No. 23-1890

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TAMER MAHMOUD; ENAS BARAKAT; JEFF ROMAN; SVITLANA ROMAN; CHRIS PERSAK, IN THEIR INDIVIDUAL CAPACITIES AND EX REL. THEIR MINOR CHILDREN; MELISSA PERSAK, IN THEIR INDIVIDUAL CAPACITIES AND EX REL. THEIR MINOR CHILDREN; KIDS FIRST, AN UNINCORPORATED ASSOCIATION,

Plaintiffs-Appellants,

v.

MONIFA B. MCKNIGHT; SHEBRA EVANS; LYNNE HARRIS; GRACE RIVERA-OVEN; KARLA SILVESTRE; REBECCA SMONDROWSKI; BRENDA WOLFF; JULIE YANG; MONTGOMERY COUNTY BOARD OF EDUCATION,

Defendants-Appellees.

Appeal from the United States District Court for the
District of Maryland, Southern Division
Case No. 8:23-cv-1380 – Judge Deborah L. Boardman

JOINT APPENDIX
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

TAMER MAHMOUD, et al.,

Plaintiffs,

v. Case No. 8:23-cv-01380-DLB

MONIFA MCKNIGHT, et al.,

Defendants.

Greenbelt, Maryland
August 9, 2023
10:08 a.m.

PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE DEBORAH L. BOARDMAN

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P R O C E E D I N G S

(Call to order of the Court.)

THE COURTROOM DEPUTY: All rise. The United States District Court for the District of Maryland is now in session, the Honorable Deborah L. Boardman presiding.

THE COURT: Okay. Good morning, everyone. Please be seated.

THE COURTROOM DEPUTY: The matter now pending before the Court is Civil Case No. DLB 23-1380, Tamer Mahmoud, et al. v. Monifa McKnight, et al. The matter now comes before the Court for a hearing on Plaintiffs' motion for preliminary injunction. Counsel, please identify yourselves for the record, beginning with counsel for the plaintiffs.

MR BAXTER: Good morning, Your Honor. Eric Baxter on behalf of the plaintiffs. To my right, my colleague, Will Haun; directly behind me, Michael O'Brien; and behind me to the right, Brandon Winchel.

THE COURT: Okay. Good morning to you, gentlemen.

MR. SCHOENFELD: Good morning, Your Honor. Alan Schoenfeld for the Montgomery County Board of Education. I'm joined by Bruce Berman, Emily Barnet, and Jeremy Brinster.

THE COURT: Okay. Good morning to all of you. Please be seated. Thank you.

Okay. We're here today for a hearing on the plaintiffs' motion for a preliminary injunction, which has been

fully briefed. The motion is at ECF 23, which includes exhibits. The defendants' opposition is ECF 42, with exhibits. The plaintiffs' reply is ECF 47, also with exhibits. I also received the defendants' notice of supplemental authority filed on Monday, ECF 48, and the plaintiffs' supplemental declaration with an exhibit filed last night, ECF 49. I've also of course reviewed the Complaint, ECF 1, and Amended Complaint, ECF 36, and their exhibits. The plaintiffs have also included citations to URLs for public school board meetings, and television reports, and other matters which I have reviewed.

The plaintiffs are three sets of parents of elementary-age schoolchildren enrolled in Montgomery County Public Schools, and another plaintiff is an organization called Kids First, an unincorporated association of parents and teachers that formed to advocate for the return of parental notice and opt-out rights in Montgomery County Public Schools. The parents and their children come from diverse faiths: Muslim, Roman Catholic, Ukrainian Orthodox.

The parents challenge the decision of the Montgomery County Board of Education, and the Montgomery County Public Schools superintendent, and the elected board members. I will collectively refer to them today as the school board or the board. And they challenge a decision of the school board to disallow them and other families from opting their children out of instruction when their teachers read or discuss books which

have been incorporated into the English Language Arts curriculum that feature characters who are lesbian, gay, bisexual, transgender, or queer, LGBTQ, and that according to the plaintiffs promote one-sided transgender ideology, encourage gender transitioning, and focus excessively on romantic infatuation, among other issues that the plaintiffs take.

The plaintiffs refer to the books as Pride Storybooks. The defendants refer to them as the LGBTQ+ inclusive books. I will refer to them as the books or storybooks today.

The parents believe the reading and discussion of the storybooks in the classroom will interfere with their sacred obligations to raise their children in their religion and form their children in their religious beliefs. They assert violations of the First and Fourteenth Amendments to the United States Constitution and Maryland law. They move for a preliminary injunction before the start of the 2023-24 school year, which begins on August 28th. They seek to enjoin the school board from denying them advance notice and an opportunity to opt out of classroom instruction that involves the storybooks or otherwise relates to family life or human sexuality.

I do not have the time here to summarize all of the plaintiffs' allegations and the evidence in support of their motion. They are in the amended complaint as exhibits -- in the exhibits to the plaintiffs' motion and reply, all of which I have reviewed.

The claims on which the plaintiffs have moved for preliminary injunctive relief are:

Count 1, a First Amendment claim that the defendants have violated the free exercise rights of the parents to direct the religious upbringing of their children;

Count 2, a First Amendment claim that the defendants have violated their free exercise rights because the no-opt-out policy is not generally applicable, because it prohibits religious conduct while permitting similar conduct that undermines the government's asserted interests in a similar way -- I should say secular conduct -- and it provides a mechanism for individualized exemptions;

Count 3 is a First Amendment claim that the defendants have violated their free exercise rights because the no-opt-out policy is not neutral, because it is specifically directed at a religious practice;

They are not moving on Count Four, which is a free speech claim;

And finally, Count 5 they are moving for preliminary injunctive relief on. That is a Fourteenth Amendment claim that the defendants have violated the parents' substantive due process rights to direct their children's education and upbringing.

Let me just state the standard for a preliminary injunction for the record. Before the entry of a final

judgment, a Court may enter a preliminary injunction under Federal Rule of Civil Procedure 65(a). A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief and may never be awarded as a matter of right.

Mountain Valley Pipeline v. Western Pocahontas Properties Partnership, 218 F.3d 353 at 366 (4th Cir. 2019). A plaintiff seeking preliminary injunctive relief bears the burden of proof and must meet a high bar by satisfying four factors. The plaintiff must clearly show that it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tip in its favor, and that an injunction is in the public interest. Those are the well-known Winter factors from the 2008 Supreme Court case.

Several of the preliminary injunction factors merge when constitutional rights are at stake. Leaders of a Beautiful Struggle v. Baltimore Police Department, 2 F.4th 330 at 346 (4th Cir. 2021). When there is likely a constitutional violation, the irreparable harm factor is satisfied. Likewise, the two final factors, the balance of the equities and the public interest, are satisfied when there is likely a constitutional violation because the public interest favors protecting constitutional rights and a state is in no way harmed by issuance of a preliminary injunction which prevents the state

from enforcing restrictions likely to be found unconstitutional.

Okay. Now that I set forth the procedural posture and the standard -- there is of course no dispute on the standard -- I have some questions for the plaintiffs.

MR BAXTER: Thank you, Your Honor.

THE COURT: Okay. So before we begin, let me just say, if you could kindly please speak clearly into the microphone for the benefit everyone, especially me and the court reporter. And -- speak slowly within reason, and if you are reading anything, please speak slowly; we tend to speak faster when we read something. So thank you.

MR BAXTER: Thank you, Your Honor.

THE COURT: And I want this to be a conversation. So let me just -- we can agree that the challenged government action is the board's no-opt-out policy. That's the challenged action -- regulation, correct?

MR BAXTER: Correct.

THE COURT: Okay. So let's talk about burden first, and before we get to that, let me just state, no one is questioning the sincerity of your clients' religiously held beliefs. It's not an issue; I don't think we need to get into that at all today, correct?

MR BAXTER: That's correct.

THE COURT: Now, what -- explain to me your burden argument. It doesn't seem to fit in the traditional types of

burdens that we see from the Supreme Court and Fourth Circuit, like -- or other Court of Appeals. So financial detriment, loss of benefits, coercion, punishment; tell me what the burden is, the constitutional burden.

MR BAXTER: Yes, I'll answer that in two ways, Your Honor. First, there is a direct coercive element here. If you look, for example, at the Mahmoud declaration in paragraph 17, the Quran specifically prohibits individuals, Islamic individuals, from engaging in discussions that would delve into the private affairs of individuals and especially discussing anything related to their sexual behavior. And for a second- or third-grade student, that would include participating in a discussion, for example, about what it means to like-like someone, to exploring your pronouns, to discussing whether your -- what it might mean to be cisgender or transgender.

And so -- and the Persaks and the Romans have -- in their declarations have made similar statements. I would refer to the Persaks' declaration at 12 and 16 and the Romans' at 19 through 20, where they stated that they had made a decision not to have their children -- a religious decision not to have their children engaged in such discussions because it directly contradicts what their religious teachings are and their desires to influence their children's understanding of those issues in a religious way. And so there is that direct coercive element.

THE COURT: Can I ask you this. Is the burden, the

constitutional burden, is it being asked the question by the teacher, or is it a forced response?

MR BAXTER: It is participating in the discussion at all, especially at a formative age, when children -- even the cases that the school board cites, like Parker and Mozert, recognize that children in particular are vulnerable to these types of issues. The Tatel case out of the District Court in Pennsylvania, the Grimm v. Gloucester County case in this court have recognized that a child's identity going to their sexuality and gender identity are issues that go to the very identity of a child, right at the heart of where parental authority lies and how a parent would help their children.

But even if the Court doesn't accept that kind of a direct coercion type of argument, that is the wrong standard -- that is not a required standard, I should say. The Supreme Court, in cases as far back as Thomas v. Review Board, has recognized that simply putting an individual in a position of having to choose between a publicly available program and the religious beliefs, whether it's coercive or not, is sufficient.

So for example, in Thomas v. Review Board, the plaintiff had left the job of his own accord because of a religious objection and was denied benefits. And the Court said even though that was not coercive, he hadn't been coerced to leave the job, he -- just being put in the position of having to choose between your religious conscience and participating in

the government benefit was enough.

THE COURT: I -- so I'll have to reread Thomas, but I thought it was the denial of the unemployment benefit that stemmed from his religious conduct. So there, it's a denial of an unemployment benefit.

MR BAXTER: Well --

THE COURT: Or a failure to meet the good cause standard.

MR BAXTER: -- he wasn't coerced -- excuse me for speaking over you. He was not coerced to leave his job, he could have continued working, and here, the exact same situation applies. The student -- the parents are being told they either have to not use the public school system, or they have to give up their religious right to control what their children -- the type of instruction their children receive.

And that's very similar to the Carson v. Makin case that was just decided a term ago, where again, the parents were just seeking the ability to have public funding for their private -- their private religious school, which was available to other students going to private school. And the Court said, even though had other options, they could have gone to public school, there was nothing coercive, the indirect pressure of them to sacrifice their religious beliefs just to receive the advantage of the public program was sufficient burden for purposes of the Free Exercise Clause.

And the Fulton v. City of Philadelphia case is very similar. There, it was even government contractors, where you're not necessarily -- that wouldn't normally be described as a benefit, but the opportunity to participate as a government contractor, the Court said that was a burden, that the --

THE COURT: So is the burden here that they're being forced to choose public versus private schools because if there's no-opt-out, they will put their children in private schools?

MR BAXTER: So that's -- of course, some of these parents don't -- many of the parents don't have that option; their public school is their only option.

THE COURT: I understand.

MR BAXTER: And so they are -- whether they would remove their children or not, they're being forced into either accepting the option of public school or maintaining their religious beliefs if they want -- once they put their kids in, that's it.

THE COURT: Well, they can still of course maintain their religious beliefs and teach their children in their faith. What -- again, help me understand, when the children are in the classroom, the mere listening to these ideas that are offensive to their religion is a constitutional burden?

MR BAXTER: Certainly. That's the same situation that you would have had in Carson, Fulton, and in Thomas v. Review

Board, where those individuals could have continued to exercise their faith, nothing stopped them from continuing to, you know, get another job, from, you know, continuing in their work, from going to another school; they simply --

THE COURT: But in Thomas, it wasn't -- the issue wasn't that he was fired for his religion; it was, he was subsequently denied unemployment benefits because he quit, and that was not deemed good cause. So that's a denial of unemployment benefits. In Carson, it was also a denial of public funds for schools. So --

MR BAXTER: Precisely. So even in the same situation here, if these parents choose to maintain their religious beliefs, that they will not allow children to participate in instruction that encourages them to question their sexuality, their gender identity, if they choose to exercise that right to fully withdraw their -- to fully protect their children from that kind of counter-instruction, then they're not -- then they can't participate in the public schools. And so they would -- in order to exercise their religious rights under the school board's theory, they would have to withdraw their children from the public schools.

Now, even without that -- I mean, under the current analysis of the Supreme Court, I mean, just look at whether strict scrutiny is triggered. So you look at is the Court treating religion equally, and here, it's clearly not. I mean,

the situation under the school board's theory, where a high school student can opt out of this exact same instruction given in his health ed class --

THE COURT: I do want to talk about that, but I just want to make sure we agree, there has to be a constitutional burden before we get to strict scrutiny, right?

MR BAXTER: Well, in Tandon, Fulton, and -- the Court did not explicitly address burden; it asked first whether religion was being treated fairly, and if it wasn't, then it went to strict scrutiny. But there is no question that there's a burden here, in that the parents are being forced to allow their children to submit to instruction that violates their religious beliefs. The Mahmouds' third-grade student would be directly violating the teaching of the Quran by participating in those discussions about sexuality, romance, gender identity. And so forcing them to compel that at the -- it's a cost of going to public school; it is a clear burden.

THE COURT: So I'm looking at the paragraph 17 of the Mahmoud Barakat declaration, which says, "It would violate our religious beliefs and the religious beliefs of our children if they were asked to discuss romantic relationships or sexuality with schoolteachers or classmates." So is it a violation if the teachers merely ask a question about romantic relationships or sexuality?

MR BAXTER: You know, I can't -- I don't know exactly

where they would draw the line, but my understanding is that yes, any of those kinds of private discussions about -- especially at a second- or third-grade level, discussion about romance, sexuality, gender identity --

THE COURT: This doesn't say gender identity, this just says romantic relationships or sexuality. Which of the books discuss sexuality?

MR BAXTER: Well, sexuality would include questions about your gender identity. And all of the books -- I mean, each of the books has some element of sexuality and gender identity. I don't know that we can clearly distinguish between those two, but sexuality is a broad topic would cover all of those.

THE COURT: Okay, okay.

THE COURT REPORTER: Excuse me. Could you please move the microphone closer? Because I can hear you, but some words --

MR BAXTER: Okay, I'll try to keep my mouth closer, thank you.

THE COURT: I saw in your complaint and I think in one of the declarations there was an inclusion of the word "inculcation." Are you arguing that the free exercise burden is an inculcation of your clients' children? I mean, are you pursuing that theory?

MR BAXTER: Well, I think there certainly are facts

that would support that. The school board has not backed away from the fact that it is -- explicitly stated it is trying to ensure a fully inclusive environment that is trying to reduce stigmatization, that even walking out of a classroom would be hurtful, that disagreeing would be hurtful. The school board's own principals union for elementary principals expressed concern that the school board was looking for books that were looking to disrupt heteronormativity and cis-normativity. That's in both the McCaw declaration and in the second Baxter declaration that was submitted last night.

And so there is no question that the school board is trying to enforce a certain end point, and that in itself is problematic and again goes to undermining of the general applicability, where the school board is saying that, you know, walking out of a classroom would be hurtful.

But we know from cases like Tinker, from the Mahanoy decision in the Supreme Court last term that -- and that's at 141 Supreme Court 2038 -- that students don't lose their rights when they walk into the classroom. And students have the right -- if they stay in those discussions, it's clear they have a right to express contrary decisions, do so even vehemently in ways that might be offensive to other students, as long as it doesn't disrupt the overall classroom atmosphere.

And so for the school board to say that it can ban students from walking out because it's hurtful, that clearly

cannot be a compelling government interest or a basis for, you know, satisfying strict scrutiny.

So I think your question was as to whether there is an effort here to inculcate students, and the school board has not shied away that it is trying influence the students and change their view. And that's inappropriate in this context, both as a matter of the religious burden and for purposes of strict scrutiny.

THE COURT: Okay. Let's switch gears just slightly. We're still talking about burden. Parker is the 2008 First Circuit case, of course not binding on me or here in the Fourth Circuit, but it's certainly relevant, and the defendants rely heavily on it. How is it distinguishable?

MR BAXTER: I would say it's distinguishable in two ways. First, the level of the burden, in Parker, one of the students was not even required to read it. And the second student was required to sit through the reading of the book, but there was no discussion about it. The Court, in Parker, recognized that there -- under its theory, there would be a sliding scale, and as it moved more toward an effort to indoctrinate or inculcate values into the students, that that would trigger a First Amendment violation.

So I think the level of the burden is much more significant here, where you have the school expressly admitting that it is seeking to influence the way students view these and

to stop having views or taking actions that others might deem hurtful. The --

THE COURT: Give me the second distinction.

MR BAXTER: Yeah, the second is -- has to do with the burden standard, where the Parker Court relied upon a direct coercion standard which, as we've discussed, is simply not the standard, was not the standard at the time, and is not the standard under the most recent free exercise cases which -- where the Court has explicitly said that an indirect coercion is sufficient and putting a plaintiff in the position of having to choose between participating in the government program and exercising their religious beliefs is sufficient to trigger strict scrutiny.

THE COURT: Okay. Let's talk about the first distinction. So what is your evidence that there will be a classroom discussion of these books?

MR BAXTER: Well, first of all, the school board has stated that the teachers are required to read the book. So in each class, one of the books has to be read at least -- one of the books has to be read at least one year -- I'm sorry, one time per year. And they -- the school board has not disavowed that its own instructions tell teachers, for example, to tell students that disagreeing viewpoints are hurtful, that if students question how one determines sex, that they are to be told that doctors simply guess at birth what your sex is. So

there's no question that the school board has not backed away from that there will be discussions.

And once there's no notice, there's no way for parents to know. Of course, there may be some teachers who handle this in a very careful manner, in a discreet manner, but it seems inevitable that there will also be teachers who take full advantage of what the school board is telling them to do and aggressively, for example, talk to students about the difference between what it means to like someone and what it means to like-like someone, which again, the principals themselves have said is inappropriate at this age regardless of sexual orientation, that they're uncomfortable talking about these issues with elementary-age students.

THE COURT: Would your clients be satisfied if the books were merely read and there was no discussion? Is it the discussion part that's concerning or that's burdensome?

MR BAXTER: Your Honor, I'm sure it would depend for each of my clients, and it would depend on the books. Some of the books explicitly, for example, promote ideas that children know better than their parents and teachers how to determine their gender identity or their sex. I'm not sure how each of my clients would break down on each individual book.

But one important point here is that the school board's own policies, the religious diversity guidelines, allow broad -- for broad accommodation of any religious objection.

You can be excepted from a class if you object to the Halloween ac- -- or you can be opted out if you object to the Halloween activity, if you object to some of the music that's being sung or played in a band or choir class. There's unlimited discretion for parents to opt their children out under the school board's own existing policy.

THE COURT: I do want to talk about that, just let's finish Parker for one minute.

MR BAXTER: Sure.

THE COURT: Thank you. So you distinguish Parker. The second ground was you said Fourth Circuit applied the wrong burden standard; it was too high, it was direct coercion, and the Supreme Court has held indirect coercion is all you need. What are the top three Supreme Court cases I should read on indirect coercion and how they apply here?

MR BAXTER: I would say that there's a handful of them. You could read the Fulton v. City of Philadelphia, the Carson v. Makin case, the Thomas v. Review Board.

THE COURT: So those are the three, the indirect --

MR BAXTER: I would also say the Hobby Lobby decision and the Little Sisters of the Poor decisions talk about indirect coercion, and -- I would say those are the leading cases on that.

THE COURT: Okay; just want to make sure I wasn't missing anything. All right.

So let's talk about Fulton, and you were just referencing the system of exemptions here.

MR BAXTER: Yes.

THE COURT: So from the Hazel declaration, it seems to me that the school was allowing opt-outs initially under the religious guidelines, religious diversity guidelines; is that your contention as well?

MR BAXTER: Yes, and they did all through the end of the last school year.

THE COURT: Right. The defendants take the position that the challenged regulation or policy, I should say, is the no-opt-out policy, and that no-opt-out policy applies across the board, no matter if your request for exemption is religious, secular, atheist, whatever, it applies across the board. They take the position, then, that it's generally applicable. What's wrong with that position?

MR BAXTER: So in both Tandon and Fulton, the Court said, when you're looking at how across-the-board a policy is, you have to look at all the policies that implicate the same underlying interests. So for example, in the Lukumi case, the Supreme Court looked at not just the city ordinances that dealt with the killing of animals, and the question is whether you can engage in ritual slaughter, but it looked at even state laws that allowed the killing of animals and faulted the city for not trying to close those loopholes.

And so here, the school board -- you'd have to ask all of the times where the school board is trying to engage or promote inclusivity, and even if you said LGBTQ inclusivity, the odd thing here is that a student in fifth grade who has sex education in his health class can opt out of that section of the health class, make the -- do the same walking out that is forbidden in the next hour, when the storybook is being read. And so there is no general applic- -- high school students can opt out, elementary students cannot opt out.

And so that -- right, that alone -- and there's undisputed evidence that both of those policies, the inclusivity in the health class, the inclusivity element of the English Language Arts lessons, that those are pursued pursuant to the same Maryland equity regulation which was passed in 2019 to promote further equity in the school district among students. We've cited evidence on 19 of our -- page 19 of our opening brief that the same type of inclusivity instruction was added to the health class regula- --

THE COURT: Can I just pause you?

MR BAXTER: Yes, mm-hmm.

THE COURT: The way I read your briefs, what you're talking about seems more to fall into your Tandon theory. And I understand Fulton and Tandon sort of intersect, and there is some overlap there, but I think there are two different types of theories you're advancing, at least in your papers.

So as I read your papers, the exemptions or the system of exemptions, similar to Fulton, is the fact that there was -- or the religious diversity guidelines that allowed opt-outs. If the parents have sincerely held religious beliefs, opt-outs were then granted by a host of Montgomery County principals last year. And then the board said no more opt-outs under that policy. So I read your papers as saying that's the system of exemptions, not --

MR BAXTER: I'm sorry, Your Honor.

THE COURT: Okay.

MR BAXTER: Let me refocus on that issue. So yes, from the very beginning, the school board said it would allow opt-outs. That was true last fall. It continued until March 22nd, when the school board issued a statement, I believe it was to FOX news, saying that they would recognize -- they would notify parents and recognize opt-out requests. The very next day, on March 23rd, they issued an e-mail to parents saying, We will no longer provide notice and no longer provide opt-outs.

Now, even after they did that, as proof of this discretion, they continued to tell parents principals had permission to tell parents that they could continue to opt out for the rest of the year, but next year, they should not expect that right. There are still -- even though the school board has issued this e-mail, there's nothing that guides them; they

haven't passed a regulation, they haven't formalized any guidelines. There's nothing that stops them from changing that, just like they did before.

In fact, their own -- you know, they said they did this pursuant to their escape hatch for opt-outs that had become too burdensome or too numerous, a question which is itself factually unsupported, but they, alone, are making that decision about what becomes too burdensome or too numerous, and that has itself numerous -- the discretion there has numerous problems. Essentially, they're saying that the more objectionable their instruction, the more parents who protest, the more right they have to cut off the opt-out. So in other words, widely held religious beliefs are less protected than minority-held religious beliefs.

So here, the school board is essentially saying, Our instruction has become so offensive, that we are offending so many people, that we now have the right to cut that off. That is infused with discretion, and it is that type of discretion where the Supreme Court says, Well, let's take a closer look. I mean, if school boards can act and can flip on an overnight -- make an overnight decision that flips the rights that are at issue, they retain discretion to continue to say, like, We can do it here but not there, we can -- you know, even after we pass the rule, we can continue to extend exemptions for another three months.

THE COURT: So just to --

MR BAXTER: All that triggers strict scrutiny.

THE COURT: I'm sorry to interrupt. Just to distill it, the discretion and the system of exemptions is in the religious diversity guidelines, not the opt-out policy itself, because right now, what the record before me is, the opt-out policy is no opt-outs. I understand you're saying it could change in a month, but right now, that's the policy. And it was, it seems to me, a change from their prior opt-out policy pursuant to the religious diversity guidelines. So there is a bit of discretion there. They decided that in this instance, for this particular curricula, the religious -- the request for opt-outs under the guidelines won't be applied.

MR BAXTER: Right. I mean, the e-mail from March 23rd is simply an application of their religious diversity guidelines. It's not a separate policy, there's been no legal action taken to recommend the policy, there's been no public vote or discussion about a new policy; it is simply a decision made under the religious diversity guidelines to deny opt-outs for one batch of students. And even then, the school board is now saying that it won't allow them going forward, but after it passed -- after it issued that decision, it continued to allow opt-outs, demonstrating the existence of continuing discretion.

So -- and Lukumi also warned about this effort to gerrymander your policy; you can't just carve off the one little

thing that you are going to ban and say, Well, this is its own policy. And that takes us back into Tandon, where it's like, Well, you're not acting consistently across all of the policies that affect the same governmental interest, and that alone triggers strict scrutiny.

THE COURT: Well, let's move on to Tandon, then. So it's a short but curious decision. First, what is the comparable secular conduct?

MR BAXTER: So some- -- anybody who wants to object for secular reasons, for example, from the health class, which implicates the same underlying interest, that would be -- that is sufficient to create -- the Supreme Court intends that any secular exemption is sufficient.

THE COURT: Doesn't there have to be an overlap in what they're opting out of? So if they're opting out of the family life and human sexuality unit, and they can't opt out of these books, doesn't there have to be similar instruction at all?

MR BAXTER: No.

THE COURT: I mean --

MR BAXTER: The --

THE COURT: -- there has to be some comparable -- some comparison between what the actual children are being opted out of.

MR BAXTER: Right. Comparability is determined by the

government's stated underlying interest.

THE COURT: In the no-opt-out policy.

MR BAXTER: In -- right. And their underlying interest is -- as I understand it, is increased inclusivity. That's the exact same interest pursuant to the Maryland equity regulation. It called for this same type of instruction to be inserted into the health class. And that's -- Lukumi --

THE COURT: They've also said a reason for the no-opt-out policy, according to Ms. Hazel's declaration, is administrative infeasibility and avoiding sending discriminatory signals.

MR BAXTER: So the discriminatory signals would be the same policy whether you opt out under either class. As for the administr- -- I mean, if you walked out of health class when those dis- -- when those same topics come out, which is when you would have walked out of the ELA lessons, the harm is the same, and the government -- there's -- it's undisputed in the briefing that both regulations were enacted pursuant to the same equity purpose.

THE COURT: How do I know what's taught in health class?

MR BAXTER: Well, the Maryland -- you know, we've set forth in our brief, including on page -- I believe it's 19 of the brief -- where -- and it's COMAR --

THE COURT: I have the COMAR.

MR BAXTER: You know, the 13A.04.18.01, I think.

THE COURT: Right.

