The New Frontier of Free Exercise in *Mahmoud v. Taylor*: Religious Exemptions from Tolerance in the Classroom

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INTRODUCTION

Recent Supreme Court decisions have left the Free Exercise clause in fundamental conflict with the rights of LGBTQ+ individuals.[1] The Court's foundational decision in *Employment Division v. Smith*[2] created an equality-focused framework designed to protect against the degradation of other constitutional rights in the name of religion.[3] However, as the Court has become more open to requiring exemptions from nondiscrimination policies for religious plaintiffs under the First Amendment, they have instituted a regime of "*structural preferentialism*," where religion must be granted the same benefits as secular entities while also being given "special treatment" through exemptions.[4] This regime has consistently "shown favoritism to religion over nonreligion," disregarding the importance of policies to protect the equality of the LGBTQ+ community.[5] As such, the Court has "subordinated" rights of the LGBTQ+ community to the religious rights of others[6] by reading the Free Exercise clause to require exemptions from LGBTQ+-nondiscrimination policies. This, in turn,

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[1] *See* Jamie Reinah, *LGBTQIA+ Public Accommodation Cases: The Battle Between Religious Freedom and Civil Rights*, 90 FORDHAM L. REV. 261, 264 (2021); Arianna Nord, *Queer and Convincing: Reviewing Freedom of Religion and LGBTQ+ Protections Post*-Fulton v. City of Philadelphia, 97 WASH. L. REV. 265, 267 (2022).

[2] 494 U.S. 872 (1990).

[3] *See* Laura Portuondo, *Effecting Free Exercise and Equal Protection*,72 DUKE L.J. 1494, 1559 (2023); Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. 1469, 1472 (2012).

[4] Richard Schragger et al., *Reestablishing Religion*, 92 UNIV. CHI. L. REV. 199, 201 (2025).

[5] *See id.* at 283.

[6] *See* David B. Cruz, *Reestablishment of Religion and LGBTQ Rights*, 72 UCLA L. REV. DISCOURSE 394, 412 (2024); *cf.* Corbin, *supra* note 3, at 1483.

legitimizes a system of marginal equality that subjects the queer community to constant "surprise discrimination."[7]

This Note seeks to contribute to pre-existing scholarship on the Roberts Court's application of the Free Exercise clause to deteriorate LGBTQ+ protections by discussing the analytical fallacies in *Mahmoud v. Taylor*.[8] It argues that the Court in *Mahmoud*, which examined whether the Free Exercise clause required parents to be able to opt their children out of an LGBTQ+-inclusive curriculum, created a new hybrid rights test for Free Exercise exemption claims. Part I will discuss the pre-existing Free Exercise doctrinal framework, focusing on *Yoder*'s strict scrutiny approach and *Smith*'s rational basis test before discussing the current trend of Free Exercise exemption cases being used to undermine LGBTQ+ rights. Part II will review how the Court applied this doctrine in *Mahmoud*, why the Court's application of the Free Exercise doctrine (or lack thereof) should not have led to strict scrutiny, and why the outcome of the *Mahmoud* analysis was incorrect even if strict scrutiny did apply. Finally, the Note concludes that the analytical framework announced in *Mahmoud* strengthens the Free Exercise clause in a way that undermines policies designed to promote unity and protect against stigmatization. Ultimately, the consequences of the regime fundamentally alter the landscape of public schools.

PART I: FREE EXERCISE EXEMPTION CLAIMS FRAMEWORK

The two key precedential cases shaping the Free Exercise exemption claim at issue in *Mahmoud v. Taylor*[9] are *Wisconsin v. Yoder*[10] and *Employment Division v. Smith*.[11] This section discusses the different analytical frameworks established by these precedents to provide context as to how the Court applied (or failed to apply) them in *Mahmoud*.

In *Yoder*, the Court considered whether Wisconsin's compulsory school-attendance law, which required children to attend public or private school until the age of sixteen without exemption, was unconstitutional.[12] The Court held that denying Amish parents an exemption to the compulsory education requirement violated their parents' Free Exercise and substantive due process rights by seriously burdening their ability to direct the religious upbringing of their children.[13]

In reaching this conclusion, the Court applied strict scrutiny.[14] The Court stated that when the "interests of parenthood" guaranteed by substantive due process are implicated alongside a Free Exercise claim, states are required to establish that the policy has "more than merely a reasonable relation" to a legitimate interest.[15] As such, "only those interests of the highest order" could defeat a Free Exercise claim,[16] although "the power of the parent, even when linked to a free exercise claim,

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[7] *See* Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72(1) BROOK. L. REV. 61, 120 (2006).

[8] 606 U.S. 522 (2025). "Surprise discrimination" refers to the experience of when one is "surprised by a denial of service and/or a directive to go down the street to a different provider." Feldblum, *supra* note 7, at 121.

[9] 606 U.S. 522 (2025).

[10] 406 U.S. 205 (1972).

[11] 494 U.S. 872 (1990).

[12] *Yoder*, 406 U.S. at 235.

[13] *See id.* at 233.

[14] Other scholarship has referred to this test (and the similar approach required by the Religious Freedom Restoration Act of 1993) as a balancing test. *See, e.g.,* Robert R. Martin, *Compelling Interests and Substantial Burdens: The Adjudication of Religious Free Exercise Claims in U.S. State Appellate Courts*, 9(2) SAGE OPEN, 1, 2 (2019). For clarity, this Note refers to this test as strict scrutiny.

[15] *Yoder*, 406 U.S. at 233–34.

[16] *Id.* at 215.

may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child."[17]

The Court began by examining the burden the law placed upon the Amish community's religious practice. It found there was a significant constitutional burden, as the law coerced compliance through threat of criminal sanction, and "formal education after eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs."[18]

Subsequently, the Court examined whether the state had a compelling interest in compulsory formal education for children up until the age of sixteen.[19] Although acknowledging that states do generally possess a strong interest in universal compulsory education, the Court held the denial of the parent's requested exemption could not be justified by those interests.[20] Importantly, the Court also noted the state could not rely on its compelling interest to protect "the physical or mental health of the child," because there was no evidence the law addressed such an issue or that granting the exemption would hinder that interest.[21] In sum, because the law constituted a significant burden on the parents' Free Exercise and parental rights, and denying the exemption was not justified by a compelling interest, it failed strict scrutiny.

While holding the states' denial of an exemption for the Amish community unconstitutional, the Court emphasized that the holding did not undermine states' general ability to determine educational requirements. Specifically, the majority noted that "courts are not school boards or legislatures," and should apply "great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable education requirements."[22]

Nearly two decades later, the Court returned to the topic of Free Exercise clause exemptions in *Employment Division v. Smith*.[23] The Court was asked to determine whether Oregon's criminal classification of "religiously inspired peyote use" and the denial of unemployment benefits for those fired because of this criminal action violated the Free Exercise clause.[24]

The *Smith* Court explicitly rejected *Yoder*'s strict scrutiny approach, instead creating a new framework, where so long as the law is neutral and generally applicable, even if it incidentally interferes with religious conduct, rational basis review applies.[25] However, the Court noted that a "hybrid" claim, in which there has been a violation of both the Free Exercise clause and another constitutionally protected right, such as the substantive due process parental rights in *Yoder*, then strict scrutiny applied.[26] Courts and commentators have referred to this exception as the hybrid rights doctrine.[27]

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[17] *Id.* at 233–34.

[18] *Id.* at 219.

[19] *Id.* at 221. Before analyzing the strength of the State's interest, the Court also found precedent precluded the State's claim that the law was outside of the First Amendment. *See id.* at 220.

[20] *Id.* at 222, 234.

[21] *See Yoder*, 406 U.S. at 230, 234.

[22] *Id.* at 235.

[23] 494 U.S. 872 (1990).

[24] *Id.* at 874–76.

[25] *See id.* at 879, 885–86

[26] *See id.* at 881–82.

[27] *See* Jonathan B. Hensley, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119, 119 (Fall 2000); David L. Hudson, Jr. & Emily H. Harvey, *Dissecting the Hybrid Rights Exception: Should It Be Expanded or Rejected*, 38 UNIV. ARK. L. REV. 449, 449 (2016).

