No. 25 -1341

**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

JOSEPH and SERENA WAILES, *et al.,*
*Plaintiffs-Appellants,*
v.
JEFFERSON COUNTY PUBLIC SCHOOLS and
JEFFERSON COUNTY PUBLIC
SCHOOLS BOARD OF EDUCATION,
*Defendants-Appellees.*

On Appeal from the United States District Court
for the District of Colorado
Case No. 1:24-cv-02439-RMR-NRN
Honorable Regina M. Rodriguez

# BRIEF OF *AMICUS CURIAE* THOMAS MORE SOCIETY IN SUPPORT OF PLAINTIFFS-APPELLANTS

Peter Breen
Matthew F. Heffron
Michael G. McHale
THOMAS MORE SOCIETY
309 West Washington Street
Suite 1250
Chicago, IL 606060
312-782-1680
tbrejcha@thomasmoresociety.org

Counsel for *Amicus Curiae*

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Statutes**



**Other Authorities**

## INTERESTS OF *AMICI CURIAE*[1]

Amicus Curiae, the Thomas More Society ("TMS"), is a not-for-profit, national public interest law firm based in Chicago, Illinois, dedicated to restoring respect in law for human life, family, and religious liberty. TMS has been actively involved in recent years in defending religious liberty, as well as parental and student rights, in the context of public education. TMS thus has a distinct interest in this Court bringing clarity to the issues in this case.

## SUMMARY OF ARGUMENT

*Amicus'* brief highlights the district court's categorical failure to abide the U.S. Supreme Court's directly-on-point decision in *Mahmoud v. Taylor*, 606 U.S. 522 (June 27, 2025), which requires opt-out opportunities from policies and practices like those of Jefferson County Schools that substantially interfere with parents' religious upbringing of their children. The district court relied on propositions squarely

[1] All parties have consented to this filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

foreclosed by *Mahmoud*. The district court also ignored the *opt-out nature* of the plaintiff parents' claims, similar to the claims at issue in *Mahmoud*.

Finally, *Mahmoud* makes clear that a broad range of coercive measures taken by school officials—both in and outside the classroom—can be cognizable burdens on parents' religious exercise. Indeed, *Mahmoud* grounded itself in *Wisconsin v. Yoder*, where the Supreme Court recognized that neither the "curriculum *or social environment*" of "modern high school[s]" was consistent with the plaintiff parents' religious beliefs in that case. 406 U.S. 205, 211 (1972) (emphasis added).

The same is true of Jefferson County Schools' transgender room-and-board policy here. The schools' refusal to grant the plaintiff parents' requested notice and opt-outs is thus subject to strict scrutiny, which it readily fails.

## ARGUMENT

### A. The District Court Derailed its own Opinion by Failing Even to Address *Mahmoud*, the Controlling Supreme Court Precedent.

This case is controlled by the U.S. Supreme Court's recent decision in *Mahmoud*. The plaintiff parents made the district court aware of *Mahmoud* by way of notice of supplemental authority after the initial briefing in this case, but well in advance of the district court's opinion. 3.App.678–79. Even without such notice, however, the district court scarcely could have missed *Mahmoud*, as it was delivered with much public fanfare and intense scrutiny as to its implications. *See e.g.*, Bethany Braun-Silva, LGBTQ Book Opt-Out Ruling Triggers National Response from Parents, Educators, Advocates, ABC News (July 2, 2025).[2] The district court delivered its opinion on August 7, 2025, just six weeks after *Mahmoud*.

There are so many aspects of *Mahmoud* that deal directly with the circumstances and issues of the case before this Court, it remains a headscratcher why the district court would completely ignore Supreme

[2] https://abcnews.go.com/GMA/Family/lgbtq-book-opt-ruling-triggers-national-response-parents/story?id=123277797.

Court precedent, as if it never had happened. The district court could have at least attempted to distinguish *Mahmoud* in some way, although that would have been a stretch. *See infra*. Instead, the district court just ignored it entirely.

In doing so, the district court made its opinion eminently reversible.

