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Brief of Amici Curiae Scholars for the Advancement of Children's Constitutional Rights and Students Engaged in Advancing Texas in Support of Respondents: *Mahmoud v. Taylor*

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No. 24-297

IN THE

Supreme Court of the United States

TAMER MAHMOUD, *et al.*,

Petitioners,

v.

THOMAS W. TAYLOR, *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* SCHOLARS FOR THE ADVANCEMENT OF CHILDREN'S CONSTITUTIONAL RIGHTS AND STUDENTS ENGAGED IN ADVANCING TEXAS IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI[1]

Amici are members of Students Engaged in Advancing Texas and United States legal scholars of children and the law, education law, family law, and anti-discrimination law.

Students Engaged in Advancing Texas is a nonprofit organization founded by young people to develop civic leadership and belonging and represents students of various faiths and identities who have an interest in the outcome of this case.

Amici draw this Court's attention to the constitutional harms that public school students and LGBTQ+ students and students with LGBTQ+ parents would bear should the Court grant Petitioners' injunctive relief.[2]

INTRODUCTION

This case is about more than parents' religious rights and a public school's opt-out policy. The outcome will materially impact the experience of young people in schools that the state compels them to attend and can create lifelong stigma for LGBTQ+ children and families. Petitioners' brief neglects young people's rights in public schools.

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1. In compliance with U.S. Sup. Ct. R. 37.6, this brief was not authored, in whole or in part, by counsel for either party, and no person other than Amici and Amici's counsel contributed monetarily to the preparation or submission of this brief.

2. "Student" and "child"/"children" are used interchangeably throughout to demonstrate the dual status of the persons of interest here—that they exist both at home and at school, and remain independent persons with thoughts, views, ideas, and opinions.

Schools have a constitutional mandate to foster the "robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection,"[3] and to guarantee LGBTQ+ students the equal protection of the law.[4]

Petitioners seek to compel Montgomery County Public Schools' (MCPS) to provide them with "notice" and "opt-out" procedures that will cause MCPS to suppress opposing viewpoints by children and single out a group for unequal treatment in violation of well-established First and Fourteenth Amendment principles.

Petitioners base their requested relief on objections to certain books in MCPS' curriculum. For instance, Petitioners object to *Love, Violet* because it depicts Violet presenting another girl with a Valentine's Day card, but do not object to other books in the MCPS curriculum like *Stella Diaz Has Something to Say* depicting Stella, a girl character, who stresses over writing a Valentine's Day card for a boy on whom she has a crush.[5]

They reject *Uncle Bobby's Wedding* because it spotlights a soon-to-be married uncle who just happens to be marrying a man, but raise no concerns about *Flora*

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3. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 740 (1969) (quotations and alterations omitted).

4. *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 190 (2021) ("America's public schools are nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.'").

5. *See* Curriculum, Elementary School English Language Arts, Montgomery Cnty. Pub. Schs., https://www.montgomeryschoolsmd.org/curriculum/english/es (visited Apr. 8, 2025) (listing *Stella Diaz* as part of the third grade English curriculum).

& Ulysses: The Illuminated Adventures, that portray Flora's discussions with her father about his divorce from her mother.[6]

Petitioners also misrepresent *Prince & Knight* as depicting two men who 'dance intimately' (when the illustration shows two male newlyweds embracing in front of family), but take no issue with MCPS curriculum books such as *Princess Hyacinth: the Surprising Tale of a Girl Who Floated*, portraying a child princess in her undergarments floating in the sky as her love interest attempts to tie her up with his kite.[7]

The demanded opt-out relief based on a scant record would result in targeted, discriminatory state action without "neutral and respectful consideration"[8] of the rights of all students. The differences between the books Petitioners target are based solely on the presence of LGBTQ+ characters, not on the nature of engagement between those characters, which in many ways is the same.[9] Following this Court's lead, "the way to stop discrimination" by the state on the basis of gender and

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6. *See id.* (listing *Flora & Ulysses* as part of the third grade English curriculum).

7. Pet'rs' First Am. Compl., *Mahmoud v. McKnight*, No. 8:23-cv-01380-DLB (D. Md. July 6, 2023), at ¶ 139; *see also* **Appendix A** hereto.

8. *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617, 634 (2018).

9. "The only difference between the storybooks and other ELA texts is that the storybooks include LGBTQ characters and their points of view." Resp't.Br.7.

sexual orientation "is to stop discriminating" on the basis of gender and sexual orientation.[10]

The Constitution protects Petitioners' rights to supervise children's book choices in their homes; however, countervailing constitutional considerations come into play when parents seek to compel or disrupt a public school district's curricular choices. Students' constitutionally protected rights to educational entitlements and experiences under the First and Fourteenth Amendments will be infringed if Petitioners' relief is granted. This brief highlights the constitutional harms to students that compel this Court to affirm.

