No. 24-297

IN THE
Supreme Court of the United States

TAMER MAHMOUD, ET AL.,

Petitioners,

v.

THOMAS W. TAYLOR, ET AL.,

Respondents.

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

BRIEF OF PROFESSORS LAWRENCE G. SAGER AND NELSON TEBBE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Professor Lawrence G. Sager and Professor Nelson Tebbe are preeminent constitutional theorists and scholars who teach, write on, and study the history and scope of the First Amendment's Free Exercise and Establishment Clauses. Amici have focused significant scholarly attention on the Free Exercise Clause requirement that governments treat religious people, beliefs, and practices with appropriate respect. Through that work, amici have developed a deep understanding of the doctrine and principles relevant to Petitioners' arguments about neutrality and general applicability.

Professor Sager holds the Alice Jane Drysdale Sheffield Regents Chair at the University of Texas at Austin School of Law.[2] Professor Sager has written extensively on religious freedom and the First Amendment. Professor Sager is the co-author of *Religious Freedom and the Constitution* (2006) (with C. Eisgruber), and has written numerous articles and book chapters about religious freedom, including *Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate*, *in* The Rise of Corporate Religious Liberty (Micah Schwartzman, Chad Flanders & Zoë Robinson, eds. 2016);

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[1] Pursuant to Rule 37, counsel for amici curiae affirm that no counsel for a party authored this brief in whole or in part and no entity or person, aside from amici or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

[2] Institutional affiliations are provided for identification purposes only. This brief reflects the signatories' personal views only and not the views, if any, of these institutions.

Equal Regard, *in* Law and Religion: A Critical Anthology (Stephen M. Feldman, ed. 2001) (with C. Eisgruber); and *Congressional Power and Religious Liberty After* City of Boerne *v.* Flores, 1997 Supreme Court Review (with C. Eisgruber).

Professor Tebbe is the Jane M.G. Foster Professor of Law at Cornell Law School. His work focuses on freedom of religion, freedom of speech, and other topics in constitutional law. He is the author of *Religious Freedom in an Egalitarian Age* (2017), which examines the contemporary conflict between free exercise and equality law. His recent scholarship on religious liberty includes *The Principle and Politics of Liberty of Conscience*, 135 Harv. L. Rev. 267 (2021), and *The Principle and Politics of Equal Value*, 121 Colum. L. Rev. 2397 (2021).

INTRODUCTION AND SUMMARY OF ARGUMENT

Running through free exercise doctrine is a deep concern that religious belief and practice be treated fairly. When the government seems to treat secular activity better than religious activity, there is reason to worry that the government has devalued religious interests relative to secular ones. Similar unease may arise when the practice of one religion, particularly a minority religion, is treated less favorably than that of another faith; the unequal treatment may indicate a lack of respect, a failure to treat some religious commitments and activities as equally valuable.

Mindful of the threat that sort of disfavoring would pose to free exercise, this Court announced in *Tandon* v. *Newsom*, 593 U.S. 61 (2021), that a regulation that "treat[s] *any* comparable secular activity

more favorably than religious exercise" is subject to strict scrutiny. *Id.* at 62. *Tandon* thus embraces an "equal value" principle. It does not require the government to favor religious activities over all else; it requires the government to treat religious and secular interests with *equal* value by regulating comparable activities the same way. Amici file this brief to respond to Petitioners' erroneous construction of *Tandon* and the cases on which it relies. In ignoring the equal-value principle underlying that precedent, Petitioners grossly misconstrue this Court's cases.

Petitioners rely on *Tandon* for the proposition that the opt-out policy of Montgomery County Public Schools (MCPS) is subject to strict scrutiny because, they say, MCPS treats health classes (Health Instruction) differently than instruction related to books featuring LGBTQ characters and stories (Storybooks). Parents with either religious or non-religious objections to the family life and human sexuality portions of Health Instruction can opt their children out of those units. But parents with either religious or non-religious objections to the Storybooks are not permitted to pull their children out of class when the books are read. Petitioners argue that, because MCPS permits parents to remove their children from Health Instruction, MCPS is constitutionally obliged to permit them to remove their children from instruction related to the Storybooks. That claim—made in the face of the identical treatment of religious and non-religious parental objections, and in the face of the distinctly different educational milieus of Health Instruction and the Storybooks—is grounded in Petitioners' misreading of *Tandon*.

The inquiry at the heart of *Tandon* and the cases from which it developed is whether the government's regulatory approach demonstrates that it has failed to treat religious activities with the same respect as the government accords to other activities. The cases use a "comparability" test as a means of detecting that devaluing of religion. But, as this case demonstrates, that doctrinal device must be understood with regard to its equal-value goal. Without that objective in mind, it is all too easy to expand out what activities are "comparable," making every regulatory asymmetry presumptively unconstitutional.

