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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 BRIEF IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

"[A] government cannot condition the benefit of free public education on parents' acceptance" of ideologically normative human sexuality and identity

instruction. *Mahmoud v. Taylor*, 606 U.S. 522, 530 (2025).[1] Indeed, "[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." *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)).

The Montana Legislature enacted Senate Bill 99 (2021) ("SB 99"), codified at Mont. Code Ann. § 20-7-120, so schools would afford parents notice of course content and an opportunity for parents to withdraw their students from objectionable material. House Bill 471 (2025) ("HB 471") revises that law to increase the curriculum's transparency and strengthen parents' control of their child's upbringing. Both laws fit into the U.S. Supreme Court's interpretations of parents' federal rights regarding the upbringing of their children. Plaintiffs' requested remedy would defy those interpretations and place Montana in conflict with the First Amendment.

This case rests on a simple premise: parents and their elected representatives control a school's curriculum; not teachers and counselors. Plaintiffs essentially ask this Court to disregard parents' right to guide their children's upbringing and their right to know the happenings of a public institution. Why? Because a few activist school employees chauvinistically believe that they know better than parents—leading them to feel entitled to veto the will of students' parents. So now Plaintiffs try to make parents the enemies of schools. This Court must reject that.

BACKGROUND

Plaintiffs challenge both SB 99 and HB 471. During the 2021 legislative session, Senator Cary Smith introduced SB 99, a bill establishing parameters for K-12 human sexuality education. In April 2021, the Governor signed SB 99 into law.

Codified at Mont. Code Ann. § 20-7-120, SB 99 provided parents or guardians may, as an excused absence, withdraw a child from "a course of instruction, a class period, an assembly, an organized school function, or instruction provided by the

[1] The *Mahmoud* Court described the materials at issue there—"'LGBTQ+-inclusive' storybooks" as "unmistakably normative[,]" *i.e.*, "clearly designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs to be rejected." *Id.* at 550.

district through its staff or guests invited at the request of the district regarding human sexuality." SB 99 § 2(1). SB 99 required schools to "adopt a policy ensuring parental or guardian notification no less than 48 hours prior to holding an event or assembly or introducing" human sexuality content "for instructional use." SB 99 § 2(2). Schools must also notify parents or guardians of the school's human sexuality instruction and the excused absence policy. SB 99 § 2(3). "[A]ll curriculum materials" for human sexuality instruction must be "available for public inspection prior to the use of the materials in actual instruction." SB 99 § 2(4).

SB 99 defined human sexuality instruction as "teaching or otherwise providing information about human sexuality, including intimate relationships, human sexual anatomy, sexual reproduction, sexually transmitted infections, sexual acts, sexual orientation, gender identity, abstinence, contraception, or reproductive rights and responsibilities." SB 99 § 2(6).

HB 471, enacted during the 2025 legislative session, further amends Section 20-7-120. HB 471 changes this section's definition of "human sexuality instruction" and introduces the term "identity instruction." HB 471 §§ 1(8)(a)(i)-(iii). "Human sexuality instruction" now means "instruction that has the goal or purpose of studying, exploring, or informing students about any of the following human sexuality topics: intimate relationships, sexual anatomy, sexual reproduction, sexually transmitted infections, sexual acts, abstinence, contraception, or reproductive rights and responsibilities." HB 471 § 1(8)(a)(i). "Identity instruction" means "instruction that has the goal or purpose of studying, exploring, or informing students about gender identity or gender expression, or sexual orientation." HB 471 § 1(8)(a)(ii). And now "instruction" is "the conduct of organized learning activities, including the provision of materials, for students in a public school, whether conducted by a teacher or other school staff or guests invited at the request of the school or district and regardless of the duration, venue, or method of delivery." HB 471 § 1(8)(a)(iii).

Clarifying SB 99's provisions, HB 471 requires schools to attain parents' written consent before a child may attend identity instruction. HB 471 § 1(1)(b). A

parent can withdraw consent through written notification to the district superintendent at any time. *Id.* HB 471 extends SB 99's notification requirements to identity instruction, requiring at least five days' notice, not exceeding fourteen days' notice. HB 471 § 1(2). Newly added is that "[n]either 'human sexuality instruction' nor 'identity instruction' includes or applies to a teacher's response to an unexpected student-initiated inquiry related to the topics under each term to the extent necessary to resolve the inquiry or to maintain civility and decorum in the classroom." HB 471 § 1(8)(b). Finally, HB 471 adds a reporting provision: "If, after investigating a violation under this section, the trustees of a district find that an individual has knowingly or repeatedly violated this section, the trustees shall report the findings to the board of public education pursuant to 20-4-110." HB 471 § 1(7).