SUMMARY OF ARGUMENT

Petitioners seek a mandatory injunction, compelling MCPS to provide them the ability to opt their children out of curricular materials involving LGBTQ+ characters and themes. Several hundred years of equitable jurisprudence require this Court to consider the public interest impacted by such relief. In the context of this case, one of the most significant public interest factors is the constitutional rights of public school children.

Petitioners' requested relief will infringe the First Amendment rights of public school children. Just as schools are constitutionally bound to respect the First Amendment rights of students so long as their behavior does not materially and substantially disrupt the work and discipline of the school, parents' First Amendment

10. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

rights cannot be wielded to materially and substantially disrupt the expression and learning of students at school. Requiring MCPS to provide a constitutionally mandated opt-out will result in MCPS' infringment of the constitutional rights of all students in the classroom. The compelled opt-out will also cause MCPS to engage in viewpoint discrimination and censor students' access to ideas in a learning environment. Petitioners do not object to equivalent books with heteronormative characters and stories, and so the demanded opt-out here will be applied because of the content of the stories, a flagrant First Amendment violation.

The First Amendment also provides public school students the right to access ideas and information, even those that their parents may consider objectionable. Only by access and exposure to a wide array of ideas and subjects do public schools fulfill their constitutional mandates to train good citizens for a diverse democracy. Similarly, Petitioners' demanded relief hinders the "marketplace of ideas" required in public schools to achieve that objective.

Further, Petitioners' requested relief would require MCPS to violate the Fourteenth Amendment's equal protection guarantee. A state sponsored opt-out would give legal effect to private biases that impermissibly discriminate on the basis of sex and LGBTQ+ stereotypes, causing LGBTQ+ children and their families psychic harm.

Petitioners seek their relief on the basis of their own constitutional rights, to the exclusion of all others, including the rights of those most impacted by a compelled

opt-out. Only by considering the rights of children, and balancing the rights of children, parents, and public education's role in a democracy, can this Court fully consider the panoply of interests at stake. This Court should affirm.

ARGUMENT

I. The Court Must Consider Students' Constitutional Rights.

Petitioners ask this Court for a mandatory injunction, exclusively focusing on whether MCPS has burdened *their* First Amendment religious rights. Injunctive relief is an "extraordinary remedy" for good reason.[11] "[I]t directs the conduct of a party, and does so with the backing of its full coercive powers."[12]

And so, a party seeking injunctive relief carries a heavy burden—it "must establish 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 tips in [its] favor, and that an injunction is ***in the public interest***."[13] In fulfilling their

11. *See, e.g.*, *Nken v. Holder*, 556 U.S. 418, 428 (2009) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

12. *Id.*

13. *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (emphasis added). Each of "[t]hese commonplace considerations applicable to cases in which injunctions are sought in the federal courts" must be considered in every case because they "reflect a 'practice with a background of several hundred years of history.'" *Starbucks Corp. v. McKinney*, 602 U.S. 339, 340 (2024) (quoting *Romero-Barcelo*, 456 U.S. at 313).

judicial obligation, "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."[14]

While the religious rights of parents are important, Petitioners' myopic perspective on public school curricula fails to "pay particular regard for the public consequences"[15] of their demanded relief that are adverse, significant, and of constitutional dimension. Children are neither functional nor physical constitutional extensions of their parents—they are independent, constitutional rights bearers.[16]

This case should not be decided in a vacuum, or in the echo chamber of *only* parents' constitutional rights. This Court must properly account for the constitutional rights and interests of those that would be *most* affected by the Petitioners' demand—public school children. In this case, concern for students' First and Fourteenth Amendment rights must be paramount.

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14. *Romero-Barcelo*, 456 U.S. at 313.

15. *Id.* at 312.

16. This Court has repeatedly affirmed that minors are not merely constitutional extensions of their parents—instead, they hold their own constitutional rights independent of their parents. *See Tinker*, 393 U.S. at 511 ("Students in school as well as out of school are 'persons' under our Constitution."); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."). Children's distinct constitutional rights include First Amendment freedoms. *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944).

II. Petitioners' Requested Relief Obfuscates Students' First Amendment Rights

This Court has clearly established the primacy of parental rights, but it has also recognized that those rights are not absolute. "[N]either rights of religion nor rights of parenthood are beyond limitation."[17] And, there are times when parents' religious rights must yield to countervailing considerations of public education and democracy. Amici challenge "the classic defense of parental rights"[18] as the exclusive way to protect young people from harm. Children's rights have also played an "integral role in ensuring the nation's fidelity to its democratic ideals."[19]

In the wake of the civil rights movement and this Court's landmark decision in *Brown v. Board of Education*,[20] children were deemed "persons, equally entitled with all others to be treated justly by the law, even if they are treated differently."[21]

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17. *Prince*, 321 U.S. at 166.

