No. 24-297

IN THE

Supreme Court of the United States

TAMER MAHMOUD, *et al.*,
Petitioners,

v.

THOMAS W. TAYLOR, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF MARYLAND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The **American Civil Liberties Union ("ACLU")** is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The **ACLU of Maryland** is one of the ACLU's statewide affiliates.

Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as amicus curiae. As organizations that have long been dedicated to preserving the right of religious exercise without harm to others and ensuring that our public education system remains safe and welcoming for all students, the ACLU and the ACLU of Maryland have a strong interest in the proper resolution of this case.

INTRODUCTION

This Court has consistently recognized that "public schools are vitally important in the preparation of individuals for participation as citizens[.]" *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (internal quotation marks omitted). And, to that end, this Court has also observed that "[t]he Nation's future depends

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of the brief; and no person other than amici, their members, or their counsel contributed money intended to fund the preparation or submission of the brief.

upon leaders trained through wide exposure to . . . [a] robust exchange of ideas[.]" *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969). Public schools instill in students democratic and civic values, expose them to a diversity of ideas and perspectives, and prepare them to live and succeed in our pluralistic society. Indeed, public schools are "at once the symbol of our democracy and the most pervasive means for promoting our common destiny." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (quoting *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948)); *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.").

Montgomery County Public Schools ("MCPS") previously allowed opt-outs from the LGBTQ-related portion of its English Language Arts ("ELA") curriculum for *any* reason, religious or secular. That policy, however, proved to be disruptive, divisive, and stigmatizing. It undermined the educational mission of the ELA curriculum, which seeks to acquaint students with their peers, neighbors, and communities through literature. As a result, MCPS barred *all* ELA opt-outs. The ELA curriculum and MCPS's decision to no longer offer opt-outs are religion-neutral, generally applicable, and entirely permissible under the First Amendment.

Under Petitioners' argument, public school parents and students could demand religious exemptions from wide swaths of curricular requirements and instruction. Citing their religious beliefs against interfaith or interracial marriages,

parents could demand that their children be pulled out of class during storybook readings because, in text or illustration, a book depicts an interfaith or multi-racial family. Parents of one religion could demand to opt their children out of neutral social studies lessons on other faiths, arguing that even an academically objective curriculum on these topics violates their religious beliefs. Some parents could object for religious reasons to their students being assigned to read Shakespeare's *Twelfth Night* because a woman character pretends to be a man. Protestant parents could claim the right to remove their children from history lessons on nineteenth-century anti-Catholicism, asserting that such lessons denigrate the Protestant faith and its history. A student or parent could demand a religious opt-out from instruction on efforts to protect endangered species because it implicitly conflicts with their view that God exerts infallible, divine control over the environment. Lessons in patriotism could be viewed by some people of faith as improperly elevating country over God. Some parents could object to lessons on any historical figure who happened to be LGBTQ (e.g., Sally Ride, Alan Turing, Frida Kahlo, Jane Addams). Others might object to their children being in the classroom for a peer's presentation on their family tree, if the family tree includes same-sex parents. And parents whose faith teaches that women should not work outside of the home could seek to opt out of every lesson featuring women who do.

In sum, *requiring* public schools to exempt students from secular instruction that they or their parents may find objectionable for religious reasons could throw public schools into disarray, effectively

forcing them to tailor their educational materials to align with the religious beliefs of individual students and/or their parents. Depending on the topic, schools might be unable to reconcile parents' and students' various religious objections and, therefore, might not have any feasible way to cover the topic at all. Or schools could even be pushed into segregating students by religion, providing instruction acceptable to some faith traditions in one classroom and instruction acceptable to other faith traditions in another. Such a risk is especially high in Montgomery County, which is, as Petitioners note, the most religiously diverse county in the United States. Pet'rs' Br. 8 n.8 (citing Aleja Hertzler-McCain, *Montgomery County, Maryland, was most religiously diverse US county in 2023*, Religion News Serv. (Aug. 30, 2024), https://perma.cc/86PU-3QLA). Rather than promoting understanding and a healthy exchange of ideas, classes with opt-outs could invite polarization and division.

Not only would such a system be extremely disruptive to the educational process, as MCPS discovered, but it would upend public schools' *raison d'être* and offend the basic principles of religious comity at the heart of the First Amendment and our democracy.

