

BEYOND THE CURRICULUM: FREE EXERCISE LIMITS ON PUBLIC SCHOOL REGULATION AFTER *MAHMOUD V.* *TAYLOR*

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*Religious and parental rights are ascendant in public schools following the Supreme Court’s decision *Mahmoud v. Taylor* and its interim docket order *Mirabelli v. Bonta*. *Mahmoud* focused on free exercise opt-out claims as they relate to the curricular content taught in public schools, and *Mirabelli* expanded that rule to reach the gender transition non-disclosure policies adopted by some of those schools. This Note considers the extent to which *Mahmoud* and *Mirabelli* should apply to a school’s “soft curriculum”: the noncurricular influences that schools and teachers have on students in developing their democratic morals and character.*

*This Note argues that while *Mahmoud* is justified on its facts, a broad reading of that decision can interfere with soft curricular policies that further schools’ compelling interests. This Note focuses on two such interests: a school’s interest in preventing the creation of second-class status among its community members and a school’s interest in fostering an environment that preserves democratic social cohesion. This Note argues that when soft curricular policies—particularly, teacher assignments and anti-bullying policies—are narrowly tailored to serving those interests, courts should not grant free exercise opt-out requests.*

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INTRODUCTION

Wendy Weaver, a teacher at Spanish Fork High School in Utah, worked as the school’s volleyball coach and led the team to the state championships on four occasions.¹ Even though she was well beloved by students,² this meant little when the Spanish Fork community—a small, majority-Mormon town—discovered that she was a lesbian.³ Parents accused Weaver of “direct[ing] and encourag[ing] a network of physically affectionate female volleyball players” and of violating teacher certification standards.⁴ The district relieved Weaver of her duties as coach and told her to avoid discussions about her sexual orientation inside or outside the classroom.⁵ Weaver took the school to federal court, winning an equal protection suit against it.⁶

Undeterred, the parents of Spanish Fork sought to hold her to account in Utah state court, relying on a law regulating teacher conduct.⁷ They claimed that since they were taxpayers paying Weaver’s salary, they could contest her suitability to teach.⁸ Since Weaver was a teacher who

1. *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1280 (D. Utah 1998).

2. Joe Costanzo & Edward L. Carter, *Nebo School District Abuzz Over Volleyball Coach’s Lawsuit*, *Deseret News* (Oct. 22, 1997), <https://www.deseret.com/1997/10/22/19341239/nebo-school-district-abuzz-over-volleyball-coach-s-lawsuit/> [https://perma.cc/J9X8-TS6H] (reporting that one former student described Weaver as “just a great person” and a “role model” for the volleyball players on the team (internal quotation marks omitted) (quoting Helen Hjorth, volleyball player, Brigham Young Univ.)).

3. *Weaver*, 29 F. Supp. 2d at 1281.

4. Kirsten Sorenson, *2 Sides Seek Hearing on Weaver*, *Deseret News* (Dec. 18, 1998), <https://www.deseret.com/1998/12/18/19419251/2-sides-see-hearing-on-weaver/> [https://perma.cc/T7N9-NKLZ].

5. *Weaver*, 29 F. Supp. 2d at 1281.

6. *Id.* at 1289–90.

7. *Miller v. Weaver*, 66 P.3d 592, 597–98 (Utah 2003).

8. *Id.* at 597–98, 600.

did not conform to the community's values and standards, the parents worried that their children would think that morality was not important.⁹ Weaver's attorney retorted that if "[a]nytime the mere presence of someone offends someone's rights, [that means] you have to start providing different access to facilities It goes right back to separate but equal."¹⁰ The Utah courts found that the law the parents relied on did not give them a private right of action, and the parents lost.¹¹

Twenty-five years later, the parents of Spanish Fork may have had better luck. That is because of *Mahmoud v. Taylor*, a decision in which the Supreme Court credited the free exercise claims of parents seeking to shield their children from some aspects of public education.¹² While that decision was limited to opting children out of certain aspects of classroom instruction, it seems to herald a new era in which religious parents are able to effectively veto whole swaths of public school policies.¹³ And only eight months after *Mahmoud*, the Supreme Court stretched its opinion even further in an interim docket order, *Mirabelli v. Bonta*.¹⁴ That order expanded *Mahmoud* in two ways. First, it clarified that *Mahmoud* applies to noninstructional school policies, like those that allow children to use their preferred names and pronouns at school without parental notification.¹⁵ Second, it expanded *Mahmoud* beyond the free exercise context by recognizing that *any* parent, religious or nonreligious, has a substantive due process right to opt out of certain educational policies.¹⁶

Parents have taken up the invitation, wielding *Mahmoud* to challenge a variety of noninstructional school policies that allegedly infringe on religious or parental prerogatives. These include preferred pronoun policies¹⁷ and mandatory vaccination policies.¹⁸ If requirements like these

9. Weaver, *Opposing Lawyer in Eye of the Storm*, Deseret News (Jan. 25, 1998), <https://www.deseret.com/1998/1/25/19359608/weaver-opposing-lawyer-in-eye-of-the-storm/> [https://perma.cc/QRL4-9UNP] (quoting Matt Hilton, att'y for Spanish Fork parents).

10. Jeffrey P. Haney, *Weaver Lawsuit Is Set for Dismissal—But Legal Battle Is Far From Over*, Deseret News (Mar. 24, 1999), <https://www.deseret.com/1999/3/24/19436168/weaver-lawsuit-is-set-for-dismissal-but-legal-battle-is-far-from-over/> [https://perma.cc/4F73-JETM] (internal quotation marks omitted) (quoting Rich Van Wagoner, att'y for Wendy Weaver).

11. *Miller*, 66 P.3d at 600.

12. 145 S. Ct. 2332 (2025).

13. *Id.* at 2395 (Sotomayor, J., dissenting) ("In effect . . . the majority's new rule will hand a subset of parents a veto power over countless curricular and administrative decisions.").

14. 146 S. Ct. 797 (2026) (per curiam).

15. *Id.* at 802.

16. See *id.* at 803 ("[California's] policies likely violate parents' rights to direct the upbringing and education of their children.").

17. *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 158 F.4th 732, 753 (6th Cir. 2025) (en banc).

18. *Miller v. McDonald*, 180 F.4th 420, 432–34 (2d Cir. 2026).

are now vulnerable to parental ire, it is possible that the Spanish Fork parents would have had a significantly greater chance of succeeding in their campaign against Weaver. In the process, those parents would have implicitly taught their children that people like Wendy Weaver did not belong.

This Note seeks a limiting principle for *Mahmoud* and *Mirabelli*. It argues that courts should continue to recognize that public schools have a compelling interest in a nondiscriminatory learning environment and can maintain school policies serving that interest, like those governing teacher assignments and bullying, without granting opt-outs on free exercise or substantive due process grounds. Exempting these policies from *Mahmoud*'s opt-out regime will preserve two core functions of public schools: offering free public education to all on equal terms and creating the tolerant citizenry necessary to maintain the pluralist character of the United States. Part I traces the importance of these administrative decisions—which this Note refers to as a school's "soft curriculum"—and the Supreme Court's growing recognition of religious opt-out claims. Part II analyzes *Mahmoud*'s and *Mirabelli*'s reasoning and their reception in the lower courts. It finds that some courts have begun to apply *Mahmoud*-style opt-out requests to public schools' soft curricula with little reservation and explains why that broad application is undesirable. Part III argues that the Supreme Court's public accommodations precedents set a limiting principle on *Mahmoud* and *Mirabelli* in the soft curricular context by articulating antidiscrimination interests that are sufficiently compelling and narrowly tailored to survive strict scrutiny.

I. THE GROWING TENSION BETWEEN PUBLIC SCHOOLING AND FREE EXERCISE

A. *Teaching Through "Soft" Curricula*

Schools simultaneously engage in two programs of education: their "hard" curriculum and their "soft" curriculum.¹⁹ A school's "hard" curriculum includes the subjects students learn in school, like reading, writing, and arithmetic. A school's "soft" curriculum,²⁰ in contrast, includes the "noncurricular practices that serve to develop moral attitudes and character in students."²¹ The soft curriculum teaches students

19. See Amy Gutmann, *Democratic Education* 53 (Preface and Epilogue ed. 1999) (arguing that schools cannot only focus on classroom content like English, history, and math because "children do not leave their souls behind when they go to school").

20. Scholars tend to refer to this concept as a school's "hidden curriculum." *Id.*; David Purpel & Kevin Ryan, *It Comes With the Territory: The Inevitability of Moral Education in the Schools*, in *Moral Education . . . It Comes With the Territory* 44–54 (David Purpel & Kevin Ryan eds., 1976). This Note will use the term "soft curriculum" to refer to the same concept discussed by these scholars.

21. Gutmann, *supra* note 19, at 53.

the values of their society without explicit instruction. Japanese schools, for example, teach egalitarianism by having all students and staff perform the chores necessary to keep the school clean.²² American schools, meanwhile, teach respect by making students raise their hands before speaking and tolerance by having them sit respectfully next to students of different races and religions.²³

Schools cannot avoid having a soft curriculum because that program of instruction is set not by *what* is learned but *how* it is learned. The Progressive Education Movement, a group of scholars and reformers who pioneered the modern public school from the nineteenth to twentieth centuries,²⁴ understood this well. That movement saw schools not only as engines for giving American children a basic education but also as vehicles for transmitting “American” cultural values to the surge of new immigrant children.²⁵ Progressives sought to “divest the immigrant of his ethnic character and to inculcate the dominant Anglo-Saxon morality.”²⁶ They did so both through explicit instruction and also through modeling behavior. In a particularly stark example from New York at the turn of the twentieth century, teachers gave immigrant students hundreds of baths each week under the belief that it was necessary for classroom instruction and to introduce those children to American standards of hygiene.²⁷ Similar efforts took root in America’s new colonial possessions²⁸ and on its frontiers, where American values were forcibly imposed on Indigenous children.²⁹

22. Id. at 53–54.

23. Id. at 53.

24. See Lawrence A. Cremin, *The Transformation of the School: Progressivism in American Education, 1876–1957*, at 328 (1st ed. 1961) (“There is a ‘conventional wisdom’ . . . in education as well as in economics, and by the end of World War II progressivism had come to be that conventional wisdom.”).

25. See id. at viii. In 1849, one reformer worried “whether the flood of immigrants would become part of the body politic or indeed prove to the Republic what the Goths and Huns had been to the Roman Empire.” Id. at 66.

26. Id. at 68.

27. Id. at 71; see also id. at 74 (“A 1913 [education] conference . . . urge[d] special approaches to . . . hygiene . . . for the immigrant child.”).

28. See Michelle Morgan, *Americanizing the Teachers: Identity, Citizenship, and the Teaching Corps in Hawai’i, 1900–1941*, 45 *W. Hist. Q.* 147, 148 (2014) (“Education was an integral part of the American empire. From Puerto Rico to the Philippines, colonial administrators created ambitious, federally sponsored school systems, drawing on models developed to educate Native Americans and African Americans.”).

29. See Bryan Newland, U.S. Dep’t of the Interior, *Federal Indian Boarding School Initiative Investigative Report* 51, 53 (2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf [https://perma.cc/L6WR-65J5] (describing the federal Indian boarding school system’s “systematic militarized and identity-alteration methodologies,” including forbidding Native American languages, cultural practices, and religions “in order to compel them to adopt western practices and Christianity”).

These examples show the coercive nature of public schools, even outside of classroom instruction. But while public schools can be used in service of atrocities, that does not detract from their role in building the democratic character necessary for the maintenance of American society. For example, progressive reformers in American cities had to teach diverse groups of immigrant children how to get along with each other in the classroom.³⁰ If this was not taught in the nation's schools, then the minimal level of tolerance that allowed pluralist societies like the United States to function would have been greatly reduced.³¹ Following the Civil Rights Movement and desegregation, this concern found a voice in the multicultural education movement.³² That movement posited that teachers and schools should change their instruction and policies "to be responsive to the cultural characteristics of students from diverse racial, ethnic, linguistic, and social-class groups" rather than impose American values.³³ While this type of education has become popular in some modern American public schools,³⁴ critics have often derided it as "DEI" and "critical race theory."³⁵ Nonetheless, the multicultural education movement exemplifies how education reformers have shifted away from using public schools to impose values and toward tolerating different cultures and ways of life.

30. Cremin, *supra* note 24, at 72.

31. See Gordon W. Allport, *The Nature of Prejudice* 281 (25th anniv. ed. 1979) ("Prejudice . . . may be reduced by equal status contact between . . . groups in the pursuit of common goals. The effect is greatly enhanced if this contact is sanctioned by institutional supports . . . and [if it] leads to the perception of common interests and common humanity."); Mark Chin, *The Impact of School Desegregation on White Individuals' Racial Attitudes and Politics in Adulthood*, 20 *Educ. Fin. & Pol'y* 185, 208 (2025) (finding that "historical court-mandated school integration by race . . . positively affect[ed] racial attitudes (and the political views that tend to correlate with th[o]se attitudes) on average across the country"); Jasper Van Assche et al., *Intergroup Contact Is Reliably Associated With Reduced Prejudice, Even in the Face of Group Threat and Discrimination*, 78 *Am. Psych.* 761, 761 (2023) (finding that intergroup contact can promote societal tolerance because contact is effective even for subpopulations for whom the goal of tolerance may be most challenging).

32. See James A. Banks, *Introduction: The Global Quest for Educational Equity*, *Dædalus*, Fall 2024, at 6, 9–10 ("[The Civil Rights Movement] gave rise to the multicultural education movement, which sought to reform schools, colleges, and universities so that students from diverse groups will experience educational equity.").

33. *Id.* at 10.

34. *Id.* at 16 ("Culturally responsive pedagogy has been implemented in schools in some nations, and especially in the United States.").

35. See Jennifer Schuessler, *Bans on Critical Race Theory Threaten Free Speech*, *Advocacy Group Says*, *N.Y. Times* (Nov. 8, 2021), <https://www.nytimes.com/2021/11/08/arts/critical-race-theory-bans.html> (on file with the *Columbia Law Review*) (reporting that, from January 2021 to November 2021, legislatures in twenty-four states introduced fifty-four bills aimed at restricting mentions of "divisive concepts" relating to race, racism, gender, and American history in K–12 schools, as well as in other agencies and organizations).

But compulsory education, for good or bad ends, has its constitutional limits. Those limits were set out by two twentieth-century Supreme Court cases: *Pierce v. Society of Sisters*³⁶ and *Wisconsin v. Yoder*.³⁷ In *Pierce*, the Court struck down an Oregon ballot initiative supported by the Ku Klux Klan³⁸ that targeted the state's Catholic population by compelling children from age eight to sixteen to attend public school.³⁹ Since children could not simultaneously attend public and private school, the law effectively forced all private Catholic schools to close.⁴⁰ The Court reasoned that "[t]he child is not the mere creature of the State" and that parents, too, needed a say in how their children should be educated; if parents wished, they could expend their own resources to exit the public school system and enroll their children in private school.⁴¹ In *Yoder*, the Court allowed Amish families to exempt their children from the ninth and tenth grades, even over Wisconsin's objections that those years of schooling were necessary to prepare its citizens to participate effectively in its political system.⁴² The Court reasoned that those two years of schooling were not necessary to serve that interest.⁴³ It reached this conclusion because of the peculiar, and perhaps singular, burden that public schooling placed on the Amish.⁴⁴ The Court also pointed to the fact that the Amish were sufficiently self-reliant to avoid being a burden on society even absent those years of schooling.⁴⁵ These cases, then, show the careful balance the Court had struck between the free exercise rights of children and families on one hand and the demands of the state to teach democratic values on the other.⁴⁶

That, of course, did not settle the matter. From the late twentieth century to the present, the tension between religious and pluralist values could be seen in controversies over who should be allowed to teach in the nation's classrooms. Prior to that period, school communities in the eighteenth and nineteenth centuries recognized that students modeled themselves on their teachers and held teachers to higher standards of

36. 268 U.S. 510 (1925).

37. 406 U.S. 205 (1972).

38. Robert Bunting, *Pierce v. Society of Sisters* (1925), Or. Encyc., https://www.oregonencyclopedia.org/articles/pierce_vs_society_of_sisters_1925/ [<https://perma.cc/QS9E-R9LG>] (last updated May 11, 2022) ("Proponents [of the initiative] included the Ku Klux Klan . . . who believed that the law was necessary to preserve and perpetuate a homogeneous American culture.").

39. *Pierce*, 268 U.S. at 531–32.

40. See *id.*

41. See *id.* at 535.

42. *Yoder*, 406 U.S. at 207, 221.

43. *Id.* at 222.

44. *Id.* at 235–36.

45. *Id.* at 224–25.

46. See *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2351 (2025) (giving a similar gloss to *Pierce*); *id.* at 2349–50 (noting that lower courts have viewed *Yoder* as *sui generis* and limited to its facts).

conduct than those expected of other community members.⁴⁷ Teachers, in other words, were a core part of the soft curriculum. In fact, the “soft” instruction of a teacher’s example was often seen as more important than their skills in the classroom, as teachers were fired more often for moral “lapses” than for incompetence.⁴⁸ These lapses could be as innocuous as fastening one’s “galoshes all the way up.”⁴⁹ Other moral failings included being pregnant, regardless of whether the pregnancy occurred in⁵⁰ or out⁵¹ of wedlock, because of a fear that pregnant teachers would “contribute[] to the problem of school-girl pregnancies.”⁵²

Similarly, parents often worried that having queer teachers⁵³ in the classroom would contribute to the “problem” of homosexuality, fearing that it was contagious.⁵⁴ In the late twentieth century, community members mobilized to eject LGBTQ+ teachers from the classroom entirely,⁵⁵ and courts often chose not to interfere with those efforts.⁵⁶ Other

47. Todd A. DeMitchell, Suzanne Eckes & Richard Fossey, *Sexual Orientation and the Public School Teacher*, 19 B.U. Pub. Int. L.J. 65, 68 (2009).

48. *Id.* at 69–70 (internal quotation marks omitted) (quoting David B. Tyack & Elisabeth Hansot, *Managers of Virtue: Public School Leadership in America, 1820–1980*, at 174 (1982)).

49. *Id.* at 71 (internal quotation marks omitted) (quoting Todd A. DeMitchell, *Private Lives: Community Control vs. Professional Autonomy*, 78 Educ. L. Rep. 187, 188 (1993)).

50. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 634–37, 641 n.9 (1974) (addressing two school boards’ rules requiring pregnant schoolteachers to take maternity leave, which were motivated in part by a desire to “insulate schoolchildren from the sight of conspicuously pregnant women”).

51. See *Avery v. Homewood City Bd. of Educ.*, 674 F.2d 337, 341–42 (5th Cir. 1982) (regarding a teacher who was fired for getting pregnant out of wedlock); *Andrews v. Drew Mun. Separate Sch. Dist.*, 507 F.2d 611, 613–16 (5th Cir. 1975) (regarding a superintendent’s policy that disqualified the parent of any illegitimate child from employment).

52. *Andrews*, 507 F.2d at 614; see also *Avery*, 674 F.2d at 341 (addressing a school district’s argument that a parent of an illegitimate child is an unfit role model).

53. Parents and schools also often worried about the influence that gay students would have on their peers. See, e.g., *Fricke v. Lynch*, 491 F. Supp. 381, 383–84 n.2 (D.R.I. 1980) (involving a school denying a gay student’s request to bring a same-sex partner to prom in part because of the “adverse effect” on his classmates that was “certain to follow approval of such a request for overt homosexual interaction”).

54. Janna M. Jackson, *Unmasking Identities: An Exploration of the Lives of Gay and Lesbian Teachers* 2 (2007); see also Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 Colum. L. Rev. 1461, 1478 (2017) (describing a campaign that claimed gay teachers would “encourage more homosexuality by inducing pupils into looking upon it as an acceptable life-style” (internal quotation marks omitted) (quoting Anita Bryant, *The Anita Bryant Story: The Survival of Our Nation’s Families and the Threat of Militant Homosexuality* 113–20 (1977))).

55. One notorious example was a failed ballot initiative to ban gay teachers from the classroom in California, commonly referred to as the “Briggs Initiative.” See Rosky, *supra* note 54, at 1477–87 (providing an overview of the Briggs Initiative, which “allowed school districts to suspend, dismiss, and deny employment to ‘any person who has engaged in public homosexual activity or public homosexual conduct’” (quoting Cal. Prop. 6, School

courts took a different tack, holding that schools could not automatically terminate teachers on the basis of their sexual orientation or other perceived moral failings; instead, schools had to show that the perceived failing affected the teacher's ability to teach or harmed the learning environment in order to terminate them without liability.⁵⁷ While polls have found that the public has increasingly supported LGBTQ+ teachers over the past fifty years,⁵⁸ challenges to teachers based on their sexual orientation⁵⁹ and especially their gender identity⁶⁰ persist up to the

Employees. Homosexuality. Initiative Statute. 29 (defeated 1978), available at https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1837&context=ca_ballot_props (on file with the *Columbia Law Review*)). Arkansas and Oklahoma succeeded in passing gay teacher bans. Primary Source Set: Briggs Initiative, GLBT Hist. Soc'y, <https://www.glbthistory.org/primary-source-set-briggs-initiative> [<https://perma.cc/4DUX-KNH5>] (last visited Aug. 5, 2026); see also *Nat'l Gay Task Force v. Bd. of Educ. of City of Oklahoma City*, 729 F.2d 1270, 1275 (10th Cir. 1984) (upholding the Oklahoma law in part but striking the portion that banned advocacy of homosexual activity on free speech grounds).

56. See, e.g., *Acanfora v. Bd. of Educ. of Montgomery Cnty.*, 491 F.2d 498, 499 (4th Cir. 1974) (upholding the termination of a gay teacher on the ground that the teacher failed to disclose he was gay on his job application); *Nat'l Gay Task Force*, 729 F.2d at 1275 (upholding Oklahoma's ban on public homosexual activity for teachers but striking the portion of the law which provided punishment for mere advocacy of homosexual activities).

57. DeMitchell et al., *supra* note 47, at 74 (finding that courts from 1966–1976 “appear[ed] to [have] be[en] fashioning a requirement that the public employer show a causal connection, a nexus, between illegal or immoral behavior, and performance on the job” (internal quotation marks omitted) (quoting M. McGhehey, *Illegal or Immoral Behavior and Performance in the Classroom: The Necessary Nexus*, *New Directions in School Law* 162 (1976))); see also *Morrison v. State Bd. of Educ.*, 461 P.2d 375, 382–83, 393–94 (Cal. 1969) (narrowing “immoral or unprofessional conduct” within the meaning of California's education code to allow for discipline only if the teacher's behavior adversely affects the school or reduces the teacher's effectiveness in the classroom).

58. Compare Jackson, *supra* note 54, at 2 (“In 1970, ‘77% of the public felt [sic] homosexuals should not be allowed to teach.’” (quoting Jackie M. Blount, *Manly Men and Womanly Women: Deviance, Gender Role Polarization, and the Shift in Women's School Employment, 1900–1976*, 66 *Harv. Educ. Rev.* 318, 331 (1996)) (misquotation)), with GLAAD, *Accelerating Acceptance 2021 Executive Summary* (2021), <https://assets.glaad.org/m/68ba2ac10bb87a16/original/Accelerating-Acceptance-2021.pdf> [<https://perma.cc/FN5H-BUXX>] (finding that 30% of non-LGBTQ respondents in 2021 would be “very” or “somewhat” uncomfortable if their child were placed with an LGBTQ teacher in school).

59. See, e.g., *Bailey v. Mansfield Indep. Sch. Dist.*, 425 F. Supp. 3d 696, 707–09 (N.D. Tex. 2019) (involving an adverse employment action taken against a lesbian art teacher because of the community's negative reaction to her sexual orientation).

60. See, e.g., Noah Goldberg, *Transgender Teacher's Pride Flag Burned at Saticoy Elementary, Where Protests Have Escalated*, *L.A. Times* (May 31, 2023), <https://www.latimes.com/california/story/2023-05-31/saticoy-elementary-school-pride-flagged-burned> (on file with the *Columbia Law Review*) (reporting the removal of a transgender teacher from teaching duties, in part in response to parental complaints like, “Wouldn't parents be uncomfortable with a trans person teaching their children to begin with?!” (internal quotation marks omitted) (quoting an Instagram commenter)); Lori Rozsa, *Transgender Teacher Removed From Classroom After Some Parents Object to Gender-Neutral Prefix*

present day. Parents have similarly raised objections to school policies fostering mutual respect among students, ranging from inclusive bathroom policies⁶¹ to policies requiring that students use each other's preferred pronouns.⁶²

In sum, the soft curriculum is unavoidably a part of public education. It is a space that repeatedly implicates society's project of constructing the meaning of "We the People." Like America itself, that project looks different in different eras, and while it is imperfect, it has been aspirationally moving in the direction of a more expansive understanding of who "the People" are.⁶³ Recent controversies have focused on the perceived sexual and gender morality of teachers and students alike. These controversies may be a product of the first fifteen years of the twenty-first century, in which the public⁶⁴ and the Supreme Court increasingly recognized that "Judeo-Christian" morality cannot be the arbiter of what is legally permissible.⁶⁵ This development, in turn, has provoked religious anxiety.⁶⁶

'Mx.', Wash. Post (Sep. 29, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/09/29/transgender-teacher-removed-from-classroom-after-some-parents-object-to-calling-her-mx/> (on file with the *Columbia Law Review*) (reporting that people told a transgender teacher that they are "selfish for being a teacher, selfish for putting [themselves] in [sic] a position where [they are] around children and exposing them to the transgender lifestyle" (internal quotation marks omitted) (quoting Kishanda Burns, Protestors Fight for Transgender Students, *The Famuan* (Feb. 25, 2017), <https://www.thefamuanonline.com/2017/02/25/protestors-fight-for-transgender-students/> [https://perma.cc/S4XZ-YCVS] (misquotation))).

61. See, e.g., *Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ.*, No. 23-3740, 2025 WL 2453836, at *1–2 (6th Cir. Aug. 26, 2025) (involving parental backlash against a school district's policy of allowing students to use bathrooms that align with their gender identity).

62. See, e.g., *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 158 F.4th 732, 738 (6th Cir. 2025) (en banc) (finding that a school district could not compel students to use the preferred pronouns of their transgender and nonbinary classmates after pushback from parents and students).

63. See Martin Luther King, Jr., Address at the Conclusion of the Selma to Montgomery March: Our God Is Marching On! (Mar. 25, 1965), in *A Call to Conscience: The Landmark Speeches of Dr. Martin Luther King, Jr.* 111, 131 (Clayborne Carson & Kris Shepard, eds., 2001) ("[T]he arc of the moral universe is long, but it bends toward justice.").

64. In July 2003, 56% of American adults said that religion is "losing influence" in American life, a percentage that peaked at 78% in March and April 2019 and sits at 61% as of April 2026. Chip Rotolo & Gregory A. Smith, *How Americans Feel About Religion's Influence in Government and Public Life*, Pew Rsch. Ctr. (May 14, 2026), <https://www.pewresearch.org/religion/2026/05/14/how-americans-feel-about-religions-influence-in-government-and-public-life/> [https://perma.cc/EZB7-WVUU]. As of April 2026, "two-thirds [of Americans] say churches and other houses of worship should keep out of political matters rather than expressing views on day-to-day social and political questions." *Id.*

65. Compare, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196–97 (1986) (Burger, C.J., concurring) (stating that antisodomy laws can be justified on the grounds of "Judeo-Christian moral and ethical standards"), with *Lawrence v. Texas*, 539 U.S. 558, 582 (2003)

B. *Free Exercise and the Rise in Religious Exemptions*

The Supreme Court has been more and less solicitous of this anxiety over time. Before 1990, the Court evaluated free exercise claims using a test favorable to religious interests, exemplified by *Sherbert v. Verner* and *Wisconsin v. Yoder*, in which burdens on free exercise had to be justified by compelling state interests.⁶⁷ Then, in 1990, the Court decided *Employment Division v. Smith*.⁶⁸ In an opinion authored by Justice Antonin Scalia, the Court adopted a new approach to evaluating free exercise claims: “neutral law[s] of general applicability” were exempt from such challenges.⁶⁹ Laws that satisfied these requirements were subject only to rational basis review;⁷⁰ if they did not, then they were subject to strict scrutiny.⁷¹ For cases presenting “hybrid” rights claims—that is, claims involving burdens on other constitutional rights in addition to free exercise—the Court held that the neutral and general applicability test did not apply.⁷² There, the burdening policy would be evaluated using strict scrutiny.⁷³ *Smith*’s rule was less favorable to religious interests because it recognized that religious exemptions had to be cabined; this prevented “professed doctrines of religious belief [from being] superior

(O’Connor, J., concurring in the judgment) (stating that “[m]oral disapproval . . . is insufficient to satisfy rational basis review”).

66. See Chip Rotolo, Gregory A. Smith & Jonathan Evans, 8 in 10 Americans Say Religion Is Losing Influence in Public Life (Mar. 15, 2024), <https://www.pewresearch.org/religion/2024/03/15/religions-role-in-public-life/> [<https://perma.cc/M9SC-P8YK>] (reporting that 64% of Christians believe that the influence of religion on American life is declining and that this is a bad thing); cf. *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (“[The majority’s decision] effectively decrees the end of all morals legislation.”); Ted Olsen & Todd Hertz, Does *Lawrence v. Texas* Signal the End of the American Family?, *Christianity Today* (June 1, 2003), <https://www.christianitytoday.com/2003/06/does-lawrence-v-texas-signal-end-of-american-family/> (on file with the *Columbia Law Review*) (quoting various evangelical speakers who “seem to be uniform in saying the court went too far” in *Lawrence*).

67. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (adopting a strict scrutiny standard); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (same).

68. *Emp. Div., Dep’t of Hum. Res. v. Smith*, 494 U.S. 872 (1990).

69. *Id.* at 874, 879 (internal quotation marks omitted) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

70. See *id.* at 879 (“[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability’” (quoting *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring in the judgment))).

71. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (citing *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)).

72. See *Smith*, 494 U.S. at 881 (“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 . . .”).

73. *Id.*; see also *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546 (“A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.”).

to the law of the land,” and prevented “every citizen [from] becom[ing] a law unto himself.”⁷⁴

In response to the *Smith* decision, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993, which returned the analysis of free exercise burdens to the strict scrutiny approach of *Sherbert* and *Yoder*.⁷⁵ Then, in *City of Boerne v. Flores*, the Court held that Congress had exceeded its powers under the Fourteenth Amendment in passing RFRA and held it inapplicable to the actions of state governments.⁷⁶ Since that decision, a majority of states have passed state-level versions of RFRA,⁷⁷ with some state protections sweeping even more broadly than the federal version.⁷⁸

Across these different statutory and case law tests, however, the Court has long rejected religious objections to antidiscrimination laws,⁷⁹ presumably because religion can be—and historically has been—used to justify evils like slavery, racism, and sexism.⁸⁰ A rightward turn in the judiciary appears to be changing that settlement.⁸¹ The Roberts Court

74. *Smith*, 494 U.S. at 879 (internal quotation marks omitted) (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)).

75. 42 U.S.C. §§ 2000bb–2000bb-4. Compare *id.* § 2000bb-1(a)–(b) (stating that the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” except if the law satisfies strict scrutiny), with *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”).

76. 521 U.S. 507, 536 (1997) (“[T]he provisions of the [RFRA with respect to the states] are beyond congressional authority . . .”).

77. Federal & State RFRA Map, Becket Fund for Religious Liberty, <https://becketfund.org/research-central/rfra-info-central/map/> [<https://perma.cc/GLL3-695A>] (last visited Aug. 6, 2026) (noting that “36 states [have] RFRA or RFRA-like protections (that require strict scrutiny)”).

78. For example, Indiana’s state-level version of RFRA allows private businesses to use the statute in defending against lawsuits alleging discrimination. Kristine Guerra & Tim Evans, *How Indiana’s RFRA Differs From Federal Version*, *Indy Star* (Mar. 31, 2015), <https://www.indystar.com/story/news/politics/2015/03/31/indianas-rfra-similar-federal-rfra/70729888/> (on file with the *Columbia Law Review*) (last updated Apr. 2, 2015). It also allows the statute’s protections to be invoked when government action is only likely to have burdened religious exercise. *Id.*

79. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (striking down university policies prohibiting interracial dating despite their claimed religious justifications because the government has a compelling interest in eradicating racial discrimination); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (rejecting a challenge to the Civil Rights Act on free exercise grounds).

80. See James W. Watts, *The Historical Role of Leviticus 25 in Naturalizing Anti-Black Racism*, *Religions*, Aug. 2021, at 1 (explaining the biblical justifications for slavery); Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women’s Equality*, 10 *Wm. & Mary J. Women & L.* 459, 459 (2004) (arguing that women’s equality is curtailed by patriarchal religions).

81. See Law, Rts. & Religion Project, *Parading the Horribles: The Risks of Expanding Religious Exemptions* 4–6 (2022), <https://lawrightsreligion.org/our-work/parading-the-horribles> [<https://perma.cc/4P8F-Y2FT>] (collecting cases where

has decided a number of cases favorable to religious interests,⁸² “creat[ing] a legal structure in which the state is required to give religious entities preferential treatment as compared to secular counterparts.”⁸³ The result has been that the Supreme Court has greatly expanded its free exercise jurisprudence and has significantly diminished the role of constitutional limits on those exemptions.⁸⁴

II. RELIGIOUS EXEMPTIONS COME TO PUBLIC SCHOOLS

That trend has now made its way to the public school context. *Mahmoud v. Taylor* marks the first time in over fifty years that the Supreme Court has recognized a parental free exercise right to opt out of part of a public school’s curriculum.⁸⁵ While that decision is justifiable

discrimination based on race, LGBTQ+ status, and disability—among other kinds of discrimination—was justified using free exercise claims, resulting in exemptions to civil rights laws); cf. Suzanne Monyak, *Liberals Face More Conservative Courts to Fight Trump*, Bloomberg L. (Nov. 6, 2024), <https://news.bloomberglaw.com/us-law-week/liberals-face-more-conservative-courts-to-fight-trump-policies> (on file with the *Columbia Law Review*) (describing how Courts of Appeals have shifted rightward since 2017).

82. See, e.g., *Chiles v. Salazar*, 146 S. Ct. 1010, 1022–24 (2026) (holding that a Colorado law restricting conversion therapy was a content-based speech restriction and so subject to strict scrutiny); 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2321–22 (2023) (holding on free speech grounds that a wedding website designer could refuse to create websites for same-sex weddings despite a state antidiscrimination law to the contrary); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (holding that the city burdened a foster care agency’s religious exercise by forcing it either to curtail its mission or affirm the validity of same-sex relationships); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617, 625 (2018) (holding that the Colorado Civil Rights Commission did not neutrally apply antidiscrimination law against a baker who refused to bake cakes for same-sex weddings).

83. Richard Schragger, Micah Schwartzman & Nelson Tebbe, *Reestablishing Religion*, 92 U. Chi. L. Rev. 199, 201 (2025); see also Ian Prasad Philbrick, *A Pro-Religion Court*, N.Y. Times (June 22, 2022), <https://www.nytimes.com/2022/06/22/briefing/supreme-court-religion.html> (on file with the *Columbia Law Review*) (finding that the Roberts Court rules in favor of religion 83% of the time, compared to the Rehnquist Court at 58%, Burger Court at 51%, and Warren Court at 46%).

84. Schragger et al., *supra* note 83, at 219. For a discussion and analysis of the Court’s recent decisions exemplifying this trend, see *id.* at 219–20.

85. Compare 145 S. Ct. 2332, 2342 (2025) (recognizing a parental free exercise right to opt children out of portions of the public school curriculum), with *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (recognizing a parental free exercise right to withdraw Amish children from compulsory schooling after the eighth grade).

The previous leading authority on school opt-out requests—now abrogated by *Mahmoud*—was *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1065 (6th Cir. 1987). There, parents brought a free exercise challenge against a school district for its choice of a reading series designed for students in the first through eighth grades. *Id.* at 1060. The Sixth Circuit ruled against the parents because “[t]he requirement that students read the assigned materials and attend reading classes, in the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not play an unconstitutional burden on the students’ free exercise of religion.” *Id.* at 1065. For a more extensive account of the *Mozert* litigation, see Nomi Maya Stolzenberg, “He Drew a Circle

when it is cabined to its facts, the more expansive reading of *Mahmoud* suggested by *Mirabelli* and adopted by some lower courts threatens the antidiscrimination interests of public schools.

