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AURORA REGINO

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

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Hearing Date: June 27, 2023
Time: 1:30 p.m.
Ctrm: 6
Judge: Hon. John A. Mendez

Complaint Filed: January 6, 2023
Trial Date: Not Yet Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

The Court should deny Defendant's Motion to Dismiss for the reasons set forth below.

FACTUAL BACKGROUND

I. BACKGROUND ON SOCIAL TRANSITIONING

"Social transitioning" is the active affirmation of a person's transgender identity. (First Am. Compl. ("FAC") ¶ 2.) In the school setting, it primarily refers to calling transgender-identifying students by a new name and pronouns associated with their transgender identity. (*Id.*)

Social transitioning is a significant form of psychological treatment. (*Id.* ¶¶ 2, 5, 43, 50.) Its purpose is to alleviate the psychological distress that can sometimes accompany having a transgender identity. (*Id.* ¶ 5.) It also has serious consequences. In children, it dramatically increases the chances that their transgender identity will persist. (*Id.* ¶¶ 33–34, 43.) In addition, most children who are socially transitioned go on to receive future additional "affirmative" care in the form of puberty blockers and cross-sex hormones. (*Id.* ¶ 44.) The risks of this care are serious, and include bone weakness, sterility, and increased suicide risk. (*Id.*)

Socially transitioning every transgender-identifying child who asks for it is a "one-size-fits-all" approach that fails to account for each child's unique situation. (*Id.* ¶ 41–42.) In addition, for some children, education about gender roles—not social transition—is appropriate. (*Id.* ¶ 42.)

Parental involvement is necessary for the assessment, diagnosis, and treatment—including social transitioning—of transgender-identifying children. (*Id.* ¶ 46–47.) Without it, children who may need professional help are unable to obtain it. (*Id.*) In addition, the child will inhabit different gender identities at home and school, a psychologically unhealthy situation that drives a wedge between parent and child. (*Id.* ¶ 48, 50.) And because children are incapable of making sound judgments regarding their own care, their parents must be involved. (*Id.* ¶ 49.)

II. THE PARENTAL SECRECY POLICY

Defendant (the "District") applies Admin. Reg. #5145.3 (the "Parental Secrecy Policy" or "Policy") at its twenty-three schools. (FAC ¶ 18 and Ex. F.) Under the Policy, if a student asks to go by a new name and pronouns, everyone at school—administrators, teachers, and students—is required to refer to the student that way. (FAC Ex. F at 5.) In other words, the Policy mandates that the student be socially transitioned. Unless the student says otherwise, the Policy requires

everyone at school to conceal this fact from the student's parents, except when disclosure is either required by law or "necessary," in the District's judgment, for the student's well-being. (*Id.* at 5–6.) Violations of the Policy are punishable by "appropriate disciplinary action." (*Id.* at 3.)

During the 2021–22 school year, A.S. was in the fifth grade at a school in the District. (FAC ¶¶ 55–63.) In early 2022, A.S. told a school counselor that she "felt like a boy." (*Id.* ¶¶ 64–71.) Pursuant to the Policy, the counselor asked A.S. whether she would like to go by a boy's name and pronouns. (*Id.*) A.S. said that she would. (*Id.*) The counselor asked A.S. if she wanted her mother to know. (*Id.*) A.S. said she did not. (*Id.*) The counselor and / or A.S.'s teacher arranged for other school personnel to begin referring to her by her boy's name and male pronouns. (*Id.*)

In April of 2022, Ms. Regino learned that the District had socially transitioned A.S. (*Id.* ¶ 72.) Ms. Regino is a fit parent, and she was supportive of her daughter. (*Id.* ¶ 73.) Had Ms. Regino been consulted, however, she would not have allowed the District to socially transition A.S. without first seeking professional guidance. (*Id.* ¶ 75.)

Ms. Regino now seeks prospective relief against continued application of the Policy.