Properly applied, *Tandon* does not support Petitioners here. First, although MCPS does not permit anyone to opt their children out of the Storybooks, MCPS allows anyone to opt their children out of Health Instruction for *any reason*, including for religious reasons. Petitioners' effort to leverage favorable treatment for religion in one context to extract favorable treatment for the same religion in another context turns *Tandon* on its head. Second, Petitioners have done nothing to show that the Storybooks are actually comparable to Health Instruction in any relevant sense. MCPS treats the two differently because they are different curricula with different substance and structures. Petitioners' misreading of *Tandon* would create a perverse incentive: If a school district's decision to offer a religious accommodation for one part of its curriculum required the school district to offer religious accommodations for *all* curricula—no matter how dissimilar—school districts might choose to not offer any accommodations at all.

Petitioners additionally argue that the history of the opt-out policy demonstrates that it is not neutral

or generally applicable under *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), and other precursor equal-value cases. But those criteria must be understood in the context of the equal-value principle underlying those decisions. Considering that principle, the history of the policy is not constitutionally suspect.

To start, the fact that MCPS initially attempted to accommodate Petitioners' religious interests, and disallowed opt outs only when they proved truly unworkable, does not mean that its policy is not neutral. Indeed, it shows that MCPS respected Petitioners' interests in attempting to accommodate them.

MCPS's discretion over what kind of opt-out policy to adopt also does not mean its policy is not generally applicable. When a government retains discretion over whether to grant exceptions to an otherwise generally applicable policy, that discretion triggers strict scrutiny because the government's decision not to grant religious exceptions (but to preserve its right to grant others) demonstrates a failure of equal value. That is distinguishable from a situation, as in this case, in which the government has the discretion to change its generally applicable policies over time.

Finally, a few scattered comments made primarily by one MCPS Board member do not raise cause for concern. MCPS's actual policy treats religious and secular opt outs equally and these comments do not suggest that MCPS has devalued Petitioners' religious interests. To accept Petitioners' argument would be to hold lawmakers to a standard of neutrality not found anywhere else in this Court's caselaw.

ARGUMENT

I. THE FREE EXERCISE CLAUSE REQUIRES HEIGHTENED SCRUTINY WHEN THE GOVERNMENT DEVALUES RELIGION RELATIVE TO OTHER INTERESTS.

Tandon's equal-value principle is deeply rooted in and developed out of this Court's precedents. The Court laid the groundwork for this approach over the last several decades, and Justice Alito's decisions while on the Third Circuit further developed it. When the Court was confronted with challenges to COVID-19 regulations on religious gatherings, it resolved those challenges by reading its precedents to require that religious activities and commitments be treated as fully equal in value with "comparable" secular activities. Examining those cases demonstrates that this Court's doctrinal rules are fundamentally aimed at identifying instances where religion is devalued. Ignoring that equal-value concern in interpreting those decisions would distort and misapply *Tandon* and *Lukumi*.

A. Free Exercise Decisions Leading Up to *Tandon* Laid the Groundwork for a Focus on Whether Uneven Treatment Demonstrated Religion Was Being Devalued.

1. This Court first planted the seeds of an equal-value approach in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Prior cases ostensibly had required laws to pass strict scrutiny where they "substantially burden[ed] a religious practice," *id.* at 883, although courts usually upheld such laws in practice. *Smith* resolved the tension between doctrine and practice, holding that no heightened scrutiny was appropriate

where laws were "neutral" and "generally applicable." *Id.* at 881, 883. Under *Smith*, laws that targeted religious beliefs or practice—such as laws banning the creation of "statues that are to be used for worship purposes" or prohibiting "bowing down before a golden calf"—"would doubtless be unconstitutional." *Id.* at 877-878. So too, "where the State has in place a system of individual exemptions," *Smith* held that "it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* at 884 (citation omitted). However, laws that neither formally disfavored religion, nor informally exposed it to disfavor, but instead had merely an "incidental effect" of interfering with religious practice, would not provoke constitutional concern. *Id.* at 878. In short, the *Smith* Court foreshadowed *Tandon* by focusing constitutional concern on situations where the state disfavored religion as compared to other, similar practices.

Three years later, in *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), the Court embraced a version of equal value in striking down laws that demonstrated a devaluing of religion. In *Lukumi*, the City of Hialeah had adopted ordinances that generally prohibited the slaughter of animals, but that contained numerous carveouts for nonritual (*i.e.*, nonreligious) killings as well as exemptions for kosher slaughter. *Id.* at 535-537. The patchwork of exemptions, the Court held, was an unconstitutional "religious gerrymander" under which "almost the only conduct" banned was "the religious exercise of Santeria church members." *Id.* at 535 (citation omitted).

In reaching that conclusion, the Court invoked the language of equal value. The Court observed that the City of Hialeah's purported interests in "protecting the public health and preventing cruelty to animals" were used to block Santeria ritual sacrifice, but gave way as to most nonreligious conduct and to the religious practices of other religious groups. 508 U.S. at 543. The City had thus "devalue[d] religious reasons for killing by judging them to be of lesser import than nonreligious reasons." *Id.* at 537-538. The Court reasoned that "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542-543.

