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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

THE MONTANA SCHOOL COUNSELORS ASSOCIATION; BRETT THACKERAY; SARAH SMITH, on behalf of her minor child, IZZY SMITH; and LIBBY THREADGOODE; Plaintiffs, v. STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as the Governor of the State of Montana; the MONTANA OFFICE OF PUBLIC INSTRUCTION; ELSIE ARNTZEN, in her official capacity as Superintendent of Public Instruction; MONTANA BOARD OF EDUCATION; Defendants.	DDV-25-2024-230 Hon. Christopher Abbott **STATE OF MONTANA'S REPLY IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Plaintiffs seek to "strip away the critical right of parents to guide the religious development of their children." *Mahmoud v. Taylor*, 606 U.S. 522, 559 (2025). That is their requested relief here because they chauvinistically believe that they know better than parents. Fortunately, the U.S. Supreme Court ruled that, when schools create curriculums with normative content regarding human sexuality, and couple that curriculum with withheld parent notice and student opt-outs, those schools unconstitutionally burden parents' religious exercise. *Id.* at 545; 569. SB 99 and HB 471, as codifications of *Mahmoud*'s Free Exercise Clause interpretation, prevent schools, teachers, and counselors from violating parents' federal rights. If the Court finds these laws unconstitutional, parents have no recourse to prevent the violation of their federal rights except through more litigation. That is, however, unnecessary. *Mahmoud* proves these laws constitutional. The Court should thus dismiss Plaintiffs' claims with prejudice.

ARGUMENT

I. This Court should dismiss Plaintiffs' claims.

A. Plaintiffs' interpretation of *Mahmoud* is fanciful.

"A government burdens the religious exercise of parents when it requires them to submit their children to instruction that poses a 'very real threat of undermining' the religious beliefs and practices that the parents wish to instill." *Mahmoud v. Taylor*, 606 U.S. 522, 530 (2025) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218

(1972)). Although Plaintiffs may disagree, this is the U.S. Supreme Court's holding on the extent of the federal Free Exercise Clause. And that holding binds this Court.

Plaintiffs' attempt to reduce the U.S. Supreme Court's holding to just "when a school system prohibits parents from opting their children out of pro-2S-LGBTQIA+ instruction related to 5 specific textbooks," (Doc. 61 at 4), simply shows their profound disrespect for the rule of law of the United States and the binding nature of the U.S. Supreme Court's judicial power. Plaintiffs believe *Mahmoud*'s holding applies—literally—just to the policy on "instruction on five specific 2S-LGBTQIA+-inclusive storybooks." (Doc. 61 at 10; *see also id.* at 6) ("*Mahmoud* focused solely on the Montgomery County Board of Education's [] introduction of 'five "LGBTQIA+-inclusive" storybooks.'") That is absurd.

First, nowhere in *Mahmoud* can Plaintiffs identify where the U.S. Supreme Court limited the holding to a school board's policy of "prohibition on parents opting their children out of reading five 2S-LGBTQIA+-inclusive storybooks." (Doc. 61 at 4.) Indeed, such a read would render *Mahmoud* pointless. If *Mahmoud*'s holding is truly so narrow, the Montgomery school district would only have to swap out one of the storybooks to resolve the case. Plaintiffs believe that is the extent of the U.S. Supreme Court's holding. But Plaintiffs' narrow interpretation cannot circumvent the U.S. Supreme Court's relief at that interim stage: "Specifically, until all appellate review in this case is completed, the Board should be ordered to notify [the parents] in advance whenever one of the books in question *or any other similar book* is used in any way and to allow them to have their children excused from that instruction."

Mahmoud, 606 U.S. at 569 (emphasis added). The *Mahmoud* Court never suggested this holding is limited to the specific school board's policy about five storybooks.

Second, Plaintiffs' interpretation of *Mahmoud* contradicts the *Mahmoud* Court's analysis of *Yoder*. "We have never confined *Yoder* to its facts." *Mahmoud*, 606 U.S. at 569. Thus "we cannot agree with the decision of the lower courts to dismiss our holding in *Yoder* out of hand … [T]here is no reason to conclude that the decision is '*sui generis*' or uniquely 'tailored to [its] specific evidence,' as the court below reasoned." *Mahmoud*, 606 U.S. at 557–58 (citations omitted). Under Plaintiffs' *Mahmoud* interpretation, at the same time the U.S. Supreme Court criticizes the lower court for limiting *Yoder* to the facts, Plaintiffs somehow believe the U.S. Supreme Court limited *Mahmoud* to the facts. Plaintiffs thus posit *Mahmoud* applies only "when a school system prohibits parents from opting their children out of pro-2S-LGBTQIA+ instruction related to 5 specific textbooks." (Doc. 61 at 4.) That is wrong. And the Court should decline to follow Plaintiffs' narrow interpretation.

Just last week, in a case where Amish plaintiffs challenged New York's new school immunization law (which repealed a religious belief exemption), the U.S. Supreme Court granted certiorari, vacated the lower court's judgment, and then remanded "for further consideration in light of *Mahmoud v. Taylor*, 606 U.S. 522 (2025)." *Miller v. McDonald*, ___ S. Ct. ___, No. 25-133, 2025 WL 3506969, at *1 (U.S. Dec. 8, 2025). That case had nothing to do with the *Mahmoud* school board's "prohibition on parents opting their children out of reading five 2S-LGBTQIA+-inclusive storybooks." Yet the U.S. Supreme Court applied *Mahmoud* anyway.

