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Lisa Kallio
CLERKLewis & Clark County District Court
STATE OF MONTANA

By: Helen Coleman

Case No. 25-2024-0000230-DK

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MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTYTHE MONTANA SCHOOL)
COUNSELORS ASSOCIATION; BRETT)
THACKERY; 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.)

Dept. 4

Case No. DV-25-2024-230

Hon. Christopher Abbott

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' MOTION TO DISMISS**

INTRODUCTION

This Court is asked to decide whether Plaintiffs’ Second Amended Complaint states claims upon which relief can be granted under Montana law. Defendants move to dismiss on two grounds: that the U.S. Supreme Court’s decision in *Mahmoud v. Taylor* forecloses Plaintiffs’ claims and that Plaintiffs fail to plead sufficient facts to confer standing. *Mahmoud v. Taylor*, 606 U.S. 522 (2025). Neither argument withstands scrutiny. *Mahmoud* is wholly distinguishable. It addressed a narrow religious freedom claim under the U.S. Constitution arising from a local school board’s outright prohibition on parental opt-outs. In stark contrast, this case challenges two statewide statutes that impose vastly different opt-in schemes, rigid parental notification windows, and disciplinary enforcement mechanisms. In addition, Plaintiffs assert several state-based constitutional claims that *Mahmoud* did not consider. And the requested relief here—declaratory and injunctive relief—does not burden religious exercise.

In addition, Plaintiffs have alleged facts showing imminent harm and constitutional violations conferring standing which easily satisfy Montana’s liberal pleading standards. The Second Amended Complaint sets forth specific facts demonstrating how SB 99 and HB 471 operate to restrict or eliminate instruction on human sexuality, impose vague compliance obligations, and chill speech, instruction and counseling services in Montana schools. Under Montana’s deferential pleading standard, these facts more than suffice to establish a likelihood of imminent injury and constitutional violations in order to confer standing. For these reasons, and as detailed below, Defendants’ Motion to Dismiss should be denied.

STANDARD OF REVIEW

Montana is a notice-pleading state. Rule 8 of the Montana Rules of Civil Procedure requires only that a complaint set forth a “short, plain statement of the claim.” Mont. R. Civ. P.

Rule 8. It is well established that, “[w]hen considering a motion to dismiss under Mont. R. Civ. P. 12(b)(6), all well-pleaded allegations and facts in the complaint are admitted and taken as true, and the complaint is construed in a light most favorable to the plaintiff.” *Sinclair v. Burlington N. & Santa Fe Ry.*, 2008 MT 424, ¶ 25, 347 Mont. 395, 2000 P. 3d 36 (citation omitted).

Motions to dismiss under Rule 12(b)(6) are “viewed with disfavor and rarely granted.” *Fennessy v. Dorrington*, 2001 MT 204, ¶ 9, 306 Mont. 307, 32 P.3d 1250. A court should not dismiss a complaint unless it appears beyond doubt that a plaintiff can prove no set of facts that would entitle them to relief. *Poeppel v. Flathead City*, 1999 MT 130, ¶ 17, 294 Mont. 487, 982 P.2d 1007; *Kleinhesselink v. Chevron, U.S.A.*, 277 Mont. 158, 161, 920 P.2d 108, 110 (1996).

In this case, Plaintiffs have pleaded allegations that, when taken as true and construed in the light most favorable to them, easily withstand Defendants’ motion to dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

This case concerns the enactment and enforcement of Senate Bill 99 (SB 99) and House Bill (HB 471) by the State of Montana.¹ In 2021, the Montana Legislature took the first step in the process of creating differential treatment for certain curriculum topics by enacting SB 99, which amended § 20-7-120, MCA to impose restrictions on discussions of human sexuality, sexual orientation, and gender identity in public schools. In 2025, the Montana Legislature took the second step in the process of creating differential treatment for certain curriculum topics by enacting HB 471, which is the operative law now. HB 471 exacerbated the issues raised by Plaintiffs in their First Amended Complaint by establishing a new category of instruction

¹ Plaintiffs hereby incorporate all other paragraphs of the Second Amended Complaint for purposes of this Court’s review of Plaintiffs’ Opposition to Defendants’ Motion to Dismiss.

(“identity instruction”), materially changing the parental notification window, and adding several conditions schools must follow to provide instruction on human sexuality or gender identity.

Defendants argue in their Brief in Support of Motion to Dismiss that “this case ends with *Mahmoud v. Taylor*’s conclusion” Defs.’ Br. in Supp. of Mot. to Dismiss at 5. However, the only feature shared by the policy struck down in *Mahmoud* and the bills challenged here are their impacts on K-12 public school students’ learning experience. SB 99 and HB 471 are not an opt-out prohibition like the policy challenged in *Mahmoud*. Neither SB 99 nor HB 471 mandate instruction on specific topics. Instead, the new regime under HB 471 creates a mandated opt-in system and a permissive opt-out system related to all human sexuality instruction and instruction on gender identity.