SUMMARY OF ARGUMENT

Amici write to explain that, should this Court identify a cognizable burden on Petitioners' religious exercise, MCPS's policy prohibiting opt-outs from the ELA curriculum should be subject to rational basis review, not strict scrutiny.

Under this Court's precedents, a "neutral law of general applicability" is subject to rational basis review under the Free Exercise Clause of the First Amendment, even if it incidentally burdens a particular religious practice or belief. *Employment Div. v. Smith*, 494 U.S. 872, 878–79 (1990); *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). The MCPS policy against opt-outs from the ELA curriculum comfortably satisfies this standard. It applies to all students and families across the board, regardless of the reason for their objection to any portion of the ELA instruction. None of the grounds Petitioners offer in proposing strict scrutiny actually requires departing from the *Smith* standard.[2] Indeed, this case demonstrates one benefit of the *Smith* rule: If public policymakers did not have leeway to impose religion-neutral and generally applicable requirements, the chaos of opt-outs could gravely threaten public schools' ability to function effectively.

First, Petitioners argue that *Wisconsin v. Yoder*, 406 U.S. 205 (1972), requires the Court to apply strict scrutiny. But *Yoder* did not alter "the obvious fact that courts are not school boards" and are "ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." 406 U.S. at 234–35. Reviewing a robust record that detailed the incompatibility of public education with Amish culture and religion, this Court permitted the Amish parents to opt out *entirely* of the public education

[2] Though Petitioners hastily suggest that this Court should overrule *Smith* in one paragraph in their Introduction, Pet'rs' Br. 3, the issue is not before this Court, has not been briefed, and is thus not directly presented here.

system. *Id.* at 207. It did not confer on parents who decide to participate in a public school system the right to veto or opt out of every curricular school requirement they find religiously objectionable.

Second, Petitioners contend that MCPS's policy is subject to strict scrutiny because it treats "comparable secular activity more favorably than religious exercise[,]" thereby undermining the governmental justifications for prohibiting opt-outs. *See Tandon v. Newsom*, 593 U.S. 61, 62 (2021). But MCPS treats religious and non-religious ELA curriculum opt-outs *exactly the same*: All opt-outs are prohibited. Petitioners' argument tries to conflate the ELA curriculum with the sex education curriculum, but they are separate curricula and are not comparable activities under *Tandon*. The sex education curriculum operates differently from, and serves a different mission and purpose than, the ELA curriculum.

Third, Petitioners assert that strict scrutiny applies under *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021). But strict scrutiny is triggered under *Fulton* only where a policy provides for a formal framework of purely discretionary, individualized exemptions. *Id.* at 536. Here, *no* exemptions exist, much less discretionary exemptions. To find otherwise would expand *Fulton* far beyond its reasoning and would threaten the validity of every generally applicable policy.

Finally, Petitioners allege that MCPS's prohibition on opt-outs from the ELA curriculum is "hostile to . . . religious beliefs" and warrants strict scrutiny on that independent basis. *See Masterpiece*

Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 619 (2018) (internal quotation marks omitted). Not so. The handful of Board member statements identified by Petitioners did not invoke or criticize specific religions. The decision to prohibit opt-outs going forward was not rooted in animus toward religion, but rather in a desire to correct a policy that undermined a core purpose of public schools. The sheer number of opt-out requests was disruptive, engendered a harmful environment for LGBTQ students and students with LGBTQ families, and interfered with MCPS's educational mission. This was true whether the opt-out was requested for religious or secular reasons.

MCPS easily passes rational basis review and is not required to offer exceptions to its facially neutral and generally applicable "no opt-out" policy. Accordingly, amici respectfully request that this Court affirm the Fourth Circuit's judgment.[3]

[3] While beyond the scope of this brief, MCPS's "no opt-out" policy would also satisfy strict scrutiny. MCPS has compelling interests in carrying out its educational mission, introducing all students to different perspectives to prepare them to live in our society, and avoiding a hostile environment for LGBTQ students and students with LGBTQ family members. MCPS's rule against opt-outs is narrowly tailored, as illustrated by the previous harms imposed by allowing exemptions.

ARGUMENT

I. *YODER* DOES NOT REQUIRE COURTS TO APPLY STRICT SCRUTINY TO EVERY CURRICULAR REQUIREMENT TO WHICH PARENTS OBJECT ON RELIGIOUS GROUNDS.