In sum, *Smith*'s neutral and generally applicable rule created a rational basis standard for Free Exercise clause claims.[28] However, it still left intact the courts' ability to constitutionally require exemptions via strict scrutiny for *Yoder*-like hybrid claims involving the Free Exercise clause and substantive due process parental rights.[29]

Despite the *Smith* test's continuing endurance as the leading framework for Free Exercise claims,[30] in recent years the Court has indicated its frustration with the test by narrowing its reach,[31] particularly in its application to LGBTQ+-related policies. For example, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court reversed the Colorado state court's decision that *Smith* required a baker who was religiously opposed to gay marriage to comply with nondiscrimination laws by finding that the law had not been applied neutrally to the baker's request for an exemption.[32]

The Court's most dramatic narrowing of *Smith*'s application to LGBTQ+ nondiscrimination laws came in *Fulton v. City of Philadelphia*.[33] There, Philadelphia's standard foster care contract required a foster care provider not to reject foster parents "based upon . . . their . . . sexual orientation," unless the Commissioner granted an exception, which was up to their discretion.[34] The city declined to enter a foster care contract with Catholic Social Services (CSS) because CSS refused to certify same-sex couples as foster parents and did not grant an exemption to the nondiscrimination policy.[35] The Court found *Smith* could not apply because the policy's system of individualized, discretionary exemptions meant it was not generally applicable.[36] The Court then applied strict scrutiny and, while noting the city's "weighty" interest in equal treatment of queer couples, found Philadelphia did not have a compelling interest in denying CSS an exemption "while making them available to others."[37]

The decision made clear that *Smith* was out of favor with the current Court. In her concurrence, Justice Barrett questioned the overall validity of *Smith*,[38] and Justices Alito and Gorsuch

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[28] *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (clarifying that *Smith* stood for the "general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice"); Holt v. Hobbs, 574 U.S. 352, 357 (2015) ("[*Smith*] held that neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause . . . [and] largely repudiated the method of analysis used in prior free exercise cases like *Wisconsin v. Yoder* . . . [where the Court] employed a balancing test that considered whether a challenged government action that substantially burdened the exercise of religion was necessary to further a compelling state interest." (internal citations omitted)).

[29] *See* James G. Dwyer, *The Good, the Bad, and the Ugly of* Employment Division v. Smith *for Family Law*, 32 CARDOZO L. REV. 1781, 1782 (2011) (arguing the majority opinion of *Smith*, while establishing a new rule, still suggested its "central principle simply would not apply to religious parenting cases").

[30] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 525 (2022).

[31] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 190–92 (2012) (creating a ministerial exception to *Smith*); Rachel Barrick, *The Ministerial Exception: Seeking Clarity and Precision Amid Inconsistent Application of the* Hosanna-Tabor *Framework*, 70 EMORY L. J. 465, 480 (2020).

[32] Masterpiece Cakeshop v. Colorado C.R. Comm'n, 584 U.S. 617, 625, 631 (2018). However, in *303 Creative LLC v. Elenis*, the Court was asked to consider *Smith* in the context of a state's antidiscrimination policy prohibiting a Christian business from refusing website services to same-sex couples on the basis of their sexual orientation. The Court granted certiorari only to the Free Speech aspect of the claim, suggesting a hesitancy to completely overrule *Smith*. Wren Gader, *A Continued Sign of the Court's Unwillingness to Overrule* Smith, 7 NEV. L.J. F. 1, 3 (2023).

[33] 593 U.S. 522 (2021).

[34] *Id.* at 535.

[35] *Id.* at 530–31.

[36] *Id.* at 540–41.

[37] *See id.* at 541–42.

[38] *Id.* at 543 (Barrett, J., concurring) ("In my view, the textual and structural arguments against *Smith* are more compelling.").

explicitly called for *Smith* to be overturned.[39] Justice Alito's concurrence was particularly troubling for the future of *Smith* in protecting LGBTQ+ individuals. He argued CSS's policy of denying same-sex parents from being foster parents was simply an expression of the idea that only straight couples should be married, and that while this may be "hurtful . . . protecting against this form of harm is not an interest that can justify the abridgment of First Amendment rights."[40] His concurrence thus exemplified how *Smith* can be (and is) circumvented so that the interest of protecting queer people from the harms of discrimination is subordinated to religious entities' First Amendment rights.

Taken together, these cases signal the Court's erosion of *Smith*'s neutrality principle without overturning the doctrine. Combined with the Court's trend of elevating religious-based claims over the rights of the LGBTQ+ community,[41] the *Mahmoud* decision is critical to understanding whether the *Smith* neutrality principle has any teeth left to protect the queer community.

PART II: CRITIQUE OF THE FREE EXERCISE EXEMPTION FRAMEWORK IN *MAHMOUD*

This section will first present the factual and procedural background of *Mahmoud* and the Court's opinion. Next, it will argue that the majority's decision to apply strict scrutiny was analytically flawed in numerous ways. Finally, it will argue that even if the majority correctly applied strict scrutiny, the manner in which it was applied was incorrect.

1. OVERVIEW OF THE COURT'S APPLICATION OF *SMITH* AND *YODER* IN *MAHMOUD*

A. *FACTUAL AND PROCEDURAL BACKGROUND*

Leading into the 2022 academic year, the Board of Education of Montgomery County, Maryland (Board), which governs the County's school systems, decided to incorporate LGBTQ+-inclusive books into its English Language Arts curriculum.[42] These books discussed gender identity and pronouns, and included stories depicting same-sex crushes, feelings of gender dysphoria, and gay marriage.[43] Teachers received training and guidance on how to incorporate texts and respond to student or parent questions.[44] Initially, the Board allowed opt-outs from lessons involving these texts.[45] However, less than a year later, citing concerns about administrative burdens and stigmatization caused by the opt-outs, the Board decided to eliminate all opt-outs.[46]

Several parents then filed suit in the District Court of Maryland, arguing they were entitled to exemptions because the policy violated their Free Exercise rights and parental rights under the Due

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[39] *Fulton*, 593 U.S. at 614 (Alito, J., concurring) ("*Smith* was wrongly decided. As long as it remains on the books, it threatens a fundamental freedom . . . [T]he Court's error in *Smith* should now be corrected."); *Fulton*, 593 U.S. at 627 (Gorsuch, J., concurring) ("Rather than adhere to *Smith* . . . the Court should overrule it . . . .").

[40] *Id.* at 615.

[41] REHAN ABEYRATNE, COURTS AND LGBTQ+ RIGHTS IN AN AGE OF JUDICIAL RETRENCHMENT 95 (2025); *see* Emily Kazyak & Kelsy Burke, *From* Smith *to* Fulton*: The Shifting Perceptions of Religion and LGBTQ Rights in the Courts*, BERKLEY CTR. (July 26, 2021), https://berkleycenter.georgetown.edu/responses/from-smith-to-fulton-the-shifting-perceptions-of-religion-and-lgbtq-rights-in-the-courts (last visited Dec. 11, 2025) (arguing the *Fulton* decision "suggests that LGBTQ Americans' full acceptance and integration in public life necessitates exemptions for religious actors opposed to LGBTQ identities and relationships").

[42] Mahmoud v. Taylor, 606 U.S. 522, 532–33 (2025).

[43] *Id.* at 533–35.

[44] *Id.* at 535–36.

[45] *Id.* at 538.

[46] *Id.*

Process clause.[47] The District Court found the plaintiffs not likely to succeed on the merits of their Free Exercise clause claim because they did not show the policy would coerce them to violate their religious beliefs.[48] That court also rejected the parental rights claim, finding parental rights could not justify requiring opt-outs from public-school curriculum in conflict with religious beliefs, and that the policy was justified by a legitimate interest in preventing stigmatization.[49] The court then denied the preliminary injunction and the request for an injunction pending appeal.[50]

The Fourth Circuit affirmed, finding the facts presented did not show a cognizable burden on the parents' or their children's Free Exercise rights.[51] The court also held that the parental rights claim, independent of the Free Exercise claim, was insufficient for a preliminary injunction.[52]

The parents then sought certiorari, which was granted in January of 2025.[53]

B. *THE COURT'S ANALYSIS*

Justice Alito's majority opinion acknowledged that the *Smith* framework first requires asking whether the policy is neutral and generally applicable, and if not, whether it passes strict scrutiny.[54] However, after this brief explanation, the Court simply stated that "[w]hen the burden imposed is of the same character as that imposed in *Yoder*," strict scrutiny applies without determining if the challenged law is neutral and generally applicable.[55] The Court then found the burden at issue to be of "the exact same character" as the one in *Yoder*, which required strict scrutiny.[56]

The Board argued that it had compelling interests in ensuring the school environment was "safe and conducive to learning for all students" and in preventing the stigmatization that opt-outs could cause.[57] The Court rejected protecting against stigmatization as a compelling interest, noting the lack of evidence in the record that opt-outs had caused any stigmatization.[58]

After finding the policy failed strict scrutiny, the majority held that the policy placed an "unconstitutional burden" on the parents' free exercise rights, and were thus likely to succeed on their free exercise claim.[59] As such, the Court granted the parents a preliminary injunction, ordering the Board to allow opt-outs from the inclusive curriculum.[60]

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[47] Mahmoud v. McKnight, 688 F. Supp. 3d 265, 287 (D. Md. 2023), *aff'd*, 102 F.4th 191 (4th Cir. 2024), *cert. granted sub nom.* Mahmoud v. Taylor, 145 S. Ct. 1123, 220 L. Ed. 2d 420 (2025), *rev'd and remanded sub nom.* Mahmoud v. Taylor, 606 U.S. 522, 145 S. Ct. 2332, 222 L. Ed. 2d 695 (2025).