Plaintiffs waited three years after the Legislature enacted SB 99 to bring this suit. (Doc. 1). Over a year later, they filed their First Amended Complaint, (Doc. 12), altering some factual assertions. (*See* Doc. 10). Then a year and half after that, they filed their Second Amended Complaint. (Doc. 54). This latest iteration retains claims against SB 99 and adds claims against HB 471. The named Plaintiffs also changed.

LEGAL STANDARD

A court may dismiss a claim if the claimant fails to sufficiently plead a cognizable claim that entitles him or her to relief. Mont. R. Civ. P. 12(b)(6). "A substantively cognizable claim for relief" "generally consists of a recognized legal right or duty; infringement or breach of that right or duty; resulting injury or harm; and, upon proof of requisite facts, an available remedy at law or in equity." *Larson v. State*, 2019 MT 28, ¶ 19, 394 Mont. 167, 434 P.3d 241. "A claim is subject to dismissal only if it either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under that claim." *Puryer v. HSBC Bank USA, N.A.*, 2018 MT 124, ¶ 12, 391 Mont. 361, 419 P.3d 105. All well-pleaded allegations are taken as true when considering a motion to dismiss. *Id.*, ¶ 10. Dismissal of a complaint is proper when "it appears beyond doubt the plaintiff can prove no set of facts in support of his

claim that would entitle him to relief." *Marshall v. Safeco Ins.*, 2018 MT 45, ¶ 6, 390 Mont. 358, 413 P.3d 828.

The Court examines only whether "a claim has been adequately stated in the complaint." *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶ 15, 337 Mont. 339, 160 P.3d 552. "A pleading which states a claim for relief must": (1) be a "short and plain statement of the claim showing that the pleader is entitled to relief"; and (2) "demand [] the relief sought." Mont. R. Civ. P. 8(a)(1), (2). Although the complaint must be construed in a light most favorable for the plaintiff, "the court is under no duty to take as true legal conclusions or allegations that have no factual basis or are contrary to what has already been adjudicated." *Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6.

In reviewing constitutional challenges, this Court must uphold the statute unless it conflicts with the Constitution beyond a reasonable doubt. *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 10, 353 Mont. 265, 222 P.3d 566. If any doubt exists, it must be resolved for upholding the statute. *Id.* Courts presume laws are constitutional. *Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. "All statutes carry with them a presumption of constitutionality, and [the Court] construe[s] statutes narrowly to avoid an unconstitutional interpretation if feasible." *City of Great Falls v. Morris*, 2006 MT 93, ¶ 19, 332 Mont. 85, 134 P.3d 692. Courts must determine "whether it is possible to uphold the legislative action which will not be declared invalid unless it conflicts with the constitution." *Powell v. State Compen. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877. The party challenging the statute bears the burden to prove beyond a reasonable doubt the law is unconstitutional. *Id.*

ARGUMENT

I. Plaintiffs fail to state a cognizable legal theory for relief.

A. Plaintiffs' requested relief violates the U.S. Constitution.

This case ends with *Mahmoud v. Taylor*'s conclusion. Drawing on *Wisconsin v. Yoder*, the *Mahmoud* Court reaffirmed that the U.S. Constitution's Free Exercise Clause guarantees parents the right "to direct the religious upbringing of their

children[.]" *Mahmoud*, 606 U.S. at 543 (quoting *Yoder*, 406 U.S. at 218). So when schools create curriculum with "LGBTQ+-inclusive" storybooks and couple that curriculum with withheld notice and opt-outs, those schools unconstitutionally burden parents' religious exercise. *Id.* at 545; 569. Plaintiffs' requested relief here leaves parents—especially those with common religious tenets—with a (quite literal) Faustian bargain: either give up their faith so to receive free public education for their children; or adhere to their faith and lose everything that comes with a free public-school education. Placing parents in this dilemma violates the U.S. Constitution. And yet that outcome is exactly what Plaintiffs request.

In *Mahmoud*, a school board announced it would read certain "LGBTQ+-inclusive" storybooks to children. *Id.* at 532–37. The school board coupled this material with its decision to cease offering students and parents an opt-out option or notice before the materials came up in class. The storybooks contained ideologically normative themes like celebrating gay marriage or affirming gender transitions. Those messages contradicted the religious beliefs many parents in the school district sought to instill in their children, so they sued the school board. *Id.* at 537–40.