ARGUMENT

I. *Mahmoud v. Taylor* is readily distinguishable and does not impact Plaintiffs’ claims.

Defendants assert that the U.S. Supreme Court’s recent holding in *Mahmoud* bars the relief Plaintiffs seek in this case. However, *Mahmoud* is distinguishable both factually and legally. *Mahmoud*’s limited holding was that when a school system prohibits parents from opting their children out of pro-2S-LGBTQIA+ instruction related to 5 specific textbooks, parents’ right to religious freedom is violated. Defendants attempt to compare *Mahmoud* to the instant case by mischaracterizing it as an opt-out bill. They argue the bill guarantees “parents can remove their child from course content that inhibits their ability to direct the upbringing of their children” Defs.’ Br. in Supp. of Mot. to Dismiss at 7. In reality, HB 471 demands schools and parents comply with the following non-exhaustive list of mandates in order for their child to receive a comprehensive education: parents must opt their children into identity instruction to receive such instruction, parents may opt their child out of human sexuality instruction if parents

do not want their child to receive such instruction, and school administrators and educators must comply with parental notification requirements to avoid punishment for noncompliance.

A. The laws being challenged in this case are materially distinct from the policy at issue in *Mahmoud v. Taylor*.

The mandates in SB 99 and HB 471 differ from the opt-out prohibition in *Mahmoud* in several crucial ways. SB 99 and HB 471 create two opposing schemes designed to disrupt schoolteachers' and counselors' ability to provide instruction and guidance related to human sexuality and gender identity in several ways. First, under HB 471, parents must opt their children into identity instruction in order for their child to receive such instruction ("[A] school may not allow a child to attend identity instruction unless the child's parent or guardian agrees in writing to allow the child to attend..." § 20-7-120, MCA). Second, under HB 471, parents may opt their children out of human sexuality instruction if they do not want their child to receive such instruction, but parents are not *required* to do so ("[A] parent...may refuse to allow the child to attend or withdraw the child from human sexuality instruction..." 20-7-120, MCA).

Additionally, HB 471's parental notification requirement mandates schools notify parents at least five days, and no more than 14 school days, before their child receives identity instruction or human sexuality instruction. The challenged policy in *Mahmoud*, on the other hand, encouraged the Board to notify parents prior to the introduction of 2S-LGBTQIA+-inclusive storybooks. *Mahmoud*, 606 U.S. at 569 ("...the Board should be ordered to notify [parents] in advance whenever one of the books in question...is to be used in any way..."). The Court in *Mahmoud* did not analyze the constitutionality of a mandatory parental notification window for all human sexuality and identity-related instruction, its harmful impacts on lesson planning, and the resulting decline in the quality of students' education. There are material

differences between the laws at issue here and the policy *Mahmoud* struck down. Defendants’ Motion to Dismiss should be denied on this basis alone.

In addition to the substantive differences between the challenged policy in *Mahmoud* and the two bills challenged here, *Mahmoud* focused solely on the Montgomery County Board of Education’s (“the Board”) introduction of “five ‘LGBTQIA+-inclusive’ storybooks that [were] approved for students in Kindergarten through fifth grade....” after rescinding a policy allowing parents to opt their children out of such lessons. *Mahmoud*, 606 U.S. at 569. Here, instead of challenging the constitutionality of a prohibition against parents opting their children out of lessons with 2S-LGBTQIA+-inclusive storybooks, Plaintiffs challenge the constitutionality of laws impacting *all* human sexuality instruction and identity instruction. This case does not involve a challenge to a policy impacting 2S-LGBTQIA+-inclusive storybooks.

In addition to the operational differences between the policy challenged in *Mahmoud* and the bills challenged here, *Mahmoud* was decided on religious liberty grounds. In this case, neither of the parties raise religious liberty claims. Defendants did not assert any religious freedom defenses in their Answer to Plaintiffs’ First Amended Complaint for Declaratory and Injunctive Relief and Demand for Jury Trial. Nor have Defendants asserted claims or defenses predicated on parental rights (which were at issue in *Mahmoud*, where the parents asserted the right to control their children’s education on religious freedom grounds). While the State makes a singular passing reference to parental rights in discussing the interest served by SB 99, *see* Answer to Pls.’ First Am. Compl. for Declaratory & Injunctive Relief & Demand for Jury Trial at 23, such a conclusory statement is insufficient to implicate the rights central to the issues in *Mahmoud*. Moreover, parental rights have not been affirmatively raised by the Defendants in their Motion to Dismiss. Defendants also failed to raise any defenses based on the right to

religious freedom in their Motion. *Mahmoud*'s limited holding rests exclusively on religious freedom claims, and Defendants' failure to assert any arguments or defenses on the grounds of religious freedom leave Plaintiffs' claims here unimpacted by *Mahmoud*.