### B. The District Court Ruled Contrary to *Mahmoud* on Many of the Same or Similar Issues Decided in *Mahmoud*.

It is a fair question whether the district court even read the *Mahmoud* decision before issuing its opinion. Many of the discrete issues the district court considered already had been squarely addressed and foreclosed by *Mahmoud*.

#### 1. The District Court Pronounced *Mahmoud*-Foreclosed Solutions.

In considering the thorny Free Exercise issues[3] of transgender roommates (and potentially, bedmates) and opposite-sex shower

[3] For a motion to dismiss under Rule 12 of the Federal Rules Civil Procedure, the plaintiff's well-pleaded factual allegations are deemed to be true and should be viewed in the light most favorable to the (Cont'd) plaintiff. *Casanova v. Ulibarri*, 595 F.3d 1120, 1124–25 (10th Cir. 2010). In addition, the defendants-appellees have not challenged the

overseers, the district court cited reasoning that these issues could be resolved because the plaintiff parents "'ha[d] a right to remove their children from [the school] if they disapprove of transgender student access to facilities,'…." *Wailes et al. v. Jefferson Cnty. Public Schs. et al.*, No. 1:24-cv-02439-RMR-NRN, 2025 WL 2530790 at *4 (D. Colo. Aug. 7, 2025) (quoting *Parents for Privacy v. Barr*, 949 F.3d 1210, 1230 (9th Cir. 2020)). That very same argument—removing children from school—had been made and rejected in *Mahmoud*. Specifically, *Mahmoud* rejected out of hand the idea that it is a reasonable and constitutional option to force parents to remove their children from public schools when school policies burden their Free Exercise rights. 606 U.S. at 560–61 ("Public education is a public benefit, and the government cannot 'condition' its 'availability' on parents' willingness to accept a burden on their religious exercise.").

The district court also opined that "Nothing about Jeffco's policy prohibits parents from teaching their children certain values." 2025 WL 2530790 at *5. Just six weeks earlier, *Mahmoud* had rejected that

---

genuinely religious nature of the plaintiff-appellants' objections to the circumstances presented in this case. *See* 3.App.617–637.

rationale also. 606 U.S. at 547 ("[T]his is not merely a right to teach religion in the confines of one's own home. Rather, it extends to the choices that parents wish to make for their children outside the home.").

### 2. The District Court Mischaracterized Plaintiffs' Requests for Reasonable Accommodations (Similar to *Mahmoud* Opt-outs).

As discussed in more depth below, the plaintiff parents have asserted religiously based requests for relatively convenient accommodations from discrete events. The parents never have maintained that other students in Jefferson County Schools must be likewise shielded from transgender roommates/bedmates or transgender shower overseers. The parents merely do not want their *own* children subjected to what they view as religiously objectionable activities.

Nonetheless, the district court *ignored these facts altogether*, instead pronouncing that the parents had no "right to dictate the *curriculum*." 2025 WL 2530790 at *4 (emphasis added) (again citing the Ninth Circuit's decision in *Barr*, 949 F.3d at 1229). The plaintiffs in this case never have made any demands concerning curriculum. The

rooming and showering arrangements to which the plaintiffs objected were a far cry from academics. The objections of the Perlmans and their daughter, in fact, were about traveling to play basketball games. 2.App.376. While some of these arrangements supported admittedly curricular events (Outdoor Lab, for instance, 2025 WL 2530790 at *1), it is an intolerable stretch of the facts to indicate that these plaintiffs were attempting even to influence curriculum, much less "to dictate the curriculum."

The district court's sweeping expansion of the actual facts can hardly be ignored, when considering another of the opinion's pronouncements:

> While parents *may have*[4] the right to instill moral and religious values in their children, parents have no right to replace public education with their own personal views nor a right to control each and every aspect of their children's education and oust the state's authority over that subject.

*Id*. at 3 (emphasis added).

