *Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717-718 (1981).

Public education cannot be described as anything less than an "important" public benefit. Pet.App.139a ("Certainly, public education is a valuable public benefit."). Indeed, the Maryland constitution entitles Petitioners to "Free Public Schools." Md. Const. Art. VIII § 1. "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Yet Petitioners must either deny their children that opportunity (at the cost of private schooling, homeschooling, or criminal penalties and fines) or subject them to compelled participation in instruction that violates their religious beliefs. Because this "inevitably deters or discourages the exercise of First Amendment rights," *Espinoza*, 591 U.S. at 478, that is a religious burden sufficient to trigger principles of neutrality and general applicability.

The Board still contends there is no burden because Petitioners remain "free to impart their religion at home." Resp. C.A. Br. 27. But *Barnette* rejected this argument over 80 years ago in reversing *Gobitis*. *Gobitis* had upheld children of Jehovah's Witnesses being forced to salute the American flag against their parents' religious objections. *Minersville Sch. Dist.* v. *Gobitis*, 310 U.S. 586, 591-592 (1940). The Court rested its holding on judicial deference to public schools: "the court-room is not the arena for debating issues of educational policy." *Id.* at 598. As such, the Court concluded that the Free Exercise Clause was not offended by forced participation of students against their parents' religious beliefs—so long as the parents retained the ability "to counteract by their own persuasiveness

the wisdom and rightness of those loyalties which the state's educational system [was] seeking to promote." *Id.* at 599.

When reversing *Gobitis*, the Court refused to let "modest estimates" of its judicial competence in "such specialties as public education" be an escape hatch from enforcing the Free Exercise Clause. *Barnette*, 319 U.S. at 640. Regardless of what parents could teach at home, the Court concluded that "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes," the government—"Boards of education not excepted"—could not ignore "the limits of the Bill of Rights." *Id.* at 637. Similarly, in *Espinoza* and *Carson*, it did not matter that parents were already paying tuition without the state subsidy. *Espinoza*, 591 U.S. at 470-471; *Carson* v. *Makin*, 596 U.S. 767, 775-776 (2022). And in *Kennedy*, it "did not matter" that "the high school football coach could have prayed at home." Pet.App.64a. Nor do Petitioners' First Amendment rights yield at the school-bus or carpool drop-off.

* * *

Under any common-sense understanding of the term, a school "burdens" parents' religious beliefs when it forces their children to undergo classroom instruction about gender and sexuality at odds with their religious convictions. Especially when that instruction is specifically designed to "[d]isrupt" the child's beliefs, the burden is obvious and must undergo strict scrutiny.

II. The Board's actions fail strict scrutiny.

The Board cannot possibly satisfy strict scrutiny.

1. In the courts below, the Board claimed three potential compelling interests: avoiding "significant disruptions" in the classroom; ensuring a "safe and conducive" learning environment free from "social stigma and isolation"; and complying with "state and federal nondiscrimination laws." Pet.App.607a-608a. The Court "cannot accept such * * * sweeping claim[s]." *Yoder*, 406 U.S. at 221. Rather, "the First Amendment demands a more precise analysis." *Fulton*, 593 U.S. at 541. The Board must show "the asserted harm of granting specific exemptions to particular religious claimants." *Ibid.*

Further, to justify its "relatively recent" withdrawal of all notice and opt-outs, the Board must explain how the withdrawal serves a compelling interest historically sufficient to justify the resulting interference with the "enduring American tradition" of parental direction in religious upbringing. *Yoder*, 406 U.S. at 226-227, 232. Here, that tradition is manifest in the longstanding, nationwide consensus allowing parents to opt their children out of instruction on human sexuality and gender.

The Board's efforts to advance compelling interests "[d]espite this long history" are unlikely to succeed. *Ramirez* v. *Collier*, 595 U.S. 411, 428 (2022); see also *id.* at 442-443 (Kavanaugh, J., concurring) ("Often, the Court also examines history and contemporary state practice to inform the inquiries" into "compelling" interests and "least restrictive" means). In the first place, the Board's interests cannot be justified by history or tradition: none are based on "conduct or actions

so regulated [that] have invariably posed some substantial threat to public safety, peace or order." *Yoder*, 406 U.S. at 230; see also *Fulton*, 593 U.S. at 555 (Alito, J., concurring in judgment) ("this description * * * corresponds closely with the understanding of the scope of the free-exercise right at the time of the First Amendment's adoption"). An interest unjustified by history or tradition is presumptively not compelling. See *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978) ("Tennessee has failed to demonstrate that its views of the dangers of clergy participation in the political process have not lost whatever validity they may once have enjoyed."). For that reason alone, the Board's policy flunks strict scrutiny as to all three of its claimed interests.

But even if a distinct history and tradition upholding the Board's claimed interests could be identified, the Board's own actions make clear that the Board has not treated them as compelling here. First, with respect to its interest in avoiding disruption, the Board—which oversees a district of more than 160,000 students—has cited "one instance" at one school of "dozens of students" seeking opt-outs. Pet.App.607a. This Court has previously "rejected" the argument that the risk of "many" requests is itself a reason to deny a religious accommodation. *Holt* v. *Hobbs*, 574 U.S. 352, 368 (2015). Holding otherwise would mean that the more religiously offensive the government conduct, the more courts must defer to the offending government—at the expense of First Amendment rights. The Constitution does not endorse such moral hazard.