18. Anne C. Dailey & Laura A, Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1453 (2018).

19. Catherine E. Smith, *"Children's Equality Law" in the Age of Parents' Rights*, 71 KAN. L. REV. 539, 539 (2023). *See id.* at 545–50 (summarizing landmark children's rights cases, including *Oyama v. Cal.*, 332 U.S. 633 (1948), *Plyler v. Doe*, 457 U.S. 202 (1982), and *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

20. 347 U.S., at 493-95.

21. Barbara Bennett Woodhouse, *Children's Rights*, HANDBOOK OF YOUTH AND JUSTICE 377 (Susan O. White ed., 2001).

In the late 1960s, this Court explicitly recognized children's rights to freedom of speech and equal protection.[22] In this Court's early child-centered First Amendment jurisprudence, it was made clear that children do not shed their constitutional protections when they enter the schools they are legally compelled to attend.[23] To allow one group of parents to substantially disrupt curricular instruction via the proposed opt-out provisions will infringe students' First Amendment rights by fostering and facilitating viewpoint discrimination *and* by breaching their right to access ideas and information—two distinct facets of the First Amendment.[24]

These two First Amendment entitlements represent two sides of the same coin in the learning spaces of public schools: a protection from authority figures proscribing a particular view, and an affirmative duty of education

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22. *See In re Gault*, 387 U.S. 1, 13 (1967) ("Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.); *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (Children "are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."); *Tinker*, 393 U.S. at 506 ("[S]tudents [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

23. *See Tinker*, 393 U.S. at 506.

24. The amici represented in this brief have advocated for more protections for children's rights in education, highlighting the ways in which book bans and opt-out provisions for parents alone obfuscate students' constitutional rights. *See* Sarah Medina Camiscoli, *Teenage Rebels and the Demand for Due Process*, 16 Geo. J. of Modern Critical Race Theory 27, 29 (2024) ("The actions of one person alone, challenging a book in a school library, should not burden and restrict the education of 90,000 students in my district without due process.") (internal quote omitted).

to prepare students as learners, thinkers, and engaged citizens. These imbricated yet discrete First Amendment rights are both infringed by the opt-out provisions Petitioners seek.

A. Petitioners' Requested Relief Facilitates Viewpoint Discrimination and Compels Students' Silence

As this Court has reiterated, "our precedents remind us that the First Amendment's protections extend to teachers and students, neither of whom shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[25] Akin to book bans, opt-outs flout core First Amendment principles because they lack legitimate pedagogical purpose and give parents *absolute* control over whether a student may engage with a topic—without any input from students themselves. "[S]chool officials cannot suppress 'expressions of feelings with which they do not wish to contend.'"[26] And the demanded opt-out does exactly that; it applies only to books reflecting certain viewpoints—subjects such as same-sex relationships, LGBTQ+ families, or other characters or plots that diverge from a heterosexual relationship or family.

When Petitioners demand the ability to opt their child out of exposure to books with LGBTQ+ characters, families, or themes, they are asking the state to prohibit their child's speech based on their own viewpoint that

25. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022) (quotations and citations omitted).

26. *Tinker*, 393 U.S. at 511 (citation omitted).

these themes are objectionable.[27] Removal of the child from the classroom inhibits the child's engagement with teachers and other students, forcing the child's absence and silencing the child's views. It also has the effect of compelling the child to adopt the parents' viewpoints on these ideas and topics through state action, compelling the child "to 'utter what is not in [her] mind' about a question of political and religious significance."[28]

Petitioners' requested relief thus has the simultaneous effect of using the state to compel children in public schools to adopt the parents' speech and to compel children's silence on certain topics, irrespective of whether the child agrees or disagrees with their parents' views and on whatever basis. "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[29] Just as the state may not compel the student to accept a viewpoint on LGBTQ+ issues, parents may not use the state, via a state-administered opt-out right, to (1) compel adoption of their views to the exclusion of others' views or (2) remove the child from being exposed to certain materials and therefore silence the child's thoughts and ideas about the materials.

Petitioners' opt-out requirement would further result in MCPS engaging in viewpoint discrimination,

27. Anne C. Dailey, *In Loco Republicae*, 133 Yale L.J. 419, 466 (2023).

28. *303 Creative LLC v. Elenis*, 600 U.S. 570, 596 (2023) (quoting *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 634 (1943)).

29. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

an "egregious form of content discrimination."[30] The government generally cannot censor or suppress speech simply because of its ideology or views.[31] That is true even if those ideas might be considered "offensive or disagreeable."[32] As this Court has explained, "[g]iving offense is a viewpoint."[33]

In *303 Creative*, this Court found Colorado's application of its public accommodation law unconstitutional because "Colorado seeks to compel [] speech in order to 'excis[e] certain ideas or viewpoints from the public dialogue.'"[34] In its majority opinion, this Court stated:

> In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance. . . . But, as this Court has long held, ***the opportunity to think for ourselves and to express those thoughts freely*** is among our most cherished liberties and part of what keeps our Republic strong. Of course, abiding the Constitution's commitment to the freedom of speech means all of us will encounter ideas we consider unattractive,

30. *Id.*

31. *Island Trees Sch. Dist. v. Pico*, 457 U.S. 853, 870-71 (1982) (holding that the "Constitution does not permit the official suppression of ideas" based upon "narrowly partisan or political" interests).

32. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

33. *Matal v. Tam*, 582 U.S. 218, 220 (2017).

34. 600 U.S. at 588 (citation omitted).

> misguided, or even hurtful. But tolerance, not coercion, is our Nation's answer. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands.[35]

Here, "tolerance, not coercion" must be the answer. Within the classroom, students are in a public space for learning where they must be free to "think and speak as they wish"—not as certain parents may demand through compelled government action. On that basis, the Petitioners advocate for this Court to compel MCPS to engage in impermissible viewpoint discrimination based on the objections of parents.

Further, the desired opt-out requirement allows parental censorship of on-campus activities, which for students is the equivalent of state censorship of off-campus speech. As in *Mahanoy Area Sch. District v. B. L.*, the distinctions between on- and off-campus speech are important First Amendment guardrails.[36] In *Mahanoy*, this Court held that while public schools have a special interest in regulating some off-campus speech in addition to on-campus speech, that regulation must stem from special interests that are enough to overcome a student's interest in free expression.[37] The Court noted that "from the student speaker's perspective, regulations

35. *Id.* at 602-603 (internal citations and quotations omitted, (emphasis added).

36. 594 U.S. at 189–90.

37. *Id.*

of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all."[38]

Under *Mahanoy*'s reasoning, a constitutionally compelled opt-out procedure dictated by parents prevents the student from engaging with speech at home and at school. In other words, the student may never be able to "engage in that kind of speech at all."[39]

Schools do have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others[.]"[40] The constitutionally mandated parental opt-out requested by Petitioners goes beyond regulation to pure censorship. It is not the content of the curriculum, but the viewpoint-discriminatory removal of students itself that materially disrupts classwork, invading the First Amendment rights of young people.

Engaging with a range of viewpoints in the classroom, even some that parents find offensive, holds value in the marketplace of ideas; indeed, it is a quintessential aspect of that marketplace. The presence of materials that some

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38. *Id* at 181.

39. *Id.* at 190. *See also* Dailey, *In Loco Republicae*, at 133 ("Outside of school, children may exercise their free speech rights only at the pleasure of their parents-which is to say they effectively have few or no actual expressive freedoms.")

40. *Tinker*, 393 U.S. at 513.

students may find offensive within a classroom provides all students with another viewpoint and contributes to the "robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection."[41] State facilitated viewpoint discrimination cannot be allowed to so blatantly infringe students' constitutional rights. This public interest must be accounted for in this Court's determination of whether the denial of injunctive relief was proper.

B. Petitioners' Demanded Relief Would Violate Students' Rights to Access Ideas and Information

This Court has also recognized that First Amendment protections extend beyond individual expression to encompass "affording the public access to discussion, debate, and the dissemination of information and ideas."[42] Critically, "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom."[43] And, those rights should not be limited via parents' administrative fiat. America's public institutions are designed to educate students and help them achieve adulthood by receiving a wealth of ideas and information, about which some of the students may have different opinions. Students are not "closed-circuit recipients of only that which the State chooses to communicate."[44]

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41. *Id.* at 512 (quotations and alterations omitted).

42. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978), quoted in *Pico*, 457 U.S. at 866.

43. *Pico*, 457 U.S. at 867 (emphasis omitted).

44. *Tinker*, 393 U.S. at 511.

This Court's plurality in *Pico* provides the analytical framework for cases involving students' constitutional right to access ideas and information. In *Pico*, a school removed certain books from libraries that it found to be "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[45] While recognizing the school's wide-ranging discretion over curricular choices, this Court emphasized that this discretion must comport with First Amendment demands:

> [W]e think that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library. Our precedents have focused 'not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.' *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783[] (1978). And we have recognized that 'the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. *Griswold v. Connecticut*, 381 U.S. 479, 482[] (1965). [. . .] [T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.[46]

The *Pico* school sought to remove optional learning materials from the school library; it was not seeking

45. 457 U.S. at 857 (internal quote omitted).

