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**Pro Hac Vice Motion Forthcoming*

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

AURORA REGINO, **Plaintiff,** **vs.** **SUPERINTENDENT KELLY STALEY, in her official capacity; CAITLIN DALBY, in her official capacity; REBECCA KONKIN, in her official capacity; TOM LANDO, in his official capacity; EILEEN ROBINSON, in her official capacity; and MATT TENNIS, in his official capacity,** **Defendants.**	**Case No.: 2:23-cv-00032-JAM-DMC** **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** Hearing Date: February 28, 2023 Time: 1:30 p.m. Complaint Filed: January 6, 2023 Trial Date: Not Yet Set

Plaintiff Aurora Regino hereby submits this Reply to Defendants' Opposition to her Motion for Preliminary Injunction. For the following reasons, the Court should grant the Motion.

ARGUMENT

Ms. Regino has demonstrated each of the preliminary injunction factors. Defendants (the "District") argue that Ms. Regino's Motion should be subject to a heightened legal standard because she seeks a mandatory and not a prohibitory injunction. But in *Hernandez v. Sessions*, the Ninth Circuit held that, to the extent there is any distinction between the two, a prohibitory injunction "prevents future constitutional violations." 872 F.3d 976, 998 (9th Cir. 2017) (collecting cases). That is precisely what Ms. Regino seeks here. (Dkt. No. 2.) Under *Hernandez*, Ms. Regino thus seeks a prohibitory injunction. Further, under the "sliding scale" approach, "a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). While Ms. Regino has made a strong showing on all of the factors, application of the sliding scale confirms that preliminary relief is warranted here.

I. MS. REGINO IS HIGHLY LIKELY TO SUCCEED ON THE MERITS

A. The Policy Violates Substantive Due Process

1. The Policy Violates Ms. Regino's Parental Rights

The District repeatedly mischaracterizes the scope of the right that Ms. Regino asserts. For example, the District claims that "[t]he question is whether a parent . . . [has] the right to know their child's transgender status." (Opp'n at 14:14–16; *see also id.* at 13:21–22, 15:16–18, 19:6–8, 22:14–16, 23:8–11.) This is false: Ms. Regino does not contend that the District has a generalized obligation to inform parents about the transgender identity of their children. Instead, Ms. Regino seeks to vindicate a much narrower right: that *if the District takes affirmative steps to socially transition students*, it must obtain parental consent.

Correctly framed, it is clear the Policy violates the right. The District takes issue with Ms. Regino's citation to out-of-circuit case law demonstrating that the Policy interferes with her right to control her children's "important decisions," but the principles those cases stand for are directly derived from Supreme Court authority. Parents—and not the state—have the "primary role" in raising their children. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). This includes the right to make the "important decisions" in the lives of their children, *H. L. v. Matheson*, 450 U.S. 398, 410 (1981), which includes being recognized under a new name and gender identity. Family bonds also create "personal relationships [that are entitled to] a substantial measure of sanctuary from unjustified interference by the state," *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984), which the District violates by secretly socially transitioning students. The District asserts that Ms. Regino has not articulated how the Policy interferes with her relationship with her children, but the interference is plain: in addition to altering the nature of the parent-child bond, parents cannot guide their children through this significant decision if parents are kept unaware. By interposing itself as the decisionmaker on this potentially life-altering issue, the District impermissibly interferes with protected familial relationships.

The District barely addresses Ms. Regino's arguments that the Policy (1) impermissibly authorizes the District to perform psychological treatment on children and (2) necessarily results in the District providing (a) substandard care (because parents and mental health professionals are not involved) and (b) unethical care (because children cannot provide informed consent). Indeed, the District's only response is that "transgenderism is not a medical concern." (Opp'n at 17:13.) But this fact only makes the Policy more problematic. By its own admission, the District is administering psychological treatment to children *who do not need it*, thus harming the majority

of minors who would otherwise desist but for the District's reckless act of solidifying their transgender identity through social transitioning. (Levine Aff. ¶ 109; Compl. ¶ 38.)

As for those students whose transgender identity *does* give rise to a medical concern—*i.e.*, gender dysphoria or an associated co-morbidity—the Policy prevents parents from even *knowing* their children may be in distress. Because children are unable to obtain medical care without their parents' involvement, Cal. Fam. Code § 6922, the Policy results in these children not getting the proper help they may need. Moreover, the District is providing medically unethical care, which violates the Constitution. *See Mann v. Cnty. of San Diego*, 907 F.3d 1154, 1162 (9th Cir. 2018) ("[P]arental consent is critical in medical procedures . . . because children rely on parents . . . to provide informed permission for medical procedures.") (cleaned up).

