No. 24-297

IN THE

Supreme Court of the United States

TAMER MAHMOUD, *et al.*,

Petitioners,

v.

THOMAS W. TAYLOR, *et al.*,

Respondents.

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

BRIEF FOR ROBERT D. KAMENSHINE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

Robert D. Kamenshine has a long-standing interest in First Amendment issues that arise in the conduct of public education (*see* Robert D. Kamenshine, *The First Amendment's Political Establishment Clause*, 67 Cal. Rev. 1104, 1132-1138 (1979); Robert D. Kamenshine, *Reflections on Coerced Expression*, 34 Land and Water L. Rev. 101 (1999); Robert D. Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 Const. Comm. 147 (1987).

He was on the Vanderbilt Law School faculty for over twenty years—1967-1988 (Full Professor 1973-88; Associate Professor 1970-73; Assistant Professor 1967-70). In 1987-88, while on leave from Vanderbilt, he was Professor-in-Residence at the United States Department of Justice, Civil Division, Appellate Staff, where he thereafter continued as an attorney, until he retired from the Department in 2017.

While at Vanderbilt, Mr. Kamenshine taught Constitutional and First Amendment Law. In 1980-81, he was a Visiting Professor at Duke Law School. In 1984-85, he was Lee Distinguished Visiting Professor, College of William and Mary, Marshall-Wythe School of Law, Bill of Rights Institute. In 1997-1998, while on leave from the Department of Justice, he was Distinguished Visiting Professor, E. George Rudolph Chair, University of Wyoming College of Law. During the 2006 spring semester, while also on leave, he was Senior Faculty

1. Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amicus* funded its preparation or submission.

Fellow at Marshall-Wythe. And from 2010-2013, he was an Adjunct professor in the University of Baltimore Law School's LOTUS (Law of the United States) program, in which he taught Constitutional law to foreign-trained lawyers.

This amicus brief will assist the Court to better understand the strong constitutional underpinning of Respondent's case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment does not effectively turn the public-school curriculum into an educational smorgasbord from which parents are privileged to select subject matter in accord with their religiously-based beliefs. The grant of a preliminary injunction here would effectively validate such a smorgasbord, and is unwarranted.

Petitioners show a degree of burden on their free exercise. But they fail to establish a likelihood of success on their claim that any such burden was the product of a policy that did not meet the constitutional "requirement of being neutral and generally applicable." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 533 (2021).

Indeed, petitioners lack any one of the three bases, under *Fulton*, that would support their claim. First, there is no "mechanism for individualized exemptions." *Id.* at 533. Second, petitioners fail to identify "religious conduct" that is prohibited in contrast with similar "secular conduct" that is permitted. *Id.* at 534. And third, there has been no "intoleran[ce] of religious beliefs" or

"restrict[ions] of practices because of their religious nature." *Fulton*, 593 U.S. at 633.

There are only two further circumstances under which the grant of a preliminary injunction would be warranted. First, the Court might deem *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) to demand strict scrutiny in *any* case in which, as here, a public school system denies a parent's request, rooted in religion and parental rights, to exempt a child from a curricular requirement. But *Yoder* upheld the Amish claim for a two-year total opt-out from public education only upon having concluded that "the State's requirement of compulsory formal education after the eighth grade would *gravely* endanger if not *destroy* the free exercise of [the Amish] religious beliefs." 406 U.S. at 219 (emphasis added). Petitioners make no comparable claim of danger and destruction.

Second, the Court might overrule *Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), and determine that strict scrutiny applies to *any* "laws incidentally burdening religion." *Fulton*, 593 U.S. at 533 (2021).

Indeed, serious imposition of strict scrutiny on curricular requirements resulting in *any* more than a de minimis burden on religious exercise would effectively mandate an untenable and constitutionally unwarranted educational smorgasbord. But the possible overruling of *Smith*'s broad validation of general non-discriminatory measures that incidentally burden religious exercise need not compel that standard.

Indeed, in *Fulton*, Justice Barrett was "skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced". *Fulton*, 593 U.S. at 543 (Justice Barrett concurring).