---

[4] There is no question whether the parents "*may have*" a right to instill moral and religious values in their children. Such a right is guaranteed by the U.S. Constitution. *See e.g., Yoder,* 406 U.S. at 213. Notably and unfortunately, *Yoder* (like *Mahmoud*) is another pertinent Supreme Court case the district court failed even to discuss. (The district court only cited *Yoder* once, 2025 WL 2530790 at *4, for a proposition in Justice White's concurrence in *Yoder*, unrelated to the discussion above.)

The facts in this case do not indicate that the plaintiff parents were trying to "replace public education with their own personal views," nor to "control each and every aspect of their children's education," nor to "oust the state's authority over that subject." Rather, they were trying to protect their *own* children during discrete events for which reasonable accommodations were available.

The district court did not limit its factual expansion to an alleged parental assault on school curriculum. The district court cited the Ninth Circuit's *Barr* decision, again, for the proposition that the parents' Free Exercise rights "did not include a right 'to direct school administration more generally' or to direct the school's bathroom and locker room policy." *Id.* at *4. Such a rationale might have had more force if the plaintiff parents actually were attempting to do such a thing. Again, the actual facts in this case demonstrate only the plaintiffs' reasonable desire to protect their *own* children during discrete events for which reasonable accommodations were available. There was no indication the plaintiff parents were seeking to enjoin the challenged policy *as such*. *See, e.g.*, Amended Complaint, ECF No. 36 at pg. 66 (Prayer for Relief

seeking injunctive relief requiring only notice and opt-outs for plaintiff parents' children).

On the other hand, the district court's consideration of parental rights in non-curricular contexts was not the problem. *Mahmoud*'s holding applies to school activities beyond merely academic curriculum. *See* Part D, below. The problem was that the district court based its reasoning on a perceived widespread interference with general school-wide curriculum, practices and policies. The facts of this case do not support the court's reasoning.

The same sort of accusations surfaced in *Mahmoud*. Unlike the district court here, the Supreme Court addressed it as follows:

> We acknowledge that 'courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education. … It must be emphasized that what the parents seek here is not the right to micromanage the public school curriculum, but rather to have their children opt out of a particular educational requirement that burdens their well-established right 'to direct 'the religious upbringing' of their children.' … We express no view on the educational value of the Board's proposed curriculum, other than to state that it places an unconstitutional burden on the parents' religious exercise if it is imposed with no opportunity for opt outs. Providing such an opportunity would give the parents no substantive control over the curriculum itself.

606 U.S. at 568 (internal citations omitted).

### C. The Brilliance of *Mahmoud* is That it Honored Widely Popular Parental Opt-outs—Including Colorado's—Which Allow Courts to Avoid the Quagmire the District Court Waded Into.

One of the key facts in this case is that the plaintiff parents never requested any change in school curriculum or school policies. Rather, they simply wanted to exempt their *own* children from discrete events involving transgender roommates and opposite-sex shower overseers, for which reasonable accommodations were available.

The plaintiff parents' goals bring them under the protection of a long line of Supreme Court precedent allowing parents to remove their own children from discrete educational situations, particularly where it conflicts with their religious convictions. *See e.g., Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (children in religious schools exempted from attending public schools); *Yoder*, 406 U.S. 205 (Amish parents' Free Exercise rights exempt their children from high school); *Board of Education v. Barnette*, 319 U.S. 624 (1943) (Jehovah Witness child exempted from school board regulation compelling flag salute and pledge).

The Constitutional history and tradition that grew out of these cases, *see Yoder*, 406 U.S. at 232, led to and informed the growth of what is now widely known as "opt-out" or "opt-in"[5] statutes. The opt-out/opt-in statutes swept the nation during the rise of the sex-ed era. This was a popular movement for parents' rights to protect their children from what they considered to be pernicious, contra-religious teaching or activities, usually involving sexual issues. Beginning with a few state statutes in the 1970s and continuing through the last decade, forty-seven states and the District of Columbia now provide parental opt-outs or opt-ins. *See Amici Curiae* Brief of Protect Our Kids (California), *et al.*, in support of Petitioners, at pp. 7-11 (March 10, 2025), in *Mahmoud v. Taylor*, No. 24-297 (U.S.).[6]