In *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission*, 584 U.S. 617 (2018), the Court again held that the government's conduct was unconstitutional with reasoning that highlighted how religion had been devalued. There, the Colorado Civil Rights Commission determined that a baker violated the state's antidiscrimination law when he refused to bake a wedding cake for a same-sex couple based on his religious convictions. *Id.* at 628-630. In holding the Commission had acted unconstitutionally, the Court highlighted that the Commission had given "disparate consideration" to the baker's objections compared to other, similar objections from different bakers. *Id.* at 636-637, 639. Specifically, the Commission sanctioned the plaintiff baker for acting on his religious convictions in refusing to bake a wedding cake for a same-sex couple, but it found that other bakers had acted lawfully when they declined to bake cakes critical of same-sex marriage based on their own "conscience-based objections." See *id.* at 636-637. Even if the situations could "ultimately be

distinguished" by some neutral legal principle, the Commission did not rely on such a principle: Its own legal reasoning across the cases was inconsistent. *Ibid*.[3] On top of that, in the Commission's hearings, one commissioner made statements expressing hostility towards religion, stating, among other things, that religion and religious freedom were to blame for slavery and the Holocaust. *Id.* at 635.

The Court held that the Commission had violated the Free Exercise Clause because it had not acted as a "neutral decisionmaker," giving "full and fair consideration to [the baker's] religious objection." 584 U.S. at 640. In doing so, the Court relied on principles of equal value: The Commission erred by "disfavor[ing] the religious basis" of the baker's objection as compared to other, secular ones. See *id.* at 638. In other words, although the relevant statute was neutral and generally applicable, the Commission's exercise of its enforcement authority revealed that it considered some secular objections more excusable than religious objections—and was therefore suggestive of impermissible devaluation.

2. In both *Lukumi* and *Masterpiece Cakeshop*, the government targeted religious exercise for disfavor—an obvious failure of equal value. But several decisions authored by Justice Alito while on the Third Circuit sketch out a broader equal-value principle—a principle that would later be embraced by this Court—in holding that there can be a failure of equal

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[3] Members of the Court disagreed over whether the Commission *could* have justified treating the religious objection differently than the other objections. Compare 584 U.S. at 641-642 (Kagan, J., concurring), with *id.* at 649-653 (Gorsuch, J., concurring).

value when the government takes insufficient care in regulating religious conduct compared to secular conduct.

First, in *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999), two Muslim police officers challenged the Newark police department's policy prohibiting officers from growing beards, arguing that they were "under a religious obligation to grow their beards" and that the department's policy violated their free exercise rights. *Id.* at 360-361. The department justified its policy by pointing to an interest in a "monolithic" and "readily identifiable" police force that presented a "uniformity of appearance." *Id.* at 366 (citation omitted and alterations accepted). The department was willing to make an exception for officers who could not shave for medical reasons, but not for officers who, like the *Fraternal Order* plaintiffs, could not shave for religious reasons. See *id.* at 365-367. The Third Circuit agreed that this inequality triggered heightened scrutiny, explaining that the department had "made a value judgment that secular (*i.e.*, medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." *Id.* at 366.

Significantly, then-Judge Alito's opinion noted that a separate exception to the no-beard policy, one for undercover officers, would not trigger heightened scrutiny because beards on undercover officers did "not undermine the Department's interest in uniformity." 170 F.3d at 366. That makes sense as an equal-value matter: The department was treating secular activity (beard growth by undercover officers) better than religious activity (beard growth by

religious officers). But that distinct treatment did not indicate that the government was making a "value judgment" that favored undercover officers, *id.* at 366; the department was treating the activities differently because only the religious activity implicated the department's interest in a uniform police force.

Justice Alito's second Third Circuit equal-value decision came in *Blackhawk* v. *Pennsylvania*, 381 F.3d 202 (3d Cir. 2004). Dennis Blackhawk, who subscribed to the religious traditions of the Lakota people, applied for an exemption from Pennsylvania's wildlife permit fee so he could steward black bears freely on his property as part of his religious practice. See *id.* at 204-205. When the state denied him the exemption, he challenged the denial on free exercise grounds, focusing, *inter alia*, on the fact that the state *did* grant a permit fee exemption to zoos and circuses. See *id*. at 204-206.

Writing for the court, then-Judge Alito read *Lukumi* and *Fraternal Order* to announce a rule that a "law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." 381 F.3d at 209. The state justified its permit fee as serving "two main interests": "bring[ing] in money" and "tend[ing] to discourage the keeping of wild animals in captivity * * * except where doing so provides a 'tangible' benefit for Pennsylvania's wildlife." *Id.* at 211. Charging zoos and circuses a permit fee would "bring[] in money" just as much as charging religious individuals. *Ibid.* And

neither circuses nor zoos in most instances provided any "tangible benefits for animals living in the wild in Pennsylvania." *Ibid.* (explaining that only under "special circumstances," such as participation in a research project, would captivity in a zoo provide relevant benefits). The court thus concluded that the exemptions that the state did allow "undermine[d] the interests served by the fee provision to at least the same degree as would an exemption for a person like Blackhawk," triggering strict scrutiny that the law could not survive. *Id.* at 211-214.