Contrary to the District's suggestion, Ms. Regino's claim is not barred by *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005) ("*Fields I*"), *opinion amended on denial of reh'g sub nom. Fields v. Palmdale Sch. Dist. (PSD)*, 447 F.3d 1187, 1190–91 (9th Cir. 2006) ("*Fields II*"). Socially transitioning a minor has nothing to do with the school's "curriculum," nor does it involve the mere "provi[sion] . . . of information" to students. *Fields I*, 427 F.3d at 1205, 1200. Moreover, requiring parental notice and consent to socially transition their children does not implicate the administrability concerns that would follow if "all parents [had a] constitutional right to dictate individually" what the school teaches. *Id.* at 1205.

Similarly, requiring schools to obtain parents' notice and consent before socially transitioning their children does not intrude on schools' ability to "direct *how* a public school teaches their child[ren]," which includes control over day-to-day management issues like "the hours of the school day," "the timing and content of examinations," or "the extracurricular activities offered at the school." *Parents for Priv. v. Barr*, 949 F.3d 1210, 1231 (9th Cir. 2020)

(emphasis in original). Instead, the Policy requires the District to administer psychological treatment to students. Excluding parents from these potentially life-altering decisions is plainly different from routine school-management like the time of the opening bell.

In short, Ms. Regino has the right "to have a say in what [her] minor child[ren are] called" by their school. *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-cv-04015-HLT-GEB, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022). At the very least, the District must provide her *notice* that it is socially transitioning her children. *Hodgson v. Minnesota*, 497 U.S. 417, 483 (1990) (noting the "common law . . . right of parents . . . to be notified of their children's actions") (Kennedy, J., concurring and dissenting).

Finally, the District contends the "shocks the conscience" test—and not strict scrutiny—applies here. (Opp'n at 13:9.) But the "shocks the conscience" test applies only to infringements of liberties caused by the "specific act[s] of a governmental officer." *Cnty. Of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). It does not apply to school policies that interfere with fundamental rights, like the Policy does here. *See, e.g,, Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 951–52 (9th Cir. 1997) (applying strict scrutiny to curfew ordinance); *Frudden v. Pilling*, 742 F.3d 1199, 1207 (9th Cir. 2014) (applying strict scrutiny to school policy compelling student speech). Accordingly, strict scrutiny—and not the "shocks the conscience" test—applies here.

2. The Policy Does not Satisfy Strict Scrutiny

The District cannot satisfy strict scrutiny. The District argues that "minor students . . . have a privacy right to maintain their gender identity secret from their parents." (Opp'n at 14:27–28.) But as noted, the issue here is the school's actions, not a child's secret. Further, minors do not have privacy rights against their parents sufficient to overcome parents' rights. Thus, privacy is not a

compelling interest. *Ricard*, 2022 WL 1471372, at *8 (concluding school had no "interest in withholding or concealing" its efforts to socially transition children).

The District cites *Whalen v. Roe*, in which the Supreme Court listed certain types of personal information and decisions that are protected from governmental interference. 429 U.S. 589, 599 n.26 (1977). This list does not include minor children's right to keep their transgender identity secret from their parents, and the Supreme Court has never held that such a right exists.

The District also cites *Nguon v. Wolf*, a district court decision that held a minor student had a privacy right to keep her sexual orientation secret from her parents. 517 F. Supp. 2d 1177 (C.D. Cal. 2007). But *Nguon* does not help the District. As an initial matter, insofar as *Nguon* is grounded in substantive due process, it is inconsistent with *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). There, the Supreme Court forcefully reiterated that substantive due process gives heightened protection only to those rights that are "deeply rooted in . . . history and tradition and . . . essential to . . . ordered liberty." *Id.* at 2246 (cleaned up). *Nguon* did not apply that test. Moreover, insofar as *Nguon* is grounded in the "right to privacy" line of cases, it is easily distinguishable on the ground that none of those cases involved minors' privacy rights against their parents, much less the government's claim to keep secret from parents its provision of medical treatment to the child. *Id.* at 2257–58 (discussing "right to privacy" cases).

Moreover, *Nguon* relied primarily on *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000). *Sterling*, however, *did not involve a minor*. *Id.* at 192. Instead, the plaintiff in *Sterling* was the estate of an *eighteen-year-old*. *Id.* Adult privacy rights are not relevant to the rights minor children may (or may not) have against their parents. *See Bellotti v. Baird*, 443 U.S. 622, 640 (1979) ("[P]arental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions."), *overruled on other grounds by Dobbs*, 142 S.