---

[5] Opt-in statutes typically require that the school cannot teach particular matters to a child unless the child's parents first expressly agree. It requires the parent to take an affirmative act before certain teaching can take place. Opt-out statutes, on the other hand, presume the instruction will take place, unless the parent expressly requests to opt-out the child. From some perspectives, particularly that of a conscientious parent, opt-in statutes are preferable to opt-outs. An opt-in statute assures parents that their child is not being subjected to arguably controversial moral teaching simply because of forgetfulness in providing an opt-out form or some sort of communication breakdown. It also resolves recurring issues of inadequate notice to parents.

[6] https://www.supremecourt.gov/DocketPDF/24/24-297/351653/20250310155834607_No.%2024-297_Amicus%20Brief.pdf.

The Jefferson County Schools have operated under Colorado's opt-out provision since 2013. Colo. Rev. Stat. §§ 22-25-104(6)(d) and 22-1-128(3)(a), (4) and (5).

The ubiquity of these opt-out/opt-in provisions shows a virtual national consensus on the rights of parents to control the way their children are introduced to the sensitive, spiritual issues that surround sexuality. These statutes also represent a rational compromise between parents' rights and educators' curricular-control interests.

The requests of the plaintiffs in the case before this Court are similar to the opt-out provisions considered by the Supreme Court in *Mahmoud*. The requests for accommodations in the case before this Court, like opt-outs, are relatively easy for courts to apply, as compared to the more complicated process when courts are asked to evaluate broadly based curricular disputes. Such accommodations alleviate courts' stated and unstated reservation from being repeatedly dragged into the details of school-based disputes. Also, it makes sense for court decisions to encourage popular support for treating matters of sexual development with restraint and principled compromise, as

demonstrated by the plaintiff parents' requests in the case before this Court.

Had Jefferson County Schools accommodated the parents' reasonable request, this case likewise would not have required any court to dig into school-day details or to evaluate competing ideologies, as the district court below did.

### D. *Mahmoud* Applies in School-Based Free Exercise Cases Beyond Strictly Curricular Disputes.

Finally, there is no serious doubt that Jefferson County Schools' transgender room-and-board policy "imposes a burden" on the plaintiff parents "of the same character as that in *Yoder*," *Mahmoud*, 606 U.S. at 565, even if the policy is not strictly curricular.

In *Mahmoud*, the Supreme Court clarified that whenever "a *law*" imposes a burden on parents' religious beliefs that is of "the same character" as the religious burden imposed in *Yoder*, strict scrutiny applies. *Id.* (emphasis added). Such a burden exists where "government *policies* . . . substantially interfere with the religious development of [the plaintiff parents'] children" or "pose a very real threat of undermining the religious beliefs and practices that parents wish to instill in their children." *Id.* at 543, 546 (emphasis added) (internal

quotes omitted); *see also id.* at 549 ("[T]he Free Exercise Clause protects against *policies* that impose more *subtle forms* of interference with the religious upbringing of children." (Emphasis added.)).

*Mahmoud* further explained that the "same character" inquiry turns in part on "the specific nature of the educational *requirement or* curricular feature at issue." *Id.* at 550 (emphasis added). In other words, school "requirements" beyond "curricular features" can trigger strict scrutiny under *Yoder* and *Mahmoud*.

*Yoder* itself confirms as much. There, the Supreme Court explained that ordinary high school education was contrary to Amish beliefs in part "because it places Amish children in an *environment* hostile to Amish beliefs," including via "pressure to conform to the *styles, manners, and ways of the peer group*." *Yoder*, 406 U.S. at 211 (emphasis added). The Court relied on testimony from an Amish society expert, who stated "that the modern high school is not equipped, in curriculum *or social environment*, to impart the values promoted by Amish society." *Id.* at 212 (emphasis added). Thus, a high school's curriculum *or* "social environment" can cognizably burden parents'

religious upbringing of their children sufficient to trigger strict scrutiny under *Yoder* and *Mahmoud*.