Again, that decision is best explained with reference to equal value. The Third Circuit asked not just whether there were other exemptions or even whether there were other exemptions that implicated the same interests as a religious exemption would. Instead, it found the law constitutionally suspect only after concluding that the other exemptions implicated the same interests as a religious exemption *and* undermined the state's interests "to at least the same degree" as that religious exemption. 381 F.3d at 211. In those circumstances, the only way to explain the uneven treatment was that the government did not put the importance of Indigenous people's religious interests on equal footing with secular entities' business practices.

B. The Court Has Now Expressly Adopted an Equal-Value Approach.

Sixteen years after *Blackhawk*, Justice Alito's approach became the law of the Court in decisions addressing COVID-19 regulations that limited the number of people who could gather for religious worship. First, in *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14 (2020) (*Brooklyn Diocese*), the

Court enjoined the portion of Governor Cuomo's executive order that imposed restrictions on attendance at New York religious services on the basis that the order "single[d] out houses of worship for especially harsh treatment." *Id.* at 17 (per curiam). The order set out operation and capacity restrictions based on the category of building—*e.g.*, schools, restaurants, and houses of worship—and on the COVID-19 case count in geographic areas, designated as "red," "orange," and "yellow" zones. See *ibid.*; *id.* at 33-34 (Breyer, J., dissenting). In red zones, houses of worship were limited to gatherings of the lesser of 25% capacity or 10 people, while essential businesses did not have any capacity restrictions. See *id.* at 17-18 (per curiam); *id.* at 34 (Breyer, J., dissenting). The Court held that those restrictions, among others, led to "troubling results." *Id.* at 17 (per curiam). For example, "a large store * * * could * * * have hundreds of people shopping there on any given day" while a "nearby church or synagogue"—perhaps even an equally large one—"would be prohibited from allowing more than 10 * * * people inside for a worship service." *Id.* at 17 (quotation marks and citation omitted). The Court concluded that the order's "especially harsh treatment" of places of worship triggered strict scrutiny, ultimately leading the Court to enjoin that portion of the order. *Id.* at 17-19.

The decision reflects an equal-value concern. New York undoubtedly had an interest in preventing transmission of COVID-19. But the order also reflected the governor's judgment that certain activities, such as shopping at grocery stores and even eating at restaurants, were so important that their ability to continue overrode that public-health interest. By declining to allow religious worship to continue to

the same degree as essential businesses, the regulation seemingly reflected a judgment that religious activities were not as important as certain secular ones. And, not finding any non-discriminatory rationale for barring religious worship from continuing to the same degree, the Court viewed the order's "disparate treatment" of religion to reflect a constitutionally suspect value judgment. 592 U.S. at 17. Or, as Justice Gorsuch put it in his concurrence, "[t]he only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as 'essential.'" *Id.* at 22 (Gorsuch, J., concurring).

A few months after deciding *Brooklyn Diocese*, the Court finally elevated an equal-value approach to an express holding of the Court in its decision in *Tandon*. California had adopted a rule limiting at-home gatherings—including gatherings for religious worship—to three households, but the state had no such limit on gatherings outside of the home. *Tandon*, 593 U.S. at 63. A minister and congregant who wished to hold larger in-home religious gatherings challenged the restrictions, alleging that California, like New York, had impermissibly imposed harsher restrictions on religious practice than it had on comparable secular activities. See Emergency Application 8, *Tandon* v. *Newsom*, No. 20A151 (Apr. 2, 2021).

The Court's reasoning reflected a clear embrace of the equal-value principle. First, the Court held, "government regulations are not neutral and generally applicable * * * whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. The Court thus made explicit what was implicit in *Lukumi*: that asymmetric regulation under circumstances signaling

devaluation of religion would trigger heightened scrutiny. Second, the Court explained that the key question of "whether two activities are comparable" was to "be judged against the asserted government interest that justifies the regulation at issue." *Ibid.* The Court thus unmistakably embraced the same approach taken in *Fraternal Order* and *Blackhawk*, each of which had turned on a finding of religious devaluation and each of which had evaluated comparability by examining the extent to which exemptions interfered with the government interest cited as justification for a rule.