Decided at the preliminary injunction stage, the U.S. Supreme Court ultimately held that "the Board's introduction of the 'LGBTQ+-inclusive' storybooks—combined with its decision to withhold notice to parents and to forbid opt-outs—substantially interferes with the religious development of [the parents'] children and imposes the kind of burden on religious exercise that *Yoder* found unacceptable." *Id.* at 550. The Court reasoned that the books were "unmistakably normative" and were "clearly designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected." *Id.* The Court accordingly ordered the school board to notify parents before reading the "LGBTQ+-inclusive" books to their children and to let parents opt their children out of sessions where school officials would read those books. *Id.* at 569.Like

the picture of Dorian Grey, this case is a deformed twist of *Mahmoud*. The State is defending what the *Mahmoud* plaintiffs fought for: parental notice and an opt-out option to human sexuality and identity instruction. Plaintiffs, meanwhile,

seek what the U.S. Supreme Court ultimately faulted the school board in *Mahmoud* for, that is to have no notice and to have no opt-out option. Still, this case turns on the same substantive issue: whether public schools may subject children to human sexuality instruction contrary to their parents' religious beliefs and without their knowledge. For the U.S. Supreme Court and the State of Montana, the answer is no. Plaintiffs disagree, however.

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. Without these laws, 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.

Although the U.S. Supreme Court specifically analyzed the "LGBTQ+-inclusive" storybooks at issue, its holding extends beyond those specific books.

The core premise of Plaintiffs' argument is that teachers and school counselors know better than students' parents. Indeed, *only* teachers and school counselors should control children's education. (*See cf.* Doc. 54, ¶ 28) ("The ostensible state interest in enacting HB 471 is parental control over childrens' [sic] education … [which is] not compelling."). But this places parents in an untenable position: place their children's upbringing against their children's education. This is wrong.

Take for example a Christian family from Livingston. The parents could hold sincere beliefs that marriage is between a man and a woman, or that God created man and woman, and their sexes reflect that. *See generally Mahmoud*, 606 U.S. at 552 ("Many Americans … believe that biological sex reflects divine creation, that sex and gender are inseparable, and that children should be encouraged to accept their sex and live accordingly."). They could wish to instill those beliefs in their children. They can also instill important community values, like supporting local charities and

wanting to be Rangers at Park High School. Under Plaintiffs' theory of this case, unless those parents relegate their beliefs behind their community values, they are forced to subscribe their children to potentially objectional human sexuality instruction or identity instruction. There is no statutory protection absent SB 99 or HB 471. Park High School would be free to provide those children with whatever a teacher decides they need; not what the parents wish to instill in their children.

The *Mahmoud* decision fills that void and shields those parents from having to weigh their children's upbringing against their children's educational opportunity. This is especially important in a state like Montana where, unlike for some plaintiffs in *Mahmoud*, there simply are not widespread alternative options like private or voucher schools, or economic opportunities so to free up a parent for homeschooling. *See also id.* at 561–63; *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, No. 23-3630, 2025 WL 3102072, at *6 (6th Cir. Nov. 6, 2025) ("If parents cannot afford private school and if a State lacks a voucher program, then, their children might not have choice but to follow a public school's speech codes.") (citing *Mahmoud*, 606 U.S. at 561–63). But even that ignores Montanans' strong community bond to their local educational institutions. For some, being a Bengal or a Vigilante or a Bruin is as much their identity as being a Montanan. Yet again, under Plaintiffs' theory, those families are hung out to dry if they do not subscribe to Plaintiffs' ideologically normative beliefs about human sexuality or identity.

Under the Supremacy Clause, the U.S. Constitution, laws, and treaties are the supreme law of the land, regardless of "any Thing in the Constitution or Laws of any State to the Contrary[.]" U.S. Const. art. VI, cl. 2. For this reason, courts do not apply provisions of state law when a party cannot simultaneously follow federal law. *See , e.g.*, *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 618 (2011) (holding FDA regulations prevented a drug manufacturing company from following a contradictory state law). Declaring the laws unconstitutional under the misguided reasoning that they violate the Montana Constitution serves no other purpose than to announce a policy that no Montana government actor, whether a school board or the Legislature, itself, could maintain. Federal law simply precludes Plaintiffs' desired result.

Plaintiffs nonetheless seek far more. Indeed, they demand this Court to enjoin enforcement of the laws. But, by granting that relief, this Court strips parents of their federal rights, depriving them of the right of notice and the right to an opt-out of instruction that violates their religious beliefs. This demand skirts the U.S. Constitution. And this Court must reject it. *Mahmoud* stands for a simple premise: if the instruction poses "a very real threat" of undermining parents' religious instruction of their children, the U.S. Constitution requires notice and an opt-out option. Without these laws, Plaintiffs and other government officials can quietly trample parents' right to direct their children's upbringing until those parents muster a federal lawsuit. These laws, however, prevent that injustice.