Ct. 2228. Indeed, the only circuit court to address the question stated that student privacy rights *do not* "preclude[] school authorities from discussing with parents matters that relate to the interests of their children." *Wyatt v. Fletcher*, 718 F.3d 496, 505 (5th Cir. 2013). *Nguon* thus stands alone.[1]

Further, *Nguon* held that students have no privacy right where there is no "reasonable expectation" of privacy. 517 F. Supp. 2d at 1191. The student in *Nguon* had such an expectation because she had only "come out" to "five friends." *Id.* Here, by contrast, the Policy requires all teachers, administrators, and students in the District to refer to the student "by name and the pronouns consistent with the student's gender identity" throughout the school environment. (Admin. Reg. #5145.3 at 5.) Accordingly, students who the District socially transitions have no reasonable expectation that their parents will not learn about it. This is especially true for Ms. Regino, who "engages with her children's schools to ensure that she is informed about what occurs in their lives." (Compl. ¶ 11.) Her children thus have no expectation of privacy.

Finally, the District's argument admits to a constitutional violation insofar as it is predicated on speculative prejudging of parental reactions. It would be "repugnant to the American tradition" to assume "that governmental power should supersede parental authority in *all* cases because of [the actions] of *some* parents." *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *see also Ricard*, 2022 WL 1471372, at *8 ("The policy is overinclusive because it prohibits [parental knowledge] without any assessment of whether disclosure would actually pose a risk."). This is

[1] The other cases the District cites are distinguishable the same ground. *Nelson v. NASA*, 568 F.3d 1028, 1037–38 (9th Cir. 2009) (Wardlaw, J., concurring) (discussing privacy rights of adults); *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (same). The District also cites *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, No. 8:20-3552-PWG, 2022 WL 3544256 (D. Md. Aug. 18, 2022), but that case did not hold that minor children have a right to keep their transgender identity secret from their parents. Instead, the court in *Parents 1* considered only whether the parental right encompasses the "right to be promptly informed of their child's gender identity." *Id.* at * 7. As noted, that is not the argument Ms. Regino makes here.

especially true for Ms. Regino, who has demonstrated that she is a fit parent who loves her children and will do what she believes is best for them regardless of their gender identity.

C. The Policy Does not Comport with Procedural Due Process

The District does not contend that the Policy creates adequate procedural protections. Rather, the District argues only that Ms. Regino has no liberty interest. For the reasons set forth in Section I.A., that argument is wrong. Moreover, even if Ms. Regino's parental rights were not "fundamental," the Ninth Circuit has held that the procedural component of the Due Process Clause protects liberty interests beyond those deemed "fundamental." *See, e.g.*, *Brittain v. Hansen*, 451 F.3d 982, 999 (9th Cir. 2006) (holding parents have a "liberty interest" in a single instance of child visitation). At the very least, the Policy infringes Ms. Regino's non-fundamental liberty interests. *Id.* The Policy thus violates Ms. Regino's procedural due process rights.

II. MS. REGINO FACES IRREPARABLE HARM

1. Ms. Regino's Alleged "Delay" Does not Undermine her Showing of Harm

The District argues that Ms. Regino's alleged delay in bringing suit counsels against a finding of irreparable harm. This argument is without merit. Delay is "only one factor among . . . many" when assessing irreparable harm. *Cuviello v. City of Vallego*, 944 F.3d 816, 833 (9th Cir. 2019). The Ninth Circuit is "loath to withhold relief solely" based on delay, especially in cases involving "constitutional injuries." *Id.* Further, courts should not "penalize [a plaintiff] for attempting to resolve [the] dispute without resorting to litigation." *Toyo Tire USA Corp. v. Mandala*, No. 8:20-cv-00502-JLS-KES, 2020 WL 5371513, at *6 (C.D. Cal. Aug. 4, 2020); *see also Ocean Garden, Inc. v. Marktrade Co., Inc.*, 953 F.2d 500, 508 (9th Cir. 1991) (similar). This is particularly true where the plaintiff was unrepresented by counsel. *Cuviello*, 944 F.3d at 833.

Also, only "long delay[s]" matter. *Id*. The Ninth Circuit routinely holds that delays longer than the one here are insufficient to undermine the presumption of constitutional irreparable harm. *Id.* (reversing conclusion that seventeen-month delay defeated showing of irreparable harm); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 798 (9th Cir. 2019) (excusing nine-month delay); *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1209 (9th Cir. 2000) (excusing five-month delay).

Here, Ms. Regino learned that the District had socially transitioned her daughter on April 8, 2022. (Compl. ¶ 35.) Over the next seven months, she had numerous email exchanges, phone calls, and in-person meetings with progressively higher ranked District officials regarding the Policy. (*Id.* ¶¶ 42–51.) At the start, District personnel led her to believe the Policy applied only at A.S.'s school. (Declaration of Aurora Regino, dated February 21, 2023 ("Regino Decl."), ¶ 6.) And at times, District personnel led her to believe she may be able to persuade the District to change the Policy. (*Id.* ¶ 8.) It was not until her in-person meeting with Superintendent Staley on October 10, 2022, that she fully appreciated the Policy was being applied District-wide. (*Id.*) On November 2, 2022, Superintendent Staley slammed the door on her final plea. (Compl. ¶ 52.)