Moreover, the Board has not even attempted to demonstrate a "direct causal link" between allowing

religious-based opt-outs and losing control of public school classrooms. *Brown* v. *Entertainment Merchs. Ass'n*, 564 U.S. 786, 799 (2011); cf. *Mahanoy Area Sch. Dist.* v. *B.L.*, 594 U.S. 180, 188 (2021) ("special interest in regulating speech" arises only if speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others"). And such a compelling interest is unlikely to emerge overnight. Yet here, that is literally what the Board would have to show: why notice and religious-based opt-outs were not disruptive through March 22, 2023, but became so on March 23, 2023, when the Board announced its 180-degree policy turn—which, even then, it did not implement until the next school year. Such a showing is particularly difficult given the ability of school districts nationwide to manage similar opt-outs and the Board itself having allowed opt-outs from so many other parts of its programming for so many years. *Supra* 6-7. "[W]hen so many [others] offer an accommodation, a [school district] must, at a minimum, offer persuasive reasons why it believes that it must take a different course, and the [Board] failed to make that showing here." *Holt*, 574 U.S. at 369.

Second, the Board also cannot justify a compelling interest in a "safe and conducive" learning environment free from "stigma and isolation." Pet.App.607a-608a. While such a goal may be "commendable" on the surface, it is insufficiently "measurable" to "be subjected to meaningful judicial review," *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard College*, 600 U.S. 181, 214 (2023). When it comes to reducing stigma by "learning about gender and sexuality identity diversity," Pet.App.638a, "[h]ow is a court to know whether [students] have been adequately" instructed? *Students for Fair Admissions*, 600 U.S. at

214. And "how is a court to know when" a stigma-free environment has "been reached?" *Ibid.* "There is no particular point" at which a court could conclude that such an "elusive" goal has been met. *Id.* at 214-215.

Furthermore, the Board "fail[s] to articulate a meaningful connection between the means [it] employ[s] and the goal[ ] [it] pursue[s]." *Students for Fair Admissions*, 600 U.S. at 215. It cannot just "make a predictive judgment that such a link exists." *Brown*, 564 U.S. at 799. Indeed, as the Board's own elementary school principals have already observed, the mandated instruction is itself "shaming" to students with contrary views and "dismissive of [their] religious beliefs." Pet.App.619a-620a. This poses no less risk of "social stigma" to these students than to those "who believe that the books represent them." Pet.App.607a-608a. Thus, even assuming a causal benefit for some students, it comes at a cost for others. "[A] law cannot be regarded as protecting an interest 'of the highest order' * * * when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547. And the First Amendment warns against "[s]truggles to coerce uniformity of sentiment in support of some end thought essential to [the] time." *Barnette*, 319 U.S. at 640. "As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be." *Id.* at 641.

Third, the Board has not identified any state or federal laws the Board might violate by honoring religious opt-outs. The very idea runs headlong into "preserving the promise of the free exercise of religion enshrined in our Constitution." *Bostock* v. *Clayton County*, 590 U.S. 644, 681 (2020). And although an interest in "equal treatment" may well be "weighty," the

Court has never deemed it sufficient to deny individuals "an exception for [their] religious exercise." *Fulton*, 593 U.S. at 542. To the contrary, "the First Amendment does not tolerate" forced uniformity "about a question of political and religious significance." *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 596 (2023) (citing *Barnette*, 319 U.S. at 634). That First Amendment rule protects the full spectrum of viewpoints—from the "sensible and well intentioned" to the "deeply 'misguided.'" *Id.* at 586. That protection extends to Petitioners here. Directing their children according to their "decent and honorable" religious views about human sexuality and gender identity is exactly what they are doing. *Obergefell*, 576 U.S. at 672.

2. The Board also fails the least restrictive means analysis. "[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. But here, the Board "has failed to offer any showing that it has even considered less restrictive measures than those implemented here." *Fellowship of Christian Athletes* v. *San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 694 (9th Cir. 2023) (en banc) (citing *Thomas*, 450 U.S. at 718). That is reason alone for failing the least restrictive means test. Indeed, as mentioned, the Board has never explained its very public flip-flop. Why were opt-outs from the storybook discussions perfectly fine on March 22, 2023, but "disruptive" the very next day? Such a *volte-face* provides no "basis for deference." *Ramirez*, 595 U.S. at 429.

It takes no special creativity to see that less restrictive means exist. The Board could, for example, leave reading and discussing the storybooks up to the students. The Board could ask that the books be left on

shelves, rather than require teachers to read and discuss them in class. Or, like in Maryland's Carroll County, the Board could teach the importance of "treat[ing] all people with dignity and respect" without delving into "all gender identities and expressions." *Approval of Family Life Advisory Committee Opt-Out Recommendations for Grades PreK through 5 Family Life Unit* at 3-1, Carroll County Public Schools (Jan. 11, 2023), https://perma.cc/A7BB-R35Y.

The Board simply cannot "demonstrate" why a total denial of religious-based opt-outs is the least restrictive means of protecting its alleged interests—especially considering nationwide practice to the contrary. See *Sherbert*, 374 U.S. at 407 & n.7 (discussing the workability of granting benefits in analogous situations nationwide); *Ramirez*, 595 U.S. at 444 (Kavanaugh, J., concurring) ("experience matters"). Yet the Board has never even tried to make this "minimum" showing. *Holt*, 574 U.S. at 369. That is, the Board has never demonstrated why it "must take a different course" than 47 states allowing opt-outs for sexuality instruction. *Ibid.*

In sum, the Board's strict scrutiny defense reduces to the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006). But this Court has never accepted that argument in any of its Free Exercise cases. This should not be the first.

* * *

"The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Yoder*, 406 U.S. at 233. At the core of that duty are Petitioners' religious beliefs about human sexuality and gender. The Board wants to disrupt Petitioners' efforts to pass those beliefs on to their young children. But the Free Exercise Clause protects Petitioners' right and high duty. Breaking the bond of parent and child should never be the price of public education.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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