If the Court revisits *Smith*, it should make uniform its First Amendment jurisprudence by bringing its free exercise standard in line with the moderate intermediate free speech standard long applied to comparable cases that involve expressive conduct. *See United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) (symbolic speech); Robert D. Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 Const. Comm. 147, 151-52 (1987) (arguing, pre-*Smith*, for rejecting nominal strict review in favor of the *O'Brien* standard). That standard requires that the restriction on First Amendment freedom must be only incidental, further a significant governmental interest, and be no greater than is essential to advancing that interest. Under that standard a preliminary injunction here is unwarranted.

Yes, despite petitioners' continued exercise of their vital right to impart their religious values to their children at home, the Board's elimination of the curricular opt-out does incidentally burden that free exercise. It does so by curtailing petitioners' desire, as related to the disputed curriculum, to be monopoly of communication with their children.

But the Board's strong educational interest in mitigating prejudiced anti-social behavior by *all* students against their LGBTQ classmates outweighs petitioners' burden. The disputed portion of curriculum—designed to show students in the majority that their minority LGBTQ classmates deserve understanding and respect—substantially relates to achieving the Board's important educational goal. Consequently, the First Amendment demands no religiously-based opt-out.

ARGUMENT

I.

THE SCHOOL BOARD WAS NOT CONSTITUTIONALLY COMPELLED TO CREATE AN OPT-OUT TO PORTIONS OF THE CURRICULUM FROM WHICH RELIGIOUSLY MOTIVATED PARENTS COULD EXCLUDE THEIR CHILDREN

The roots of this case lie in this Court's more than five decade-old decision in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). There, the Court upheld, under free exercise and due process, the right of Amish parents to withdraw their children from public education once they had completed the eighth grade. *See Smith*, 494 U.S. at 881 (explaining that *Yoder*'s holding rested on a combination of free exercise and "the right of parents * * * to direct the education of their children" (citing *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925)).

As the Court in *Yoder* explained, the withdrawal was intended to insulate Amish children from secular

influences that would seriously prejudice their integration into the insular and virtually self-sufficient Amish agrarian religious community. *Yoder*, 406 U.S. at 218 ("inescapable" conclusion that secondary schooling would "expos[e] Amish children to worldly influences * * * contrary to beliefs" and "substantially interfer[e} with the religious development of the Amish child and his integration into the way of life of the Amish faith community").

Here, as petitioners themselves stress, their children are growing up in the highly diverse population of Montgomery County, Maryland. *See* Pet. Br. 6 ("Montgomery County, Maryland, is the most religiously diverse county in the nation."). It is also ethnically diverse.[2]

Petitioners do not claim that they are directing their children toward anything like Amish agrarian insularity. Rather, it is fair to suppose that they will finish high school, go on to higher education, and ultimately will fully participate in Montgomery County life.

Montgomery county is well known as a nationally leading center for bio-technology.[3] The excellence of its public schools has been nationally recognized.[4] Those

2. See Montgomery County Statistics—U.S. Census 2024: https://www.census.gov/quickfacts/fact/table/montgomerycountymaryland/PST045224

3. Montgomery County's Biotechnology Industry, https://montgomeryplanning.org/research/analysis/industry_reports/biotech/biotech_industry.pdf

4. In 2021, "[a]ll 25 Montgomery County public schools earned spots on the 2021 Best High Schools list, published by *U.S. News & World Report*. Five ranked in the top 500 nationally,

schools must prepare students to participate in 21st Century Montgomery County society. That society is estimated to includes 88,000 (8% of households) LGBTQ members.[5]

But petitioners, on sincere religious grounds, claim a First Amendment right to remove their children from a portion of instruction the Board deems essential toward that participation—but which petitioners view as threatening to impede their children's religious upbringing.

For perspective, it is as important to recognize what this case does not involve, as much as what it does. Petitioners do not face regulation of the information, doctrine or views, religious or otherwise, that they impart to their children. *See Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (state may not prohibit religious instruction); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) (state may not prohibit instruction in German).

Nor are their children being compelled to speak words or to engage in ceremonies in contravention of their parents' or their own religious convictions. *See West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943) (Jehovah's Witnesses public school students may not be compelled to recite pledge of allegiance).