B. *Mahmoud* is silent on several of Plaintiffs' claims.

Mahmoud interpreted a religious freedom claim brought under the U.S. Constitution—not claims brought under the Montana Constitution. Even if this Court found *Mahmoud* to be persuasive, and even if a religious freedom right was implicated here, Plaintiffs here raise multiple state constitutional claims which *Mahmoud* does not address. HB 471's design and impact is different and far more broad and complex, than the Board's prohibition on parents opting their children out of reading five 2S-LGBTQIA+-inclusive storybooks. Those differences in design and impact are the subject of four state-based constitutional claims *Mahmoud* did not address: Educational Opportunity, Due Process, Right of Individual Privacy, and Freedom of Speech and Expression.

As to the right to educational opportunity, the plaintiffs in *Mahmoud* did not bring an educational opportunity claim, much less one under the Montana Constitution. Here, Plaintiff Sarah Smith raised an educational opportunity claim on behalf of her minor child Izzy Smith, as “the right to receive equal educational opportunity is a fundamental right established to provide Montanans with the opportunity to develop to their full educational potential.” SAC ¶ 144.

Mahmoud does not address how a constitutional provision protecting a child's quality of education would be impacted by an opt-in system for identity instruction, an opt-out system for human sexuality instruction, and a parental notification mandate that is not uniformly applied across all categories of instruction. Plaintiffs' educational opportunity claim remains unimpacted by *Mahmoud*.

As to due process implications, *Mahmoud* is also silent. Here, all Plaintiffs raise due process claims under the Montana Constitution's guarantee in Article II, Section 17 that "no person shall be deprived of life, liberty, or property without due process of law." Plaintiffs' Second Amended Complaint alleges that educators "who are trying to stay within the bounds of the law may struggle to understand how to implement it" or reasonably "fail to adhere to the scheme of one category while complying with the other due to overlap in the substance of HSI and identity instruction lessons and discussions." SAC ¶ 145. As to school counselors, "it is unclear whether confidential counseling constitutes 'instruction,' whether parents may provide opt-in consent for identity instruction outside the annual or semester window, and what constitutes an 'unexpected' inquiry." SAC ¶ 132. Given the relative straight forward nature of the prohibition in *Mahmoud*, due process and its interplay with religious freedom or other constitutionally protected rights, were never addressed in that case. *Mahmoud*'s has nothing to say with regard to Plaintiffs' due process claims and cannot serve as a legitimate reason to dismiss the Complaint.

Regarding the right to individual privacy guaranteed under Montana Constitution Article II, Section 10, *Mahmoud* was also silent. In this case, all Plaintiffs raised individual privacy claims, as HB 471 significantly burdens that fundamental right in a way never contemplated by the policies addressed in *Mahmoud*. Under HB 471, a school counselor would not be able to initiate nor provide confidential counseling services to a student without seeking notice from the student's parent prior to engaging in that conversation. The policies at issue in *Mahmoud* did not implicate privacy concerns at the federal level or the state level. Thus, *Mahmoud* does not impact Plaintiffs' individual privacy claims in this case.

Likewise, *Mahmoud* did not address the freedom of speech claims—particularly under Montana Constitution Article II, Section 7—asserted by Plaintiffs here. The case was not decided on the basis of Montana’s constitutional guarantee to freedom of speech and expression. In *Mahmoud*, the Court’s only commentary related to freedom of speech was as follows: “If questions of public-school curriculum were purely a matter of internal affairs, one could imagine that other First Amendment protections—such as the right to free speech or the right to be free from established religion—would also be inapplicable in the public school context.” *Mahmoud*, 606 U.S. at 557. Here, *Mahmoud* does not impact Plaintiffs’ state constitutional freedom of speech claims, as it did not assess how such rights are impacted by diverging opt-in and opt-out systems and an arbitrary parental notification window.

