

No. 24-297

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IN THE  
**Supreme Court of the United States**

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TAMER MAHMOUD, ET AL.,  
*Petitioners,*

v.

THOMAS W. TAYLOR, ET AL.,  
*Respondents.*

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

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**BRIEF OF AMICI CURIAE  
THIRTY-FIVE MARYLAND LEGISLATORS  
IN SUPPORT OF PETITIONERS**

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## IDENTITY & INTEREST OF AMICI CURIAE<sup>1</sup>

Amici are thirty-five Maryland delegates and senators.

*Amici* have a compelling interest in ensuring that the calibration in Maryland law between the county school boards' educational objectives and the First Amendment rights of Maryland's families of faith is applied the way that the Maryland Legislature intended. This balance is straightforward; county school boards get to set the curricula, but they must notify parents of the curricula's components and provide them with an opportunity to opt their children out of instruction related to family life and human sexuality. Because the Montgomery County Board of Education has transgressed both the First Amendment and the legislative intent behind the Opt-Out Requirement, *Amici* offer the following to aid the Court's deliberation over this vital case.

A list of the *amici* legislators is included as an appendix to this brief.

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<sup>1</sup>Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part. No person or entity other than Amici and the counsel below contributed the costs associated with the preparation and submission of this brief.

## INTRODUCTION & SUMMARY OF THE ARGUMENT

Petitioners have done a magnificent job of establishing why the Montgomery County Board of Education's guidance violates the First and Fourteenth Amendments to the U.S. Constitution. Indeed, this case largely begins, and should come to a quick end, with *Wisconsin v. Yoder*, 406 U.S. 205 (1972), for all the reasons Petitioners have already presented. See Pet'rs' Br. 24–35. Amici offer the following to show that the antics of the Montgomery County Board of Education violate not only our Nation's charter but also the state law that it was trusted to implement.

Simply put, the Maryland Code of Regulations Section 13A.04.18.01(D)(2) (the "Opt-Out Requirement") appropriately calibrates two competing interests: the first, possessed by the boards of education, in producing public-school curricula that cover a wide variety of diverse viewpoints; and the second, possessed by the faithful, in rearing their children in accordance with the tenets of their beliefs. The solution: the school boards set the curricula, tell the parents what is in them, and then let them opt their children out of lessons or material that is either objectionable or in tension with the family's' faith.

All was well, until the Montgomery County Board of Education got creative. By nesting an LGBTQ-book requirement in its "English language arts curriculum" instead of in a formal "family life and human sexuality" module (i.e., sex education), the Board absolved itself of having to comply with the Opt-Out Requirement altogether. Even worse, the Board no

longer considers itself obligated to notify parents when their children (some as young as four or five) will be exposed to materials touching on sex, sexual orientation, and gender identity.

This exploit, as shown by Petitioners, transgresses decades of this Court's First Amendment jurisprudence. It was also never what the Maryland Legislature intended when it enacted the Opt-Out Requirement, which by its terms, grants an opt-out right any time "instruction *related to* family life and human sexuality *objectives*" arises, *id.* (emphases added), no matter if it arises in an English, math, social studies, or science module. For these reasons (and all those set out in Petitioners' brief), the Court should reverse.

## ARGUMENT

### I. THE OPT-OUT LAW WAS MEANT TO EMPOWER PARENTS.

State lawmakers throughout the Nation have continuously endeavored to balance the right of parents to choose what information their children will receive at school with pressure from local school boards to "represent all" aspects "of . . . sexual orientation, gender identity, and gender expression." Md. Code Regs. § 13A.04.18.01(D)(2). Maryland is no exception. Its efforts to do so culminated in the Opt-Out Requirement.

As currently in effect, the Opt-Out Requirement is straightforward. It provides that all Pre-K through Twelfth Grade students will receive comprehensive health-education instruction. *Id.* Part of this



instruction includes “family life and human sexuality.” *Id.* And given the sensitive nature of this topic, Maryland law emphasizes that the community must be “involved [in] reviewing and commenting on instructional materials.” *Id.*

Because it is impossible to reach an absolute consensus regarding which “family life and human sexuality” materials are appropriate for which age (or at all), *id.*, the Opt-Out Requirement provides an eminently sensible solution. Specifically, it imposes a mandatory obligation on all “local school system[s]” to “establish policies, guidelines, and/or procedures for student opt-out regarding instruction *related to* family life and human sexuality *objectives.*” *Id.* (emphases added). Crucially, the Opt-Out Requirement applies not only to material or information offered solely in a “family life and human sexuality” module; i.e., sex ed. Instead, opting out must be an option anytime curricula touch on the “objectives” regarding family life and human sexuality; i.e., anything involving questions of “sexual orientation, gender identity, and gender expression.” *Id.* And, lest the Opt-Out Requirement lose all meaning, it provides that local school systems “shall provide an opportunity for parents/guardians to view instructional materials to be used in the teaching of family life and human sexuality objectives.” *Id.*