MR BAXTER: -- that -- and we've cited also -- we have a link at that page, at page 19, to where the state superintendent I believe sends an e-mail to the State Board of Education explaining why the Maryland health ed regulation was amended to include requirements to have more discussion about inclusivity for LGBTQ students. And that was done in pursuit of the Maryland equity regulation, which I believe is at 13A.01.06, which is the same regulation that the school board admits in the Hazel declaration, at 5 through 7, was the regulation that they relied on to add the ELA inclusivity books.

THE COURT: So I'm looking at the amended COMAR. I think it's correct. I've got 13A.04.18.01 -- let's see, hold on -- (D)(2), Family Life and Human Sexuality. (a) Maryland Family Life and Human Sexuality instruction shall represent all students regardless of ability, sexual orientation, gender identity, and gender expression. So that's all that I see that COMAR says about that, just "shall represent all students." I don't see that there's instruction on it.

MR BAXTER: Your Honor, and that -- and the school board said that was done pursuant to the equity regulation, which was the same interest that the school board is -- and I believe -- well, the school board is pursuing with respect to the ELA. So there's no question about the common interest and

that they allow an exception and opt-out in one place and not the other. And I believe I may be able to find more -- an example of the more explicit direction that comes from the Montgomery County School Board website where it details instruction and goes to this.

There's no question students are being taught these same issues in health class as they're being taught in the ELA class.

THE COURT: Okay.

MR BAXTER: And if I could, Your Honor, if -- unless you have another question.

THE COURT: Go ahead.

MR BAXTER: I would just -- I would also just emphasize that the Supreme Court, in the Masterpiece Cakeshop, said -- Your Honor, especially, I think this is a possible approach, where we're asking simply to maintain the status quo for the pendency of the litigation.

In -- you know, in the League of Women Voters case, the status quo ante, the last status before the action that created the controversy, is that -- the statements of a couple of the school board members, that the parents who were seeking an opt-out were engaged in white supremacy, were xenophobes, were promoting hate, that they were dehumanizing other individuals.

Under the Masterpiece Cakeshop, those types of

statements, the Court said, are alone sufficient to set aside a policy without further inquiry. And so it certainly makes sense where there have been those types of statements with no disavowal from any other members of the school board, no counterstatements, that that is alone sufficient to set aside the policy and certainly for the duration of the litigation while these issues can be further explored.

THE COURT: So let's talk about your hostility claim. And I'm focusing on hostility in the Masterpiece Cakeshop case. Does it matter the distinction between the adjudicatory body in Masterpiece and the fact that this is more of a legislative or school board body?

MR BAXTER: There's no policy or principle reason why it would be -- why there would be a difference. And the Supreme Court, in Kennedy -- in footnote 1, it says -- in Kennedy v. Bremerton School District, they said, simply, Any law or policy that's accompanied by hostile remarks is alone sufficient to justify setting the policy aside.

THE COURT: How, based on the record before me, have you connected the hostile remarks, in particular, Ms. Harris' remarks on March 28th, to the decision to deny opt-outs; how are they connected?

MR BAXTER: Well, as parents have come in asked for the opt-outs to be restored, those are the remarks that she made directly following the testimony of parents asking for the

opt-outs, and that was -- that those decisions -- that those parents were acting out of white supremacy.

THE COURT: I don't think she said white supremacy; I think Ms. Harris said other remarks. Let me just pull them up. One minute, please.

MR. SCHOENFELD: We've cited the testimony in our brief, which --

THE COURT: Yeah.

MR. SCHOENFELD: And she did say that it was -- that -- a member of the -- as I understand it, a member of the County Council, Ms. Mink, also re- -- she softened it to say that these were -- that the parents were aligned with white supremacists, but --

THE COURT: I understand. That's Ms. Mink, that's in June. I'm not dis- -- I'm not saying that's irrelevant, but I want to focus on Ms. Harris' comment. She's the board member and made statements about a week after the no-opt-out policy was publicly announced. I mean, you've directed me to these statements. She said -- this is on March 28th. She said, I just want to address, what is it, Moms for Liberty? If we could talk about what this is really about, you say parents to pull their students out of lessons when they're going to be reading a book that has an LGBTQ character in it because of your religious rights, your family values, your core beliefs, but Rodgers and Hammerstein got it right 70 years ago; you have to be taught to

hate. No child is born other-izing, marginalizing, thinking about somebody else is not as good as they are. So that's a comment you've pointed to for hostility, correct?

MR BAXTER: I've lost -- yeah, I think the comment that I was referring to we've cited on page 25 of our brief, where we stated -- school board member, Lynne Harris, stating that children who support opt-out rights were parroting dogma from their parents. Then, testimony after that --

THE COURT: What date -- hold on. What date is that Ms. Harris statement; is that from January?

MR BAXTER: No. Well, I don't recall the day. Let's see, January 12th. There's another statement, and maybe, you know, if I'm confusing those, I apologize. There's a second citation, where it says, Comparing what we have -- wrote -- noted the statement comparing religious objectors to white supremacists and xenophobes. That was at the school board meeting, and our cite doesn't directly state who it is. My recollection was that it was Lynne Harris.

THE COURT: Okay. Well, that's a fact we can verify.

So how do you connect those comments to the no-opt-out policy? Was she the decision-maker?

MR BAXTER: She was one of the decision-makers. She -- this was, you know, very soon, you know, in connection with the opt-out policy. I mean, some of those comments were -- happened before the opt-outs, and then the opt-out ban was put

in place. And so we know that Lynne Harris was making those types of statements before the opt-out -- the March 23rd e-mail went out. And that's very analogous to what happened in the Masterpiece Cakeshop. It said, those types of statements, in connection with a decision like this, are sufficient to set aside the decision. And certainly, it would make sense for the course of litigation.

THE COURT: Of course, before you can make out a claim for First Amendment violation under Masterpiece, there has to be a burden, of course, right?

MR BAXTER: Your Honor, I'm not sure that's correct in Masterpiece. I mean, again, the decision was made not because there had been any decision that Mr. Phillips would have to bake the cake; it was based on simply the comments alone triggered strict scrutiny. The Court held it cannot be satisfied, and in that instance, the case was reversed simply on that point, without ever getting -- the Court itself said, without further inquiry, the existence of those types of comments.

THE COURT: Wasn't the burden assumed in that case?

MR BAXTER: I don't believe so, Your Honor. And again, there, it's -- you know, I'm not sure -- I'm not sure the burden would be that much different as far as coercing our students to participate in discussion that directly violates their beliefs or, you know, forcing Mr. Phillips to create a cake that violated his religious beliefs.

THE COURT: Let's jump back to coercion again. Is there any evidence in the record that if a child said, I can't talk about this, they would be forced to do so, or punished, or their grade would be lowered?

MR BAXTER: Yes, there is evidence that they would be told, That's hurtful, that doctors -- so they're being countered -- children, who are very trusting of their teachers and are very susceptible to, you know, authority, to instruction, are being told that their views are hurtful and wrong. And the parents are --

THE COURT: Do you have any evidence that that happened last year, or that couldn't have happened because everyone got to opt out?

MR BAXTER: Right, we don't have evidence that it did happen, but we have evidence that the school board has instructed it to happen.

THE COURT: That's from the principals' memo?

MR BAXTER: It's from the principals' memo, it's from the guidance that we cited in our brief, that the school board has not disputed that it was presented in the -- I believe the New York Post article from November of last fall, where they cited the teacher instruction guidelines and said that teachers were instructed to say it's hurtful, teachers were instructed to say that doctors only guess, and teachers are instructed to basically, as students reject those teachings, to continue to

push back to encourage students to accept a different dogma.

And the coercion also lies in the parents' choice to have to either give up their right to participate in public education or subject their children to this type of very sensitive, complex, and controversial instruction, which is -- the principals themselves have said is inappropriate for children of this age.

THE COURT: Okay. Are there any books with LGBTQ characters that your clients would be comfortable having be part of the curriculum?

MR BAXTER: Your Honor, I suspect there would be. I -- you know, this -- these types of issues have been around for a long time. I suspect there may have been books. There's clearly something about these books that have not only triggered reactions from my clients but for hundreds of parents in Montgomery County.

So -- but the point is that the school board's policy allows the parents to opt out regardless of the level of instruction, for any reason that the parent feels that instruction would violate the religious beliefs or practices of the student. Under the religious diversity guidelines, the parents can opt out, and Maryland law says, "any instruction on family life and human sexuality objectives." So it's, you know --

THE COURT: Who defines that? Who gets to define what

family life and human sexuality is, the parents or the school?

MR BAXTER: Well, I believe, under the policy, the parents have that right. I mean, in the past, the school board has broadly allowed these types of exceptions based on the parents' assertion that they don't want their children to participate in a Halloween lesson, or a Christian music presenta- -- you know, Christian songs being sung in choir.

THE COURT: But that's under the religious diversity guidelines. I'm talking about COMAR, under the law.

MR BAXTER: So -- right. And again, under the sex ed, for students who want to opt out of the formal sex ed class -- which again, is not a requirement under the regulation, it just says any instruction on family life and sexual -- human sexuality objectives -- that those --

THE COURT: Right. That's what I'm asking, under that; who interprets what --

MR BAXTER: Right. As far as I'm aware -- I'm sorry, I didn't mean to cut you off.

THE COURT: Go ahead.

MR BAXTER: As far as I'm aware, parents or students -- I personally know students who have just -- they just choose to opt out, and it's just allowed; there's no question about whether it's --

THE COURT: Well, I understand that. I mean, there's a -- by this -- at this point in time, there's a formal

procedure for opt-outs from family life and human sexuality unit instruction.

What I am saying is, you are suggesting that this addition, supplemental reading to the English language curriculum, falls within the statute's definition of family life and human sexuality, correct, and that because it falls within that, you are entitled to the opt-outs under the law. The school board is saying no, this isn't family life and human sexuality, that's totally different. There are designated units for that. We've got a system where -- this is not family life and human sexuality. Who decides whether this is family life and human sexuality such that the opt-outs under COMAR apply?

MR BAXTER: Well, I think there's a commonsense reading of what family life and human sexuality is, that even if it were this Court -- I mean, I don't -- the principals themselves -- there's really no dispute that when you're talking about a student's gender identity, their romantic attraction to other individuals, that those implicate family life and human sexuality.

And so the school board can't, you know, play games by relabeling this an English language assignment, when it clearly discusses the same things that a student might be discussing in their sex ed class, about how do you -- what does is it mean to like versus like-like someone; that's a very elementary school way of saying, what is -- you know, what is sexual attraction.

THE COURT: I don't have before me on the record what they talk about in the health and family life. I --

MR. SCHOENFELD: That is one of the -- well, yeah, I don't --

THE COURT: I've read from COMAR what it includes, and I don't need to go over it, but I can infer from the statute what it is. But I'm looking solely at the record.

MR BAXTER: Well, even looking within the regulation itself, for example, it says that menstruation is included within. That's in the regulation itself.

THE COURT: Right.

MR BAXTER: That's the one thing you can't opt out of. There's no definition, as far as I know, within any of the regulations that further explain what family life and human sexuality is, and so I don't think the school board can just say like, Well, we think that only includes the nuts and bolts of sexual intercourse and not, for example, engaging in safe sex practices or talking to children about romantic interests, or -- and the commonsense reading of family life and human sexuality would include all of those topics.

THE COURT: Is there a difference in your mind or your clients' minds between gender identity and sexuality?

MR BAXTER: Certainly, I would imagine. Again, I didn't ask my clients that question, but there's -- certainly, those cover diverse, you know, or different -- a range of

topics, and a lot of people would consider those differently, but they certainly implicate sexuality and family life.

THE COURT: Gender identity implicates sexuality?

MR BAXTER: I think in most people's minds that it can affect your sexuality as well.

THE COURT: I'm asking. I mean, I really just -- I'd like to hear your position on it. Okay.

Okay. Does My Uncle's Wedding violate your clients' religious beliefs, having that book read?

MR BAXTER: Your Honor, I haven't asked my clients about each of the books that are read. Again, the school's own guidelines allow parents to decide when a book would violate their religions beliefs. And so whether -- you know, whether a culling of certain books would satisfy -- there are around over 300 families in Kids First, and they may have different views on those issues.

THE COURT: Okay, I understand.

I'd like to switch gears and talk about your substantive due process claim. I certainly want to give you the opportunity, and perhaps in rebuttal, to cover anything on your First Amendments claims or anything else. I don't want to foreclose any argument, but I just want to make sure I have time to get my questions answered, so --

MR BAXTER: Sure.

THE COURT: Okay. So in Count 5, you are asserting a

substantive due process violation, and you allege that the no-opt-out policy violates the parents' fundamental right to make key decisions regarding the upbringing, education, custody, care, and control of their children, including the right to opt out their children of instruction on family life and human sexuality that violates their religious beliefs. That's the due process right you are asserting is violated, correct?

MR BAXTER: Correct.

THE COURT: It seems to me, for the source of that right -- well, the source, the Constitution, I understand that's what you allege, but the Supreme Court cases are Yoder, Pierce, and Meyer, and Troxel.

MR BAXTER: Correct, Your Honor, those are the leading cases on that issue.

THE COURT: This is a very specific right that you've identified exists. What Court has held that specific right exists?

MR BAXTER: Well, Yoder is directly on point, and that was an opt-out; it was an opt-out for students to be completely removed from high school to go and work on the farm. And the Supreme Court held that -- upheld that right. And so I think Yoder is directly applicable. The Troxel -- I'm sorry, the Tatel case, which is a District Court case out of Pennsylvania, also recognized that as a substantive due process right.

THE COURT: The facts in Tatel are quite different,

though, we can agree, setting aside whether or not that's controlling or binding authority. I mean, the facts in Tatel, the first grade teacher seemed to have an agenda that went beyond the prescribed curriculum, told the student- -- the first graders not to tell their parents that they could be transgender. I mean, those facts seem very different than those here; would you agree with that?

MR BAXTER: So the facts are always going to be different from case to case. A couple things in response, though. The Court in that case held that there was a de facto policy that endorsed the teacher's approach because the school board did not disavow it. In the reconsideration opinion issued just a couple of months ago, the Court reinforced that. The school board essentially acknowledged there was a de facto policy supporting the teacher.

And it can't -- this can't turn on the extremity of the facts, because that would call into question, like, which religious objections; if you have -- if you only -- if you're very religiously sensitive, you don't have protection; if you're kind of religiously moderate, you do have protections. So that type of a reading would result in essentially denominational discrimination. That would discriminate against parents who have more, I guess, sensitive religious beliefs.

THE COURT: Okay. The defendants, in their opposition, I guess anticipatorily argued that you were

asserting a hybrid claim under Smith. Are you asserting a hybrid claim under Smith? It's hard for me to tell.

MR BAXTER: Yeah, and I think the Fourth Circuit seems to suggest that it's open to a hybrid rights claim. We haven't really asserted it as a hybrid rights claim. I think that when you have religion connected to a substantive due process right, under Herndon, the Court has indicated that that automatically triggers strict scrutiny. And so we think that that is another way that this Court has to get to strict scrutiny.

THE COURT: Because of Herndon.

MR BAXTER: Because of Herndon.

THE COURT: Can we talk about Herndon?

MR BAXTER: Certainly.

THE COURT: Great.

So Herndon did not involve a free exercise claim as we have here. It was, of course, the parents challenging a North Carolina public school requirement of community service -- and the students, of course, too -- and the parents asserted a due process claim, that we have the right to, you know, upbring our children and direct their care, custody, and control. And the Court was grappling with whether the right they asserted, the specific right they asserted in that case was subject to rational basis or strict scrutiny. Along the way, it made the comment interpreting Yoder.

I'm just -- I need -- it said, When those rights --

the parental rights we just talked about -- combined with First Amendment free exercise concerns, the Court, referring to the Supreme Court, held they are fundamental, and then there's a colon, and then they quote Yoder. Was the Fourth Circuit. In Herndon saying, beyond the facts in Yoder, there is a fundamental parental right whenever First -- free exercise concerns are raised?

MR BAXTER: I mean, I think that's a fair reading of Herndon, and I think -- and I think there's also little basis for distinguishing what happened in Yoder and what is happening here. The school board wants to say that, like, Herndon only applies if it would destroy your religious lifestyle; it has to be something extremely -- again, there's -- no Supreme Court case has ever interpreted Yoder that way.

If you look at how all of the Justices in the various opinions in the Espinoza case -- I believe Justice -- you know, I can't remember if it was Alito or Roberts who offered the opinion. There's a Breyer opinion, a Gorsuch opinion. All of them discuss -- in a case about getting access to, you know, funding for private religious schools -- rely upon Yoder as -- for the general principle of protecting parents' rights to control the religious education of their children. And that case was -- you know, was an opt-out case.

And it's also -- a Court doesn't have the competency to say, like, how serious of a violation is this. To say that,

like -- you know, it's not really accurate to say, for example, that not allowing Amish children to opt out of their final years of high school would destroy their faith any more than saying that forcing children to sit through instructions directly contrary to their faiths would not have a similar kind of destructive --

THE COURT: A little slower.

MR BAXTER: -- would not be similarly destructive to their faith.

From our parents' perspective, exposing prekindergarten through fifth grade students to instruction about what -- that encourages them to question their pronouns, to decide for themselves what their sex is, to engage in playground romances, all of those have significant impact that could be destructive of their faith and their religious understanding of the importance of sexuality, sex, gender in their religious viewpoint.

And so for a Court to make a decision that one type of instruction would be more destructive of faith than another type of instruction really gets into religious questions that are outside --

THE COURT: Well, I certainly don't want to do that, but when I've read your clients' declarations, I haven't read that this would destroy their children's religious upbringing to the same degree that it did in Yoder. I mean, I -- I mean --

MR BAXTER: Yeah, I guess the response is that that's not a requirement, that it has to rise to that level. The Court just said the Amish don't want their children in high school; they want them to work on the farm, which, you know, has its own kind of social questions about the rights of children to be fully educated and things like that, and the Court said, We'll defer to the religious beliefs of the parents in that context and allow them to opt out.

We're obviously asking for a much narrower opt-out, to simply be able to opt out of classes, a procedure which has been allowed by the school board for as long as we know, it's required under Maryland law, and simply allows, you know, students to feel like their rights are being protected.

I mean, everybody agrees here that students -- all students should be helped and feel inclusive, to be respected. I mean, my clients, they know; many of their children are regularly bullied because of their religious distinctives, and that's something that they abhor and they want to see ended.

But they also know that forcing their views on other children is not the way to solve that problem, that you teach respect and inclusivity by helping children be kind and respectful, despite differences, and to recognize that people are going to disagree on difficult and sensitive issues. And that allows everyone to feel like they are part of the system, and they are invested in promoting and protecting the system, as

opposed to telling children that your religious beliefs are too offensive, we're going to push you to the outside, you really don't have a place in our society and in our system, and you don't -- and you disincentivize those students, then, to support and promote that system for others.

THE COURT: All right, just give me one moment.

I think that's all the questions I have for now. If you have -- if you want to reserve anything else you'd like to say for later, or are you -- I'm happy to hear from you now if you'd like.

MR BAXTER: I'll just briefly mention that the -- that, you know, the assertive compelling government interests here are interests that have been disallowed by the Supreme Court. You can't assert interests in things that are as amorphous and immeasurable as, you know, promoting inclusivity because there's no way for the Court to measure it. That would give the government a blank check to continually suppress religious rights. The 303 Creative case said that when these types of inclusive and diversity initiatives conflict with religious rights, then the constitutional rights have to prevail.

And here, again, the school board is not even consistent; they would allow students to sit in class, make comments that are disagreeing and even disagreeable, but they're saying that you can't allow those students to walk out to the

library because that's too offensive. So they've undermined their own compelling government interests in that respect.

Even more importantly -- and I'm sorry; I'll slow down. Even more importantly, the government doesn't even try, the school board doesn't even try to address the least restrictive means; they've just said, Well, these books promote our interests. Well, that's not the question. The question is, could you achieve these interests in a different way.

Could you teach inclusivity without talking about sexuality and gender identity, like Carroll County has done, if you look at footnote 2 of our reply. You can be like Baltimore County, which has said, We have put this material throughout our curriculum, and we discourage parents from opting out, but they still have the right to opt out. You have school boards across the country that are teaching inclusivity, kindness, and respect without denying parental opt-outs. And the school board has not even tried to show why it's different and cannot meet that same standard, which is the requirement under the Holt v. Hobbs case.

And I'll remain -- unless you have questions, Your honor, I'll reserve any other comments for rebuttal.

THE COURT: All right. Well, let's talk about the compelling government interests, since you I think appropriately raised it. Based on my read of the defendants' papers -- and of course, I'll be asking them about this -- I saw three asserted government interests in their opposition that they

claim that they're supported by Ms. Hazel's declaration.

The first is to ensure a safe environment for all students. I'm not exactly sure what that means, but I -- that's No. 1. Ensuring health and safely of all LGBTQ students. I believe that means protecting them from stigma or harassment that might occur if people leave the room when these books are being read. And then the third is the interest in not violating antidiscrimination laws.

So do you have anything specific in response to those three that I think are the ones asserted?

MR BAXTER: Certainly. To the extent the first one is different from the second, I'm not sure what they're getting at. They fail to assert any kind of safety risks that actually come from allowing students to opt out. They allowed it all last year, they allowed it in health sex ed class for as far -- as long as we know. And so I don't think they've actually asserted any interest that would be cognizable in this Court.

And again, you know, in the Students for Fair Admissions v. Harvard case, which was just decided this last term, the Supreme Court said that those type of broad and amorphous interests are not cognizable under strict scrutiny; you have to show why allowing this student to opt out would create a safety or health risk, and they have -- the government hasn't even tried to meet that burden,

that to-the-person standard under the compelling government

interest.

As to -- I think I've already addressed kind of the general desire to end stigmatization. Again, same reasons, those types of efforts to just generally not hurt people's feelings is not cognizable because there's no way for the Court to measure when that would ever be satisfied. It would give the government a blank check to continue to suppress protected First Amendment rights.

And again, the possibility that people will be offended by each other's beliefs is built into our constitutional system; that's what the First Amendment protects, is that right to disagree. And so that can be a compelling -- you can't have a compelling government interest to wipe out the First Amendment, and the Court reinforced that in the 303 Creative case.

As far as complying with state and federal law, they have not identified any state or federal law that requires this kind of teaching. No other -- we're not aware of other school districts that are not LGB- --

THE COURT: No, that -- not the teaching, the no-opt-out policy.

MR BAXTER: And I don't -- they haven't identified how the no-opt-out policy is required by state or federal law. It's contrary to the Maryland state regulation that requires opt-outs for instruction on the merit of family life and sexuality. And

I'm just not aware of any law. And 303 Creative said that even if there were a law, like a nondiscrimination law, for example, if it comes into conflict with protected First Amendment rights, that the First Amendment has already given us the answer, that it prevails in protecting the rights of individuals.

THE COURT: What about the Fourth Circuit's decision in Doe, in which I believe the Court found that bathroom policy permitting transgender use served a compelling government interest in preventing -- in not discriminating against transgender students; how, if at all, does that apply here?

MR BAXTER: So if it applied, it would apply to say maybe the school -- the school board may have an interest, for example, in introducing the curriculum, and the parents have not objected to that. That's why we're not challenging the curriculum. That's the issue in most of the cases, the so-called wall of authority that the school board cites. Those were all cases challenging an entire curriculum, and we're not doing that here.

We're not saying that other students and other parents can't have that instruction; we're just saying that even where the school board does that, that there is an overriding interest in protecting the First Amendment rights of those who object to that instruction.

THE COURT: Okay. Thank you very much.

MR BAXTER: Thank you, Your Honor.

THE COURT: All right.

Just one minute.

MR. SCHOENFELD: Of course.

THE COURT: Good morning -- Ms. Klepp, are you good?

THE COURT REPORTER: Yes, thank you.

THE COURT: All right.

Okay. Good morning, Mr. Schoenfeld.

MR. SCHOENFELD: Good morning, Your Honor.

THE COURT: All right.

All right. So tell me why the plaintiffs and -- the parents and the students have not alleged a burden on their exercise of free religion if I've got affidavits from three sets of parents telling me that this -- these books, what are in the books, the classroom discussion that it can reasonably be inferred will ensue when the books are read conflict with their religious beliefs, interfere with their obligation, their sacred obligation to raise their children in their faith; why is that not a constitutional burden?

MR. SCHOENFELD: I think every Court that has addressed this question has said that exposure to school materials, curriculum materials, no matter whether they are offensive to religious beliefs or not, doesn't impose a constitutionally significant burden. I think Parker says this best, and it says it reviewing, as we call it, a wall of authority addressing this question, but mere exposure to those

sorts of materials in a classroom context is not a burden on free exercise; no one is compelled to affirm any particular belief, no one is penalized for their presence in the classroom, no one is asked to do anything in particular, they don't forego any benefit, they are not taking on any obligation by mere exposure to those texts or even discussion with them.

THE COURT: But isn't this a unique situation, where we're dealing with elementary schoolchildren in their most formative years, and they're being told ideas from their teachers, people in authority whom their parents told them to trust and to listen to; isn't -- doesn't that make this case just a little bit different?

MR. SCHOENFELD: I don't think so; I think that's precisely the facts of Parker. Parker was about elementary schoolchildren. The al- -- elementary schoolchildren. The allegation was that they were young, and impressionable, and subject to potential indoctrination. And the context there I think is important; this was right after Massachusetts recognized same-sex marriage, and the curriculum had been introduced to normalize the existence of households headed by same-sex couples. And the first --

Am I doing okay?

THE COURT REPORTER: Can you please slow down a little bit?

MR. SCHOENFELD: Sure.

And the First Circuit addressed that precise scenario, and all of the concerns, they were -- these were religious-based objections to having children be exposed to the type of curriculum that I think is being challenged here as well.

And the Court made clear -- you know, the Court goes on a long detour about whether indoctrination is a potential First exercise violation. It then makes clear that what it's talking about is influence toward tolerance, rather than indoctrination. And influence toward tolerance, in the First Circuit's view, was inarguably not a free exercise violation. And we are very clearly on the influence toward tolerance side of the spectrum, here.

I want to address one -- if I might, Your Honor -- recurring misstatement that counsel on the other side made. I think he used the word "hurtful" maybe a dozen times in his presentation. I want to be very clear about the context in which that word used in the materials cited in the record. This is document 47-1, which is the letter from the principals, and on the left side of the column, it says --

THE COURT: Can you give me a minute to get there, please?

MR. SCHOENFELD: Sure. It's page 10 of that document.

THE COURT: This is the white paper from Mr. Bayewitz?

MR. SCHOENFELD: Correct, Your Honor.

THE COURT: Okay. I'm page at page 10 of his

document.

MR. SCHOENFELD: So on the left side of the grid, it says, "A student may say something like," and on the right side, it says, "We can respond with." And the comment on the left side is, "That's weird; he can't be a boy if he was born a girl," and the "We can respond," which says, "That comment is hurtful; we shouldn't use negative words to talk about people's identities." So what's hurtful in that context is calling another student weird. I think all of us who have raised young children can agree that you discourage your child, no matter the substance of the disagreement, from using words like "weird" to describe anyone.