Plaintiffs' argument reeks of what *Mahmoud* warned against. Their argument advances an "unmistakably normative" position that is "clearly designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected." *Mahmoud*, 606 U.S. at 550.

Plaintiffs claim the Montana Constitution—whether under Article II, Sections 1, 7, 10, or 17—prohibits the State from requiring public school officials to notify parents before their child receives human sexuality or identity instruction and from allowing parents to opt their child out of that instruction. *Mahmoud*, however, clarifies that the federal law requires exactly that. Even if Plaintiffs were correct in their interpretation of the Montana Constitution (they are not), federal law still prevails in this regard.

But the Montana Constitution and federal Constitution do not disagree on this point, either. The Montana Constitution's Article II, Section 7, expands upon the federal equivalent, guaranteeing the protection of speech and expression. *Compare* Mont. Const. art. II, §7 *with* U.S. Const., amend. I; *see also State v. Dugan*, 2013 MT 38, ¶ 17, 369 Mont. 39, 303 P.3d 755. The Montana Constitution's Article II, Section 5, also tracks with federal law. *Compare* Mont. Const. art. II, § 5 *with* U.S. Const., amend. I *Miller v. Cath. Diocese of Great Falls*, 224 Mont. 113, 117, 728 P.2d 794, 796 (1986) (applying federal law, including *Yoder*, to determine section 5's scope). Federal protections are, therefore, Montana's constitutional minimum; the Montana

Constitution can build on federal rights, but it cannot contradict them. *Mont. Democratic Party v. Jacobsen*, 2024 Mt. 66, ¶16, 416 Mont. 44, 545 P.3d 1074 ("This Court can diverge from the minimal protections offered by the United States Constitution when the Montana Constitution clearly affords greater [or identical] protection."). This undermines Plaintiffs' contention here because if Plaintiffs' claims under the Montana Constitution are correct, then the State simply cannot simultaneously follow the U.S. Constitution and the Montana Constitution. One must prevail. The Supremacy Clause thus ensures that Plaintiffs' claims under the Montana Constitution fail.

Mahmoud advances a simple premise: if schools offer human sexuality or identity instruction, they must provide parental notification and an opportunity for parents to opt their children out of that course content if the content interferes with their children's religious upbringing. If not, then the school violates the parents' First Amendment rights. Plaintiffs ask this Court to declare two laws mandating parental notification and an opportunity for opt-out unconstitutional. This Court must respond that those laws do not violate the Montana Constitution.

II. Plaintiffs do not sufficiently plead facts to support their claims.

A. Plaintiffs lack standing.

In Montana, a court's judicial power is limited to "justiciable controversies." *See Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 22, 353 Mont. 201, 219 P.3d 881; *see also* U.S. Const. art. II, § 2, cl. 1; Mont. Const. art. VII, § 4(1). "A justiciable controversy is one upon which a court's judgment will effectively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical or academic conclusion." *Clark v. Roosevelt Cnty.*, 2007 MT 44, ¶ 11, 336 Mont. 118, 154 P.3d 48. "The central concepts of justiciability have been elaborated into more specific categories or doctrines—namely, advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions—each of which is governed by its own set of substantive rules." *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*,

2010 MT 26, ¶ 8, 355 Mont. 142, 226 P.3d 567 (citing *Greater Missoula*, ¶ 23). Of those doctrines, standing proves dispositive here.

To meet the case or controversy requirement, a dispute must be "definite and concrete, touching legal relations of parties having adverse legal interests." *Plan Helena*, ¶ 9. This does not include an "abstract differences of opinion," *id.*, but a clearly alleged "past, present, or threatened injury to a property or civil right, and the injury must be one that would be alleviated by successfully maintaining the action." *Shreves v. Mont. Dep't of Lab. & Indus.*, 2024 MT 256, ¶ 12, 418 Mont. 514, 558 P.3d 784 (quoting *Advocates for Sch. Tr. Lands v. State*, 2022 MT 46, ¶ 19, 360 Mont. 207, 255 P.3d 90). In other words, the plaintiff's claim must be that there is "an invasion of *a legally protected interest*." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 35, 360 Mont. 207, 255 P.3d 80. This is more than a "general legal, moral, ideological, or policy objection to a particular government action." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024). None of the Plaintiffs' allegations satisfy the case or controversy requirement.

i. Educational opportunity.