C. Montana’s Constitutional Rights are more broadly interpreted than those in the U.S. Constitution.

Montana’s Constitution provides more expansive constitutional protections to its citizens than those provided under the U.S Constitution, and thus to the extent *Mahmoud* provides any authority at all, that authority is merely persuasive. For example, unlike the Federal Constitution, in Montana, the right to privacy is both explicit and fundamental. *See Planned Parenthood of Montana v. State by and through Knudsen*, 2025 MT 120, ¶ 20, 422 Mont. 241, 570 P.3d 51 (explaining that Montana courts extend “one of the most stringent protections of its citizens’ right to privacy in the United States—exceeding even that provided by the federal constitution”); *State v. Hardaway*, 2001 MT 252, ¶ 31, 307 Mont. 139, 36 P.3d 900 (explaining that Montana courts are not “compelled to march lock-step with pronouncements of the United States Supreme Court if our own constitutional provisions call for more individual rights protection than that guaranteed by the United States Constitution”); *see also State v. Bullock*, 272 Mont. 361, 383-84, 901 P.2d 61 (1995) (explaining that “Montana has a strong tradition of

respect for the right to individual privacy,” and Montana courts “have chosen not to ‘march lock-step’ with the United States Supreme Court, even when applying nearly identical language”). This Court need not rely upon federal constitutional rights or jurisprudence at all in considering Plaintiffs’ claims. Given the significant divergence between analysis of the Montana Constitution and its federal counterpart, *Mahmoud* has little bearing on this Court’s review of SB 99 and HB 471’s constitutionality.

D. Plaintiffs’ requested relief does not run afoul of *Mahmoud*.

Defendants argue that “Plaintiffs’ requested relief violates the U.S. Constitution.” Defs.’ Br. in Supp. of Mot. to Dismiss at 5. Plaintiffs’ requested relief here is declaratory and injunctive relief. SAC ¶ 151. Notwithstanding the fact that this case does not implicate religious freedom, declaring SB 99 and HB 471 unconstitutional and enjoining their enforcement would not impose a religious burden on parents. *Mahmoud* held that prohibiting parents from opting their children out of lessons featuring five 2S-LGBTQIA+-inclusive storybooks unconstitutionally burdened parents’ religious freedom. Until Defendants say the quiet part out loud (that SB 99 and HB 471 are designed to reduce 2S-LGBTQIA+-inclusive lessons in K-12 public schools), Plaintiffs’ well-pled allegations implicate the actual language of these bills, which disrupt *all* instruction related to expansive instruction categories of human sexuality and gender identity. Neither human sexuality instruction nor identity instruction mandate curricula or discussions related to 2S-LGBTQIA+ inclusivity. Thus, unlike in *Mahmoud*, enjoining these laws would not mandate any instruction, let alone instruction on five specific 2S-LGBTQIA+-inclusive storybooks. Accordingly, if a religious burden is imposed (and it is not), the burden is experienced across all religions in a neutral manner. Defendants have not—and cannot—reasonably identified with any meaningful specificity a religious principle that would be

burdened by discussion on all topics under the categories of human sexuality instruction and gender identity instruction. Since Plaintiffs' requested relief here does not impose a religious burden on parents, the requested relief does not run afoul to *Mahmoud*.

II. Plaintiffs have plead sufficient facts to support their claims.

A. Plaintiffs have adequately plead the threat of injury or a violation of constitutional rights to establish standing.

Plaintiffs have sufficiently alleged facts establishing standing. Nevertheless, Defendants seek dismissal of most claims based on a misinterpretation of the standing requirement. Montana is a liberal pleading state, and to survive a Motion to Dismiss under 12(b)(6), Plaintiff need only to set forth a "short, plain statement of the claim" that would grant them standing to bring such claim. Mont. R. Civ. P. Rule 8.

As to standing in civil rights cases, the Court stated in *Held v. State*, 2024 MT 312, ¶ 32, 419 Mont. 403, 560 P.3d 1235:

A plaintiff has legal standing to assert a claim if (1) the claim is based on an alleged wrong or illegality that has caused, or is likely to cause, the plaintiff to suffer a past, present, or threatened injury to person, property, *or* exercise of civil or constitutional right and (2) the harm is of a type that legal relief can effectively alleviate, remedy, or prevent.

Id. Thus, the question is not whether Plaintiff has alleged actual harm. Plaintiffs have standing if they have pled facts which establish a wrong that is likely to cause imminent injury or threaten the exercise of a civil right and such harm is the type from which legal relief can alleviate. Defendants spend pages explaining to the Court that Plaintiffs have not suffered an *actual* injury but wholly ignore the fact that a likelihood of *imminent* injury including an allegation of a violation of a constitutional right also gives rise to standing.

The Montana Supreme Court examined nearly this same issue in *Held v. State*. In that case, the State sought to dismiss a case asserting constitutional violations for lack of standing

because the plaintiffs did not allege an actual injury. In finding that the plaintiffs had standing, the Court stated that asserting an allegation that “a statute violates a plaintiff’s constitutional right is sufficient to show an injury, and seeking to vindicate those constitutional rights confers standing.” *Held*, 2024 MT 312, at ¶ 33. The Court found that a plaintiff need not allege an injury beyond that of a constitutional violation to maintain standing. The Courts stated that imposing standing requirements beyond this was “incompatible with the constitutional rights...” *Id.* at ¶ 34.