While this Court's precedents recognize that parents have an interest in directing their children's education, they do not confer on parents the right to dictate the curricular and instructional requirements of public schools, or the broad right to opt out of those requirements based on religious objections. *Yoder*, central to Petitioners' argument, concerned the constitutionality of a statute mandating attendance at any school, whether private or public. 406 U.S. at 207. It had nothing to do with parents' rights vis-à-vis the curriculum and instruction once a child is actually enrolled in school. The situation in *Yoder* is therefore entirely distinct from the circumstances here.

In *Yoder*, this Court held that the state could not compel Amish children to attend public or private school for formal education after eighth grade against their parents' wishes, where doing so would not only violate core Amish religious precepts but would also threaten the existence of the entire Amish community's way of life. *Id.* at 235. The ruling was based on the unique nature of the Amish religion and an understanding that the Amish faith and daily life are inextricably interwoven. *Id.* at 216 ("[T]he Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.").

Compulsory school attendance prevented Amish children from engaging in a "program of informal vocational education" that taught "specific skills needed to perform the adult role of an Amish farmer or housewife." *Id*. at 222. *Yoder,* then, was about the First Amendment and due process right to opt out *entirely* of the formal education system. *Id*. at 208. The ruling has little applicability outside of this context: As one court has observed, "few sects could make a similar showing of a unique and demanding religious way of life that is fundamentally incompatible with *any* schooling system." *Parker v. Hurley*, 514 F.3d 87, 100 (1st Cir. 2008).

The other cases cited by Petitioners, *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), also do not help them. *Pierce* addressed the due process right of private schools (there, religious schools) to provide private education and the right of parents to send their children to those schools instead of public schools—not the right to control or opt out of curricular requirements in a *public* school. 268 U.S. at 532. Indeed, in discussing Oregon's compulsory education law, which required students to attend public schools, this Court noted: "No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; [or] to require that . . . certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." *Id.* at 534.

Meyer likewise dealt with the due process right of parents to choose private instruction for their

children, as well as the right of an instructor to provide such education. 262 U.S. at 398. There, the state had convicted a teacher of violating a law prohibiting foreign-language instruction for students who had not yet completed eighth grade. *Id.* at 397. As in *Pierce*, "[t]he power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English," was not at issue. *Id.* at 402. "Nor [was] the state's power to prescribe a curriculum for institutions which it supports." *Id.* Rather, the Court held that the law violated the instructor's Fourteenth Amendment right "to teach and the right of parents to engage him so to instruct their children[.]" *Id.* at 400.

These precedents affirm the rights of parents to choose alternatives to public schooling—but they say nothing about whether parents may pick and choose from a public school's curriculum. Parents, like those in *Pierce* and *Meyer*, who choose a private educational path will have more control over the instruction their child receives. They may enroll their children in a religious school affiliated with their faith or a private school whose curriculum aligns with their religious beliefs. But these cases "in no way alter[ed] [the Court's] recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." *See Yoder*, 406 U.S. at 234–35. Indeed, this Court has never held that parents have a free exercise right to dictate, opt out of, or subject to strict scrutiny a religiously neutral and generally applicable secular curriculum that their children will be taught in public schools. And

Petitioners present no good reason for the Court to reverse course now.

Such a result would turn public education on its head, allowing parents and students to opt out of any lesson or requirement that they find religiously objectionable—potentially trapping the public school system in an educational impasse among competing objections. Indeed, MCPS's curricula include instruction on myriad topics that some parents and students could find unacceptable for religious reasons. For example, the pre-kindergarten curriculum presents instruction on respect for different cultures. *Intro to CKLA: PreK*, Montgomery Cnty. Pub. Schs., https://perma.cc/XBT4-6G7D. The kindergarten curriculum has a unit on the importance of caring for the earth. *Intro to CKLA: Kindergarten*, Montgomery Cnty. Pub. Schs., https://perma.cc/TRG6-8Z7N. In first grade, students learn that the earth rotates around the sun, a lesson that could be controversial to people who believe the earth is flat. *Science Curriculum: Elementary School*, Montgomery Cnty. Pub. Schs., https://perma.cc/4WBE-EV9J (click "Grade 1 Science"). Second graders learn about America's immigration history, and third graders learn about evolution. *Intro to CKLA: Grade 2*, Montgomery Cnty. Pub. Schs., https://perma.cc/6G2N-UN94; *Science Curriculum: Elementary School*, Montgomery Cnty. Pub. Schs., https://perma.cc/4WBE-EV9J (click "Grade 3 Science"). In fourth grade, students learn about gun safety and disease prevention, such as masking. *Comprehensive Health Education in Grade 4*, Montgomery Cnty. Pub. Schs., https://perma.cc/9N63-2TA9. In fifth grade, students read *Science of*

Breakable Things, a book featuring a character with depression. *CKLA Grade 5 Overview*, Montgomery Cnty. Pub. Schs., https://perma.cc/4A5H-F2A3.