Around that same time, Ms. Regino contacted counsel, with whom she discussed the benefits and burdens of bringing suit. (Regino Decl. ¶ 10.) Ultimately, on or about November 28, 2022, after many phone calls with counsel and deep reflection about filing suit, Ms. Regino engaged counsel. (*Id.* ¶¶ 10–11.) Over the next several weeks, counsel spent many hours working diligently to research the weighty constitutional issues involved, procure a 100+ page expert report, and draft a twenty-five-page verified complaint and a twenty-one-page preliminary injunction memorandum. (*Id.* ¶ 12; Dkt. No. 1–2.) On January 6, 2023, Ms. Regino filed suit while the District was still on winter break, which started on December 23, 2022. (Regino Decl. ¶ 13.) On these

facts, the delay of less than three months from the time Ms. Regino learned the Policy applied District-wide does not undermine her showing of irreparable harm.

2. The Threat to Ms. Regino's Rights is Imminent

The District also argues that Ms. Regino's harm is not imminent. But Ms. Regino is *currently* experiencing emotional distress arising from her concern that the District will (again) socially transition her children. (Compl. ¶ 48; *see also* Regino Decl.¶¶ 4–5.) This alone satisfies the imminence requirement. *Chalk v. U.S. Dist. Court*, 840 F.2d 701, 710 (9th Cir. 1988) (concluding that ongoing "emotional and psychological" injury is irreparable and "immediate").

Moreover, Ms. Regino has demonstrated a "substantial risk" that the District will apply the Policy against her children *in the future*. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) (affirming preliminary injunction based on "substantial risk" of future harm). The District previously socially transitioned A.S., which makes persistence of her transgender identity more likely, especially considering she is subject to the same stressors that accompanied her prior transgender identification. (Levine Aff. ¶ 109; Compl. ¶ 54). Further, there is also a "substantial risk" that C.S., A.S.'s younger sister, will develop a transgender identity. The District is "prompting students to question their . . . gender," (Compl. ¶ 2), and, in Ms. Regino's judgment, her children are too young to understand what having a transgender identity might mean for their lives (Regino Decl. ¶ 4), facts that makes their assumption (or resumption) of a transgender identity likely.

The Policy remains in force, creating the substantial risk that the District will (again) socially transition Ms. Regino's children in secret. The Court should not allow the District to advance a litigation position—lack of immediacy—based on its *own* unlawful failure to provide Ms. Regino notice of its actions. On these facts, Ms. Regino has established immediate harm.

III. THE EQUITIES TIP DECIDEDLY IN MS. REGINO'S FAVOR

Because Ms. Regino has made a strong showing on the merits, the District bears the burden of demonstrating that her proposed injunction will "seriously hamper significant governmental interests." *Cuviello*, 944 F.3d at 834. The District cannot make that showing. The only interest the District invokes is student privacy, but, as discussed, this argument fails. Further, the District has no legitimate interest providing students unconsented-to and inadequate psychological care, precluding students who need care from receiving it from a licensed therapist, and continuing to drive a wedge between students and their parents.

In the alternative, the District has no interest in keeping its social transitioning of *Ms. Regino's* children secret from her. Ms. Regino has demonstrated that she is a fit parent who loves and supports her children and will do what she believes is best for them regardless of their gender identity. Thus, the Policy should at least be enjoined as applied against her and her children.

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST

Finally, enjoining the Policy will benefit all parents and children in the District by stopping the District from providing un-consented to and inadequate psychological care, helping students who need it receiving psychological care, and fostering dialogue among parents, their children, and the District.

In the alternative, enjoining the Policy against Ms. Regino is in the public interest. The public has an interest in seeing that a fit parent may raise her children according to the principles she deems best, free from overbearing governmental intrusion.

CONCLUSION

For the foregoing reasons, Ms. Regino respectfully requests this Court grant her Motion for Preliminary Injunction and enter the relief requested therein.

Respectfully submitted,

Dated: February 21, 2023

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**Pro Hac Vice Motion Forthcoming*

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

AURORA REGINO, **Plaintiff,** **vs.** **SUPERINTENDENT KELLY STALEY, in her official capacity; CAITLIN DALBY, in her official capacity; REBECCA KONKIN, in her official capacity; TOM LANDO, in his official capacity; EILEEN ROBINSON, in her official capacity; and MATT TENNIS, in his official capacity,** **Defendants.**	**Case No.: 2:23-cv-00032-JAM-DMC** **PLAINTIFF'S RESPONSE TO DEFENDANTS' OBJECTIONS TO EXPERT AFFIDAVIT OF DR. STEPHEN B. LEVINE, MD** Hearing Date: February 28, 2023 Time: 1:30 p.m. Complaint Filed: January 6, 2023 Trial Date: Not Yet Set

Plaintiff Aurora Regino hereby submits her Response in Opposition to Defendants' Objections to the Expert Affidavit of Dr. Stephen B. Levine (the "Objection"). (Dkt. No. 21-4.) For the reasons set forth below, the Court should deny the Objection.[1]

INTRODUCTION

Defendants (the "District") seek exclusion of Dr. Levine's expert affidavit under Rule 702, but that request is premature. The Objection should be denied for that reason alone. Moreover, on the record before the Court, Dr. Levine's affidavit easily satisfies Rule 702's low bar for admissible expert testimony. Dr. Levine's opinions are based on specialized knowledge, the affidavit is relevant and reliable, and Dr. Levine has impeccable qualifications. His expert affidavit is therefore admissible, especially at this preliminary stage in the proceedings.