The reason the Opt-Out Requirement exists is (or should be) self-evident. State law allows a school board to teach that “diversity in its community is an asset that makes it stronger and that building relationships with its diverse community requires it to understand the perspectives and experiences of others.” *Mahmoud v. McKnight*, 688 F. Supp. 3d 265,

272 (D. Md. 2023). It also recognizes the fundamental rights of parents to “direct the religious upbringing of their children.” *Yoder*, 406 U.S. at 218, 232. The inevitable clash between those two principles leads to the solution: let the local school boards choose their curricula, but tell the parents what they include, and give the parents an option to opt out when (at a minimum) exposing their children to the curricula would interfere with their right to rear their children in accordance with their faith.

Indeed, the Opt-Out Requirement echoes the principles that this Court articulated in *Yoder*, which first acknowledged that “[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.” *Id.* (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925)). But then it added the counterbalance “of parental direction of the religious upbringing and education of their children in their early and formative years,” which remains at “a high place in our society.” *Id.* (citing *Rowan v. U.S. Post Off. Dep’t*, 397 U.S. 728 (1970); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Meyer v. Nebraska*, 262 U.S. 390 (1923)). For that reason, “a State’s interest in universal education, however highly [the Court] rank[s] it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children[.]” *Id.* (quoting *Pierce*, 268 U.S. at 535).

In other words, Maryland’s Opt-Out Requirement ensures that the State has complied with more than fifty-years of this Court’s precedent. And it is not, moreover, an outlier. Thirty-eight states (and the District of Columbia) explicitly allow students to opt out of sexual education courses,<sup>2</sup> four require opting in,<sup>3</sup> and six implement a combination.<sup>4</sup> In other words,

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<sup>2</sup> See Ala. Code § 16-41-6; Alaska Stat. §§ 14.30.355(b)(7), 14.30.356(b)(6); Ark. Code § 6-16-1006(e); Cal. Educ. Code § 51937; Colo. Rev. Stat. §§ 22-25-104(6)(d), 22-1-128(3)(a) & (4) & (5); Conn. Gen. Stat. § 10-16e; Fla. Stat. §§ 1002.20(3)(d), 1003.42(5); Ga. Code § 20-2-143(d); Haw. Dep’t of Educ., Bd. of Educ. Policy 103-5; Haw. Dep’t of Educ., Bd. of Educ. Policy 101-13; Haw. Dep’t of Educ. Reg. No. 2210.1, <https://perma.cc/6QAT-B6EL>; Keith T. Hayashi, Superintendent, Haw. Dep’t of Educ., Annual Memorandum: Notice on Board of Education Policy 101-13 Controversial Issues (June 23, 2023), <https://perma.cc/T6DS-XSWP>; Idaho Code § 33-1611; 105 Ill. Comp. Stat. 5/27-9.1a(d); Iowa Code § 256.11(6)(a); La. Stat. § 17:281(D); Mass. Gen. Laws ch. 71, § 32A; Me. Rev. Stat. tit. 22, § 1911; Mich. Comp. Laws § 380.1507(4); Minn. Stat. § 120B.20; Mo. Stat. § 170.015(5)(2); Mont. Code § 20-7-120; N.C. Gen. Stat. § 115C-81.30(b); N.H. Rev. Stat. § 186:11(IX-c); N.J. Stat. § 18A:35-4.7; N.M. Code R. § 6.29.6.11; N.Y. Comp. Codes R. & Regs. tit. 8, § 135.3; Ohio Rev. Code § 3313.60(A)(5)(c), (d), (f); Okla. Stat. tit. 70, § 11-103.3(C); Or. Rev. Stat. §§ 336.035(2), 336.465(1)(b); Ore. Dep’t of Educ. Admin. R. 581-022-2050(5); Ore. Dep’t of Educ. Admin. R. 581-021-0009; 22 Pa. Code § 4.29(c); R.I. Gen. Laws §§ 16-22-17(c), 16-22-18(c), 16-22-24(b); S.C. Code § 59-32-50; Va. Code § 22.1-207.2; Vt. Stat. tit. 16, § 134; Wash. Rev. Code §§ 28A.230.070(4), 28A.300.475(7); Wis. Stat. §§ 118.019(3) & (4); W. Va. Code § 18-2-9(c); D.C. Mun. Regs. subtit. 5, § E2305.5.