46. *Id.* at 866–67 (emphasis omitted).

to infringe students' access to certain books within a compulsory curriculum in the classroom, like Petitioners' relief would do here. Students' ability to access *optional* books in a library is important. But students' access to certain books within the *required* curriculum enjoys even greater First Amendment protection. MCPS has the authority to curate curriculum, and students have a complementary right to access the compulsory curriculum established by it.[47] The First Amendment protects students from having certain ideas and information suppressed by state action compelled by their parents, overriding MCPS' long-respected authority over curricular decisions.[48] And if Petitioners' relief is granted, MCPS may instead simply remove all LGBTQ+-related materials from all curricula to avoid further disputes or litigation, suppressing access to a particular set of materials for all students entirely.

The curricular discretion of schools is derivative of their "duty to inculcate community values."[49] MCPS has established its community values as "provid[ing] for educational equity and ensur[ing] that there are no obstacles to accessing educational opportunities for any student,"[50] including by having LGBTQ+-inclusive storybooks in its curriculum. Students' First Amendment

47. *Id.* at 863.

48. *Id.* at 859–60; *Epperson v. Arkansas*, 393 U.S. 97, 107–09 (1968); *Griswold*, 381 U.S. at 482; *Meyer v. Nebraska*, 262 U.S. 390 (1923); *see also The New Law of the Child*, 127 YALE L.J. at 1453 ("Parental rights should never automatically trump the interests of all others—most importantly, those of children themselves").

49. *Pico*, 457 U.S. at 869.

50. MD Code Regs. 13A.01.06.01.(B).

rights to access this curriculum should not be infringed by a required, state-sponsored opt-out that allows any parents to cherry-pick pieces of the curriculum their children will be able to access.

Students whose parents exercise this state-sponsored opt-out will be excluded from exposure to LGBTQ+-inclusive materials, without the students' input. Parental disagreement with curriculum content (based on religious beliefs or otherwise) should be addressed in off-campus family discussions, not by removing children from educational experiences to which they are constitutionally entitled. Reading a book does not compel students to accept, adopt, or believe specific ideas or values; it simply exposes them to perspectives they can evaluate for themselves and from which they may develop their own opinions.[51]

The First Amendment operates to ensure a student's constitutional right to an educational experience that functions as a true marketplace of ideas. Infringing on public school children's First Amendment rights to access and contemplate ideas, even if their parents may object to them, diminishes both the educational experience to which they are constitutionally entitled and their capacity for meaningful engagement as good citizens that public education is established to foster and flourish.[52]

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51. *But see 303 Creative LLC v. Elenis*, 600 U.S. 570, 602–03 (2023) (holding Colorado "seeks to force an individual to 'utter what is not in [her] mind' about a question of political and religious significance" (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943)).

52. *See generally Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

C. A "Marketplace of Ideas" that Prepares Students to Participate in Democracy Requires Conflicting Perspectives.

This Court has consistently recognized the importance of exposure to diverse perspectives in public education: "'[t]he Nation's future depends upon leaders trained through wide exposure to [the] robust exchange of ideas'"[53] to prepare them to participate as citizens in a democracy.[54]

Thus, public schools have a constitutional mandate to protect the expression of ideas in schools, even more so when those ideas are unpopular: "[S]chools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, "I disapprove of what you say, but I will defend to the death your right to say it."[55]

Participating effectively in a democracy requires the ability to hear new concepts and ideas that may differ from one's own and schools offer children a safe learning environment in which to practice this skill. To grant Petitioners their demanded relief would have the effect of excluding certain students from the classroom on the basis of the curriculum's content, depriving all students of the opportunity to practice the most fundamental

53. *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

54. *Brown*, 347 U.S. at 493; *see also* Catherine E. Smith & Susannah W. Pollvogt, *Children as Proto-Citizens: Equal Protection, Citizenship, and Lessons from the Child-Centered Cases*, 48 U.C. Davis L. Rev. 655 (2014).

55. *Mahanoy*, 594 U.S. at 190.

democratic skill. Such selective access to curriculum would fundamentally undermine public schools' educational mission to prepare students for citizenship in a diverse society.[56]

The presence of materials within a classroom that some in society may find offensive provides all students with another viewpoint. The public has a significant interest in furthering the development of this "marketplace"[57] and that interest must be factored into the relief requested by Petitioners.

III. Petitioners' Demanded Relief Would Give Legal Effect to Sex Discrimination and LGBTQ+ Stereotyping, Violating Children's Equal Protection Rights

To force MCPS to provide Petitioners an opt-out from LGBTQ+ character-based books may result in removal of the books and threaten well established equal protection principles that prohibit giving indirect legal effect to constitutionally impermissible private biases.[58] "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them

56. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (noting schools' role in preparing students for citizenship and the privileges and responsibilities of adult life); *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (recognizing that exposure to diversity "better prepares students for an increasingly diverse workforce and society" (citation omitted)).