[48] *Id.* at 305–06.

[49] *Id.* at 306.

[50] *Id.* at 307.

[51] Mahmoud v. McKnight, 102 F.4th 191, 214 (4th Cir. 2024), *cert. granted sub nom.*, Mahmoud v. Taylor, 145 S. Ct. 1123 (2025), *rev'd and remanded sub nom.*, Mahmoud v. Taylor, 606 U.S. 522 (2025).

[52] *Id.* at 216–17.

[53] Mahmoud v. Taylor, 145 S. Ct. 1123, 1123 (2025) (mem.).

[54] Mahmoud v. Taylor, 606 U.S. 522, 564 (2025). The Court has recently endorsed this approach to Free Exercise challenges in its decision in *Kennedy v. Bremerton*. *See* 597 U.S. 507, 525 (2022) (noting plaintiffs can establish a Free Exercise claim by showing the burden imposed on a sincere religious practice was caused by a non-neutral or generally applicable policy, and if such a showing is made, the policy must satisfy strict scrutiny by showing it was narrowly tailored to address a compelling state interest).

[55] *Mahmoud*, 606 U.S. at 564.

[56] *Id.*

[57] *Id.* at 565.

[58] *Id.* at 567–68.

[59] *Id.* at 569.

[60] *Id.*

2. THE COURT INCORRECTLY APPLIED THE HYBRID RIGHTS APPROACH TO JUSTIFY STRICT SCRUTINY

The Court was incorrect at multiple points in its determination to apply strict scrutiny. As previously discussed, despite rumblings from the Court, *Smith* is still controlling for Free Exercise exemption claims,[61] including its hybrid rights doctrine. First, the no-opt-out policy is neutral and generally applicable, and thus should have been upheld under *Smith*'s rational basis review. Second, there are four different approaches circuit courts have taken when considering *Smith*'s hybrid rights justification of *Yoder*: rejection, independent viability, colorable claims, and cabining.[62] Third, if the Court implicitly used the rejection approach, it was incorrect to do so. Finally, despite this potential rejection, the Court actually created a new 'burden' test for hybrid free exercise and parental rights claims. This test is most similar to the cabining approach, but goes even further by simultaneously expanding the substantive due process rights that can trigger the hybrid rights strict scrutiny and limiting the extremity of the burden needed for hybrid rights strict scrutiny to apply.

A. *THE NO-OPT-OUT POLICY SHOULD HAVE BEEN UPHELD UNDER* SMITH

The Court incorrectly skipped the first, and most critical, question under *Smith*: whether or not the denial of opt-outs was neutral and generally applicable. Had the Court looked at this first question, it should have found the blanket prohibition on opt-outs to be clearly neutral and generally applicable, and thus analyzed—and upheld—the policy under rational basis review.

Three years after *Smith*, the Court explained that a law is not neutral if "the object of a law is to infringe upon or restrict practices because of their religious motivation."[63] In *Fulton*, the Court further clarified that a policy is not neutral when it is "intolerant of religious beliefs or restricts practices because of their religious nature."[64] In contrast, a policy is neutral when it is facially neutral and does not specifically target religious practices.[65] Whether or not a law targets religious practices can be established by examining a policy's "object, text, legislative history, and real-world operation."[66] For example, in *Olympus Spa v. Armstrong*, the Ninth Circuit analyzed a spa's claim that the Free Exercise clause required them to be exempted from Washington's anti-discrimination law prohibiting discrimination based on sexuality, gender expression.[67] The court found the law's stated purpose of "prevent[ing] discrimination" without specifically singling out religious exemptions indicated neutrality.[68] The neutrality factor can easily be disposed of in *Mahmoud*. The blanket prohibition on opt-outs did not target religious exemptions, and its object was to prevent stigmatization of LGBTQ+ youth and families and potential noncompliance with state and federal nondiscrimination laws, not hostility towards religion.[69] As such, the policy was neutral.

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[61] *See supra*, Part I.

[62] *See* Hudson & Harvey, *supra* note 27, at 456.

[63] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

[64] Fulton v. City of Philadelphia, 593 U.S. 522, 533 (2021).

[65] *See Lukumi*, 508 U.S. at 533.

[66] Olympus Spa v. Armstrong, No. 23-4031, 2026 WL 700882, at *7 (9th Cir. Mar. 12, 2026)

[67] Olympus Spa v. Armstrong, 138 F.4th 1204, 1211–12 (9th Cir. 2025), *amended and superseded on denial of reh'g by*, No. 23-4031, 2026 WL 700882 (9th Cir. Mar. 12, 2026).

[68] *See Olympus Spa*, 138 F.4th at 1218; *see also* Parents for Privacy v. Barr, 949 F.3d 1210, 1235 (9th Cir. 2020) (finding school policy neutral when the record did not indicate the policy "was adopted with the specific purpose of infringing . . . religious practices or suppression . . . religion").

[69] *See* Appendix to Petition for a Writ of Certiorari at 607a–608a, Mahmoud v. Taylor, No. 240-297 (U.S. 2024).

In *Fulton*, the Supreme Court made clear that a policy is not generally applicable if it "provid[es] a mechanism for individualized exemptions."[70] Courts have found exemptions not generally applicable when government officials have discretion to grant them.[71] In contrast, when a nondiscrimination policy lacks an individualized exemption mechanism and applies evenly to both religious and secular conduct, the law is generally applicable.[72] Here, the Board was motivated to prohibit opt-outs to prevent stigmatization and had no system of individualized exemptions.[73] Thus, the policy should have been found to be generally applicable.

Because the prohibition on opt-outs was both neutral and generally applicable as required by *Smith*, it should have been analyzed under rational basis review and upheld. In *Parents for Privacy v. Barr*, the Ninth Circuit considered a free exercise challenge to a high school's "Student Safety Plan" that sought to protect transgender students' ability to "safely participate in school activities," which included ensuring they had access to bathrooms and locker rooms that aligned with their gender identity.[74] The plaintiffs claimed the plan violated their free exercise rights "because the Student Safely plan forces them to be exposed to an environment in school bathrooms and locker facilities that conflicts with, and prevents them from fully practicing, their religious beliefs."[75] The court considered the plan under rational basis review, and held the plan valid as it was rationally related to the Board's legitimate purpose of protecting youths against stigmatization.[76] In *Mahmoud*, the school board similarly decided to deny opt-outs from its inclusive curricula to prevent stigmatization of students.[77] As such, the no-opt-out policy should have been upheld under rational basis review.

B. *THE CIRCUIT COURTS' TREATMENT OF HYBRID RIGHTS*

Even if the Court was correct to not apply *Smith*'s general rule, the claim should have been analyzed as a hybrid rights case for strict scrutiny to apply. Lower courts have struggled to ascertain a clear meaning from *Smith*'s treatment of *Yoder*.[78] As discussed, the Court noted that *Yoder* was different than *Smith* because *Yoder* involved both Free Exercise and substantive due process parental rights,

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[70] *See Fulton*, 593 U.S. at 533 (internal citations omitted).

[71] *See* Bates v. Pakseresht, 146 F.4th 772, 777 (9th Cir. 2025); Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ., 82 F.4th 664, 687 (9th Cir. 2023) (finding policy permitting ad hoc decisions about which programs qualify for religious exemptions not generally applicable); Smith v. Atlantic City, 138 F.4th 759, 771 (3d Cir. 2025) (finding grooming policy not generally applicable when it provided "built-in discretion").

