No. 23-1890

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiffs-Appellants,

v.

MONIFA B. MCKNIGHT, *IN HER OFFICIAL CAPACITY AS SUPERINTENDENT OF THE MONTGOMERY COUNTY BOARD OF EDUCATION*; THE MONTGOMERY COUNTY BOARD OF EDUCATION; AND SHEBRA EVANS, LYNNE HARRIS, GRACE RIVERA-OVEN, KARLA SILVESTRE, REBECCA SMONDROWSKI, BRENDA WOLFF, AND JULIE YANG, *IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE 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

EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Today was the first day of school in Montgomery County, Maryland. The Plaintiffs ("Parents") need urgent relief from this Court because Defendants ("School Board" or "Board") have eliminated legally required parental opt-outs—and even *notice*—for elementary school instruction on gender and sexuality that violates the Parents' and their children's religious beliefs.[1] In particular, the Board has made clear that, once students enter the classroom, parents lose any right to opt their children out of ideological instruction that, in the School Board's own words, seeks to "[d]isrupt" the child's "either/or thinking" on gender and sexuality.

This is unlawful. Maryland law has long required public schools to notify parents and allow opt-outs from *any* instruction on "family life and human sexuality." The School Board's Religious Diversity Guidelines further direct schools to provide alternatives to *any* instruction that might burden students' or parents' religious beliefs. This approach wisely allows parents to retain control over the religious upbringing of their children on such sensitive and complex issues without stopping the Board from implementing its preferred curriculum generally.

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[1] This case involves the same defendants as *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, No. 22-2034, 2023 WL 5184844 (4th Cir. Aug. 14, 2023), and the two cases concern similar issues of parental exclusion from public school on issues around gender and sexuality. Judicial economy would be served by having the same panel resolve this case.

But now that balanced approach has toppled. Last fall, the School Board imposed a new series of ideological Pride Storybooks beginning in pre-kindergarten. The Storybooks explore what it means to be "cisgender" or "non-binary" and invite students to reconsider their pronouns. They introduce the concept of childhood romance and invite elementary-school students to discuss with teachers what it means to "like like" someone. They teach students that gender is disconnected from sex, and that children should decide for themselves what they are, not rely on their doctor's "guess" at birth.

The Parents, who are Muslims, Christians, and Jews, are not challenging the curriculum, but seek only to restore their right to notice and opt-outs. Their faith requires them to preserve a period of innocence before introducing their children to such weighty and consequential matters. They seek to ensure that their children are mature enough to process these issues within their respective religious traditions. Barring parental notice and opt-outs enables the Board to confuse students, set them against their Parents, and send them down a path that violates their faith. Surrendering one's religious tradition cannot be the price of receiving a public education.

Montgomery County's own elementary school principals share these concerns. Shortly after the Storybooks were introduced, they protested too. They warned that the Storybooks "teach[] about sexual orientation and gender identity as stand alone concepts" and are "not appropriate for

the intended age." Teachers felt "discomfort" with these books, and found the teaching guides to be "dismissive of religious beliefs" and "shaming" to children. The Storybooks "[s]tated as … fact [things] [s]ome would not agree [are] fact." And the principals advised it is "problematic to portray elementary school age children falling in love with other children, regardless of sexual preferences."

Initially, the Board responded by upholding notice and opt-outs. It said so publicly on March 22, but then reversed itself the next day. Even then, the Board continued granting opt-outs through the end of the school year. Now it says there will be no further accommodation—starting today.

Under the Free Exercise Clause, the Board's notice and opt-out ban triggers strict scrutiny in at least four different ways: via the "enduring American tradition" of parental religious educational rights under *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), or because the opt-out ban is neither neutral nor generally applicable under *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), and *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018). Through any of these paths, the Parents are entitled to an injunction. The Board cannot survive strict scrutiny.

A child's innocence, once lost, is gone forever. And depriving Parents their First Amendment rights for any period is irreparable harm. Because the public interest always favors upholding the Constitution, the Parents' "serious legal questions on the merits" warrant an injunction

pending appeal that restores the status quo ante of parental notice and opt-outs.