This makes sense in a school setting, where learning and development take place in dynamic and manifold ways. As the Ninth Circuit explained in a pre-*Mahmoud* parental rights' challenge to an educational requirement:

> [N]either education itself nor the legitimate functions of a public school are limited to the curriculum. Such a view construes too narrowly the aims of education and fails to recognize the unique role that it plays in American society. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (stating that public education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation"); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (calling public education "a most vital civic institution for the preservation of a democratic system of government"). One need review only the Supreme Court's unanimous decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), for a reminder of the state's compelling interest in the broad ends of education, **the scope of which extend far beyond "curriculum."**

*Fields v. Palmdale Sch. Dist.*, 427 F. 3d 1197, 1209 (9th Cir. 2005) (emphasis added) (some internal citations omitted). This can be no less true after *Mahmoud*. *See, e.g.*, *Mahmoud*, 606 U.S. at 592-93 (Sotomayor, J., dissenting) (asserting that "[p]ublic schools . . . offer . . . an opportunity to practice living in our multicultural society")

(emphasis added). Plainly *extra*-curricular policies can "expose [the plaintiff parents'] children to . . . attitudes, goals, and values contrary to their beliefs" and thus "substantially interfere with the religious development of [their] child." *Mahmoud*, 606 U.S. at 549 (cleaned up) (quoting *Yoder*, 406 U.S. at 218); *accord Doe No. 1 v. Bethel Local Sch. Dist. Bd. of Educ.*, No. 23-3740, 2025 WL 2453836, *12 (6th Cir. Aug. 26, 2025) (Larsen, J., concurring) ("All sorts of non-curricular school rules . . . can interfere with parents' religious upbringing of their children.").

Ironically, the district court repeatedly relied on the Ninth Circuit's pre-*Mahmoud* decision in *Barr* without acknowledging the import of its separate decision in *Fields*. *See Wailes*, 2025 WL 2530790, at *3, *4, *5, *6, *8, & n.9 To be sure, *Barr* held that students allegedly lack "a fundamental right not to share restrooms and locker rooms with transgender students who have a different [biological] sex than theirs." 949 F.3d at 1223. But that is simply not true after *Mahmoud*, which protects the right to *opt out* of school-imposed burdens of "the same character" as those in *Yoder*. And *Fields* confirms "the scope of" education that can burden parents' religious rights—and trigger a right

to notice and opt-out—"extend[s] far beyond 'curriculum.'" 427 F.3d at 1209.

Accordingly, Jefferson County Schools must allow opt-outs for the plaintiff parents' children or otherwise undergo strict scrutiny—which it woefully fails under *Mahmoud*. *See* Plaintiffs-Appellants' Opening Br. at 39-42. Indeed, "the [school] cannot purport to rescue one group of students from stigma and isolation by stigmatizing and isolating another." *Id.* at 568. "A [school] environment that is welcoming to all students is something to be commended, but such an environment cannot be achieved through hostility towards the religious beliefs of students and their parents." *Id.* The same is plainly true here.

## CONCLUSION

The decision below should be reversed.

Respectfully submitted,

/s/ Peter Breen
Peter Breen
Matthew F. Heffron
Michael G. McHale
THOMAS MORE SOCIETY
309 West Washington Street
Suite 1250
Chicago, IL 606060
312-782-1680
pbreen@thomasmoresociety.org

Counsel for *Amicus Curiae*

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 3,202 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a 14-point proportionally spaced Century Schoolbook typeface using Microsoft Word for Microsoft 365 MSO.

/s/ Peter Breen
*Attorney for Amicus Curiae*

## CERTIFICATE OF SERVICE

On November 26, 2025, a true and correct copy of this brief was filed with the electronic case filing (ECF) system of the U.S. Court of Appeals for the Tenth Circuit, which currently provides electronic service on the counsel of record.

/s/ Peter Breen
*Attorney for Amicus Curiae*