Requiring religious exemptions from these and other curricular requirements would put schools in an untenable position. Teachers would need to create alternative assignments for every lesson, stretching their resources and capacity. Pet. App. 605a–06a ¶32. Where specific topics draw numerous opt-outs, instruction could become effectively segregated by faith to accommodate all parents' and students' religious beliefs. Moreover, depending on the topic, opt-outs could stigmatize and harm students who remain, as MCPS discovered with its initial opt-out policy for the ELA curriculum's LGBTQ-inclusive elements. In the end, the educational and civic mission of our public schools could be severely undermined. *Yoder* does not mandate this outcome, nor does any other decision of this Court.

II. THE "NO OPT-OUT" POLICY DOES NOT TREAT SECULAR AND RELIGIOUS CONDUCT DIFFERENTLY AND DOES NOT TRIGGER STRICT SCRUTINY UNDER *TANDON*.

Under *Tandon*, a government regulation is not neutral or generally applicable if it treats "comparable secular activity more favorably than religious exercise." 593 U.S. at 62–63 (applying strict scrutiny to pandemic restrictions that "treat[ed] some comparable secular activities," such as patronizing hair salons and restaurants, "more favorably than" engaging in religious activities, such as "at-home religious exercise"). Comparability is judged "against

the asserted government interest that justifies the regulation at issue." *Id.* (internal quotation marks omitted). For example, if religious activities and secular activities "both . . . pose[] a similar hazard" to the governmental interest in a policy, restricting only the former is a "form[] of underinclusiveness" and the law is "not generally applicable." *Fulton*, 593 U.S. at 534 (citing *Lukumi*, 508 U.S. at 544–46).

Lukumi illustrates the point. There, the city adopted several ordinances prohibiting animal sacrifice, a practice of the Santeria faith. 508 U.S. at 524–28. The city claimed that the ordinances were necessary, in part, to protect public health, which was "threatened by the disposal of animal carcasses in open public places." *Id.* at 544. But the ordinances did not regulate comparable conduct, such as hunters' disposal of their kills or improper garbage disposal by restaurants, both of which posed a similar hazard. *Id.* at 544–45. The Court concluded that this and other forms of underinclusiveness meant that the ordinances were "religious gerrymanders" that targeted Santeria religious practice, and were thus neither religiously neutral nor generally applicable. *Id.* at 535, 545–46 (internal quotation marks omitted).

Here, MCPS's current "no opt-out" policy treats religious and secular exemptions *exactly the same* because it offers no exemptions at all. *All* students must be present for the approved ELA curriculum. There is no differential treatment, and Petitioners have introduced no evidence to the contrary. MCPS does not offer opt-outs for secular reasons while denying them for religious reasons. In fact, some of the opt-out requests under the previous policy were lodged for secular reasons, not religious reasons.

Pet. App. 14a. Where religious and secular activity are not treated differently, strict scrutiny is not required under *Tandon*.

Instead of comparing the availability of religious opt-outs and secular opt-outs in the ELA curriculum, Petitioners urge the Court to compare apples to oranges, pointing to a regulation permitting opt-outs from the sex education curriculum, Md. Code Regs. 13A.04.18.01. But the ELA curriculum and sex education curriculum are not proper comparators under *Tandon*. *See* 593 U.S. at 62. The curricula do not function in the same way, and they serve different educational interests. *Cf. General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) ("Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities.").

A. The ELA Curriculum and the Sex Education Curriculum Present Different Content and Serve Different Governmental Interests.