These conclusions are so obviously correct that they reveal the District had an ulterior motive in filing the Objection—namely, to try to undermine the weight of Dr. Levine's testimony by cherry-picking allegedly disputed assertions at the margin as the Court considers Ms. Regino's Motion for Preliminary Injunction. The Court should reject that effort. The Objection identifies only three opinions with which it disagrees in Dr. Levine's 100+ page expert affidavit, none of which bear upon Dr. Levine's central thesis in this case—*i.e.*, *that parents must be involved when a school socially transitions their children*. The District points out that other courts have found aspects of Dr. Levine's testimony in those cases to be unpersuasive, but, again, that prior testimony has no bearing on to the parent / child issues here. On that point, Dr. Levine's testimony is unopposed, unequivocal, and unassailable: parents must be involved when a school socially transitions their children. The Court should deny the Objection.

[1] Dr. Levine's expert affidavit was previously filed as Dkt. 1-1 and 18-3.

ARGUMENT

While the Objection is not styled as a "motion," it nevertheless asks the Court to "not consider Dr. Levine's declaration [sic] in consideration of the pending motion for a preliminary injunction, nor for any other purpose" under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). (Objection at 5:3–5.) Ms. Regino thus interprets the Objection to be a motion to strike Dr. Levine's expert affidavit under Rule 702, and she hereby opposes that motion.

The District's request to strike Dr. Levine's expert affidavit should be denied out of hand because it is premature. "A district court should not make a *Daubert* ruling prematurely, but should only do so when the record is complete enough to measure the proffered testimony against the proper standards of reliability and relevance." *Jahn v. Equine Servs., PSC*, 233 F.3d 382, 393 (6th Cir. 2000); *see also Process Specialties, Inc. v. Sematech, Inc.*, No. CIV. S-00-414 FCD PAN, 2002 WL 35646610, at *1 n.3 (E.D. Cal. Jan. 18, 2002) (denying *Daubert* motion as premature "without further discussion" and noting that the court will resolve all *Daubert* issues "after it has heard all dispositive pretrial motions"); *Barajas Centeno v. City of Carlsbad*, No. 3:19-CV-2098-L-DEB, 2021 WL 1605563, at *1 (S.D. Cal. Jan. 14, 2021) (denying *Daubert* motion as premature and allowing party to raise *Daubert* issues in its "summary judgment briefing" or in a "motion *in limine* filed after the final pretrial conference"). The record in this case—such as it is—is far too undeveloped to exclude Dr. Levine's expert affidavit under Rule 702. The Court should thus deny the Objection "without further discussion." *Sematech*, 2002 WL 35646610, at *1 n.3.

Given the obvious prematurity of the Objection and the paucity of the arguments it raises, it is clear that the District does not really expect the Court to *exclude* Dr. Levine's expert affidavit. Instead, the Objection was designed to be nothing more than an effort to persuade the Court that it

should not *credit* Dr. Levine's testimony in connection with its consideration of Ms. Regino's Motion for Preliminary Injunction. That argument, however, is not the proper basis of a request to strike an expert affidavit under Rule 702. *See, e.g.*, *Orgain, Inc. v. N. Innovations Holding Corp.*, No. 8:18-cv-01253-JLS-ADS, 2022 WL 2189648, at *4 (C.D. Cal. Jan. 28, 2022) (declining to exclude expert testimony based on objections that go to the "weight of the evidence, not its admissibility"). For that reason, the Court should not only deny the District's request to strike, but it should do so *with prejudice*. *See Don v. Omni Hotels Mgmt. Corp.*, No. 16-CV-0599-TUC-FRZ, 2017 WL 10635898, at *3 (D. Ariz. Aug. 3, 2017) (denying *Daubert* motion with prejudice when it focuses solely "on [the expert's] academic and professional credentials—conflating the issues of relevancy and witness qualification").