<sup>3</sup> See Ky. Rev. Stat. § 158.1415(1)(d), (e); Miss. Code § 37-13-173; Nev. Rev. Stat. § 389.036(4); Wyo. Stat. § 21-9-104(b).

<sup>4</sup> See Ariz. Rev. Stat. §§ 15-711(B), 15-716(E); Ind. Code § 20-30-5-17(c), (d); Kan. Admin. Regs. § 91-31-35(a)(5)(b); Kan. Dep’t of Educ., Frequently Asked Questions about Health Education in

the Opt-Out Requirement, when applied correctly and commonsensically, strikes the same notice-and-choice balance arrived at by most of the Nation’s lawmaking bodies.

**II. IN CONTRAVENTION OF LEGISLATIVE INTENT, MONTGOMERY COUNTY HAS THROWN THE BALANCE STRUCK BY THE OPT-OUT REQUIREMENT INTO DISARRAY.**

Despite the plain intent behind the Law—i.e., that, to comply with the First Amendment, as interpreted by *Yoder*, schools *must* provide parents with notice and an opportunity to opt out of *any* sex-related instruction—the Montgomery County Board of Education has proclaimed that “[s]tudents and families may not choose to opt out” and will not be informed when certain “books are read.” Pet.App.185a, 657a. These books include *Pride Puppy*; *My Rainbow*; *Intersection Allies*; *What Are Your Words?*; *Love, Violet*; *Born Ready*; and *Jacob’s Room to Choose*, each of which is detailed in Petitioners’ opening brief. See Pet’rs’ Br. 9–12. To accomplish this circumvention of state law, the Montgomery County School Board opted to “incorporate[] into its *English language arts curriculum* a collection of storybooks featuring LGBTQ characters . . . in an effort to reflect the diversity of the school community.” *Mahmoud*, 688 F. Supp. 3d at 271 (emphasis added).

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Kansas, <https://perma.cc/JTW9-8FUH>; Kan. Dep’t of Educ., Kansas Model Curricular Standards for Health Education 2018, Appendix A, <https://perma.cc/TNA9-8ENE>; Tenn. Code §§ 49-6-1305, 49-6-1307, 49-61308; Tex. Educ. Code § 28.004(i), (i-2); Utah Code §§ 53E-9-203(3), 53G10-205, 53G-10-403.

A brief perusal through these materials, some of which are read to children as young as four, is proof positive that these materials are not used solely to instruct students in “sentence structure, word choice, and style.” BIO at 5. And in any event, the Montgomery County Board of Education has never denied that it is using its English language arts curriculum to inculcate their preferred worldview. The books are, by the Board’s own lights, intended to “[d]isrupt students’ either/or thinking” on sexuality and gender transitioning. Pet.App.12a. The Board has admitted that it wants to disrupt “heteronormativity” and “cishnormativity.” Pet.App.622a–623a. And by conceding that “there will be discussion that ensues” when children are exposed to these materials, and “part of the discussion” may involve “teachers . . . *instructing* children that gender is anyone’s guess at birth,” J.A. 48 (emphasis added), it is “[d]irect[ly] teaching . . . family life and human sexuality indicators and objectives.” Md. Code Regs. § 13A.04.18.01(D)(2).

In other words, the Montgomery County Board of Education is doing what the Opt-Out Requirement (and this Court’s precedent) forbids; *disallowing* “opt-out regarding instruction related to family life and human sexuality objectives.” *Id.* It is no answer to say that the Board still allows opt out of the “family life and human sexuality” unit of instruction, Pet.App.68a, 70a n.4; i.e., sex-ed. As this Court has recognized, “the title of the statute and the heading of a section cannot limit the plain meaning of the text,” and “[f]or interpretive purposes, they are of use only when they shed light on some ambiguous word or phrase.” *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*,

331 U.S. 519, 528–29 (1947). If the same type of instruction finds its way into kindergarten classrooms through the English language arts curriculum, the Opt-Out Requirement is still being flouted. Md. Code Regs. § 13A.04.18.01(D)(2).

Indeed, the Montgomery County Board of Education stands alone with this senseless interpretation of the Opt-Out Requirement. Other Maryland counties apply it as it reads: the opt-out guarantee applies to instruction “*related to family life and human sexuality objectives.*” Md. Code Regs. § 13A.04.18.01(D)(2) (emphases added). Frederick and Carroll Counties, for example, adhere to that interpretation. *See Elementary Health Education Frequently Asked Questions (FAQ), Frederick County Public Schools*, <https://perma.cc/45LL-P7HF>; *Approval of Family Life Advisory Committee Opt-Out Recommendations for Grades PreK through 5 Family Life Unit, Carroll County Public Schools* (Jan. 11, 2023), <https://perma.cc/A7BB-R35Y>.