57. *Tinker*, 393 U.S. at 512 (quoting *Keyishian*, 385 U.S. at 603).

58. Resp't.Br.2 ("MCPS tried to accommodate parents requests to opt their children out of class when the storybooks were used until doing so became unworkably disruptive.").

effect."[59] This Court has addressed this prohibition in several contexts, including LGBTQ+ cases.[60]

In the seminal case *Palmore v. Sidoti*,[61] this Court struck down a state family court's order transferring custody of a White couple's young child from the mother to father because of the mother's marriage to a Black man.[62] This Court reversed the lower court's reliance on a segment of society's private, biased views of interracial relationships, proclaiming that while "the Constitution cannot control such prejudices [] neither can it tolerate them."[63] The elimination of racial discrimination by the State is a core purpose of the Fourteenth Amendment: the law must not give credence to private views in direct contravention of the Amendment's objectives.[64]

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59. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

60. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) ("The City may not avoid the strictures of the [Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic."); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."); *Bowers v. Hardwick*, 478 U.S. 186, 212 (Blackmun, J., dissenting) ("A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. "The Constitution cannot control such prejudices, but neither can it tolerate them." (quoting *Palmore*, 466 U.S. at 433)).

61. *Palmore*, 466 U.S. 429.

62. *Id.* at 430.

63. *Id.* at 433.

64. *Id.* at 432 ("This raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race.").

Petitioners' deeply held religious beliefs are, of course, protected by the First Amendment. But the Fourteenth Amendment prohibits state action that gives legal effect to private views—even religious ones—that are contrary to existing constitutional anti-discrimination mandates.[65]

This Court has echoed similar concerns about giving legal effect to private beliefs contrary to constitutional dictates against the LGBTQ+ community.[66] In *Obergefell v. Hodges*, this Court acknowledged that "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted,"[67] and recognized same-sex couples' fundamental right to marry. In doing so, *Obergefell* was clear that:

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises . . . . But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion. . . .[68]

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65. *Id.* at 433 (" Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

66. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."); *Bowers v. Hardwick*, 478 U.S. 186, 212 (1986) (Blackmun, J., dissenting).

67. *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015).

68. 576 U.S. at 672. This Court has also struck down other laws, including those supported by sincerely held moral and religious

The threshold inquiry is not about the source of private belief; the issue is once that belief violates the Fourteenth Amendment, the government may not give it legal effect.

In this case, forcing MCPS to provide the demanded opt-out gives legal effect to private beliefs that violate constitutional mandates prohibiting sex discrimination and engages in pernicious LGBTQ+ stereotyping. Allowing the exclusion would also harm children in the LGBTQ+ community by erasing representations of themselves or their families in public schools.

A. The Demanded Opt-Out Would Give Legal Effect to Impermissible Sex Discrimination

Granting Petitioners' relief because of their viewpoint (religiously based or otherwise) would stamp the government's imprimatur on impermissible sex classifications, a practice that carries a "strong presumption" of "invalid[ity]" under Equal Protection guarantees.[69]

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike."[70] It protects against discriminating against

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beliefs, that singled out or excluded LGBTQ+ people from the Fourteenth Amendment's strictures. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 635 (1996).

69. *J.E.B. v. Alabama*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring).

70. *Cleburne Living Ctr.*, 473 U.S. at 439.

persons "on the basis of"—that is "because of"—certain characteristics.[71] The question of whether state action violates the Equal Protection Clause by discriminating because of one's sex is essentially whether, "but for" sex, the state action would have occurred.

In the context of discriminating between LGBTQ+ and non-LGBTQ+ classes, an Equal Protection violation is unavoidable. Indeed, in *Bostock v. Clayton County*, this Court determined that it is impossible to discriminate against homosexual or transgender people without engaging in sex discrimination.[72]

Petitioners object to books with LGBTQ+ characters, but not books with heteronormative or cisgender characters with similar storylines. Should MCPS be forced to provide an opt-out, in turn resulting in its inability to provide LGBTQ+ books in its curriculum, the differential treatment by the state in the provision of books amounts to impermissible sex discrimination.

Indeed, the sole cause for excluding the books at issue is because of religious beliefs that hold that legitimate relationships are only between men and

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71. *See J.E.B.*, 511 U.S. at 142 ("When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.").

72. 590 U.S. 644, 651–52 (2020) ("An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.").

women.[73] *Bostock*'s reasoning should apply with equal or greater force in this context because "but for the sex" of one of the characters, there would be no objection.[74] In other words, if Violet were a boy (not a girl), the book *Love, Violet* would not be one of the five challenged books. Allowing the removal, voluntarily or by parentally forced administrative decree, of books with LGBTQ+ content because of private beliefs here gives legal effect to sex discrimination.