Applying these principles, the *Tandon* Court enjoined the California restriction on in-home worship. First, the Court found there were secular activities—gatherings in places like "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants"—that were treated "more favorably than at-home religious exercise." 593 U.S. at 63. Second, those activities were "comparable" because the court of appeals had not concluded that the secular activities "pose a lesser risk of transmission than applicants' proposed religious exercise at home," *id.* at 63-64—that is, the forbidden religious activity did not, in the Court's view, undermine the government interest behind the restrictions any more than the permitted secular activity did. Without a transmission-based rationale for allowing larger secular gatherings than religious ones, the Court viewed the difference in regulation as explainable only by the government's failure to assign religious practice the same importance as it had to secular activities. See *id.* at 64. In short, it was the perceived devaluing of religious practice

that triggered strict scrutiny and doomed California's COVID-19 policy. See *id.* at 63-65.

Tandon thereby expanded the scope of the protections under the Free Exercise Clause. That approach addresses the criticism that *Smith*'s neutral-and-generally-applicable rule protects religious activities only from discrimination in the traditional sense. *E.g.*, *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 543 (2021) (Barrett, J., concurring). Under *Tandon*, a plaintiff need not show that a law has a discriminatory intent or object, or that it facially classifies based on religion. Instead, under *Tandon*'s equal-value principle, a law that fails to equally account for religious interests, even through mere inadvertence, triggers heightened scrutiny under the Free Exercise Clause. *Tandon*, therefore, offers something "more than protection from discrimination." *Ibid.*

II. MCPS HAS NOT DEVALUED PETITIONERS' RELIGIOUS PRACTICE.

As explained, *Tandon* offers robust protection to free exercise rights by holding that strict scrutiny applies when the government appears to devalue religious interests in drawing its regulatory scheme. But even under that protective standard, Petitioners cannot establish that their claims are subject to strict scrutiny.

A. MCPS Does Not Devalue Petitioners' Religious Beliefs or Practice by Allowing Petitioners to Opt Out of Health Instruction for Religious Reasons.

Petitioners argue that MCPS's policy is subject to strict scrutiny under *Tandon* because MCPS allows opt outs for Health Instruction, but not the

Storybooks. See Petitioners Br. 36. That argument fails for two independent reasons. First, Petitioners cannot show that MCPS treats "secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. To the contrary, MCPS treats religious and secular objections precisely the same way. Second, Petitioners cannot establish that Health Instruction and the Storybooks—two completely different curricula—are "comparable," as required to trigger *Tandon*'s rule. *Ibid.*

1. MCPS Does Not Treat Secular and Religious Conduct Differently.

Tandon and its antecedent cases sought to protect religion and religious commitments from government disregard. They all involved situations in which the government—without any apparent justification or with a seemingly discriminatory justification—betrayed a lack of concern for religious claimants relative to others. In each of those cases, "[t]he only explanation for treating religious [activity] differently" was "a judgment" that the religious activity was just not "as 'essential'" or valuable as analogous secular or religious activity. *Brooklyn Diocese*, 592 U.S. at 22 (Gorsuch, J., concurring). What mattered was that the government's regulation demonstrated that it valued someone's conduct more than the challenger's religious practice.

That simply does not describe the facts of this case. Petitioners assert that MCPS has "[a]llow[ed] all secular opt-outs (from the health curriculum) while banning all religious opt-outs (from the storybooks)." Petitioners Br. 38. That selective presentation of the facts is misleading: MCPS has allowed secular *and religious* opt outs from Health Instruction, while

disallowing *secular and* religious opt outs from the Storybooks.[4] See, *e.g.*, Pet.App.192a, 608a. Petitioners' brief entirely fails to grapple with the existence of religious opt outs to Health Instruction in Petitioners' discussion of *Tandon*.

The fact that MCPS has accommodated religious objections in one context but not another does not suggest a devaluing of religion. To see why, imagine that two school districts, District A and District B, use the same Health Instruction and Storybooks as MCPS. The only difference between them is that District A does not permit opt outs from either Health Instruction or the Storybooks, while District B (like MCPS) permits parents to opt out of Health Instruction, including for religious reasons. District B's willingness to permit religious (and other) opt outs from Health Instruction does not provide any reason to worry that religion is being disfavored; to the contrary, District B has shown a greater willingness to accommodate religious concerns than District A. Yet, under Petitioners' reading of *Tandon*, District B would be constitutionally required to permit opt outs from the Storybooks, while District A's more restrictive approach would be immune from a *Tandon* challenge. That reading of *Tandon* makes no sense. And, perversely, it would create a great disincentive for a school district to make religious accommodations for any

[4] For the same reason, the United States is incorrect when it states that religious opt outs to the Storybooks are "the only exemptions that appear to be forbidden" by MCPS's policy. U.S. Br. 33. MCPS has forbidden all opt outs to the Storybooks, regardless of whether they are sought for religious reasons. See Pet.App.192a, 608a; see also U.S. Br. 8 (acknowledging that MCPS disallowed opt outs "for any reason").

curriculum, since doing so would oblige the district to permit opt outs for *all* curricula.