As an initial matter, the ELA curriculum and the sex education curriculum are entirely distinct curricula that are "tailored to different grade levels, cover different topics, and serve different educational objectives." JA 4. The mission of the ELA curriculum is "to create literate, thoughtful communicators, capable of controlling language effectively as they negotiate an increasingly complex and information-rich world." JA 5. In ELA class, students explore a variety of texts as "catalysts for deep thought and emotion." *Id.* The class seeks to "encourage[] critical thinking" and "nurture[] appreciation and understanding of diverse individuals, groups, and

cultures." JA 8. The sex education class, by regulation, seeks to provide comprehensive instruction that "shall help students adopt and maintain healthy behaviors and skills that contribute directly to a student's ability to successfully practice behaviors that protect and promote health and avoid or reduce health risks." Md. Code Regs. 13A.04.18.01(B)(1).

Petitioners' attempt to characterize all material that touches on LGBTQ-related themes as prurient instruction elides this difference, fails the common-sense test, and lacks any support in the record. Seeking to shoehorn the ELA and sex education curricula into comparator roles under *Tandon*, Petitioners imply that the ELA storybooks include pornography lessons or sex simulations. Pet'rs' Br. 35. But all of the LGBTQ-related books added to the ELA curriculum are children's books with children's themes.

Early MCPS learners read books like *Uncle Bobby's Wedding*, *Intersection Allies: We Make Room for All*, and *Prince & Knight*. *Uncle Bobby's Wedding* is about a child's worry that her uncle, who is gay, will have less time for her once he gets married. *Intersection Allies: We Make Room for All* is about a diverse group of friends—one child uses a wheelchair, another has a single parent, another child wears a hijab, another speaks Spanish, and another appears to not conform to gender stereotypes. The book's repeated refrain is: "Where there's room for some, we can make room for all." *Prince & Knight* is a story of a prince falling in love with a knight as they battle a dragon in a mythical land. These books are age-appropriate and designed for young learners, and they speak directly to a core governmental interest

animating the ELA curriculum: to teach children about the existence of diverse individuals, groups, and cultures, in preparing them to live and thrive in our society. JA 8.

Nothing in these books is remotely salacious, and it is incorrect and offensive to equate the matters they depict with sexual behavior or sex education. These books are no more related to sex education than a book in which a princess marries a prince or a family with a mom and dad go on an adventure, common themes in children's literature. In fact, MCPS's ELA curriculum already includes books with similar themes. Pre-kindergarten classes read *Full, Full, Full of Love*,[4] a book about the depth of a grandmother's love for her grandchild—a similar theme to *Uncle Bobby's Wedding* but without a gay character. *CKLA PreK Overview*, Montgomery Cnty. Pub. Schs., https://perma.cc/2CX2-BQRY. *Princess Hyacinth,*[5] read in kindergarten, is about the adventures of a princess who floats and a boy who saves her, an adventure tale similar to *Prince & Knight*. *CKLA Kindergarten Overview*, Montgomery Cnty. Pub. Schs., https://perma.cc/H97S-BTEE. Reading books about magical kingdoms, families, adventure, and love are archetypal for early grades, and teachers are experts in how to present such material effectively and appropriately.

Meanwhile, the sex education curriculum covers entirely different topics, such as "sexual activity,"

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[4] Trish Cooke, *Full, Full, Full of Love* (2008).

[5] Florence Parry Heide, *Princess Hyacinth (The Surprising Tale of a Girl Who Floated)* (2016).

"sexually transmitted infections, including HIV," "pregnancy," "contraception," "condoms," and "consent." Md. Code Regs. 13A.04.18.01(D)(2). Because they present different instruction that serves different government purposes, the ELA and sex education curricula are not similarly situated and are not proper comparators under *Tandon*.

B. The ELA Opt-Outs Undermined MCPS's Governmental Interest in Educating Students About Diverse Individuals, Groups, and Cultures, Conflicted with MCPS's Obligation to Provide an Inclusive and Safe Learning Environment for LGBTQ Students and Families, and Proved Unworkable.

The attempted comparison under *Tandon* is especially inappropriate here because the opt-outs that Petitioners seek from the ELA curriculum are different in nature and impact than MCPS's opt-out from sex education instruction. LGBTQ students and students with LGBTQ family members are part of MCPS's student body and community. Accordingly, ELA lessons that invoke or reflect the existence of LGBTQ people and teach inclusivity of LGBTQ people are paramount not only to preparing students to be part of a diverse school environment and live in a diverse society, but also to carrying out MCPS's obligation and "effort[] to ensure a classroom environment that is safe and conducive to learning for all students." Pet. App. 607a. ¶39.