B. The Demanded Opt-Out Would Give Legal Effect to Impermissible LGBTQ+ Stereotyping

Granting Petitioners' relief reduces LGBTQ+ people to a narrow, single dimensional lens focused solely on

73. *Id.* at 656 (as long as "plaintiff's sex was *one* but for cause [of the challenged employment] decision, that is enough to trigger the law" (emphasis added)).

74. Erwin Chemerinsky, Chemerinsky: Gorsuch Wrote His "Most Important Opinion'" in SCOTUS Ruling Protecting LGBTQ Workers, ABA J. (July 1, 2020), https://www.abajournal.com/news/article/chemerinsky-justice-gorsuch-just-wrote-his-most-important-opinion ("It is possible that the court will say Bostock was just about interpreting the language of Title VII, and that it is different under equal protection. But there seems to be little basis for such a distinction once the court held that a prohibition against sex discrimination includes outlawing discrimination based on sexual orientation and gender identity."); *Bostock*, 590 U.S. at 733140 S. Ct. at 1783 (Alito, J., dissenting) ("Under our precedents, the Equal Protection Clause prohibits sex-based discrimination unless a 'heightened' standard of review is met . . . [] By equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjection subjecting all three forms of discrimination to the same exacting standard of review." (internal citations omitted)).

sexual conduct that is not equally applied to heterosexual or cisgender people. This harkens to an era in which pernicious negative LGBTQ+ stereotypes reigned. It is this one-sided view of LGBTQ+ people and state action that has endorsed it that is at the heart of the prohibitions of the Fourteenth Amendment. It is "axiomatic" that discrimination that "serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about" a group of people offends the equal protection guarantee.[75]

Petitioners consistently equate LGBTQ+ characters, families, or themes exclusively as offensive to their religious teaching about sexual intercourse. For example, Petitioners Mahmoud and Barakat's religious grounds for their objections are because "they have 'a sacred duty' to teach their children their faith, 'including religiously grounded sexual ethics."

Petitioner Morrisons 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."[76] They believe "their religious obligation is 'pressured'" by the story books because they "conflict with their religious understandings of marriage, sexuality, and gender."[77]

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75. *J.E.B.*, 511 U.S. at 131.

76. *Mahmoud v. McKnight*, 688 F. Supp. 3d 265, 276 (D. Md. 2023).

77. *Id.*

Petitioners repeatedly object to the use of LGBTQ+ books, using terms like "sexual health," "sexual ethics," and "human sexuality." But they fail to offer such sexually laden interpretations of almost identical heterosexual characters, families, or themes, and do not otherwise explain how these books are about sexual health or similar topics.[78] In fact, Petitioners go so far as to argue that books with LGBTQ+ characters are on par with the school district's "family life and sexual health curriculum," even as the school district is clear that "the storybooks are not sex-education materials."[79]

If the sole interpretation of a book's simple representation of a "boy" and "girl" or a "mom" and "dad" was always and unequivocally equated with sexual conduct instead of the vast expanse of multifaceted emotional, experiential, and relational aspects of life and the human condition, one could imagine the offense. For example, Petitioners claim that the book *Born Ready* would require their children to speak about the body parts of the main character.[80] While the main character happens to be transgender, there is no mention of his body. In fact, the book simply celebrates his life in a loving

78. *Id.* at 274 ("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.'"); *id.* at 274-75 ("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.").

79. Resp't.Br.2.

80. Resp't.Br.11.

home, a supportive school, and an engaging martial arts practice where he excels. The implication that the young boy's body is the center of conversation, instead of his full life and gifts as a young person, reflects a stereotype about transgender people.

Neither the majority nor a "fraction of the body politic" is permitted to "use the power of the state to enforce [its private] views on the whole of society through operation of . . . law," let alone to flout hallowed Fourteenth Amendment tenets. But the demanded, state sponsored opt-out here gives legal effect to impermissible stereotypes, in direct violation of those tenets.

C. Excluding LGBTQ+ Books Based on Impermissible Private Views Harms LGBTQ+ Children in Public Schools

It is important for children in the LGBTQ+ community to see representations of themselves and their families in public schools, which provide "the most important function of state and local governments"[81] and serve as the "nurseries of democracy."[82] To effectively participate in democracy, one must see themselves as an equal member in it.[83] Public schools must therefore not "singl[e] out" a group of children in ways that create a "lifelong . . . stigma."[84]

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81. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

82. *Mahanoy Area Sch. Dist.*, 594 U.S. 180, 190 (2021).