No one's religious belief is impugned, no one's views on gender identity is derogated; it's simply a reminder to children not to call their classmates weird. And I think we can all argue that that's part of the tolerance and respect that Mr. Baxter suggested is welcome in the curriculum, indeed, encouraged in the curriculum.

So I want to make sure there is a clear distinction between what students are being asked to do, which is, be exposed to these inclusive texts, and what they're not being asked to do, which is disa- -- they're encouraged to disagree, they're encouraged to express their beliefs. There is no evidence in the record that any student was told something is right versus wrong or asked to disagree with their religious

faith or in any way impugn any student's religious faith as part of these discussions. The only allegations in the declarations are that students were asked participate in read-alouds where these books were read.

THE COURT: Do you agree that the record -- there is record evidence that there will be classroom discussion about these books? I mean, it goes without saying, it seems so obvious, but I need to pin that down.

MR. SCHOENFELD: Sure. I'll answer in two ways; I want to make sure I satisfy you. I don't dispute that there will be discussion that ensues. In fact, I think everyone would hope that discussion ensues. There is no evidence, however -- and that's sort of (1)(A) -- that there would be anything derisive, or derogatory, or impugning anyone's religious faith, or that anyone would be punished for expressions of religious faith or beliefs rooted in religious faith as part of that discussion.

I'll also make the second point, which is, none of the declarations complains about some sort of discussion or anything that happened in those discussions. Each of the declarations is specific, that their complaint is about exposure to the text in the classroom.

THE COURT: Well, with the exception of the Mahmoud Barakat declaration at paragraph -- hold on, 16 or 17; let's pull it up.

MR. SCHOENFELD: Let me just turn to it.

THE COURT: 17, the one I read earlier.

MR. SCHOENFELD: I was reading along with you, and I think I might respectfully disagree, Your Honor. So I agree with you what paragraph 18 says.

THE COURT: 17.

MR. SCHOENFELD: 17, correct. It is talking about a specific prohibition of Islam into prying into others' private lives and discourages public disclosure of sexual behavior. "It would violate our religious beliefs and the religious beliefs of our children if they were asked to discuss romantic relationships or sexuality with schoolteachers or classmates."

But then the specific allegation about what they're complaining about is found in paragraph 23. It says, "We asked the acting principal of our son's elementary school for the option to opt him out of the class reading of Prince & Knight and to assign him an alternative activity."

Nothing in my presentation rides on whether there's discussion or not, and so I don't want to make too much of a fuss about it, but what they are complaining about is the inclusion of these texts and the exposure of their children to these texts as part of classroom read-alouds or discussions.

THE COURT: What about the argument that -- I think it's been made for the first time in oral argument today, not really in the papers -- that if the parents are not allowed to

opt out, they will be in a position where they have to maybe choose not to go to public schools. I understand some can't afford it, and that's very real, but what about that alleged burden?

MR. SCHOENFELD: So I don't think -- the line of cases that Your Honor was discussing with counsel on the other side relates to foregoing a specific burden. Retirement benefits. Sherbert v. Verner was about unemployment benefits. Some sort of public subsidy, as in Espinoza or Trinity Lutheran. Real concrete harms that you're foregoing by observing a particular religious tenet.

The substantial burden question goes to whether there is a burden that actually requires you to forgo that benefit, and the case law holds that exposure to these sort of offensive texts is not a substantial burden. If parents are going make the choice to take their students out of public school and enroll them in private school, that's not being compelled or even indirectly compelled, as in Thomas or any of the other cases that plaintiffs have cited; it's not an indirect compulsion, it's a choice that they're making.

The point is that the offense taken at being exposed to these texts doesn't rise to the level of a constitutional burden. There are plenty of things that are taught in schools with no opportunity to opt out that offend people. Evolution offends people, based on their religious beliefs. There is no

free exercise protective right to opt out of science classes.

And even though some would say, based on their religious beliefs, that it substantially burdens their ability to teach about creation, they have no right to opt out, and they can't complain that if they choose to enroll their children in private religious school, as many do, and as is protected by Yoder, that they're being forced to do so in a constitutionally protected way.

THE COURT: Will the teachers be instructing children that gender is anyone's guess at birth?

MR. SCHOENFELD: I think that is one of the -- that is a paraphrase of one of the Q and A that's provided. I think that's a way of answering a specific question presented to a child. And so that may well be part of the discussion. I -- that statement may take place as part of the discussion. There is nothing free exercise violative of that statement, right; it is a way of describing to a questioning child how gender identity works.

Parents are aware -- as is evidenced by this case, parents are aware of that sort of discussion potentially happening; they remain free to have those discussions with their children at home.

THE COURT: One thing the plaintiffs argue -- and it wasn't raised here, but it's in their declarations -- is that they don't want to have those discussions so early, that they're

being forced now to have those discussions to preempt and defuse what they believe is information that conflicts with their religion.

MR. SCHOENFELD: I understand that. And you know, age-appropriateness of curriculum is a choice that school districts always have to make. And this was the same issue that was raised in Parker. Once professional educators make a decision to include this in the curriculum, the question -- and it may be a good decision, it may be a bad decision; that's why public school boards are democratically elected, and that's why school board meetings are open to the public, and that's why the process for selecting these texts is meant to be open and participatory, as it was here.

The question before the Court, and the challenging one, is whether there's a free exercise claim to including age-inappropriate -- or that some would claim are age-inappropriate texts; the answer is no. Some principals may take that view, some teachers may take that view. The question before the Court is whether it violates someone's free exercise rights to have their child exposed to that and have them come home asking certain questions.

THE COURT: Okay. Go ahead.

MR. SCHOENFELD: I would just make one observation about your colloquy, and you maybe get at this, but your colloquy with Mr. Baxter about the healthy life curriculum or

whatever it's called. You know, it struck me that his description of the family life curriculum is precisely why Montgomery County has introduced these texts. As I understood his argument -- and I'm sure he'll clarify if I have it wrong -- anything that mentions LGBT people should be subject to a special curriculum about human sexuality and family life.

And these texts were introduced in order to defuse that notion, that families are straight, and they're white, and they have two kids, and there's a mom and a dad, and to push everything that acknowledges the existence and humanity of LGBT people into a special curriculum from which people may have the opt-out right in Maryland I think is precisely what this curriculum is meant to fight against.

And this then gets to some of the compelling interest part of the argument, but document 1-15, which is the introduction of the grade-level-specific books and the explanation of the school board's rationale for it -- tell me when you're there.

THE COURT: Yeah, give me one minute. I'm at 1-15.

MR. SCHOENFELD: So page 17 talks about the impact of including the LGBT-inclusive text in the curriculum, and it talks about the fact that, "Compared to students in schools without an LGBTQ-inclusive curriculum, LGBTQ students and schools with an LGBTQ-inclusive curriculum were less likely to hear homophobic remarks, were less likely to hear negative

remarks about gender expression often or frequently."

And Your Honor can read it, and the exhibit is in the record, but I think that goes precisely to each of the compelling interests that the school district has advanced here, including compliance with state and federal law. If you are allowing a climate where students hear homophobic remarks or negative remarks about gender expression often or frequently, you are suborning a hostile environment, a hostile educational environment, potentially in violation of Title VI or Title IX. So this is part of the compelling interest that the government is advancing here, by including these curriculum for younger children.

THE COURT: How is the no-opt-out -- well, are the books the least restrictive means -- are these books -- do they go beyond advancing the goal of inclusion? I mean, are there -- is there anything in the books that you would agree might go beyond just merely including LGBTQ characters?

MR. SCHOENFELD: So let me answer the question I think in three different ways, only the third of which directly answers your question, but to start, obviously, our position is that the no-opt-out policy is subject to rational basis review and not strict scrutiny, so it's --

THE COURT: And we can talk about that.

MR. SCHOENFELD: Yeah, of course, but I just wanted make that observation.

The second point is, I think you asked whether the books are the narrowest tailored way to do this. I think it's whether allowing -- I think the way I've been thinking about it is that the question is whether requiring opt-outs or permitting opt-outs is the most narrowly tailored way.

THE COURT: So that is the better way to put it, I agree with that, but I wanted to get to the books themselves.

MR. SCHOENFELD: Sure, yes. And I apologize for the indirect--

THE COURT: No, there's no apology, that's the correct legal way to frame it, but I wanted to get to the books.

MR. SCHOENFELD: So I think Your Honor's question was, is there anything that goes beyond what I think the First Circuit called influence toward tolerance to indoctrination? I don't think so.

There may be disagreement, rational good-faith disagreement about whether some of the texts are pedagogically sound, whether they are age-inappropriate, whether it's appropriate to introduce fourth-graders who might otherwise be reading Sleeping Beauty, or Romeo and Juliet, or William Steig's Shrek, or anything else that involves a romantic relationship, whether talking about someone's heart going thumpety thump is age-inappropriate in that -- those are all subject to rational disagreement, but there's nothing in those books that I view as indoctrinating anyone or even in the discussion materials as

indoctrinating anyone.

I think Parker and then Tatel, in its extended discussion of Parker, makes clear that this is not -- this is not like a weekly drumbeat of particular text; this is one book included in a curriculum that ought to be read maybe once a year or left on a library shelf. This is about making a curriculum modestly more representative of the community that the students come from. There's nothing that directs students to think a particular way. Again, no one is penalized, no punishment is meted out, no benefit is withheld from anyone expressing a particular view about any of the topics at issue here.

THE COURT: So your answer raised a question in my mind, which is, it's reading the book once a year; that's what the requirement is?

MR. SCHOENFELD: So the requirement is that teachers are meant to teach to particular ELA standards, and books are provided to teachers to create their lesson plans. They're not required to read any particular book for any particular lesson. They are required to choose some book from the LGBT-inclusive texts as part of the curriculum. For some teachers, maybe that means one book read over the course of the year, for some teachers that may mean more. But there's nothing in the record to suggest that any teacher is sort of beating her students over the head with a particular agenda, as was the case in Tatel.

I think one of the points that Parker makes and that

Tatel makes is, it may be a different thing if a teacher is targeting specific students whom the teacher believes has particularly intolerant views for some kind of reeducation and there's a real focus on those students, but it's a completely different thing to have a generally applicable curriculum, of which these texts are part of, as part of a broader curriculum to teach English Language Arts, with the secondary message of ensuring respect and toleration as part of that curriculum.

THE COURT: All right. Let's talk about -- I understand your position is that rational basis applies, but my questions are concerning the cases that apply strict scrutiny.

Let's first discuss Fulton. How is this opt-out -- no-opt-out policy not the product of a system of exemptions? It existed, and then it didn't exist.

MR. SCHOENFELD: So I don't think it's the existence of the system of exemptions that matters under Fulton or Sherbert. What Fulton says specifically is that what matters to a system of exemptions is, quote -- is when it "Invites the government to consider the particular reasons for the conduct." In other words, a system of exemptions doesn't necessarily violate Fulton; if it did, We the Patriots would have come out differently.

The issue in Fulton was that the decision-maker had sole discretion to consider the reason for the exemption, and because there were allegations in that case that the reason for

the exemption or the exemption request was what drove the decision-maker's exercise of her discretion, that was constitutionally impermissible.

Here, there is no inquiry whatsoever into the reason for the exemption. All students, no matter the reason, can opt out of the health education curriculum. No students, no matter the reason, can opt out of the English Language Arts curriculum or the reading of the LGBT books.

THE COURT: But what I heard Mr. Baxter say is that the no-opt-out policy is an application of the religious guidelines, which itself is discretionary.

MR. SCHOENFELD: It -- so I think that's -- I want to make sure that I'm being clear for the record here. I don't view the no-opt-out policy as an application of the guidelines; I view it as a policy. The guidelines contemplate opt-outs; the policy of the board is not to allow opt-outs, and that's the focus here. I think that --

THE COURT: Well, how can they be so separated? There were opt-outs for a whole school year under the religious guidelines policy. Now the school board has said no opt-outs under that same policy.

MR. SCHOENFELD: Well, so I think what I'm trying to get at is, even when it was sort of pursuant to the religious guidelines, the opt-out policy applied to all requests to opt out no matter the reason. There were people who -- if you had

an opt-out for political reasons, or your core beliefs, or anything else, your opt-out was honored without any inquiry into the basis of the reason for the request.

So I think what I'm trying to say is that the opt-out policy could have been a fulfillment of what's mentioned in the religious guidelines, but it also applied more broadly to nonreligious opt-outs. And there's no allegation and certainly nothing in the record that suggests that the opt-out policy was ever applied discrepantly or discriminatorily; opt-outs were honored no matter the reason. And the new policy that's being challenged here is that no opt-outs are honored.

This is obviously quite different from the Connecticut vaccine policy at issue in We the Patriots, where it's explicit on its face that students who are seeking exemptions from the vaccine requirement for religious reasons won't have that exemption honored, whereas students who are seeking exemptions based on medical reasons will have it honored. There's none of that here.

THE COURT: Well, I'm looking at Ms. Hazel's declaration. And perhaps I'm either misinterpreting what she says or I'm not understanding your argument, but I'm at paragraph 32 of her declaration. I'll give you a minute.

MR. SCHOENFELD: I'm here.

THE COURT: And there, she says, During the 2022-23 school year -- and she refers to the guidelines for religious

diversity -- provided that they should make, you know, exceptions for sincerely held religious beliefs when feasible. So to me, she's telling me that at least some of the opt-outs, the religious-based opt-outs were done pursuant to this policy. You're telling me other people who opted out, perhaps because they thought it was just simply age-inappropriate, were granted opt-outs just because they were granted opt-outs.

MR. SCHOENFELD: Correct, and I don't -- certainly, what Ms. Hazel has described is right. I think the point is that in the old days, when opt-outs were honored, they were honored for any reason. This was the specific articulation with respect to religious-based opt-outs, but now there is no opt-out for anyone, no matter the reason. It's not like a religiously justified request to opt out is subject to different scrutiny.

That puts the decision-maker in a position of evaluating the merits of that decision, and that's precisely what the Court and that's only what the Court found to violate the Constitution in Sherbert and in Fulton. It doesn't go beyond that to say that any system that is discretionary violates the Free Exercise Clause. The question is whether the decision-maker needs to make inquiry and normatively evaluate the weight of the rationale that's being offered, and there's none of that here. There's certainly no allegation of that here.

I mean, I think everyone concedes or everyone agrees

that the policy that's being challenged is a blanket no-opt-out policy. And there's nothing constitutionally impermissible about withdrawing an old opt-out policy and creating a blanket no-opt-out policy, and I think We the Patriots identifies all of the reasons why that is so, including that it would create a one-way ratchet that meant that anytime you would introduce any type of opt-out, including an opt-out for religious reasons, it then becomes constitutionalized in a way that the government after can't walk it back for any reason.

THE COURT: I believe what you're telling me, that there were opt-outs granted for non-religious reasons and secular reasons. Where in the record is that?

MR. SCHOENFELD: So I think at paragraph 34, Ms. Hazel says -- and this is during the 2022-2023 school year. She says, "Many of the opt-out requests were not religious in nature. Some parents, for instance, expressed their opposition to what they believed was an effort to teach students about sex, to teach students lessons about LGBTQ issues, or to use instructional materials that were not age-appropriate."

THE COURT: Were they granted?

MR. SCHOENFELD: They were.

THE COURT: Where does it say that?

MR. SCHOENFELD: I don't -- I don't know that it's -- I don't know that it explicitly says this, but paragraph 33 says at the beginning of the 2022-2023 school year. Paragraph 34

follows from that. It describes the pre-March 23rd policy revision, it describes that -- the state of that world.

So my understanding is that there were non-religiously based opt-outs that were honored. I don't think it ultimately matters to the constitutional analysis for the reasons given in We the Patriots, but my understanding is that -- and I think the Hazel declaration is consistent with this -- that opt-outs were honored for any reason, and now they are not allowed for any reason at all.

THE COURT: All right. Let's talk about Tandon, please.

MR. SCHOENFELD: Sure.

THE COURT: Tell me why Tandon doesn't apply here.

MR. SCHOENFELD: So Tandon held only -- and as Your Honor pointed out, that's sort of a short decision, but it held only that a system of exemptions must treat similar religious and secular activities similarly. The opt-out policy does; no opt-outs are allowed, no matter whether it's religious or secular.

I understand Plaintiff's argument under Tandon essentially to be that the apples-to-apples comparison -- or maybe it's the apples-to -- well, I'm going to not use --

THE COURT: Not use fruit, no fruit.

MR. SCHOENFELD: My understanding of their argument is that there is something Tandon-relevant between the health

education curriculum, which allows opt-outs, and the ELA LGBT-inclusive texts, which do not allow opt-outs. I don't think that's the relevant comparison for Tandon, because that's not about secular versus religious activity; it's about a universe in which all opt-outs are permitted and a universe in which no opt-outs are permitted.

And the distinction between the health education curriculum and the ELA curriculum has multiple rational justifications. One is a hermetically sealed off curriculum that is scheduled. I think COMAR requires that it be done in, you know, one 90-minute window or multiple 45-minute windows. But it's practical to opt students out of it, and it's a long-standing policy.

And I want to make sure I address counsel's argument about the relationship of the equity imperative to that. But number one, it's much easier to allow students, just as a practical matter, to opt out of the health curriculum than it is to opt them out of reading a particular text, which might be unscheduled and could arise organically in a classroom if students pick it off the shelves.

Number two, the decision could ra- -- I think was made but could rationally be made that health education is simply more dispensable than is learning English Language Arts at the young -- at a young age. Maryland made the decision, for whatever reason, as many states have done, to allow students to

opt out of sex education. Notably, they're not allowed to opt out of instruction relating to menstruation. So there's at least some piece of the health education curriculum that is compulsory and not subject to opt-out rights.

But my point is that there's a rational reason for distinguishing between the health education curriculum and the ELA curriculum, if that were required, but it's not even required, because under Tandon, I think Plaintiffs are just making the wrong comparison.

THE COURT: But under Tandon, aren't I supposed to look at the asserted government interest for the challenged regulation -- and the challenged regulation is the no-opt-out policy. The asserted government interest for that challenged regulation, my understanding is, because you want to make sure all students are exposed to this inclusivity curricula, and it would also potentially stigmatize and result in harassment of people that fall within that inclusive community. And I think the other interest for the no-opt-out policy was administrative infeasibility.

So don't I need to look at those interests to see if that undermines the interests in the family life and sex ed opt-outs?

MR. SCHOENFELD: I think the answer is no, but I also think that on those comparisons, the school board's policy is justified. I think you only get to the comparison if you first

identify similar secular and religious activity, which you cannot here. Both are subject to the same -- both are subject to opt-out policies, opt-outs in one and opt-outs in the other, which are agnostic as to the justification for the opt-out. You don't think about religion or secular justifications in one, nor do you in the other.

So I think in order for you to get to the point where you are evaluating -- I think what you described is how you evaluate facial discrimination between secular and religious activity. And in Tandon, it was apparent, right; you couldn't have people congregating in a home for religious purposes, but you could have more than three households congregating in a barber shop or for other reasons. It was apparent from the face of the regulation that the state was making a distinction between secular and religious activity.

The next step --

THE COURT: But the ban on the household gatherings apply across the board -- no, excuse me, the other way around.

MR. SCHOENFELD: Yeah, I'm not sure what that's ...

THE COURT: So -- yeah.

MR. SCHOENFELD: So my recollection of Tandon -- and it's short, so we both should remember the facts specifically, is that --

THE COURT: Indeed, I should.

MR. SCHOENFELD: -- there was a distinction in the way

multifamily gatherings were treated for secular and religious purposes.

THE COURT: Oh, it's all private gatherings, regardless, secular or nonreligious, at home. That's where --

MR. SCHOENFELD: Right, yes, because this is where the question about the ventilation systems comes in.

THE COURT: Right.

MR. SCHOENFELD: But the point was that -- so in that case, the question was whether the outright ban on gatherings in a private home had a relevant comparator to unregulated secular activity in public spaces. There's still a relevant distinction; I mean, you can argue about whether home versus home or home versus public space is the right apple or orange to compare it to, but on the face of the regulation, you've got a distinction between secular and religious activity.

There is none of that here; there is no distinction between secular and relevant activity. So because there is no facial discrimination, there's no line being drawn, whether it's a relevant line or not, no line being drawn between secular and religious activity, you don't get to Your Honor's question, which is, how do you justify the differential treatment between secular and religious activity?

THE COURT: But doesn't that turn on an assumption that there is no religious instruction that's similar to what's in the inclusive books in the health and family life; in other

words, is there an overlap of subject matter that's being taught, and if that overlap violates religious beliefs, then there seems to be comparable secular conduct.

MR. SCHOENFELD: I don't think so, I think that goes farther than Tandon requires, but I think this gets to a point that Mr. Baxter was returning to, which is, the health education curriculum has long permitted opt-outs under COMAR. In 2019, the health regulation was amended to include some application of the broader equity policy; in other words, health education now needed to be taught with these equity and diversity guidelines in mind. The fact that it is now more diverse and more representative of the community doesn't undermine or modify in any way the ultimate aim of the health education curriculum, which is to prepare students for maturity and puberty.

In other words, it has a different purpose, even if it's now infused with the same understanding that it needs to be more reflective of the community that is being taught that curriculum. In other words, I think you can draw, even on the face of COMAR, a rational distinction between the differential treatment between the health education curriculum and the ELA curriculum.

THE COURT: Let's talk about their hostility claim in Masterpiece Cakeshop. Why haven't they alleged a hostility claim?

MR. SCHOENFELD: So let me answer it in two ways. One

is procedural, and one is substantive. I don't think that they've alleged enough to satisfy Rule 12(b)(6) on a Masterpiece Cakeshop or Lukumi-type claim. They certainly haven't shown they are clearly likely to succeed on the merits, and I think that distinction is important for the posture that we're at now. When we move to dismiss the complaint, we'll be making a 12(b)(6) argument for the reasons that I'm about to give, but here, where their burden, especially seeking a mandatory injunction, is to show a clear likelihood of success on the merits, they certainly haven't gotten that far.

But on the merits of the Masterpiece Cakeshop claim, I think -- I say this with a great deal of respect for my opposing counsel -- I think they are being unfair to Ms. Harris on the comment she made at that meeting. She was very clear that she was talking about all types of objections to the LGBT-inclusive curriculum. She was very clear that she was talking about religious rights or family values or core beliefs. In other words, her point was, I don't care the reason for your decision to opt out on this curriculum, I disagree with it no matter the basis for the objection, which just takes us back to the Fulton and Tandon problem.

This is a blanket policy. People may think it's a sledgehammer rather than a scalpel, but it is not discriminatory, and it's not based on any religious animus. It's a blanket policy, it says no opt-outs are allowed for this

aspect of the criticism that the school board believes is critically important to educating students in a diverse society.

The only comment attributable to one member of a seven-member board is the one that they focused on with Ms. Harris, and I think, as Your Honor obviously has done, you've listened to it in context; there is nothing to suggest religious animus, certainly not anything like the language in Masterpiece Cakeshop.

And just to quote some of it, "Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust, whether it be -- I mean, we -- we can list hundreds of situations where freedom of religion has been used to justify discrimination, and to me, it is one of the most despicable pieces of rhetoric that people can use to use their religion to hurt others."

That is categorically different from what was said here. And you see Ms. Harris' statement manifest in the policy that was adopted. She rattles off a number of reasons why parents might want to opt out their kids of the LGBT-inclusive texts, and she says, "In my view, as one member of this seven-member voting board, none of them suffices." None of them suffices. It would be a very different thing if she focused on religion in particular and impliedly or directly said, I think that is less worthy of deference as we consider whether students

are entitled to object. And she said nothing like that.

THE COURT: What's your response to Mr. Baxter's -- I think his position was that the plaintiffs don't have to allege a constitutional burden to have a claim, a hostility claim under Masterpiece.

MR. SCHOENFELD: It's a hard question. I don't know that there's a clear answer to it. I think that -- I guess my view is, it's hard for me to see how a claim of religious bias or animus, without an underlying constitutionally protected interest, would be actionable, but I don't think Masterpiece or Lukumi is clear on that.

You can see it -- you can see what the burden is in each of these cases, right? In Lukumi, they're not permitted, as a matter of ordinance, to participate in something that is central to the Santerian faith. And in Masterpiece, all of these issues are arising during a disciplinary proceeding before the Colorado Civil Rights Commission. So I think Your Honor had said that the burdens were sort of assumed in those cases. So I think the better reading of those cases is that there's got to be some cognizable burden before you get to the question.

The through line in all of these cases is, can you identify, on the face of the text, through the adjudicatory process, whatever, some evidence that religion is being treated less well than secular justifications. It seems to me that a predicate is a --

THE COURT: Where did you get that language from, "treated less well"? I've been trying to focus on to what extent any purportedly hostile remarks have to be connected to the decision, and it's not very clear to me. I mean, Masterpiece Cakeshop, of course, was -- I think we can all say, based on what you've just discussed, a very clear set of facts; there was religious hostility.

MR. SCHOENFELD: Yeah. So I think it is fair to read, like Cuomo, Catholic Diocese of Rockville Centre v. Cuomo, maybe Tandon -- sorry.

Got it?

I think it's fair to read those to say that one of the things you were trying to suss out before you apply strict scrutiny is, is religious observance being treated less well than some secular comparator. That's sort of how I make sense all of the case law. There is nothing in this case that suggests that religious behavior is being -- or religious conduct, or religious beliefs is being singled out for any treatment that is less respectful than any nonreligious objection to the same curriculum.

THE COURT: I candidly haven't watched or listened to all of the parents who testified at the hearings against the opt-out. I do remember, though, there was a woman in January who testified. I don't believe she referred to religion. But were there other parents who testified who were not raising

religious objections but merely raising perhaps age-inappropriate objections?

MR. SCHOENFELD: I honestly don't remember the videos, but I think Ms. Hazel's declaration says that some of the objections and some of the criticism from the community was about issues relating to age-inappropriateness. And I think the principals' document -- and you can take it for whatever it's worth, and I'm happy to talk about it -- talks about objections to age-appropriateness untethered to concerns about religious beliefs.

THE COURT: Is age-inappropriateness a core value or a family value?

MR. SCHOENFELD: Absolutely. I mean, it can be. If you -- and it can have religious basis or nonreligious basis. Saying that your child -- saying that your child is too young to be exposed to the existence of LGBT people is a family value, is a core value. Some people think that you need to shelter your young children from the existence of people whose choices, and world views, and behaviors, and attitudes differs from yours.

And that concept, that perception varies across communities along religious and nonreligious vectors. There's nothing uniquely religious about the belief that young people should be told about dating, and sexuality, and LGBT people, and same-sex marriages, and gender transition in elementary school or middle or high school. Some people are introduced to it of

necessity because their children happen to be transgender, and they come out when they're six or seven. I mean, there's nothing -- there's nothing specifically religious about that concept.

THE COURT: What are your asserted compelling interests in the no-opt-out policy? I summarized them earlier and it was based on my reading of your paper, but I want to hear from you what they are.

MR. SCHOENFELD: I thought you did a great job of that.

THE COURT: Well, I read them from your paper, so I --

MR. SCHOENFELD: Yeah, I know, I'm only half joking. I mean, I think that -- and I think we got to it before, substantive due process.

So I can't find it. I think one of them is in order to ensure that students coming from diverse families see some level of representation.