Although Defendants are unable to appreciate the depth and seriousness of the imminent injury and constitutional violations, Plaintiffs in this case have pled facts which establish a likelihood of imminent injury including violation of constitutional rights. These allegations are demonstrably sufficient, particularly under Rule 12(b)(6)’s deferential pleading standard, to satisfy case-or-controversy standing. *See Weems v. State*, 2019 MT 98, ¶ 14, 395 Mont. 350, 440 P.3d 4 (finding standing for case-or-controversy purposes of claims to go forward for adjudication where plaintiffs are “plainly [] impacted” by a statute at issue).

B. Plaintiffs allege sufficient facts to maintain standing for violation of protected educational opportunities.

The Montana Constitution guarantees all students in public elementary and secondary schools the right to an equal and quality educational opportunity. SAC ¶ 143. Plaintiff Izzy Smith (“Smith”), a twelfth-grade student at Fergus High School in Lewistown, Montana, alleges that SB 99 and HB 471 violate this constitutional right. SAC ¶¶ 96, 142-150. Defendants, relying on selective excerpts from Plaintiffs’ Second Amended Complaint, contend that Smith lacks standing to assert this claim. A complete review of the allegations made by Smith, however, clearly demonstrates that she meets Montana’s standing requirements.

As alleged in Plaintiffs' Second Amended Complaint, SB 99 and HB 471 restrict—or effectively eliminate—discussion of human sexuality, sexual orientation, and gender identity in public school classrooms. SAC ¶ 1. These restrictions are implemented through vague statutory definitions, an opt-in scheme, and broad, arbitrary parental notification requirements. SAC ¶¶ 4, 10, 15, 20. As further alleged, because educators cannot determine what conduct violates HB 471, when parental notice is required, or what disciplinary consequences may follow, teachers avoid any topics related to human sexuality or 2S-LGBTQIA+ rights and inclusion. SAC ¶ 29. These subjects are thereby erased from Montana students' education, including Smith's. *Id.*

The Complaint alleges that comprehensive sex education—including instruction on gender identity and sexual orientation—is essential to Montana public school education. SAC ¶ 40. Without such inclusive education, Smith alleges she faces imminent harm to her constitutional right to a quality education, including teacher self-censorship, diminished learning opportunities about diverse perspectives, increased bullying, and the loss of meaningful classroom discussion about marginalized communities. SAC ¶ 99. Smith's claim is based on well-pled allegations that SB 99 and HB 471 are both likely to cause injury to her quality of education and threaten the exercise of her right to a quality education. These allegations, taken as true, satisfy the deferential pleading standard under Rule 12(b)(6) and establish standing.

Defendants attempt to argue Plaintiffs lack standing by first incorrectly stating that Plaintiffs do not mention Smith in their educational opportunity claim. Mot. at 11. In fact, Plaintiffs expressly include Smith in that claim by incorporating all prior allegations by reference as if fully set forth therein. SAC ¶ 142. Defendants then pivot their argument to focus on Smith's alleged concern for the 2S-LGBTQIA+ community and her purported inability to assert claims on behalf of others. Mot. at 12. This argument ignores the numerous allegations in the

Complaint that describe the imminent and concrete harm to Smith’s own education and the exercise of her constitutional rights. Defendants’ reliance on *Shreves v. Montana Department of Labor and Industry*, 2024 MT 256, 418 Mont. 514, 558 P.3d 784, and *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 381 (2024), is therefore misplaced. Smith specifically alleges a direct and personal threat of injury to her educational experience, including teacher self-censorship, diminished opportunities to learn diverse perspectives, and the loss of meaningful classroom discussion. SAC ¶¶ 99. For these reasons, Defendants’ request to dismiss this claim should be denied.

C. Plaintiffs’ Due Process claim is justiciable because HB 471 is unconstitutionally vague and invites arbitrary enforcement.

Plaintiffs plausibly allege concrete, imminent harms caused by HB 471’s vague enforcement design, which is traceable to the statute and redressable by the requested relief. SAC ¶¶ 10–12, 15–16, 18, 29–31, 56–63, 85, 87, 90–95, 100–04, 124–26, 135–41, 146. They plead present uncertainty about covering certain topics with students, receiving inconsistent directives, risking discipline, and the resulting self-censorship that is already altering conduct. SAC ¶¶ 29–31, 56–63, 74–76, 79–81, 85–90, 91–95, 100–04. Threadgoode details district-level policy changes and suppressed instruction; Thackeray identifies removed materials, curtailed interactions, and chilled extracurricular instruction; and MSCA explains the conflict between statutory compliance and professional confidentiality obligations. SAC ¶¶ 72–76, 79–81, 88–90, 91–95, 100–04, 124–26. These are “threatened injur[ies] to a . . . civil right” sufficient for standing at the motion-to-dismiss stage, notwithstanding Defendants’ contrary assertion. Mot. at 10–14. *See also Reichert v. State*, 2012 MT 111, ¶¶ 55–57, 365 Mont. 92, 278 P.3d 455 (recognizing standing at the pleadings stage based on threatened injury and crediting well-pleaded allegations).