ARGUMENT

To survive a Rule 12(b)(6) motion, a complaint must plead only a "plausible" claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court must "draw all reasonable inferences" in the plaintiff's favor and "presume [her] factual allegations [are true]." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). This requirement applies to allegations of a "scientific" nature. *Ferrari v. Nat. Partners, Inc.*, No. 15-CV-04787-LHK, 2016 WL 4440242, at *5 (N.D. Cal. Aug. 23, 2016). *See also Jones v. Johnson*, 781 F.2d 769, 772 n.1 (9th Cir. 1986) (allegations regarding medical causation), *overruled on other grounds by Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014); *Branca v. Nordstrom*, No.: 14cv2062-MMA (JMA), 2015 WL 10436858, at *7 (C.D. Cal. Oct. 9, 2015) (allegations regarding consumer survey data).

The Court may not consider facts "extrinsic" to the complaint or take "judicial notice of disputed . . . fact[s]." *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). Thus, the Court must disregard the District's citation to the Declaration of Jack Turban and the WPATH Guidelines. (Mot. at 9 n.1.) *See also* Pl.'s Opp'n to Def.'s Request for Judicial Notice.

I. THE POLICY VIOLATES MS. REGINO'S SUBSTANTIVE RIGHTS

A. The Policy Violates Ms. Regino's Due Process and First Amendment Rights

Parents have a fundamental due process right to the "care, custody, and control" of their children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.). This right rests on the presumptions that (1) "parents possess what a child lacks in maturity, experience, and capacity for judgment" and (2) the "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

Because the Supreme Court has long held that parents have this right, Ms. Regino is not required to demonstrate, by a "careful description," that it exists under our history and traditions. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Rather, the question is whether Ms. Regino's claims fall within the scope of this right. *Troxel*, 530 U.S. at 65–66 (plurality op.) (evaluating whether statute violated right to child visitation without considering whether such right was "careful[ly] descri[bed]" under our history and traditions); *id.* at 77–78 (same) (Souter, J., concurring); *id.* at 80 (same) (Thomas, J., concurring); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1203–04 (9th Cir. 2005) ("*Fields I*") (same with respect to right to control information given to children), *opinion amended on denial of reh'g sub nom. Fields v. Palmdale Sch. Dist. (PSD)*, 447 F.3d 1187 (9th Cir. 2006) ("*Fields II*"); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 952 (9th Cir. 1997) (same with respect to right to allow children to go outside at night); *see also Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (noting that question was not whether the Court should create a "new . . . right to same-sex marriage" but whether the right to same-sex marriage falls within "the right to marry in its comprehensive sense") (cleaned up).

In any event, based on a careful description of the right involved, under our history and traditions, Ms. Regino plausibly alleges that the Policy violates her parental rights in three ways:

First, the Policy violates Ms. Regino's right to make "medical decisions for [her] children." *Wallis v. Spencer*, 202 F.3d 1126, 1141–42 (9th Cir. 2000) (citing *Parham*, 442 U.S. at 602). Social transitioning is a significant form of psychological treatment. (FAC ¶¶ 2, 5.) By authorizing the District to socially transition her children without her consent, the Policy usurps her right to control her children's "care." *Troxel*, 530 U.S. at 65 (plurality op.).

The District does not dispute Ms. Regino's allegation that social transitioning constitutes "treatment," nor could it at this stage in the proceedings. Moreover, the Ninth Circuit and other courts have concluded that social transitioning constitutes "treatment." *Edmo v. Corizon, Inc*., 935 F.3d 757, 770 (9th Cir. 2019); *Monroe v. Meeks*, 584 F. Supp. 3d 643, 678 (S.D. Ill. 2022); *Pinson v. Hadaway*, No. 18-CV-3420-NEB-KMM, 2020 WL 6121357, at *1 (D. Minn. July 13, 2020); *Porter v. Allbaugh*, No. 18-CV-0472-JED-FHM, 2019 WL 2167415, at *2 (N.D. Okla. May 17, 2019). This conclusion is buttressed by the purpose of social transitioning—to alleviate psychological distress (FAC ¶ 5)—and its grave consequences, especially in children. It substantially reduces the number of children who desist. (*Id.* ¶ 43.) *See also Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 48 (D.D.C. 2020) (noting that "childhood social transitions [are] important predictors of persistence") (cleaned up). And children who are socially transitioned are highly likely to receive future "affirmative" care, which has serious side-effects. (FAC ¶ 44.)