THE COURT: Hang on one second; let's just -- I need to moor myself in the briefs, and if you're going to deviate from that, you have to let me know, but --

MR. SCHOENFELD: Okay. I'm happy to go back to it.

THE COURT: All right. I'm at your opposition, which was ECF 42.

THE COURT REPORTER: Are you able to get closer to the microphone?

MR. SCHOENFELD: I will; I apologize.

THE COURT: Just give me one moment.

MR. SCHOENFELD: So it's page 25 in their opposition.

THE COURT: Yes, on to 26 is where I found the --

MR. SCHOENFELD: Right.

THE COURT: Great, okay.

MR. SCHOENFELD: So I think we identify three.

The first is an interest in -- as a public school in providing a safe educational environment, and I think Ms. Hazel's declaration and also the document I read to you, which is the sort of launch document for this curriculum, makes clear that one of the purposes is to ensure through the curriculum that it's cultivating an environment where students are less likely to hear homophobic remarks or negative remarks about gender expression often or frequently.

There's an interest in ensuring the health and safety of LGBTQ students. I think that's obviously related, but I think it goes a little bit more to a question of the school's obligation -- and this relates to its third one -- its obligation to ensure against a hostile educational environment for students who are LGBT.

And the third one is its interest in complying with federal and state antidiscrimination policies and expectations. One is the COMAR equity regulation, and the other is Title IX. I think there's no shortage of cases where students have brought

viable Title IX claims because they were marinating in an environment of hostility towards their sexual orientation or gender identity.

And part of this curriculum is then to ensure that there is a respectful environment for students that, you know, are reflected in the texts that are used. And just to sort of preempt the point, it's not about indoctrinating anyone; you don't need to agree with anyone about anything. You are free to express a different view, parents are free to teach their children a different view; no one is penalized for anything. But the point is that you have to learn to respect people who are not like you.

THE COURT: So what if a student says, in response to a transgender discussion, My parents told me that being transgender is against my religious beliefs. What does the teacher say at that point?

MR. SCHOENFELD: Any good elementary school teacher worth his or her salt would engage the student and engage the classroom in a productive discussion that doesn't make any student, including the transgender student in the class or the religious student, feel bad about their beliefs or attitudes. There are ways -- and this is why teachers are so well paid. There are ways to -- that was a joke, that was a joke.

This is -- skilled teachers know how to navigate those difficult discussions. And there are ways to make sure that

students in those classrooms understand that this voices a particular belief and that students are protected from any harm, either the religious student expressing that belief or the transgender student who feels in any way beleaguered or besieged by that statement.

And that's what teachers do. And that's what teachers do in every context; it's not limited to these particularly hot-button issues today.

THE COURT: All right. Let's mine down into your three compelling government interests.

MR. SCHOENFELD: Sure.

THE COURT: I think the plaintiffs would characterize No. 1, which is the safe environment for all students -- which I interpret -- tell me if I'm wrong -- as different than No. 2, which is more, if people can't opt out -- or if people do opt out, those that remain may be stigmatized if the students know why they were opting out. But for No. 1, ensuring a safe environment, why is that not an imponderable that can't be defined?

MR. SCHOENFELD: So I think that -- I mean, the slide that I referred to earlier I think is based on empirical work that shows the effect of having these curricula introduced into the -- into -- or having these books introduced into the curriculum. This is different from SFFA, which talked about improving the type of dialogue or improving -- you know,

improving the sort of diversity of discussion on college campuses.

Courts have recognized the need to create a safe environment for students. In any number of cases -- and we cite, you know, cases going back to Saxe in 2001 as well as Grimm and Doe, all of which talk about not just -- these aren't just bathroom cases; these are cases about things like referring to students by their appropriate pronouns. They all go to the question of whether you are creating a safe environment for students who are either LGBT themselves or come from LGBT families.

THE COURT: And allowing opt-outs for religious reasons undermines those goals?

MR. SCHOENFELD: Absolutely. So I think -- that gets to a separate part of the strict scrutiny analysis, but I think Ms. Hazel talks about the fact that there was rampant absenteeism, there was disruption caused by multiple children needing to leave the classroom. And again, this is narrow tailoring to justify a no-opt-out policy at all, not one that is based on any inquiry into the reason for the opt-out policy.

But she talks about high absenteeism, she talks about disruption to lessons. A third of students left a classroom, and when they came back, they needed to be reintegrated into the discussion, and there were challenges in making sure that everyone could do the same assigned work.

THE COURT: Does that overcome the First Amendment objections or the -- if we assume there's a violation of the First Amendment rights?

MR. SCHOENFELD: I view these as explanations for why the no-opt-out policy is narrowly tailored; yes. I mean, the alternative, as I understand it, is allowing opt-outs for this curriculum, and I think it's unsustainable for Montgomery County, for the reasons described in Ms. Hazel, and nothing, then, stops families from opting out of tons of other things. I don't mean to invoke a kind of slippery slope argument here, but this is the real experience of Montgomery County Schools under a system where opt-outs were allowed for these particular texts.

THE COURT: Go ahead.

MR. SCHOENFELD: No, I was done.

THE COURT: I was going to ask -- so tell me more about the experience last year. I under- -- I've read what Ms. Hazel has said. Were there any reports of students who might be transgender, or transitioning, or gay being bullied because of opt-outs or harassed because of opt-outs?

MR. SCHOENFELD: There's nothing in the record to that effect, and I don't know why, but I think it's also the case that the absence of those -- the absence of those incidents might just be a testament to the fact that there was some curriculum being introduced at that point in time. I don't know

a way of making a kind of causation or correlation between the two.

THE COURT: All right. Let's switch gears to substantive due process, please.

How do you interpret Herndon?

MR. SCHOENFELD: It's dicta, and I think every other Court that has addressed this question about the hybrid rights has made the obvious observation that you can't tack on a non-meritorious substantive due process claim to a non-meritorious First Amendment claim and suddenly be entitled to strict scrutiny. The Second Circuit said that in Leebaert, and I think every other Court of Appeals to address the question has held the same way.

The only two cases they cite to for that principle, I think, are Herndon, which describes that in dicta and Hicks, which just sort of keys off of Herndon. But there was no religious-based claim in Herndon, and I don't think it's a sustainable motive analysis.

THE COURT: Let's just probe Herndon a bit more.

MR. SCHOENFELD: Sure.

THE COURT: It doesn't mention the words "hybrid rights." It did follow Smith. Judge Britt, in Hicks, distinguished between hybrid rights, and what the Judge interpreted was the holding in Herndon as something separate. So my question to you is, setting aside the hybrid rights issue

and the, you know, line of authority that's interpreted, what Justice Scalia said in Smith, does Herndon create sort of a separate substantive due process right when you have the intersection of the right for a parent to control a child's upbringing and free exercise concerns? That's the language that was used.

MR. SCHOENFELD: Right, and I think the answer is no, it's still dicta, because there were no free exercise concerns in Herndon, and I think the Court was pretty explicit about that. And the same rationale would apply. There's no good reason why someone could take a non-meritorious substantive due process claim and a non-meritorious free exercise claim and combine them. I forget which Court said it but said the level of scrutiny doesn't vary based on the number of rights being asserted. I think that may have been Leebaert.

But I think that analysis is exactly right, that even on the sort of evolutionary plane of First Amendment jurisprudence, there's nothing in any of the recent Supreme Court cases that would suggest that you could take a claim in which Plaintiffs failed to establish a constitutionally significant burden on their free exercise rights as well as a plausibly alleged -- and I think that's brought into Herndon -- substantive due process claim and suddenly -- and subject to the most exacting scrutiny known to the law.

THE COURT: Let me ask you more about the least

restrictive means and the compelling of the -- the strict scrutiny analysis. So you've asserted three interests, all of which existed last year when opt-outs were allowed. What evidence have you provided me that the no-opt-out policy is the -- well, you've said the number of opt-outs, then, was basically the reason that you instituted a no-opt-out policy. How does that undermine those three interests, the administrative and feasibility of it?

MR. SCHOENFELD: So the interest is in making sure that all students are exposed to this curriculum, to advance the goals that we've described. It doesn't work if only some students are exposed to that curriculum. The point of including that in the curriculum is to ensure that there is a school environment that is safe for all students, and that's what leads to an environment where students are less likely to hear homophobic remarks, et cetera.

The school was willing for a time to allow opt-outs until it determined that it couldn't because of the administrative infeasibility points that we raised here, which is the absenteeism and the high number of opt-outs. And I think as Ms. Hazel describes, MCPS was concerned that when some students are permitted to leave the classroom whenever language arts lessons draw on books featuring LGBTQ characters, students who believe that the books represent them or their families are exposed to social stigma and isolation. So there's a direct

connection drawn between the high number of opt-outs and the specific goals that the school means to advance here.

THE COURT: So it's not that it's difficult to administer; it's that you didn't realize how many people would be requesting opt-outs, and then that undermined your goal of inclusion.

MR. SCHOENFELD: That's certainly part of it. I mean, I think the bigger number -- well, so narrow tailoring, you know, it also does need to be practicable, and there were practical impediments to honoring the opt-outs, and I don't think that should be lost in the analysis.

The fact that many students were leaving the classroom to do different curriculum and then had to come back into the classroom and be taught separately by teachers or media specialists, because the exercises -- the character studies is one that I think is cited -- were just being based on different texts, that's not irrelevant to the narrow tailoring analysis. I mean, schools sometimes try to accommodate students. It's not constitutionally required that there be an opt-out, but it turns out that it's just not doable.

THE COURT: I don't think I have any other questions right now. Do you have anything else to add?

MR. SCHOENFELD: The only one -- and it's a very, very minor point, but I'll just make it. I do think the standard here is higher, because this is a mandatory injunction and not a

prohibitory injunction. League of Women Voters involved a case where the injunction was prohibitory because the lawsuit was filed the day the policy change was made, and the Fourth Circuit is very careful to look at the language of a request for prohibitory relief in the complaint, whereas the complaint here makes very clear that what they are asking for is mandatory injunctive relief.

And so the standard is higher. It's not just, you know, the Winter likelihood of success; it is a clear likelihood of success on the merits of their claims.

THE COURT: Thank you very much.

MR. SCHOENFELD: Thanks, Your Honor.

THE COURT: Ms. Klepp? You can keep going? All right.

Mr. Baxter?

MR BAXTER: Thank you, Your Honor. I don't know --

THE COURT: I'd be happy to hear from you. I'm sure I'll jump in, you've noticed I'm not shy, but --

MR BAXTER: Yeah. Thank you, Your Honor. I do have a list of issues, and I've tried to track them in the order that they're discussed in the briefs. There's a couple of preliminary things that I'd like to have first.

Opposing counsel makes the -- or my friend on the other side, I would like to say, indicates that my clients oppose the very existence of LGBT children; nothing could be

further from the truth. Some of my clients have LGBTQ members of their own family, they know about these issues. There's a different question about whether you force children to talk about these issues in very ideological ways when they are in pre-K through fifth grade, and that is what my clients object to.

I would like to just note that we have connected Harris' comments on white supremacy and racism in our brief on page 22. It's true that some -- those particular comments came after the no-opt-out ban was enacted, but under Masterpiece, that is irrelevant. The question is whether you can get neutral and fair consideration of your request. And it's been made clear, both by Ms. Harris' statements before the opt-out policy and after -- the ban and after, that they cannot get a fair hearing on their objection because of her views that their religious objections are akin to white supremacy and xenophobia.

THE COURT: Just give me one moment. It's page 22 of your motion -- the memorandum in support of your motion?

MR BAXTER: There's an article by Espey, and I think it's the Montgomery360- --

THE COURT: Just give me one moment. I see.

MR BAXTER: The very end of the first paragraph.

THE COURT: Yeah. We printed all your permalinks, so I'm not sure I can readily get my hands on it, though.

MR. SCHOENFELD: It just says she -- Harris later also

compared a largely Muslim group of concerned parents to "white supremacists," xenophobes, see Em Espey, MoCo360 (June 2, 2023).

THE COURT: Okay.

MR BAXTER: Just, again, a couple of kind of housekeeping matters before I get to the substance. The Montgomery -- and I -- we've -- I have the permalink for this, we could submit it afterward, where Montgomery County identifies, for example, what has to be taught in high school sex ed class. It includes analyzing how programs and policies can promote dignity and respect for people of all sexual orientations and gender identities, how programs and policies can support people of all sexual orientations, gender identities, and gender expression. And so, you know, students can walk out of those classes, but they can't walk out of that same -- the type of discussion in the books.

I would also just note that in Bostock, the Supreme Court said that homosexuality and transgender identity are inextricably bound up with sex. The Mahmoud, in the verified complaint, First Amendment complaint, paragraph 55, Persaks at paragraph 62, both said that in their religious view, these understandings of sexuality and gender identity are interwoven and cannot be separated, that your understanding of who you are as your gender identity is interwoven in your -- in an understanding of the importance of sexuality and the role that it plays in propagating families.

To hit the substance --

THE COURT: Can I ask you a follow-up question --

MR BAXTER: Yes.

THE COURT: -- about one of these procedural matters. You said you'll give me a permalink on the health education reference you just made. How do the opt-outs in health education work; can you just opt out of one particular part of health ed that -- or my understanding -- and perhaps it's not based on the record, but it is, you opt out of the entire health ed program, not just this part of it I can't listen to, but other parts I can.

MR BAXTER: I'll -- I believe you -- you know, under the rule, you can opt out of any part that you want because it's -- under the Maryland reg, it just says you can opt out. You have to provide opt-out procedures. Under the Montgomery County reg, it says you can opt out for any reason of anything specifically that violates your religious beliefs.

I can only speak to my own personal experience. My son, when he was in Wheaton High School, I had no objection to him participating in the class, but he came to me and said, Hey, I'm not comfortable with some of the discussion in our class, can I opt out, and we said sure, and he asked for an opt-out and got it for a particular portion of the health class. So I'm not aware of anything that would limit any person from just opting out of any particular part. And again, that kind of parsing

would go to like, well, your religious objection is too narrow, your religious objection is too broad, questions that a Court really can't delve into.

On the question of Fulton -- and the school board can bend itself, tie itself into pretzels trying to distinguish its different aspects of the policy, but if you look at, for example, Fulton, in that case, there was one provision of the contract that absolutely banned any exception -- or, you know -- so there could be no exceptions, and the Supreme Court said, Well, you have to look at other portions of the contract that do allow it. And the city said, Well, that doesn't apply in this context. And the Supreme Court said, you know, Disregard all of that, and said, You can't parse this into different pieces, you have to look at the broad picture. And in Lukumi, the Court looked at both state law and city law and said that anything that -- that goes maybe perhaps more to the Tandon question, but you look broadly at the discretions available to the organization.

There's no question here that the school board has broad discretion; at a whim, on March 22nd, it can allow them, on March 23rd, it can disallow them, and there's nothing -- there are no specific guidelines. You know, Counsel cited the We the People case, but there, the Court said there was -- there were specific medical guidelines; you had to have a doctor who would say certain things to get you an exemption. There's

nothing in here that would guide the school board's decision about when they apply the religious guidelines to storybooks and when they don't.

THE COURT: But what I heard Mr. Schoenfeld say is, the opt-outs were allowed for anyone. I don't even know that reasons were asked, just if you want to opt out, you can opt out, and then they just revoked that policy without regard to any reason for why. So their position is, religion played no part in it.

MR BAXTER: But that doesn't undermine the discretion. And he -- you know, he says you have to be looking at individual religious, you know, positions. There's nothing in the cases that say that. It says anything that would allow -- that would give the government solicitude to decide which exemptions are worthy of solicitude and which are not.

Here, the Court decided, Well -- sorry, the school board decided that these ones are not worthy of solicitude because they're too numerous, or they're too burdensome, which, by the way, is not reflected in the record. The most they said -- in the Garti declaration, the school board said that it wasn't because of numerosity, and the only thing in the Hazel declaration is that there were dozens of students at a single school. When you're talking about across dozens of classrooms and hundreds, potentially thousands of students, there's nothing to suggest that that's unusual or inadministrable; there's

really no evidence to support the type of burden analysis.

And again, it's -- there's no question about the broad discretion based on the facts and the written policy here that the school board has. Even if there was -- you know, the Court has concerns about the existence of discretion, that pushes us into the Tandon.

The types of arguments that the school has made are the exact same arguments that were made in all of the COVID cases in the Diocese of Brooklyn, where the government tried to say, Well, we're -- this policy only applies to essential businesses, not, you know, nonessential businesses, and the Court said, None of that matters; you look at the underlying interest, which is to avoid the spread, and any kind of exception that undermines that triggers strict scrutiny.

The -- Counsel is also trying to say that a lot of these differences are justified, but that goes into the strict scrutiny analysis, not under whether a policy is neutral and generally applicable. So whatever justifications they have for distinguishing between exception- -- you know, opt-outs in storybook hour versus opt-outs in health class, those -- that can go to strict scrutiny, which the government also fails, but it doesn't go to whether the policy is neutral and generally applicable.

And again, it's not relevant -- and this is directly from Tandon. It doesn't matter if some secular exceptions are

treated worse or as bad as the religion exceptions, it doesn't matter if some religious objections are treated better; the fact that there is this variation of treatment is alone enough to trigger strict scrutiny.

On the question of burden --

THE COURT: But is -- let's just mine down into Tandon a bit. So you've got family life and human sexuality units, and you've got ELA curriculum that -- a subset of which is some of these inclusive books. How are those comparable?

MR BAXTER: Because the underlying interest in both of those is to promote -- and that's the reason --

THE COURT: You're going back to the equity guidelines.

MR BAXTER: Right.

THE COURT: Okay.

MR BAXTER: It's to promote the equity, and the interests they have asserted, which are ensuring that there's --

THE COURT: But the human -- let me just interrupt. The family life and human sexuality unit, I mean, that's been around since -- I went to Maryland Public Schools; that's been around since I went to public school. It's just been updated to include one line that says, Now we will include in our curriculum a reflection of inclusive communities. How does that connect the two, for --

MR BAXTER: So --

THE COURT: -- comparison purposes?

MR BAXTER: And that's the preliminary ones that I mentioned where Montgomery County School Board has added further guidance and talks about how do you promote diversity, inclusion, and equity. If the student walks out of that -- or opts out of that portion of the discussion, that undermines the same interest that's asserted in the ELA and the ELA storybooks.

On the burden issue, I would, you know, again point the Court to the Lovelace decision out of the Fourth Circuit. That's at 472 F.3d 174, citing Thomas v. Review Board, where it says that the pressure to modify your beliefs is sufficient to impose a burden. The government wants to say, Well -- or the school board wants to say, Well, they -- you know, they're just sitting there, they don't want to have to do anything, but that assumes, then, that they've already given up their religious practice. That, I think -- if they sacrifice their religious objection, they can be in the schoolroom.

But the point is that if they practice their religion, if they choose to walk off the job, then the Court's saying, like, Yeah, you can't participate -- you can't just have the opt-out; you have to go all the way out of the school. You lose the ability to participate in the school system.

THE COURT: But you can still practice your religion --

MR. SCHOENFELD: So could Mr. Thomas.

THE COURT: Let me just finish, one moment, please.

MR BAXTER: I'm sorry.

THE COURT: If you're a parent and you're a child of Montgomery County Public Schools, you can still practice your religion, espouse your religious views in the face of what you view as conflicting views. In fact, it may empower people to be more strong in their religious views. I mean, how is it preventing the exercise of religion?

MR BAXTER: Preventing the exercise of religion, again, is not the standard under Thomas, under Lovelace; it's are you being pressured to modify your religious beliefs. And if your religious belief is --

THE COURT: So how are they being pressured to modify what they believe?

MR BAXTER: Because they have to either put their child into a situation that would violate their religious beliefs or leave the public school. So that pressure -- if they want to use the public schools -- which some of my parents are under intense pressure to stay in the public schools; they have no financial options to go elsewhere. They're pressured -- they're being pressured to leave their children in these classes.

THE COURT: I didn't see any of this in their declarations, this pressure that they feel.

MR BAXTER: All of them said that this is a violation

of their religious beliefs to leave their children in, and so if they -- it's obvious that they're having to choose between putting their children in or to take advantage of the public school system. That pressure is alone sufficient to constitute a burden on religion.

And again, the school board wants to say, Well, you have to -- it has to be much more severe, but getting into that type of severity analysis again rewards parents who are less religiously, you know, conservative or sensitive than parents who maybe have, you know, more of what might be considered more moderate views.

I would also again point to Fulton, where the Court deferred to the parties' religious, you know, concerns. There, Catholic Social Services said that this was -- endorsing families to be certified as, you know, fos- -- LGBTQ couples to serve as foster parents was tantamount to endorsing that relationship. The City said, We're not asking them to endorse the relationship; we're just trying to get them to show that they meet certain statutory requirements of eligibility for parenting. And the Supreme Court deferred to the CSS's view that doing that would be a violation of their religion.

And that same deference is required here. The parents have testified that putting their children in these situations, when they're, you know, pre-K through fifth grade -- one of our -- you know, this is outside the record, but I think it

reflects kind of common sense. One of the members of Kids First has a daughter who has Down's syndrome and autism, and they said there's such a level of respect for what they hear from other adults, and if this child sits in a discussion where she's told these things, it's very -- it's almost impossible for them to kind of undo that teaching.

And there's a range, of course, of things. Some parents may be successful in that, but at that age, a lot of parents -- there were a thousand parents protesting at the school board meeting in July -- have concerns that exposing their children to this type of teaching, being told that their sex is, you know, the doctor's best guess, that interrupts their ability to direct the religious understanding of their children.

And again, the kind of parsing that the school board wants to get into, about, you know, are we talking about books that just introduce characters or -- you know, that kind of parsing is the kind of parsing that this Court cannot get into, because the First Amendment even protects views that we find odious, or that we don't like, or are not popular.

There's just no way for the Court to draw the line between what's -- how much is indoctrination and how much is influencing, how much is just introducing. You know, I think it's telling that for the last decade, where LGBTQ individuals have had prominent places in society, our teachers, our administrators, that this has not been an issue, but that these

books trigger a different level of concern from the parents.

On the Masterpiece issue, counsel mentioned a 12(b)(6) motion, the reasons he's about to give. This was not in the briefing. I'm not exactly sure what we're arguing about. He says that there's a higher standard. Again, I would point to the League of Women Voters. We are the parties that are trying to preserve the status quo. What has always existed is the right to opt out. It was the change on March 23rd that triggered this lawsuit. And the point of a preliminary injunction is to preserve what happened before the last action that created the controversy. And so we are trying to --

THE COURT: Help me understand that. I mean, I, frankly, can see it both ways. Right now, there is a no-opt-out policy. If I were to grant a preliminary injunction, I would be telling Montgomery County Public Schools, Change your policy, not, Stop, you know, not keeping the status quo, because the status quo right now is no opt-outs.

MR BAXTER: You have to look at what is the challenged action. And so the challenged action -- the substance of the lawsuit is the ban. And so the Court in League of Women Voters, says you look at what was the status quo immediately before that. If they always get the advantage because they just change the policy, that would kind of undermine the point of a preliminary injunction, which is always to go back to what existed before the action that created the lawsuit.

They've also made the point that Ms. Harris objects to everyone, not just the religious people. But that was a similar argument that was made in Masterpiece, and the Court said that just because you also have feelings of hatred or -- you know, to people who disagree with you for other reasons doesn't mean that those who come with religious objections are going get a neutral and fair proceeding. It's clear from her statements that there is not going to be a fair proceeding on this issue. And what's even more offensive is that no other member of the school board has countered or disavowed her statements, which again, in Masterpiece, was a point that reinforced the Court's decision.

Just quickly, a few additional items. Counsel stated that the hurtful statement was only talking about students shouldn't call other students weird, but that misrepresents the statement on page 10 of the declaration, where the student says, "That's weird," not a person is weird, that's weird, you can't be a boy if you're born a girl. And the student -- the teacher is told to say, That's hurtful to basically disagree with that ideological statement.

And finally, the school board has made a bunch of arguments about its compelling government interest. It says there's been empirical work in contrast for the Students for Fair Admissions, and there's been thousands of studies about the values of diversity. And they were cited in the Students for Fair Admissions case about the value of diversity in higher

education. Here, there are no studies; there are simply statements by Ms. Hazel that it's beneficial. And even in that case, with empirical -- extensive empirical studies in SFFA, the Supreme Court said that that was insufficient.

And then finally, counsel says that -- on the SDP point, I would just note that Herndon cites to Souter in Lukumi, where Souter said that, "Where parents make a free exercise claim Pierce's reasonableness test is inapplicable and you have to go to strict scrutiny."

And finally, counsel just states that -- you know, reinforces that the point is to, you know, change students' views on these, that he wants to ensure a respectful environment by making students agree with these -- or compelling students to change their views on these issues that -- he says in one case, you can state religious disagreements in class, but you can't walk out. It makes no sense and is an inconsistent application. It can't be a compelling government interest if it's enforced in one instance and not the other.

And it's not just about indoctrination per se, but talking to preschool children about things like thumpety thump in your heart, whether you like-like or just like someone, what you think about your pronouns, these encourage students, in the time of innocence, to think about things that they don't need to think about. They don't need to be thinking about what does it mean -- you know, is my teacher gay or straight, is my

teacher -- how does my teacher identify.

Our parents are just saying, let children be children for a period of innocence. They will learn these things and have exposure, but not at this stage and this time. So it's not just the indoctrination, but it's introducing thoughts and ideas and topics that are heavy -- too heavy for children.

Again, just in closing, Your Honor, our -- the First Amendment was designed to ensure a pluralistic society, to allow people to be able to live side by side despite differences. We don't do that by, you know, compelling people to believe or participate in things that violate their religious beliefs; we do that by allowing parents to step aside when there's something that violates their faith, would violate their children, and allows every student to feel like they're part of the system, that they belong, they have -- they're vested in our constitutional system, they're protected, and they have an incentive to protect others.

And that's what our parents are asking for here; let the books be in the school, let the parents who object opt out, supported by the -- Maryland's law and by the school board's own regulations. We'd ask for the Court to enter a preliminary injunction.

We'd also move orally, if the Court is not inclined to, to grant a stay pending appeal. As required under Federal Rule of Appellate Procedure 8, we have to move this Court, and

so we would orally ask the Court to -- if it were to rule against the parents, to grant a stay pending appeal of the -- pending the appeal. Thank you.

THE COURT: Okay. Thank you, Mr. Baxter.

Mr. Schoenfeld, I just have a question for you about burden, and I then will have -- Mr. Baxter can have the last word, since it's his motion. So I'm inviting a -- I guess I'll allow a surreply.

With respect to burden, I mean, Mr. Baxter takes the position, or his clients take the position, the parents and students take the position that they are being pressured to choose between going to public schools and not because their children will be exposed to ideas that violate their religion. Why isn't that a constitutional burden?

MR. SCHOENFELD: Because exposure -- because exposure to offensive ideas doesn't violate the Constitution. It doesn't violate the Free Exercise Clause. It's one thing to be receiving a state subsidy, as in Espinoza or Trinity Lutheran, and to say that you get the benefit, you know, the rubber for the school playground or the money, you get the benefit if you're going to a secular school but not if you're going to a religious school. That is a real, tangible, concrete --

THE COURT: I understand those are different. I mean, I --

MR. SCHOENFELD: Yeah. So -- I mean, to answer your

question directly, I think every Court to have addressed this question says that mere exposure to those sorts of texts doesn't constitute pressure in any constitutionally cognizable way. Again, I'll return to Parker --

THE COURT: Well, what if the parents are claiming they feel the pressure?