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and eight were ranked in the top 25 in Maryland. https://ww2.montgomeryschoolsmd.org/press/?id=10690

5. https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/resources/AntiHateTaskForce/Minutes/LGBTQ-Report-231109.pdf.

Most importantly in *Barnette*, as here, the decision did *not* excuse the objecting students from the classroom, and they heard recitation of the contested pledge. Thus, petitioners' extensive reliance on *Barnette* (Pet. Br. 25-26, 29, 31, 33, 45-46, 50), a leading free speech-coerced expression decision, is unavailing.

Rather, petitioners demand, as a constitutional right, an enforced exclusivity to control what their children may hear. The premise is that petitioners' free exercise of religion will be adversely affected unless they retain the *maximum* opportunity to mold their children's religious beliefs to mirror their own.[6] Therefore, petitioners claim that they have the First Amendment right to isolate their children from anything the public schools say that, in petitioners' unreviewable opinion, might detract from the message that they wish to convey. In short, they claim a constitutionally compelled monopoly of communication.

In *Yoder*, the Court deeply and critically examined the adverse impact on the Amish religious community. The Court deemed compulsory attendance to threaten the

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6. Petitioners write as if, but never explicitly claim, that any community opposition to the disputed curriculum would necessarily be religiously-based. But given the nature of the material in the books in question, it is fair to think that some objecting parents might invoke grounds that are not narrowly religious. There is nothing to suggest that the Board would apply a restrictive, and consequently constitutionally problematic interpretation of its opt-out. *Cf. Welsh* v. *United States*, 398 U.S. 333 (1970) (broadly construing draft exemption for religious conscientious objectors to include essentially secular objectors); *United States* v. *Seeger*, 380 U.S. 163 (1965) (same). Rather, it is also fair to assume that, as in *Welsh* and *Seeger*, Montgomery County's opt-out would be accorded a comparably broad reading.

very continuance of Amish society and therefore validated a total two-year opt-out. Yet, in the far less compelling circumstances of this case, neither free exercise nor due process, demands parental exclusivity. *See Smith*, 494 U.S. at 890. ("[T]o say that a non-discriminatory religious-exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required.").

Here, undoubtedly, a requirement that petitioners' children attend an objected-to portion of the curriculum literally places a degree of burden on petitioners' rights.[7] But not all burdens are equally weighty, and only the most severe should trigger the strict scrutiny that petitioners demand under *Yoder*. The relatively slight burden here comes nowhere near that in *Yoder*. Consequently, while both *Yoder* and the present case involve curricular opt-outs, that decision affords no aid to petitioners.

II.

THE BOARD'S RESTORATION OF THE PRE-OPT-OUT STATUS QUO COMPORTS WITH FIRST AMENDMENT REQUIREMENTS OF GENERAL APPLICABILITY AND NEUTRALITY

Given first, *Yoder*'s limits, where the very survival of a religious community was at stake; and second, *Smith*'s sweeping rejection of free exercise claims, a free

7. The court of appeals held, based on the very limited record presented, that "petitioners have not shown a cognizable burden to support their free exercise claim." Pet. App. 34a. The court explained that there was "no evidence at present that the Board's decision not to permit opt-outs compels the parents or their children to change their religious beliefs or conduct, either at school or elsewhere." *Id.*

exercise claim against a non-discriminatory law of general applicability would have little or no chance, No matter the law's burden on free exercise, the negative result would likely be the same. Thus, plaintiffs that attack such laws are understandably impelled to characterize *any* regulation alleged to burden their religious exercise to lack general applicability and/or neutrality.

The arduous task that confronts petitioners, under those general applicability and neutrality tests, is even more difficult than that successfully accomplished in *Fulton*. There, Justice Gorsuch, characterized the Court's opinion as "seek[ing] to sidestep" the possible overruling of *Smith*—an issue on which the Court had granted certiorari. 593 U.S. at 618 (concurring in judgment), He explained that to avoid that issue, the Court's majority had to undertake the "long and lonely" "burden of showing that the policy [at issue] isn't 'generally applicable.'" *Id.* at 619. That, he pointed out, required a "dizzying series of maneuvers." *Id.* at 623.