BACKGROUND

The opt-out rights

Maryland's Health Education Regulation requires all local school systems to establish "procedures for student opt-out[s] regarding" any "instruction related to family life and human sexuality objectives" other than "menstruation." COMAR § 13A.04.18.01(D)(2)(e)(*i*) & (*iii*). The School Board's Religious Diversity Guidelines similarly authorize students "to be excused from specific classroom discussions or activities that [students or parents] believe would impose a substantial burden on their religious beliefs." Ex. 3 at 6; *see also* Ex. 3 at 59-63.

The Pride Storybooks

In fall 2022, the School Board introduced new "LGBTQ+-inclusive" storybooks. Ex. 1 at 3. Reading the books to students in class is mandatory for teachers. *Id.* at 4, 11-12; Ex. 3 at 68-74. All the books focus on issues surrounding family life and human sexuality. One book, mandated for pre-kindergarten, focuses on a pride parade and what a child might find there. Ex. 3 at 76-93. Another is about a same-sex playground romance, that encourages teachers to ask students how it feels when they "don't just 'like'" but "like like" someone. *Id.* at 98, 256-74. Another focuses on a biological girl named Penelope who identifies as a boy. *Id.* at 276-310. The mother chides Penelope's brother that "[n]ot

everything *needs* to make sense. *This is about love*." *Id.* at 293. The Board's discussion manual encourages teachers to instruct children that, at birth, doctors only "guess about our gender," but "[w]e know ourselves best." *Id.* at 22 ¶ 144; *Id.* at 99; Ex. 12 at 3. Another book invites children to ponder what it means to be "transgender" or "non-binary" and asks "[w]hat pronouns fit you?" Ex. 3 at 20 ¶¶ 135-36; *id.* at 174. In yet another story, "Uncle Lior" visits to comfort "their" niece/nephew, whose pronouns are "like the weather. They change depending on how I feel." Ex. 7-1. The Storybooks are replete with lessons that encourage children to question sexuality and gender identity, to focus prematurely on romantic feelings, and to accept the concept of gender transitioning. *See* Ex. 1 at 11; Ex. 3 at 3-6, 16-22.

Employees responsible for selecting books are encouraged to look through an "LGBTQ+ Lens" and ask whether "stereotypes," "cisnormativity," and "power hierarchies" are "reinforced or disrupted." Ex. 10; *see also* Ex. 9 at 10. The Board tells teachers to emphasize ideological viewpoints—for example, that "not everyone is a boy or girl" and that "some people identify with both, sometimes one more than the other and sometimes neither," so students "shouldn't" "guess[]" but instead solicit "pronouns." Ex. 12 at 3. The Board directs teachers to frame disagreement with these ideas as "hurtful," *id.* at 2, 4; Ex. 1 at 15, and "[d]isrupt either/or thinking," Ex. 12 at 2, 4; Ex. 1 at 14. The School Board acknowledges that "[a]ny child … may come away from [the]

instruction with a new perspective not easily contravened by their parents." ECF 54 at 4.

The teachers' and parents' objections

The School Board's own elementary school principals objected. Ex. 1 at 15. They expressed concern that the Storybooks "support the explicit teaching of gender and sexuality identity," are "dismissive of religious beliefs," invite "shaming comment[s]" to students who disagree, and "[s]tate[] as … fact" things that "[s]ome would not agree" are facts. Ex. 9 at 8, 10. The principals also found it "problematic to portray elementary school age children falling in love with other children, regardless of sexual preferences." *Id.* at 8.

The Plaintiff Parents—among hundreds of others—objected for religious reasons. They teach their children that, as God's creations, everyone has equal dignity before God and is entitled to love, kindness, and respect. Ex. 4 ¶¶ 3, 5; Ex. 5 ¶¶ 4-5; Ex. 6 ¶ 8; Ex. 11 ¶ 7. They believe sexuality is a sacred gift to be expressed in marriage between a man and a woman for creating life and strengthening the marital union. Ex. 4 ¶¶ 6-8; Ex. 5 ¶¶ 7-9; Ex. 6 ¶¶ 6-7; Ex. 11 ¶¶ 5-6. They also believe that biological sex is a God-given, immutable reality integral to everyone. Ex. 4 ¶¶ 5-6, 9-12; Ex. 5 ¶¶ 6-7, 10-11; Ex. 6 ¶¶ 5, 7; Ex. 11 ¶ 7.