Neither SB 99 nor HB 471 limits or diminishes Smith's educational opportunity as guaranteed in Montana Constitution Article X, Section 1. On the contrary, they *enhance* Montana students' opportunities to receive an education befitting their background and development, allowing them to reach their "full educational potential." Mont. Const. art. X, § 1(1). The Montana Constitution requires the Legislature "provide a basic system of free quality public elementary and secondary schools." Mont. Const. art. X, § 1(3). It does not demand students receive the education they think they need. Nor does it create a special carve out for certain students, as Plaintiffs seem to imply.

Plaintiffs never once mention Sarah Smith, or her daughter Izzy Smith, in their educational opportunity claim. (Doc. 54, ¶¶ 142–51.) Yet she is the only one bringing this claim. Rather than tie that claim to Smith's allegations, this claim relies on conjured allegations without any factual support.

Izzy Smith is a 12th grade student at Fergus High School. (*Id.*, ¶ 96.) She participates in extracurricular activities and describes herself as an "ally" to "2S-LGBTQIA+" classmates. (*Id.*, ¶¶ 96–97.) Plaintiffs claim Izzy "is concerned" about her classmates' mental health and "socio-emotional needs and well-being." (*Id.*, ¶¶ 98–99.) She "is concerned" other students might be bullied. (*Id.*, ¶ 99.) And she "is concerned" "about the quality of her education under these bills." (*Id.*) This is the extent of Sarah Smith's alleged harm on behalf of Izzy Smith.

"Concern" is plainly insufficient to support standing. "[A] general or abstract interest in the constitutionality of a statute … is insufficient for standing absent a direct causal connection between the alleged illegality and specific and definite harm personally suffered, or likely to be personally suffered, by the plaintiff." *Shreves v. DLI*, 2024 MT 254, ¶ 17, 418 Mont. 514, 559 P.3d 784 (quoting *350 Mont. v. State*, 2023 MT 87, ¶ 15, 412 Mont. 273, 529 P.3d 847). To have standing, a plaintiff must allege more than a "general legal, moral, ideological, or policy objection to a particular government action." *All. for Hippocratic Med.*, 602 U.S. at 381.

Smith's problem is she does not even claim that the government is regulating her. Instead, she alleges "unlawful regulation (or lack of regulation) of *someone else*." *Id.* at 382 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992). While "standing is not precluded, [] it is ordinarily substantially more difficult to establish." *Id.* For example, Smith alleges not that she will receive a lower quality education but merely that she is "concerned about the quality of her education under these bills." (Doc. 54, ¶ 99.) She does not allege her teachers have self-censored under these laws but that she "is concerned" they might at some point. *Id.* She is not concerned she will be bullied, but that others might be bullied. (*Id.*, ¶ 98.) Izzy's harm rests on her concern that *someone else's* constitutional rights may be threatened; not her own. That falls far short of establishing standing here.

Smith perfunctorily argues "students seeking counseling regarding issues they face concerning sexual orientation or gender identity and transition will not receive the equal educational opportunity and counseling to which they are entitled." (*Id.*, ¶

149.) Yet with over four years of enforcement to draw from, she has no facts to support this conclusion.

The main shortcoming of Smith's educational opportunity claim is that she asserts these laws "rob[] 2S-LGBTQIA+ students of their history and identity." (*Id.*, ¶ 146.) But she never claims SB 99 or HB 47 robs *her* of her history or identity. Thus, this sounds like an equal protection claim, not an educational opportunity claim.

Smith exposes her own attempt to shoehorn an equal protection claim into an educational opportunity claim: "Cisgender and heterosexual students are not subject to the equivalent burden and deprivations that SB 99 and HB 471 and the Defendants have imposed on the 2S-LGBTQIA+ students and their community." (*Id.*, ¶ 150.) While this allegation is an equal protection claim dressed as an educational opportunity claim, it remains that Smith lacks any factual support for this allegation. Rather than present actual evidence of harm, Smith makes ambiguous, baseless, and abstract allegations of some sinister plot for nondescript harm against some unidentified classmates. But she still simply cannot show that either law violates Montanans' right to education opportunity. Dismissal of this claim thus is proper.

ii. Due Process.

A statute is unconstitutionally vague on its face when "it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute." *Monroe v.* State, 265 Mont. 1, 3, 873 P.2d 230, 231 (1994) (quoting *City of Choteau v. Joslyn*, 208 Mont. 499, 505, 678 P.2d 665, 668 (1984)). "[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Whitefish v. O'Shaughnessy*, 216 Mont. 433, 440, 704 P.2d 1021, 1026. "The fact that a statute is difficult to apply to some situations does not render it unconstitutionally vague." *State v. Martel*, 273 Mont. 143, 151, 902 P.2d 14, 19 (1995) (quoting *Monroe*, 265 Mont. at 3, 873 P.2d at 231). "The strong presumptive validity [of a law means] that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *Monroe*, 265 Mont. at 3, 873 P.2d at 231 (quoting *United States v. Nat'l Dairy Corp.*, 372 U.S. 29, 32 (1963)).