Plaintiffs state a classic vagueness claim. A statute is so vague as to deny due process of law if (1) the statute fails to give “a person of ordinary intelligence fair notice that [the person’s] contemplated conduct is forbidden” or (2) it fails to establish “minimal guidelines to govern law enforcement.” *State v. Dixon*, 2000 MT 82, ¶¶ 28, 30, 299 Mont. 165, 998 P.2d 544. HB 471’s core terms—“human sexuality instruction,” “identity instruction,” and “instruction”—use subjective, purpose-based triggers (“has the goal or purpose of studying, exploring, or informing students about”) and sweep across ubiquitous curricular content (e.g., “intimate relationships”) and routine school interactions, then tether that sweep to a rigid preclearance-style notice window and a disciplinary referral mechanism. SAC ¶¶ 16, 20–22, 32–35, 135–41, 146. Plaintiffs plausibly allege they cannot discern with fair notice what falls within the statute’s ambit in ordinary classroom, counseling, library, club, or faculty-advising settings, and administrators have already issued conflicting directives on basic scenarios. SAC ¶¶ 58, 61–63, 74, 79–81, 85–90, 91–95, 100–04. This is the very uncertainty due process forbids.

The statute’s breadth compounds the indeterminacy. As pleaded, the definitions of “identity instruction” and “human sexuality instruction” encompass cisgender identity and heterosexual orientation as much as 2S-LGBTQIA+ identities, and sweep literature, history, government, biology, and counseling content that are the hallmark of K-12 education. SAC ¶¶ 16, 20–22, 135–41. Educators cannot reasonably know whether answering a routine question about a spouse, teaching *Romeo and Juliet*, facilitating a pronoun discussion at a student club, or addressing anti-bullying strategies triggers the 5–14-day notice rule or “opt-in” condition. SAC ¶¶ 21–22, 32–35, 79, 85, 88, 91–92. Nor does HB 471 define “unexpected student-initiated inquiry” or the scope of the exception “to the extent necessary to resolve the inquiry,” inviting

inconsistent, after-the-fact judgments. SAC ¶¶ 15, 132. These defects force self-censorship and avoidance of covered topics, which is a cognizable due process harm.

Defendants’ “common usage” assurances, Mot. at 13–14, cannot defeat well-pleaded allegations of conflicting administrative guidance and practical uncertainty under a hybrid subjective standard anchored in “goal or purpose.” SAC ¶¶ 16, 20–22, 58, 61, 135–41. Nor does the “unexpected student-initiated inquiry” exception cure the vagueness problem at the Rule 12 stage; by its terms, it adds ambiguity about what is “unexpected” and when discussion is “necessary,” leaving line-drawing to ad hoc judgments. Defendants also point to isolated compliance anecdotes to argue clarity. Mot. at 14–15. But sporadic, cautious workarounds do not render a statute clear at the pleadings stage. *Reichert*, 2012 MT 111, at ¶¶ 55–57.

HB 471 also invites arbitrary enforcement. Its cross-cutting “opt-in” and “opt-out” schemes for overlapping content create traps for technical noncompliance, while the disciplinary referral provision heightens the stakes for line-drawing errors, particularly in politically charged contexts. SAC ¶¶ 3–5, 32–35, 60–62, 146. Accepting the SAC’s allegations and reasonable inferences, Plaintiffs plausibly allege HB 471 fails to provide constitutionally adequate notice and fosters arbitrary enforcement. SAC ¶¶ 15–16, 18, 29–31, 56–63, 135–41, 146. Defendants’ reliance on federal vagueness standards and “reasonable construction” principles cannot overcome Montana’s requirement that statutes afford fair notice before risking professional sanction. The Motion must be denied for this reason as well. *Reichert*, 2012 MT 111, at ¶¶ 55–57. Finally, Defendants’ suggestion that sporadic compliance examples demonstrate clarity and justify dismissal is misplaced. Isolated adaptations by cautious employees do not cure statutory vagueness. The earlier record showed SB 99’s undefined triggers and 48-hour notice scheme produced conflicting directives, self-censorship, book removals, canceled presentations, and

reduced access to inclusive content and counseling—harms that implicate due process and speech rights. FAC ¶¶ 9, 55, 63, 77, 146. HB 471 replicates and intensifies those defects by layering subjective purpose-based triggers onto stricter timing rules and a new opt-in precondition, magnifying uncertainty and enforcement risk. SAC ¶¶ 3–5, 32–35, 135–41, 146. That pattern is pleaded here and must be credited on a Rule 12 Motion. *Reichert*, 2012 MT 111, at ¶¶ 55–57.