The Parents have a religious obligation to teach these principles to their children. Ex. 4 ¶¶ 4, 14; Ex. 5 ¶ 12; Ex. 6 ¶ 7; Ex. 11 ¶ 7. The Parents also believe that some of what is taught via the Pride Storybooks

is false. Ex. 4 ¶¶ 9, 19; Ex. 5 ¶ 14; Ex. 6 ¶¶ 5, 16; Ex. 11 ¶ 8. They disagree that a child's sex can be separated from his or her biology and that "gender" is a separate form of manipulable identity. Ex. 4 ¶ 9; Ex. 5 ¶ 14; Ex. 6 ¶ 5; Ex. 11 ¶ 5.

The Parents also believe that directing teachers to talk to children about sexuality, to invite children to question their gender identity, or to encourage young children to embrace gender transitioning is spiritually and emotionally harmful to a child's well-being. Ex. 4 ¶¶ 16-20; Ex. 5 ¶¶ 10-13; Ex. 6 ¶¶ 4-6, 11-12. And they have a religious obligation to shield their children from such discussions while at such a young and impressionable age. Ex. 4 ¶¶ 17-20; Ex. 5 ¶¶ 12-15, 20; Ex. 6 ¶¶ 7, 10-16; Ex. 11 ¶¶ 7-9, 13-14. Hundreds of parents in Kids First share these beliefs. Ex. 3 at 7-8 ¶¶ 32-33; *id.* at 11-12 ¶¶ 72-75.

The School Board's notice and opt-out ban

Throughout most of last year, the School Board honored parental opt-outs. Ex. 4 ¶ 27; Ex. 5 ¶¶ 16-17; Ex. 6 ¶¶ 16-18; Ex. 3 at 26-27 ¶¶ 164-74; Ex. 3 at 320. Indeed, on March 22, the Board issued a public statement that "[i]f a parent chooses to opt out, a teacher can find a substitute text for that student that … aligns with curriculum." Ex. 1 at 17. But the next day, it reversed course, announcing that, as of the school year beginning August 28, 2023 (*i.e.*, today), no further notice would be provided and no opt-outs tolerated. *Id.* Still, the School Board reaffirmed that students could continue to opt out of the "Family Life and Human Sexuality Unit

of Instruction" or "sex-ed," *Id.* at 17, even though it includes the same type of instruction for the same "inclusivity" reasons, ECF 23-1 at 19; ECF 47 at 9-10; ECF 51 at 1-3; ECF 57 at 2.

In fact, the School Board's opt-out ban applies *only* to the Pride Storybook mandate. Students are permitted to opt-out of any other instruction that violates their religious beliefs. Ex. 3 at 6 ¶ 18; *id.* at 61-62. When the Parents protested this disparate treatment, Board members responded by accusing the Parents of promoting "hate" and "a dehumanizing form of erasure," and by comparing them to "white supremacists" and "xenophobes." Ex. 1 at 21, 23, Ex. 3 at 27 ¶ 176.

The Parents' lawsuit

Stripped of the opt-out rights that apply to all other lessons, the parents sued and moved for a preliminary injunction. ECF 1; ECF 23; Ex. 3. After a hearing, the district court denied the Parents' motion. Ex. 1; Ex. 2. It held the Parents were unlikely to succeed because they cannot show "that the no-opt-out policy burdens their religious exercise." Ex. 1 at 29. Finding no burden, the district court presumed it did not need to address the Parents' other arguments. For the same reasons, the district court declined to enjoin the ban pending appeal. Ex. 1 at 59-60.

LEGAL STANDARD

An injunction pending appeal is appropriate when the movant shows (1) likelihood of success on the merits, (2) likelihood of irreparable harm absent relief, (3) that an injunction will not substantially injure the other

party, and (4) that relief is in the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). "The first two factors … are the most critical." *Id.* When irreparable harm exists and the other factors support an injunction pending appeal, a "serious legal question on the merits" is enough to satisfy the test. *Alabama Ass'n of Realtors v. Dep't of Health and Hum. Servs.*, 141 S. Ct. 2485, 2487 (2021). Here, all the factors warrant an injunction pending appeal.