MR. SCHOENFELD: I think that's exactly the argument that was made in Parker, you know, if you enroll your students in public school, then one of the things that comes along with it is the possibility that they are going to be exposed to content that is offensive to you, with which you disagree, or where you would have taught it to them at a different age, but that's part of the bargain in going to public school.

And I think Parker addressed precisely this issue. Parker has been all over these briefs. Plaintiffs' counsel have never suggested that it's inconsistent with contemporary Supreme Court jurisprudence or with Fourth Circuit jurisprudence in this context. And what it says is that the plaintiffs contended in that case that, "The exposure of their children at these young ages and in this setting is contrary to ways of life, contrary to the parents' religious beliefs, violates their ability to direct the religious upbringing of their children."

And what the Court said was, "As to the parents' free exercise rights, the mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's

religious belief does not inhibit the parent from instructing the child differently." That's why there is no constitutionally cognizable burden from being exposed to this instruction in public school.

THE COURT: All right. Thank you very much.

MR. SCHOENFELD: Can I make two additional points, if I might. So the first one is with respect to the mandatory injunction piece. I mean, League of Women Voters is sui generis. It involved an injunction that was sought the day the policy was changed, and the Court is quite clear on that. The chronology here is that the policy was changed in March. Plaintiffs filed suit in May and moved for a preliminary injunction in June. There is no world in which the status quo ante is anything other than the policy that was announced in March.

Moreover, in League of Women Voters, the Court looked at what they were asking for and said that what they were looking for was something prohibitory. If you look at Prayer for Relief (e) on page 40 of their complaint, it says, "Enter preliminary and permanent injunctions prohibiting the school boards from forcing the parents' children and other students, over the objection of their parents, to read, listen to, or discuss the school board's Pride Storybooks and also requiring the school board to provide advance notice and an opportunity for opt-outs to any other instruction related to family life or

human sexuality." It is a mandatory injunction. It is asking the school board to begin doing something that it is not currently doing and has not done since March.

Plaintiffs just asked for a stay of the injunction. I don't know what you would be staying; would you be staying the no-opt-out policy, would you be staying the opt-out policy? Like it -- just logically, as a matter of chronology, what they're asking you to do is direct a different policy from the one that exists now and to affirmatively introduce opt-outs as the rules of the road for the '23-'24 school year.

And then the last point I'll make, Your Honor, is, on Fulton, I don't think there's anything sort of pretzel-adjacent about the argument here. The Court was quite clear in Fulton that what it was preoccupied with is whether a mechanism for individualized exemptions would render a policy not generally applicable because it "invites the government to consider the particular reasons for a person's conduct." That's what Fulton prohibits. That's what was the issue with Fulton, that's what was the issue with Sherbert, that's what was the issue with Lukumi Babalu Aye. That is the substance of the Fulton prohibition.

And the final point, if I may, just a note of personal privilege, my point here was not -- or the point I made, the first one Mr. Baxter addressed, was not to suggest anything other than that his suggestion that all of this LGBT-inclusive

content should be treated as part of the healthy life curriculum is precisely the reason why the school board has integrated it into a broader curriculum.

It's not a segregable, hermetically sealed curriculum where people are to learn about the existence of LGBT people and LGBT families, but rather, it is meant to diversify curriculum that up until the introduction of these texts was -- the percentages are in the record -- was overwhelmingly representative of non-LGBT families.

The point here is not to impugn anyone's motives or impugn anyone's beliefs but instead to suggest that the ana- -- or the point that he was making I think just demonstrates the wisdom behind the school board's decision in integrating this curriculum in this way.

THE COURT: Thank you.

MR. SCHOENFELD: Thanks, Your Honor.

THE COURT: Mr. Baxter.

MR BAXTER: I'll just hit the points, Your Honor, that were raised. League of Women Voters, just to quote, Requires a party who has recently disturbed -- An injunction that requires a party who has recently disturbed the status quo to reverse its actions is prohibitory, not mandatory, as it restores rather than disturbs the status quo. Again, it would make no sense if the government could just simply always claim the status quo based on the action that's at issue in the litigation.

On the question of Fulton, getting to the particular reasons for conduct -- and Ms. Harris has made clear that that's what's going on here. She thinks that the -- these particular objections are related to xenophobia and white supremacy, and that's at least supporting her reason for denying the opt-out. So even if they haven't explicitly said, We're looking at the reason, that's clearly what's underlying this whole discussion, is whether particular objections based on sexuality and gender identity are acceptable, as opposed to other types of exceptions based on Halloween, or the music being played in band class, and so forth.

On the issue of burden, which I think was the main point, counsel can cite only Parker, a Second Circuit case, which applied the wrong standard. It said that there had to be direct coercion. It did not consider neutrality and general applicability. All the other cases and the supposed law of authority were really cases challenging the curriculum itself, and Courts have said that your right -- the burden doesn't give you the right to challenge the curriculum itself, but they don't speak anything about the opt-out possibility.

And Yoder itself was just that, was an opt-out. The parents there were not being forced to stop teaching their children their religious beliefs, to continue to encourage them to live the Amish lifestyle; they simply felt that keeping their children in school might pressure them, might make them less

likely to want to live that lifestyle.

And that's the exact same type of burden that's at issue here. So regardless of -- and Parker, it's inconsistent with Yoder. You don't have to show that it would stop the teachers. The curriculum, based on counsel's own comments, is clearly trying to normalize ideas that are contrary to our clients' religious beliefs and at an age where their children are uniquely susceptible and unable to distinguish these types of issues on their own.

It's dangerous to their religious belief and pressures them to either keep their children in religious -- in schools in violation of their religious beliefs or pull them out and not be able to take advantage of the public school system.

Thank you, Your Honor.

THE COURT: Thank you very much. All right, just give me one moment.

Okay. All right, I want to thank counsel for their submissions and for their argument. I don't think I have any more questions. And I will issue a ruling before August 28th. Anything else from the parties?

Mr. Schoenfeld.

MR. SCHOENFELD: Just one housekeeping matter. If Your Honor's going take up Plaintiffs' motion for a stay of the injunction, we'd obviously like the opportunity to respond to it.

THE COURT: Well, let me understand your request, again?

MR. SCHOENFELD: Your Honor, under Rule 8 of the Federal Rules of Appellate Procedure, if the Court were to rule against the plaintiffs and we go up on appeal, we'd have to ask both this Court and the Court of Appeals before -- before we can ask the Court of Appeals, we have to ask this Court for a rule granting the relief pending appeal. And since they are essentially the same -- asking the same relief, whether you enjoin the opt-out ban or enjoin it just for the appeal, I'm just flagging that for Your Honor so that they can both be addressed in the same order.

THE COURT: That hasn't been briefed.

MR. SCHOENFELD: Correct.

THE COURT: All right. Let me think about it, and I'll get back to you on that. All right. Thank you very much.

THE COURTROOM DEPUTY: All rise. This Honorable Court stands adjourned.

(The proceedings were adjourned at 12:49 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Patricia Klepp, Registered Merit Reporter, in and for the United States District Court for the District of Maryland, do hereby certify, pursuant to 28 U.S.C. § 753, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 30th day of August, 2023.

/s/
PATRICIA KLEPP, RMR
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

TAMER MAHMOUD, *et al.*,	*	
Plaintiffs,	*	
v.	*	**Civ. No. DLB-23-1380**
MONIFA B. MCKNIGHT, *et al.*,	*	
Defendants.	*	

MEMORANDUM OPINION

In this lawsuit, parents whose elementary-aged children attend Montgomery County Public Schools ("MCPS") seek the ability to opt their children out of reading and discussion of books with lesbian, gay, bisexual, transgender, and queer characters because the books' messages contradict their sincerely held religious beliefs about marriage, human sexuality, and gender. Last school year, MCPS incorporated into its English language arts curriculum a collection of storybooks featuring LGBTQ characters (the "storybooks" or "books") in an effort to reflect the diversity of the school community. Initially, parents could opt their children out of reading and instruction involving the books, as they could with other parts of the curriculum. In March of this year, the defendants—the Montgomery County Board of Education, the MCPS superintendent, and the elected board members (collectively, the "School Board")—announced that parents no longer would receive advance notice of when the storybooks would be read or be able opt their children out. Following the announcement, three families of diverse faiths filed suit against the School Board, claiming the no-opt-out policy violates their and their children's free exercise and free speech rights under the First Amendment, the parents' substantive due process rights under the Fourteenth Amendment, and Maryland law.

The parents have moved for a preliminary injunction that requires the School Board to give them advance notice and an opportunity to opt their children out of classroom instruction that involves the storybooks or relates to family life and human sexuality. ECF 23. The motion is fully briefed. ECF 42, 43, 47. The parties have filed supplements in support of their positions. ECF 48, 49, 51, 52, 54, 55, 57. The Court held a hearing on the motion on August 9, 2023. ECF 50. For the following reasons, the motion is denied.

I. Background

Montgomery County Public Schools is the largest public school system in Maryland and one of the largest public school systems in the country. ECF 36, ¶ 39. As of fall 2021, it included 209 schools with approximately 160,000 students. *Id.* ¶ 38. Roughly 70,000 of those students attended an elementary school. *Id.* The Montgomery County Board of Education is the entity authorized by the State of Maryland to administer MCPS. *Id.* ¶ 36. It has authority to adopt educational policies, rules, and regulations consistent with state law. *Id.* ¶ 37.

The School Board believes 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. ECF 43, ¶ 5. These values are memorialized in the School Board's Policy on Nondiscrimination, Equity, and Cultural Proficiency, which supports "proactive steps to identify and redress implicit biases and structural and institutional barriers that too often have resulted in" disproportionate exclusion and underrepresentation. *Id.* ¶ 6; *see* ECF 42-2. Accordingly, the School Board strives to "provide a culturally responsive . . . curriculum that promotes equity, respect, and civility" and prepares students to "[c]onfront and eliminate stereotypes related to individuals' actual or perceived characteristics," including gender identity and sexual orientation. ECF 43, ¶ 6. A critical part of the School Board's approach is

representation of diverse identities and communities in the curriculum. *Id.* ¶ 21. "Representation in the curriculum creates and normalizes a fully inclusive environment for all students" and "supports a student's ability to empathize, connect, and collaborate with diverse peers and encourages respect for all." *Id.* ¶ 22.

A. The Storybooks

In October 2022, the School Board announced the approval of "over 22 LGBTQ+-inclusive texts for use in the classroom." ECF 36, ¶ 113. According to the associate superintendent for curriculum and instruction programs at MCPS, Niki T. Hazel, the School Board introduced the storybooks into the English language arts curriculum to further its system-wide goals of promoting diversity, equity, and nondiscrimination. ECF 43, ¶¶ 23–26, 31. In the spring of 2022, the School Board had determined that the books in its English language arts curriculum were not sufficiently representative because they did not include LGBTQ characters. *Id.* ¶ 23. It initiated procedures to evaluate potential new instructional materials that would be more inclusive. *Id.* ¶ 24. A committee of four reading specialists and two instructional specialists engaged in two rounds of evaluation and eventually recommended the approval of the storybooks, finding they "supported MCPS content standards and performance indicators, contained narratives and illustrations that would be accessible and engaging to students, and featured characters of diverse backgrounds whose stories and families students could relate to." *Id.* ¶ 26; *see* ECF 49-1.

The plaintiffs have attached seven of the storybooks to their complaint. ECF 1-4, 1-6 – 1-11. *Pride Puppy!* chronicles a family's visit to a "Pride Day" parade and their search for a runaway puppy, using the letters of the alphabet to illustrate what a child might see at a pride parade. ECF 1-4. *Uncle Bobby's Wedding* tells the story of a girl who is worried that her soon-to-be-married uncle will not spend time with her anymore, but her uncle's boyfriend befriends her

and wins her trust. ECF 1-6. *Intersection Allies: We Make Room for All* features nine characters who proudly describe themselves and their diverse backgrounds and connects each character's story to the collective struggle for justice. ECF 1-7. *My Rainbow* tells the story of a mother who creates a rainbow-colored wig for her transgender child. ECF 1-8. *Prince & Knight* tells the story of a young prince who falls in love with and marries a male knight after they work together to battle a dragon. ECF 1-9. *Love, Violet* chronicles a shy child's efforts to connect with her same-sex crush on a wintry Valentine's Day. ECF 1-10. *Born Ready: The True Story of a Boy Named Penelope* is about an elementary-aged child who experiences triumphs and frustrations in convincing others what the child knows to be true—that he's a boy, not a girl. ECF 1-11. *Pride Puppy!* is for pre-kindergarten and the Head Start program; the other books are for kindergarten through fifth grade. ECF 1-3; ECF 1-15, at 23.[1]

The plaintiffs contend state law requires MCPS to provide opt-outs from the storybooks because, in their view, the books concern family life and human sexuality. The School Board's position is that the storybooks are part of its English language arts curriculum and opt-outs are required only for the family life and human sexuality unit of instruction, a separate curriculum. *See* ECF 43, ¶ 43.

B. State and MCPS Opt-Out Policies

Maryland law requires local school systems like MCPS to provide "a comprehensive health education" that includes "concepts and skills" related to "family life and human sexuality." ECF

[1] In their preliminary injunction motion, the plaintiffs identify two additional books they object to: *What are Your Words?* and *Jacob's Room to Choose*. ECF 23-5. The former tells the story of a child figuring out their pronouns. The latter depicts two gender-nonconforming children and their elementary-aged class deciding to replace male/female bathroom signs with different, non-binary signs. The School Board recommends these books as "Resources for Students, Staff, and Parents – Affirming LGBTQ+ Young Adults." *See id.* at 1–2.

36, ¶¶ 84–87. This instruction must "represent all students regardless of ability, sexual orientation, and gender expression." *Id.* ¶ 89. Maryland law requires school systems to provide parents and guardians with an opportunity "to view instructional materials to be used in the teaching of family life and human sexuality objectives." *Id.* ¶ 99 (citing COMAR § 13A.04.18.01(D)(2)(e)(iv)). Like most other states that require or permit instruction on human sexuality in public schools, Maryland allows for opt-outs from such instruction in certain circumstances and requires schools to adopt "policies, guidelines, and/or procedures for student opt-out" and to provide alternative learning activities. *Id.* ¶¶ 95, 100–01 (citing COMAR § 13A.04.18.01(D)(2)(e)(i) & (ii)).

Separately, the School Board has adopted an opt-out policy for parents and students who have religious objections to MCPS classroom instruction or activities. *Id.* ¶¶ 104–12. For the 2022–2023 school year, the MCPS School Board's "Guidelines for Respecting Religious Diversity" ("Religious Diversity Guidelines") stated, in part:

> When possible, schools should try to make reasonable and feasible adjustments to the instructional program to accommodate requests from students, or requests from parents/guardians on behalf of their students, to be excused from specific classroom discussions or activities that they believe would impose a substantial burden on their religious beliefs. Students, or their parents/guardians on behalf of their students, also have the right to ask to be excused from the classroom activity if the students or their parents/guardians believe the activity would invade student privacy by calling attention to the student's religion. When a student is excused from the classroom activity, the student will be provided with an alternative to the school activity or assignment.
>
> Applying these principles, it may be feasible to accommodate objections from students or their parents/guardians to a particular reading assignment on religious grounds by providing an alternative selection that meets the same lesson objectives. However, if such requests become too frequent or too burdensome, the school may refuse to accommodate the requests. Schools are not required to alter fundamentally the educational program or create a separate educational program or a separate course to accommodate a student's religious practice or belief.

ECF 1-2, at 11–12.

C. The Plaintiffs' Objections to the Storybooks

The individual plaintiffs are Montgomery County residents of diverse faiths with children enrolled in MCPS. ECF 36, ¶¶ 21–31. Tamer Mahmoud and Enas Barakat are Muslims with three school-aged children, including a second grader. *Id.* ¶¶ 24–25. Jeff and Svitlana Roman are members of the Roman Catholic and Ukrainian Orthodox faiths, respectively, who also have a second grader in MCPS. *Id.* ¶¶ 27–28. Chris and Melissa Persak are Catholics with two elementary-aged children enrolled in MCPS. *Id.* ¶¶ 29, 31. Each believes all persons should be respected regardless of sex, gender identity, sexual orientation, or other characteristics. *Id.* ¶¶ 50, 59, 66, 76. Each also has religious objections to the storybooks.

The individual plaintiffs have submitted declarations in which they describe their religious beliefs and the grounds for their objections. Mahmoud and Barakat believe they have "a sacred duty" to teach their children their faith, "including religiously grounded sexual ethics." ECF 23-2, ¶¶ 4, 14. Their religion teaches that mankind was divinely created as male and female and that sex and sexuality are sacred gifts from God to be expressed through the forming of a spiritual, marital bond that "entails sexually distinct but mutual duties and affections." *Id.* ¶¶ 5–7. "Inherent in these teachings" is the belief that "gender cannot be unwoven from biological sex . . . without rejecting the dignity and direction God bestowed on humanity from the start." *Id.* ¶ 9. Accordingly, they believe "humans attain their fullest God-given potential by embracing their biological sex," and their religion forbids medical procedures to alter the sex of a healthy person and condemns the imitation of the appearance of the opposite gender. *Id.* ¶¶ 10–12. With respect to instruction that uses the storybooks, they believe "there are detrimental spiritual consequences from letting authoritative figures such as schoolteachers teach" their children "principles concerning sexual and gender ethics that contravene" their faith. *Id.* ¶ 16. They view the books

as undermining their efforts to raise their second grader because the books "encourage young children to question their sexuality and gender, to identify with labels that categorize them by their sexuality, to focus prematurely on romantic relationships, to disregard differences between men and women, to accept gender transitioning, and to dismiss parental and religious guidance on these issues." *Id.* ¶ 19. They state it would conflict with their religious duties to intentionally expose their son "to activities and curriculum on sex, sexuality, and gender that undermine Islamic teachings . . . ." *Id.* ¶ 18. And because Islam "prohibits prying into others' private lives and discourages public disclosure of sexual behavior," they state it would violate their beliefs and the beliefs of their children if the children "were asked to discuss romantic relationships or sexuality with schoolteachers or classmates." *Id.* ¶ 17.

The Romans' faiths teach that all humans are created in God's image with inherent dignity. ECF 23-3, ¶ 4. Based on the teachings of their faiths, the Romans believe biological sex is a divine gift that "entails differences in men's and women's bodies and how they relate to each other and the world." *Id.* ¶ 6. They believe "a person's biological sex is both unchanging and integral to that person's being," that "gender and biological sex are intertwined and inseparable," and that "humans attain their fullest God-given potential by embracing their biological sex." *Id.* ¶¶ 10–11. They also view human sexuality as a divine gift that "calls for an authentic and healthy integration in the person" through the "virtue of chastity" and expression "only in marriage between a man and a woman for creating life and strengthening the marital union." *Id.* ¶¶ 8–9. They have "a sacred obligation to teach these principles" to their son and "to encourage him at appropriate times to embrace" their religious way of life. *Id.* ¶ 12. Based on these beliefs, the Romans believe that "encouraging children to unwind" gender and biological sex will teach them that their bodies are objects that may be disposed of at will rather than "a gift to be received, respected and cared for

as something intrinsic to the person." *Id.* ¶ 10. They view much of the content of the storybooks as "false religiously and scientifically," and they would prefer children "enjoy a time of innocence, when it is not necessary for them to have detailed understanding of issues surrounding human sexuality," rather than for them to be encouraged "to focus prematurely on romantic emotions and relationships." *Id.* ¶¶ 13–14. Because their son "loves his teachers and implicitly trusts them," they believe instruction on "sexuality or gender identity" that conflicts with their faiths "is spiritually and emotionally harmful to his well-being" and will significantly interfere with their "ability to form his religious faith and religious outlook on life." *Id.* ¶ 20.

The Persaks, too, believe "all humans are created as male or female, and that a person's biological sex is a gift bestowed by God that is both unchanging and integral to that person's being." ECF 23-4, ¶ 5. They view themselves as having "a God-given responsibility" to raise their children in accordance with the tenets of their faith, including "the Catholic Church's teachings on the immutable sexual differences between males and females, the biblical way to properly express romantic and sexual desires, and the role of parents to love one another unconditionally and sacrificially within the confines of biblical marriage . . . ." *Id.* ¶ 7. They view the storybooks as going "far beyond teaching kindness and respect," to the point of imposing "an ideological view of family life and sexuality that characterizes any divergent beliefs as 'hurtful.'" *Id.* ¶ 15. They believe the books encourage children "to question their sexuality and gender, ignore important differences between men and women, approve gender transitioning, focus prematurely on romantic relationships and sexuality, and dismiss parental and religious guidance on these issues." *Id.* ¶ 16. Because they regard young children as "highly impressionable to ideological instruction presented in children's books or by schoolteachers," particularly "when ideological instruction is imposed to the exclusion of other viewpoints," they believe the books undermine

their efforts to raise their children in their faith. *Id.* ¶¶ 13–14, 16. Accordingly, they believe "exposing" their children to "viewpoints on sex, sexuality, and gender that contradict Catholic teaching on these subjects is inappropriate and conflicts with" their religious duty to raise their children in their faith. *Id.* ¶ 12.

The individual plaintiffs' concerns are shared by Kids First, an unincorporated association of parents and teachers that formed "to advocate for the return of parental notice and opt-out rights with respect to any instruction related to family life and human sexuality" in MCPS. ECF 36, ¶¶ 32–33. Kids First includes members of diverse faiths and is open to individuals of all faiths. *Id.* ¶ 34. The association's members believe in prioritizing the needs of children and "allowing elementary-age children to be kids first, without prematurely exposing them to issues regarding human sexuality, gender identity, and gender transitioning." *Id.* ¶ 72. They believe parents have the primary responsibility to decide how and when to instruct their children on such matters. *Id.* ¶ 73. And they believe they have religious obligations to ensure their children are taught about family life and human sexuality in a manner consistent with their faiths. *Id.* ¶ 74.

After the August 9 motion hearing, the plaintiffs submitted a declaration of Grace Morrison, a board member of Kids First. ECF 52, ¶ 2. Morrison and her husband are Roman Catholics and adhere to the Catholic Church's teachings on marriage, family, sex, sexuality, and gender. *Id.* ¶ 4. They believe gender is "interwoven" with sex and that "marriage is the lifelong union of one man and one woman—distinct from each other, while complementary to each other—and that the nature and purpose of human sexuality is fulfilled in that union." *Id.* ¶ 5. Their ten-year-old daughter has Down Syndrome and Attention Deficit Disorder. *Id.* ¶ 3. She is enrolled in MCPS's Learning for Independence Program, has an Individualized Educational Plan ("IEP"), and is assisted by a full-time, one-on-one paraeducator. *Id.* The Morrisons believe they have a "sacred

obligation . . . to form [their] daughter's understanding of what it means to be a woman, to love another person, the nature and purpose of marriage, and how to embrace the vocation she is called to by God." *Id.* ¶ 7. They believe their religious obligation is "pressured" by the storybooks, which conflict with their religious understandings of marriage, sexuality, and gender. *Id.* ¶ 8. Because of their daughter's learning challenges, she does not "understand or differentiate instructions from her teachers and her parents" and "will not be able to understand how or why" the Morrisons disagree with the content of the storybooks. *Id.* ¶ 9. For these reasons, the Morrisons believe "it is practically impossible" for them to contradict instruction involving the books. *Id.* ¶ 8. At the same time, because of their daughter's needs, they do not believe they have "a clear alternative" for their daughter's education "except to remain in the public schools" and use public school resources. *Id.* ¶ 10.

The plaintiffs articulate strong objections to the storybooks. As a general matter, they object to the introduction of concepts of gender identity, sexuality, and transgenderism to their elementary-aged children. *See* ECF 36, ¶ 119. They note, for example, that *Pride Puppy!* includes among a list of words to search for in its picture "[drag] king" and "[drag] queen," "leather," "underwear," and the name of a prominent sex worker and gay liberation activist. *Id.* ¶ 116. They read it to "encourage unqualified support for pride parades," without acknowledging pride parades "often contain material that many parents find inappropriate for young children." *Id.* ¶¶ 117, 131. Similarly, they object to *Intersection Allies* because it defines sex, gender, and transgender and asks readers what pronouns fit them best, and they object to *Love, Violet* because it depicts children experiencing romantic feelings. *Id.* ¶¶ 136, 140–41. The plaintiffs believe the books, and the School Board's guidance on their use, promote "an ideologically one-sided view of issues" that is

contrary to their faiths and their understandings of scientific evidence. *Id.* ¶ 132.[2] They note the resource guide for *Pride Puppy!* comes from the Human Rights Campaign, which they describe as an "activist organization" that advocates for "sex positivity" and "ideological education on sexual orientation and gender identity starting in kindergarten"; that the teacher's guide for *My Rainbow* "eschews analysis of the various other ways parents might appropriately help their children experiencing gender dysphoria"; and that the resource guide for *Born Ready* encourages teachers to respond to questions and comments about the main character's "body parts" by suggesting people only "make a guess" about gender at birth. *Id.* ¶¶ 120–32, 138, 141–44. In short, they believe the storybooks "promote one-sided transgender ideology, encourage gender transitioning, and focus excessively on romantic infatuation[.]" *Id.* ¶ 5.

D. How Teachers Will Use the Storybooks

The MCPS English Language Arts Framework and Core Learning Practices for English Language Arts state in broad terms the goals and strategies of the curriculum, but they do not provide specific guidance on the use of any particular texts, including the storybooks. *See* ECF 42-3; ECF 42-4. Hazel states MCPS teachers decide how they will use the storybooks in their classrooms. ECF 43, ¶¶ 29–31. The MCPS Office of Curriculum and Instructional Programs suggested teachers incorporate the books into the curriculum like any other book, "namely, to put them on a shelf for students to find on their own; to recommend a book to a student who would enjoy it; to offer the books as an option for literature circles, book clubs, or paired reading groups; or to use them as a read aloud." *Id.* ¶ 29. While the School Board expects "that teachers use the LGBTQ-Inclusive Books as part of instruction," as with all curriculum resources, teachers have a

[2] The plaintiffs refer to scientific literature that is, in their view, consistent with their religious beliefs. ECF 36, ¶¶ 145–51.

choice "regarding which MCPS-approved materials to use and when to use them through each unit" and may "choose among the texts" rather than being limited to a single book corresponding to grade level. *Id.* ¶¶ 30–31. The School Board has stated "there [was] no planned explicit instruction on gender identity and sexual orientation in elementary school, and that no student or adult is asked to change how they feel about these issues." *Id.* ¶ 30; *see* ECF 1-5, at 3. Rather, the books will be "used to assist students with mastering reading concepts like answering questions about characters, retelling key events . . . , and drawing inferences about story characters based on their actions." ECF 43, ¶ 31. In advance of the books' introduction into the curriculum in the 2022–2023 school year, MCPS offered a professional development session on their use that drew more than 130 participants. *Id.* ¶ 28.