A. *An Overview of Mahmoud and Its Potential Benefits to Public Schooling*

Mahmoud arose from a Maryland public school district's choice to include thirteen LGBTQ+-inclusive picture books in its K–5 language arts curriculum.⁸⁶ Parents of diverse religious faiths protested the policy at a school board meeting, charging that the school district was going behind their backs and “pushing ideas of gender ideology on their kids,” contrary to many families’ religious beliefs.⁸⁷ The school board initially tried to compromise with the parents by allowing them to opt their children out of instruction on days when the LGBTQ+-inclusive picture books would be used.⁸⁸ Eventually, however, the board decided to rescind its opt-out policy, in part because it could not continue to accommodate the growing number of requests without causing significant disruption to its schools.⁸⁹ In response, the religious parents asked the board to reinstate the opt-out system, with some arguing that it would be “immoral” to expose their “young, impressionable, elementary-aged [children]” to a curriculum that “undermine[d] [religious] teaching.”⁹⁰ The school board refused, emphasizing that the books would be used only to supplement its literacy curriculum, not to offer explicit instruction on gender and sexuality issues.⁹¹

The religious parents sued to enjoin the policy, claiming that the school board's failure to provide an opt-out system infringed on their rights under the Free Exercise Clause. The parents invoked *Wisconsin v. Yoder* as the basis for their claim⁹² and requested a preliminary injunction, but the district court and Fourth Circuit declined that

That Shut Me Out”: Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 Harv. L. Rev. 581, 593–98 (1993).

86. The five books at issue in the lawsuit were Chelsea Johnson, LaToya Council, Carolyn Choi & Ashley Seil Smith, *IntersectionAllies: We Make Room for All* (2019); Daniel Haack & Stevie Lewis, *Prince & Knight* (2018); Charlotte Sullivan Wild & Charlene Chua, *Love, Violet* (2022); Jodie Patterson & Charnelle Pinkney Barlow, *Born Ready: The True Story of a Boy Named Penelope* (2021); and Sarah S. Brannen & Lucia Soto, *Uncle Bobby's Wedding* (2020). *Mahmoud*, 145 S. Ct. at 2343–44.

87. *Mahmoud*, 145 S. Ct. at 2345 (internal quotation marks omitted) (quoting Montgomery Cnty. Pub. Schs., Business Meeting, at 27:21–27:30 (Jan. 12, 2023), <https://mcpsmd.new.swagit.com/videos/196679> (statement of Lindsey Smith) (on file with the *Columbia Law Review*)).

88. *Id.* at 2346.

89. *Id.*

90. *Id.* at 2347 (internal quotation marks omitted) (quoting Petitioners’ Appendix at 532a, *Mahmoud*, 145 S. Ct. 2332 (No. 24-297)).

91. *Id.* at 2346.

92. *Id.* at 2349.

request.⁹³ Those courts reasoned that *Yoder* was limited to its facts because the Amish parents demonstrated a religious burden that “probably few other religious groups or sects could make.”⁹⁴

In a majority opinion penned by Justice Samuel Alito, the Court reversed and ruled for the parents. It held that “the Board’s introduction of the ‘LGBTQ+inclusive’ storybooks—combined with its decision to withhold notice to parents and to forbid opt outs—substantially interfere[d] with the religious development of [the parents’] children and impose[d] the kind of burden on religious exercise that *Yoder* found unacceptable.”⁹⁵ The Court disagreed with the lower courts on *Yoder*’s perceived factual limitation, instead labeling the decision an “important precedent” that could not be “breezily dismissed.”⁹⁶ The majority found that the policy should be subject to strict scrutiny because it imposed a burden on free exercise that was “of the exact same character as the burden in *Yoder*.”⁹⁷ Applying that standard, the Court concluded that the parents were likely to prevail on their free exercise claims and thus were entitled to a preliminary injunction.⁹⁸

The *Mahmoud* decision, cabined to its facts, could be a boon for public schools at a time when public education is facing new and potentially existential threats. From 2019 to 2023, two-thirds of traditional public schools lost enrollment,⁹⁹ a trend driven both by declining fertility rates and by an increase in the number of states offering private school vouchers.¹⁰⁰ When schools lose students, they also lose funding, forcing some districts to consider consolidation and district rezoning.¹⁰¹ Others have gone so far as to hire consultants to drive new student enrollment.¹⁰²

93. *Id.*

94. *Mahmoud v. McKnight*, 688 F. Supp. 3d 265, 294 (D. Md. 2023) (internal quotation marks omitted) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972)); see also *Mahmoud v. McKnight*, 102 F.4th 191, 210 (4th Cir. 2024) (citing *Yoder*, 406 U.S. at 236). These decisions reflect the federal courts’ longstanding view of *Yoder* as a limited decision. See *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1067 (6th Cir. 1987) (“*Yoder* rested on such a singular set of facts that we do not believe it can be held to announce a general rule that exposure without compulsion to act, believe, affirm or deny creates an unconstitutional [free exercise] burden.”).

95. *Mahmoud*, 145 S. Ct. at 2353.

96. *Id.* at 2357.

97. *Id.* at 2361.

98. *Id.* at 2363.

99. Dana Goldstein, Public Schools Try to Sell Themselves as More Students Use Vouchers, *N.Y. Times* (Aug. 5, 2025), <https://www.nytimes.com/2025/08/05/us/public-school-enrollment-decline-vouchers.html> (on file with the *Columbia Law Review*).

100. *Id.*; Dylan Council, Sofoklis Goulas & Faidra Monachou, Brookings Inst., Declining Public School Enrollment 3–4 (2025), <https://www.brookings.edu/articles/declining-public-school-enrollment/> [https://perma.cc/WM68-Z3JW].

101. Krista Kaput, John Bellaire, Carrie Hahnel, Biko McMillan & Paul Beach, How Student Enrollment Declines Are Affecting Education Budgets, Explained in 10 Figures: How Will Districts Align Budgets With New Enrollment Realities?, *Bellwether* (2024),

That crisis in public education could translate into a crisis for democratic values. Private schools can and do make soft curricular decisions that foster animosity rather than tolerance, undermining the American social fabric.¹⁰³ State and local governments that want to prevent the tearing of this fabric should do their best to keep students and families in the public school system, where the state can better inculcate these values.¹⁰⁴

One way to do that is to grant some parental opt-out requests. Public schools are inherently coercive,¹⁰⁵ and overzealous attempts to secularize children in the name of democratic values will only cause religious families to exit the system altogether.¹⁰⁶ Public schools should grant exemptions to religious parents in some cases to prevent exit. On the assumption that public schools are usually better at teaching pluralistic values than private schools are, it is better that children are exposed to some aspects of public education than none at all.¹⁰⁷ Exemptions need to be subject to limits; opt-outs should not be allowed if they would require public schools to be “discriminatory or repressive.”¹⁰⁸ For example, schools should allow opt-outs from the Pledge of Allegiance but not from policies requiring students to sit next to students who are Black.¹⁰⁹ With a

<https://bellwether.org/publications/declining-enrollment-in-10-figures/?activeTab=8> [<https://perma.cc/9SJF-9RBS>] (last updated July 2026); Goldstein, *supra* note 99.

102. Goldstein, *supra* note 99; see also Dorie Clark, Why Public Schools Are Finally Getting Savvy About Marketing, *Forbes* (Apr. 27, 2015), <https://www.forbes.com/sites/dorieclark/2015/04/27/why-public-schools-are-finally-getting-savvy-about-marketing/> (on file with the *Columbia Law Review*) (noting that, as of 2015, schools were embracing modern marketing tactics like hiring consultants).

103. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 580–81 (1983) (involving a private religious institution forbidding interracial dating); *St. Dominic Acad. v. Makin*, 181 F.4th 11, 24–26 (1st Cir. 2026) (involving a private Catholic school seeking both public money and an exemption from state law antidiscrimination protections on the basis of religion, sexual orientation, and gender identity); see also Leslie C. Griffin, The Ministerial Exception Allows Racial Discrimination by Religions, *Verdict* (July 16, 2020), <https://verdict.justia.com/2020/07/16/the-ministerial-exception-allows-racial-discrimination-by-religions> [<https://perma.cc/P7DT-89PJ>] (collecting cases and noting that the ministerial exception in employment law “allows any form of discrimination by religious organizations,” including private schools, “to proceed without a lawsuit”).

104. See Gutmann, *supra* note 19, at 122 (arguing that public schools should take steps to prevent student exit because children in private schools will likely be “less exposed to common democratic standards”).

105. See *supra* section I.A.

106. See Gutmann, *supra* note 19, at 121 (“Attempts to impose a primarily secular education upon children whose parents are intensely committed to parochial education may galvanize opposition among those parents and fail to convert children away from the intensely held commitments of their parents.”).

107. *Id.* at 122–23 (“If public schools do not permit such exemptions, they are likely to drive more parents to enroll their children in private schools, where they will be . . . less exposed to common democratic standards.”).

108. *Id.* at 122.

109. *Id.* at 122–23.

properly balanced opt-out system, public schools will teach students and families valuable lessons in democratic tolerance and minimize exits by dissenting minorities at a time when public education needs to retain its student population to survive.¹¹⁰

In light of this, *Mahmoud* is justifiable on its facts—public schools are coercive institutions that need to be solicitous of religious families to avoid trampling their entitlement to direct their children’s religious development.¹¹¹ At the same time, however, the Court’s decision can be, and has been, read in an expansive way that upsets the careful balance between respect for free exercise and antidiscrimination principles.

B. Mahmoud’s *New Readings of Yoder and Smith*

Even as *Mahmoud* reached a justifiable result in allowing religious parents to opt out from some aspects of a school’s hard curriculum, its reasoning has proven to be challenging for lower courts deciding new controversies, particularly as it relates to public schools’ soft curricular choices.

One challenging aspect of *Mahmoud* is that the opinion seems to have lowered the exacting standards for the unique burden at issue in *Yoder*.¹¹² In *Yoder*, the showing of a burden was one that “few other religious groups or sects could make”;¹¹³ in *Mahmoud*, it is one that can be satisfied by many religious groups, including Catholics, Muslims, and Ethiopian Orthodox Christians.¹¹⁴ The circumscribed nature of the *Yoder* opinion justified its finding that the *threat* of a burden, rather than an actual burden, could constitute a free exercise violation.¹¹⁵ That standard is overly permissive now that most other religious groups can meet it. The lower threshold for free exercise violations under the majority’s “very real threat” standard¹¹⁶ is illustrated by the fact that the books at issue were not particularly coercive with respect to the students’ religious beliefs. The majority found that the storybooks’ messages were coercive

110. See *id.* at 123 (explaining how allowing “conscientious dissent” within “principled limits” promotes democratic tolerance and can preserve the support of dissenting minorities).

111. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 518 (1925) (holding that parents have a substantial liberty interest in the religious and intellectual upbringing of their children).

112. See *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2353 (2025) (“[T]he Board’s [policy] . . . imposes the kind of burden on religious exercise that *Yoder* found unacceptable.”).

113. *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972).

114. See *Mahmoud*, 145 S. Ct. at 2346–47 (describing the wide array of religious identities requesting opt-outs for their children).

115. See *Yoder*, 406 U.S. at 218 (“[C]ompulsory school attendance . . . carries with it a very real threat of undermining . . . Amish . . . religious practice[s] . . .”).

116. *Mahmoud*, 145 S. Ct. at 2342.

because they were “unmistakably normative,”¹¹⁷ carrying messages like “same-sex marriage should be accepted by all as a cause for celebration.”¹¹⁸ That message was conveyed by one of the storybooks at issue because it implied that the “entire kingdom” celebrated a prince marrying a knight¹¹⁹ and by another because it read that “[e]veryone was smiling and talking and crying and laughing.”¹²⁰ The majority located similarly “subtle” and “sly[]” messages about LGBTQ+ inclusion contrary to the parents’ religious beliefs in the other books.¹²¹ To further bolster this finding, the majority pointed to the coercive nature of the classroom, which derived in part from “the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure,” and particularly to the fact that the books would be discussed in class.¹²² This standard is so low that the dissent remarked that, “if even potentially imagined ‘coy’ messages hidden in a picture book are sufficient to trigger strict scrutiny when they conflict with a parent’s religious beliefs, then it is hard to say what will not.”¹²³ Now that most religious parents qualify for *Yoder*’s “threat” standard for free exercise claims, it seems that mere exposure to objectionable ideas triggers strict scrutiny.¹²⁴

This burden standard should apply with even more force to certain soft curricular policies, but those policies go to the heart of inclusive education. As the majority seems to acknowledge implicitly, a public school’s soft curriculum will often be *more* coercive than its hard curriculum.¹²⁵ But how is a teacher to enforce a school’s bullying policy when that policy conflicts with a student’s religious beliefs?¹²⁶ Or what if religious parents in a community do not want a transgender teacher to teach their children?¹²⁷ A school’s antibullying policies, or a teacher’s gender presentation, can and do present messages far less subtle than

117. *Id.* at 2353.

118. *Id.*

119. *Id.*

120. *Id.* (emphasis added by *Mahmoud*) (internal quotation marks omitted) (quoting Brannen & Soto, *supra* note 86).

121. *Id.* at 2354.

122. *Id.* at 2355 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987)).

123. *Id.* at 2393 (Sotomayor, J., dissenting) (citation omitted).

124. See *id.* at 2397 (“[The majority’s standard] is mere exposure to objectionable ideas in its clearest form.”). But see *id.* at 2356 (majority opinion) (“[T]he storybooks unmistakably convey a particular viewpoint about same-sex marriage and gender That goes far beyond mere ‘exposure.’”).

125. See *id.* at 2355 (“‘The State exerts great authority and coercive power through’ public schools ‘because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure.’” (quoting *Edwards*, 482 U.S. at 584)).

126. See *id.* at 2393–94 (Sotomayor, J., dissenting) (“If a student calls a classmate a ‘sinner’ for not wearing a headcovering or coming out as gay, how can a teacher respond without ‘undermining’ that child’s religious beliefs?”).

127. See Goldberg, *supra* note 60 (“Wouldn’t parents be uncomfortable with a trans person teaching their children to begin with?!” (internal quotation marks omitted) (quoting an Instagram commenter)).

those present in picture books.¹²⁸ Tolerating parents' objections to these policies risks upsetting the wise policy of not allowing religious exemptions to amount to repression or discrimination.¹²⁹ If these exemptions were allowed, a core mission of public schools—to create a tolerant citizenry—would be seriously eroded.¹³⁰

This problem is exacerbated by the fact that the Court's analysis short-circuits *Employment Division v. Smith*.¹³¹ The *Mahmoud* majority held that “[w]hen the burden imposed is of the same character as that imposed in *Yoder*, we need not ask whether the law at issue is neutral or generally applicable before proceeding to strict scrutiny.”¹³² That is not quite what *Smith* said.¹³³ *Smith* said that *Yoder*, and many other cases, were not subject to the neutral and generally applicable standard because they presented hybrid rights claims.¹³⁴ *Yoder* was a hybrid rights case because it implicated the rights of parents under *Pierce v. Society of Sisters* in addition to the Free Exercise Clause.¹³⁵ In *Mahmoud*, however, the majority failed to mention how the parents' free exercise claims interacted with their parental due process rights under the Fourteenth Amendment.¹³⁶ The

128. See Michael Hansen & Alex Hubbard, Actions Against LGBTQ+ Students Also Threaten K-12 Teachers, Brookings Inst. (Mar. 6, 2025), <https://www.brookings.edu/articles/actions-against-lgbtq-students-also-threaten-k-12-teachers/> [<https://perma.cc/7587-L7GU>] (“Prior research suggests that . . . having an LGBTQ+ teacher can have a positive impact on LGBTQ+ youth. This happens primarily through caring about LGBTQ+ students; providing positive role models and exposure to LGBTQ+ issues may also play a role.”); see also *supra* section I.A (discussing moral objections to teachers because of their role model status).

129. See Gutmann, *supra* note 19, at 122.

130. See *Mahmoud*, 145 S. Ct. at 2401 (Sotomayor, J., dissenting) (“Today’s ruling threatens the very essence of public education.”); see also Johann Neem, How the Supreme Court Is Making Public Education Itself Unconstitutional, *EducationWeek* (July 9, 2025), <https://www.edweek.org/policy-politics/opinion-how-the-supreme-court-is-making-public-education-itself-unconstitutional/2025/07> [<https://perma.cc/RZ89-5P9J>] (arguing that *Mahmoud* suggests that the entirety of public education may not be “narrowly tailored,” a finding that could make private school voucher programs mandatory and thus bring an end to the public education project in its current form).

131. *Employment Division v. Smith*, 494 U.S. 872 (1990). Indeed, *Smith* seems to increasingly be on life support. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., concurring, joined by Kavanaugh, J.) (voicing sympathy for the view that *Smith* should be overruled but worrying about what standard should replace it); *id.* at 1883 (Alito, J., concurring, joined by Thomas & Gorsuch, JJ.) (arguing that *Smith* “is ripe for reexamination”). The Supreme Court seems poised to weaken *Smith* further this term. See *St. Mary Catholic Parish v. Roy*, 146 S. Ct. 2573 (2026) (mem.) (granting certiorari on two questions that could further limit the scope of *Smith*).

132. *Mahmoud*, 145 S. Ct. at 2361.

133. *Mahmoud*, 145 S. Ct. at 2400 (Sotomayor, J., dissenting) (“The problem for the majority is that this is not what *Smith* said.”).

134. *Smith*, 494 U.S. at 881–82.

135. *Id.*

136. See *Mahmoud*, 145 S. Ct. at 2400 (Sotomayor, J., dissenting) (“[T]he Court’s analysis makes no mention of substantive due process rights or the Fourteenth Amendment Due Process Clause.”).

Mahmoud majority said that it thought that finding that the parents' claims qualified as "hybrid rights" claims was unnecessary because "it is sufficient to note that the burden imposed here is of the exact same character as that in *Yoder*."¹³⁷ *Mahmoud*, then, seems to pluck *Yoder* out of the line of hybrid rights cases and recharacterize it as establishing a novel special burden test.