ARGUMENT

I. The Parents are likely to succeed on the merits.

A. Strict scrutiny is triggered under *Yoder*.

Yoder upheld the "right of parents … to direct the [religious] education of their children," *Emp. Div. v. Smith*, 494 U.S. 872, 881 & n.1 (1990), allowing Amish parents to opt their children out of high school entirely. 406 U.S. at 214, 233. *Smith* discussed this as a "hybrid situation," where "the Free Exercise Clause [was] in conjunction with ... the right of parents ... to direct the education of their children." 494 U.S. at 881-82 (cleaned up); *see also John & Jane Parents 1*, 2023 WL 5184844, at *2 n.3 (parental liberty interest "coupled with a religious element" receives more than rational basis review) (citing *Herndon v. Chapel Hill-Carrboro Bd. of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996)). *Yoder* agreed that public schooling ranked "at the very apex" of state power and that the state had a "duty to protect children from ignorance." 406 U.S. at 213, 222. But that was insufficient to override Amish parents' concerns about the "exposure

of their children to a 'worldly' influence in conflict with their beliefs." *Id.* at 211.

The Parents have the same objection, though they seek more modest relief. They believe it is wrong to expose their elementary-age children to instruction that promotes values "in marked variance with [their] values and [their] way of life." *Id.* at 210-11. That alone triggers strict scrutiny. Holding otherwise would license denominational favoritism based on how "central" the burdened exercise is to one's faith. This is a forbidden inquiry. *Smith*, 494 U.S. at 886-87. Courts lack any administrable standard to claim, for example, that schooling on worldly success is a threat to the Amish faith, but schooling that contradicts the understanding of sex, marriage, and family of the Parents' faiths is not a comparable threat to handing on those traditions.

Similarly untenable is the Board's claim—credited by the district court—that the opt-out ban is not coercive. Ex. 1 at 51. There was no such claim in *Yoder*. Moreover, "substantial pressure" to modify one's beliefs is all that is required. *Thomas v. Rev. Bd.*, 450 U.S. 707, 718 (1981); *see also Sherbert v. Verner*, 374 U.S. 398, 400, 401 (1963) (pressure to forgo Sabbath observance from a state law that withheld unemployment benefits from anyone "able to work" imposed religious burden); *Carson v. Makin*, 142 S. Ct. 1987, 1998 (2022) (pressure to forgo religious schooling from subsidy available only at secular schools imposed religious burden); *Lovelace v. Lee*, 472 F.3d 174, 187-89 & n.2 (4th Cir. 2006) (accord). The

choice in those cases is akin to what the Parents face here: pressure to forgo shielding their children from premature exposure to sexuality and gender ideology as a condition of attending public school.

The district court misdescribed the Parents' religious beliefs as only barring their children from joining in "discuss[ing] topics that [their] religion prohibits" or "shar[ing]" their own "private information" in the classroom. Ex. 1 at 45. But the Parents object to their children's *presence* in situations that prematurely expose them to ideas about gender and sexuality in conflict with their religious beliefs. Ex. 4 at ¶¶ 14-18; Ex. 5 at ¶¶ 12-13; Ex. 6 at ¶¶ 10-12; Ex. 11 ¶¶ 7-9. Compelling children to sit in such discussion against their religious convictions is unlawful coercion. *See Lee v. Weisman*, 505 U.S. 577, 593 (1992) (unlawful coercion based on thirty-second prayer at graduation ceremony).

Nor is it relevant that the Parents "remain free" to keep teaching their children when home. Ex. 1 at 48; *see also* Ex. 1 at 46-47 & nn. 11, 12. Indeed, the district court's reasoning that "the vital aspect of religious toleration" is the parents' "right to counteract by their own persuasiveness" what "the state's educational system is seeking to promote" echoes precedent that the Supreme Court overturned eighty years ago. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 599 (1940) *overruled by W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). If that were still the rule, the state could do anything it wanted to

students, as long as parents could say different things in the home. It's not the rule that applied in *Yoder*.

Finally, this case is not an effort to "require the Government *itself* to behave in ways" the Parent's prefer. Ex. 1 at 38-39. This is not a challenge to including the Pride Storybooks in the curriculum. It is a challenge to the mandate that every student be forced to be read the Storybooks, without parental knowledge and without opportunity to opt out.