In any event, Dr. Levine's expert affidavit is admissible under Rule 702. The standard for admissibility of expert testimony under Rule 702 is a "liberal" one. *United States v. Lewis*, No. 21-50229, 2023 WL 1990544, at *1 (9th Cir. Feb. 14, 2023). The Court should admit expert testimony where it is based on specialized knowledge, is relevant and reliable, and the proposed expert has the appropriate qualifications. *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000); *see also Guilfoyle v. Beutner*, 2:21-cv-05009-VAP, 2021 WL 4594780, *11 (C.D. Cal. Sept. 14, 2021) ("At bottom, the Court must ensure that expert testimony 'both rests on a reliable foundation and is relevant to the task at hand.'") (quoting *Daubert*, 509 U.S. at 597). Any attack "on the soundness of an opinion . . . or the unorthodox nature of a witness's views usually go to the weight of the expert's opinion, not its admissibility." *Commodity Futures Trading Comm'n v. Monex Credit Co.*, No. 8:17-cv-01868, 2020 WL 7786540, at *16 (C.D. Cal. Dec. 28, 2020), *aff'd sub nom. U.S. Commodity Futures Trading Comm'n v. Monex Credit Co.*, No. 21-55002, 2021 WL 3057072 (9th Cir. July 20, 2021); *see also United States v. Riley*, No. 2:12-CR-00478-JAD, 2014 WL 537013,

at *5 (D. Nev. Feb. 7, 2014) ("In the context of *Daubert*, the focus is on the 'principles and methodology' applied, not the conclusions they generate.") (quoting Rule 702).

Dr. Levine's expert affidavit easily satisfies Rule 702's liberal standard. Dr. Levine is a leading expert in the field of diagnosing and treating gender dysphoria in both adults and children, with experience spanning over five decades. (Levine Aff. ¶ 2–9 and Exhibit A.) Federal courts across the country, including the Ninth Circuit, have credited his testimony when deciding cases involving issues related to gender, gender transition, and treatment for gender dysphoria. *See, e.g.*, *Doe v. Snyder*, 28 F.4th 103, 109, 112 (9th Cir. 2022)[2]; *Kosilek v. Spencer*, 774 F.3d 63, 77–78 (1st Cir. 2014) (*en banc*) (appointing Dr. Levine as independent expert to "assist [the Court] in determining what constituted the medical standard of treatment"); *Kadel v. Folwell*, No. 1:19-CV-272, 2022 WL 3226731, at *16 (M.D.N.C. Aug. 10, 2022) (finding Dr. Levine "is qualified to offer expert testimony on the treatment of gender dysphoria and the efficacy and findings of research studies evaluating gender dysphoria treatments"); *Hennessy-Waller v. Snyder*, 529 F. Supp. 3d 1031, 1042 (D. Ariz. 2021)(describing Dr. Levine as a "well-qualified expert" on the "standards of care for treating adolescents with gender dysphoria"); (Levine Aff. ¶ 2–9 and Exhibit A at XI (listing prior expert testimony)). His testimony here is both relevant—because it will assist the finder of fact in understanding concepts that are beyond the keen of the average layperson—and reliable—because it is the product of sound analytic principles and methodology. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (holding that expert testimony need only have a "reliable basis in the knowledge and experience of the relevant discipline") (cleaned up).

[2] Dr. Levine was the "second expert" referred to in *Snyder*. *See Step Hennessy-Waller v. Snyder*, 529 F. Supp. 3d 1031, 1040 (D. Ariz. 2021), *aff'd sub nom. Doe v. Snyder*, 28 F.4th 103 (9th Cir. 2022).

The District claims that Dr. Levine's affidavit is "inundated with inaccuracies" (Objection at 4:13–14), but the District identifies only *three opinions* in the entirety of Dr. Levine's 100+-page expert affidavit that it finds objectionable. Specifically, the District takes issue with Dr. Levine's opinions that (1) there are no generally-accepted "standards of care" in the field concerning the treatment of gender dysphoria, (2) there is no medical consensus regarding the causes of a transgender identity, and (3) there are no studies that demonstrate affirming care in young children improves long-term outcomes. (Objection at 2:25–3:17; *Cf.* Levine Aff. ¶¶ 51–76, 77–102, 114–155.) As noted, however, Rule 702 is geared toward methodologies—not conclusions—and the District does not identify any alleged methodological flaw in any aspect of Dr. Levine's affidavit. Moreover, even as to these three opinions, the District does little more than simply assert Dr. Levine's opinions are incorrect and cite to vague provisions from WPATH's self-proclaimed "Standards of Care" Version 8 (Objection at 2:25–3:17), a prior version of which Dr. Levine himself oversaw the creation of. (Levine Aff. ¶ 5.) The District has not demonstrated that there are no *generally-accepted* "standards of care," (2) that there is no *medical consensus* regarding the causes of a transgender identity, or (3) that there are no studies that demonstrate affirming care in young children is beneficial improves *long-term* outcomes. Each of these opinions involve questions of a complex and scientific nature, and the fact the District may disagree with Dr. Levine's opinions is not a sufficient ground to exclude them.