[72] *See Olympus Spa*, 138 F.4th at 1219 (9th Cir. 2025) (finding state's nondiscrimination law generally applicable because there is "no formal mechanism for granting individualized exceptions, and its nondiscrimination provisions apply to religious and secular conduct alike") (internal citations and quotations omitted); Does 1-6 v. Mills, 16 F.4th 20, 30 (1st Cir. 2021) (finding law generally applicable when it "applies equally across the board" and "does not require the . . . government to exercise discretion in evaluating individual requests for exemptions); *see also* Parents for Privacy v. Barr, 949 F.3d 1210, 1235 (9th Cir. 2020) (finding a law generally applicable when it did not impose certain conditions or restrictions only on religious conduct).

[73] Mahmoud v. Taylor, 606 U.S. 522, 538 (2025).

[74] *Parents for Privacy*, 949 F.3d at 1218.

[75] *Id.* at 1234.

[76] *See id.* at 1235 (noting policy designed to protect trans students was "rationally related to the legitimate purpose of protecting student safety and well-being, and eliminating discrimination on the basis of sex and transgender status"); *see also* Foote v. Ludlow Sch. Comm., 128 F.4th 336, 357 (1st Cir. 2025) (holding school policy survived parental rights claim under rational basis review based on the school's interest in "cultivating a safe, inclusive, and educationally conducive environment for students").

[77] Mahmoud v. Taylor, 606 U.S. 522, 538 (2025).

[78] *See, e.g.*, Benjamin I. Siminou, *Making Sense of Hybrid Rights: An Analysis of the Nebraska Supreme Court's Approach to the Hybrid- Rights Exception in* Douglas County v. Anaya, 85 Neb. L. Rev. 311, 348 (2011).

whereas *Smith* addressed only a Free Exercise claim.[79] Thus, *Smith* made clear that strict scrutiny would apply to similar hybrid rights claims.[80] However, what precisely counts as a hybrid claim was left ambiguous.[81]

Because of this lack of guidance, some circuits have avoided the question of whether or how hybrid rights could justify strict scrutiny. For example, the Fifth Circuit has endorsed the concept of hybrid rights, but has not articulated a clear analytical framework for its application.[82] The Eighth Circuit similarly found "*Smith* did more than simply speculate" about the existence of the hybrid rights doctrine, but did not clarify how it would apply.[83] Additionally, the Fourth Circuit has not established a position on the validity of the hybrid rights theory[84] and declined to rule on the issue in its consideration of *Mahmoud*.[85]

The circuits that have weighed in on how to apply the hybrid rights theory have created diverging approaches: rejection, independent viability, colorable companion claims, and cabining.[86]

The Second, Third, and Sixth Circuits have rejected the hybrid claims doctrine. The Second Circuit and Third Circuits have stated that the hybrid rights discussion is dicta.[87] The Sixth Circuit has gone as far as stating the doctrine was "completely illogical."[88]

The independent viability approach, adopted in the First and D.C. Circuits, requires that the second constitutional claim be viable in its own right for strict scrutiny to apply.[89] However, the First Circuit has taken steps to retreat from the independent viability approach,[90] leaving the D.C. Circuit as the only circuit to retain it.[91] In contrast, the colorable claims approach, adopted by the Seventh,

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[79] Smith v. Emp. Div., 494 U.S. 872, 881–82 (1990).

[80] *Id.*

[81] *See* Siminou, *supra* note 77, at 316–17; Hudson & Harvey, *supra* note 27, at 455.

[82] *See* Soc'y of Separationists, Inc. v. Herman, 939 F.2d 1207, 1216 (5th Cir. 1991), *on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (noting "*Smith* specifically excepts religion-plus-speech cases from the sweep of its holding"); *see also* Fairbanks v. Brackettville Bd. of Educ., 218 F.3d 743, 1 n.2 (5th Cir. 2000) (unpublished table decision) (noting that under *Smith* strict scrutiny applies to hybrid claims, though not applying such analysis).

[83] Telescope Media Grp. v. Lucero, 936 F.3d 740, 759– 60 (8th Cir. 2019); *see also* Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473 (8th Cir. 1991) (remanding for a hybrid rights claim without clarifying the meaning of a hybrid rights analysis).

[84] *See* Hudson & Harvey, *supra* note 27, at 449.

[85] Mahmoud v. McKnight, 102 F.4th 191, 217 (4th Cir. 2024), *cert. granted sub nom.*, Mahmoud v. Taylor, 145 S. Ct. 1123 (2025), *rev'd and remanded sub nom.*, Mahmoud v. Taylor, 606 U.S. 522 (2025).

[86] *See* Hudson & Harvey, *supra* note 27, at 449 (2016); *see also* Ryan S. Rummage, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L. J. 1175, 1189–95 (2015).

[87] Knight v. Conn. Dept. of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001); Leebaert v. Harrington, 332 F.3d 135, 144 (2d Cir. 2003); Combs v. Homer-Center Sch. Dist., 540 F.3d 231, 246–47 (3rd Cir. 2008).

[88] Kissinger v. Bd. of Trs. of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993); *see* Pleasant View Baptist Church v. Beshear, 838 Fed. Appx. 936, 940 (6th Cir. 2020) (Donald, J., concurring) (noting the circuit has "outright rejected" the hybrid rights doctrine).

[89] *See* William J. Huan, *A Standard for Salvation: Evaluating "Hybrid-Rights" Free-Exercise Claims*, 61 CATH. UNIV. L. REV. 265, 280 (2012); Hope Lu, *Addressing the Hybrid-Rights Exception: How the Colorable-Plus Approach Can Revive the Free Exercise Clause*, 63 CASE W. RSRV. L. REV. 257, 267 (2012).

[90] Originally, in *Brown v. Hot, Sexy and Safer Productions*, the court found that strict scrutiny could not be applied under the hybrid rights theory because the Free Exercise challenge was "not conjoined with an independently viable constitutional protection." 68 F.3d 525, 539 (1st Cir. 1995). Later, the court disclaimed that *Brown* set an independent viability standard and has declined to further clarify how to apply the hybrid rights theory. *See* Parker v. Hurley, 514 F.3d 87, 98, 98 n.9 (1st Cir. 2008); Roman Cath. Bishop of Springfield v. City of Springfield, 724 F.3d 78, 101 n.18 (1st Cir. 2013).

[91] *See* E.E.O.C. v. Cath. Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996); Rummage, *supra* note 85, at 1189–95.

Ninth, and Tenth Circuits, requires the second constitutional claim to have a fair probability or likelihood of success on the merits.[92]

Scholars have also argued that some courts have applied a cabining approach, which limits the application of hybrid rights to "claims and fact patterns that quite closely resemble" the cases *Smith* identified as exemptions to its general rule.[93] Commentators have argued that the First Circuit implicitly engaged in this type of analysis,[94] and it was more recently employed in the Eleventh Circuit.[95] The cabining approach is similar to how courts that have rejected the hybrid rights theory have then applied the exempted cases, as it still requires fact-to-fact analysis to a specific case exempted from *Smith*'s general rule. However, the cabining approach correctly acknowledges the hybrid rights doctrine as required by *Smith*.

C. *THE FALLACIES OF THE COURT'S NEW BURDEN TEST*

The *Mahmoud* majority attempted to distance itself from the hybrid rights theory by stating the *Smith* Court merely "speculated" that *Yoder* was exempt from *Smith*'s general rule because of its hybrid nature.[96] While this is in line with the rejection approach of the Second and Third Circuits,[97] the hybrid rights doctrine should not be so easily overlooked.[98] In reality, the *Mahmoud* decision instituted a new,

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[92] *See* Illinois Bible Colleges Ass'n v. Anderson, 870 F.3d 631, 641 (7th Cir. 2017) (finding there is no hybrid rights claim entitled to strict scrutiny when the companion claim is "meritless" (quoting Miller v. Reed, 176 F.3d 1202, 1207–08 (9th Cir. 1999))); Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 705 (9th Cir. 1999) *vacated en banc on ripeness grounds*, 220 F.3d 1134 (9th Cir. 2000) ("[W]e conclude that a plaintiff invoking Smith 's hybrid exception must make out a 'colorable claim' that a companion right has been infringed." (citing Swanson v. Guthrie Indep. Sch. Dist. No. 1-L, 135 F.3d 694, 700 (10th Cir. 1998))); Miller v. Reed, 176 F.3d 1202, 1207–08 (9th Cir. 1999); Axson-Flynn v. Johnson, 356 F.3d 1277, 1295 (10th Cir. 2004). However, the colorable claim approach has been called into question in the Ninth Circuit, because the case establishing the framework was later reversed en banc on other grounds, and the case reaffirming the framework was decided prior to the reversal. Parents for Priv. v. Barr, 949 F.3d 1210, 1237–38 (9th Cir. 2020); Huan, *supra* note 88, at 279 n.109. However, the court has continued to engage in the colorable claims analysis. *See Parents for Priv.*, 949 F.3d at 1238.