That distinction also helps explain why the School Board is wrong to rely on cases such as *Mozert*, *Fleischfresser*, and *Parker*. *See, e.g.*, Ex. 1 at 31. *Mozert* and *Fleischfresser* were curriculum challenges, not opt-out cases—a significant distinction from *Yoder*. And *Parker* blurred that line by reducing the Free Exercise trigger to "direct coercion." *Parker v. Hurley*, 514 F.3d 87, 105 (1st Cir. 2008). As explained, that is not the law. Pressuring the parents to give up their religious convictions as a condition of attending public schools is a substantial burden. *Supra* 10. Moreover, these cases also—wrongly—treat *Yoder* as *sui generis* and evade the rule that government actions that are neither neutral nor generally applicable must undergo strict scrutiny. In short, the School Board and district court, in admitted absence of guidance from this Court, both tethered their arguments to out-of-circuit cases that were badly reasoned and outdated.

As a result of the notice and opt-out ban, the Parents are being compelled against their religious convictions to leave their children in a

setting where they may be confused on issues of gender and sexuality and pressured to change their familial beliefs. That imposes a cognizable religious burden the same as for the parents in *Yoder*.

B. Strict scrutiny is triggered by lack of neutrality and general applicability.

"[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.'" *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421-22 (2022); *see also Fulton*, 141 S. Ct. 1868, 1876-77 (2021). Here, there are multiple reasons why the School Board's opt-out ban is neither neutral nor generally applicable, any of which triggers strict scrutiny.[2]

[2] In a one-sentence footnote, the district court relied on its erroneous *Yoder* analysis to dispatch all the Parents' separate Free Exercise claims. Ex. 1 at 51 n.14. This cursory treatment ignored that *Yoder* has long been understood as an "alternative" to the neutrality and general applicability analysis. *See Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527 (2020). "[T]here is no substantial burden requirement" for the latter claims. *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002); *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-47 (1993) (applying strict scrutiny without finding independent burden); *Fazaga v. FBI*, 965 F.3d 1015, 1058 (9th Cir. 2020) (strict scrutiny applies "regardless of the magnitude of the burden"); *Hartmann v. Stone*, 68 F.3d 973, 979 n.4 (6th Cir. 1995) ("need not demonstrate a substantial burden").

1. Allowing some opt-outs but not others triggers strict scrutiny under *Tandon*.

A government restriction on religion is not "generally applicable"—and thus triggers strict scrutiny—when its "categorizations" treat comparable activities differently. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). "[W]hether two activities are comparable" is "judged against the asserted government interest that justifies the regulation at issue." *Tandon*, 141 S. Ct. at 1296 (2021). If "*any* comparable secular activity" is treated "more favorably than religious exercise," strict scrutiny is required. *Id.*

Here, the School Board's opt-out policy is not generally applicable. Opt-outs are banned for the Pride Storybooks but permitted for comparable instruction provided in the sex-ed portion of health class. Ex. 1 at 17. Indeed, although the School Board's inclusivity standards apply to all "[i]nstructional materials used in MCPS schools," Ex. 8 at 5, it allows opt-outs anywhere *except* with respect to the Pride Storybooks. *See* ECF 42 at 20-21; Ex. 3 at 60-63.

This is true even though the inclusivity instruction has the same purpose—*i.e.*, is "comparable" under *Tandon*—regardless of which class it shows up in. For example, the School Board concedes that the Pride Storybooks were adopted to comply with Maryland's "Equity Regulation," ECF 42 at 2, which was adopted by the Maryland Board of Education in 2019 to ensure "educational equity" based on students "[g]ender identity

and expression" and "[s]exual orientation" (among other characteristics). COMAR §§ 13A.01.06.01(A) & .03(B)(2) & (5). That is the same regulation that prompted "Inclusiv[ity]' updates to the unit on Family Life and Human Sexuality in Health Education, Mem. from Superintendent to Members of State Board of Education at 2, 12 (June 25, 2019), https://perma.cc/6JCX-B7RC; *see also* ECF 51 (detailing School Board's inclusivity metrics for Health Education).

But although the instruction in both contexts is motivated by the same government interest, the opt-out policy does not apply equally. For example, a parent with a fifth grader is entitled to notice and opportunity to opt out of instruction on "male and female stereotypes" during the sex-ed portion of the health curriculum, ECF 51 at 1, but that same family cannot opt that same child out when teachers are encouraged to "[d]isrupt" traditional views on gender and sexuality during story hour, Ex. 12 at 4.