Mahmoud could not be clearer: the Free Exercise Clause protects parents' right "to direct the religious upbringing of their children[.]" *Mahmoud*, 606 U.S. at 543 (quoting *Yoder*, 406 U.S. at 218). If instruction "poses 'a very real threat of undermining' the religious beliefs and practices that the parents wish to instill [in their children,]" that interference violates parents' free exercise rights. *Id.* at 530. Indeed, "a government cannot condition the benefit of free public education on parents' acceptance of such instruction." *Id.* These principles are not limited to a specific school policy about five storybooks. Plaintiffs' extremely narrow interpretation of *Mahmoud* is illogical. And the Court must reject it.

Plaintiffs also try to procedurally defeat the State's *Mahmoud* argument, but those arguments are mystifying. Plaintiffs argue "*Mahmoud* was decided on religious liberty grounds. In this case, neither of the parties raise religious liberty claims." (Doc. 61 at 6.) They continue "Defendants did not assert any religious freedom defenses in their Answer to Plaintiffs' First Amended Complaint[.]" *Id.* And they contend the same for parental rights. *Id.* But that is a red herring.

Plaintiffs first improperly rely on the State's Answer to Plaintiffs' First Amended Complaint to assert the State has not asserted certain affirmative defenses. But that is improper because Plaintiffs have since filed their Second Amended Complaint. (Doc. 54.) Thus: (1) Plaintiffs' Second Amended Complaint supersedes their First Amended Complaint; and (2) the State has not answered Plaintiffs' Second Amended Complaint. Plaintiffs' argument here is then doubly wrong.

First, the State need not raise affirmative defenses in the Motion to Dismiss because the Motion to Dismiss is not a responsive pleading. It is a defense to a claim for relief, where the State challenges the legal sufficiency of the complaint rather than reaching the merits. So no affirmative defense pleading is necessary. And Plaintiffs' attempt to argue that the State has not raised affirmative defenses is incorrect. The State has not yet answered Plaintiffs' Second Amended Complaint and so has also not yet raised any affirmative defenses. It is wrong for Plaintiffs to assert the State's Answer (to a now-void complaint) controls when Plaintiffs superseded their First Amended Complaint with their Second Amended Complaint. Just like Plaintiffs obtained a third shot at their complaint, the State gets the opportunity to answer again if necessary. It is not bound by its Answer to a now-void complaint.

Plaintiffs also misstate the *Smith* standard. They contend, "if a religious burden is imposed …, the burden is experienced across all religions in a neutral manner." (Doc. 61 at 10.) What *Smith* actually stands for is that "the government is generally free to place incidental burdens on religious exercise so long as it does so pursuant to a neutral policy that is generally applicable." *Mahmoud*, 606 U.S. at 564 (citing *Employment Div., Dept. of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 878–79 (1990)). The *Mahmoud* Court, however, went in another direction because "the character of the burden [here] requires us to proceed differently." *Id.* "When 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[.]" *Id.* So not only did the

Court not apply *Smith*, but Plaintiffs' inartful articulation of *Smith* is also nonsensical.

Both SB 99 and HB 471 comport with the *Mahmoud* Court's articulation of parents' federal Free Exercise right to direct the upbringing of their children. They require schools to notify parents of upcoming human sexuality or identity instruction, and they guarantee parents can remove their child from course content that inhibits their ability to direct the upbringing of their children. The *Mahmoud* Court found this to be the U.S. Constitution's minimum requirement. Plaintiffs may disagree, but that is the law. Without SB 99 nor HB 471, public schools do not have to offer opt-outs to parents; in turn, schools compromise parents' right to direct the religious upbringing of their children. That is a harbinger of constitutional violations. The Court can avoid that outcome by dismissing Plaintiffs' claims.

CONCLUSION

The U.S. Supreme Court established that parents have the right to notice and opportunity to withdraw their children from courses of instruction that "'substantially interfer[e]' with the parents' ability to direct the 'religious development' of their children." *Mahmoud*, 606 U.S. at 554 (quoting *Yoder*, 406 U.S. at 218.) SB 99 and HB 471 codify that right—schools, teachers, or counselors cannot circumvent parents to advance their normative instruction on human sexuality or identity instruction. If parents want that instruction for their children, that is available. If parents do not want that instruction for their children, they now have a statutory scheme to protect that choice. As the Montana Supreme Court regularly

reiterates, "Parents have a fundamental constitutional right to make decisions concerning the care, custody, and control of their children and it is well-established that a natural parent's right in this regard is a fundamental liberty interest." *Matter of J.S.L.*, 2021 MT 47, ¶ 24, 403 Mont. 326, 481 P.3d 833; *see also Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court.") Plaintiffs, through this litigation, try to make parents the enemies of schools. The Court must reject this. The Court should dismiss Plaintiffs' claims with prejudice.

DATED this 17th day of December 2025.

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