Similarly, Justice Alito illuminated the "confusion about the meaning of *Smith*'s holding on exemptions from generally applicable laws." 593 U.S. at 609 (concurring in judgment). He described how "[p]ost *Smith* cases have * * * struggled with the task of determining whether a purportedly neutral rule 'targets' religious exercise or has the restriction of religious exercise as its 'object.'" *Id.* at 605. Thus, he concluded, "[d]ecisions of the lower courts on the issue of targeting remain in disarray." *Id.* at 609. And he similarly illuminated the "confusion about the meaning of *Smith*'s holding on exemptions from generally applicable laws." *Id.*

Petitioners invite another such "struggle" in a different context—public education. That difference is critical. Indeed, *Yoder* itself, while applying strict scrutiny to the extreme burden placed on the Amish, urged the Court's future caution in public education cases.

The Court should heed *Yoder*'s emphatic caution, that it is "ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." 406 U.S. at 235. Thus, it "must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable education requirements." *Id. See* Justice White's concurrence (calling for "delicate balancing of important but conflicting interests").

Despite petitioners' strenuous efforts, the "general applicability" and "neutrality," standards impose no constitutional impediment to the Board's rescission of an opt-out that, in the first instance, it was not constitutionally bound to create. As previously explained, the Board exercised its constitutionally valid discretion when it initiated the opt-out, restoration of which petitioners now seek to compel.

Once the Board adopted that opt-out, the Constitution equally permitted the Board to withdraw it, and thus restore the status quo to require the attendance of *all* students. To hold otherwise would have the perverse effect of deterring school boards from ever adopting curricular opt-outs, for fear that even if they later proved untenable, there would be no turning back.

Petitioners' reasoning is convoluted and confusing (Pet. Br. 22-23, 35-43) when they contend that "[t]he Board's actions are not *generally applicable* or *neutral*," such that "*Smith*'s residual rule * * * proves a First Amendment violation." Pet. Br. 35 (emphasis added). Their intensive parsing of the Board's course of action and the comments of a some of its members readily evokes the "dizzying series of maneuvers" that Justice Gorsuch described (*Fulton*, 593 U.S. at 623), and the "struggle[s]" that Justice Alito referenced. *Id.* at 605.

Fulton explained that "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Id.* at 533 (quoting *Smith*, 494 U.S. at 884, quoting *Bowen* v. *Roy*, 476 U.S. 693, 708 (1986) (opinion of Burger, C.J., joined by Powell and Rehnquist, J.J.). But petitioners identify no such individualized mechanism.

Fulton further explained that a law fails to meet the general applicability standard if the law prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." 593 U.S. at 534 (citing *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520 (1993). *See Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 526-27 (2022); *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021). But petitioners identify no such "*prohibit[ed]* religious conduct" (emphasis added) versus "permit[ed] secular conduct." Rather, they essentially claim that they have a constitutionally-mandated monopoly over communication with their children on subjects addressed by petitioners' respective religions.

Finally, *Fulton* explained that "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." 593 U.S. at 533. Here, however, there is no constitutionally relevant intolerance of religious beliefs. And *no* practices, religious or otherwise, are restricted.

Yes, petitioners' views rest on religion, including beliefs at variance with the themes pursued in the Board's curriculum. But the Board's effort to help safeguard LGBTQ students against prejudice and, as much as possible, produce prejudice-free adults does not rest on hostility toward religion. Prejudice against minorities, sexual or otherwise, may derive from a variety of religious and non-religious sources. Thus, it is fallacious to equate opposition to prejudice with intolerance of religion, even where that prejudice originates religiously.

Here, the Board is trying to forestall public school students from ultimately engaging in acts of prejudice against LGBTQ students, and to foster the development of law-abiding adults. It is not surprising that some frustrated Board members would express consternation (even if not well-considered and appropriately tempered) to learn that views, religiously or otherwise rooted, that could undermine the Board's anti-discrimination efforts are being fostered at home.