"The Legislature need not define every term it employs when constructing a statute. If a term is one of common usage and is readily understood, it is presumed that a reasonable person of average intelligence can comprehend it." *State v. Nye*, 283 Mont. 505, 513, 943 P.2d 96 (1997). "The words of a statute are not impermissibly vague simply because they can be 'dissected or subject to different interpretations,' and the constitutionality will be upheld if the Court can do so under a 'reasonable construction of the statute.'" *DeVoe v. City of Missoula*, 2012 MT 72, ¶ 17, 364 Mont. 375, 274 P.2d 752 (quoting *Mont. Media v. Flathead Cty.*, 2003 MT 23, ¶ 58, 314 Mont. 121, 63 P.3d 1129). There is no due process violation here because Plaintiffs fail to present sufficient facts to support such allegations.

Plaintiffs never articulate a due process violation stemming from either SB 99 or HB 471. For example, Ms. Threadgoode merely ponders "whether teaching [a book], which includes a gay character, would constitute instruction that has the goal or purpose of informing students of sexual orientations." (Doc. 54, ¶ 88.) Mr. Thackeray alleges SB 99 and HB 471 strip him of certain course material. (*Id.*, ¶ 91.) He continues that he "fears" violating the law by answering an "innocuous, standard question"[2] and that he can no longer "acknowledg[e] marginalized communities." (*Id.*, ¶¶ 92, 95.) Neither Izzy Smith nor MSCA allege facts to show either bill is vague. None of these statements support their vagueness claim.

For a law to be void for vagueness, it must fail to convey to a person of ordinary intelligence a reasonable opportunity to know what conduct is permitted or not permitted. *Dugan*, ¶ 67. Plaintiffs cannot conjure even an iota of concrete allegations to plausibly claim a person of ordinary intelligence does not understand what these laws require. On the contrary, in their earlier complaint, some plaintiffs described how teachers understood and implemented the law in their classrooms. (*See*, *e.g.*, Doc. 12, ¶¶ 74; 76) (a teacher keeping a public library in her classroom indicates books requiring parental notification); (a teacher sends parents a standardized email about

[2] This complaint is ill-founded because HB 471 contemplates "unexpected student-initiated inquiry" and provides an exception "to the extent necessary to resolve the inquiry." HB 471, § 1(7)(b). So Mr. Thackeray's fears are illusory.

the curriculum). These examples show there is no case or controversy under this claim. *Cf. Epperson v. Arkansas*, 393 U.S. 97, 109–11 (1968) (Black, J., concurring) (doubting plaintiffs' claims were justiciable based on lack of concrete evidence).

Plaintiffs seek to buttress their vagueness argument with three questions: (1) "whether confidential counseling constitutes 'instruction'"; (2) "whether parent may provide opt-in consent for identity instruction outside the annual or semester window"; and (3) "what constitutes an 'unexpected' inquiry." (Doc. 54, ¶ 132.) Fortunately, these questions rest on terms of common usage, and a reasonable person of average intelligence can readily understand the statute. As to each question, simply raising alleged confusion cannot by itself render a statute facially void for vagueness.

Plaintiffs also purport that the notice windows "risk inadvertent violations and arbitrary enforcement." (Doc. 54, ¶ 133.) This is nonsensical. Every notice window, in theory, presents such "risks." Rather than present evidence of violations or arbitrary enforcement, they simply present no facts to support a due process problem with the notice windows. This Court should reject that say-so. Across every government institution there are requirements for notice. A parent does not, for example, suffer a due process violation because their child did not return the field trip permission slip form. Nor does a ballot get counted when the voter submits it a month after the election. Plaintiffs' allegations simply strain the bounds of credulity.

Finally, regarding their allegations that the laws' definitions are so vague that no reasonable person of average intelligence can comprehend that definition, (Doc. 54, ¶¶ 134, 138–39), "'instruction … on human sexuality' is not so vague that it lacks a core of understandable meaning." *Smiley v. Jenner*, 684 F. Supp. 3d 835, 844 (S.D. Ind. 2023). Plaintiffs again present no well-pleaded facts that either SB 99 or HB 471 are so vague that any Plaintiff cannot reasonably understand the line of prohibited conduct. Plaintiffs' purposeful blindness renders neither law vague.

The Court must reject Plaintiffs' attempt to contort individual clauses to invalidate the whole statute. The reasonable construction of SB 99 and HB 471 proves

both are nowhere near so vague as to be void. The Court should accordingly dismiss this claim.

iii. Privacy.

