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U.S. SUPREME COURT DECIDES GAME-CHANGING RELIGIOUS FREEDOM CASE

The First Amendment guarantees us the right to free exercise of religion. In numerous cases over the past century, the U.S. Supreme Court has provided guidance on when government may burden citizens' free exercise rights, and when those rights must be accommodated in the public school setting. On June 27th, the final day of its term, the U.S. Supreme Court issued its latest pronouncement on the subject.

In *Mahmoud v. Taylor*, https://www.supremecourt.gov/opinions/24pdf/24-297_4f14.pdf, the Court addressed parents' religious objections to readings from "LBGTQ+-inclusive" storybooks to their elementary school-age children. The case arose from a clash between parents from diverse religious backgrounds and school officials in Montgomery County, Maryland, over the school district's refusal to allow opt-outs from lessons where these stories were presented. In a 41-page opinion on behalf of the six-member conservative majority authored by Justice Samuel Alito, the Court held that when a district's curricular choices interfere with parents' religious upbringing of their children, the district owes parents a duty of reasonable accommodation – an opt-out, in this case -- which cannot be denied absent a compelling justification that wasn't shown here. The Court further ordered the district to notify the parents in advance whenever one of the books or any similar book was going to be used. Justice Sonia Sotomayor, joined by two other Justices from the Court's liberal wing, filed a vigorous dissenting opinion.

It's important to note that this decision was entered at the preliminary injunction stage of the proceedings. Technically, all the Court ruled is that the parents stand a good enough chance of prevailing at the end of the case that they're entitled to this relief while the litigation goes forward in the lower courts. Still, the Court majority has tipped its hand on where it stands on the ultimate issue in the case, and essentially announced a rule that, as a practical matter, binds all school districts in the Nation effective immediately.

Many judicial decisions are written in dense legalese that only lawyers and judges can understand. This one is quite readable (intentionally so, we think) and board members and administrators are encouraged to review both the majority and dissenting opinions, which sharply articulate the opposing positions on the Court. There may be many in the New Jersey public school community who agree with the dissenters' views, but this Alert will focus on the majority opinion as it now represents controlling law.

Much of the debate in this case centered on whether the stories, and especially their manner of presentation, were intended merely to expose students to non-traditional versions of sexuality to foster tolerance and respect, or to coerce them into conforming to a

particular mindset about what versions of sexuality are acceptable. The Court majority observed that the books in this case were "unmistakably normative[,] . . . clearly designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected." One of the books included a discussion guide suggesting that "at any point in our lives, we can choose to identify with one gender, multiple genders, or neither gender," and asked children "What pronouns fit you best?"

To facilitate classroom discussion, the district provided teachers with a guidance document suggesting how to respond to students' questions. For example, if a student asked, "what is transgender?", it was recommended that teachers explain: "When we're born, people make a guess about our gender and label us 'boy' or 'girl' based on our body parts. Sometimes they're right and sometimes they're wrong." Teachers were encouraged to "disrupt the either/or thinking" of their students. The Court found that the lessons were clearly intended to inculcate values and viewpoints that directly conflicted with the religious beliefs of the Muslim and Christian parents who complained that the instruction interfered with their children's religious upbringing.

The district argued that allowing opt-outs wasn't feasible, but the Court wasn't persuaded. For starters, the district allowed opt-outs for various other course offerings and could not provide a convincing explanation for why it could not be done here. The district's fallback position was that allowing too many opt-outs would cause significant disruption to the classroom environment, and permitting some students to exit the classroom would expose other students to social stigma and isolation. To this, the Court responded: "The Board is doubtless aware of the presence in Montgomery County of substantial religious communities whose members hold traditional views on marriage, sex and gender. When it comes to instruction that would burden the religious exercise of parents, the Board cannot escape its obligations under the Free Exercise Clause by crafting a curriculum that is burdensome that a substantial number of parents elect to opt out."

There are some important nuances to the Court's decision that help inform our firm's guidance to our clients. First, the Court made clear that nothing in its decision limits what school districts can teach. It was only addressing the right of religious parents to have their children excused from certain lessons. Second, the parents in this case were able to articulate specific reasons why the lessons conflicted with their religious beliefs and interfered with the religious upbringing of their children. Third, the Court emphasized a distinction between lessons targeted at highly impressionable elementary school students, and those taught at the high school level where students may be mature enough to decide for themselves what viewpoints they wish to embrace. Fourth, the Court distinguished between coursework presented in a neutral manner in the academic study of a subject, and pressuring students to

conform to a particular viewpoint. (Not unlike the distinction between a comparative religion course and religious instruction). Fifth, the Court did not grant parents *carte blanche* to insist on any accommodation they desired, nor did the majority foreclose the possibility that in some cases there may be no feasible accommodation. It simply held that on the facts of this case, the district had no persuasive reason to deny the particular opt-out accommodation at issue.