It does not matter that Ms. Regino's children may want the District to socially transition them. As minors, Ms. Regino's children are unable to provide informed consent to psychological treatment. (FAC ¶ 5, 49, 101.) Accordingly, the District may not socially transition them without her consent. *Mann v. Cnty. of San Diego*, 907 F.3d 1154, 1162 (9th Cir. 2018) (noting that "children [are unable] to provide informed permission for medical procedures").[1]

Second, the Policy violates Ms. Regino's right to make "important . . . decisions," *Fields I*, 427 F.3d at 1208, in the lives of her children that go to the "heart of parental decision-making," *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005). Indeed, the default common-law rule was that parents generally have the "right . . . to speak and act on their [children's] behalf." *Hodgson v. Minnesota*, 497 U.S. 417, 483 (1990) (Kennedy, J., concurring in part). Thus, the state

[1] Even if the Court considered the WPATH Guidelines, they establish that social transitioning: (1) constitutes psychological treatment (WPATH Guidelines at S39, S46, S60, S77–78); (2) requires parental involvement (*id.* at S44, S49, S58, S61–62, S77–78); and (3) is not appropriate for every transgender-identifying child who asks for it, (*id.* at S45, S50–51, S61, S58, S73, S76, S78).

may not, for example, unduly interfere with parents' decisions regarding child visitation, *Troxel*, 530 U.S. 57, whether to send their children to private school, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), the subjects they can teach their children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and whether their children can go out in public at night, *Nunez*, 114 F.3d at 952.

The decision whether to socially transition a child falls squarely within this precedent. *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 522CV04015HLTGEB, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022) (holding parents must "have a say in what [their] minor child[ren are] called" by their school). Social transitioning is a life-altering decision that impacts the very "core" of the child's identity. *B.P.J. v. West Virginia State Bd. of Educ.*, No. 2:21-CV-00316, 2023 WL 111875, at *7 (S.D. W. Va. Jan. 5, 2023) (cleaned up). And as discussed, it substantially reduces the odds of desistence, is likely to lead to a life of medicalization, and—when done by schools behind parents' backs—results in the child suffering alone and without parental guidance. (FAC ¶¶ 43–44, 47–50.) *See also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (noting that the "nurture of the child reside[s] first in the parents"). In short, the Policy impermissibly treats students as if they were "mere creatures of the state." *Pierce,* 268 U.S. at 535.

Third, the Policy infringes on Ms. Regino's right to family "integrity" and "association." *Kelson v. City of Springfield*, 767 F.2d 651, 654, 656 n.4 (9th Cir. 1985). This right is based on the "sanctity of the family" and the importance of the emotional "bonds uniting [its] members." *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503–04 (1977) (plurality op.) This right prohibits "unwarranted interference" into family relationships. *Lee*, 250 F.3d at 686. It arises under both the Fourteenth Amendment, *Moore*, 431 U.S. at 503 n.12 (plurality op.), and the First Amendment, *Bd. of Dir. v. Rotary Club*, 481 U.S. 537, 545 (1987).[2]

In the Western tradition, parents' relationships with their children are deeply shaped by whether the child is their "son" or their "daughter." By authorizing the District to socially

[2] Even assuming Ms. Regino were required to "careful[ly] descri[ibe]" her Fourteenth Amendment rights under *Glucksberg* (and she is not), there is no such requirement under the First Amendment.

transition Ms. Regino's children without her consent, the Policy fundamentally alters the nature of her "emotional bond[s]" with them. *Ovando v. City of Los Angeles*, 92 F. Supp. 2d 1011, 1021 (C.D. Cal. 2000); *see also Doe v. Dickenson*, 615 F. Supp. 2d 1002, 1014 (D. Ariz. 2009). Moreover, the Policy treats Ms. Regino as the enemy, impermissibly driving a "wedge" into the parent-child relationship. (FAC ¶ 50.) *See also Bohn v. Dakota Cnty.*, 772 F.2d 1433, 1436 n.4 (8th Cir. 1985); *Patel v. Searles*, 305 F.3d 130, 134, 140 (2d Cir. 2002) (holding acts that created "mistrust among the members of [plaintiff's] family towards him" violated this right). Further, the Policy's secrecy requirement precludes Ms. Regino from even knowing that her daughters are being socially transitioned, thus "depriv[ing her] the opportunity to counter influences" on her children that she disagrees with. *Arnold v. Bd. of Educ. of Escambia Cnty.* 880 F.2d 305, 313 (11th Cir. 1989); *see also Gruenke v. Seip*, 225 F.3d 290, 306 (3d Cir. 2000) (holding school personnel's interference with "management of [] teenage pregnancy" violated right to family integrity).