Plaintiffs allege "SB 99 and HB 471's notification and opt-in requirements compel the disclosure of sensitive student information to parents, even when students seek confidential counseling or support." (Doc. 54, ¶ 123.) There is, however, a glaring issue with this assertion: in over four years of enforcement, they cannot present a shred of evidence that someone, whether school administrator, teacher, counselor, or parent, has disclosed sensitive student information. This allegation is simply illusory, premised on a 'what-if' without factual evidence.

Worse for Plaintiffs, their unsound allegations do not even track with the text of either SB 99 or HB 471. Neither requires the exchange of sensitive student information. As to identity instruction, parents must opt-in for that education. HB 471, § (1)(b). So there is no real concern of disclosure of sensitive information because parents give consent for their children to receive that identity instruction. For human sexuality instruction, the school must adopt a policy ensuring parental or guardian notification. HB 471, § (2). Such policy could take many forms, like a generic, beginning of semester email; a syllabus; a course schedule; or an individualized email as circumstances arise. That decision belongs to the school. But even if the school adopts a policy that requires such disclosure, under federal law, incorporated through state statute, parents have access to student records until the minor turns 18 years old. Mont. Code Ann. § 20-1-213(1).

Nowhere do Plaintiffs proffer any factual allegations that teachers or school counselors have had to disclose confidential information because of either SB 99 or HB 471. And it would not even be their right to assert; the student or parents would assert that kind of violation. And even still, Plaintiffs have no students claiming someone disclosed confidential information because of SB 99 or HB 471.

Really, what Plaintiffs challenge here is that a teacher or school counselor cannot initiate confidential counseling services absent parental notification. (Doc. 54, ¶ 124.) But that does not violate the right to privacy. The Montana Constitution's

Article II, Section 10 has never contemplated that teachers or school counselors have a right to initiate private conversations with students, especially regarding topics like human sexuality or identity. Indeed, such a right would be exceptional given that teachers and school counselors are government employees.

Although not directly a privacy claim, MSCA alleges school counselors "cannot comply with the parental notification of law without violating their professional obligations to maintain confidentiality." (*Id.*, ¶ 103.) But there are at least two problems with this allegation. First, the plain text of either SB 99 or HB 471 does not prohibit student counseling—yet that seems to be precisely what they allege here. Second, nowhere does MSCA allege facts showing how either SB 99 or HB 471 forces counselors to breach their ethical obligations. Indeed, MSCA fails to allege what their standards as school counselors are, (*Id.*, ¶ 100), and how SB 99 and HB 471 would violate those standards. They do claim their members "are bound to follow the ASCA Ethical Standards," but do not present those standards. (*Id.*, ¶ 102.c.) But even assuming the school counselors follow some kind of standards, Plaintiffs do not sufficiently show how SB 99 or HB 471 violate those standards.

And even so, Plaintiffs argument simply means a third-party professional organization's standards—which do not bind all Montana school counselors but just MSCA members—somehow trump state law, which Plaintiffs again fail to explain.[3] It seems paradoxical for MSCA to allege that SB 99 and HB 471 put "school counselors between the proverbial rock and a hard place" when they did not allege what those professional obligations are and what balancing between confidential communications and informing parents entails. (*Id.*, ¶ 103.)

Under none of the alleged facts are school employees obliged to disclose confidential information because of SB 99 or HB 471. SB 99 and HB 471 do not violate the right to privacy because they do not demand disclosure of any information. Instead, they require schools to adopt policies for parental notification. No confidential information needs to be exchanged to tell parents what content their

[3] If it is Plaintiffs' position that the validity of a duly enacted state law requires it not offend the diktats of a non-party professional organization, they should directly assert as much.

children will receive. Because Plaintiffs fail to allege sufficient facts to support their privacy claim against either SB 99 or HB 471, the Court should dismiss this claim.

iv. Speech and expression.

Neither SB 99 nor HB 471 impairs speech or expression in violation of article II, section 7 of the Montana Constitution. And Plaintiffs do not allege any facts to show otherwise. Neither restricts or burdens the speech of students, public school employees, or MSCA. Instead, HB 471 requires that, before a course of instruction on human sexuality, parents and guardians get a chance to review and decide whether to withdraw their child from that instruction as an excused absence. And for identity instruction, teachers, counselors, and students are free to speak after parents give consent. Any chilling of speech is either imagined or self-imposed—not because the laws prohibit that speech, but because the employee does not wish to notify the parent or guardian of that speech. Any diminished speech flows from the employees' own refusal to notify parents or guardians of human sexuality or identity instruction.