Any lines or categorizations that the Board has drawn, although evoking petitioners' strong religiously-based objections and vulnerable to criticism, have nothing to do with the constitutionally suspect factors that this Court has previously identified. For example, petitioners

prominently quarrel with the Board's "rely[ing] on superficial categories to deny opt-outs to preschoolers, while permitting opt-outs for children in junior high and high school." Pet. Br. 36. They complain that the Board has maintained opt-outs for the "sex education," part of the junior high and high school curriculum, while discontinuing opt-outs for the disputed elementary school material. Pet. Br. 36. *See id.* (complaining of "superficial" and "goassmer-thin categories"). Yet that simply invites the Court to substitute its educational judgment for the Board's.

There may well be religious objections to varying portions of the curriculum. But the Board is not constitutionally mandated to make all, none, or parts of the curriculum subject to religiously-based opt-outs. Rather, in deciding on opt-out policy, the Board is constitutionally entitled to make individualized educational judgments as to the role and importance of distinct elements of the curriculum at various levels of the educational process.

The Board may consider one part of curriculum more urgent than another, and therefore initiate a religious waiver for only one part. Importantly, at a later time, the Board (perhaps with a different membership, in whole or part)[8] might well reach a different judgment—again reinstating the opt-out, or, perhaps, even deciding that the disputed curricular material is age-inappropriate for lower grades.

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8. The Board is elected, not appointed. Members have four-year terms, and elections are held every two years. https://www.montgomeryschoolsmd.org/boe/about/. Indeed, the religious groups to which petitioners belong are a substantial portion of Montgomery County's voters. Thus, they are not lacking recourse in contesting the portions of the Board's policies to which they object.

III.

IF THE COURT DECIDES TO RECONSIDER *SMITH* AND TO OVERRULE IT, THE COURT SHOULD UNIFY ITS FIRST AMENDMENT JURISPRUDENCE BY ADOPTING FOR FREE EXERCISE CASES THE INTERMEDIATE STANDARD THAT GOVERNS SYMBOLIC SPEECH

If the Court agrees that first, *Yoder*, involving a threat to a religious community's very existence, is unavailing; and second, the Board's curricular requirement meets the standards of neutrality and generality, the Court would face reconsideration of *Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872, 878-882 (1990).[9] Petitioners have not argued that point, other than to simply state that "Smith is in direct conflict with free-exercise guarantees and should be overruled." Pet. Br; 3).[10] The Court may well opt to overrule *Smith*, and

9. In *Fulton*, Justices Barrett, although reluctant to revisit *Smith*, observed that "[a]s a matter of text and structure, it is difficult to see why the Free exercise Clause—alone among the First Amendment freedoms—offers nothing more than protection from discrimination." 593 U.S. at 543 (Justice Barett concurring).

Going further, Justices Alito, Thomas, and Gorsuch urged the Court to address "whether this Court's governing interpretation of a bedrock constitutional right, the right to free exercise of religion, is fundamentally wrong and should be reversed." *Fulton*, 593 U.S. at 545 (Justice Alito's concurrence). And Justice Gorsuch added that "*Smith* failed to respect this Court's precedent, was mistaken as a matter of the Constitution's original public meaning, and has proved unworkable in practice." *Id*. at 618.

10. *See Citizens United* v. *Federal Election Comm'n*., 558 U.S. 310, 330-331 (2010). *See generally*, Joan E. Sherman. *Appellate*

go on to determine that strict scrutiny applies to *any* "laws incidentally burdening religion."[11] *Fulton*, 593 U.S. at 533. Yet to impose strict scrutiny on a curricular requirement resulting in *any* more than a de minimis burden on religious exercise would effectively mandate a constitutionally unwarranted educational smorgasbord.

But overruling of *Smith*'s broad validation of general non-discriminatory measures that incidentally burden religious exercise need not equate with requiring strict scrutiny. Rather, the Court, consistent with Justice Barrett's observation in *Fulton*, 593 U.S. at 543 (Justice Barrett concurrence), should unify its First Amendment jurisprudence by bringing its free exercise standard in line with that applied to comparable symbolic free speech cases. *See* Robert D. Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 Const. Comm. 147, 151-52 (1987) (arguing, pre-*Smith*, for rejecting nominal strict review in favor of the moderate intermediate standard of review invoked in comparable free speech-conduct cases).