The purpose of the neutral and generally applicable analysis is to determine whether the law or policy at issue targets religion.¹³⁸ In omitting that step, the Court seems to be implying that public schools are so inherently coercive that there is no need to inquire whether they intended to target religious practice in the first place.¹³⁹ This reading is supported by the majority's repeated references to Maryland's compulsory education laws and their penalties.¹⁴⁰ It rejected the idea that exiting public schools was a solution for religious parents due to prohibitive cost.¹⁴¹ In jettisoning a significant component of the *Smith* analysis, the Court implied that a whole suite of policies—including those regulating classroom conduct and teacher assignments—may need to satisfy strict scrutiny's exacting standard of review when they threaten families' religious beliefs.¹⁴²

This problem would be less pronounced if the Supreme Court had given more guidance to the lower courts on how broadly *Mahmoud*

137. *Id.* at 2361 n.14 (majority opinion) ("We need not consider whether the case before us qualifies as . . . a 'hybrid rights' case.").

138. *Smith*, 494 U.S. at 878 ("[I]f prohibiting the exercise of religion (or burdening [it]) is not the object of the [policy] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.").

139. See *Neem*, *supra* note 130 (arguing that *Mahmoud* implies that public education is not "narrowly tailored" enough to avoid burdening religious exercise).

140. *Mahmoud*, 145 S. Ct. at 2342, 2359.

141. *Id.* at 2360 ("It is both insulting and legally unsound to tell parents that they must abstain from public education . . . when alternatives can be prohibitively expensive and they already contribute to financing the public schools."). This line of reasoning departs from typical constitutional law. The Constitution requires that the government not inhibit rights, not that the government must provide resources to its citizens to exercise those rights. See Sharon Morioka, 5Qs: Herzog on LGBTQ+ Opt-Outs in *Mahmoud v. Taylor* Supreme Court Decision, U. Mich. L. News (June 27, 2025), <https://michigan.law.umich.edu/news/5qs-herzog-lgbtq-opt-outs-mahmoud-v-taylor-supreme-court-decision> [<https://perma.cc/UY8P-ED8Z>] ("Quite generally, constitutional law has worried about obstacles the government throws in your path to try to stop you from doing something. It simply hasn't worried that maybe you haven't got the money to do what you want to do."). The majority also did not mention that Maryland provides some families with private school vouchers. Broadening Options and Opportunities for Students Today (BOOST) Scholarship Program, Md. State Dep't Educ., <https://marylandpublicschools.org/pages/boost/index.aspx> [<https://perma.cc/WVF3-6RBN>] (last visited Aug. 8, 2026).

142. The Court made *Mahmoud's* application to noncurricular policies clear in *Mirabelli v. Bonta*. See 146 S. Ct. 797, 802 (2026) (per curiam) (asserting that schools that decline to disclose a child's gender transition to that child's parents—a noncurricular policy—present a greater intrusion on parents' free exercise rights than the books at issue in *Mahmoud*).

sweeps. It did not seem to meaningfully do so.¹⁴³ The majority found that a free exercise burden under *Mahmoud* “will depend on the specific religious beliefs and practices asserted, . . . the specific nature of the educational requirement or curricular feature,” the age of the children, and the context and manner in which the relevant materials are presented.¹⁴⁴ But those limits are highly fact-intensive and subjective.¹⁴⁵ What counts as an objective danger?¹⁴⁶ How young is too young? What about school antibullying policies¹⁴⁷ or classroom assignments?¹⁴⁸ This uncertainty is pressing because if public schools cannot anticipate with any certainty what their new obligations will be under *Mahmoud*, it is more likely that already cash-strapped schools will simply omit any part of their curricula or policies that could potentially result in a free exercise violation.¹⁴⁹

Mahmoud gave lower courts a free hand to interpret its rule narrowly or broadly. This flexibility stems from the decision’s low threshold and fact-based inquiry in deciding if strict scrutiny is triggered. A narrow interpretation of the decision accords with sound public policy—making public schools responsive to parental religious opt-out requests on a reasonable basis. A broad interpretation, however, could imperil the fundamental quality of what makes public education so essential in a pluralistic society like the United States.

C. *After Mahmoud: Mirabelli v. Bonta and Churn in the Lower Courts*

For the first eight months following *Mahmoud*, lower courts began to wrestle with that decision’s scope. But then, with the “ink on that

143. See *Mahmoud*, 145 S. Ct. at 2391 (Sotomayor, J., dissenting) (“[The majority’s] test lacks any meaningful limit.”).

144. *Id.* at 2353 (majority opinion).

145. See *id.* at 2392 (Sotomayor, J., dissenting) (questioning how judges can objectively evaluate what counts as a “very real threat,” or if they will “simply know it when they see it and call their analysis ‘fact intensive’” (quoting *id.* at 2352–53 (majority opinion))). Justice Alito himself agrees that at least some lower courts are “confused on how to manage the tension between students’ rights and schools’ obligations.” *L.M. v. Town of Middleborough*, 145 S. Ct. 1489, 1497 (2025) (Alito, J., dissenting from the denial of certiorari).

146. See *Mahmoud*, 145 S. Ct. at 2392 (Sotomayor, J., dissenting) (questioning how judges can objectively evaluate if a policy is a threat to a parent’s ability to determine their child’s religious development).

147. See *id.* at 2393 (“Hard questions might arise, too, from a school’s efforts to encourage mutual respect or to prevent bullying.”).

148. See *id.* at 2381 (“Given the great diversity of religious beliefs in this country, countless interactions that occur every day in public schools might expose children to messages that conflict with a parent’s religious beliefs.”).

149. See *id.* at 2395 (“[T]he majority’s new rule will have serious chilling effects on public school curricula. Few school districts will be able to afford costly litigation over opt-out rights or to divert resources to administering impracticable notice and opt-out systems . . .”). But see *id.* at 2363 (majority opinion) (“Providing [opt-outs] would give the parents no substantive control over the curriculum itself.”).

decision . . . barely dry,”¹⁵⁰ the Supreme Court sought to limit the free hand of the lower courts, insisting that *Mahmoud* be accorded a broad interpretation in an interim order, *Mirabelli v. Bonta*.¹⁵¹ Not only that, but it expanded *Mahmoud*’s original holding by finding that parents could bring an opt-out claim under the doctrine of substantive due process as well as under the Free Exercise Clause.¹⁵² With the Supreme Court unlikely to offer a merits opinion on a *Mirabelli*-like challenge in the near-term,¹⁵³ lower courts are scrambling to understand the scope of *Mahmoud* and *Mirabelli* and to apply them in a way that does not completely upend public education.

Begin with lower courts’ initial impressions of *Mahmoud*. Two months after the Supreme Court decided that case, the Sixth Circuit considered its scope in *Doe No. 1 v. Bethel Local School District*.¹⁵⁴ There, parents brought a free exercise and parental rights challenge to a public school’s transgender-inclusive bathroom policy.¹⁵⁵ As support for their claims, the parents cited *Mahmoud*, arguing in part that the bathroom policy did not need to be neutral and generally applicable to warrant strict scrutiny because the religious burden was of the same character as those in *Mahmoud* and *Yoder*.¹⁵⁶ The panel majority disagreed, finding that burdens falling under the *Mahmoud*–*Yoder* line needed to arise from school policies that are “compulsory [or] instructional.”¹⁵⁷ This was because *Mahmoud*’s reasoning related to hard curricular requirements,

150. *Mirabelli v. Bonta*, 146 S. Ct. 797, 807 (2026) (per curiam) (Kagan, J., dissenting).

151. See *id.* at 802 (characterizing the Ninth Circuit as “brush[ing] aside” *Mahmoud* and criticizing the Circuit for characterizing that opinion as “narrow” (internal quotation marks omitted) (quoting Emergency Application to Vacate Interlocutory Stay Order Issued by the United States Court of Appeals for the Ninth Circuit at 10a, *Mirabelli*, 146 S. Ct. 797 (No. 25A810), 2026 WL 147443)).

152. See *id.* at 803 (asserting that parents who challenged the policies on due process grounds were likely to succeed on the merits).

153. See *id.* at 807 (Kagan, J., dissenting) (noting that the Court did not need to decide *Mirabelli* using its interim docket when there was a functionally similar case, *Foote v. Ludlow School Committee*, that was pending certiorari on the Court’s merits docket); see also *Foote v. Ludlow Sch. Comm.*, No. 25-77, 2026 WL 1052101 (U.S. Apr. 20, 2026) (denying certiorari). Even so, this term the Court may provide further insight in a case presenting a question regarding parents’ standing to challenge a state’s youth shelter policy. See *Int’l Partners for Ethical Care, Inc. v. Ferguson*, 146 S. Ct. 2804 (mem.) (2026) (granting certiorari); *Petition for Writ of Certiorari, Ferguson*, No. 25-840 (U.S. Jan. 7, 2026) (presenting the question of “[w]hether parents have standing to challenge a law or policy that deliberately displaces their decision-making role as to ‘gender transitions’ of their children, and in so doing creates present and likely future impediments to their ability to parent their children as they deem best for them”).

154. No. 23-3740, 2025 WL 2453836 (6th Cir. Aug. 26, 2025).

155. *Id.* at *1.

156. *Id.* at *6.

157. *Id.* at *7.

not any school operational policy that might interfere with religious development.¹⁵⁸

Judge Joan Larsen concurred in the judgment but disagreed with the majority's narrow reading of *Mahmoud*. She pointed out that the decision "never limits its reach to 'educational requirements or curricular features' or any other category of school regulation."¹⁵⁹ She noted that all kinds of school policies could interfere with parents' ability to provide a religious upbringing for their children, even if these policies were not compulsory or instructional.¹⁶⁰ In her view, if *Mahmoud* held that the Free Exercise Clause followed children into the classroom, it should also follow them down the hall to the bathroom.¹⁶¹ In other words, Judge Larsen saw nothing in the *Mahmoud* opinion that prevented it from reaching schools' soft curricula.

In *Mirabelli v. Bonta*, the Ninth Circuit followed the Sixth Circuit panel majority in trying to cabin *Mahmoud* to hard curricular policies.¹⁶² In that case, the Ninth Circuit considered a challenge brought by parents and teachers to various California state laws that required teachers "to hide a student's gender nonconformity and social transition, including from the student's parents, unless the student consents to disclosure of that information."¹⁶³ The challenge alleged that the laws violated both teachers' free exercise and free speech rights and parents' free exercise and substantive due process rights.¹⁶⁴ As was the case in *Bethel*, the parents presented the Ninth Circuit with a religious and parental challenge to a school's soft curricular policy.

Considering the case in an emergency stay posture, the Ninth Circuit granted the stay.¹⁶⁵ In evaluating the merits of the parents' free exercise claims, the Ninth Circuit cited to *Bethel* and characterized *Mahmoud* as a "narrow decision focused on uniquely coercive 'curricular requirements.'"¹⁶⁶ "[G]eneral operational policies," like the transition nondisclosure policy, did not trigger strict scrutiny because nondisclosure

158. *Id.* at *7 n.3.

159. *Id.* at *12 (Larsen, J., concurring in part and concurring in the judgment) (quoting *id.* at 12–13 (majority opinion)).

160. *Id.*; accord *Mirabelli v. Olson*, 820 F. Supp. 3d 1123, 1158 (S.D. Cal. 2025) (finding that a school's policy of forbidding teachers from informing parents when the parents' child uses a new name or pronouns at school undermined the parents' efforts to guide their child's religious development within the meaning of *Mahmoud*).

161. *Bethel*, 2025 WL 2453836, at *13 (Larsen, J., concurring in part and concurring in the judgment). Judge Larsen ultimately concurred in the majority's judgment because the public school's transgender-inclusive bathroom policy did allow children to opt out by offering those students the use of single-stall bathrooms. *Id.*

162. No. 25-8056, 2026 WL 44874, at *3 (9th Cir. Jan. 5, 2026) (citing *Bethel*, 2025 WL 2453836, at *7 n.3), vacated in part and denied in part, 146 S. Ct. 797, 803 (2026).

163. *Id.* at *1.

164. *Id.*

165. *Id.* at *1–2.

166. *Id.* at *3 (citing *Bethel*, 2025 WL 2453836, at *7 n.3).

was the *student's* decision.¹⁶⁷ Thus, the policy did not present a burden like the one at issue in *Mahmoud* or *Yoder*.¹⁶⁸ As for the parents' substantive due process parental rights claim, the panel gave a brusque analysis because it was "skeptical" that the claims would be successful given the Supreme Court's recent rigor in evaluating substantive due process claims.¹⁶⁹

On emergency appeal from the Ninth Circuit decision, the Supreme Court disagreed that *Mahmoud* had no application to schools' soft curricular policies, vindicating Judge Larsen on the Sixth Circuit.¹⁷⁰ The Court accused the Ninth Circuit of "brush[ing] aside" *Mahmoud* and criticized it for relying on the Sixth Circuit panel's rationale that *Mahmoud* only applied to hard curricular policies.¹⁷¹

Conducting its own back-of-the-napkin analysis, the Court found that the parents were likely to succeed on the merits.¹⁷² On the score of the parents' free exercise rights, it concluded that California's policies imposed a burden similar to the ones considered in *Mahmoud* and *Yoder*.¹⁷³ It noted that "the intrusion on parents' free exercise rights here—unconsented facilitation of a child's gender transition—is greater than the introduction of LGBTQ storybooks [the Court] considered sufficient to trigger strict scrutiny in *Mahmoud*."¹⁷⁴ Subjecting California's nondisclosure policy to strict scrutiny, the Court found that the policy did not serve the compelling interest of protecting children because it "cut out the primary protectors of children's best interests: their parents."¹⁷⁵ And the policy was not narrowly tailored because the state's interest in safety could be served by allowing for religious exemptions while screening out parents who would be abusive if they found out their child was transitioning.¹⁷⁶ The Supreme Court thus rejected any categorical rule limiting *Mahmoud* to classroom instruction—instead, potentially *any* school policy or administrative decision could be subject to a free exercise challenge.¹⁷⁷

167. Id. at *3 (citing *Bethel*, 2025 WL 2453836, at *7 n.3).

168. Id.

169. Id. (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2247–48 (2022)). As for the teachers' claims, the panel found that their free exercise claims were contradicted by the record and that their free speech claim rose and fell with the parents' unsuccessful constitutional claims. Id. at *4.

170. See *Mirabelli v. Bonta*, 146 S. Ct. 797, 802 (2026) (per curiam) (citing *Mirabelli*, 2026 WL 44874, at *3) (criticizing the Ninth Circuit for reading *Mahmoud* too narrowly).

171. Id.

172. Id.

173. Id.

174. Id. (citing *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2360 (2025)).

175. Id.

176. See id. at 802–03.

177. See Aidan Keaveney, Note, Case Note: Supreme Court Holds Schools Likely Required to Inform Parents of Students' Gender Identity, *Geo. Wash. L. Rev.* On the

Then, going even broader, the Court found that *Mahmoud*-like challenges can be brought by religious and nonreligious parents alike via a parental rights substantive due process claim.¹⁷⁸ In a single paragraph, the Court explained that those parents raising only substantive due process claims were also likely to succeed on the merits.¹⁷⁹ The Court reasoned that the nondisclosure policy “shut out” parents from “decisions regarding their children’s mental health,” likely violating the parents’ rights to direct the “upbringing and education of their children.”¹⁸⁰ By crediting *nonreligious* parents’ substantive due process claims, the Supreme Court raised the possibility that, going forward, parents may not even need to allege a free exercise burden to challenge a school policy; any interference with parental prerogatives may be enough to subject a school policy to strict scrutiny.¹⁸¹

Lower courts have only begun wrestling with *Mirabelli*’s expansion of *Mahmoud*, even as the Supreme Court has signaled that it does not intend to offer a binding merits opinion on the issue in the near future.¹⁸² Without further guidance, lower courts face two headwinds. First, it is difficult for them to assess how precedential interim orders are outside of the precise factual scenarios those orders considered.¹⁸³ And second, it is

Docket (2026), <https://www.gwlr.org/mirabelli-parental-rights/> [https://perma.cc/24Y7-VAXA] (explaining that “[a]s a doctrinal matter, *Mirabelli* seems to clarify one thing: Contrary to the holdings of the Sixth and Ninth Circuits, *Mahmoud* applies beyond school curriculum to any policy” imposing a religious burden like those in *Mahmoud* and *Yoder*).

178. As for the teachers’ claims, the Court declined to vacate the Ninth Circuit’s stay as to them. See *Mirabelli*, 146 S. Ct. at 802 (“We grant the application and vacate the stay with respect to the parents” (citation omitted) (citing *Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ.*, No. 23-3740, 2025 WL 2453836, at *7 (6th Cir. Aug. 26, 2025))).

179. *Id.* at 803.

180. *Id.* (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979); then quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925)).

181. Cf. Ian Millhiser, The Supreme Court’s Republicans Just Seized the Most Dangerous Power in Constitutional Law, *Vox* (Mar. 3, 2026), <https://www.vox.com/politics/481401/supreme-court-mirabelli-bonta-sauron-wins> (on file with the *Columbia Law Review*) (inquiring whether schools must now tell parents if teachers see “two female students holding hands” or “[i]f a member of the drama club performs in a way that lampoons gender roles”).

182. See *Mirabelli*, 146 S. Ct. at 807 (Kagan, J., dissenting) (suggesting the Court grant certiorari in *Foote v. Ludlow School Committee* and issue a merits opinion on the issue); see also *Foote v. Ludlow Sch. Comm.*, No. 25-77, 2026 WL 1052101 (U.S. Apr. 20, 2026) (denying certiorari); cf. *Trump v. Boyle*, 145 S. Ct. 2653, 2655 (2025) (Kavanaugh, J., concurring) (“[I]f we grant a stay but do not also grant certiorari before judgment, we may leave the lower courts and affected parties with extended uncertainty and confusion about the status of the precedent in question.”).

183. Compare *Boyle*, 145 S. Ct. at 2654 (“Although our interim orders are not conclusive as to the merits, they inform how a court should exercise its equitable discretion in like cases.”), with *Mirabelli*, 146 S. Ct. at 807 (Kagan, J., dissenting) (“[N]o one . . . is apt to read the Court’s *per curiam*, brusque though it is, as anything less than a conclusive merits judgment.”). Further, the value of the majority’s reasoning in *Mirabelli* as to how *Mahmoud* will or should be read going forward is limited because *Mirabelli* truncates the analysis *Mahmoud* demanded. For example, *Mahmoud* requires a “fact-

presently unclear how the Court intends to reconcile its recent substantive due process precedents with *Mirabelli*.¹⁸⁴

Those difficulties aside, lower courts have not yet treated *Mirabelli* as significantly changing *Mahmoud*'s free exercise analysis. For example, one court ruled against a parent bringing free exercise and parental due process claims seeking an opt-out from Maryland's health class requirement.¹⁸⁵ The judge handed down the decision the same day as *Mirabelli*.¹⁸⁶ Nonetheless, the judge denied a motion for reconsideration two months later without mentioning *Mirabelli* at all.¹⁸⁷ Likewise, in

intensive" burden inquiry that considers, among other things, the "specific religious beliefs and practices asserted, as well as the specific nature of the educational requirement or curricular feature," including whether it is targeted at young children. *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2353 (2025). That analysis is missing in *Mirabelli*. See *Mirabelli*, 146 S. Ct. at 802–03.