MCPS officials realized that, due to the sheer number of opt-outs, permitting students to leave the classroom whenever books featuring LGBTQ

characters were used "defeated" this educational purpose and obligation by exposing "students who believe that the books represent them or their families" to "social stigma and isolation." *Id.* This type of social stigma can impact a student's ability to focus and participate in class. *See* Amy L. Gower et. al, *First- and Second-Hand Experiences of Enacted Stigma among LGBTQ Youth*, J. Sch. Nurs. (July 23, 2019), https://perma.cc/FRC4-MVW6. In other words, the ELA opt-outs ultimately undermined the mission of the ELA curriculum by creating a classroom situation that directly conflicts with the very purpose of incorporating LGBTQ-inclusive materials into lessons, conveying the exact opposite of the curriculum's intended pedagogical message and denying those who remained in class the full benefit of that lesson.

MCPS's current "no opt-out" policy makes sense when considered in relation to instruction about the existence, history, and achievements of other historically marginalized communities—for example, Indigenous people, people of color, religious minorities, and women. Public schools have long presented this information in the humanities, literature, and history courses. To allow students to selectively opt out of education regarding disfavored groups would undermine the purpose of the public education system. Creating engaged citizens in a thriving multi-faith, multi-cultural democracy necessitates that students learn about their peers and community members and practice discussing (and potentially disagreeing on) complex issues and ideas with respect and civility.

Moreover, as discussed above, in addition to harming LGBTQ students and students with LGBTQ family members, the ELA opt-outs became utterly unworkable. Each time a student opted out of LGBTQ-related ELA instruction, discussion, or reading, the teacher had to create an alternate lesson, and many students did not bother to attend school at all on those days, leading to high absenteeism. Pet. App. 605a–06a ¶32, ¶37. The growing number of opt-out requests created "significant disruptions to the classroom environment" and placed "too great a burden on school staff" tasked with tracking which students needed accommodations and developing alternative lesson plans for those students. Pet. App. 16a.[6]

The opt-outs for sex education have not resulted in the same concerns as the ELA opt-outs. Under the sex education curriculum, MCPS students who want to opt out must do so in full, Md. Code Regs. 13A.04.18.01(D)(2); opt-outs from discrete portions of the sex education class, such as information that may be inclusive of sex education concerns specific to LGBTQ students, are not permitted and thus do not present the same risk of marginalizing students based on protected characteristics or conveying a lesson that is in direct conflict with the pedagogical purposes of

[6] The opt-outs demanded by Petitioners in this case could be even more disruptive. While much of Petitioners' brief focuses on the LGBTQ-inclusive books being read aloud in ELA class, Petitioners' asserted objections are substantially broader. Petitioners' Motion for Preliminary Injunction sought an injunction allowing parents to opt their child out of "reading, listening to, or discussing" the books, as well as "any other instruction related to family life or human sexuality." Mot. for Prelim. Inj., *Mahmoud v. McKnight*, No. 8:23-cv-01380 (D. Md. Aug. 9, 2023), ECF No. 23.

sex education classes. Further, the sex education curriculum is a "hermetically sealed off curriculum" that is scheduled in one 90-minute window or two 45-minute windows. Prelim. Inj. Tr. at 70, ¶¶7–13, *Mahmoud v. McKnight*, No. 8:23-cv-01380 (D. Md. Aug. 9, 2023), ECF No. 50. Thus, the unit on sex education can be quarantined and alternative assignments can easily be coordinated, avoiding the administrative chaos and disruption to the educational environment that occurred with the prior ELA opt-outs.

In sum, MCPS's policies merely recognize the substantive difference—in purpose and content—between sex education, on one hand, and information relating to LGBTQ themes that may arise in ELA classes, on the other. Indeed, even if the ELA and sex education curricula were proper comparators under *Tandon*, the opt-out demanded by Petitioners would severely undermine MCPS's educational and civic mission, its obligation to provide an equal education to all children, including LGBTQ students and students with LGBTQ family members, and the inclusive purpose of the ELA curriculum. The sex education opt-out does not compromise MCPS's interests in the same way, or at all. Petitioners' efforts to draw a parallel between the sex education and ELA curricula under *Tandon* are thus unavailing.