As was the case in *Yoder* the practice of the Montgomery County Board of Education “carries with it a very real threat of undermining the” vibrantly diverse Montgomery County faithful “community and religious practice as they exist today.” 406 U.S. at 218. Any family that objects to the worldview being taught in the Montgomery County English language arts curriculum “must either abandon belief and be assimilated . . . , . . . be forced to migrate to some other and more tolerant region,” or send their children to a private school. *Id.* The First Amendment prevents this impossible choice. So too, does the Opt-Out Requirement—at least when it is interpreted correctly. Because the Montgomery County Board of

Education's interpretation defies the text, spirit, and sense of *both* the Opt-Out Requirement and the Free Exercise Clause, the Court should reverse.

### **III. WITHOUT REVERSAL, THE PROBLEM WILL WORSEN.**

By lending its imprimatur to the Montgomery County Board of Education's sleight of hand, the Fourth Circuit has given individuals, schools, and legislatures a way to skirt *Yoder's* requirement. As to the former, other cases that query "the extent of constitutional rights of parents of young children in a public elementary school to notice and the ability to opt their young children out of . . . instruction on transgender topics" are arising with greater frequency. *See, e.g., Tatel v. Mt. Leb. Sch. Dist.*, No. 22-837, 2024 U.S. Dist. LEXIS 176782, at \*1 (W.D. Pa. Sept. 30, 2024).

As for the latter, certain members of the Maryland Legislature are now suggesting amendments to the Opt-Out Requirement that would allow the Montgomery County Board of Education's actions. Specifically, an amendment to the Law has been proposed that would excise issues regarding sexual orientation and gender identity from the "family life and human sexuality" provision in the Maryland Code of Regulations. As a practical matter, this would eliminate the opt-out right entirely. This, of course, would represent an even greater affront to the First Amendment. But the Fourth Circuit's reasoning, if it prevails in this Court, will expedite these sorts of legislative transgressions.

The risk is neither hypothetical nor conjectural. An earlier version of the bill required “the State Superintendent to provide notice to a county board if [it is determined] that the county board is not following the State Board policy and guidelines or *is authorizing students to opt-out of instruction in a manner that is not approved by the State Board,*” and authorizes the State Comptroller to withhold funds from the county school board until the “discrepancy” is resolved.<sup>5</sup> In other words, the writing on the wall is crystal clear; the Opt-Out Requirement, and the core First Amendment Free Exercise principles that it enshrines, are under duress.

This issue, then, cries out of the Court’s correction. An affirmance will ensure that the right of parents to direct their children’s faith will continue to erode, despite the Free Exercise Clause’s lofty command and more than a half-century of this Court’s enshrinement of it. A reversal ends that attrition in its tracks.

## CONCLUSION

The Court should reverse the judgment of the Fourth Circuit.

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<sup>5</sup> See <https://mgaleg.maryland.gov/2023RS/bills/hb/hb0119t.pdf>.



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## **APPENDIX**

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1. Delegate Nicholas Kipke
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4. Delegate April Miller
5. Delegate Chris Tomlinson
6. Senator Johnny Mautz
7. Senator Justin Ready
8. Senator Mike McKay
9. Delegate Todd Morgan
10. Delegate Matt Morgan
11. Senator Marybeth Carozza
12. Delegate Brian Chisholm
13. Senator Jason Gallion
14. Delegate Mark Fischer
15. Delegate Kevin Hornberger
16. Delegate Bob Long
17. Delegate Lauren Arian
18. Delegate Ryan Nawrocki
19. Delegate Kathy Szeliga
20. Delegate Seth Howard
21. Delegate William Wivell
22. Delegate Jeff Ghrist
23. Delegate Wayne Hartman
24. Delegate William Valentine

- 25.**Delegate Rik Metzgar
- 26.**Delegate Theresa Reilly
- 27.**Delegate Steve Arentz
- 28.**Delegate Terry Baker
- 29.**Delegate Stuart Schmidt
- 30.**Delegate Nino Mangione
- 31.**Delegate Jason Buckel
- 32.**Delegate Josh Stonko
- 33.**Senator JB Jennings
- 34.**Delegate Jay Jacobs
- 35.**Delegate Charles Otto