However, even though *Mirabelli*'s full scope with respect to school policies is unclear, there is no question that it controls on the issue of gender transition nondisclosure policies. See *City of Huntington Beach v. Newsom*, No. 25-3826, 2026 WL 1785110, at *2 (9th Cir. June 18, 2026) (acknowledging that *Mirabelli*'s analysis controls the outcome in evaluating a gender transition nondisclosure policy); *Vitsaxaki v. Skaneateles Cent. Sch. Dist.*, No. 25-952, 2026 WL 1831552, at *1 (2d Cir. June 25, 2026) (remanding to determine how *Mirabelli* will affect the due process and free exercise analyses of a gender transition nondisclosure policy). The Court appears likely to issue a merits opinion touching on gender transition nondisclosure policies in the separate but related context of youth shelters in *International Partners for Ethical Care, Inc. v. Ferguson*, No. 25-840 (U.S. docketed Jan. 7, 2026).

184. See *Mirabelli*, 146 S. Ct. at 808 (Kagan, J., dissenting) ("Substantive due process has not been of late in the good graces of this Court . . ."); *id.* at 805 (Barrett, J., concurring) (recognizing that "it would have been unwise" for the Court to issue an "unreasoned" substantive due process order in light of *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022)).

This Note focuses on the Free Exercise Clause and so does not dwell on substantive due process, which raises separate if related issues. Even so, this Note's proposed solution of defending certain school policies from free exercise challenges at the strict scrutiny stage applies with equal force to substantive due process challenges. See Mich. L. Rev., Project, Education and the Law: State Interests and Individual Rights, 74 Mich. L. Rev. 1373, 1395 n.115 (1976) (arguing that parental substantive due process challenges to educational policies, if they were recognized, should require the same constitutional analysis as parental free exercise challenges because the strict scrutiny standard applies to both); see also *infra* section III.B.

185. *Gottesman v. Bd. of Educ. of Montgomery Cnty.*, No. 25-1682, 2026 WL 574975, at *1 (D. Md. Mar. 2, 2026). The challenge involved the same school district defendant as in *Mahmoud*, 145 S. Ct. at 2342.

186. *Gottesman*, 2026 WL 574975, at *1; *Mirabelli*, 146 S. Ct. at 797.

187. *Gottesman v. Bd. of Educ. of Montgomery Cnty.*, No. 25-1682, 2026 WL 1346173, at *1 (D. Md. May 14, 2026). Although plaintiff brought the motion for reconsideration so that he could amend his pleadings with additional factual allegations and not because of the intervening decision, *id.*, it is still noteworthy that the court and parties made no mention of *Mirabelli*, which would seem to bear directly on the case. Cf. *Gottesman*, 2026 WL 574975, at *17 ("Given the strictures of the fundamental right inquiry, 'most due process challenges to public school policies are subject only to rational basis review.'" (quoting *Mahmoud v. McKnight*, 102 F.4th 191, 217 (4th Cir. 2024), *rev'd* and *remanded sub nom. Mahmoud*, 145 S. Ct. 2332)).

evaluating a parental free exercise challenge to a public school's mandatory vaccination policy, the Fourth Circuit distinguished both *Mahmoud* and *Mirabelli* on the ground that neither dealt with the "need for some to protect the health and well-being of all."¹⁸⁸ And in a sign of continuity in the Ninth Circuit's approach, judges on that circuit have objected that the court continues to "relegate[] religious liberty to a second-class right," even after it has been scolded for its "failure to guard against intrusions on religious liberty."¹⁸⁹

And, although lower courts have just begun earnestly analyzing substantive parental due process claims,¹⁹⁰ the due process analyses they have engaged in are nothing new: Courts have diverged along familiar lines depending on whether they define parental rights at greater or lesser levels of generality.¹⁹¹ For example, one court has reasoned that a parent-plaintiff "must carefully define each parental right [claimed] and identify a substantial historical pedigree."¹⁹² Other courts, noting that *Mirabelli* declined to define parental rights on a narrow case-by-case basis, have rejected that approach and embraced a broad vision of parental rights,¹⁹³ often to the detriment of what are compelling state interests.¹⁹⁴

Far from clarifying *Mahmoud*, then, *Mirabelli* left lower courts just as confused as they were before. Indeed, even now, lower courts are testing new ways to limit *Mahmoud's* scope. Some courts have read *Mahmoud* to apply only to religious objections within the educational context, not

188. *Perry v. Marteney*, 172 F.4th 315, 327 (4th Cir. 2026); *id.* at 327 n.1 ("The Supreme Court's recent action in *Mirabelli v. Bonta* is distinguishable for similar reasons. It was a preliminary action that did not involve a public health measure." (citation omitted) (citing *Mirabelli*, 146 S. Ct. at 797)).

189. *Union Gospel Mission of Yakima Wash. v. Brown*, 181 F.4th 1331, 1332 (mem.) (9th Cir. June 18, 2026) (Bumatay, J., dissenting from grant of reh'g en banc).

190. See, e.g., *Mirabelli v. Bonta*, No. 25-8056, 2026 WL 44874, at *3 (9th Cir. Jan. 5, 2026) (expressing skepticism about expanding parental substantive due process claims); *Gottesman*, 2026 WL 574975, at *16–17 (same); see also Melissa Moschella, Clarifying the True Breadth and Strength of Parental Rights Under *Pierce*, 49 Harv. J.L. & Pub. Pol'y 95, 114 (2024) (arguing that "the narrow and weak interpretation of parents' constitutional rights under *Pierce* that has been adopted by many circuit courts is deeply flawed").

191. See Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057, 1058 (1990) (arguing that whether a right is described narrowly or broadly affects what level of protection courts afford it).

192. *Gottesman*, 2026 WL 574975, at *17.

193. *Henry v. Sheriff of Tuscaloosa Cnty.*, 180 F.4th 1294, 1324 (11th Cir. 2026) (Rosenbaum, J., concurring) ("[I]n *Mirabelli*, the Court did not narrowly describe the asserted right as the right of the parents to know whether their children are gender-transitioning at school. Rather, the Court held that California's 'policies likely violate parents' rights to direct the "upbringing and education of their children."' (emphasis added by Henry) (quoting *Mirabelli*, 146 S. Ct. at 803)).

194. See *id.* at 1298–1300 (holding that a father convicted of possessing images of child pornography—and who accessed more images even after his conviction—had a fundamental right to live with his young child despite an Alabama law prohibiting the same for those with child pornography convictions).

religious exemptions more generally.¹⁹⁵ Others, even when dealing with educational policies, have found that the decision only protects the rights of parents and students, not other parties who claim that education policies burden their free exercise.¹⁹⁶ And some courts have sought to distinguish *Mahmoud* on factual grounds,¹⁹⁷ with sometimes dubious reasoning.¹⁹⁸

By finding ways to distinguish *Mahmoud* despite the Supreme Court's emphasis on its broad reach,¹⁹⁹ lower courts are exhibiting sensitivity to the harm of a limitless understanding of free exercise and parental substantive due process claims.

D. *Assessing the Potential Negative Consequences of a Broad Reading of Mahmoud and Mirabelli*

Mahmoud's most important legacy may not be what it has to say about school opt-outs but how it reimagines the relationship between families and public schools.²⁰⁰ This reimagining is illustrated by *Defending*

195. See, e.g., *Ariz. Mining Reform Coal. v. U.S. Forest Serv.*, 172 F.4th 641, 665 (9th Cir. 2026) (distinguishing *Mahmoud* from a free exercise challenge brought by Native Americans to prevent mining on sacred lands because *Mahmoud* concerns the “education context” and “policies that directly coerce or indirectly compel behavior at odds with individual religious beliefs or practices[] not involving the disposition of government property” (citing *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2350–53 (2025)); *Kondilis v. City of Chicago*, 160 F.4th 866, 871 n.4 (7th Cir. 2025) (distinguishing *Mahmoud* from a free exercise challenge brought by municipal employees against a mandatory vaccination policy because *Mahmoud* “involved compulsory school programs that infringed on parents’ fundamental right to direct the education of their children”).

196. See, e.g., *Polk v. Montgomery Cnty. Pub. Schs.*, 166 F.4th 400, 412 (4th Cir. 2026) (applying *Smith* instead of *Mahmoud* to a substitute teacher’s free exercise challenge to a school’s requirement that school personnel refer to students using their preferred pronouns); *St. Dominic Acad. v. Makin*, 181 F.4th 11, 61 (1st Cir. 2026) (finding *Mahmoud* and *Mirabelli* inapplicable to a private Catholic school’s action seeking a religious exemption from the Maine Human Rights Act because those cases concerned parental rights and “neither case concerned schools’ rights”).

197. See, e.g., *Gottesman*, 2026 WL 574975, at *14 (declining to apply *Mahmoud* to a parent’s request to exempt his child from Maryland’s health class requirement in part because the child was a high schooler).

198. Compare *Nathan v. Alamo Heights Indep. Sch. Dist.*, 173 F.4th 576, 584 (5th Cir. 2026) (en banc) (finding *Mahmoud* inapplicable to a free exercise challenge to a Texas law requiring the Ten Commandments be hung in all public school classrooms because, unlike the children’s books in *Mahmoud*, the Texas law “authorizes no religious instruction and gives teachers no license to contradict children’s religious beliefs (or their parents’)”), with *id.* at 645 (Higginson, J., dissenting) (“[It] is iron[ic] . . . [that] the majority today . . . goes beyond [*Mahmoud*]. In *Mahmoud*, the school materials at issue were non-religious books that parents deemed contradictory to their values; here, the material is the exact text of the King James Version of the Ten Commandments.” (citing *Mahmoud*, 145 S. Ct. at 2343–44)).

199. See *Mirabelli v. Bonta*, 146 S. Ct. 797, 802 (2026).

200. Another key legacy of *Mahmoud* and *Mirabelli* not discussed here is that they both challenge the long-standing principle of constitutional law that individuals are not entitled to governmental aid in exercising their constitutional rights. *Mahmoud* essentially

Education v. Olentangy Local School District, in which the Sixth Circuit cites *Mahmoud* for the proposition that public schools are inherently coercive because parents cannot afford private religious education.²⁰¹ Some concurring judges took the point further, characterizing public schools as impermissibly “indoctrinat[ing]” children,²⁰² which they defined as exerting on students “a psychological ‘pressure to conform’ to . . . specific viewpoints.”²⁰³

While these judges are indisputably correct that public schools are coercive²⁰⁴ (how else would they fulfill their socializing role?), that coercion is what teaches students that the earth is round, that they need to be respectful of their teachers in class, and that bullying is bad. If the only permissible indoctrination is that which comes with parental approval, then parents have the prerogative to exempt their children from any aspect of public schooling that they wish.²⁰⁵ If this proposition were taken to its logical endpoint, parental opt-outs not only would cause schools to face administrative nightmares;²⁰⁶ depending on the targeted

requires public schools to affirmatively assist parents in ensuring their children receive a religious upbringing. For a detailed discussion of this, see Laura Portuondo, *Free Exercise and the Redistribution of Liberty*, 136 Yale L.J. (forthcoming 2027) (manuscript at 3), <https://ssrn.com/abstract=6187039> [<https://perma.cc/88EW-KJZ8>] (identifying an “emerging asymmetry in constitutional law . . . that stands to reshape the distribution of basic public resources” caused by the Supreme Court, which has “increasingly found that the state burdens religious liberty by failing to provide religious litigants benefits beyond the market”).

201. 158 F.4th 732, 745 (6th Cir. 2025) (en banc) (citing *Mahmoud*, 145 S. Ct. at 2351, 2359–60); id. at 770 (Thapar & Nalbandian, JJ., concurring) (“The greater the state’s control, the greater the need to protect students’ and parents’ rights—especially when the state is claiming a right not just to step into the parents’ shoes, but to inculcate values that directly contradict the parents’ views.” (citing *Mahmoud*, 145 S. Ct. at 2352, 2357–58)).

202. Id. at 773 (Thapar & Nalbandian, JJ., concurring); see also id. at 792 (Bush, J., concurring) (arguing that *Mahmoud* “requires heightened attention to school policies that compel or coerce students in the name of educational mission”).

203. Id. at 773 (Thapar & Nalbandian, JJ., concurring) (quoting *Mahmoud*, 145 S. Ct. at 2355).

204. See *supra* section I.A.

205. For scholars advocating for this broad view of parental rights, see, e.g., Melissa Moschella, *Do Parental Rights Extend Beyond the Schoolhouse Door? Correcting Misinterpretations of Pierce in Light of History and Tradition*, 100 Notre Dame L. Rev. 1607, 1615 (2025) (arguing, on originalist grounds, that *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), stands for a broad view of parental rights and that violations of parental rights should trigger strict scrutiny); S. Ernie Walton, *In Loco Parentis*, the First Amendment, and Parental Rights—Can They Coexist in Public Schools?, 55 Tex. Tech L. Rev. 461, 497 (2023) (arguing that courts should construe delegations of parental rights to public schools narrowly and that public schools do not have the authority to exceed that delegation).

206. See *Mahmoud*, 145 S. Ct. at 2381 (Sotomayor, J., dissenting) (“Requiring schools to provide advance notice and the chance to opt out of every lesson plan or story time that might implicate a parent’s religious beliefs will impose impossible administrative burdens on schools.”).

policy, they could result in harm to teachers, students, and the cohesion of American society.

First, the harm to teachers. The clearest risk to this group would be if parents could object to teachers' moral character and use that objection as a justification for removing their children from those teachers' classrooms.²⁰⁷ Courts should not allow parents to recreate via opt-out request the old legal regime in which teachers were disciplined for morally disfavored conduct that had no bearing on their pedagogical ability.²⁰⁸ This conclusion follows even more strongly when considering the retention and morale issues facing the teaching profession²⁰⁹ and how teachers holding vulnerable identities serve as vital role models for students sharing those identities.²¹⁰

The clearest risk to students would be if parents could opt out their child from following certain portions of school antibullying policies.²¹¹

207. See, e.g., *Bailey v. Mansfield Indep. Sch. Dist.*, 425 F. Supp. 3d 696, 707–08 (N.D. Tex. 2019) (involving a school district placing a lesbian teacher on leave after the teacher shared photos of her fiancée and parents complained); Walton, *supra* note 205, at 498 (“[P]arents should have the right to object to teachers for their children when teachers routinely contradict parental goals of education with either their instruction *or their own character.*” (emphasis added)).

208. See DeMitchell et al., *supra* note 47, at 74 (describing courts' shift away from a moral “exemplar” standard toward a “nexus” standard for evaluating teachers' moral shortcomings); see also *Morrison v. State Bd. of Educ.*, 461 P.2d 375, 391 (Cal. 1969) (illustrating this shift). But see Walton, *supra* note 205, at 498 (“[P]arents hold the educational right, and when a teacher consistently undermines parental goals, parents should have the right to place their child with another teacher in the same school—subject to reasonable limits . . .”).

209. See Luona Lin, Kim Parker & Juliana Menasce Horowitz, *What's It Like to Be a Teacher in America Today?*, Pew Rsch. Ctr. (Apr. 4, 2024), <https://www.pewresearch.org/social-trends/2024/04/04/whats-it-like-to-be-a-teacher-in-america-today/> [<https://perma.cc/S2A9-LYPT>] (finding that 77% of teachers say their job is frequently stressful; 68% say their job is overwhelming; and only a third say they're extremely or very satisfied with their job overall); see also *An Overview of Teacher Shortages: 2025*, Learning Pol'y Inst. (July 16, 2025), <https://learningpolicyinstitute.org/product/overview-teacher-shortages-2025-factsheet> [<https://perma.cc/MQ7R-AX26>] (finding that “411,549 positions were either unfilled or filled by teachers not fully certified . . . representing about 1 in 8 of all teaching positions nationally” and that “[a]ttention comprises about 90% of annual teacher demand and drives many of the shortages we see today”).

210. See Seth Gershenson, Cassandra M.D. Hart, Joshua Hyman, Constance Lindsay & Nicholas W. Papageorge, *The Long-Run Impacts of Same-Race Teachers*, *Am. Econ. J.: Econ. Pol'y*, Nov. 2022, at 300, 300–01 (“Black students randomly assigned to at least one Black teacher in grades K–3 are 9 percentage points (13 percent) more likely to graduate from high school. They are 6 percentage points (19 percent) more likely to enroll in college than their same-school, same-cohort Black peers who are not assigned a Black teacher”); Hilton Kelly, *Race, Remembering, and Jim Crow's Teachers* 55, 59, 68 (2010) (observing that Black teachers had a traditional function as “cultural bearers, role models, and mentors”); Hansen & Hubbard, *supra* note 128.

211. See, e.g., *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 668 (8th Cir. 2023) (finding, in a parental challenge to a school policy requiring that students respect each other's gender identities, that a preliminary injunction was

Some religious actors attempting to receive public money have already moved to make sure that they do not need to treat students of certain identities the same.²¹² The consequences of allowing these kinds of opt-outs are predictable and severe. Bullied students tend to have lower academic achievement²¹³ and experience increased negative health and psychosocial consequences.²¹⁴ Often, the alternative to implementing inclusive antibullying policies is to tolerate tragic consequences like suicide.²¹⁵

Next, while societal harms are less tangible than the direct harms to students and teachers, they are no less significant. The Supreme Court has previously recognized that public schools teach students the fundamental values necessary for the maintenance of democracy by serving as an “assimilative force” by which diverse and conflicting elements in [American] society are brought together on a broad but common ground.”²¹⁶ While this work can partially be done through hard curricular offerings like civics classes, it primarily occurs through a school’s soft curricular choices that govern the everyday conduct of students.²¹⁷ These soft curricular choices might include deciding to hire a math teacher who happens to be transgender, having an inclusive bathroom policy, or asking that students use each other’s preferred names and pronouns.²¹⁸ Implementing such policies allows public

improperly denied as the plaintiffs were likely to succeed in arguing that the challenged policy is void for vagueness because it did not define the term “respect”).