Article II, section 7 of the Montana Constitution provides, "No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty." Mont. Const. art. II, § 7. "The right to free speech is a fundamental personal right and 'essential to the common quest for truth and the vitality of society as a whole.'" *Dugan*, ¶ 18 (quoting citing *St. James Healthcare v. Cole*, 2008 MT 44, ¶ 26, 341 Mont. 368, 178 P.3d 696). "However, neither the First Amendment nor Article II, Section 7, provide unlimited protection for all forms of speech." *Id.*, ¶ 18 (citing *Cole*, ¶ 26).

As a basic premise, government employees, speaking on behalf of the government, can say just what the government authorizes them to say. Because "the government's own speech 'is not restricted by the Free Speech Clause,' … it is free to 'choose [] what to say and what not to say.'" *Walls v. Sanders*, 144 F.4th 995, 1000 (8th Cir. 2025) (citations omitted) (second alteration in original). "When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain

viewpoint-neutrality when its officers and employees speak about that venture." *Matal v. Tam*, 582 U.S. 218, 234 (2017). Students, and teachers and counselors for that matter, cannot "compel the government to say something it does not wish to." *Walls*, 144 F.4th at 1002; *see also Little v. Llano County*, 138 F.4th 834, 842–47 (5th Cir. 2025) (en banc). So "the right to receive information cannot constrain the government's ability to decide what to say and what not to say." *Id.*, 144 F.4th at 1003 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009)).

Plaintiffs incorrectly rely on *Pico* for the premise that students have an unadulterated right to receive whatever information they desire—here, "important aspects of 2S-LGBTQIA+ history, literature, art, and contemporary politics without state or parental inference." (Doc. 54, ¶ 116). First, *Pico* dealt with what books are in the school library; not what is taught in the classroom. *Bd. of Ed., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 863, 855–56 (1982) (plurality opinion). Beyond Plaintiffs' unconstitutional elevation of those topics, *Pico* stands for the opposite proposition: government has "absolute discretion in matters of *curriculum*" and "the compulsory environment of the classroom" so to "inculcate community values." *Pico*, 457 U.S. 863, 868–69 (1982) (plurality opinion). At any rate, the U.S. Supreme Court recognizes when a case, like *Pico*, has a fragmented decision, its judgment comes from the narrowest grounds. *Marks v. United States*, 430 U.S. 188, 193 (1977). So *Pico*'s judgment is found in Justice White's concurring opinion—where he did not decide any constitutional questions. *See Pico*, 457 U.S. at 855–56 (White, J., concurring in the judgment). *Pico* does not lend itself as support for Plaintiffs' speech claim here.

Izzy Smith never alleges any chilling of speech or other Section 7 related harm. She never alleges her speech has been denied, nor that she has been denied certain speech. Her claim is dead on arrival without supporting facts.

Teachers Ms. Threadgoode and Mr. Thrackeray also allege neither being denied their speech nor having to self-censor. Nor could they.

And MCSA fails to present any evidence that a school counselor either had to speak or was denied a chance to speak. Indeed, its allegations do not even touch Section 7—at most they argue they run the risk of violating their self-imposed ethical

obligations. (Doc. 54, ¶ 103.) Because MSCA is a third-party organization, neither SB 99 nor HB 471 even regulates it, let alone restricts its speech rights.

Finally, Plaintiffs make clear the point of this litigation: they want to advance their favored ideological normative positions on human sexuality and identity vis-à-vis taxpayer-funded public schools—without impediment. Throughout their complaint, they treat as objective their subjective beliefs regarding what belongs in school classrooms—from pride flags and safe space stickers to course content specifically focusing on "2S-LGBTQIA+-instruction." They assume these things "good" and opposition to these things as "bad." But Montanans, through their elected representatives, voice a different opinion. On whether public schools may subject children to human sexuality or identity instruction—absent parents' knowledge and without their consent—the People, through their elected representatives, answered no. This Court should respect that answer.

CONCLUSION

Plaintiffs wrongly believe that, so long as they say SB 99 and HB 471 are unconstitutional, then they are. But the U.S. Supreme Court established that parents have the right to notice and opportunity to withdraw their children from "LGBTQ+-inclusive" instruction. Indeed, 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.") Even having the four corners of their complaint to make a contrary argument, Plaintiffs failed miserably to do so. Yet despite *Mahmoud*, Plaintiffs' well-pleaded factual allegations, even assumed as true, still do not reach the level of a constitutional violation. Plaintiffs—and the Court—cannot make parents the enemies of schools. The Court should dismiss Plaintiffs' claims and causes of action with prejudice.

DATED this 12th day of November 2025.

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