III. MCPS'S POLICY PROHIBITING OPT-OUTS DOES NOT INCLUDE DISCRETIONARY EXEMPTIONS AND DOES NOT IMPLICATE STRICT SCRUTINY UNDER *FULTON*.

Fulton is a narrow decision holding that a regulation allowing for a "formal" system of "entirely

discretionary exceptions" on an individualized basis is not generally applicable. 593 U.S. at 536. In *Fulton,* the City of Philadelphia suspended a contract with a provider of foster care services after it refused to certify same-sex couples as prospective foster parents on the ground that doing so would contravene its religious beliefs. *Id.* at 530. Although the provider's refusal violated an antidiscrimination provision in the agency's contract with the city, which prohibited sexual orientation discrimination, the contract also included a provision that permitted the Commissioner to grant an exception to the antidiscrimination bar "in his/her sole discretion." *Id.* at 537. This Court concluded that the discretionary-exception provision "render[ed] the contractual non-discrimination requirement not generally applicable" because it invited a decisionmaker to discriminate on the basis of religion. The Court thus applied strict scrutiny to the City's refusal to exempt the provider from the nondiscrimination rule. *Id.*

Here, not only does MCPS's "no opt-out" policy offer no individualized, discretionary exemptions—it permits *no exemptions at all*. *See Fulton*, 593 U.S. at 551–52 (2021) (Alito, J, concurring) (explaining that the city would not violate the Free Exercise Clause if it "eliminate[s] the never-used exemption power"). Uniformly, every lower court to review a rule that offers *no* exceptions has held that such a law cannot trigger strict scrutiny under *Fulton* because, by definition, it allows for no discretionary decision-making. *See*, *e.g., Canaan Christian Church v. Montgomery Cnty.*, 29 F.4th 182, 197 (4th Cir. 2022); *Swartz v. Sylvester*, 53 F.4th 693, 696, 702 (1st

Cir. 2022); *Tingley v. Ferguson*, 47 F.4th 1055, 1064, 1088 (9th Cir. 2022).

Petitioners seek to cast the creation of an opt-out policy itself, or any changes to that policy, as discretionary acts because the Board, at some point, used its discretion to create, amend, or withdraw the policy. Pet'rs' Br. 38–39. But Petitioners' sweeping position would render *every* policy decision ever made by *any* governmental entity subject to *Fulton*'s "discretion" rule. *Fulton* does not require or permit this: It applies only when there is a formal system allowing entirely discretionary exceptions on an individualized basis. These criteria reflect the Court's concern that such a system could easily be abused by decisionmakers, who could inquire into the reasons underlying an exemption request and subjectively weigh the offered rationale against the religious applicant.[7] *Fulton*, 593 U.S. at 542. In short, application of such a policy can "devalue[] religious reasons" for noncompliance "by judging them to be of lesser import than nonreligious reasons," and thus expose religious practice to discriminatory treatment. *Lukumi*, 508 U.S. at 537. Such is not the case here.[8]

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[7] Petitioners also assert that the grant or denial of some opt-out requests made under the Board's previous policy were subject to school officials' discretion. Pet'rs' Br. 39. This is a red herring. This case does not challenge the prior policy, which is no longer in effect at MCPS.

[8] Petitioners' suggestion that MCPS's Religious Diversity Guidelines, Pet'rs' Br. 38, operate as a discretionary exemption scheme requiring strict scrutiny under *Fulton* likewise fails. With respect to the ELA curriculum, the challenged "no opt-outs" policy supplanted the guidelines as well as any other existing

IV. THE "NO OPT-OUT" POLICY WAS NOT ENACTED OUT OF HOSTILITY TO RELIGION AND STRICT SCRUTINY IS NOT REQUIRED UNDER *MASTERPIECE*.