212. *St. Dominic Acad. v. Makin*, 181 F.4th 11, 26–27 (1st Cir. 2026) (involving a Catholic school’s as-applied challenge to state nondiscrimination rules concerning religion, sexual orientation, and gender identity).

213. Muthanna Samara, Bruna Da Silva Nascimento, Aiman El-Asam, Sara Hammuda & Nabil Khattab, *How Can Bullying Victimization Lead to Lower Academic Achievement?: A Systematic Review and Meta-Analysis of the Mediating Role of Cognitive-Motivational Factors*, *Int’l J. Env’t Rsch. & Pub. Health*, Mar. 2021, at 1, 3 (2021) (finding that “bullying victimisation reduces academic achievement by decreasing students’ motivation and aspirations”).

214. See Comm. on Biol. & Psychosoc. Effects of Peer Victimization: Lessons for Bullying Prevention, *Nat’l Acads. Scis., Eng’g, & Med.*, Preventing Bullying Through Science, Policy, and Practice 113–60 (Frederick Rivara & Suzanne Le Menestrel eds., 2016) (listing the negative consequences of bullying for both the bullied and bullying students).

215. See Francisco M. Negrón, Jr., *Maddening Choices: The Tension Between Bullying and the First Amendment in Public Schools*, 11 *First Amend. L. Rev.* 364, 365 (2013) (noting that state legislatures have sought to address bullying in part because of a series of teenage suicides).

216. *Ambach v. Norwick*, 441 U.S. 68, 77–78 (1979) (citing John Dewey, *Democracy and Education* 26 (1929); Newton Edwards & Herman G. Richey, *The School in the American Social Order* 623–24 (2d ed. 1963)).

217. See *supra* section I.A; see also *Ambach*, 441 U.S. at 80 (“[A] State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught.”).

218. Policies requiring students and teachers to use each other’s preferred pronouns, like transition nondisclosure policies, have been a popular target for litigious parents as of

schools to serve what many consider to be their high purpose: being the foundation of America's civil and political freedoms.²¹⁹ When public schools use their soft curricula to further this purpose, they ensure that parents can continue to exercise their religious and parental rights into the future; the exercise of those rights depends on future citizens being taught tolerance for different ways of life.²²⁰ Indeed, by exposing students to teachers holding diverse identities, schools can foster mutual respect in students for people who are unlike themselves. Without facilitating this form of contact, prejudice will persist.²²¹

It follows that less inclusive public schools will harm demographics beyond the LGBTQ+ community.²²² Free exercise objections have been used to justify exemptions from antidiscrimination laws protecting other groups,²²³ including harms to older people, people with disabilities, and

late. See, e.g., *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 158 F.4th 732, 738–40 (6th Cir. 2025) (en banc).

219. See *Ambach*, 441 U.S. at 76 (“The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions . . .”); Gutmann, *supra* note 19, at 54 (underscoring that parental freedom to “teach their values to their children” hinges on public schools instilling children with a “widespread and enduring tolerance for different ways of life”).

220. Gutmann, *supra* note 19, at 54.

221. See Allport, *supra* note 31, at 281 (“Prejudice . . . may be reduced by equal status contact between . . . groups in the pursuit of common goals. The effect is greatly enhanced if this contact is sanctioned by institutional supports . . . [and] is of a sort that leads to the perception of common interests and common humanity . . .”); Van Assche et al., *supra* note 31, at 771 (finding contact to be effective even among “highly intolerant or marginalized individuals”); Chin, *supra* note 31, at 208 (finding that racial integration in public schools is positively correlated with positive racial attitudes later in life).

222. Civil rights protections for the LGBTQ+ community have been first in the line of attack over the past decade. See, e.g., *West Virginia v. B.P.J.*, 146 S. Ct. 2356 (2026) (state seeking to forbid transgender girls from competing in public school sports programs); 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (wedding website designer seeking not to serve gay couples getting married); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (adoption agency seeking not to certify adoptions to same-sex couples). For a discussion of how issues impacting the transgender community are often breach points for rolling back civil rights protections for other vulnerable groups, see Katie Eyer, *Anti-Transgender Constitutional Law*, 77 Vand. L. Rev. 1113, 1119 (2024) (arguing that constitutional law arguments currently wielded against transgender individuals have the potential to “profoundly limit the reach of anti-discrimination law—for all protected classes”).

223. See, e.g., *St. Dominic Acad. v. Makin*, 181 F.4th 11, 25–26 (1st Cir. 2026) (challenging the application of Maine state laws to a private Catholic school’s policies on the basis that those laws’ requirement that the school not discriminate on the basis of religion, sexual orientation, or gender identity infringes on the school’s free exercise). In other opt-out litigation, parents have challenged books that celebrate civil rights victories. See, e.g., *Alan L. v. Lexington Pub. Schs.*, 814 F. Supp. 3d 61, 70 (D. Mass. 2025).

Further, although the Supreme Court has acknowledged that race discrimination cannot escape sanction by cloaking itself in a free exercise claim, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014), some courts have done just that via the ministerial exception to Title VII and its state-level analogues. See, e.g., *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 614 (Ky. 2014) (finding that a seminary professor’s

unmarried people.²²⁴ There are more than 370 religious groups in the United States,²²⁵ meaning that a whole host of seemingly innocuous school policies or teaching practices could come under fire.²²⁶

Together, these harms force the conclusion that at least some soft curricular policies should be able to survive *Mahmoud's* analysis; otherwise, *Mahmoud* and *Mirabelli* will kneecap public schools' ability to administer their internal affairs and regulate student conduct.

III. WITHSTANDING SCRUTINY: TOLERANCE AS AN INTEREST OF THE "HIGHEST ORDER"

A. *Considering and Rejecting Other Limiting Principles*

To articulate a reading of *Mahmoud* that appropriately balances the interests of families and schools, the decision must be taken on its own terms. This conclusion follows because the Court has insisted that lower courts faithfully apply *Mahmoud*,²²⁷ and other sources of authority—like the Establishment Clause, Title VII, and Title IX—cannot step in to provide a satisfying limiting principle on it.

racial discrimination claim under the Kentucky Civil Rights Act was barred by the ministerial exception); see also Griffin, *supra* note 103 (collecting cases and noting that the ministerial exception in employment law “allows any form of discrimination by religious organizations to proceed without lawsuit”).

224. See, e.g., *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020) (holding that the Religion Clauses barred a private Catholic school teacher's age discrimination claim under the ADEA); *Tassinari v. Salvation Army Nat'l Corp.*, 610 F. Supp. 3d 343, 349–50 (D. Mass. 2022) (involving a religious organization justifying the denial of medication-assisted treatment for opioid-use disorder on free exercise grounds); Tracey Tully, *An Unmarried Catholic Schoolteacher Got Pregnant. She Was Fired.*, N.Y. Times (June 28, 2021), <https://www.nytimes.com/2021/06/28/nyregion/pregnant-catholic-school-teacher.html> (on file with the *Columbia Law Review*) (reporting that a Catholic school terminated an unmarried teacher for getting pregnant, leading to a lawsuit). See also Law, Rts. & Religion Project, *supra* note 81, at 5–6 (cataloguing cases in which religious exemptions have been invoked to justify discrimination and other harms).

225. *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2394 (2025) (Sotomayor, J., dissenting).

226. See *id.* (“Under the majority’s test, school administrators will have to become experts in a wide range of religious doctrines in order to predict, in advance . . . [potential parental objections].”); see also, e.g., *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 253 (5th Cir. 2010) (involving a Native American family’s lawsuit brought under Texas’s RFRA state analogue challenging a school grooming policy); *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 153 (6th Cir. 1995) (involving a student raising a free speech challenge against a teacher for not allowing her to discuss Jesus Christ in a school paper); *Guyer v. Sch. Bd. of Alachua Cnty.*, 634 So. 2d 806, 806 (Fla. Dist. Ct. App. 1994) (involving a parent raising an Establishment Clause objection to a teacher dressing up as a witch for Halloween because of witchcraft’s associations with the Wicca religion).

227. See *Mirabelli v. Bonta*, 146 S. Ct. 797, 805 (2026) (Barrett, J., concurring) (“The Ninth Circuit (following the Sixth Circuit) significantly misunderstood *Mahmoud v. Taylor*, and general course correction will allow the case to progress efficiently.” (citation omitted)).

The Establishment Clause, at least under the Court's current jurisprudence, is unlikely to provide a satisfactory limit. Scholars have argued that the clause occupies a position of "relative irrelevance" because, despite the Court's claims of the clause's broad authority, the Court has inconsistently enforced that authority.²²⁸ This relative irrelevance has only become truer in recent years, as the Roberts Court has consistently weakened the Establishment Clause's force when the opportunity arises.²²⁹ If scholars fifteen years ago thought that some laws implicating establishment concerns had to be policed by other sources of authority,²³⁰ that assertion is doubly true now.

Existing antidiscrimination protections, like those flowing from Title IX²³¹ and Title VII,²³² seem to provide a clear limiting principle. Unfortunately, they are both inadequate. Title IX comes up short in protecting students from bullying because the school policies that are subject to litigation are often those policies that protect students on the basis of sexual orientation and gender identity.²³³ Although the Biden Administration tried to extend the reach of Title IX to include sexual orientation and gender identity using *Bostock v. Clayton County*,²³⁴ a district court rejected that reading of the statute.²³⁵ The second Trump Administration then took office and immediately reversed course, rejecting the idea that *Bostock* has any application to Title IX.²³⁶ And most recently, the Supreme Court made clear in *West Virginia v. B.P.J.* that

228. See Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 *Tex. L. Rev.* 583, 591, 614, 649 (2011) (arguing that the Supreme Court underenforces the Establishment Clause despite its "stated doctrine" being "expansive").

229. See, e.g., *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2453 (2022) (Sotomayor, J., dissenting) ("Today, the Court once again weakens the [Establishment Clause]."); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 495 (2017) (Sotomayor, J., dissenting) ("Today's decision . . . jeopardizes the government's ability to remain secular [by weakening Establishment Clause doctrine].").

230. See Schragger, *supra* note 228, at 649 (suggesting that the Equal Protection Clause can step in to check the imposition of "religious moralities").

231. 20 U.S.C. §§ 1681–1689.

232. 42 U.S.C. §§ 2000e–2000e-17.

233. See, e.g., *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 158 F.4th 732, 738 (6th Cir. 2025) (en banc) (hearing a challenge to a preferred pronoun policy); *Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ.*, No. 23-3740, 2025 WL 2453836, at *1 (6th Cir. Aug. 26, 2025) (hearing a challenge to an inclusive bathroom policy); *Vitsaxaki v. Skaneateles Cent. Sch. Dist.*, 771 F. Supp. 3d 106, 111 (N.D.N.Y. 2025), *aff'd in part*, vacated in part, No. 25-952, 2026 WL 1831552 (2d Cir. June 25, 2026) (summary order) (hearing a challenge to a gender transition nondisclosure policy).

234. 140 S. Ct. 1731 (2020).

235. *Tennessee v. Cardona*, 762 F. Supp. 3d 615, 626 (E.D. Ky. 2025) (holding, in part, that "Title IX does not unambiguously condition the receipt of [federal] funds on the prohibition of gender identity discrimination" and so declining to apply *Bostock*'s inclusion of gender identity in sex discrimination protections to Title IX).

236. Exec. Order No. 14,168, 90 *Fed. Reg.* 8615 (Jan. 20, 2025) (repealing Biden Administration guidance applying *Bostock* to Title IX).

Bostock cannot be transferred whole-cloth to the Title IX context, if at all.²³⁷

Title VII, too, is inadequate. Controversies surrounding public school teachers also tend to implicate the teacher's gender identity²³⁸ or sexual orientation.²³⁹ While Title VII does provide protections for public school teachers on the basis of those characteristics,²⁴⁰ at least some courts have declined to recognize the full force of that protection.²⁴¹ And even in extending Title VII's protections in *Bostock*, the Supreme Court suggested that RFRA may "supersede Title VII's commands in appropriate cases," implying that free exercise claims, too, could override Title VII.²⁴² Regardless, Title VII only provides protections on the basis of protected characteristics like religion and sex, not other aspects of

237. 146 S. Ct. 2356, 2373 (2026) (holding that "Title VII [and *Bostock*] concern[] employment, whereas Title IX as relevant here focuses on sports," and so Title IX does not apply to a state law banning the participation of transgender girls and women in sports). While *B.P.J.* does not hold that *Bostock* lacks any application to the Title IX context, Justice Neil Gorsuch, the author of *Bostock*, intimated that may be the case. See *id.* at 2383 (Gorsuch, J., concurring) (arguing that Title IX is Spending Clause legislation and so any conditions on funds must be "clear[] and unambiguous[]," and that "sex" at the time of Title IX's enactment referred to "biological sex" (internal quotation marks omitted) (quoting *Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2232 n.4 (2025))).

238. See, e.g., *Wood v. Fla. Dep't of Educ.*, 142 F.4th 1286, 1288–89 (11th Cir. 2025) (involving a transgender teacher's challenge to a policy prohibiting teachers from using self-identified pronouns and titles when speaking to students); Rozsa, *supra* note 60 (involving a transgender teacher removed from a public school classroom following parental complaints); Kate Grumke, Kirkwood 'Sexualized My Identity': 3 Trans Educators Claim Discrimination, Say They Were Forced Out, *St. Louis Pub. Radio* (Apr. 28, 2023), <https://www.stlpr.org/education/2023-04-28/kirkwood-sexualized-my-identity-3-trans-educators-claim-discrimination-say-they-were-forced-out> [<https://perma.cc/8SRF-4ML3>] (involving three transgender teachers removed from public school classrooms following parental complaints).

239. See, e.g., *Bailey v. Mansfield Indep. Sch. Dist.*, 425 F. Supp. 3d 696, 707–08 (N.D. Tex. 2019) (involving an adverse employment action taken against a lesbian art teacher because of some community members' negative reaction to her sexual orientation).

240. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (holding that Title VII's prohibition on discrimination because of sex includes discrimination on the basis of "homosexuality [and] transgender status").

241. See *Wood v. Fla. Dep't of Educ.*, 729 F. Supp. 3d 1255, 1271–72 (N.D. Fla. 2024), vacated on other grounds, 142 F.4th at 1286 (finding that a Florida Department of Education policy forbidding gender nonconforming teachers from using preferred pronouns was not an adverse employment action within the meaning of Title VII because it did not impact salary or status and that misgendering was not severe enough to create a hostile working environment).

242. *Bostock*, 140 S. Ct. at 1754. Although public school teachers are generally state employees, and thus not subject to RFRA, many states have state-level equivalents. See Becket Fund for Religious Liberty, *supra* note 77 (noting that thirty-six states have religious protections requiring strict scrutiny). While it's not clear how those state-level RFRA's will interact with Title VII (a federal statute) when combined with a free exercise claim, this possibility is raised only to point to the Supreme Court's recognition that there might be religious exemptions to *Bostock*.

teacher conduct.²⁴³ Parental objections can and do target teachers outside of those characteristics, and in those cases, Title VII would provide no protection.²⁴⁴ For similar reasons, this Note does not argue that the Equal Protection Clause provides an adequate limiting principle, especially in light of the Court's findings that the Equal Protection Clause does not bar state restrictions on gender affirming care for minors or sports participation for transgender people.²⁴⁵

Setting those solutions aside, that means that courts will need to engage with *Mahmoud* on its own terms. There are two steps to a *Mahmoud*-style analysis: the burden analysis and the strict scrutiny analysis.²⁴⁶ Of those two, the strict scrutiny analysis seems to be the more promising location for finding a limiting principle on *Mahmoud*. This is because the standard for finding a free exercise burden in that decision is so low that it is difficult to imagine what aspect of public schooling would not qualify as a burden.²⁴⁷ The majority opinion characterizes the entirety of the public school project as coercive: "The government's operation of the public schools . . . implicates direct, coercive interactions between the State and its young residents."²⁴⁸ There's no limiting principle there—the majority sweeps in both hard and soft curricular instruction. While some lower courts have tried to draw a distinction between the hard and soft curriculum by characterizing *Mahmoud* as only applying to school policies that are compulsory or

243. 42 U.S.C. § 2000e-2(a).

244. For example, parents have brought legal challenges against teachers whose Halloween costumes allegedly violated their religious beliefs. *Guyer v. Sch. Bd. of Alachua Cnty.*, 634 So. 2d 806, 806 (Fla. Dist. Ct. App. 1994) (involving a parental religious objection to a teacher dressing up as a witch for Halloween). Parents have also brought challenges against teachers because of the posters they hang in their classrooms. *Cajune v. Indep. Sch. Dist. 194*, 105 F.4th 1070, 1075–76 (8th Cir. 2024) (Black Lives Matter poster); *Pruitt v. Grosse Pointe Pub. Sch. Sys.*, No. 26-cv-10958, 2026 WL 2137817, at *1 (E.D. Mich. July 24, 2026) (rainbow pride flag). Although these challenges are sometimes brought as free speech claims, see *Cajune*, 105 F.4th at 1076, they show that parents bring challenges against which Title VII would offer no protection.

245. See *West Virginia v. B.P.J.*, 146 S. Ct. 2356, 2379 (2026); *United States v. Skrmetti*, 145 S. Ct. 1816, 1829 (2025).

246. The neutral and generally applicable rule of *Employment Division, Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990) seems to no longer apply in the public school context. See *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2361 (2025) ("[W]hen a law imposes a burden of the same character as that in *Yoder*, strict scrutiny is appropriate regardless of whether the law is neutral or generally applicable."). While it is not entirely clear what makes a burden of the "same character" as that in *Yoder*, this Note takes this to mean that free exercise cases involving the intersection of parental and religious rights implicated in the school context are not spared from strict scrutiny because they are neutral or generally applicable.

247. See *Mahmoud*, 145 S. Ct. at 2393 (Sotomayor, J., dissenting) (noting that the majority's burden analysis is not "seemingly limited to reading material," and could include interactions with teachers and antibullying policies); *supra* section II.B.