The Supreme Court typically paints with a broad brush, establishing general rules for the lower courts to apply to specific facts in future cases. So, until our own federal appeals court governing New Jersey applies *Mahmoud*'s holding to different scenarios that we suspect will arise in the near future, there is much that is unclear about the impact of the Court's decision. There are, nevertheless, several take-aways that New Jersey school districts should seriously consider:

1. Nothing in the Court's decision imposes any limitations on what school districts can teach, what messaging is permissible regarding LGBTQ+ issues, or what celebrations are legally ok (e.g. "Pride Month"). Nor does the decision empower students to engage in "harassment, intimidation or bullying" (HIB) toward fellow students whose sexuality they may find religiously offensive, or in any way address districts' legal obligations to accommodate transgender students. The only issue before the Court was whether parents should be able to opt their children out of lessons they believe interfere with their children's religious upbringing. That said, there remain unresolved legal issues concerning the implications of the Trump Administration's policy pronouncements regarding so-called "radical ideology," the boundary line between HIB and speech protected by the First Amendment, and the extent of legally-required accommodation for transgender students under Title IX and the New Jersey Law Against Discrimination that are the subject of ongoing litigation and beyond the scope of this Alert.

2. Once certain parents have requested notice of lessons they find religiously objectionable, develop a protocol for informing them when those lessons are going to be taught.

3. Do not reflexively dismiss religious opt-out requests. Once parents request to opt their child out of lessons they find religiously objectionable, develop a process for evaluating whether, and how, to accommodate the request. Nothing in the majority opinion placed any guardrails on what sort of lessons could be targeted for this

accommodation. As the dissenting opinion argued, "[n]ext to go could be teaching on evolution, the work of female scientist Marie Curie, or the history of vaccines." Until the lower federal courts provide more clarity in future cases, we recommend that school administrators treat religious opt-out requests in a manner similar to disability accommodation requests. Start with an "interactive discussion" about what the real concern is, and attempt to reach an outcome that's administratively feasible. Apply the "what's the big deal" test in determining to grant or deny a particular request.

4. The parents in *Mahmoud* were able to clearly articulate specific reasons why the lessons interfered with the ability to control their children's religious upbringing. We are comfortable taking the position that districts may ask objecting parents to do the same. It may not be your place to judge the validity of those objections, even if you have a different view of what that particular religion requires, but it is not unreasonable to ask parents for an explanation before proceeding further.

5. One of the problems faced by the district in *Mahmoud* was that the storybook readings in question were not shoe-horned into one particular course, like sex education, that students could easily opt-out of without causing disruption throughout the school day. If you anticipate numerous religious objections to particular lessons, consider presenting them in one particular course, or period of the day, so opt-outs and advance notice do not pose the logistical problem that the Montgomery County district created for itself.

6. Title 18A requires districts to infuse the curriculum with instruction on the contributions of various groups that have been historically underrepresented in the telling of our nation's story. N.J.S.A. 18A:35-4.36a goes even further, requiring districts to "*highlight* and *promote* diversity, including economic diversity, equity, inclusion, tolerance, and belonging in connection with gender and sexual orientation, race and ethnicity, disabilities, and religious tolerance[.]" (Emphasis added.) It is one thing to "highlight" to students the *existence* of individuals who may be different from themselves and to encourage tolerance and respect for all in the school community. It is quite another to "promote" a particular mindset or viewpoint on whether certain versions of sexuality or lifestyle choices are "good" or to be celebrated, especially with impressionable elementary school students who may feel pressured to conform. To avoid the same problems the district faced in *Mahmoud*, we recommend that this

distinction be made clear to the teaching staff. Also, since many teachers have strongly held opinions on all sides of this issue, which they are entitled to as private citizens, they should be reminded that while on duty they cannot use their classroom as soapboxes to advocate their own personal viewpoints on these matters.

Mahmoud is a game-changer, for sure, so please reach out to our firm with any questions about this important issue.