Under *Masterpiece*, a decision by a quasi-judicial body grounded in religious hostility "casts doubt on the fairness of the adjudication" and indicates that the individual may not have received "neutral and respectful consideration of his claims." 584 U.S. at 618. There, this Court held that strict scrutiny applied to Colorado's denial of a religious accommodation for a bakery owner's free-exercise objections to compliance with the state's nondiscrimination law because the Colorado Civil Rights Commission had acted with religious animosity in denying the exemption. *Id.* at 634. One commissioner described the baker's religious beliefs as "one of the most despicable pieces of rhetoric that people can use," not only disparaging the baker's religion but also "characterizing it as merely rhetorical—something insubstantial and even insincere." *Id.* at 635. The commissioners in *Masterpiece* "wished to condemn" the baker "for expressing" an "irrational" or

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policy or practice that allowed opt-outs from ELA instruction. Moreover, the Guidelines have since been amended to eliminate any potential exemption from curricular instruction, so even if there were not a specific policy barring opt-outs from the ELA curriculum, such exemptions would not otherwise be permitted under *current* MCPS Religious Guidelines. Pet. App. 15a. *No* school official has discretion to disregard either the "no-opts" ELA policy or the current Guidelines, despite the availability of opt-outs in the past. *See id.*; *Yellowbear v. Lampert*, 741 F.3d 48, 58 (10th Cir. 2014) (Gorsuch, J.) ("Surely the granting of a religious accommodation to some in the past doesn't bind the government to provide that accommodation to all in the future.").

"offensive" religious message. *Id.* at 649 (Gorsuch, J, concurring). Moreover, the Commission had taken actions that treated secular claims differently from analogous religious claims, further suggesting hostility to religion. *Masterpiece*, 584 U.S. at 654 (Thomas, J, concurring).

The facts here stand in sharp contrast to those in *Masterpiece*. To begin, in *Masterpiece*, this Court found it important that the remarks disparaging the bakery owner's religion were made "by an adjudicatory body deciding a particular case," which presents "a very different context" from a non-adjudicatory body issuing a neutral, across-the-board policy. 584 U.S. at 636; *see Lukumi*, 508 U.S. at 540–42. That "very different context" exists here: The School Board, in its non-adjudicatory, quasi-legislative role, enacted a policy that applies equally to all families. Religious parents and students are not singled out for disfavor or hostility in any way. Indeed, the Board was responding to an unadministrable number of opt-out requests that were based both on religious and non-religious grounds.

There is simply no evidence of hostility to religion here. Petitioners attempt to establish religious animus by cherry-picking a few statements—most of which occurred after the "no opt-out" policy was enacted—without providing any context. *See* Pet'rs' Br. 15; *see also* Pet. App. 50a n.18 (noting that Petitioners "have bundled together a handful of statements made during and outside Board meetings, both before and after the decision to allow opt-outs"). But on their face, the statements do not support Petitioners' narrative of animus against religion for at least two reasons. First, Board members' statements

expressing opposition to perceived discrimination must be viewed in connection with their obligation and desire to protect all students from discriminatory harms—again, regardless of whether those harms stem from opt-outs asserted for religious or non-religious reasons. *See* Pet. App. 50a n.18 (noting that additional discovery may help further contextualize the comments of Board members).

Second, *none* of the statements pointed to by Petitioners invokes or criticizes a specific religion, much less the Petitioners' religions. Opposing discrimination generally does not equate to religious hostility, and Petitioners offer no evidence to support their conclusory assertions. The parents seeking opt-outs did so for religious and non-religious reasons, and the Board members addressed the problems and disruption created by the opt-out requests by enacting a neutral "no opt-out" policy that does not target religion facially or in application. It would be a misuse of *Masterpiece* to presume religious hostility in every contentious interaction between the government and its citizens.

Petitioners also ask this Court to assume that the change in policy, alone, is sufficient evidence of religious hostility. Pet'rs' Br. 41. But a showing of hostility requires substantially more.[9] If anything, the prior policy of allowing opt-outs rebuts any inference

[9] To be sure, further factual development during the merits phase of the litigation could uncover actual evidence of Board members' hostility toward Petitioners' faiths at the time the Board adopted the "no opt-outs" policy. But given the current record, the district court and court of appeals correctly held that Petitioners were not entitled to a preliminary injunction on that basis.

of animus, demonstrating that the Board sincerely attempted to accommodate all objections, including religious ones. *Accord* Pet'rs' Br. 41. It is clear that MCPS eliminated the opt-outs because they were disruptive, exacerbated student absenteeism, created a stigmatizing and harmful environment for some students, and seriously compromised MCPS's pedagogical mission—not due to religious hostility.

* * *

CONCLUSION

For the foregoing reasons, the court of appeals correctly concluded that Petitioners did not "satisfy the extraordinary showing necessary to obtain a preliminary injunction." Pet. App. 51a. The decision should be affirmed by this Court.

Respectfully submitted,

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