83. *Brown*, 347 U.S. at 493; *see also* Catherine E. Smith & Susannah W. Pollvogt, Children as Proto-Citizens: Equal Protection, Citizenship, and Lessons from the Child-Centered Cases, 48 U.C. Davis L. Rev. 655 (2014).

84. *Plyler v. Doe*, 457 U.S. 202, 238–39 (1982) (discussing treatment of students as second class citizens); *see also Brown*, 347 U.S. 483.

This Court has repeatedly acknowledged that discrimination causes psychic harm to children.[85] In *United States v. Windsor*, this Court highlighted how the "differentiation" of families based on the sex of parents "humiliates tens of thousands of children now being raised by same-sex couples."[86]

To exclude LGBTQ+ books in the curriculum may humiliate or embarrass children in LGBTQ+ communities who may never see themselves or their families reflected in the panoply of familial images in children's books; such rejection would also be confusing and painful.[87]

Along with inflicting psychic harm, excluding books with LGBTQ+ characters would impact the integrity of LGBTQ+ families by interfering with a child's relationship to or association with their parents and siblings.[88] As the

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85. *Obergefell v. Hodges*, 576 U.S. 644, 646; *see also Brown*, 347 U.S. at 494; *Plyler*, 457 U.S. at 222 (listing psychological harms to children excluded from school enrollment because of their parents' undocumented status); *see also* Tanya Washington, *In* Windsor*'s Wake: Section 2 of DOMA's Defense of Marriage at the Expense of Children,* 48, Ind. L. Rev. 1, 64 (2014) ("Children in same-sex families deserve to be protected from, not victimized by, harmful and discriminatory governmental action.").

86. 570 U.S. 744, 772 (2013).

87. *Romer v. Evans*, 517 U.S. 620, 635 (1996) ("A State cannot so deem a class of persons a stranger to its laws."). The exclusion of young people in the LGBTQ+ community has especially deleterious effects on our democracy. *See generally* Catherine E. Smith, *The Adult Rights Bearing Archetype and How it Stifles Young People's Equal Protection*, 19 Duke J. of Con. L. & Pub. Policy 139 (2024).

88. *See* Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of*

Windsor Court observed, this kind of discrimination "makes it even more difficult for [] children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[89]

Children are most impacted by the environments where they spend significant time, like school. Discriminatory exclusion of LGBTQ+ content in a public school may send a message to students that identify as part of that community—and to the world at large—that they and their families are suspect and inferior. Moreover, these very young children may internalize a harmful message that they, as individuals, are "less worthy" than other people. The interests of LGBTQ+ students must be considered and, when that is properly done, denial of injunctive relief to Petitioners was proper.[90]

CONCLUSION

Over seventy years ago, this Court recognized public education as the cornerstone of training good stewards of our democratic, pluralistic society:

Exclusion—Legitimacy, Dual-Gender Parenting, and Biology, 28 Law & Ineq. 307, 309 (2010) ("An underdeveloped area of sexual orientation and gender identity scholarship is the legal rights and remedies of those who face discrimination because of their relation to or association with gays and lesbians, including children [in] same-sex families.").

89. 570 U.S. at 772.

90. *Romero-Barcelo*, 456 U.S. 305, 313 (1982).

> Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.[91]

Petitioners' requested relief undermines MCPS' authority over curricular choices to use its discretion to prepare students for "good citizenship" in contravention of the most fundamental and cherished American ideals by seeking to suppress certain viewpoints and exposure to ideas and deny LGBTQ+ children the equal protection of laws. And, they seek to do so based on the "scant record" of any burden on their religious rights,[92] and without any consideration of the rights of students and the role of public schools. This Court should not mandate a practice of coercion instead of tolerance.

"An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."[93] When due regard is given to the public interest in Petitioners' request—that is, the constitutional rights of students—the Fourth Circuit's decision was not an abuse of discretion subject to reversal. This Court should affirm.

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91. *Brown*, 347 U.S. at 493.

92. Pet.App.9a.

93. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2009).

Respectfully submitted,

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APPENDIX

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APPENDIX A* — COMPARISON OF CURRICULAR MATERIALS

Petitioners object to the *Prince & Knight*, which features two male characters, sharing a celebratory embrace at their wedding, supported by family.

Petitioners do not object to books of similar grade level with similar content such as *Princess Hyacinth: the*

Surprising Tale of a Girl Who Floated, portraying a child princess in her undergarments floating in the sky as her love interest attempts to tie her up with his kite.*

*. *See* Pet.App.425a (excerpt from *Prince & Knight*); Curriculum, Elementary School English Language Arts, Montgomery Cnty. Pub. Schs., https://www.montgomeryschoolsmd.org/curriculum/english/es (visited Apr. 8, 2025) (listing *Princess Hyacinth* as part of the kindergarten English curriculum).