More importantly, even if these three opinions were wrong (and they are not), none of them has any impact on the core of Dr. Levine's testimony here—*i.e.*, *that parents must be involved when a school socially transitions their child*. (Levine Aff. ¶¶ 185–213.) The District's efforts to flyspeck Dr. Levine's expert affidavit on tangential assertions are designed to obfuscate this crucial point. *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1231 (9th Cir. 1998) ("Disputes as to the

strength of an expert's credentials, faults in his use of a particular methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.") (cleaned up).

It is also worth noting that the affidavit submitted by proposed intervenor GSA Network's proposed expert—gender-affirming care activist Dr. Jack Turban—does not so much as *mention* Dr. Levine's testimony regarding the critical role that parents must play when a school socially transitions their children, much less make any effort to dispute that testimony. (Proposed Turban Decl., Dkt. No. 22-3.) The fact that the District and Dr. Turban snipe at the margins of Dr. Levine's expert affidavit while avoiding a frontal assault on Dr. Levine's testimony that parents must be involved for the effective treatment of their children should not be lost on the Court. The reason for this tactic is plain—as Ms. Regino explained in her Memorandum in Support of her Motion for Preliminary Injunction, even the WPATH agrees that the involvement of parents when their children are socially transitioned is crucial for the health and well-being of the child. (Pl.'s Mot. for Prelim. Injunct., Dkt. No. 18-2 at 4–5.) Despite its hand waiving, the District provides no reason to doubt that critical point.

Instead, citing a trio of out-of-district cases that cite themselves, the District tries to build the case that Dr. Levine generally cannot be trusted. But the District ignores the fact that many federal courts have qualified Dr. Levine as an expert and / or relied on his expert testimony, *including the Ninth Circuit just last year*. *Snyder*, 28 F.4th at 109, 112. The District does not cite a *single case* in which the Court has refused to qualify Dr. Levine as an expert, instead focusing on cases where the court—sitting as a factfinder—found other evidence to be more persuasive on the record before it. Moreover, the subject matter of Dr. Levine's disputed testimony in these other three cases was unrelated to the core of Dr. Levine's testimony here regarding the importance of parental involvement in social transitioning. The Objection is therefore little more than a side-

show. *See Fitzhenry-Russell v. Keurig Dr. Pepper Inc.*, No. 17-CV-00564-NC, 2018 WL 10476581, at *4 (N.D. Cal. Dec. 10, 2018) ("Whether a particular expert was excluded in another case is not relevant to whether that expert is qualified or suited to testify in *this* case.") (emphasis in original).

Specifically, in *Norsworthy v. Beard*, the question was whether the Eighth Amendment required a prison to provide a transgender inmate certain surgery for gender dysphoria. 87 F. Supp. 3d 1164 (N.D. Cal. 2015). Dr. Levine testified on behalf of the prison that the surgery was not medically necessary. *Id.* at 1179. The court denied the plaintiff's motion to strike Dr. Levine's testimony, but it credited other expert testimony that the treatment was medically necessary. *Id.* at 1183, 1188–89. A similar question was presented in *Edmo v. Idaho Dep't of Corr.*, 358 F. Supp. 3d 1103 (D. Idaho 2018), *order clarified*, No. 1:17-CV-00151-BLW, 2019 WL 2319527 (D. Idaho May 31, 2019), *and aff'd in part, vacated in part, remanded sub nom, Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019). Importantly, Dr. Levine was not even an expert witness in this case. *Id.* Rather, the prison had hired Dr. Levine to conduct training on the medical necessity of certain surgery for gender dysphoria. *Id.* at 1125-26. Finally, in *Hecox v. Little*, the question was whether a transgender female could participate in women's collegiate athletics. 479 F.Supp.3d 930 (D. Idaho. 2020). Dr. Levine testified on behalf of cisgender female athletes regarding the risks such competition posed. *Id.* at 977 n.33. The court, citing *Norsworthy* and *Edmo*, credited other expert testimony on that topic.

In sum, the courts in the *Norsworthy*, *Edmo*, and *Hecox* feedback loop did not exclude Dr. Levine's testimony, and each of those cases involved testimony far afield from the core testimony that Dr. Levine offers here. Thus, those cases do not remotely support the District's argument that the Court should strike Dr. Levine's testimony here, nor, again, do they provide any reason to

doubt Dr. Levine's uncontroverted testimony regarding the importance of parents in the process of socially transitioning their children. (Levine Aff. ¶¶ 185–213.)