[93] Note, *The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 HARV. L. REV. 1494, 1513 (2010) [hereinafter *The Best of a Bad Lot*].

[94] *See* Hudson & Harvey, *supra* note 27, at 469 (discussing the First Circuit's decision in Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008)).

[95] Henderson v. McMurray, 987 F.3d 997, 1006–07 (11th Cir. 2021).

[96] Mahmoud v. Taylor, 606 U.S. 522, 565 n.14 (2025).

[97] *See supra*, Part II.2.B. This is also in accord with numerous commentators and Justices who have levied critiques against the doctrine. *See* Hensley, supra note 27, at 120; Gage Raley, Note, Yoder Revisited, Why the Landmark Amish Schooling Case Could—And Should—Be Overturned, 97 VA. L. REV. 681, 715 (2013); Fulton v. City of Philadelphia, 593 U.S. 522, 599 (2021) (Alito, J., concurring) (arguing "[i]t is hard to see the justification for this curious doctrine," which would "swallow up" Smith's framework, since many Free Exercise exemption cases could be argued as hybrid rights issues); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in judgment**)** (finding the hybrid rights doctrine "untenable," as it would "swallow the Smith rule").

[98] Mahmoud v. Taylor, 606 U.S. 522, 626 (2025) (Sotomayor, J., dissenting) (*Smith* stood for the proposition that "only in such 'hybrid situations' does the Court set aside its neutral and generally applicable inquiry"); Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception"*, 108 DICK. L. REV. 573, 608 (2003) (arguing that hybrid-rights was an intentional decision of Justice Scalia's to "ruleify" the law that should not be discarded so easily); Fulton v. City of Philadelphia, 593 U.S. 522, 614 (2021) (Alito, J., concurring) ("[P]recedent should not be lightly cast aside….") *see also* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1730 ("Even when a Supreme Court opinion reflects sharp disagreement on the Court . . . lower courts are forbidden to revisit it."); Bosse v. Oklahoma, 580 U.S. 1, 2 (2016) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality" (internal citations omitted)).

analytically sparse burden test for hybrid Free Exercise and parental due process rights exemption claims to justify strict scrutiny.[99]

The Court announced that "when 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."[100] The Court clarified that the "special character of the burden" in *Yoder* was the challenged policy's substantial interference with the religious development of parents' children.[101] Thus, while not explicitly using the hybrid rights language, the Court created a new alternative to *Smith* where, if a claim implicates free exercise and parental rights issues, the hybrid nature of the claim can transform the burden into one of a "special character" that justifies strict scrutiny.[102] As discussed in the next two sections of this Note, the new test expands the substantive due process parental rights claims that can justify a hybrid rights analysis, while also significantly relaxing the burden required to trigger hybrid rights strict scrutiny.

i. The Burden Test Greatly Expands Parental Rights in Free Exercise Claims

Unlike lower courts that have applied the hybrid rights exemption through the independent viability or colorable claim framework, the *Mahmoud* majority did not separately evaluate the parents' substantive due process rights claim. Instead, it collapsed the analysis by finding that teaching the curriculum's books without opt-outs would "substantially interfere[] with the religious development of children and impose[] the kind of burden on religious exercise that *Yoder* found unacceptable."[103] This was because, according to the majority, the books and teachings had normative messages about gender and sexuality that imposed a "set of values and beliefs that are hostile to [the] parents' religious beliefs."[104] This expounds the idea that exposure to ideas contrary to one's religious beliefs requires an exemption under the Free Exercise clause.[105] Although the Court attempted to limit its holding by stating the curriculum at issue was more than "mere 'exposure'" because "the storybooks unmistakably convey a particular viewpoint about same-sex marriage and gender" and teachers were encouraged to "reinforce this viewpoint and reprimand any children who disagree,"[106] as correctly noted by the dissent, this is "simply exposure by another name."[107]

Allowing this type of exposure challenge will significantly expand parental rights in the Free Exercise realm. The Supreme Court has found that the Fourteenth Amendment's substantive due process guarantee protects parents and guardians' right to "direct the upbringing and education of [their] children."[108] However, parental rights challenges to curricula that expose children to ideas that parents disapprove of have not traditionally been cognizable, as schools have "broad discretion" in

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[99] Justice Sotomayor's dissent refers to the majority's new rule as a "threat" test, which is undergirded by a new "constitutional right to avoid exposure to subtle themes contrary to the religious principles that parents wish to instill in their children." Mahmoud v. Taylor, 606 U.S. 522, 593, 605 (2025). Though this Note does discuss exposure, it refers to the majority's test as the 'burden' test, to more fully reflect the majority's language and the importance of *Yoder*'s character as a hybrid rights claim.

[100] Mahmoud v. Taylor, 606 U.S. 522, 565 (2025).

[101] *Id.*

[102] *Id.* at 564–65.

[103] *Mahmoud*, 606 U.S. 522 at 550 (2025).

[104] *Id.* at 553–54.

[105] *See id.* at 621 (Sotomayor, J., dissenting).

[106] *Id.* at 556–57 (majority opinion).

[107] *Id.* at 605 (Sotomayor, J., dissenting).

[108] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); *see* Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

their curricular decisions.[109] Thus, while parental rights protect the fundamental right to direct the upbringing of children, they do not extend "a fundamental right of every parent to tell a public school what his or her child will or will not be taught."[110] Rather, there must be evidence that the curriculum coerced the student to believe a concept contrary to those the parents wish to teach their children.[111]

This coercion finding has also been found to be necessary to find an exemption constitutionally required by the Free Exercise Clause. For example, in *Parker v. Hurley*, the First Circuit found a school had not violated parents' parental and Free Exercise rights when it required children to listen to a storybook that had a positive message about gay marriage, contrary to the parents' religious beliefs.[112] Although the book was likely "precisely *intended*" to influence children to be tolerant towards gay marriage, parental rights could not justify an exemption from exposure without showing the materials coerced students to comply with or affirm those beliefs.[113] This was the case even when the court used a hybrid rights approach to consider a parental rights claim alongside a Free Exercise challenge.[114] Similarly, in *Mozert v. Hawkins County Board of Education*, the Sixth Circuit found that parents were not entitled to opt their children out of exposure to books that were contrary to the parents' religious teachings without the "critical element of compulsion."[115]

Under the above-detailed approach to parental rights in public schools, the burden alleged by the parents in *Mahmoud* is not constitutionally cognizable. Like the *Parker* parents, the parents here argued that the storybooks' messages of tolerance towards transgender and gay people hinder their religious beliefs that only heterosexual couples should marry, and that the only valid gender identity is the one aligned with a child's biological sex.[116] Again, as *Parker* made clear, this exposure without coercion does not give rise to a constitutionally cognizable parental rights claim, and as *Mozert* demonstrated, this remains true even if the parental rights are not explicitly discussed as a separate claim, as was the case in *Mahmoud*.

The majority claimed that the storybooks and their associated lessons endorsed normative messages that would coerce students into accepting them, contrary to the religious teachings their parents wish to impart.[117] However, this is directly undermined by the underlying facts. Like the book in *Parker*, the storybooks and curriculum were designed to "encourag[e] mutual tolerance and 'respect' for all those in the community."[118] For example, the guidance for teachers implementing the curriculum explains that students might say "Being _____ (gay, lesbian, queer, etc.) is wrong and not allowed in my religion."[119] Teachers were then told they could respond by saying, "I understand that is what you believe, but not everyone believes that. We don't have to understand a person's

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[109] *See* Foote v. Ludlow Sch. Comm., 128 F.4th 336, 352 (1st Cir. 2025).