Critically, MCPS has not carved out any conduct from its allowance for Health Instruction opt outs. Instead, MCPS has allowed *anyone* for *any* reason—secular or religious—to excuse their children from Health Instruction. Petitioners' contention that they are entitled to an exemption from the Storybooks therefore boils down to a claim that because they are free from governmental burdens on their religion in one way, they must also be free from governmental burdens on their religion in another way.

Petitioners thus ask this Court not to apply *Tandon*, but to extend it to a markedly different circumstance—an extension that is not warranted by the underlying rationale of the cases. As explained, *Tandon* and the cases that came before it rest on a concern that when religion receives "especially harsh treatment," that may reflect a constitutionally suspect failure to accord appropriate value to religious practice. *Brooklyn Diocese*, 592 U.S. at 17. But when the government *grants* an exemption for religious exercise, it shows that it is *valuing* that exercise. It makes no sense to treat MCPS's decision to allow parents with religious objections to Health Instruction to exclude their children from that instruction as evidence that MCPS is disfavoring the exact same religion in declining to allow opt outs from the Storybooks. Indeed, far from advancing religious practice, Petitioners' in-for-a-penny-in-for-a-pound conception of the Free Exercise Clause could, if accepted, lead to *fewer* exemptions for religious practice: If every such exemption opened the door for an argument that the government must enact carveouts from other regulations for that

same practice, governments might respond by being less charitable to religion in their regulatory approach.

2. A Language and Reading Skills Curriculum Is Not Comparable to a Health Curriculum.

The fact that Petitioners' beliefs have not been devalued is enough to dispose of their *Tandon* argument. But the argument also fails because the Storybooks, part of MCPS's language and reading skills curriculum, implicate dramatically different educational concerns than Health Instruction and they are thus not "comparable" under *Tandon*.[5] See *Tandon*, 593 U.S. at 62 ("[W]hether two activities are comparable * * * must be judged against the asserted government interest that justifies the regulation at issue.").

Petitioners' only argument for why the Storybooks constitute "comparable instruction" to Health Instruction is that MCPS implemented both the Storybooks and Health Instruction to comply with a regulation that requires all public schools to promote equitable access to education. Petitioners Br. 36-37.[6] It

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[5] Some Amici suggest that the opt-out policy is not generally applicable because, at the time it was adopted, MCPS allowed religious opt outs for other parts of the curriculum, Laycock Amicus Br. 26-27, and MCPS currently allows opt outs for noncurricular activities, U.S. Br. 32. Amici make no attempt to show that other parts of the curriculum or, indeed, noncurricular activities are comparable in the relevant sense.

[6] The regulation requires schools to, among other things, give "every student * * * access to the opportunities, resources, and educational rigor they need * * * to maximize academic success

may well be that this regulation prompted the inclusion of some course content in both of these curricula, including some material on sexuality and gender identity. But the content of each of these courses and its importance to student development—including, but by no means limited to, the instruction's promotion of inclusionary perspectives—is dramatically different.

The Storybooks and Health Instruction teach fundamentally different subject matter, with different learning goals and objectives, to different age groups. See MCPS Br. 10-12. Specifically, Health Instruction constitutes one unit in a discrete class aimed at teaching students about sexuality and family planning. See *ibid*. The Storybooks, by contrast, are integrated sporadically in instruction with the primary purpose of teaching students reading and language skills. See, e.g., JA.5-7 (describing curricular goals of English Language Arts instruction). In this curriculum, discussion of LGBTQ people is incidental to the language acquisition and reading skills on which the curriculum focuses; children learn to read by reading stories and, because of the Storybooks, sometimes those stories will be about LGBTQ people and sometimes they will be about straight and/or cisgender people. Given the myriad ways that Health Instruction serves different instructional goals than the Storybooks, MCPS's adoption of different approaches to opt outs

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and social/emotional well-being and to view each student's individual characteristics"—including religion, physical ability, national origin, race, gender identity and expression, and sexual orientation—"as valuable." Md. Code Regs. §§ 13A.01.06.01, 13A.01.06.03(B)(2), (5); see also Petitioners Br. 37.

for these two contexts does not show that MCPS is disfavoring religion.

There are also meaningful—and obvious—administrability differences in permitting opt outs from the two curricula. Although amici are not education professionals, common sense would dictate that it is drastically easier to facilitate opt outs of an entire unit than of certain sporadically read books. See Pet.App.607a (explaining that "media specialists and other instructors who spend time in multiple classrooms each day" would have difficulties ensuring that they were abiding by the opt outs); AASA Amicus Br. 14-16, 21-22 (discussing other administrability concerns). And Petitioners have presented no evidence to counter this commonsense conclusion.

Again, the point of looking to the governmental interest behind a regulation is to see whether the government's non-uniform pursuit of a particular interest suggests that religion has been disregarded. *Tandon*'s approach is intended to reveal a devaluation of religious commitments. Even accepting that the Storybooks and Health Instruction were adopted in response to the same regulation, nothing about MCPS's differential treatment of health classes and reading classes supports any worry on that score.