248. *Mahmoud*, 145 S. Ct. at 2357 (majority opinion).

instructional,²⁴⁹ it is difficult to imagine a school policy, even those outside the classroom, that is not compulsory or instructional in some form. Historically and presently, schools seek to educate students by adopting rules of conduct and modeling behavior through the example of teachers and peers.²⁵⁰ *Mahmoud* takes pains to note the coercive influence that peers and teachers have on students, while *Mirabelli* applies *Mahmoud* to strike down a noncurricular school policy.²⁵¹ If what qualifies as a burden under *Mahmoud*'s test can be as low as exposing children to LGBTQ+ people in a storybook, then it is very difficult (if not impossible) to argue that other policies, especially those that directly regulate student conduct, somehow do not qualify as a burden under *Mahmoud*.²⁵² This leaves strict scrutiny as the remaining avenue to find a limiting principle for *Mahmoud*.²⁵³

B. *Satisfying Strict Scrutiny*²⁵⁴

Even if strict scrutiny is the most promising avenue to discipline *Mahmoud*'s holding, it has long been noted that strict scrutiny is often

249. See, e.g., *Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ.*, No. 23-3740, 2025 WL 2453836, at *7 (6th Cir. Aug. 26, 2025).

250. See *supra* section I.A.

251. See *Mahmoud*, 145 S. Ct. at 2355 (citing *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987)); *Mirabelli v. Bonta*, 146 S. Ct. 797, 802 (2026).

252. *Mahmoud*, 145 S. Ct. at 2393 (Sotomayor, J., dissenting) (arguing that if even coy messages in children's books qualify as a free exercise burden, "it is hard to say what will not").

253. But see Maxine Eichner, Mary Ziegler & Naomi Cahn, *Opting Out: Mahmoud, Public Education, and the Future of Parental Rights*, Duke L.J. (forthcoming 2026) (manuscript at 32), <https://ssrn.com/abstract=6343218> [<https://perma.cc/JS3J-X2Y3>]. These authors argue that the strict scrutiny step of the *Mahmoud* analysis "likely blocks any successful assertion of countervailing interests to parents' religious views." *Id.* This is because they read *Mahmoud*'s strict scrutiny analysis as "treat[ing] religious parents' rights to teach their children to disapprove of their peers as superseding the well-being of those other children, their interest in full inclusion, and the state's interest in inculcating civic tolerance." *Id.* at 22. As explained below, while it is true that *Mahmoud* gave these interests short shrift, it also did not disavow them as compelling. Further, to the extent that *Mirabelli* abrogates the burden analysis attendant to free exercise claims by allowing parents to opt out on substantive due process grounds, it makes sense to articulate an argument why certain school policies ought to survive a strict scrutiny analysis.

254. This section borrows liberally from the Court's free speech jurisprudence, with the recognition that public school cases will often simultaneously raise free exercise and free speech issues. The Court itself has not seen these two doctrinal areas as walled off from each other, a sentiment that *Mahmoud* itself exhibits. See *Mahmoud*, 145 S. Ct. at 2357 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)); *id.* at 2338 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943)); see also 303 *Creative LLC v. Elenis*, 143 S. Ct. 2298, 2304 (2023) (evaluating a religious-based refusal to serve same-sex couples using a compelled speech analysis). One scholar has even suggested that free speech and free exercise should be harmonized by drawing from similar methodologies and tools. John Fee, *Harmonizing Freedom of Speech and Free Exercise of Religion*, 32 *Wm. & Mary Bill Rts. J.* 677, 679, 681–82 (2024).

“strict’ in theory and fatal in fact.”²⁵⁵ But strict scrutiny does not inevitably mean that a challenged policy will be struck down.²⁵⁶ Courts can uphold at least some soft curricular policies by justifying them on antidiscrimination grounds; specifically, by invoking compelling interests in ensuring equal educational access and societal cohesion. While the current Court has given antidiscrimination interests short shrift, it has not categorically ruled them out as compelling. The following sections argue that these interests, with adequate tailoring, can be used to uphold some soft curricular policies.

1. *Antidiscrimination Interests as Compelling Interests.* — On its face, *Mahmoud* appears to reject antidiscrimination as a compelling interest.²⁵⁷ But the opinion does not reject that interest wholesale. It only rejects a particular kind of antidiscrimination: one that seeks to prevent hypothetical and indirect harms suffered by some students at the expense of direct harms to religious students.²⁵⁸ What the majority rejects

255. Gerald Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

256. See Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 796 (2006) (finding that nearly one in three cases where federal courts apply strict scrutiny resulted in the law being upheld). Even so, in the post-*Mahmoud* era, the current trend is that courts that want the policy at issue to survive uniformly distinguish *Mahmoud* at the burden stage rather than the strict scrutiny stage. See, e.g., *Perry v. Marteney*, 172 F.4th 315, 327–28 (4th Cir. 2026) (finding that a school’s mandatory vaccination policy does not impose a burden that is similar to the one in *Mahmoud* and *Yoder* and that it survives rational basis review); see also *supra* notes 195–198. But these cases often seem to ignore what the Supreme Court characterizes as a burden under *Mahmoud*. Compare, e.g., *Miller v. McDonald*, 146 S. Ct. 879, 879 (2025) (mem.) (granting certiorari, vacating, and remanding a Second Circuit decision upholding a school’s mandatory vaccination policy in light of *Mahmoud v. Taylor*), with *Miller v. McDonald*, 180 F.4th 420, 434 (2d Cir. 2026) (“We have reconsidered our decision in light of *Mahmoud*, . . . and we adhere to our [original] conclusion.”). And in the pre-*Smith* days when the *Sherbert* strict scrutiny standard controlled, the Supreme Court found that some governmental policies burdening religion could survive strict scrutiny. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (finding that the government’s “overriding interest in eradicating racial discrimination in education” outweighed the university’s free exercise claim); *United States v. Lee*, 455 U.S. 252, 257–60 (1982) (finding that the government’s interest in maintaining the tax system overrode religious objections to the social security system).

257. See *Mahmoud*, 145 S. Ct. at 2363 (“[T]he Board’s policies [cannot] be justified by its asserted interest in protecting students from ‘social stigma and isolation.’” (quoting Petitioners’ Appendix at 608a, *Mahmoud*, 145 S. Ct. 2332 (No. 24-297), 2024 WL 4227215)); *id.* at 2364 (finding there is a “lack of a compelling interest supporting the Board’s policies”).

258. See *id.* at 2363 (“[T]he Board cannot purport to rescue one group of students from stigma and isolation by stigmatizing and isolating another.”). This is both an evidentiary issue, in that the school failed to make a showing of harm to students, and a sufficiency-of-harm issue, in that the harm to religious students was direct and the harm to LGBTQ+ students was indirect. And, especially outside what is taught in class, schools’ interests weigh more heavily because they have a special interest in regulating student behavior when it results in “substantial disorder” or results in the invasion of the rights of

is not antidiscrimination; it is discrimination masquerading under the label of antidiscrimination. Indeed, Justice Alito himself has emphasized the importance of antidiscrimination in his personal remarks, worrying that American society is becoming a society not “inclusive enough to tolerate people with unpopular religious beliefs.”²⁵⁹ *Mahmoud’s* facial rejection of antidiscrimination, then, is a call for schools to attend to particular harms suffered by particular students. This is what the Court itself has counseled: “Rather than rely on ‘broadly formulated interests,’ courts must ‘scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.’”²⁶⁰

Finding that specificity begins with distinguishing between hard and soft curricular features. Hard curricular instruction is less likely to implicate antidiscrimination concerns than soft curricular instruction. That is, it is less likely that a student opting out of a particular instructional unit will harm others.²⁶¹ The opposite is true in the soft curriculum: Often, these policies (like antibullying policies) are adopted with the design of preventing harm to others. These policies are meta-instructional, meaning that they teach students how to respectfully engage with each other in the process of classroom learning. They permeate the whole academic experience, and so it is difficult for schools to accommodate individualized opt-outs without getting rid of the policy entirely.²⁶²

A school’s interest in maintaining soft curricular policies is compelling when those policies are designed to serve two substantive equality norms: an antisubordination norm and an antibalkanization norm.²⁶³ The antisubordination norm—what this Note refers to as a

others. Cf. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2045 (2021) (citing *Tinker*, 393 U.S. at 513) (recognizing the special interest of schools in the free speech context).

259. Samuel A. Alito, Jr., Remarks to the 2020 Federalist Society National Lawyers Convention, in 45 *Harv. J.L. & Pub. Pol’y* 83, 93 (2022).

260. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (alteration in original) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)).

261. The particular aspects of public schools’ hard curricula that might be vulnerable to free exercise opt-out claims are beyond the scope of this Note. For the debate between Justice Clarence Thomas and Justice Sonia Sotomayor on this issue, compare *Mahmoud*, 145 S. Ct. at 2376 (Thomas, J., concurring) (arguing that a history and tradition approach should be used to weigh curriculum interests against religious liberty interests), with *id.* at 2401 n.16 (Sotomayor, J., dissenting) (arguing that a history and tradition approach would fail to take account of the evolving nature of school curricula).

262. Cf. *United States v. Lee*, 455 U.S. 252, 259–60 (1982) (“[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs The tax system could not function if denominations were allowed to challenge the . . . system because tax payments were spent in a manner that violates their religious belief.”).

263. This Note’s discrimination framework is drawn from Craig Konnoth, *Discrimination Denials: Are Same-Sex Wedding Service Refusals Discriminatory?*, 124

school's "public accommodations interest"—requires public schools to prevent the creation of second-class status among their community members.²⁶⁴ The antibalkanization norm—what this Note refers to as a school's "democratic cohesion interest"—requires public schools to create environments that preserve social cohesion so that they can teach students how to live in a pluralist democracy.²⁶⁵

A school's public accommodations interest is particularly weighty. It is no accident that some of the Court's most consequential race and sex discrimination cases related to school access.²⁶⁶ This stems from the recognition that deprivations of education are particularly serious injustices.²⁶⁷ While there has recently been churn in the Supreme Court's public accommodations precedents,²⁶⁸ it has never seriously disputed that the state has a compelling interest in ensuring equal access to public institutions,²⁶⁹ or that the Court's typical public accommodations framework applies to LGBTQ+ identities or other groups subject to religious hostility.²⁷⁰ Enforcing public accommodations laws, in public schools or

Colum. L. Rev. 2003, 2045 (2024). Under Professor Konnoth's model, there is a third set of antidiscrimination values: anticlassification values. *Id.* Those values protect against legislative classifications on the basis of protected characteristics, which are not implicated here. *Cf. Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) ("[T]he drawing of lines that create distinctions is peculiarly a legislative task . . .").

264. Laurence H. Tribe, *American Constitutional Law* §§ 16–21, at 1515 (2d ed. 1988) (explaining the antistatutory interest, which he calls the "antisubjugation principle").

265. Konnoth, *supra* note 263, at 2045 (defining antibalkanization interests); see also Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *Yale L.J.* 1278, 1299 (2011) (originating the term and defining it as a concern in "promot[ing] social cohesion and . . . avoid[ing] [minority group] arrangements that balkanize and threaten social cohesion").

266. See, e.g., *United States v. Virginia*, 518 U.S. 515, 519 (1996) (holding that a military academy could not deny enrollment to women); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that school segregation is unconstitutional).

267. See *Brown*, 347 U.S. at 493 ("[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

268. See, e.g., 303 *Creative LLC v. Elenis*, 143 S. Ct. 2298, 2321–22 (2023) (holding that the First Amendment exempts a company from a state law prohibiting the denial of services to same-sex couples); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (holding that the First Amendment prohibits Philadelphia from refusing to contract with a state-licensed foster care provider that refused to certify same-sex foster parents); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 640 (2018) (holding that the First Amendment protected a bakery owner's religiously motivated decision not to make wedding cakes for same-sex couples).

269. See 303 *Creative LLC*, 143 S. Ct. at 2314 ("This Court has recognized that governments in this country have a 'compelling interest' in eliminating discrimination in places of public accommodation." (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984))).

270. See Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 *Yale L.J. Forum* 201, 208 (2018), https://yalelawjournal.org/pdf/NeJaimeSiegel_t7ffwsct.pdf [<https://perma.cc/J7LQ-AAVD>] (noting how *Masterpiece Cakeshop* rejected arguments that the Court should adopt a

otherwise, is far from an absolute interest,²⁷¹ but this recognition concerns whether policies serving that interest are appropriately tailored, not whether the interest is sufficiently compelling.²⁷²

Public schools' other antidiscrimination interest is the democratic-cohesion interest.²⁷³ While public schools have an immediate interest in ensuring that all students can access educational resources, they also have a prophylactic interest in teaching behaviors and values that preserve the fabric of democratic society. Some educational scholars have referred to this interest as teaching the "morality of association."²⁷⁴ By "morality," the scholars do not mean to suggest that schools should teach the content of moral principles—that is a role better served by parents and religious leaders.²⁷⁵ Instead, they suggest that the morality of association is about teaching students how to contribute and claim their fair share in cooperative associations.²⁷⁶ By adopting appropriately tailored policies, schools teach students how to navigate the world and their obligations as citizens so that they can afford others the dignity they are due as people. The Court has credited this public school prerogative in explicit terms, saying that education is "the very foundation of good citizenship" and that public schools "inculcat[e] fundamental values" by serving as an "assimilative force."²⁷⁷ Schools further their antibalkanization interest in part by creating a disruption-free learning environment, and so this interest dovetails with the schools' interest—recognized by the Court in *Tinker*—in creating such an environment.²⁷⁸

The compelling status of both of these interests is supported by *Wisconsin v. Yoder*.²⁷⁹ There, the Court suggested that those aspects of public schooling that would result in the student becoming a "burden[]"

public accommodations framework for sexual orientation different from the one that it uses in race or sex discrimination cases).

271. 303 *Creative LLC*, 143 S. Ct. at 2315 ("[The] Court has . . . recognized that no public accommodations law is immune from the demands of the Constitution.").

272. See *infra* section III.B.2.

273. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) ("The role and purpose of the American public school system . . . [is to] 'inculcate the habits and manners of civility . . . indispensable to the practice of self-government in the community and the nation.'" (quoting Charles A. Beard & Mary R. Beard, *New Basic History of the United States* 228 (rev. ed. 1968))).

274. Gutmann, *supra* note 19, at 60–61.

275. See *id.* at 57 ("What can schools contribute to moral education more reliably or more efficiently than other educational institutions—such as families and churches?").

276. *Id.* at 61.

277. *Ambach v. Norwick*, 441 U.S. 68, 77–78 (1979) (internal quotation marks omitted) (first quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); then quoting John Dewey, *Democracy and Education* 26 (1929)).

278. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (explaining that officials were not permitted to disrupt students' free speech activities unless they constituted a material disruption of school activities).

279. 406 U.S. 205 (1972).

on society” are sufficiently compelling to not be subject to opt-outs.²⁸⁰ Denying equal access to schools, for any group, is “destructive of democratic society.”²⁸¹ The same could be said of schools’ democratic-cohesion interest. This is shown by the line of the Court’s precedents in which it has applied what some scholars call “rational basis with bite.”²⁸² Those cases dealt with laws that failed even rational basis review because they were motivated by hostility to an unpopular or undesired group.²⁸³ In *Romer v. Evans*, for example, voters approved a ballot initiative adopting an amendment to their state constitution to prevent sexual minorities from accessing antidiscrimination protections.²⁸⁴ The Court struck down the enactment because animus (“a bare . . . desire to harm”) motivated its passage, not any legitimate aim.²⁸⁵ While the citizens of Colorado did not need to affirm sexual minorities, they could not allow their dislike of those groups to motivate legislation targeting them.²⁸⁶ Other civic responsibilities, like serving on a jury, likewise depend on citizens being able to suspend their personal dislike of other groups to serve—jurors must judge a case on the facts, not their view of the identity group a party belongs to.²⁸⁷ *Yoder*, then, does not license opt-outs to school policies that would undermine democratic cohesion, because doing so would interfere with students’ abilities to fulfill their civic responsibilities. *Mahmoud* did not categorically bar antidiscrimination as a compelling interest, and it certainly did not do so in the context of soft curricular policies.²⁸⁸ This Note understands that compelling interest to

280. *Id.* at 224.

281. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in judgment) (internal quotation marks omitted) (quoting Alexander Bickel, *The Morality of Consent* 133 (1975)).

282. See Gayle Lynn Pettinga, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 Ind. L.J. 779, 780 (1987) (using the phrase “rational basis with bite” to describe a standard of review for cases where the Supreme Court used the Equal Protection Clause to invalidate a law even in the absence of a suspect classification).

283. See, e.g., *USDA v. Moreno*, 413 U.S. 528, 534 (1973) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group [here, hippies] cannot constitute a legitimate governmental interest.” (emphasis omitted)); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47 (1985) (same standard but applied to individuals with mental disabilities).

284. 517 U.S. 620, 623–24 (1996).

285. *Id.* at 634–35 (internal quotation marks omitted) (quoting *Moreno*, 413 U.S. at 534).

286. *Id.* at 635.

287. E.g., *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 222–26 (2017) (holding that evidence that jury deliberations were infected with racial bias was admissible, contrary to the typical rule barring such evidence).

288. Cf. *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2362 (2025) (“We do not doubt that, as a general matter, schools have a ‘compelling interest in having an uninterrupted school session conducive to the students’ learning.” (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972))). On the score of *Mirabelli*, it is true that the transition nondisclosure policy at issue there is a soft curricular policy as this Note understands that

include a public accommodation interest, ensuring students have access to public education on reasonably equal terms, and a prophylactic interest in preserving the cohesion of democratic society.

2. *Narrowly Tailoring the Antidiscrimination Interests.* — With the antidiscrimination interests defined and their compelling status confirmed by the Court’s jurisprudence, attention can be turned toward narrowly tailoring those limits so as to reach an accommodation between free exercise claims and the dignity of religious targets.

A public school policy furthering the school’s public accommodations interest should be considered narrowly tailored for free exercise purposes when allowing opt-outs would result in dignitary harm to members of the school community. Dignitary harms are those that result when community members are denied equal access to the school, are subject to community-wide or state-inflicted stigma, or are treated worse than other community members.²⁸⁹ *Brown v. Board of Education* provides a classic formulation of these kinds of harms, describing segregation as impermissibly “denoting the inferiority of [Black students].”²⁹⁰ *United States v. Virginia* held similarly, concluding that “inherent differences” between men and women could not “create or perpetuate the legal, social, and economic inferiority of women.”²⁹¹ Dignitary harms are a narrow category, and would not include mere offenses to religious beliefs.²⁹² For example, a student could assert their belief that marriage can only occur between one man and one woman without seriously demeaning their peers. However, if that student were to call

term. However, it could be the case that that policy is distinguishable from other such policies in that it requires schools to insert themselves between parents and their children and affirmatively lie to parents. See *Mirabelli v. Bonta*, 146 S. Ct. 797, 800 (2026) (focusing on the nondisclosure element of California’s gender transition policy in the strict scrutiny analysis).

289. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617, 632 (2018) (finding that although “gay persons could recognize and accept [certain exercises of religion] without serious diminishment to their own dignity and worth,” without limits those exercises would generate “community-wide stigma inconsistent with the history . . . of civil rights laws that ensure equal access to goods, services, and public accommodations”).

This Note relies on *Masterpiece Cakeshop*’s language about balancing religious and LGBTQ+ interests even in light of *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023). *303 Creative* did not formally overrule *Masterpiece Cakeshop* and presented a compelled speech claim, not a free exercise claim. *Id.* at 2308. Since *Masterpiece Cakeshop* did present a free exercise claim, it is more applicable than *303 Creative* to this Note. *Masterpiece Cakeshop*, 584 U.S. at 624.

290. 347 U.S. 483, 494 (1954) (internal quotation marks omitted) (quoting the district court’s findings of fact).

291. 518 U.S. 515, 533–34 (1996) (internal quotation marks omitted).

292. Cf. *Masterpiece Cakeshop*, 584 U.S. at 632 (finding that LGBTQ+ people can and must recognize some limited assertions of free exercise which do not seriously “diminish[] . . . their own dignity and worth”).

their classmate or teacher a “sinner” for having a same-sex partner,²⁹³ that would result in a dignitary harm.²⁹⁴ Under this Note’s conception of schools’ public accommodations interest, schools could adopt and enforce policies enjoining the latter expression of free exercise (and decline opt-out requests) but not the former. Put more simply, the distinction between offenses and dignitary harms would track whether the harmful conduct targets particular individuals in the school community, in which case the conduct causes dignitary harm not licensed by the Constitution, or whether it is non-targeted conduct, in which case the conduct may be harmful but is nevertheless licensed by the Constitution.²⁹⁵

Any tailoring of policies protecting this interest is complex and raises administrability concerns. In the hard curriculum setting, schools can often grant religious exemptions and avoid inflicting dignitary harms on other students by creating discrete units of instruction.²⁹⁶ When it comes to the soft curriculum, however, permitting students to opt-out becomes much more difficult. If students can invoke their free exercise rights to escape certain standards of conduct—say, antibullying policies—they defeat the point of those standards and become “law[s] unto [themselves].”²⁹⁷ Schools may even prefer to get rid of the policy entirely rather than manage which students are and are not governed by it.

293. Cf. *Mahmoud*, 145 S. Ct. at 2393–94 (Sotomayor, J., dissenting) (presenting a similar hypothetical).

294. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (suggesting that First Amendment protection does not accrue when First Amendment activity “colli[des] with the rights of other students to be secure and to be let alone”).

295. A familiar philosophical invocation for First Amendment line drawing that can provide some guidance here is John Stuart Mill’s harm principle. That principle provides that “the only purpose for which power can be rightfully exercised . . . against [someone’s] will[] is to prevent harm to others.” John Stuart Mill, *On Liberty* 80 (David Bromwich & George Kateb eds., 2003). Many scholars argue that Mill’s harm principle heavily influences the Court’s free speech jurisprudence. See, e.g., Eric T. Kasper & Troy A. Kozma, *First Free Speech, Then “Experiments in Living”: John Stuart Mill’s Influence Over the U.S. Supreme Court on Constitutional Rights After the Freedom of Expression*, 32 Kan. J.L. & Pub. Pol’y 1, 1–3 (2023) (tracing the Supreme Court’s use of Mill’s philosophy over time, in and out of the free speech context). The critical move in applying the harm principle is deciding how to draw the line between “harms” (what this Note refers to as “dignitary harms”), which justify coercion, and “offenses,” which do not justify coercion. This Note uses the rule of thumb of whether religious expression is targeted to approximate the line between dignitary harms and offenses; for further discussion of how courts can draw that line, see Jeremy Waldron, *The Harm in Hate Speech* 105–11 (2012) (“The distinction [between harm and offense] is . . . between objective or social aspects of a person’s standing in society, on the one hand, and subjective aspects of feeling, including hurt, shock, and anger, on the other.”).

296. See *Mahmoud*, 145 S. Ct. at 2380–81 (Thomas, J., concurring) (noting that the school district “easily could avoid sowing tension between its curriculum and parents’ First Amendment rights” by including the LGBTQ+ storybooks in a discrete unit of instruction).

297. *Reynolds v. United States*, 98 U.S. 145, 167 (1879).

Whatever the school chooses—granting opt-outs or abolishing the policy entirely—it withdraws protection from certain disfavored students, allowing them to be targeted, and thus allowing dignitary harm.²⁹⁸ Administrability is not decisive, however. For example, in the case of Wendy Weaver,²⁹⁹ although a policy allowing opt-outs from her classroom would not be any more administratively difficult than those in *Mahmoud*, it would single out a school community member for disfavored treatment and would thus defeat the school’s public accommodations interest.

Turning to public schools’ democratic-cohesion interest, that interest is narrowly tailored when public school policies regulate democratic values, not religious or moral values.³⁰⁰ This means that schools can adopt policies that govern conduct and institutional participation but not policies that compel affirmation, belief, or expressive endorsements.³⁰¹ For example, a school could not punish a male student for expressing his religious belief that women are inferior to men, but it could prevent that student from using that religious belief to justify speaking over his female peers in the classroom.³⁰² While a school may want that student to see his female peers as equals, the Court has long held that the inculcation of democratic norms like this can only be accomplished through “persuasion and example,” not compulsion.³⁰³

The distinction between school policies that regulate democratic values and those that regulate moral values can explain some of the tensions between *Mahmoud* and another opinion written by the same

298. Cf. *Romer v. Evans*, 517 U.S. 620, 627 (1996) (striking down a Colorado constitutional amendment because it “withdr[ew] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination”).

299. See *supra* Introduction.

300. See Gutmann, *supra* note 19, at 123 (explaining how schools should teach democratic values, like developing a common deliberative morality among students, but should not teach religious values). “Democratic” values include, for instance, “empathy, trust, benevolence, and fairness.” *Id.* at 61. This roughly translates to those values necessary to prevent undue disruption to the school environment. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that a school could only regulate students’ expressive activity if that activity disrupted or materially interfered with school activities).

301. Cf. *Tinker*, 393 U.S. at 513 (providing the disruption standard); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (striking down West Virginia’s mandatory flag salute law because it “require[d] affirmation of a belief and an attitude of mind”).

302. If, however, that male student directed his view that women are inferior to a particular female student, a school may be able to punish that conduct; the analysis is necessarily fact intensive.

303. *Barnette*, 319 U.S. at 640; see also *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 60, 62 (2006) (applying a similar distinction in the free speech context in holding that law schools can be required to send emails on behalf of military recruiters because such emails do not amount to endorsements).

majority: *Kennedy v. Bremerton School District*.³⁰⁴ There, far from rejecting the interest that schools have in producing tolerant citizens, the Court insisted that “[t]he Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.”³⁰⁵

In *Kennedy*, the Court held that a public school erred in terminating the contract of one of its football coaches, who prayed at the fifty-yard line following Friday night games and was often joined by some of his players.³⁰⁶ Parents complained that students felt pressured to join the coach in praying.³⁰⁷ The Court, however, found that “learning how to tolerate speech or prayer of all kinds is ‘part of learning how to live in a pluralistic society,’ a trait of character essential to ‘a tolerant citizenry.’”³⁰⁸ This was the case even though the coach’s prayers would certainly have posed a “‘very real threat of undermining’ the religious beliefs”³⁰⁹ of non-Christian players and their families.³¹⁰ It is difficult to imagine a scenario in a public school more coercive to non-Christian religious beliefs than this one, in which these players would have felt compelled by their peers and coach to join in the prayer of a religion that was not their own.³¹¹ Even though the students were coerced by their coach’s prayers, the prayers would have survived strict scrutiny because the students were not told that their coach’s religious activity was desirable or that they should endorse it. Exposing students to the potential discomfort of watching religious activity would have served the school’s interest in developing citizens who can tolerate others who they might find unpleasant. Using

304. 142 S. Ct. 2407 (2022); *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2386–87 (2025) (Sotomayor, J., dissenting) (noting that *Kennedy* stood in tension with the majority’s burden analysis).

305. *Kennedy*, 142 S. Ct. at 2416. But see *Mahmoud*, 145 S. Ct. at 2362–63 (majority opinion) (finding that the denial of opt-out requests cannot be justified by the school’s interest in preventing stigma and isolation).

306. *Kennedy*, 142 S. Ct. at 2416–19.

307. *Id.* at 2430. Justice Gorsuch dismissed these parental comments as “hearsay” and irrelevant because they referred to locker-room prayers that the coach discontinued at the school’s request. *Id.* The coach was terminated because of his prayers on the fifty-yard line, not because of these locker-room prayers. *Id.*

308. *Id.* (citing *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

309. *Mahmoud*, 145 S. Ct. at 2355 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)).

310. These non-Christian families are front-and-center in *Mahmoud* but are not a focus in *Kennedy*. Compare *id.* at 2342 (“[Montgomery County] ranks in the top five in the Nation in per-capita population of Jews, Muslims, Hindus, and Buddhists.”), with *Kennedy*, 142 S. Ct. at 2435 (Sotomayor, J., dissenting) (“[Kitsap County] is home to Bahá’ís, Buddhists, Hindus, Jews, Muslims, Sikhs, Zoroastrians, and many denominations of Christians, as well as numerous residents who are religiously unaffiliated.”).

311. See *Kennedy*, 142 S. Ct. at 2440–41 (Sotomayor, J., dissenting) (“After the issues with *Kennedy* arose, several parents reached out to the District saying that their children had participated in *Kennedy*’s prayers solely to avoid separating themselves from the rest of the team. No . . . students appeared to pray on the field after *Kennedy*’s suspension.”).

similar logic, being assigned to Wendy Weaver’s classroom would coerce students’ religious beliefs under *Mahmoud*, but that coercion would be justified so long as the school refrained from telling students that their teacher’s sexuality is good or desirable.

To summarize, public schools can ensure their interest in guaranteeing equal student access is narrowly tailored by ensuring that policies which interfere with the free exercise rights of their community members only do so insofar as those policies prevent dignitary—that is to say, targeted—harms to others. For their democratic-cohesion interest, schools can ensure narrow tailoring by staying in the space between the *Barnette* and *Tinker* opinions³¹²: Schools may adopt policies that enforce democratic values but that do not cross over into the moral policing of students.

3. *Applying the Strict Scrutiny Analysis.* — Evaluating free exercise claims is necessarily a fact-dependent analysis.³¹³ Even so, this Note attempts to point courts toward some general principles that can limit *Mahmoud*’s reach at the strict scrutiny stage.³¹⁴ Applying the analysis to three different factual situations illustrates how it will work in practice.³¹⁵

First, take the facts from *Mahmoud*. The LGBTQ+ book policy that the public school in that case chose to implement was an aspect of the hard curriculum, meaning that it is less likely to implicate compelling antidiscrimination interests. Indeed, the policy cannot be justified on either antidiscrimination interest outlined above. It cannot be justified on the public accommodations interest because allowing a religious child to opt out of LGBTQ+-inclusive instruction does not cause dignitary harm by targeting any particular LGBTQ+ student; one student opting out does not inflict stigma and isolation on another.³¹⁶ It cannot be justified on the grounds that it serves schools’ democratic-cohesion

312. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (“[C]onduct by the student, in class or out of it, which for any reason . . . materially disrupts classroom or involves substantial disorder or invasion of the rights of others is, of course, not immunized . . .”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (“[T]he compulsory flag salute and pledge [ordered by the State Board of Education] requires affirmation of a belief and an attitude of mind.”).

313. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (finding that courts should step away from broadly formulated interests and toward the particular facts of each case (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006))); see also Brady Earley, *Responsible Religious Freedom: Factual Scrutiny in Free Exercise Doctrine*, 39 J.L. & Religion 297, 318 (2024) (arguing that a fact-intensive approach to free exercise respects the limited institutional role of courts).

314. This is not in tension with Justice Alito’s fact-dependent test in *Mahmoud*, 145 S. Ct. at 2353. That analysis helps courts determine if a law or policy creates a burden on religious practices, whereas this Note’s analysis concerns how courts should assess policies creating those burdens under strict scrutiny.

315. This Note’s proposal is not meant to have application beyond the free exercise context. For example, a parent could still ask that their child be removed from a teacher’s classroom if the teacher is ineffective without implicating the Free Exercise Clause.

316. *Mahmoud*, 145 S. Ct. at 2363–64.

interest because those books went beyond promoting democratic values and imposed substantive moral judgments about the desirability of LGBTQ+ identities.³¹⁷ The book policy would therefore fail this Note's strict scrutiny analysis, as it did in *Mahmoud's*.³¹⁸

Second, a preferred pronoun policy would satisfy strict scrutiny as it is here illustrated.³¹⁹ This is because it is a soft curricular policy that implicates a school's interest in ensuring educational access by preventing targeted dignitary harms. Refusing to use an individual's chosen name and pronouns because they do not correspond to those that were given at birth imposes second-class status on non-cisgender students by denying them a courtesy that is afforded to everyone else. Using someone's correct pronouns does not amount to an affirmation that gender is mutable; it simply affirms the dignity of that individual person.³²⁰ While preferred pronouns do raise unique compelled speech concerns,³²¹ these policies are not dissimilar from those preventing students from telling each other that they are "going to hell," even if those students have a genuine religious conviction that their statement is true.³²² A student's religious views should not exempt them from common standards of propriety at school.

317. *Id.* at 2353.

318. *Id.* at 2363.

319. But see *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 158 F.4th 732, 738 (6th Cir. 2025) (en banc) (holding that a district's policy of requiring students to use each other's preferred pronouns violated the Free Speech Clause).

320. Cf. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct . . ."). Therefore, refusing to respect a student's preferred pronouns arguably violates anti-harassment rules. However, the Sixth Circuit has ruled that refusing to use preferred pronouns *is* speech with content value. See *Defending Educ.*, 158 F.4th at 760 ("The use of 'he' or 'she' will lead most to believe that the identified person is male or female [This] may well establish a new cultural norm about the *thoughts* that are 'expected' or 'permissible.'" (quoting *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985))).

321. While a full free speech analysis is outside the scope of this Note, a preferred pronoun policy comports with Justice Alito's understanding of how the *in loco parentis* doctrine allows schools to limit the free speech rights of students. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2049 (2021) (Alito, J., concurring). In Justice Alito's view, enrolling in a public school results in the diminution of a student's free speech rights because "by enrolling a child in a public school, parents consent on behalf of the child to the relinquishment of some of the child's free-speech rights." *Id.* at 2051. While a parent's delegation of authority to schools to limit their children's speech is limited, Justice Alito argues that "a school must have the authority to protect everyone on its premises, and therefore schools must be able to prohibit threatening and harassing speech." *Id.* at 2052. This follows, in part, because "the school has a duty to protect students while in school because their parents are unable to do that during those hours." *Id.* at 2053. In other words, schools can limit harassing speech—here, deliberately misgendering another student—because the school has a duty to the harassed students' parents to protect the harassed student.

322. For a case presenting similar facts where the free exercise challenge was unsuccessful, see *R.Z. ex rel. Zimmer v. Carmel Clay Schs.*, 868 F. Supp. 2d 785, 801 (S.D.

Third, a school policy that enjoins students from engaging in religious speech—say, wearing a shirt to school saying, “God Made Two Genders”—would not satisfy this Note’s free exercise strict scrutiny analysis.³²³ That policy would not be narrowly tailored to serving the school’s public accommodations interest. This conclusion follows because the shirt is not directed against any one student, meaning that it is an exercise of religion that queer “persons could recognize and accept without serious diminishment to their own dignity and worth.”³²⁴ That policy would also not be narrowly tailored to a school’s democratic-cohesion interest because that policy goes beyond “the school’s interest in maintaining an atmosphere in which students are not distracted from their studies by wrenching debates over issues of personal identity.”³²⁵

CONCLUSION

Mahmoud v. Taylor properly held that public schools need to be careful not to use their hard curricula to impose normative messages infringing on families’ free exercise rights. Parents, however, have used that decision and the *Mirabelli v. Bonta* order to unduly intervene in public schools’ soft curricular policies, like their antibullying policies. If courts grant these kinds of requests, they risk unconstitutionally disregarding public schools’ antidiscrimination interests, including those that prevent the creation of second-class status in schools and those that promote democratic cohesion.

At bottom, this Note tries to shore up the institutional prerogative of schools and their local communities to set policies by using anti-discrimination values as limiting principles. This allows lower courts to draw a line beyond which *Mahmoud* and *Mirabelli* cannot reach. While those decisions remind states to be sensitive to parental and student

Ind. 2012) (holding that “while . . . a student’s right to proclaim damnation” may implicate the Free Exercise Clause, “there is no right to do so in the school setting”).

323. See, e.g., L.M. ex rel. Morrison v. Town of Middleborough, 145 S. Ct. 1489, 1489–90 (2025) (Alito, J., dissenting from denial of certiorari) (involving a student wearing a shirt to school saying “There Are Only Two Genders”); Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 676 (7th Cir. 2008) (Posner, J.) (staying an injunction and allowing a religious student to wear a “Be Happy, Not Gay” shirt to school).

324. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n, 584 U.S. 617, 632 (2018). If the student wearing the shirt directly said to a non-cisgender student that “God made only two genders,” then that would result in a dignitary harm and thus the policy enjoining that free exercise would survive strict scrutiny. An in-between case that would require careful factual analysis would be if a religious student wears the same shirt to intimidate a particular non-cisgender student in the classroom.

325. *Nuxoll*, 523 F.3d at 676. This is not to deny that the T-shirt is, itself, discriminatory and demeans gender-diverse individuals. It is only to say that it warrants free exercise protection. See Konnoth, *supra* note 263, at 2057 (“[Some] stigma a group suffers . . . might be permitted by the First Amendment [Free Speech Clause] . . . but . . . it is important to acknowledge that the actions *do* discriminate.”).

religious prerogatives, that contribution needs to be carefully weighed against the states' interests and society's interest in maintaining its pluralist character. Properly maintaining that balance in the nation's public schools will produce a more tolerant, inclusive society—a necessary precondition to ensure the religious, parental, and dignitary rights of all.