The plaintiffs take issue with some of the guidance the School Board has given to teachers on how to use the storybooks. They refer to official MCPS documents and instructional materials referenced in a November 15, 2022 *Fox News* article published on the *New York Post* website that discussed the books. *See* ECF 1-5. The School Board has not disputed the accuracy of any information in the article. The article discusses a PowerPoint presentation on the storybooks from a professional development workshop held in August 2022. *Id.* at 2–4. That presentation appears to have substantially overlapped with a document titled "Responding to Caregivers/Community Questions," which the plaintiffs also provide. *See* ECF 55-4. The proposed responses in this document are comprehensive, and the Court shares only excerpts. If parents ask why children should learn about sexuality and gender in school, or whether elementary school is too early for such learning, educators might respond:

> The learning we're talking about will happen through exposure to diversified gender and sexuality representation, not explicit instruction. Students are already learning about gender and sexuality identity in myriad ways. For example, when we read a story with a mom and dad, a Prince kisses a Princess at the end of a

> fairytale. . . . Children are already learning about it and mostly see "straight" and "cisgender" representations around them. . . . By learning about the diversity of gender, children have an opportunity to explore a greater range of interests, ideas, and activities. . . . Beginning these conversations in elementary school will help young people develop empathy for a diverse group of people and learn about identities that might relate to their families or even themselves. It is never too early for schools to set up a foundation of understanding and respect.

Id. at 2. If parents express concerns that these ideas conflict with their values and ask whether the lessons are teaching children to reject those values, educators might say:

> Absolutely not. . . . Teaching about LGBTQ+ is not about making students think a certain way; it is to show that there is no one "right" or "normal" way to be. . . . While one aim for learning about diversity is to become more accepting of those around us, not everyone will be best friends. . . . The purpose of learning about gender and sexuality identity diversity is to demonstrate that children are unique and that there is no single way to be a boy, girl, or any other gender. If a child does not agree with or understand another student's gender identity or expression . . . , they do not have to change how they feel about it. However, they do not get to make fun of, harass, harm, or ignore the existence of other students . . . .

Id. at 3. If parents ask about opt-outs, teachers are encouraged to explain why the instruction is important and how the books are used:

> While there are no planned explicit lessons related to gender and sexuality, students will see these identities embedded in our curriculum and learning environment. Explicit instruction involves teaching a specific concept or procedure in a highly structured and carefully sequenced manner where there is an opportunity to model, coach and apply the learning. The concepts or terms that relate to gender and sexual identity are not taught explicitly, but there may be a need to define words that are new and unfamiliar to students. . . . No child who does not agree with or understand another student's gender, expression, or their sexual identity is asked to change how they feel about it. Parents always have the choice to keep their student(s) home while using these texts; however, it will not be an excused absence.

Id. at 3–4.

The *Fox News* article also provides excerpts of proposed "think aloud" moments for some of the books. After reading *Intersection Allies*, students "will recognize their own responsibility to stand up to exclusion, prejudice and injustice." *Id.* at 4. For *Prince & Knight*, students might notice "that the prince doesn't seem happy about all the princesses trying to get his attention" and

wonder "how he might feel about the pressure his parents are putting on him to find a princess." *Id.* at 5. For *Love, Violet*, students might acknowledge "how uncomfortable we might [be] in situations when we feel our heart beating 'thumpity thump' & how hard it can be [to] talk about our feelings with someone that we don't just 'like' but 'like like.'" *Id.* They "will develop language and knowledge to accurately and respectfully describe how people (including themselves) are both similar to and different from each other and others in their identity groups." *Id.* at 6. And for *Born Ready*, students might notice "how happy [the main character] is when his mom hears him and commits to sharing with their loved ones that he is a boy"; teachers might then say "that we know ourselves best." *Id.* The article states that another slide of the presentation encouraged teachers, "Use five of the books by the end of December." ECF 1-5, at 2.

According to the article, educators who attended the workshop received a list of potential questions from students and a list of suggested responses. *Id.* at 6. The article appears to be referring to a document titled "Sample Student Call-Ins." *See* ECF 55-3. The following excerpts are representative but not exhaustive. If a student says being "gay, lesbian, queer, etc." is "wrong and not allowed" by his or her religion, teachers might respond,

> I understand that is what you believe, but not everyone believes that. We don't have to understand or support a person's identity to treat them with respect and kindness. School is a place where we learn to work together regardless of our differences. In any community, we'll always find people with beliefs different from our own and that is okay—we can still show them respect.

Id. at 2. If a student says "she can only like boys because she's a girl" or "boys can't paint their nails," teachers might try to "disrupt the either/or thinking" and provide examples like "Harry Styles wears dresses" or "my best friend is a woman and she is married to another woman." *Id.* at 2–4. If a student says "that's gay" or "that's weird" about gay characters, teachers might explain that the word gay "describes people of the same gender who love each other. In our school we

respect all people so we don't talk about being 'gay' in a negative way, like saying it's 'weird.'" *Id.* at 2. Teachers might also say "using gay to describe something negative reflects a long history of prejudice against LGBTQ+ people" and "when I ask you to not use expressions like 'that's so gay,' I'm just trying to make you aware that it is hurtful to a lot of people." *Id.* at 4. If a student says, in reference to transgenderism and the main character in *Born Ready*, "That's weird. He can't be a boy if he was born a girl," or asks about the character's "body parts," teachers are encouraged to respond,

> That comment is hurtful; we shouldn't use negative words to talk about peoples' identities. Sometimes when we learn information that is different from what we always thought, it can be confusing and hard to process.
>
> When we're born, people make a guess about our gender and label us "boy" or "girl" based on our body parts. Sometimes they're right, and sometimes they're wrong. When someone's transgender, they guessed wrong; when someone's cisgender, they guessed right. Our body parts do not decide our gender. Our gender comes from inside – we might feel different than what people tell us we are. We know ourselves best. When someone tells us what their gender is, we believe them because they are the experts on themselves.
>
> It's none of our business what body parts a person has, so we should never ask that question.

Id. at 2–3. Generally, the suggested responses focus on tolerance, empathy, and respect for different views.

E. Rollout and Opt-Out Policy

A November 2022 white paper prepared by the Montgomery County Association of Administrators and Principals expressed concerns about the content of some of the books, the suggested responses to student questions, and the proposed end to opt-outs. *See* ECF 47-1. The white paper noted "several of the books and supporting documents seemingly contradict [the] message" that the books were not supposed to be teaching about sexual orientation or gender identity as standalone concepts in elementary school. *Id.* at 8. It stated that teachers had "not been

trained on the use of these materials and subsequent questions, conversations, and class discussions that may occur," and it worried about the "potentially polarizing position" educators would be put in if individual schools or teachers were left to decide whether to use the books. *Id.* at 9. It referred to "numerous concerns" from educators and community members that some of the books were not appropriate for the intended age group. Singling out *Love, Violet*, for example, the white paper stated, "It is problematic to portray elementary school age children falling in love with other children, regardless of sexual preferences." *Id.* at 8. The white paper also critiqued excerpts from the list of anticipated questions and suggested answers. *Id.* at 10. Regarding the suggested answer "people make a guess about our gender," it stated, "Concern: Stated as a fact. Some would not agree this is a fact." *Id.*

According to Hazel, at the beginning of the 2022–2023 school year, some parents began requesting their children be excused from classroom instruction using the storybooks. ECF 43, ¶ 33. Some of the requests were religious in nature, but many others were rooted in opposition to what the parents perceived as efforts to teach students about sex and LGBTQ issues. *Id.* ¶ 34. In some instances, the teachers and principals who received these requests accommodated them by excusing students when the storybooks were read in class. *Id.* ¶ 35.

In communications with the individual plaintiffs in early 2023, school officials expressed uncertainty about whether parents would be allowed to opt their children out of classroom instruction on the storybooks. *See, e.g.*, ECF 1-12 – 1-14. The Romans corresponded with their school's principal, seeking to opt their son out and a guarantee that parents would continue to receive advance notice. ECF 36, ¶ 167. Eventually, the principal agreed their son did not have to be present when one of the books was read during class and that other parents could request the same treatment. *Id.* ¶ 168. Mahmoud and Barakat, meanwhile, were informed by their school's

acting principal that MCPS was not supporting opt-outs from the storybooks and that teachers were not required to provide alternative assignments, but the acting principal later agreed on March 20 to allow their son to sit outside his classroom while one of the books was being discussed. *Id.* ¶¶ 169–74. On March 22, an MCPS spokesperson responding to a media inquiry issued a statement confirming parents' notification and opt-out rights:

> When a teacher selects a curriculum, a notification goes out to parents about the book. If a parent chooses to opt out, a teacher can find a substitute text for that student that supports these standards and aligns with curriculum.

ECF 36, ¶ 159.

The following day, March 23, the School Board reversed course and issued a "Revised Message Regarding the Use of Inclusive Texts" that stated:

> [T]here is an expectation that teachers utilize these inclusive lessons and texts with all students. . . . Students and families may not choose to opt out of engaging with any instructional materials, other than "Family Life and Human Sexuality Unit of Instruction" which is specifically permitted by Maryland law. As such, teachers will not send home letters to inform families when inclusive books are read in the future.

Id. ¶ 160. Hazel states the new no-opt-out policy was the result of meetings with a small group of principals in March 2023, during which the School Board determined that principals and teachers "could not accommodate the growing number of opt out requests without causing significant disruptions to the classroom environment and undermining MCPS's educational mission." ECF 43, ¶ 36. The School Board had three concerns. First, high student absenteeism. *Id.* ¶ 37. In one instance, for example, parents sought to excuse dozens of students in a single elementary school from instruction. *Id.* Second, the infeasibility of managing numerous opt-outs. *Id.* ¶ 38. Teachers would have to track and accommodate opt-out requests for their students, and other staff who spent time in multiple classrooms would have to do so across an entire school. *Id.* Finally, the School Board was concerned that permitting some students to leave the classroom whenever books

featuring LGBTQ characters were used would expose students who believe the books represent them and their families to social stigma and isolation. *Id.* ¶ 39. The School Board believed that would defeat its "efforts to ensure a classroom environment that is safe and conducive to learning for all students" and would risk putting MCPS out of compliance with state and federal nondiscrimination laws. *Id.* Based on these concerns, the School Board decided to disallow opt-outs from the storybooks, regardless of the reason, after the 2022–2023 school year. *Id.* ¶¶ 40–42.[3] If schools already had granted opt-out requests, those accommodations would continue through the end of the school year. *Id.* ¶ 41. New requests would not be granted. ECF 36, ¶ 160.

On March 24, teachers at the Persaks' elementary school were instructed to introduce and read the books in their classrooms. *Id.* ¶ 163. Due to the Persaks' prior request for an opt-out for their daughter, she was excused from the classroom when one of the storybooks was read, but the principal made it clear to the Persaks that no further notifications or opt-outs would be provided. *Id.* ¶¶ 164–65.

On May 31, Morrison asked her daughter's teacher whether her class would be reading any of the storybooks and was told that some of the books would be used on June 2, 5, and 6. ECF 52, ¶¶ 11–12. Morrison asked whether she could opt her daughter out. The teacher said no, and the principal later confirmed to Morrison that the school would adhere to the School Board's no-opt-out policy. *Id.* ¶ 12. Morrison kept her daughter home on the days the books were being read. *Id.*

[3] Hisham Garti, the Outreach Director the Montgomery County Muslim Council, states in a declaration that Muslim community leaders met with School Board officials, including Hazel, on May 1, 2023. ECF 47-2. Garti recalls being told the "decision to rescind the opt-out was made after a few parents of the LGBTQ community complained [children] were offended and had their feelings hurt when students started leaving classrooms during instructions of these texts." *Id.* ¶ 5. According to Garti, that was "the only explanation MCPS provided for why it rescinded the opt-out." *Id.* ¶ 6.

F. MCPS Responses to Community Opposition

Both before and after the School Board's decision to end opt-outs, parents raised concerns about the books with the School Board at public meetings.[4] At the January 12, 2023 board meeting, one parent objected to *My Rainbow* by stating, "the transgender ideology is throughout the whole book" and "this is not instruction, it is indoctrination." (27:10 – 29:10). She found "most appalling" the proposed teacher responses, such as saying people "guess" about gender at birth. *Id.* She believed such statements undermine "any teaching or viewpoint that many families . . . have used at home." *Id.* She criticized the School Board for providing only its viewpoints, which implied that parents' religions and family traditions are wrong. *Id.* She asserted the School Board was not allowing kids to "think for themselves" and was indoctrinating students. *Id.* Another community member later expressed support for her comments and added that "many if not more parents . . . believe in traditional Judeo-Christian values as taught in the Bible" and are "opposed to gender-fluid ideology." (30:47 – 33:02). He expressed concern that introducing "highly sexualized concepts in elementary school" will "cause children to question their identity when they otherwise don't." *Id.*

School officials responded to the parents' concerns in different ways. At the meeting, Board Member Lynne Harris responded to these comments by stating:

> Some of the testimony today was disturbing to me personally. Transgender, LGBTQ individuals are not an ideology, they're a reality. And there are religions out there that teach that women should achieve only subservient roles in life, and MCPS would never think of not having a book in a classroom that showed a woman

[4] The plaintiffs provide abbreviated quotations of selected statements made during several School Board meetings, which were recorded and posted online. The Court watched the recordings of the meetings referred to by the plaintiffs. The January 12, 2023 board meeting is found at https://perma.cc/T234-559Q; the March 28, 2023 board meeting is found at https://shorturl.at/fAET6; and the May 25, 2023 board meeting is available at https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/Public. The Court cites general timestamps where appropriate.

> as being a superintendent of a very large school system, or a doctor, or vice president of the United States. So, our students, our staff, our part of the LBGTQ community, they are transgender. The very few books that we're intentionally including in our curriculum—which, by the way, the language being suggested to support teachers in answering questions is evidence- and science-based—that is what we have pledged to do, is to make sure every student sees themselves reflected in the curriculum, in the course, in the work they're doing in their classrooms. I am very proud that we're doing that work, and I continue to support it.

(38:35 – 39:40). An MCPS student who sits with the board expressed similar sentiments:

> It is our responsibility as a school system to equitably provide a high-quality education to all of our students, and that is impossible if every single student cannot see themselves reflected in the classroom. Every student, regardless of their sexual orientation or their gender identity, regardless of what they look like or where they come from, has the right to be reflected in what they learn. I know that I cannot speak for all of my peers, for all of the students in this county, but let me speak for many of them as I applaud the school system for their work in realizing this vision. To the students of MCPS, yes, ignorance and hate does exist within our community. Please know that every student, each of our 160,000 students in our large county, has a place in the school system, has a place in their school, and certainly has a place in their classroom.

(39:40 – 40:40). After Hazel and Deputy Superintendent Patrick Murphy spoke about the storybooks and how their implementation would be communicated to families, Board Vice President Shebra Evans expressed her "full support" for the student board member's comments, stating "it was very important that that be stated out loud." (44:05 – 44:36).

In a January 24 email, the Persaks' elementary school principal reflected on a recent parent meeting about the storybooks and stated, "several people (both staff and parents) expressed to me that they felt less safe as a result of some of the comments made by" community members who opposed the storybooks and that "the county is considering an 'opt out' for parents" to accommodate certain parents' "fears." ECF 1-12. The principal expressed her unequivocal opposition to an opt-out from "books with LGBTQ+ characters in them," likening it to a decision to opt out of "books with characters from other marginalized groups" such as Jews, Muslims, and African Americans. *Id.*

At the March 28 board meeting, an individual representing various parent groups protested the decision to end opt-outs: "How is taking away parental rights to opt-out of teachings that go against religious rights, family values, and core beliefs helping us to trust you . . . ?" (1:08:50 – 1:10:45). Harris commented on the individual's concerns:

> I just want to address, what is it, Moms for Liberty? If we could talk about what this is really about. You say, "parents rights to pull their students out of lessons when they're going to be reading a book that has an LGBTQ character in it," because of your "religious rights, your family values, your core beliefs." But Rogers and Hammerstein got it right seventy years ago, you have to be taught to hate. No child is born other-izing, marginalizing, thinking somebody else is not as good as they are, because of the way they look or the way they talk or the religion they practice or who they love. I am proud of the work that this system is doing and is committed to doing, to say we are going to ensure that every student in our school at every age can seek themselves reflected in the work of their classroom and in the people in the schools that do that work with them. And even if they don't feel safe being who they are at home, or in their other community, we're going to create a space that acknowledges the humanity of everybody. Because saying that a kindergartener can't be present when you read a book about a rainbow unicorn because it offends your religious rights or your family values or your core beliefs is just telling that kid, "here's another reason to hate another person." And we are not going to do that in the school system.

(1:46:41 – 1:48:19). The student board member also shared his thoughts:

> We cannot opt out of diversity and inclusion. It's the school system's responsibility to deliver a meaningful education to all of our students, every student has the right to be reflected in what they learn. Which means that we cannot treat instruction that reflects some students any differently than as we treat instruction that reflects others. No aspect of a student's identity should limit the quality of their education—not what they look like, not where they come from, not what language they speak, not their sexuality, not their gender identity, and not their religion. To be clear, diversity is a necessity to a comprehensive education, so inclusion must stay.

(1:48:23 – 1:49:13).

At the May 25 board meeting, many more community members spoke about the storybooks and the no-opt-out policy, both for and against the change. In response, the student board member sought clarification about when state law required opt-outs and whether the storybooks were part

of the family life and human sexuality unit of the health curriculum. (1:11:14). Hazel explained that state law required opt-outs only from the human growth and sexuality course and that the storybooks were part of the literacy curriculum. (1:11:54). The student board member stated in response:

> We heard this from all parts of our community, but, fundamentally, diversity is a good thing. Inclusion is a good thing. And by providing these diverse and inclusive texts, by aligning ourselves and following state guidance on when opt-out is appropriate, we are doing a service to our students by creating an inclusive education. It is disheartening to hear about the cases of students being bullied about practicing their religious beliefs in schools, and we know of students facing discrimination based on sexuality or their gender identity. But across the board, by staying true to the value of diversity and inclusion, we are addressing these issues in our schools, and I think that is the greatest service we can do for all of our students. And this work around creating inclusive texts at the elementary school levels, the work around the anti-racist audit, the new pilot courses coming to our schools next fall . . . that are inclusive of so many communities in our school system are really starting to change the face of what it looks like to deliver an inclusive education. . . . [I want to make sure we continue] to send a clear message to all our students that regardless of their gender identity or sexuality, regardless of their religion, this is their MCPS and they have a right to see themselves in what they learn everyday.

(1:14:24 – 1:15:50). Superintendent Monifa B. McKnight then discussed the value of diversity within the MCPS community:

> When we think about the diversity that sits within our community, that's often referred to as a strength, and the school system absolutely has a responsibility to respect and support that. Every day, when our children go home, then they have the lessons that are taught in their home that is reflective of culture, religion, and all of those pieces. We would expect that to be the case and would continue in our community as it always has. . . . We would expect that there are values that come out of every home, and those are the lessons that are taught in that home. And this is not an invasion of that.

(1:16:20 – 1:17:12).

A June 2, 2023 article on the *MoCo360* website purports to quote statements made by Harris at the May 25 meeting.[5] *See* ECF 23-1, at 30, (https://perma.cc/5GD9-2YVQ). Harris stated she felt "kind of sorry" for an MCPS student who had expressed personal discomfort with the curriculum. She wondered whether the student was "parroting dogma" learned from her parents. *Id.* She pushed back on the idea that the School Board was infringing parental rights, stating: "There is no right for a parent to micromanage their child's public-school experience. If they want their child to receive an education that strictly adheres to their religious dogma, they can send their kid to a private religious school." *Id.* Harris said she considered it a "badge of honor" to have been quoted four times in the complaint in this lawsuit, which had been filed the previous day, and she expressed concern about the precedent that would be set if the plaintiffs prevailed: "Do [the plaintiffs] realize it would be an impossible disruption to the school system if teachers had to screen the content they plan to teach every day and send out notices so white supremacists could opt out of civil rights content and xenophobes could opt out of stories about immigrant families?" *Id.*[6]

G. Relevant Procedural History

On May 24, 2023, the individual parents, on behalf of themselves and their children, filed this lawsuit against the Montgomery County Board of Education, Superintendent Monifa B.

[5] The Court could not locate the quoted statements during its review of the hours-long recording of the May 25 meeting or the recordings of the adjacent board meetings. The accuracy of these quotations, which the School Board has not disputed, does not bear on the Court's analysis.

[6] The plaintiffs also highlight comments by a Montgomery County Council member who stated it was unfortunate that the issue put "some Muslim families on the same side of an issue as White supremacists and outright bigots." *See* ECF 23-1, at 30, https://perma.cc/3AJE-RSBA. She continued, "I would not put you in the same category as those folks, although, you know, it's complicated because they're falling on the same side of this particular issue." *Id.*

McKnight, and board members Karla Silvestre, Shebra Evans, Grace Rivera-Oven, Rebecca Smondrowski, Julie Yang, Brenda Wolff, and Lynne Harris. ECF 1. They asserted violations of the Free Exercise Clause of the First Amendment, a violation of the Free Speech Clause of the First Amendment, a violation of the Due Process Clause of the Fourteenth Amendment, and a violation of Maryland law. The federal constitutional claims are brought pursuant to 42 U.S.C. § 1983. On June 12, the individual parents moved for a preliminary injunction based on the likely success of their free exercise and due process claims. ECF 23. On July 6, the plaintiffs filed an amended complaint, which added Kids First as a plaintiff. ECF 36. Kids First has not joined the preliminary injunction motion.[7]

II. Preliminary Injunction Standard

Before the entry of a final judgment, a court may enter a preliminary injunction. Fed. R. Civ. P. 65(a). "The traditional office of a preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." *United States v. South Carolina*, 720 F.3d 518, 524 (4th Cir. 2013) (quoting *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003)). In other words, a preliminary injunction enables the court to ensure that, should the plaintiff prevail, the relief sought will be available to it to the same extent as when it filed suit. *See*

[7] Even though Kids First has not joined the parents' motion, the parents rely on a declaration from one of the association's members, Grace Morrison, to support their legal arguments, and they argue the requested injunctive relief also would protect Kids First and its members. ECF 52 & 57. The Court is not convinced that Kids First has standing to bring claims on behalf of its members, including Morrison. An association has standing to bring suit on behalf of its members when "neither the claim asserted nor the relief requested requires the participation of individual members in the suit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Free exercise claims "ordinarily require[] individual participation." *Harris v. McRae*, 448 U.S. 297, 320–21 (1980); *Cornerstone Christian Schs. v. Univ. Interscholastic League*, 563 F.3d 127, 133–34 (5th Cir. 2009). The parties have not presented arguments on this issue, which was thrown into sharp relief by Morrison's post-hearing declaration about her family's unique situation.

id. "A preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief' and may never be awarded 'as of right.'" *Mountain Valley Pipeline, LLC v. W. Pocahontas Props. Ltd. P'ship*, 918 F.3d 353, 366 (4th Cir. 2019) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008)).

A plaintiff seeking preliminary injunctive relief bears the burden of proof and must meet "a high bar" by "[s]atisfying . . . four factors." *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 385 (4th Cir. 2017); *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991). The plaintiff must clearly show "[1] that [it] is likely to succeed on the merits, [2] that [it] is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [its] favor, and [4] that an injunction is in the public interest." *Winter*, 555 U.S. at 20; *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 339 (4th Cir. 2021) (en banc) (citing *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 170–71 (4th Cir. 2019)).

Several of the preliminary injunction factors merge when constitutional rights are at stake. *Leaders*, 2 F.4th at 346. To start, when "there is a likely constitutional violation, the irreparable harm factor is satisfied." *Id.*; *see also W.V. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) ("[I]n the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is 'inseparably linked' to the likelihood of success on the merits of [the] plaintiff's First Amendment claim."). This is so because "the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Leaders*, 2 F.4th at 346 (quoting *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))). Likewise, the final two factors—the balance of the equities and the public interest—are satisfied when there is a likely constitutional violation because "the public interest favors protecting constitutional rights" and "a

state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional." *Id.* (quoting *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 191 (4th Cir. 2013)); *see also Miranda v. Garland*, 34 F.4th 338, 365 (4th Cir. 2022) (noting the final two preliminary injunction factors "merge when the Government is the opposing party") (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

The School Board contends the plaintiffs seek a mandatory preliminary injunction. Mandatory preliminary injunctions "alter rather than preserve the status quo" and are particularly "disfavored." *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 216 n.8 (4th Cir. 2019). They are "warranted only in the most extraordinary circumstances." *Taylor v. Freemen*, 34 F.3d 266, 270 n.2 (4th Cir. 1994) (quoting *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976)).

The heightened standard for a mandatory preliminary injunction does not apply here because the plaintiffs ask the Court to maintain the status quo. An injunction that "maintain[s] the status quo and prevent[s] irreparable harm while a lawsuit remains pending" is prohibitory rather than mandatory. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (quoting *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013)). The Fourth Circuit has defined "the status quo" as the "last uncontested status between the parties which preceded the controversy." *Id.* In *Pashby*, the plaintiffs moved for a preliminary injunction the day before the policy they challenged took effect. 709 F.3d at 320. While the policy had been approved by the legislature months earlier, it had not taken effect at the time the plaintiffs filed their motion. *Id.* For that reason, the court held the plaintiffs sought a prohibitory injunction. *Id.* Here, the plaintiffs filed their motion on June 12, 2023, four days before the close of the 2022–2023 school year. At that time, the opt-out requests of the individual plaintiffs that previously had been granted were

still honored. *See* ECF 36, ¶ 164; ECF 43, ¶ 41 (stating "accommodations would no longer be provided after the 2022–2023 school year ended"). The individual plaintiffs seek to stop the School Board from implementing a change in policy that has not yet caused them injury. That is a prohibitory, not mandatory, injunction.

III. Discussion

A. Likelihood of Success on the Merits

The parties agree the preliminary injunction analysis in this case collapses into the first factor, the likelihood of success on the merits. The plaintiffs claim the School Board's decision to disallow opt-outs from the storybooks likely violates their rights under the Free Exercise Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment. The School Board argues the plaintiffs have not established a likely constitutional violation.

1. Free Exercise

The First Amendment, applicable to the states through the Fourteenth Amendment, provides in part that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I. The Free Exercise Clause "protects against laws that discriminate against or among religious beliefs or that restrict certain practices because of their religious conduct." *Alive Church of the Nazarene, Inc. v. Prince William Cnty., Va.*, 59 F.4th 92, 108 (4th Cir. 2023). To violate the Free Exercise Clause, a law, regulation, or government policy must "burden religious exercise." *Fulton v. City of Philadelphia*, --- U.S. ----, 141 S. Ct. 1868, 1876 (2021); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462–63 (2017); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963) (noting "a violation of the Free Exercise Clause is predicated on coercion"). Even when state action burdens religious exercise, it still may be "constitutionally permissible" if it survives the requisite level of

judicial scrutiny. *Fulton*, 141 S. Ct. at 1876. A "facially neutral and generally applicable" law that has the incidental effect of burdening religious exercise is subject to rational basis review. *Alive Church of the Nazarene*, 59 F.4th at 108; *see Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 878–82 (1990). "Laws that are not neutral and generally applicable, however, are subject to strict scrutiny review." *Alive Church of the Nazarene*, 59 F.4th at 108.