B. The History of MCPS's Policy Does Not Reflect a Devaluing of Religion.

Petitioners additionally argue that the opt-out policy is subject to strict scrutiny because the history surrounding that policy suggests that it is not neutral and generally applicable under *Lukumi*. Petitioners Br. 38-43. The Court should reject those arguments.

1. MCPS's Decision to Initially Allow Opt Outs Does Not Reflect Devaluation.

According to Petitioners, the fact that MCPS initially allowed opt outs but then changed its policy triggers strict scrutiny for two reasons. First, Petitioners argue that MCPS's change to its policies demonstrates that it has targeted Petitioners' religious exercise, so the opt-out policy is not neutral. Petitioners Br. 41-42. Second, they argue that this history demonstrates that MCPS has discretion over how to structure its policies, so the opt-out policy is not generally applicable. *Id.* at 38-40. The equal-value principle demonstrates why both arguments fail.

First, contrary to Petitioners' assertions, the history of the opt-out policy reflects MCPS's *equal* treatment of Petitioners' religious interests. MCPS initially allowed religious and secular opt outs to the Storybooks. Petitioners Br. 38; Pet.App.606a-607a. After the opt outs proved extremely burdensome, MCPS decided not to allow any opt outs to the Storybooks after all. Pet.App.98a-99a (explaining that, based on concerns that the number of opt-out requests was causing high levels of student absenteeism, putting burdens on school staff, and undermining MCPS's curricular goals, MCPS decided to disallow them); Pet.App.607a-608a. The fact that MCPS chose to adopt a new policy that applied equally to secular opt outs demonstrates that the policy is far from a "religious gerrymander" in which "almost the only conduct subject to [the policy] is * * * religious exercise." *Lukumi*, 508 U.S. at 535.

This history also demonstrates that MCPS attempted to accommodate Petitioners' religious interests. Petitioners cannot explain why, if MCPS were

truly motivated by religious animus, it would have allowed religious opt outs to the Storybooks at all—let alone grandfathered in opt outs for the remainder of the school year even after deciding they were generally unworkable, see Petitioners Br. 39 (noting that the Board permitted schools that had granted opt outs to continue opt outs for remainder of 2022-2023 school year). Moreover, Petitioners' theory would, once again, create a perverse incentive: If the fact that a government changes its policy in the face of feasibility concerns is enough to trigger strict scrutiny, governments may simply refuse accommodations entirely rather than test them out first.

Second, MCPS's discretion to change its policy over time does not raise any equal-value concerns. This Court has held that, in some circumstances, the government's retained discretion can trigger strict scrutiny: When the government denies a request for a religious exemption to a policy but retains discretion over whether to grant other exemptions, the policy is not generally applicable. See *Fulton*, 593 U.S. at 536. To put that in the language of equal value: If the government chooses not to grant an exemption based on religious interests but it preserves the discretion to grant exemptions based on other interests, that asymmetric regulation may suggest that the government has devalued religious interests relative to other ones. Such seeming devaluation triggers strict scrutiny.

Petitioners would extend this rule beyond the circumstances that justify it. Petitioners argue that strict scrutiny applies here because MCPS exercised its policymaking discretion over what kind of policy to adopt in the first place and then had continuing policymaking discretion to change that policy over time.

See, *e.g.*, Petitioners Br. 39 (arguing that the fact that MCPS "retained discretion to change course or adopt a more targeted approach" after disallowing opt outs triggers strict scrutiny); *ibid*. (arguing that the Board's "discretionary tinkering" with its policies over time triggers strict scrutiny). But that kind of policymaking discretion cannot raise equal-value concerns. The government ordinarily has discretion over how to structure its policies and whether to change them. So long as the government exercises that discretion to adopt neutral and generally applicable policies, the fact that it can adjust those policies over time does not suggest a failure of equal value. If the Court were to accept Petitioners' theory that the discretion to ultimately change a policy (in other words, ordinary policymaking discretion) triggers strict scrutiny, then it is difficult to imagine any policy that could be considered generally applicable at all. The Court should reject Petitioners' attempt to allow this exception to *Smith* to swallow the rule.[7]

2. The Scattered Comments Primarily by One Board Member Do Not Reflect Any Devaluing of Religion by MCPS.

Petitioners are also wrong in their contention that statements made primarily by a single MCPS Board member trigger strict scrutiny. Petitioners Br. 42-43.

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[7] Petitioners point to other instances of MCPS's discretion that demonstrate the breadth of their argument. For instance, they note that MCPS decided to withdraw two Storybooks from the curriculum after the litigation began. Petitioners Br. 40. If MCPS's discretion over establishing its curriculum—curriculum that is taught to all students—means that any policies related to that curriculum are not generally applicable, it is hard to see how any government action could meet that standard.