The School Board's only response is that the Storybook opt-out ban applies to both "religious and secular" requests, while the Health Education opt-outs are available for both. ECF 42 at 20-21. But "[i]t is no answer that [the School Board] treats some comparable secular" opt-outs "as poorly as" some "religious" opt-outs, or vice versa. *Tandon*, 141 S. Ct. at 1296. The disparate treatment shows a lack of general applicability and thus requires strict scrutiny. *Id.*

2. The School Board's discretion to provide notice and opt-outs triggers strict scrutiny under *Fulton*.

Fulton separately requires strict scrutiny because the no-opt-out policy results from the School Board's "sole discretion." 141 S. Ct. at 1878. Whenever the government "has in place a system of individual exemptions," the policy is not generally applicable, "regardless whether any exceptions have been given." *Id.* at 1877, 1879.

The School Board's discretion is apparent in its Religious Diversity Guidelines. Ex. 3 at 52. It is also apparent from the history of the Storybook opt-out ban. For almost the entire last year, opt-outs were permitted. Ex. 1 at 16-18. The overnight about-face alone is sufficient to trigger strict scrutiny. *Fulton*, 141 S. Ct. at 1882 (exceptions "undermine[] the [government's] contention that its … policies can brook no departures.").

To evade *Fulton*, the School Board claims that the new Storybook opt-out ban itself has "no exceptions." ECF 42 at 17. But *Fulton* rejected a government's attempt to obscure discretion by shifting the baseline. There, trying to conceal its discretion, the government parsed its contractual policy to claim that one exemption did "not apply" and another "on its face" did "not … allow for exceptions." 141 S. Ct. 1878-79. But the Court rejected those arguments, because the overall contract showed "the City's reservation of the authority to grant such an exception." *Id.* at 1879. Here too, the Religious Diversity Guidelines

uphold a "foundational" commitment to accommodation. Ex. 3 at 52. The School Board's decision to deny accommodations for the Storybooks while continuing them for the sex-ed portion of health class proves that discretion.

3. The School Board's religious targeting and animosity trigger strict scrutiny under *Lukumi* and *Masterpiece*.

By allowing opt-outs, then withdrawing them only for the Pride Storybooks after parents raised religious objections, the School Board unlawfully "targeted religious conduct for distinctive treatment." *Lukumi*, 508 U.S. at 546. That alone triggers strict scrutiny. *Id.*

Furthermore, some School Board members responded with religious animus. Defendant Harris accused the Parents of finding "another reason to hate another person," Ex. 1 at 21; Lynne Harris, Remarks at the MCPS Board Meeting, at 1:48:00-1:48:15 (Mar. 28, 2023), https://perma.cc/AW3T-DMJB, and promoting a "dehumanizing form of erasure" Ex. 3 at 339. She later accused a student who testified for opt-outs of "parroting" his parents' "dogma," Ex. 1 at 23; Em Espey, *Parents, students, doctors react to MCPS lawsuit targeting LGBTQ+ storybooks*, MoCo360 (June 2, 2023), https://perma.cc/5GD9-2YVQ, and compared a largely Muslim group of concerned parents to "white supremacists" and "xenophobes." *Id.* Another School Board member added that, "[y]es, ignorance and hate does exist in our community." Ex. 1 at 20; MCPS Business Meeting, at 38:34-40:40 (Jan. 12, 2023), https://perma.cc/T234-

559Q. No other members disavowed these statements, casting doubt on the School Board's "neutral and respectful consideration." *Masterpiece*, 138 S. Ct. at 1729-30.

When religious exercise is the object of government action, that at least requires strict scrutiny. But if the government hostility rises to the level of animus, the policy can be "'set aside' … without further inquiry"—that is, even without heightened review. *Kennedy*, 142 S. Ct. at 2422 n.1 (quoting *Masterpiece*, 138 S. Ct. at 1732).

C. The no-opt-out policy cannot survive strict scrutiny.

"A government policy can survive strict scrutiny only if it advances interests of the highest order and is narrowly tailored to achieve those interests." *Fulton*, 141 S. Ct. at 1881 (cleaned up). This only happens in "rare cases." *Lukumi*, 508 U.S. at 546. This isn't one of them.