The parties debate whether the plaintiffs' free exercise claims are subject to strict scrutiny or rational basis review. The plaintiffs argue, first, that strict scrutiny applies under *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972), whenever laws restrict the "right of parents . . . to direct the [religious] upbringing of their children." Next, they argue strict scrutiny applies under *Fulton v. City of Philadelphia*, 141 S. Ct. at 1877, which reaffirmed that policies are not generally applicable when they allow for individualized exemptions. The plaintiffs argue the Religious Diversity Guidelines, which allowed parents to opt out of the storybooks last school year, operate as a system of discretionary exemptions and invite "individualized governmental assessment of the reasons for" opt-out requests. *See Smith*, 494 U.S. at 884. Third, the plaintiffs argue strict scrutiny applies under *Tandon v. Newsom*, --- U.S. ----, 141 S. Ct. 1294, 1296 (2021), which held that laws are not generally applicable when they treat "*any* comparable secular activity more favorably than religious exercise." The plaintiffs argue the School Board allows opt-outs for secular reasons from its family life and human sexuality curriculum but refuses to allow opt-outs for religious reasons from the storybooks, which they view as covering some of the same topics. Finally, the plaintiffs argue the no-opt-out policy is not neutral because its adoption was surrounded by official expressions of hostility toward religion and, as a result, it is subject to strict scrutiny under *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, --- U.S. ----, 138 S. Ct. 1719 (2018), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The defendants

argue the no-opt-out policy is neutral and generally applicable because it was not adopted based on hostility toward religion and no one can opt out of instruction involving the storybooks for any reason. Thus, they contend, the policy is subject to rational basis review.

Before the Court may reach the question of the appropriate level of judicial review, it first must address the threshold question of whether the plaintiffs can establish that the no-opt-out policy burdens their religious exercise. They assert the policy substantially interferes with their sacred obligations to form their children in their faiths and the religious exercise of their children. The School Board argues the no-opt-out policy does not burden the plaintiffs' religious exercise because the parents and their children are not being directly or indirectly coerced into activity that violates their religious beliefs.

a. Burden – Legal Principles

"[T]he ordinary meaning of 'prohibiting the free exercise of religion' was (and still is) forbidding or hindering unrestrained religious practices or worship." *Fulton*, 141 S. Ct. at 1896 (Alito, J., concurring). Thus, "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Schempp*, 374 U.S. at 223; *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014) (finding religious exercise burdened by a law that required the plaintiffs to "engage[] in conduct that seriously violates their religious beliefs"). Coercion can be direct or indirect. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988). Direct coercion is the express prohibition of conduct required by faith or the compulsion to perform conduct prohibited by faith. *See Smith*, 494 U.S. at 878 (recognizing an individual's religious exercise is burdened by any law that "requires (or forbids) the performance of an act that his religious belief forbids (or requires)"). Indirect coercion exists when government action places "substantial pressure on an adherent to modify his behavior

and violate his beliefs[.]" *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981).[8]

The early indirect coercion cases involved "state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion." *Smith*, 494 U.S. at 883. For example, in *Sherbert v. Verner*, a woman lost her job and was unable to obtain other employment because she refused to work on her religious day of rest. 374 U.S. 398, 399 (1963). She sought unemployment benefits, but under state law, she was ineligible because she had failed, without good cause, to accept available suitable work. *Id.* at 400–01. The Supreme Court held the state law burdened the plaintiff's religious exercise because "the pressure upon her to forego [the practice of her religion] is unmistakable"—the law "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404. "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [an individual] for her Sunday worship." *Id.*; *see also Thomas*, 450 U.S. at 717–18.

The Supreme Court has clarified that these cases support a general rule that "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Carson v. Makin*, --- U.S. ----, 142 S. Ct. 1987, 1998 (2022). Thus, in *Carson*, the Court

[8] At oral argument, the plaintiffs suggested a burden on religious exercise may not be required to establish a free exercise violation, citing three recent Supreme Court cases they say did not address burden. However, in one case, the Court stated, "it is plain that the City's actions have burdened [the plaintiff's] religious exercise . . . ." *Fulton*, 141 S. Ct. at 1876. In the other cases, the burden was equally obvious. California had prohibited private religious gatherings of a certain size. *Tandon*, 141 S. Ct. at 1297. And Colorado had ordered an individual to engage in conduct contrary to his beliefs. *Masterpiece Cakeshop*, 138 S. Ct. at 1726. These cases do not support the plaintiffs' position that a burden on religious exercise may not be required to establish a free exercise claim, a position that cannot be squared with the text of the Free Exercise Clause.

concluded a state law that provided certain parents with tuition assistance for their school-aged children but prohibited religious schools from receiving the state-issued tuition assistance burdened the parents' religious exercise. *Id.* The law forced the parents to choose between religious schooling and a public benefit, just as the unemployment benefits framework in *Sherbert* forced the worker to choose between honoring her religious day of rest and receiving unemployment assistance. *Id.*; *see also Trinity Lutheran*, 582 U.S. at 462 ("[T]he Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution."). Similar reasoning led the Court to find indirect coercion when a policy forced a religious organization to choose between "curtailing its mission" and violating its beliefs. *Fulton*, 141 S. Ct. at 1876. In *Fulton*, a Catholic foster care agency faced exclusion from municipal contracts for the placement of needy children into foster homes unless it agreed to certify same-sex foster families—conduct it viewed as "approving relationships inconsistent with its beliefs." *Id.* There, too, the coercive pressure to forgo religious exercise was clear.

This case involves objections to a public-school curriculum. The Fourth Circuit has not addressed the question of when a mandatory public-school curriculum might burden the religious exercise of students or parents. Other courts have. Every court that has addressed the question has concluded that the mere exposure in public school to ideas that contradict religious beliefs does not burden the religious exercise of students or parents. *See, e.g.*, *Parker v. Hurley*, 514 F.3d 87, 107 (1st Cir. 2008); *Bauchman v. West High Sch.*, 132 F.3d 542, 557 (10th Cir. 1997); *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 690 (7th Cir. 1994); *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1065 (6th Cir. 1987); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1542–43 (9th Cir. 1985); *Jones v. Boulder Valley Sch. Dist. RE-2*, No. 20-cv-3399-RM-

NRN, 2021 WL 5264188, at *14 (D. Colo. Oct. 4, 2021); *Coble v. Lake Norman Charter Sch., Inc.*, No. 3:20-CV-596, 2021 WL 1109360, at *7 (W.D.N.C. Mar. 23, 2021); *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 479 F. Supp. 3d 808, 818 (D. Az. 2020); *Cal. Parents for Equalization of Educ. Mats. v. Torlakson*, 267 F. Supp. 3d 1218, 1227 (N.D. Cal. 2017), *aff'd*, 973 F.3d 1010 (9th Cir. 2020); *Freedom From Religion Found. v. Hanover Sch. Dist.*, 665 F. Supp. 2d 58, 71 (D.N.H. 2009). The Court will discuss a few of these cases in detail, but in brief, these courts reasoned that the mere exposure to ideas in public school did not burden religious exercise because (1) students were not required to behave contrary to their faiths or affirm any views contrary to their religious beliefs, and (2) parents were not prevented from discussing and contextualizing any contrary views at home.

In *Mozert v. Hawkins*, students and parents brought a free exercise challenge against a mandatory public-school curriculum involving a series of basic reading textbooks. 827 F.2d at 1059–60. The families had religious objections to several themes in the books, including mental telepathy, evolution, and pacifism. *Id.* at 1060–61. Initially, the school worked with the families to provide an alternative reading program for students whose parents objected to the books. *Id.* at 1060. But the school board later voted to eliminate all alternative reading programs, making the books mandatory. *Id.* Several students who refused to read the books or attend reading classes in which they were used were suspended, others transferred schools or withdrew from public school, and a few received unsanctioned accommodations. *Id.* The families claimed the mandatory curriculum violated their rights under the Free Exercise Clause. The lower court agreed, concluding "the plaintiffs' free exercise rights ha[d] been burdened because their 'religious beliefs compel[led] them to refrain from exposure to the [book] series,' and the defendant school board 'ha[d] effectively required that the student plaintiffs either read the offensive texts or give up their

free public education.'" *Id.* at 1062. But the Sixth Circuit reversed and held exposure to ideas did not burden the families' religious exercise. *Id.* at 1065. The court discussed indirect coercion cases, noting that in each, "there was compulsion to do an act that violated the plaintiffs' religious convictions." *Id.* at 1065–66. But nothing in the record suggested "any student was ever required to affirm his or her belief or disbelief in any idea or practice mentioned in the various stories." *Id.* at 1063–64. The plaintiffs pointed to guidance in teachers' materials that they viewed as encouraging teachers to present the objectionable ideas as "truth," but the court noted students did not read the teachers' materials and there was "no proof that any plaintiff student was ever called upon to say or do anything . . . or to engage or refrain from engaging in any act either required or forbidden by the student's religious convictions." *Id.* The court concluded "compulsion" must mean something beyond simply "reading and discussing assigned materials." *Id.* at 1064.

Similarly, in *Fleischfresser v. Directors of School District 200*, the Seventh Circuit affirmed the dismissal of a free exercise challenge brought by parents against a public school district for its use of a series of books in a supplemental reading program. 15 F.3d at 690. The parents alleged the book series focused on supernatural beings including "wizards, sorcerers, giants and unspecified creatures with supernatural powers" and "indoctrinate[d] children in values directly opposed to their Christian beliefs by teaching tricks, despair, deceit, parental disrespect and by denigrating Christian symbols and holidays." *Id.* at 683. The court acknowledged the parents' right "to control the religious upbringing and training of their minor children." *Id.* at 689 (citing *Yoder*, 406 U.S. at 213–14). But it found no free exercise violation because the parents had not alleged the use of the books had "a coercive effect that operate[d] against the [] practice of their religion." *Id.* at 689–90. The defendants were "not precluding the parents from meeting their religious obligation to instruct their children," and "the use of the series [did not] compel the

parents or children to do or refrain from doing anything of a religious nature. Thus, no coercion exist[ed] . . . ." *Id.* at 690. The court concluded by endorsing a concern Justice Jackson had expressed nearly 50 years earlier: "If we are to eliminate everything that is objectionable to any [religious group] or inconsistent with any of their doctrines, we will leave public schools in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits." *Id.* (quoting *McCollum v. Bd. of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring)).

The most recent circuit-level analysis of free exercise challenges to public-school curricula is found in *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008). In that case, parents brought free exercise challenges to two books that portrayed families with same-sex parents. *Id.* at 90. The parents sought advance notice from the school about when the books would be used and the opportunity to opt their children out of instruction using the books, which they believed contradicted their religious beliefs. *Id.* The First Circuit affirmed the dismissal of the parents' claims, which it characterized as seeking an "exemption from religiously offensive material." *Id.* at 95, 104. It began with "the standard constitutional threshold question"—"whether the plaintiff's free exercise is interfered with at all." *Id.* at 99 (quoting N.M. Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 Harv. L. Rev. 581, 592–93 (1993)). It found no allegations of direct coercion:

> The parents do not allege coercion in the form of a direct interference with their religious beliefs, nor of compulsion in the form of punishment for their beliefs . . . . Nor do they allege the denial of benefits. Further, plaintiffs do not allege that the mere listening to a book being read violated any religious duty on the part of the child. There is no claim that as a condition of attendance at the public schools, the defendants have forced plaintiffs—either the parents or the children—to violate their religious beliefs.

Id. at 105. Instead, the court determined the "heart of the plaintiffs' free exercise claim is a claim of 'indoctrination': that the state has put pressure on their children to endorse an affirmative view of gay marriage and thus has undercut the parents' efforts to inculcate their children with their own opposing religious views." *Id.* It declined to decide whether such a theory might be cognizable, instead concluding that the plaintiffs had not alleged coercion through indoctrination. *Id.* "[A]s to the parents' free exercise rights, the mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently" because parents remain "free to discuss [objectionable] matters and to place them in the family's moral or religious context . . . ." *Id.* (quoting *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 (3d Cir. 2005)). In addressing the children's rights, the court imagined a spectrum between impermissible indoctrination and permissible "influence-toward-tolerance." *Id.* at 106. One child's rights were not burdened at all because he was never required to read the book, which in his case merely depicted same-sex couples and did not endorse homosexuality. *Id.* The other child had "a more significant claim" because he was forced to sit through a classroom reading of a book that did endorse same-sex marriage and homosexuality. But his claim still fell well short of potentially actionable indoctrination because he was not required to affirm same-sex marriage, faced no consequences for disagreeing with the books or refusing to read them, and was not "subject to a constant stream of like materials." *Id.* The court concluded the "reading by a teacher of one book, or even three, and even if to a young and impressionable child, does not constitute 'indoctrination.'" *Id.* at 107.

When courts have found free exercise violations based on public-school curricula, the challenged curricula involved more than exposure to ideas. The curricula required conduct that conflicted with students' faiths. In *Moody v. Cronin*, for example, parents and students brought a

free exercise challenge against a statewide requirement that public-school students "attend all coeducational physical education classes under penalty of suspension, expulsion, denial of credits for graduation and other discipline." 484 F. Supp. 270, 272 (C.D. Ill. 1979). The families had religious objections to their children being "required to view and interact with members of the opposite sex who are wearing 'immodest attire.'" *Id.* The court found the statewide requirement "substantially interfere[d] with the religious development of the Pentecostal children and their integration into the way of life of the Pentecostal faith community." *Id.* at 276. It reasoned:

> [T]here is a degree of visual and physical contact inherent in physical education that is not present in other classes. The required participation in coeducational physical education forces interaction with members of the opposite sex who are wearing "immodest attire." The nature of the activities engaged in effectively deprives the Pentecostal children of the decision of "taking the second look" and is thus in direct violation of Church teachings regarding being a party to lust, either by being provocative themselves or by allowing themselves to be put in a position where the temptation is present.

Id. at 275. The court held the students could not be required to participate in coeducational physical education in violation of their religious beliefs. *Id.* at 277. Similarly, another court found a requirement that high school students participate in a military training program or be denied a diploma burdened the religious exercise of a student whose religious beliefs prohibited him from participating in training to prepare for war. *Spence v. Bailey*, 465 F.2d 797, 800 (6th Cir. 1972). That choice was tantamount to indirect coercion, as in *Sherbert*. *Id.* at 799. A court in this circuit found a school's uniform requirement that contravened a parent's religious beliefs burdened religious exercise. *Hicks ex rel. Hicks v. Halifax Cnty. Bd. of Educ.*, 93 F. Supp. 2d 649, 659 (E.D.N.C. 1999). And in yet another case, a court recognized that a school's refusal to excuse students with religious objections to watching movies and listening to recordings of any kind burdened parents' rights to pass on their faiths because it "allows to be done in school what is prohibited at home. It places the children between the Scylla of obeying their parents' religious

teachings and the Charybdis of obeying the commands of their teachers and school authorities." *Davis v. Page*, 385 F. Supp. 395, 399–400 (D.N.H. 1974).

Each of these cases relied on *Yoder*, a seminal Supreme Court case that reaffirmed the "right of parents to direct the religious upbringing of their children." 406 U.S. at 233. In *Yoder*, Amish parents challenged their convictions under a state criminal statute requiring them to cause their children to attend public or private school until age 16. *Id.* at 207. The parents had declined to send their 14- and 15-year-old children to public or private school. *Id.* They believed their children's attendance in school was contrary to the Amish religion and way of life, and that "by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but . . . also endanger their own salvation and that of their children." *Id.* at 209. Substantial evidence supported the parents' contention that their religious communities were "characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence." *Id.* at 209–210. The evidence included "the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life . . . ." *Id.* at 219. Based on this evidence, the Supreme Court found that

> secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to their beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith[.]

Id. at 218. In other words, the record showed compulsory school attendance for Amish children "carrie[d] with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be

forced to migrate to some other and more tolerant religion." *Id.* The Court acknowledged the state's interest in universal compulsory education but held it was not absolute and did not outweigh the Amish parents' fundamental rights and interests "with respect to the religious upbringing of their children . . . ." *Id.* at 214–15.

The *Yoder* Court was clear that its holding was inexorably linked to the Amish community's unique religious beliefs and practices. *Id.* at 235–36. It stated its heightened scrutiny of the challenged law was compelled by the combination of "the interests of parenthood" and "a free exercise claim *of the nature revealed by this record*." *Id.* at 233 (emphasis added). It anticipated "probably few other religious groups or sects could make" a showing similar to the evidence provided by the Amish parents, including the interrelationship of their beliefs and a centuries-long practice of isolated and self-sufficient communal living, and it counseled courts to "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 educational requirements." *Id.* For these reasons, *Mozert* distinguished *Yoder* as resting "on such a singular set of facts that . . . it cannot be held to announce a general rule that exposure without compulsion to act, believe, affirm or deny creates an unconstitutional burden." 827 F.2d at 1067. *Parker*, too, observed that "*Yoder* emphasized that its holding was essentially sui generis, as few sects could make a similar showing of a unique and demanding religious way of life that is fundamentally incompatible with *any* schooling system." 514 F.3d at 100. Still, *Yoder* stands as the ultimate application of the Free Exercise Clause's protection against compulsory public-school education that violates parents' religious beliefs.

Finally, it is worth emphasizing one throughline in all these cases. The Supreme Court never has "interpreted the First Amendment to require the Government *itself* to behave in ways

that the individual believes will further his or her spiritual development or that of his or her family." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). In *Bowen*, parents challenged the government's practice of assigning and using Social Security numbers. They asserted that practice, as applied to their two-year-old daughter, would violate their religious beliefs and limit their daughter's spiritual development. The Court rejected their claims because the "Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* "Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter." *Id.* at 699–700. "The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 700. The Court acknowledged that the parents' "religious views may not accept this distinction between individual and governmental conduct[,]" but it concluded that "the Constitution, rather than an individual's religion, must supply the frame of reference." *Id.* at 701 n.6. For the same reasons, the Court rejected free exercise challenges to federal agency actions that had authorized road construction across land used for religious purposes. *Lyng*, 485 U.S. at 442. The Court reaffirmed the Free Exercise Clause's protection against forms of indirect coercion like the disqualification from unemployment benefits based on religious conduct, which it analogized to direct fines on religious worship. *Id.* at 450. But the Court held that line of indirect-coercion cases "does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require" judicial scrutiny. *Id.* at 450–51.

b. Burden – Application

With these principles in mind, the Court considers whether the plaintiffs likely have established their and their children's religious exercise rights will be burdened by the no-opt-out policy. In their declarations, the parents claim a sacred obligation to teach their children their faiths and their religious views on family structure, gender, and human sexuality. ECF 23-2, ¶¶ 4, 14; ECF 23-3, ¶ 12; ECF 23-4, ¶ 7; ECF 52, ¶ 7. Mahmoud and Barakat state their faith prohibits prying into others' private lives and discourages public disclosure of sexual behavior. ECF 23-2, ¶ 17. They state it would violate their religious beliefs and the beliefs of their children if their children "were asked to discuss romantic relationships or sexuality with schoolteachers or classmates." *Id.* They also state "[i]ntentionally exposing" their children to contrary instruction would conflict with their religious obligations. *Id.* ¶ 18. The Romans state their child loves his teachers and implicitly trusts them, so "[h]aving them teach principles about sexuality or gender identity that conflict with [their] religious beliefs significantly interferes with [their] ability to form his religious faith and religious outlook on life and is spiritually and emotionally harmful to his well-being." ECF 23-3, ¶ 20. The Persaks state "exposing" their children to viewpoints that contradict their beliefs "conflicts" with their religious duties and "undermines [their] efforts to raise [their] children in accordance with [their] faith . . . ." ECF 23-4, ¶¶ 12, 16. Finally, Morrison, a board member of Kids First, states her religious obligations are "pressured" by the books because "it is practically impossible for [her and her husband] to contradict" contrary instruction due to her child's learning disability, which prevents her from understanding their disagreement with the books and differentiating their instruction from her teachers' instruction. ECF 52, ¶¶ 8–9. Morrison also states she has no realistic alternative to public school for her child's education. *Id.* ¶¶ 10, 14.

The Court begins with the asserted burden on the children's religious exercise. The plaintiffs contend not allowing opt-outs from the storybooks exerts "behavioral pressure" on the children to "modify their religious beliefs and behavior." ECF 47, at 10–11. The pressure comes from the books' calls to action and introspection and the inevitable teacher-led discussion, which advance the School Board's express goal to normalize an inclusive environment. In essence, the plaintiffs argue that by being forced to read and discuss the storybooks, their children will be pressured to change their religious views on human sexuality, gender, and marriage. The Court interprets this argument as an indoctrination claim of the sort contemplated in *Parker*.

The plaintiffs have not identified any case recognizing a free exercise violation based on indoctrination. The closest any court has come to doing so appears to be *Tatel v. Mount Lebanon School District*, 637 F. Supp. 3d 295 (W.D. Penn. 2022). In *Tatel*, the court denied a motion to dismiss a free exercise claim brought by parents who challenged a public-school teacher's non-curricular instruction on transgender topics. *Id.* at 330. The parents alleged the teacher had engaged in a year-long course of instruction to first graders on gender dysphoria, including books, videos, discussions, and private counseling. *Id.* at 303–05. She also had "instructed the children in her first-grade class that their parents might be wrong about their children's gender," told one student that he could dress like a different gender, said she would never lie to them (suggesting their parents would), and encouraged her students "not to tell their parents about her instruction." *Id.* Such instruction was "contrary to the District's published curriculum," though administrators allegedly had adopted a *de facto* policy allowing the teacher to continue her activities. *Id.* at 304.

The *Tatel* Court's basis for finding a burden on the parents' religious exercise is not clear, but the court's analysis seems to align with the First Circuit's description of indoctrination in *Parker*. In distinguishing *Parker*, the court noted that the teacher "did attempt to indoctrinate" the

children by telling them their parents "may be wrong and her teachings about gender identity were right." *Id.* at 325. Later, in summarizing its reason for finding a viable free exercise claim, the court stated the teacher had impermissibly "advocated her own agenda and beliefs about gender identity" in the classroom despite the parents' objections. *Id.* at 330.[9] The teacher allegedly engaged in a consistent, multi-pronged, year-long effort to convince her first-grade students to believe her views on gender and, in some cases, to change their gender identities. *Id.* at 303–05. She told her students she would never lie to them, and she encouraged them not to discuss her instruction with their parents. *Id.* The students were not just exposed to ideas. They were being pressured by their teacher to change their religious views on gender identity.

Here, the plaintiffs have not shown that the no-opt-out policy likely will result in the indoctrination of their children. Their allegations do not approach the parents' allegations in *Tatel* or the description of indoctrination in *Parker*. To be sure, the topics in the storybooks the plaintiffs find objectionable—gender identity, transgenderism, and same-sex marriage—outnumber the single objectionable issue (same-sex marriage) in the two books in *Parker*. And some of the books may be viewed as endorsing particular viewpoints, like one of the books in *Parker* that the court

[9] On a motion for reconsideration, the court expanded on its analysis. *Tatel v. Mt. Lebanon Sch. Dist.*, --- F. Supp. 3d ----, 2023 WL 3740822, at *13–14 (W.D. Penn. May 31, 2023). The court reasoned, first, that the plaintiffs did not have to allege coercion because "a non-neutral policy to the detriment of a religious belief is a per se burden on Free Exercise rights" under *Kennedy v. Bremerton School District*, --- U.S. ----, 142 S. Ct. 2407 (2022). *Tatel*, 2023 WL 3740822, at *13. In support, the court cited the following language from *Kennedy*: "[A] plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" 142 S. Ct. at 2421–22. The Court does not read this language from *Kennedy* as describing a *per se* burden. Rather, the language explains when strict scrutiny may be triggered by a law that imposes a burden. The *Tatel* Court reasoned in the alternative that the plaintiffs had pled coercion because they "must either withdraw their children from the public school or submit to [the teacher's] advocacy." 2023 WL 3740822, at *14 n.18. This reasoning seems to find indirect coercion based on the pressure either to "submit to" indoctrination or abandon a public education.

suggested presented "a more significant claim." *Parker*, 514 F.3d at 106. But the storybooks are still a small subset of many books used in the MCPS English language arts curriculum; they are not a "constant stream of like materials." *Id.* Moreover, as in *Parker*, the School Board "imposes no requirement that the student[s] agree with or affirm" the books' views on the topics and threatens no punishment if they refuse to do so. *Id.* To the contrary, it consistently has stated, "No child, or adult, who does not agree with or understand another student's gender identity or expression of their sexual identity is asked to change how they feel about it." ECF 1-5; ECF 43, ¶ 30; ECF 55-3, at 2 (suggesting teachers to respond to student religious objections by saying, "I understand that is what you believe, but not everyone believes that" and "we don't have to understand a person's identity to treat them with respect and kindness"). Even if one or two of the suggested answers to possible student questions in the School Board's guidance could be interpreted to promote a particular view as correct, they are not required answers, and they are outliers among the suggested answers that do not promote a particular view. ECF 55-3. And some MCPS educators have expressed concerns about the more assertive suggested answers, suggesting those responses are less likely to be used in the classroom. ECF 47-1, at 10. On the current record, the plaintiffs have not shown that MCPS's use of the storybooks crosses the line from permissible influence to potentially impermissible indoctrination. Therefore, as in *Parker*, the Court need not decide whether indoctrination burdens religious exercise.

The plaintiffs contend the Morrisons' daughter, at least, has a viable indoctrination claim. Their daughter has Down Syndrome and Attention Deficit Disorder. She is enrolled in the Learning for Independence Program, has an IEP, and qualifies for the full-time, one-on-one assistance of a paraeducator. Morrison states her daughter's learning disability prevents the child from understanding or differentiating instructions from her teachers and her parents and renders

her unable to understand how or why her parents disagree with the ideas presented in the storybooks. As a result, Morrison states, it is practically impossible for Morrison and her husband to contradict instruction the child receives at school that conflicts with the family's religious beliefs.