As explained, MCPS's actual policy puts religious and secular interests on equal footing—that is, it is neutral and does not suggest any devaluation of religion that could trigger strict scrutiny. To hold that the sort of stray comments on which Petitioners rely could somehow eliminate the policy's neutrality would be an unwarranted expansion of this Court's limited inquiries into the subjective intent of lawmakers.

This Court has been hesitant to invalidate otherwise neutral laws and policies based on concerns about a government official's comments—even in cases where, unlike here, the official has the unilateral authority to adopt the challenged policy. For instance, in *Department of Homeland Security* v. *Regents of the University of California*, 591 U.S. 1 (2020), this Court held that the plaintiffs had not plausibly alleged that the rescission of the Deferred Action for Childhood Arrivals program was motivated by racial animus, *id.* at 34-35, even though, among other things, President Trump had compared immigrants to "'animals' responsible for 'the drugs, the gangs, the cartels, the crisis of smuggling and trafficking, [and] MS13,'" *id.* at 37 (Sotomayor, J., concurring in part and dissenting in part). Similarly, in *Trump* v. *Hawaii*, 585 U.S. 667 (2018), the Court rejected arguments that President Trump's "travel ban" was motivated by anti-Muslim animus, *id.* at 705-707, despite, among other things, evidence that President Trump had stated that the law was an attempt to "legally" adopt a "Muslim ban," *id.* at 700. In doing so, the Court emphasized that the travel ban was "neutral on its face." *Id.* at 702; see also *Brooklyn Diocese*, 592 U.S. at 17 & n.1 (contrasting the COVID-19 limitation on religious gatherings with the travel ban in *Trump* v. *Hawaii* on the grounds that the travel ban was

"neutral on its face"). Here, MCPS's policy is otherwise neutral and generally applicable, and the comments Petitioners cite should not undermine it.

Even in cases in which a court determines that an otherwise neutral policy is "motivated in part by a * * * discriminatory purpose," that finding does not "necessarily * * * require[] invalidation of the challenged decision." *Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977). Rather, the policy can still stand if there is evidence that "the same decision would have resulted even had the impermissible purpose not been considered." *Ibid.* Here, even assuming that the MCPS Board members' statements reflect religious animus, there is no evidence that the rest of MCPS was motivated by anything other than concerns about absenteeism, the burdens on school staff, and undermining MCPS's curricular goals. Pet.App.607a-608a.

Masterpiece Cakeshop represents a limited departure from those general principles, and it cannot support Petitioners' arguments. There, the Commission treated the baker's religious objections differently from other conscience-based but secular objections—in other words, the Commission's application of the antidiscrimination law did not appear to be neutral. 584 U.S. at 636-637. In considering whether the Commission had nonetheless neutrally adjudicated the complaint against the baker, the Court looked to statements made by a commissioner that suggested a hostility towards religion. *Id.* at 635.

Here, there is no unequal treatment in the first place: MCPS has adopted a policy that neither facially nor practically distinguishes between religious and secular conduct, and there is no evidence that any

decisionmaker granted or denied an opt out based on religious hostility. Moreover, as this Court recognized in *Masterpiece Cakeshop*, the statements there were made by an "adjudicatory body deciding a particular case"—a "very different context" than statements made by lawmakers adopting widely applicable policy. *Masterpiece Cakeshop*, 584 U.S. at 636. Adjudicators are held to a much higher standard of neutrality than lawmakers, in part because lawmakers are tasked with acting on and communicating their own political views. *Cf. Trump* v. *Hawaii*, 585 U.S. at 701. Accordingly, the heightened scrutiny applied to the statements of adjudicators in *Masterpiece Cakeshop* cannot be carried over to this context.[8]

* * *

To put it simply, MCPS has not devalued Petitioners' religious interests by offering a pre-defined, secular curriculum in a public school. Petitioners, like all parents, are free to choose between MCPS and a number of alternative schooling options. Indeed, that freedom is even more robustly protected today than in decades past: Petitioners can now choose a religious private school that is entitled to government funding on the same terms as secular private schools.

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[8] This Court has never resolved the question whether statements made by lawmakers, as opposed to adjudicators, are relevant to the question whether a law discriminates against religion. *Masterpiece Cakeshop*, 584 U.S. at 636; see also *Fulton*, 593 U.S. at 606-607 (Alito, J., concurring) (explaining that *Masterpiece Cakeshop* resolved only the question of whether the subjective motivations of officials are relevant in the context of an adjudication, not the context of legislative action). Even assuming statements made by lawmakers are relevant, the statements at issue here cannot bear the weight Petitioners put on them.

Carson ex rel. O.C. v. *Makin*, 596 U.S. 767, 781 (2022). Nonetheless, Petitioners would have this Court hold that, for religious and secular interests to be valued equally, parents must not only have a right to choose equally funded religious private schools but also a right to control what happens in public schools. The Free Exercise Clause does not require that result.

CONCLUSION

For the foregoing reasons, the Court should reject Petitioners' arguments that MCPS's policy is subject to strict scrutiny.

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