1. The School Board lacks a compelling interest.

Strict scrutiny "obligate[s]" the School Board to show "a compelling interest in" withdrawing opt-outs for the Pride Storybooks. *Redeemed Christian Church of God v. Prince George's County*, 17 F.4th 497, 510 (4th Cir. 2021). This interest must be both "of the highest order" and "particular to the specific case." *Id.* This "more precise analysis" means "courts must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Fulton*, 141 S. Ct. at 1881 (cleaned up). The School Board can't meet this burden.

Here, the School Board asserts three interests: "fostering an inclusive educational environment," "reducing stigmatization," and providing a "learning environment free of discrimination." ECF 42 at 7, 25, 30; Ex. 1 at 58-59. At no point has the School Board done anything but state these interests "at a high level of generality," and that is insufficient. *Fulton*, 141 S. Ct. at 1881. Nor is that a surprise. As the Supreme Court held last term, such educational goals are "imponderable" and thus not "coherent for purposes of strict scrutiny." *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2166-67 (2023). Because "it is unclear how courts are supposed to measure any of these goals," schools would be free to continue burdening religion with no end in sight. *See id.* at 2166.

Moreover, none of these abstractions could be compelling here, because the School Board allowed opt-outs to the Pride Storybooks through the end of last school year, including to the Parents in this case. Granting exemptions, inexplicably withdrawing them, and retaining discretion over what instruction is subject to notice and opt-out, all "undermines the [School Board's] contention that its [no-opt-out-policies] can brook no departures." *Fulton*, 141 S. Ct. at 1882. Nor does such a categorical refusal comport with the "long history" and "continue[d]" practice of most states, Maryland included, which allow for opt outs (or opt ins) on all family life and human sexuality instruction. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1279 (2022); Ex. 3 at 14 ¶¶ 93-97; ECF 47 at

14 & n.2 (citing examples from Baltimore, Carroll, and Frederick Counties).

2. The policy is not the least restrictive means.

Finally, the School Board still cannot show that its obstinacy is narrowly tailored to achieve any compelling interest. "[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881. The School Board cannot meet that tall order.

First, the least restrictive means isn't shown when the government fails to explain why its "system is so different" from other jurisdictions that accommodate religious exercise. *Holt v. Hobbs*, 574 U.S. 352, 367 (2015). Here, almost all States that require or permit instruction on family life and human sexuality either allow for student opt-outs or require an opt-in. Ex. 3 at 14 ¶¶ 93-97. Other Maryland school districts acknowledge that state law requires opt-outs on all family life and human sexuality instruction "integrated" into any course—not just Health Ed. ECF 47 at 14 & n.2.

Moreover, claims of administrative inconvenience are the unsubstantiated "rejoinder of bureaucrats throughout history," not a credited reason to claim that burdening religion is the only way to achieve a compelling interest. *Holt*, 574 U.S. at 368; *see also* ECF 42 at 7. So even if the School Board's claims of administrative burdens in allowing opt outs had substance, it would still be "incumbent upon the [School Board]

to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Sherbert*, 374 U.S. at 407. The School Board has not done so.

II. The Parents easily satisfy the remaining injunction factors.

Irreparable harm. It's hard to imagine a harm more irreparable than the loss of childhood innocence. The School Board desires to "disrupt" the "thinking" of the Parents' children, Ex. 12 at 2, teaching them principles that "may not [be] easily contravened by their parents," ECF 54 at 4. An injunction pending appeal is necessary to restore the status quo ante "before the legality of that action has been conclusively determined." *Nken*, 556 U.S. at 434. Regardless, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Diocese of Brooklyn*, 141 S. Ct. at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Substantial harm and public interest. The last two injunction factors "merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. The School Board is not harmed by an injunction that returns the parties to the status quote ante. Ex. 1 at 26-27. Combine this with the Parents' having raised serious legal questions and shown irreparable harm to their children's innocence, and the standard is met. *Supra* 9.

CONCLUSION

This Court should grant the motion.

Dated: August 28, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record, in compliance with Federal Rule of Appellate Procedure 25 and Local Rule 25(a)(4).

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