D. HB 471 burdens the Right to Privacy by compelling or foreseeably revealing sensitive information and chilling confidential counseling.

Plaintiffs allege imminent injury to their fundamental privacy right under Montana law. HB 471 compels or foreseeably results in disclosure of sensitive student information by requiring pre-approval notice and parental authorization before students may receive or even discuss content that, by definition, concerns intimate matters, including gender identity, sexual orientation, and human sexuality. SAC ¶¶ 3–5, 13–15, 32–35, 124–26, 135–41. For 2S-LGBTQIA+ students and those in crisis, mandated notification itself communicates private facts—that the student is engaging with identity topics or seeking related support—undermining confidentiality central to well-being and safety. SAC ¶¶ 13–15, 59, 103–04, 124–26. These effects are not speculative; the SAC alleges students are forgoing counseling and educators are curtailing confidential support now. SAC ¶¶ 59, 100–04, 124–26.

Montana’s privacy clause protects decisional and informational autonomy in the most personal spheres, including sexual orientation, gender identity, intimate relationships, and related counseling matters. *Armstrong v. State*, 1999 MT 261, ¶¶ 35–40, 296 Mont. 361, 989 P.2d 364 (recognizing fundamental privacy right and applying strict scrutiny); *Great Falls Trib. Co. v. Day*, 1998 MT 133, ¶¶ 18–23, 289 Mont. 155, 959 P.2d 508 (recognizing informational privacy and balancing against asserted state interests). HB 471 infringes those interests by interposing

compelled notification and parental veto into counseling and educational interactions that implicate a student’s most intimate personal information. SAC ¶¶ 13–15, 32–35, 59, 100–04, 124–26. For instance, school counselors, bound by ethical standards of confidentiality, are placed in an untenable conflict, causing them to alter or withhold services. SAC ¶¶ 100–04, 124–26.

Defendants assert the statute “does not require disclosure of confidential information.” Mot. at 18–19. At the Rule 12 stage, that assertion cannot override detailed factual allegations that compliance with HB 471’s opt-in and notice regimes itself communicates sensitive information—e.g., that a student seeks identity-related support—and predictably chills confidential engagement. SAC ¶¶ 13–15, 32–35, 59, 103–04, 124–26; *Reichert*, 2012 MT 111, at ¶¶ 55–57.

Nor does Defendants’ appeal to general parental access statutes rescue HB 471 from Plaintiffs’ requested relief: when Article II, Section 10 applies, the State bears the burden to demonstrate a compelling interest advanced by narrowly tailored means. *Armstrong*, 1999 MT 261, at ¶¶ 35–40; *Great Falls Trib.*, 1998 MT 133, at ¶¶ 18–23. On this record, the State cannot satisfy strict scrutiny at the pleadings stage. Plaintiffs plausibly allege the asserted interests—generic “transparency” or parental oversight—are neither necessary nor narrowly drawn and, in purpose and operation, suppress pro-2S-LGBTQIA+ content. SAC ¶¶ 6, 23–29; *Armstrong*, 1999 MT 261, at ¶¶ 35–40. Substantial countervailing harms to student welfare and the integrity of counseling relationships are pleaded and must be accepted as true. *See* SAC ¶¶ 59, 100–04, 124–26; *Reichert*, 2012 MT 111, at ¶¶ 55–57. Nor can Defendants rely on *Mahmoud*. Mot. § I.A. *Mahmoud* required notice and opt-outs to avoid burdening parental free exercise when schools introduced discrete materials; it did not authorize the State to compel disclosures that

chill confidential counseling or to erect an opt-in gate to identity-related support in a manner incompatible with Montana’s heightened privacy protections. The Montana Constitution may provide greater protection than the federal floor, and there is no Supremacy Clause conflict where the State constitution constrains state action more strictly. *See Armstrong*, 1999 MT 261, at ¶¶ 35–40. SB 99’s regime already undermined confidentiality by forcing disclosure-adjacent notices around identity-related content; HB 471 heightens the intrusion by converting identity-related instruction to a prior opt-in regime, adding rigid timing constraints, and maintaining public inspection requirements—all of which predictably chill counseling and supportive services. *See SAC* ¶¶ 32–35, 59, 100–04, 124–26; *Great Falls Trib.*, 1998 MT 133, at ¶¶ 18–23. These allegations more than suffice under Article II, Section 10, and Plaintiffs’ Second Amended Complaint may not be dismissed.