Both constitutional text and history support the conclusion that the Free Exercise Clause protects

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Courts as First Responders: The Cost and Propriety of Appellate Courts Resolving Issues in The First Instance, 87 Notre Dame l. Rev. 1521, 1585 (2012).

11. In his *Fulton* concurrence, Justice Alito addressed "[i]f *Smith* is overruled, what legal standard should be applied." *Fulton*, 593 U.S. at 614 (joined by Justices Thomas and Gorsuch). He responded that "[t]he answer the comes most readily to mind is the standard that *Smith* replaced"—"[a] law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest. *Id.*

"religious practice" as well as "worship." *Fulton*, 593 U.S. at 566 (Justice Alito, concurring in the judgment). More difficult, however, is to determine the *extent* to which that provision invalidates measures that "forbid[] or hinder[] *unrestrained* religious practice or worship"—to afford the right to the exercise of religion "*without hindrance*." 593 U.S. at 568 (emphasis added).

Of course, no constitutional right is absolute. Consequently, free exercise, like others, may be "hindered," but *only* if that hindrance satisfies the appropriate constitutional standard. And any such standard—rational basis, intermediate scrutiny, strict scrutiny—does not appear in the Constitution, but is the product of the Court's reasoning.

At the time the First Amendment was framed, there was little if any reason to consider the interaction between a constitutional right of free exercise and legislation to deal with a myriad of important social problems—for example, compulsory vaccination,[12] or mandated attendance at public schools.[13] Rather, religious exercise, to the extent it involved conduct, would typically mean prayer, other rituals, and gatherings for worship.

Indeed, Justice Alito, concurring in *Fulton*, observed that even by the early 19th century, "legislation imposed

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12. There were virtually no vaccines (smallpox vaccine, 1796), and no thought of compulsory vaccination (first state compulsory vaccination, 1855). https://www.mayoclinic.org/diseases-conditions/history-disease-outbreaks-vaccine-timeline/requirements-research

13. Compulsory attendance at public schools was first adopted by Massachusetts in 1852). https://en.wikipedia.org/wiki/Compulsory_education

only limited restrictions on private conduct, thereby "minimiz[ing] the chances of conflict between generally applicable laws and private conduct." 593 U.S. at 586.

He further described how the homogeneity of "religious demographics of the time decreased the likelihood of conflicts." 593 U.S. at 586. More specifically, he explained "that the population [was] overwhelmingly Christian and Protestant denominations," so that other than * * * taxes to support an established church, it is hard to think of conflicts between the practices of members of those denominations and generally applicable laws * * *." *Id.* Of course, as the present case well exemplifies, there is great and ever-increasing religious diversity, thus dramatically increasing the chances of conflicts with general legislation.

There has been substantial judicial support for the overruling of *Smith*. *Fulton*, 593 U.S. at 626 ("No fewer than ten Justices—including six sitting Justices—have questioned [Smith's] fidelity to the Constitution.") (Justice Gorsuch concurring in the judgment). Yet, by way of perspective, it important to recall that in the same way that the post-*Smith* environment has prompted an understandable impetus to vindicate substantial free exercise claims, the pre-*Smith* environment, raised the converse problem.

Generalized application of strict scrutiny to almost any challenged general law adversely affecting free exercise could well seriously undermine public welfare. Thus, pre-*Smith*, there was a powerful impetus in some cases to escape that standard. *See Scrapping Strict Review*, *supra*, 4 Const. Comm. at 147-150. In sum, post-*Smith*, courts sought to moderate that decision's harsh effect

on religious exercise, and pre-*Smith* courts sought to moderate what would have been extreme applications of the strict scrutiny standard.

Either standards of strict scrutiny, if seriously applied, or almost no scrutiny can create extreme results. Indeed, *Smith* was an overreaction. But a return to strict scrutiny, unless applied in a watered-down fashion, would be an equally unfortunate overreaction.[14] Consider what it would mean to apply strict review to *every* case in which parents asserted a sincere religious necessity to exclude their children from portions of the curriculum. That standard would all but guarantee constitutionally-mandated exclusion.