Finally, it is well-established that "the rules of evidence do not apply strictly to preliminary injunction proceedings." *Herb Reed Enters., LLC v. Fla. Entm't Mgmt. Inc.*, 736 F.3d 1239, 1250 n.5 (9th Cir. 2013). Under this relaxed application of the rules of evidence, the court may "give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial." *Flynt Distrib. Co., Inc. v. Harvey,* 734 F.2d 1389, 1394 (9th Cir.1984). Under this standard, even if Dr. Levine's expert affidavit violated Rule 702 (and it plainly does not), the Court should still rely on it in adjudicating Ms. Regino's request for preliminary relief. It provides detailed analysis of complex scientific questions and gives the Court important context to assist in resolving her request for a preliminary injunction. *Masseth v. Jones*, No. EDCV 21-1408 JGB, 2021 WL 6752317, *5–6 (C.D. Cal. Nov. 9, 2022) (overruling objections to plaintiff's expert testimony at preliminary injunction stage). Most importantly, it gives an uncontroverted account of why parents must be involved when schools socially transition their children.

///

CONCLUSION

For the foregoing reasons, the Court should deny the District's Objection.

Respectfully submitted,

Dated: February 21, 2023

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**Pro Hac Vice Motion Forthcoming*

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

AURORA REGINO, **Plaintiff,** **vs.** **SUPERINTENDENT KELLY STALEY, in her official capacity; CAITLIN DALBY, in her official capacity; REBECCA KONKIN, in her official capacity; TOM LANDO, in his official capacity; EILEEN ROBINSON, in her official capacity; and MATT TENNIS, in his official capacity,** **Defendants.**	**Case No.: 2:23-cv-00032-JAM-DMC** **DECLARATION OF PLAINTIFF AURORA REGINO**

I, Aurora Regino, hereby declare:

1. I am the plaintiff in the above-captioned matter. I am above the age of 18, and I make this declaration from my own personal knowledge. If called upon to testify to the contents below, I could and would do so competently.

2. I have been made aware that the District is contending I have not been irreparably harmed by the District's actions. The purpose of this Declaration is to respond to that contention.

3. A.S. is still in regular counseling, and I believe it is likely that she will again experience a transgender identity based on the facts that (1) the District is prompting students to question their gender identities, (2) she has experienced such an identity in the past, and (3) she is too young to understand what having a transgender identity might mean for her life.

4. I also believe it is likely that C.S. will begin to experience a transgender identity because (1) the District is prompting students to question their gender identities and (2) her sister has experienced such an identity in the past, and (3) she is too young (eight years old) to understand what having a transgender identity might mean for her life.

5. While I love my daughters and will continue to love and support them if they come to experience a transgender identity in the future, I am concerned that if my daughters do experience such an identity in the future, the District will socially transition them without informing me or obtaining my consent, thus precluding me both from being involved in this important decision in their lives and from seeking the guidance of a mental health professional. Considering the District has socially transitioned A.S. without my knowledge or consent in the past, this concern is real, and I am experiencing worry, concern, anxiety, and emotional distress due to these implications from continued application of the Parental Secrecy Policy.

6. In my Verified Complaint, I explained my efforts to persuade the District to change the Policy. Those efforts began soon after April 8, 2022, the day I learned that the District had socially transitioned A.S. without informing me. I started my efforts at the school level. At that time, I was led to believe by District personnel that the Policy applied only at A.S.'s school.

7. Children in the District, including my daughters, were on summer break from approximately June 2, 2022 to August 8, 2022.

8. Although my efforts were ultimately unsuccessful, based on comments District personnel made to me, there were moments during this time period when I believed I may be able to persuade District officials that the Parental Secrecy Policy was inappropriate. I progressively went higher and higher in the chain of command until I was able to have an in-person meeting with Superintendent Staley on October 10, 2022. It was not until that meeting that I definitively learned the Policy applied throughout the District.

9. During the time period I was communicating with District personnel, I was not represented by counsel.

10. Around the same time I last heard from Superintendent Staley on November 2, 2022, I started reaching out to law firms who I thought might be able to help me. In early November 2022, I first spoke with Josh Dixon and Eric Sell at the Center for American Liberty. Over the next several weeks, I had many telephone calls with them regarding the law, the strengths of my case, and the benefits and burdens of bringing this lawsuit. I have never been a party to litigation, and I did not know what to expect from it. My daughters were (and are) still in schools operated by the District, and I was (and am) concerned about them (and me) facing scorn in the community and retaliation from the District for suing them. Over the course of November 2022, I discussed these and other issues with Messrs. Dixon and Sell.

11. On or about November 28, 2022, I formally retained the Center for American Liberty. I later retained the Dhillon Law Group.

12. Over the next several weeks, I had many telephone calls and emails with Messrs. Dixon and Sell regarding the details of my case, case strategy, and the legal documents we would be filing.

13. Children in the District, including my daughters, were on winter break from December 23, 2022 until January 6, 2023.

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VERIFICATION

I, Aurora Regino, declare under penalty of perjury that the factual allegations in the foregoing **DECLARATION OF AURORA REGINO** are true and correct.

Executed this 21st day of February 2023

Aurora Regino

Aurora Regino