[110] *See* Leebaert v. Harrington, 332 F.3d 134, 141 (2d Cir. 2003); Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1206 (9th Cir. 2005) (holding parents have "no constitutional right . . . to prevent a public school from providing its students with whatever information it wishes to provide . . . when and as the school determines that it is appropriate to do so"); *see also* Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 702 (10th Cir. 1998); Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174, 179 (4th Cir. 1996).

[111] *See* Foote v. Ludlow Sch. Comm., 128 F.4th 336, 353 (1st Cir. 2025);

[112] Parker v. Hurley, 514 F.3d 87, 90, 106 (1st Cir. 2008).

[113] *Id.* at 103, 106 (emphasis in the original).

[114] *Id.*; *see also* Lee v. Weisman, 505 U.S. 577, 587 (1992) (noting students may be exposed to "ideas deemed offensive and irreligious" as part of their education).

[115] Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1069 (6th Cir. 1987).

[116] *See* Mahmoud v. Taylor, 606 U.S. 522, 540–43 (2025).

[117] *See id.* at 553–54.

[118] *Id.* at 598 (Sotomayor, J., dissenting).

[119] *See* Appendix to Petition for a Writ of Certiorari at 619a, Mahmoud v. Taylor, No. 240-297 (U.S. 2024).

identity to treat them with respect and kindness."[120] Similarly, the majority noted that if a child says another student "can't be a boy if he was born a girl," the teacher was instructed to inform them that the "comment is hurtful."[121] These responses simply acknowledge the reality of a multicultural society, and do not coerce active affirmance of a particular viewpoint. As noted by the dissent, if there is any ideological conformity the storybooks were meant to encourage, "it is the universal acceptance of kindness and civility."[122]

A least one lower court has upheld a parental rights challenge to LGBTQ+-inclusive lessons,[123] but the decision is inapplicable to the facts of *Mahmoud*. Critical to that holding was that the materials were not part of the official curriculum, but instead taught "in accordance with [the teacher's] beliefs" with "intolerance and disrespect for the religious or moral beliefs and authority of the [p]arents."[124] Thus, this exception to the broad pattern of not permitting parental rights challenges to curricular decisions is inapposite, as the materials in *Mahmoud* were part of the official curriculum and taught in accordance with non-coercive guidance that recognized that parents may impart other beliefs.

Because there was no meaningful evidence of coercion, and exposure alone is insufficient, the facts in *Mahmoud* did not present a legally cognizable parental rights claim. Given the well-established limit on parental rights from intruding into the workings of public schools, there was no viable secondary constitutional claim. Thus, under the hybrid rights colorable claim or independent viability, strict scrutiny should not have applied. However, the Court instead collapsed these two analyses and erroneously found that exposure to teachings contrary to parents' religious beliefs equated to an infringement of their parental rights sufficient to justify strict scrutiny when brought as a Free Exercise claim.[125]

ii. The Burden Test Expands the Nature of the Burden Adequate to Justify Strict Scrutiny

The Court's new test also dramatically alters the burden sufficient to justify strict scrutiny. On its face, this test appears similar to the cabining approach taken by the First Circuit and the Eleventh Circuit, in that strict scrutiny is justified by similarities between the case at hand and one of the cases *Smith* noted as exceptions to its general rule. It is also similar to how circuits that have rejected the hybrid rights doctrine analyze Free Exercise/parental rights claims directly under *Yoder*.[126] However, the *Mahmoud* Court's test significantly lowers the threshold for the type of burden necessary to trigger hybrid rights-based strict scrutiny.

Many scholars and lower courts have long read *Yoder* to be a "very narrow, fact-based decision"[127] that is "essentially sui generis."[128] In *Yoder*, the Court "took pains explicitly to limit its holding" to the "severe and inescapable burden" imposed on the parents' abilities to raise their children according to the Amish faith and the "fundamental mode of life" mandated by the religion.[129]

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[120] *Id.*

[121] *See* Mahmoud v. Taylor, 606 U.S. 522, 554 (2025).

[122] *See id.* at 623 n.14 (2025) (Sotomayor, J., dissenting).

[123] Tatel v. Mt. Lebanon Sch. Dist., 752 F. Supp. 3d 512, 560–61 (W.D. Penn. 2024).

[124] *Id.*

[125] *See Mahmoud*, 606 U.S. at 564.

[126] *See* Leebaert v. Harrington, 332 F.3d 134, 144 (2d Cir. 2003).

[127] *See* Raley, *supra* note 98, at 685; Chad Flanders, *Is* Wisconsin v. Yoder *Limited to Its Facts?*, 16 CONLAWNOW 23, 24–25 (2024-2025).

[128] *See* Parker v. Hurley, 514 F.3d 87, 100 (1st Cir. 2008).

[129] Miller v. McDonald, 130 F.4th 258, 270 (2d Cir. 2025) (quoting Leebaert v. Harrington, 332 F.3d 134, 144 (2d Cir. 2003); Wisconsin v. Yoder, 406 U.S. 205, 217–19 (1972)).

As discussed in the Fourth Circuit's decision of *Mahmoud*, lower courts have read *Yoder* to mean there is a cognizable burden on a party's Free Exercise rights only when the challenged policy "affirmatively compelled them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[130]

In *Mahmoud*, the Court explicitly rejected this constrained reading of *Yoder*, declining to require a showing of a fundamental threat to the parents' ability to instill their religious teachings or of compulsion or coercion to forgo their religious beliefs.[131] Instead, it read *Yoder* as necessitating strict scrutiny whenever a policy similarly "substantially interfere[d]" with parents' ability to direct the upbringing of their children.[132] In its analysis, the Court found that the storybooks were a substantial interference like the one in *Yoder* because they "impose[d]" LGBTQ+-positive values "hostile" to the religious beliefs the parents wished to instill in their children.[133]

However, learning tolerance through LGBTQ+-inclusive storybooks simply does not create a burden that is similarly substantial as *Yoder*'s compulsory attendance policy. *Yoder* compelled students to comply with an entire learning system that was irreconcilable with their religious way of life, and threatened criminal sanctions if parents and their children did not comply.[134] Unlike the policy in *Yoder*, the storybooks and lessons do not "automatically and irreversibly" [135] prevent parents from raising their children to believe gay marriage is wrong and that gender is based on biological sex. The curricula and books simply teach students that there are gay and trans children and families, and that tolerance is encouraged—none of which stops parents from teaching children that gender is sex-based or that gay marriage is contrary to their religion.[136] The no-opt-out policy also lacks the coercive penalties that were critical to finding a Free Exercise burden in *Yoder*.[137]

Rather than meaningfully engage with its own test, the Court simply stated the two burdens were the same. However, "saying so does not make it so."[138] Since the burden in *Mahmoud* was significantly less intrusive than the one in *Yoder*, *Mahmoud* fails its own test, and strict scrutiny should not have applied.

3. EVEN IF THE COURT WAS CORRECT TO APPLY STRICT SCRUTINY, ITS APPLICATION WAS INCORRECT

Even if the Court was correct to bypass the *Smith* in favor of strict scrutiny, its analysis was incorrect. The Court should have held that the Board (A.) had a compelling interest in denying opt-outs from the LGBTQ+-inclusive curriculum, and that (B.) its policy was narrowly tailored to protect the mental health of LGBTQ+ students.

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[130] Mahmoud v. McKnight, 102 F.4th 191, 211 (4th Cir. 2024), *cert. granted sub nom.* Mahmoud v. Taylor, 145 S. Ct. 1123 (2025), *rev'd and remanded sub nom.* Mahmoud v. Taylor, 606 U.S. 522 (2025) (citing Wisconsin v. Yoder, 406 U.S. 205, 218 (1972))

[131] *See* Mahmoud v. Taylor, 606 U.S. 522, 557–59 (2025).

[132] *Id.* at 546 (internal citations omitted).

[133] *See id.* at 553–54.

[134] *See* Wisconsin v. Yoder, 406 U.S. 205, 219 (1972).

[135] *See* Parker v. Hurley, 514 F.3d 87, 100 (1st Cir. 2008).

[136] *See* Mahmoud v. Taylor, 606 U.S. 522 at 606 n.6 (2025) (Sotomayor, J., dissenting).

[137] *Id.* at 608 (arguing that Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) and Bowen v. Roy, 476 U.S. 693 (1986) clearly establish that the coercive impact of *Yoder*'s attendance policy is what gave rise to a cognizable Free Exercise claim).

[138] *See id.* at 626.