As with the application of general laws in free speech-conduct cases, the matter of similarly regulating acts in the realm of free exercise is for the most part a matter of relatively recent judicial concern. When ideas, whether religious or political, turn into communicative conduct regulated by a content-neutral law, strict scrutiny is misplaced.

There is no good reason to accord religious exercise a greater degree of protection than is accorded, in

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14. *See Fulton*, 593 U.S. at 543 ("I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime." (Justice Barrett, concurring). *But see id.* at 614 ("Whether [(strict scrutiny] should be rephrased or supplemented with specific rules is a question that need not be resolved here * * * ." (Justice Alito concurring in the judgment), *Id.* at 627 ("Challenging questions may arise across a large field of cases and controversies," but "the Court should overrule it now * * * and address each case as it comes.").

comparable circumstances, to the equally critical right to freedom of speech. Rather, religion-based conduct should receive as much, but *no more* protection against general non-discriminatory regulation as does politically-motivated communicative conduct. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). Thus, if in *O'Brien*'s draft card-burning scenario there were a religiously-compelled rather than a politically-motivated burning, the identical First Amendment standard would govern.

Adoption of the middle tier standard, like that applied in free speech symbolic expression cases, would properly address both pre-and post-*Smith* concerns, and sensibly keep free exercise and freedom of symbolic speech on an equal footing. Under that standard, to be valid a content-neutral law must "further an important or substantial governmental interest" and involve an "incidental restriction on alleged First Amendment freedoms [that] is no greater than is essential to the furtherance of that interest." *O'Brien*, at 377. Although a content-neutral law must be closely tailored to its ends, the government does not have to employ the least restrictive alternative. *See Ward* v. *Rock Against Racism*, 491 U.S. 781, 798 (1989).

IV.

THE BOARD'S CURRICULAR REQUIREMENT FURTHERS AN IMPORTANT EDUCATIONAL INTEREST UNRELATED TO SUPPRESSION OF FREE EXERCISE, ONLY INCIDENTALLY BURDENS THAT RIGHT, AND IS WELL-TAILORED TO THE REQUIREMENT'S GOAL

The Court's familiar intermediate standard of review does not support the petitioner's desired mandatory opt-out. Yes, the Board's generally applicable curriculum marginally burdens petitioners' free exercise. Importantly, however, as previously noted, that limit leaves them free to impart their religious values to their children. And the constitution does not guarantee them a monopoly of communication.

The Board's valid and strong educational interest is unrelated to the suppression of religion and outweighs the incidental adverse effect on free exercise. That interest is to mitigate prejudiced anti-social behavior by students against their LGBTQ classmates, and ultimately to help shape a community that is largely free of prejudice.

More specifically, the disputed portion of the curriculum substantially relates to that interest by helping to show majority students that their minority LGBTQ classmates deserve understanding and respect.[15]

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15. In 2016 in Montgomery County, 83.3 percent of students identified as heterosexual; 2.6 percent identified as gay or lesbian; and 8.7 percent identified as bisexual. Also in 2016, 1.3 percent of high school students identified as transgender. https://www.montgomeryschoolsmd.org/siteassets/district/boe/meetings/memorandum/191016-Data-Collection-LGBTQIA-SPC-06-27-19-07-BD.pdf

Petitioners, who understandably focus on their own concerns, quickly dismiss that point. *See* Pet. Br. 30 ("[T]he Board condescends: 'A School is where children are taught to respect one another * * * [and] [l]earning about gender diversity and sexuality identity diversity is part of that work.'"). Perhaps strict scrutiny warrants that cursory dismissal,[16] but not the moderate intermediate First Amendment standard.[17]

Harassment, discrimination, and even crimes, against Montgomery County's estimated 88,000 LGBTQ residents (8% of households) present a serious problem[18]—one that often begins in the County's schools. The incidental burden on petitioners' free exercise must be balanced against the strong public interest to minimize the chances that LGBTQ members of the community will face such anti-social behavior, whether as public-school students[19] or later

16. *See* Pet. Br. 23 (referencing "the Board's generic concerns about disruption, stigma, and compliance with unspecified civil rights laws"), *id.* at 47 ("[t]he Board must explain how the withdrawal [of the opt-out] serves a compelling interest.").