E. Montana’s robust Speech Clause forbids HB 471’s preclearance, opt-in gating, and stigmatizing notice regime (Art. II, § 7).

Plaintiffs allege imminent and ongoing burdens to speech and the corollary right to receive information. HB 471 imposes prior restraints and preclearance conditions on planned instructional and extracurricular speech about identity and human sexuality, backed by disciplinary referral, and its vagueness and punitive structure are chilling speech now. *SAC* ¶¶ 3–5, 16–18, 32–35, 56–63, 135–41, 146. Students and educators report withdrawing books, canceling presentations, avoiding discussion, and curtailing club activities—cognizable First Amendment-type harms—at the Rule 12 stage. *SAC* ¶¶ 74, 79–81, 85, 87, 90–95.

Article II, Section 7 of the Montana Constitution bars laws impairing the freedom of speech and expression and protects the right to receive information. HB 471 conditions planned classroom speech about gender identity and sexual orientation on prior notice and parental opt-in and subjects a vast range of speech touching “intimate relationships” and “sexual reproduction”

to rigid notice rules and discipline. SAC ¶¶ 3–5, 16, 32–35, 135–41, 146. The scheme restricts protected speech and compels speech by forcing educators to deliver controversial, stigmatizing notices as a precondition to speaking. SAC ¶¶ 32–35, 117. It also infringes the right of students to receive information and ideas in school by excluding or deterring 2S-LGBTQIA+ history, literature, civic topics, and supportive resources. SAC ¶¶ 10–12, 16–17, 29, 56–63, 74, 79–81, 85–90. These allegations state a claim under Montana’s heightened speech guarantees. *See Planned Parenthood of Mont.*, 2025 MT 120, at ¶ 20 (explaining that Montana courts extend “one of the most stringent protections of its citizens’ right to privacy in the United States—exceeding even that provided by the federal constitution.”).

Defendants’ argument that SB 99 and HB 471 merely regulate government speech and curriculum control misses the mark. Defendants invoke government-speech cases like *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), *Walls v. Sanders*, 144 F.4th 995 (8th Cir. 2025), and *Little v. Llano County*, 138 F.4th 834 (5th Cir. 2025), to claim plenary control over classroom speech. Mot. at 19–21. Those authorities are inapposite. *Pleasant Grove* concerns permanent monuments as the government’s own speech; HB 471 does not merely select a state message—it restricts and compels private speech by teachers, librarians, counselors, and students through prior restraints and discipline. *Walls* underscores that the government cannot be compelled to adopt private speech; Plaintiffs do not seek to compel the government’s message, but to enjoin suppression and stigmatization of private speakers via content- and viewpoint-based restraints. *Little* addressed library collection curation; HB 471 goes far beyond curation by conditioning instruction on preclearance and imposing opt-in barriers uniquely on identity-related speech. The Montana Constitution provides robust protections for speech and the right to receive information in educational settings that exceed the federal floor.

Defendants also misread *Board of Education v. Pico*, 457 U.S. 853 (1982). Mot. § II.A. iv. While *Pico* concerned libraries and yielded a fragmented Court, Montana law independently recognizes the right to receive information. Plaintiffs plead the removal of classroom libraries, the marking and sidelining of books, canceled presentations, and suppressed discussion—harms within Article II, Section 7. SAC ¶¶ 63–64, 74, 79–81, 85, 87, 90–95. At the motion-to-dismiss stage, those allegations must be credited.

Under SB 99, educators experienced chilled speech, book removals, and lost access to inclusive content. HB 471 escalates those harms by making identity-related instruction contingent on parental opt-in, narrowing timing windows, and expanding enforcement risks, thereby functioning in practice as a categorical barrier to protected speech. SAC ¶¶ 4–6, 11–12, 32–35, 56–63, 74, 79–81, 85–90, 135–41, 146. At minimum, Plaintiffs plausibly allege burdens on speech and receipt of information that cannot be resolved against them on the pleadings. Defendants’ Motion to Dismiss must be denied.

CONCLUSION

For the foregoing reasons, Defendants’ Motion to Dismiss should be denied.

DATED this 12th day of December 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 5(A)(2), I certify the following:

This brief complies with the word limitation of Local Rule Local Rule 5(A)(2) because this brief contains 6,370 words. This brief complies with the typeface requirements of Local Rule 5(A)(2) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 12-point Times New Roman font.

/s/ Ashlee Rossler
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I, Ashlee Nichole Rossler, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Response Brief to the following on 12-12-2025:

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