A. *THE BOARD HAD A COMPELLING INTEREST IN DENYING OPT-OUTS*

The Board had a compelling interest in denying the religious opt-outs from the curriculum because of the stigmatization of LGBTQ+ children that opt-outs would cause.[139] To defeat strict scrutiny for Free Exercise exemption claims, governmental entities must establish a compelling interest in denying the specific exemption.[140] Here, the majority rejected the Board's assertion that its interest in "protecting students from social stigma and isolation" was sufficient to justify the no-opt-out policy, because the record did not show that Maryland's other legally required opt-outs for discussions about sexuality and gender in its health curriculum had led to stigmatization or isolation.[141] However, stigmatization has long been a compelling interest in the Court's jurisprudence, and there is significant empirical evidence that allowing opt-outs would directly undermine this compelling interest.

Yoder itself noted that policies designed to prevent "any harm . . . [to the] mental health" of children would be a compelling interest sufficient for strict scrutiny.[142] Additionally, in other areas of constitutional law, it is well settled that states have a compelling interest in protecting the "emotional well-being of youth"[143] and safeguarding students against stigmatization.[144] Even in *Masterpiece Cakeshop*, the Court noted that "gay persons . . . cannot be treated as social outcasts or as inferior in dignity or worth."[145] Separating children in schools through opt-outs based on their beliefs regarding LGBTQ+ rights creates a similar stigmatizing effect by eroding their sense of belonging.[146] Similarly, the Court in *Lawrence v. Texas* held that a law was unconstitutional when it targeted same-sex couples, which stigmatized queer people by acting as "an invitation to subject homosexual persons to discrimination."[147] Although in *Mahmoud*, the opt-outs do not explicitly punish queer children or those who support LGBTQ+-inclusive curricula, they would similarly act as state endorsement of discrimination against such people by insinuating their lives and beliefs to be so offensive as to be unteachable to all, thereby undermining the state's compelling interest.[148]

Permitting opt-outs would directly worsen the problem of stigmatization, showing the Board has a clear, compelling interest in denying the exemptions requested by the parents in *Mahmoud*. For example, at schools that had not adopted LGBTQ+-inclusive curricula, 62.7% of LGBTQ students felt unsafe because of their sexual orientation, and 44.7% felt unsafe because of their gender

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[139] Even when finding policies violated the Free Exercise clause, lower courts have noted states' valid interests in "promoting the health and safety of LGBTQ children." *See* Bates v. Pakseresht, 146 F.4th 772, 798 (9th Cir. 2025).

[140] *See* Fulton v. City of Philadelphia, 593 U.S. 522, 541 (2021); *Bates*, 146 F.4th at 798; Tatel v. Mt. Lebanon Sch. Dist., 637 F. Supp. 3d 295, 322 (W.D. Penn. 2022) ("[T]he District must demonstrate why it has a compelling need to prevent these particular Plaintiffs from opting their children out of this particular instruction").

[141] *Mahmoud*, 606 U.S. at 567 (internal citations omitted).

[142] *See* Wisconsin v. Yoder, 406 U.S. 205, 230 (1972).

[143] *See* New York v. Ferber, 458 U.S. 747, 756–57 (1982) (internal citations omitted).

[144] *See* Brown v. Board of Ed., 347 U.S. 483, 494–95 (1954).

[145] Masterpiece Cakeshop v. Colorado C.R. Comm'n, 584 U.S. 617, 632 (2018).

[146] *See* Danielle Legare, *Curriculum opt-outs and the classroom: What the Supreme Court's ruling means for inclusive education*, UNIV. BUFFALO: THE VIEW (Nov. 6, 2025), https://www.buffalo.edu/news/news-releases.host.html/content/shared/university/news/ub-reporter-articles/stories/2025/11/king-curriculum-opt-out.detail.html.

[147] Lawrence v. Texas, 539 U.S. 558, 575 (2003).

[148] It may be argued that the criminal penalties imposed by the challenged law in *Lawrence* increased the stigmatizing impact beyond what the opt-outs (which lack any penalty) may create. However, as noted, the underlying fact that the policy implied the state's imprimatur on discrimination against a specific class is what leads to discrimination and is thus applicable to this analysis of *Mahmoud*.

expression.[149] In comparison, at schools with inclusive curricula, 44.4% of LGBTQ students felt unsafe because of their sexual orientation, and 33.5% felt unsafe because of their gender expression.[150]

Experts have found that a key reason inclusive curricula decrease stigmatization and poor mental health outcomes for queer students is that they feel more valued as members of their community.[151] However, as *amici* correctly pointed out, opt-outs undermine this benefit, as they "may signal that LGBTQ+ identities are controversial or inappropriate."[152] Studies have also shown that inclusive curricula are only effective in negating the harmful effects of stigmatization when they reach a "critical mass" of students.[153] However, opt-outs allow for the possibility that only a small number of students receive inclusive curricula, which undermines the positive climate effects they create for LGBTQ students.[154] In sum, because other areas of constitutional law acknowledge that preventing stigma is a compelling interest, the Board had a compelling interest in instituting LGBTQ+ inclusive material in its curriculum, and allowing opt-outs undermines that interest.

B. *THE BOARD'S DENIAL OF OPT-OUTS WAS NARROWLY TAILORED*

Although in *Yoder* the Court rejected the state's claim that the compulsory attendance policy could be justified by an interest in protecting the emotional development of Amish youth, key to that rejection was that the policy was not narrowly tailored, because there was no evidence that the Amish students needed such protection.[155] Unlike *Yoder*, there is extensive empirical evidence showing that LGBTQ+ children are at risk for poor mental health outcomes. In its 2023 national survey, the Trevor Project found that among LGBTQ youth aged 13 to 17, 46% considered suicide in the past year, 70% experienced symptoms of anxiety, and 57% experienced symptoms of depression.[156] A similar 2024 survey, looking at mental health of children aged 14-18, found that LGBTQ+ students had significantly worse mental health outcomes: compared to their heterosexual counterparts, LGBTQ+ students reported higher rates of persistent feelings of sadness (65.7% versus 31.4%), poor mental health (53.5% versus 21.5%), seriously considered attempting suicide (41.0% versus 13.0%), and attempted suicide (19.7% versus 6.0%).[157] Researchers have consistently linked these poor outcomes

[149] JOSEPH G. KOSCIW ET AL., THE 2019 NATIONAL SCHOOL CLIMATE SURVEY 74 (Gay, Lesbian & Straight Educ. Network ed., 2020).

[150] *Id.*

[151] *Id.* at 73.

[152] *See* Brief for American Psychological Association and the American Counseling Association as Amici Curiae Supporting Respondents, Mahmoud v. Taylor, 606 U.S. 522 (2025) (No. 24-297).

[153] Shannon D. Snapp, Jenifer K. McGuire, Katarina O. Sinclair, Karlee Gabrion, and Stephen T. Russell, *LGBTQ-inclusive curricula: why supportive curricula matter*, 15 SEX EDUC. 580, 590 (2015).

[154] *Id.*

[155] Wisconsin v. Yoder, 406 U.S. 205, 230–32 (1972).

[156] The Trevor Project, *2023 U.S. National Survey on the Mental Health of LGBTQ+ Young People*, https://www.thetrevorproject.org/survey-2023/ (last visited Nov. 9, 2025). This survey was brought to the attention of the Court in Maryland's amicus brief. *See* Maryland et al. as Amici Curiae Supporting Respondents, Mahmoud v. Taylor, 606 U.S. 522 (2025) (No. 24-297).

[157] Jorge V. Verlenden et al., *Mental Health and Suicide Risk Among High School Students and Protective Factors — Youth Risk Behavior Survey, United States, 2023*, 73(4) CTRS. FOR DISEASE CONTROL AND PREVENTION MORBIDITY AND MORTALITY WKLY. REP. 79, 80–81 (2024).

to the stigma faced by LGBTQ+ individuals.[158] This is particularly true for adolescents.[159] This trend is also apparent in Maryland. In the state, 40% of LGBTQ youth seriously considered suicide, and 10% attempted suicide.[160] Additionally, among LGBTQ+ young people in Maryland, 57% reported symptoms of anxiety, and 48% reported experiencing symptoms of depression.[161] Thus, the Board's decision to deny opt-outs was narrowly tailored to that problem, and as such, should have defeated the Free Exercise claim.

In sum, the Board has a compelling interest in denying the opt-outs to safeguard the mental health and equal dignity of LGBTQ+ youth, and the Board's no opt-out policy was narrowly tailored to that interest. As such, the no-opt-out policy should have survived strict scrutiny.