17. For example, petitioners ask, "'[how] is a court to know whether students have been adequately' instructed?" Pet. Br. 49 (quoting *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023), and "'how is a court to know when 'a stigma free environment has 'been reached?'" *Id.* at 50.

18. Montgomery County Anti-Hate Task Force, Report. 2023, https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/resources/AntiHateTaskForce/Minutes/LGBTQ-Report-231109.pdf

19. The CDC's LGBQ+ Youth Report shows youth consistently report higher rates of bullying, being threatened or injured with a weapon, and dating violence compared to their heterosexual peers. Montgomery County Anti-Hate Task Force, Report. 2023, https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/resources/AntiHateTaskForce/Minutes/LGBTQ-Report-231109.pdf

as adults.[20] It is more than reasonable for the Board to have concluded that the best way to forestall it is to first address the problem in the course of public education, not leave the matter to the criminal law.

There is a further circumstance that supports the reasonableness of the curricular requirement. Ordinarily, claims for free exercise exemptions, such as in *Smith*, concern only the claimant. As in *Yoder*, however, the disposition of the present case has import not just for petitioners' interest in the imparting of their values, but also for that of their children in their own development. The Board has a weighty responsibility to those children to structure a program to best advance their development.

Importantly, as petitioners stress, the Constitution affords strong protection to parental rights. *See Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 468 (2020) (Court has " long recognized the rights of parents to direct the 'religious upbringing' of their children"). But it does not confer the educational monopoly that they effectively seek. Surely Montgomery County, through its public schools, has a weighty interest in preparing students to function well in its 21st Century modern society.

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20. Despite the advancements in legal protections and social acceptance, discrimination remains prevalent. Nearly half of the LGBTQ+ respondents in Montgomery County reported facing discrimination in various aspects of their lives over the past year, underscoring the persistent challenges faced by the community. Montgomery County Anti-Hate Task Force, Report. 2023, https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/resources/AntiHateTaskForce/Minutes/LGBTQ-Report-231109.pdf

The Board confronts the difficult question of reconciling two goals: first, to ensure that *all* of its students are well-educated, and second, to accommodate parents who have principled objections to their children receiving a part of that instruction. Striking that balance is difficult, and of necessity, may involve a continuing process of adjustment, one not encumbered by the most severe degree of judicial review. Certainly, contrary to what petitioners imply (Pet. Br. 32-33), the constitutionality of the Board's decisions cannot be a matter of polling the educational choices of other school districts, even on arguably related matters. Rather, as *Yoder* recognized, in all but the most extreme cases, the Constitution gives each the Board the room to shape its educational program.

Today, the curriculum segment concerns fictional LGBTQ characters. The appropriateness of such sexually-related subject matter is highly controversial (whether or not on religious grounds), especially, as here, where it relates to young students. Yet tomorrow, some equally sincere parents may seek to opt their children out of exposure to non-sexual material that they find to be just as religiously or otherwise objectionable.

What if, for example, the future contested books involve stories of girls who dream of becoming a scientist,[21]

21. *See* Martha Freeman, *Born Curious: 20 Girls Who Grew up to be Awesome Scientists* (2020).

an engineer,[22] or perhaps even a Justice of this Court.[23] It is not far-fetched to envision a school board confronting a dispute over those books.[24] Consequently, as here, there could well be constitutionally-based demands for opt-outs. And there would be no easy way to distinguish any such cases from this one. The Court should not embark on that journey

22. *See* Andrea Beaty, *Rosie Revere, Engineer: A Picture Book* (*The Questioners*) (2013).

23. *See* Jimmy Zabel, *Sandra Day O'Connor Biography For Kids: A Little Big Dreamers Book* (2024); Dean Robbins, *You Are A Star Ruth Bader Ginsberg* (2022).

24. *See*, *e.g.*, *Career Women Are Failures in the Sight of God*, https://biblicalgender\roles.com/2020/05/15/; RELIGION VS-GIRLS-EDUCATION, https://religiondispatches.org/religion-vs-girls-education/.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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