The Morrisons are not named plaintiffs, and the Court questions whether Kids First has standing to bring claims on their behalf. *See Harris*, 448 U.S. at 320–21; *Cornerstone Christian Schs.*, 563 F.3d at 133–34 (rejecting religious school's claims of associational standing to bring free exercise challenges on behalf of parents and students); 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Fed. Prac. & Proc.* § 3531.9.5 (3d ed.) ("Some substantive claims may seem inherently so personal that individual participation should be required simply because of the nature of the claim."). Even if the Court were to assume the Morrisons' claims are properly presented, the Morrisons have not shown the use of the storybooks will result in their daughter's indoctrination. She may be uniquely vulnerable to indoctrination due to her neurodivergence, but on the current record, the Morrisons still have not established that indoctrination is likely to occur. The evidence suggests that, generally, MCPS teachers will occasionally read one of the handful of books, lead discussions and ask questions about the characters, and respond to questions and comments in ways that encourage tolerance for different views and lifestyles. That is not indoctrination. That the Morrisons' child cannot distinguish between what her parents and teachers instruct does not convert the teachers' instruction into indoctrination—nothing suggests she will be pressured to affirm or agree with the views presented in the storybooks. Moreover, the Morrisons have not offered evidence about how the books will be incorporated into the Learning for Independence Program or whether the Morrisons have requested a modification to their

daughter's IEP to accommodate her disability as it relates to the storybooks. Based on the evidence before the Court, the Morrisons are likely to succeed on an indoctrination claim.[10]

Separate from any indoctrination claim, Mahmoud and Barakat contend their son would be forced to violate Islam's prohibition of "prying into others' private lives" and its discouragement of "public disclosure of sexual behavior" if his teacher were to ask him to discuss "romantic relationships or sexuality." ECF 23-2, ¶ 17. Forcing a child to discuss topics that his religion prohbits him from discussing goes beyond the mere exposure to ideas that conflict with religious beliefs. But nothing in the current record suggests the child will be required to share such private information. Based on the evidence of how teachers will use the books, it appears discussion will focus on the characters, not on the students. *See* ECF 43, ¶ 30 (stating the books "are used to assist students with mastering concepts like answering questions about characters, retelling key events . . . and drawing inferences about story characters"); ECF 1-15, at 24 (same); ECF 1-5 (noting "think-aloud moments" about what characters feel). While some instructional guidance seems to encourage student introspection, none encourages students to share their personal experiences or to discuss their or their families' romantic relationships, gender identities, or sexuality. *See* ECF 55-3, at 3 ("Are you comfortable sharing your pronouns with me?"). Additionally, Mahmoud and Barakat have not established the likelihood that prohibited conversations will occur. They do not allege they have told their son's teachers that his religion does not allow him to discuss prohibited topics with others or that his teachers, when on notice that he cannot discuss these topics, will pressure him to do so. Thus, the Court cannot conclude the child is likely to be coerced into violating his beliefs in the manner identified by his parents.

[10] Even if Kids First has standing to bring a claim on behalf of the Morrisons and the Morrisons could satisfy the standard for a preliminary injunction, the unique situation of one family would not justify a broad injunction applicable to the individual plaintiffs and every Kids First member.

The *sine qua non* of a free exercise claim is coercion, and the plaintiffs have not shown the no-opt-out policy likely will result in the indoctrination of their children or otherwise coerce their children to violate or change their religious beliefs. "Public schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student" violate his or her faith during classroom instruction. *Parker*, 514 F.3d at 106.

The parents' burden arguments, too, fall short. The parents assert that their children's exposure to the storybooks, including discussion about the characters, storyline, and themes, will substantially interfere with their sacred obligations to raise their children in their faiths. The Court's analysis of the parents' asserted burden is guided by *Parker* and the other circuit-level cases, which the Court finds persuasive. Under these cases, the parents' inability to opt their children out of reading and discussion of the storybooks does not coerce them into violating their religious beliefs. *See Parker*, 514 F.3d at 105–06; *Fleischfresser*, 15 F.3d at 690; *Mozert*, 827 F.2d at 1065–66. The parents still may instruct their children on their religious beliefs regarding sexuality, marriage, and gender, and each family may place contrary views in its religious context.[11] No government action prevents the parents from freely discussing the topics raised in the storybooks with their children or teaching their children as they wish. The no-opt-out policy

[11] The Morrisons, too, do not face any coercion to violate their sacred duty to raise their child in their faith. Morrison states they cannot contextualize contrary ideas for their disabled daughter because her disability prevents her from understanding the difference between what her parents say and what her teachers say. But the no-opt-out policy does not prevent the Morrisons from taking the action required by their religion—trying to teach their daughter their beliefs.

does not prevent the parents from exercising their religious obligations or coerce them into forgoing their religious beliefs.[12]

The plaintiffs argue this conclusion is inconsistent with Justice Alito's concurrence in *Morse v. Frederick*, which stated: "It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities." 551 U.S. 393, 424 (2007) (Alito, J., concurring). *Morse* involved a free speech challenge to a school's decision to punish a student for raising a controversial banner at an off-campus, school-approved event. *Id.* at 396. In context, Justice Alito was reaffirming that schools act as agents of the State and not private actors when they regulate student speech. *See id.* ("When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents."). In the same paragraph, he observed that "[m]ost parents, realistically, have . . . little ability to influence what occurs in the school[,]" undermining the plaintiffs' argument that Justice Alito intended to suggest parents' have substantial control over public-school curricula. *Id.* The Court's findings here are not inconsistent with the holding in *Morse* or Justice Alito's concurrence.

The plaintiffs further argue *Parker*, *Mozert*, and *Fleischfresser* are not persuasive and should not be followed here. They argue first that, even if they remain free to teach their beliefs to their children, their religious exercise is nonetheless burdened because the storybooks impede their efforts to instill their religious beliefs in their children. In other words, they argue instruction

[12] The plaintiffs argue they will not know what to discuss with their children or when without advance notice of when the storybooks will be read. But parents know the books are a part of the English language curriculum and must be used in the classroom at some point during the upcoming school year. They may read the books for themselves and decide whether, when, and how best to address them with their children. Not receiving notice of the precise dates on which the books will be read does not burden their religious exercise.

that uses the storybooks will make it less likely they will accomplish their religious obligations to raise their children in their faiths. Yet, they cite no case that has recognized a free exercise claim based on government action that reduces the likelihood of meeting a sacred obligation. Such a finding would seem to contravene the Supreme Court's guidance that the Free Exercise Clause cannot be used to "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Bowen*, 476 U.S. at 699. It is not enough for a plaintiff to identify "the incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs[.]" *Lyng*, 485 U.S. at 450. "The crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Id.* (quoting *Sherbert*, 374 U.S. at 412). With or without an opt-out right, the parents remain free to pursue their sacred obligations to instruct their children in their faiths. Even if their children's exposure to religiously offensive ideas makes the parents' efforts less likely to succeed, that does not amount to a government-imposed burden on their religious exercise.

The plaintiffs next argue that the no-opt-out policy is a form of indirect coercion, which they claim *Parker* did not address. They contend the policy pressures them to choose between the benefits of a public education and exercising their religious rights. Indirect coercion, as discussed above, is substantial pressure short of an express command to modify one's behavior or to violate one's beliefs. Such pressure may come from conditions on receiving public benefits, which courts have found are analogous to fines. Certainly, public education is a valuable public benefit. And many families cannot afford to send their children to private schools. But the benefit of a public education in this case is not conditioned on any activity or abstention that violates the parents'

religious beliefs. The no-opt-out policy does not pressure the parents to refrain from teaching their faiths, to engage in conduct that would violate their religious beliefs, or to change their religious beliefs. The policy may pressure them to discuss the topics raised by the storybooks with their children, but those discussions are anticipated, not prohibited, by the parents' faiths. The parents are not pressured into violating their religious beliefs in order to obtain the benefits of a public education.

Third, the plaintiffs argue the Supreme Court's decision in *Yoder* compels the conclusion that the no-opt-out policy interferes with their rights to direct the religious upbringing of their children and teach their religious views on topics central to their faiths. They claim the reading and discussion of the storybooks will interfere with this right by encouraging their children to think about and question their sexuality and gender identity, to focus prematurely on romantic relationships, and to disregard religious teachings.

Parker and *Mozert* are representative of how courts have viewed *Yoder* in cases challenging curricula on free exercise grounds. The Sixth Circuit in *Mozert* noted "*Yoder* was decided in large part on the impossibility of reconciling the goals of public education with the religious requirement of the Amish that their children be prepared for life in a separated community" and the threat to the Amish way of life and religious practice posed by the public-school attendance requirement. 827 F.2d at 1067. It found no similar threat to the parents on the facts before it because they wanted the benefits of a public education, albeit with greater control over the curriculum, and because they did not claim their children's exposure to the curriculum would prevent them from practicing their religion. *Id.* The First Circuit in *Parker* likewise found "substantial differences" between the parents' claims and the claims in *Yoder*, covering much the same ground as *Mozert*. 514 F.3d at 100. Unlike in *Yoder*, the parents in *Parker* had chosen to

enroll their children in public school and made no claim of a distinct community and lifestyle threatened by the curriculum. *Id.* They had not shown that "exposure to the materials in dispute" would "automatically and irreversibly prevent [them] from raising [their children] in the religious belief that gay marriage is immoral." *Id.* By contrast, the continued education of the Amish children in *Yoder* would have prevented their parents from raising their children in their separate and distinct religious culture and lifestyle. *Id.* And, in both cases, the courts noted the parents had legal alternatives to public school (private schools and homeschooling) that would satisfy their religious concerns, whereas the Amish parents in *Yoder* did not. *Id.*; *Mozert*, 827 F.2d at 1067.

The plaintiffs argue these readings of *Yoder* are too narrow and conflict with the Supreme Court's recent description of the parental right at issue in that case. They cite *Espinoza v. Montana Department of Revenue*, in which parents challenged a state regulation that blocked private religious schools from receiving funds from a state scholarship program. --- U.S. ----, 140 S. Ct. 2246, 2249 (2020). The majority in *Espinoza* noted that *Yoder* supported the Court's longstanding recognition of "the rights of parents to direct 'the religious upbringing' of their children." *Id.* at 2261. Justice Gorsuch, writing in concurrence, stated "this Court has already recognized that parents' decisions about the education of their children . . . can constitute protected religious activity." *Id.* at 2276 (Gorsuch, J., concurring). And Justice Breyer, writing in dissent, noted "the Free Exercise Clause draws upon a history that places great value upon the freedom of parents to teach their children the tenets of their faith." *Id.* at 2284 (Breyer, J., dissenting). In each instance, *Yoder* is referred to in passing and at a high level of generality.

Such stray statements offer limited guidance here, with facts that are a far cry from both *Yoder* and *Espinoza*. Neither the majority, the concurrence, nor the dissent stated lower courts' interpretations of *Yoder* in this context is incorrect or provided any analysis from which this Court

may infer their dissatisfaction with those interpretations. At the same time, the plaintiffs offer no analogous case to support their proposed application of *Yoder* to these facts. Even if the plaintiffs are correct that the Supreme Court has never adopted the reading of *Yoder* followed by lower courts in this context, the Court is persuaded to follow the persuasive authority in the absence of any controlling authority to the contrary. *Yoder* is *sui generis*. The Supreme Court itself said as much, anticipating few groups could match the Amish parents' claims. The outcome in that case turned on the Court's findings that the Amish parents' religious beliefs required them to live apart from the modern world and that their children's continued enrollment in school would destroy their religious way of life. Thus, the statutory requirement that they send their children to school on pain of criminal punishment coerced them to violate their religious beliefs. The plaintiffs here do not and cannot make a similar claim.[13]

"[A] violation of the Free Exercise Clause is predicated on coercion," either direct or indirect. *Schempp*, 374 U.S. at 223. The plaintiffs have not shown the no-opt-out policy likely coerces them to violate their religious beliefs. Regardless of the wisdom of affording opt-outs in these circumstances, the weight of existing authority is clear. The plaintiffs' free exercise claims are not likely to succeed on the merits.[14]

[13] The plaintiffs argue distinguishing their claims from the Amish parents' claims requires the Court to engage in "doctrinal favoritism." ECF 57, at 3. Not so. The Court's analysis does not turn on religious doctrine. It turns on whether the facts involve government coercion to violate religious beliefs. In *Yoder*, they did; here, they do not.

[14] Because the plaintiffs have not shown that the no-opt-out policy likely will burden their religious exercise, the Court need not address whether the policy is neutral and generally applicable under *Fulton*, *Tandon*, and *Masterpiece*/*Lukumi*.

2. Substantive Due Process

The plaintiffs assert that the School Board's refusal to allow parents to opt their children out of reading and discussion of the storybooks infringes their right to direct their children's upbringing in violation of the Due Process Clause of the Fourteenth Amendment. They claim this due process right is fundamental, triggering strict scrutiny.

Under substantive due process jurisprudence, "courts examine whether government intrusions into citizens' liberties are justified by adequate state interests." *Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 177 (4th Cir. 1996). "A substantive due process challenge is considered under rational-basis review unless some fundamental right is implicated." *Doe v. Settle*, 24 F.4th 932, 953 (4th Cir. 2022) (citing *Herndon*, 89 F.3d at 177). Fundamental rights are those "which are, objectively, deeply rooted in this Nation's history and tradition." *Hawkins v. Freemen*, 195 F.3d 732, 739 (4th Cir. 1999) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)). "Critical to the 'fundamental interest' inquiry is the requirement that it be conducted on the basis of a 'careful description of the asserted fundamental liberty interest.'" *Id.* (quoting *Glucksberg*, 521 U.S. at 720). In defining the asserted liberty interest, courts must avoid "overgeneralization in the historical inquiry." *Id.* at 747 (citing *Glucksberg*, 521 U.S. at 722–23).

In their complaint and preliminary injunction motion, the parents asserted a violation of their substantive due process rights to direct the upbringing of their children, which they described as "[s]eparate and apart from" their free exercise claims. ECF 23-1, at 31; *see* ECF 36, ¶¶ 262–75. But in their reply brief and at oral argument, they characterized their due process rights as concerning the *religious* upbringing of their children, blurring the line between their due process

arguments and their free exercise arguments based on *Yoder*. *See* ECF 47, at 16. The Court considers the asserted secular due process right and its religious variation, in turn.

The "interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Nearly 100 years ago, the Court held that the "liberty" protected by the Due Process Clause includes the right of parents "to control the education of their own," *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923), and "to direct the upbringing and education of children under their control," *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925). *Troxel*, 530 U.S. at 65. In the subsequent decades, the Court has addressed parents' rights in different contexts, often using broad language. *See, e.g.*, *id.*; *Glucksberg*, 521 U.S. at 720 (noting the right "to direct the education and upbringing of one's children" under *Meyer* and *Pierce*); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights[.]'") (citations omitted). Relying on these cases, the parents argue the right to control the upbringing of their children is fundamental.[15]

There is no doubt parents have substantial rights under the Due Process Clause, but the Court still must define the specific right at stake with granularity. *Hawkins*, 195 F.3d at 747. Indeed, "'[a]lthough the Supreme Court has never been called upon to define the precise

[15] The plaintiffs cite several other cases that have no clear application to the facts of this case. *See, e.g.*, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, --- U.S. ----, 141 S. Ct. 2038, 2043–44 (2021) (concerning a school's regulation of off-campus speech); *Troxel*, 530 U.S. at 60–63 (concerning parents' control over visitation rights for their children); *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (concerning school's adoption of a religious curriculum in violation of the Establishment Clause); *Stanley*, 405 U.S. at 646–47 (concerning unwed father's custodial rights); *Gruenke v. Seip*, 225 F.3d 290, 295 (3d Cir. 2000) (concerning parents' rights to learn and control the disclosure of information about their daughter's pregnancy).

boundaries of a parent's right to control a child's upbringing and education,' it is clear that the right is neither absolute nor unqualified." *Bailey v. Va. High Sch. League, Inc.*, 488 F. App'x 714, 716 (4th Cir. 2012) (unpublished per curiam) (collecting cases) (quoting *C.N.*, 430 F.3d at 182). The Court has noted, for example, that there is "no support [for] the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society." *Runyon v. McCrary*, 427 U.S. 160, 177 (1976). And in several cases, the Court has expressly adopted a narrow reading of *Meyer* and *Pierce*. *Id.* (describing the rights established in *Meyer* and *Pierce* as protecting "the subject matter . . . taught at . . . private school" and the right to send children to private school); *Norwood v. Harrison*, 413 U.S. 455, 462 (1973) (finding *Pierce* "affirmed the right of private schools to exist and operate" and "said nothing of any supposed right of parochial schools" to state funding); *see also Leebaert v. Harrington*, 332 F.3d 134, 140–41 (2d Cir. 2003) (holding "*Meyer, Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught"). So, while parents have the right to "control the education of their own" and "to direct the upbringing and education of children under their control," the existence of those rights does not require the application of strict scrutiny every time parents assert authority over a child's education. *Herndon*, 89 F.3d at 179; *see also Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005) ("While parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child.").

The controlling Fourth Circuit authority regarding parental control over a child's public education is *Herndon by Herndon v. Chapel Hill-Carrboro City Board of Education*, 89 F.3d 174 (4th Cir. 1996). *Herndon* involved a substantive due process challenge by parents to a public

school's community service requirement. *Id.* at 176–77. The challenge was not motivated by religious objections. *Id.* at 179. After discussing the relevant Supreme Court cases, including *Meyer*, *Pierce*, and *Yoder*, the court summarized:

> [T]he Supreme Court has stated consistently that parents have a liberty interest, protected by the Fourteenth Amendment, in directing their children's schooling. Except when the parents' interest includes a religious element, however, the Court has declared with equal consistency that reasonable regulation by the state is permissible even if it conflicts with that interest. That is the language of rational basis scrutiny.

Id. Because the plaintiffs conceded "their interest [was] not religious," the court applied rational basis review to the service requirement. *Id.* Thus, *Herndon* stands for the proposition that the parental right to direct a child's education is not fundamental unless it includes a religious element. To the extent the parents' substantive due process claims are premised on a secular liberty interest, they do not assert a fundamental right, and their claims are subject to rational basis review.

The plaintiffs do not address this holding in *Herndon*. Instead, they emphasize the religious nature of their opposition to the storybooks. They argue that, under *Herndon*, whenever a due process claim involves both a parent's right to direct their child's education and free exercise concerns, as is the case here, strict scrutiny automatically applies. They see support for such a rule in *Herndon*'s statement that the Supreme Court had applied rational basis review "[e]xcept when the parents' interest includes a religious element" and its subsequent discussion of *Yoder*, which it described as having "reaffirmed that parental rights are among the liberties protected by the Constitution." 89 F.3d at 178. The court continued, "When those rights combine with First Amendment free exercise concerns, the [*Yoder*] Court held, they are fundamental[.]" *Id.* (citing *Yoder*, 406 U.S. at 232).

There are several problems with the plaintiffs' reading of *Herndon*. First, *Herndon* did not involve any free exercise concerns, so the court had no cause to adopt such a broad rule. Its

description of *Yoder* is *dicta*, and it would be strange indeed if the court fundamentally rewrote its constitutional jurisprudence in a single sentence when its holding did not depend on such a revision. Second, when the court discussed *Yoder*, it wrote descriptively. It observed the parents' rights asserted in *Yoder* were fundamental for the reasons stated in *Yoder*. It did not extend *Yoder*'s holding beyond its unique facts. Neither *Yoder* nor the Fourth Circuit's interpretation of *Yoder* in *Herndon* holds that a parent's right to direct their children's upbringing automatically rises to the level of a fundamental right whenever the parent's interest includes a religious element.

At oral argument, the plaintiffs proposed another reading of *Herndon* that they believe warrants the application of strict scrutiny to the no-opt-out policy. They suggested *Herndon* indicated the Fourth Circuit would be open to so-called "hybrid-rights" claims, in which two constitutional rights violations are based on the same set of facts. The concept of hybrid-rights claims originated in *Smith*. 494 U.S. at 881–82. *Smith*'s central holding was that the Free Exercise Clause "does not relieve an individual of the obligation to comply with" neutral and generally applicable laws. *Id.* at 879. In discussing that rule, the Court observed that "the only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections[.]" *Id.* at 881–82. The Court included *Pierce* and *Yoder* on its list of "hybrid" cases to which its general rule did not apply. *Id.*

"Whether and how to apply the hybrid-rights exception described in *Smith* have been the subject of much debate and disagreement among the circuit courts of appeal and academic commentators" since *Smith*'s publication. *Hicks*, 93 F. Supp. 2d at 659. Over the years, several justices have expressed skepticism about the hybrid-rights doctrine. Most recently, Justice Alito stated in his concurrence in *Fulton*, "[I]t is hard to see the justification for this curious doctrine . . .

such a scheme is obviously unworkable and has never been recognized outside of *Smith*." 141 S. Ct. at 1915 (Alito, J., concurring). Justice Alito also suggested "the hybrid-rights exception would largely swallow up *Smith*'s general rule" because "a great many claims for religious exemptions can easily be understood as hybrid free-exercise/free-speech claims." *Id.* *But see Danville Christian Academy, Inc. v. Beshear*, --- U.S. ----, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting) ("[U]nder this Court's precedents, even neutral and generally applicable laws are subject to strict scrutiny where a plaintiff presents a 'hybrid' claim—meaning a claim involving the violation of the right to free exercise *and* another right, such as the right of parents 'to direct the education of their children.'").

Herndon cannot be read to endorse a hybrid-rights theory. Beyond the fact that *Herndon* was not itself a hybrid-rights case and did not expressly refer to the concept, the Fourth Circuit more recently has confirmed that it has not taken a stance on the topic. *See Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 353 (4th Cir. 2011) (unpublished table opinion) ("We observe that there is a circuit split over the validity of this 'hybrid-rights' exception. However, we do not need to decide this issue here . . . ."). The Court does not read *Herndon* to require strict scrutiny anytime a plaintiff challenges a public-school curriculum based on both parental and religious rights.

Without Fourth Circuit guidance on when strict scrutiny *is* required in such cases, the Court looks outside the circuit. Notably, as of 2008, "[n]o published circuit court opinion . . . ha[d] ever applied strict scrutiny to a case in which plaintiffs argued they had presented a hybrid claim." *Parker*, 514 F.3d at 98. That observation remains true today. Three circuits have expressly rejected the hybrid-rights theory. *See Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 244–47 (3d Cir. 2008); *Leebaert v. Harrington*, 332 F.3d at 143–44; *Kissinger v. Bd. of Trs. of Ohio St.*

Univ., Coll. of Veterinary Med., 5 F.3d 177, 180 (6th Cir. 1993). The circuits that have not rejected the theory have held that the component claims must be, at least, colorable. *See 303 Creative LLC v. Elenis*, 6 F.4th 1160, 1188 (10th Cir. 2021), *rev'd on other grounds*, --- U.S. ----, 143 S. Ct. 2298 (2023); *Henderson v. McMurray*, 987 F.3d 997,1005–07 (11th Cir. 2021); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1237–38 (9th Cir. 2020); *Cornerstone Christian Schs.*, 563 F.3d at 136 n.8; *Parker*, 514 F.3d at 97–99; *Civil Liberties for Urban Believers v. Chicago*, 342 F.3d 752, 764–65 (7th Cir. 2003). "Colorable" in this context means likely to succeed on the merits. *Parents for Privacy*, 949 F.3d at 1237.[16]

In the absence of persuasive authority to the contrary, the Court will not adopt a lower standard. Any hybrid-rights claim, if such a claim is cognizable at all, does not warrant strict scrutiny here because the plaintiffs' free exercise claims are not likely to succeed on the merits. The Court concludes the plaintiffs' asserted due process right to direct their children's upbringing by opting out of a public-school curriculum that conflicts with their religious views is not a fundamental right. Rational basis review is the appropriate level of scrutiny.

Rational basis review "requires only that the [challenged state action] be shown to bear some rational relationship to legitimate state purposes." *Herndon*, 89 F.3d at 177 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37–40 (1973)); *see also Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 561 (4th Cir. 2013). The plaintiffs do not dispute the no-opt-out policy would survive rational basis review. Indeed, the policy serves the School Board's legitimate interest in "[f]oster[ing] social integration and cultural inclusiveness of transgender and gender nonconforming students" by ensuring all MCPS students are exposed to

[16] At least one district court in this circuit has applied strict scrutiny to a hybrid-rights claim that involved colorable free exercise and substantive due process claims. *See Hicks*, 93 F. Supp. 2d at 657–63.

inclusive and representative instructional materials. *See* ECF 42-7, at 4; ECF 43, ¶ 6. It also helps prevent students who identify with characters in the storybooks from feeling stigmatized or discriminated against when other students leave the room when the books are read, furthering the School Board's interests in providing a safe and supportive learning environment for its students, protecting LGBTQ students' health and safety, and complying with anti-discrimination laws. ECF 43, ¶ 39.

The plaintiffs are not likely to succeed on their substantive due process claim.

B. The Remaining Preliminary Injunction Factors

Because the plaintiffs have not established any of their claims is likely to succeed on the merits, the Court need not address the remaining preliminary injunction factors. Nonetheless, because a constitutional violation is not likely or imminent, it follows that the plaintiffs are not likely to suffer imminent irreparable harm, and the balance of the equities and the public interest favor denying an injunction to avoid undermining the School Board's legitimate interests in the no-opt-out policy. *See Leaders*, 2 F.4th at 346.

IV. Injunction Pending Appeal

At the hearing on the preliminary injunction motion, the plaintiffs made an oral motion for a stay pursuant to Rule 8(a)(1) of the Federal Rules of Appellate Procedure if the Court were to deny their motion. That rule requires that a "party ordinarily move first in the district court for . . . a stay of the judgment or order of a district court pending appeal." Fed. R. App. P. 8(a)(1)(A). There is no judgment or order of this Court to be stayed. The Court construes the plaintiffs' motion as a request for an injunction pending appeal under Federal Rule of Civil Procedure 62(d).[17] The standard for injunctive relief pending appeal is the same as for a preliminary injunction. *See Nken*,

[17] Fed. R. App. P. 8(a)(1)(C) requires parties to move for such relief first in the district court.

556 U.S. at 434; *Goldstein v. Miller*, 488 F. Supp. 156, 171–72 (D. Md. 1980). This is so "because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Nken*, 556 U.S. at 434.

The plaintiffs seek the same relief pending appeal as in their preliminary injunction motion: an injunction that requires the Board to provide advance notice and opt-outs from instruction involving the storybooks and family life and human sexuality. For the reasons stated in this opinion, the Court cannot conclude the plaintiffs are likely to succeed on the merits of an appeal. The plaintiffs' request for a preliminary injunction pending appeal is denied.

V. Conclusion

The plaintiffs have not established the requirements for a preliminary injunction. Their motion is denied. Their request for an injunction pending appeal is denied. A separate Order follows.

Date: August 24, 2023

Deborah L. Boardman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

TAMER MAHMOUD, *et al.*,	*	
Plaintiffs,	*	
v.	*	**Civ. No. DLB-23-1380**
MONIFA B. MCKNIGHT, *et al.*,	*	
Defendants.	*	

ORDER

For the reasons stated in the memorandum opinion issued this same date, it is, this 24th day of August, 2023, hereby ORDERED that

1. The plaintiffs' Motion for Preliminary Injunction, ECF 23, is denied; and

2. The plaintiffs' oral motion for an injunction pending appeal is denied.

Deborah L. Boardman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

TAMER MAHMOUD, *et al.*,

Plaintiffs,

v.

MONIFA B. MCKNIGHT, *in her official capacity as Superintendent of the Montgomery Board of Education*, *et al.*,

Defendants.

Case No. 8:23-cv-01380-DLB

NOTICE OF APPEAL TO THE FOURTH CIRCUIT

Plaintiffs Tamer Mahmoud and Enas Barakat; Jeff and Svitlana Roman; and Chris and Melissa Persak, in their individual capacities and ex rel. their minor children; and Kids First, an unincorporated association of parents and teachers, appeal to the United States Court of Appeals for the Fourth Circuit from the District Court's Memorandum Opinion (Dkt. 59) and Order (Dkt. 60) entered on August 24, 2023, denying their Motion for Preliminary Injunction (Dkt. 23).

Dated: August 25, 2023

Respectfully submitted,

/s/ Eric S. Baxter
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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2023, the foregoing brief was served on counsel for all parties by means of the Court's ECF system in compliance with Fed. R. Civ. P. 5.

Dated: August 25, 2023

/s/ Eric S. Baxter
Eric S. Baxter