CONCLUSION

The Court's decision in *Mahmoud* represents a troubling reorientation of Free Exercise jurisprudence. Lower courts have already begun to take divergent approaches to its application. Some lower courts have cited *Mahmoud* to overturn school policies designed to create safe learning environments, such as rules requiring students to use other students' preferred pronouns.[162] In contrast, other courts limited *Mahmoud* to curricular decisions[163] for younger children.[164] However, the Supreme Court has indicated *Mahmoud*'s rule should be applied more broadly. In *Mirabelli v. Bonta*, the Court considered a challenge to California's teacher training curriculum that "directed teachers not to tell parents about their children's gender identity without the children's consent."[165] The Court, in a per curiam decision, found the challenge is likely to succeed on the merits under *Mahmoud*.[166]

In *Mahmoud*, by side-stepping *Smith*, under which the no opt-out policy would have been upheld, the Court instituted a new test that creates an extensive path for strict scrutiny to be applied to any Free Exercise claim that could be read as implicating parental rights. Given the Court's intended breadth of *Mahmoud*'s applicability, this leads us to a new frontier of Free Exercise claims.

The new burden test is particularly concerning for two reasons. First, it applies a hybrid-rights approach that broadens the type of parental rights claims that can be brought in conjunction with Free Exercise claims to trigger strict scrutiny. Second, it allows for burdens significantly less substantial than the one imposed by the policy in *Yoder* to trigger strict scrutiny.

The first point is critical because parents must now simply articulate that public school curricula *expose* their children to ideas that undermine their religious teaching without any evidence of coercion. This effectively provides parents with "veto power" over inclusive teachings so long as they

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[158] Brief for Maryland, et al. as Amici Curiae Supporting Respondents, Mahmoud v. Taylor, 606 U.S. 522 (2025) (No. 24-297).

[159] James S. McGraw et al., *Stigma and negative mental health outcomes in sexual/gender minority youth in Utah*, 42 CURRENT PSYCH. 5638, 5638–39 (2023).

[160] *See* Brief for PEN American Center, Inc. as Amici Curiae Supporting Respondents, Mahmoud v. Taylor, 606 U.S. 522 (2025) (No. 24-297).

[161] Ronita Nath et al., *2024 Survey on the Mental Health of LGBTQ+ Young People in Maryland*, THE TREVOR PROJECT (2025), https://www.thetrevorproject.org/state-reports-maryland-2024/ (last visited Dec. 11, 2025); *see also* Brief for Maryland, et al. as Amici Curiae Supporting Respondents, Mahmoud v. Taylor, 606 U.S. 522 (2025) (No. 24-297).

[162] *See* Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., 158 F.4th 732, 760 (6th Cir. 2025).

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

[164] *See* Planned Parenthood of Greater New York v. U.S. Dep't of Health & Hum. Servs., No. CV 25-2453, 2025 WL 2840318, at *24 (D.D.C. Oct. 7, 2025).

[165] *See* Mirabelli v. Bonta, 146 S. Ct. 797, 801 (2026).

[166] *Id.* at 802–03.

can establish that the teaching differs from their religious beliefs.[167] The majority argued the parents were not seeking to "micromanage" the curriculum, as opt-outs are not "substantive" curricular decisions.[168] However, this is a difference in name only. Requiring opt-outs necessitates the use of alternative teaching materials for those not participating in the original lesson, thus creating precisely the same effect as substantive control.[169] Thus, *Mahmoud* grants "privileged status to the views of religious parents" by providing them control over public school educational materials.[170]

In turn, providing such capacious power to parents significantly hamstrings the traditional role of local school boards in determining what curricula best suit their communities' needs,[171] including how to guarantee an inclusive environment for LGBTQ+ students and families. School boards, a "'distinctive hallmark' of American education," are democratically accountable institutions charged with policy implementation.[172] However, the majority's acceptance of exposure as a constitutional burden ignores the important and historical role of these entities and creates an "undemocratic restriction of ideas" that prioritizes parents' individual will above the will of the community as enacted through Boards.[173]

In sum, the Court's decision is an "exercise in judicial maximalism" that supplants local boards' ability to enact meaningful LGBTQ+-inclusive policies in schools in accordance with the will and needs of their communities.[174] Rather than follow *Yoder*'s warning that courts move with "great circumspection" when conducting the "sensitive and delicate task of weighing a … legitimate social concern" against the religious interests involved in an exemption claim, the majority "rejected a long-standing constitutional settlement that balanced the rights of religious parents to raise and educate their children with the government's interest in running an effective public education system."[175]

The Court's proclamation that no-opt-outs to tolerance-enhancing policies were sufficiently burdensome to justify strict scrutiny similarly opens the floodgates for more Free Exercise exemption claims to prevail. The majority purported to provide a more detailed framework by noting the analysis "will always be fact-intensive" and dependent on factors such as the specific religious beliefs and practices asserted, the specific nature of the curricular feature, the age of the children, and the context of the instruction or material.[176] However, the opinion did not provide clear guidance as to how these factors would operate in practice.[177] For example, the Court's analysis did not discuss the importance of the differing ages of the students reading the storybooks, "treating 5-year-old kindergarteners and

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[167] Mahmoud v. Taylor, 606 U.S. 522, 629 (U.S.) (Sotomayor, J., dissenting).

[168] *Id.* at 568 (majority opinion).

[169] *See* Richard B. Katskee & Ira C. Lupu, Mahmoud v. Taylor*: Cause or Effect of Disruptions in the Public Schools?* 37 (GW L. Sch. Pub. L. Legal Theory, Paper No. 2025-52, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5550278.

[170] *See* Micah Schwartzman et al., *The Structure of Religious Preference*, 139 HARV. L. REV. 211, 238 (2025).

[171] *Mahmoud*, 606 U.S. at 629 (Sotomayor, J., dissenting) ("The Court, in effect, constitutionalizes a parental veto power over curricular choices long left to the democratic process and local administrators.").

[172] Charity Anderson, *School Boards: A Hallmark of American Education*, in LEADERSHIP AND POLICY IN URBAN EDUCATION: KEY ISSUES 2–3 (Tiffany A. Flowers ed., 2023).

[173] *Mahmoud*, 606 U.S. at 618 (Sotomayor, J., dissenting); *see* Sarah Jana, *Who Decides What Students Learn? Examining the Scope of Parental Rights in Public Education*, 91 U. CIN. L. REV. BLOG (Mar. 16, 2023), https://uclawreview.org/2023/03/16/examining-the-scope-of-parental-rights-in-public-education/ (last visited Dec. 11, 2025).

[174] *See Mahmoud*, 606 U.S. at 625 (Sotomayor, J., dissenting).

[175] Schwartzman, *supra* note 169, at 236.

[176] *Mahmoud*, 606 U.S. at 550.

[177] *See id.* at 613 (Sotomayor, J., dissenting).

11-year-old fifth graders identically."[178] The lack of clarity and the sparse analysis provided by the Court will empower judges to apply strict scrutiny with little justification. Once strict scrutiny is applied, the *Mahmoud*'s Court's rejection of stigmatization as a compelling interest will leave boards hard-pressed to find a constitutionally valid reason to deny exemptions. Given that Free Exercise claimants were already significantly more likely to succeed under strict scrutiny than under *Smith*,[179] this decision further "entrenches [religious] preferentialism."[180]

The potential impact of *Mahmoud* goes beyond simply threatening schools' ability to teach LGBTQ+-inclusive materials. As the dissent argued, given the religious diversity of the country, "innumerable themes" such as "expressing implicit support for patriotism, women's rights, interfaith marriage, consumption of meat, immodest dress, and countless other topics may conflict with sincerely held religious beliefs and thus trigger stringent judicial review under the majority's test."[181]

Lower courts will continue to grapple with *Mahmoud*, but if denying opt-outs from learnings intended to promote societally beneficial goals is a significant enough burden to require strict scrutiny, "then mutual tolerance and respect may no longer have a place in public schools,"[182] particularly towards LGBTQ+ students.

[178] *See id.* at 621 n.12.

[179] *See* Martin, *supra* note 14, at 9.

[180] *See* Schwartzman, *supra* note 169, at 234.

[181] *Mahmoud*, 606 U.S. at 613–14 (Sotomayor, J., dissenting).

[182] *Id.* at 623.