In sum, Ms. Regino has plausibly alleged that she has the right to decide whether the District socially transitions her children. Alternatively, the District must at least provide her notice before doing so. *Hodgson*, 497 U.S. at 483 (discussing parents' "common law right . . . to be notified of their children's actions") (Kennedy, J., concurring in part).

B. The District's Counterarguments are not Persuasive

The District's counterarguments are without merit:

First, the District claims the questions at issue are whether parents have the rights to "know their child's gender identity" and to "compel their own identity preferences upon the child." (Mot. at 12.) This is a strawman. Ms. Regino does not assert that the District must inform her if it merely has *knowledge* that her children are identifying as transgender, nor does this case ask whether her children *generally* must have the gender identity she chooses. Instead, the question is whether *the District* must obtain her consent before *it* takes affirmative steps to socially transition her children.

Second, the District argues Ms. Regino has no power over medical treatment that her children "voluntarily seek." (Mot. at 14.) According to the District, a five-year old could go to a state-run health clinic complaining of sad thoughts and obtain a Zoloft prescription. That is not the law. Children lack the "maturity, experience, and capacity for judgment" needed to "make

sound judgments concerning . . . their need for medical care." *Parham*, 442 U.S. at 603. Parents thus have the right "to make . . . medical decisions for their children." *Wallis*, 202 F.3d at 1141. This rule protects children from themselves, among other things, and it is not altered "[s]imply because the decision of the parent is not agreeable to [the] child." *Parham*, 442 U.S. at 603.

The cases the District cites do not call this rule into question. In *Thomas v. Evansville-Vanderburgh School Corporation*, a mother claimed a right to know about "academically oriented conversations" her child had with a school counselor. 258 F. Appx. 50, *54 (7th Cir. 2007). In *Doe v. Irwin*, parents claimed a right to know when a public health clinic distributed birth control to their children. 615 F.2d 1162, 1163 (6th Cir. 1980). In neither of those cases, however, did the courts consider whether the state action at issue—conversations with a school counselor about academics or the distribution of birth control—constituted psychological or medical *treatment*. Here, by contrast, Ms. Regino has squarely made such an allegation. (FAC ¶¶ 2, 5, 43–44, 101.)

Moreover, conversations with a school counselor and the distribution of birth control do not impinge upon parents' rights to make important decisions for their children or meddle in the family dynamics in the same way that social transitioning does. And unlike *Thomas* and *Irwin*, the District is accomplishing the social transitioning of children through coercive state power at a public school. Mere conversations with a child and the distribution of birth control at a public health clinic do not involve this level of state control. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 265–66 (Ct. App. 1993) (distinguishing *Irwin* on this basis).[3]

Third, the District contends that Ms. Regino lacks the right to compel it to adhere to her curriculum preferences. (Mot. at 13–14.) But socially transitioning students does not involve the mere "provi[sion] . . . of information" to students. *Fields I*, 427 F.3d at 1206. Moreover, requiring parental consent before socially transitioning students does not implicate the concern that schools could not function if every parent had a "constitutional right . . . to dictate" what their children's

[3] The District asserts that the public health clinic in *Irwin* was operated by a "school." (Mot. at 12, 14.) This is wrong. *Irwin*, 615 F.3d at 1168–69.

school teaches them. *Id.* Similarly, requiring parental consent does not intrude on schools' ability to "direct *how* a public school teaches their child[ren]." *Parents for Priv. v. Barr*, 949 F.3d 1210, 1231 (9th Cir. 2020) (emphasis in original). Social transitioning is not remotely analogous to things like "the hours of the school day," "the timing and content of examinations," or "the extracurricular activities offered at the school." *Id.*

In short, the Ninth Circuit has recognized that parents' rights *do not* stop at the schoolhouse door. *Fields II*, 447 F.3d at 1190–91 (deleting language from *Fields I* implying otherwise). Indeed, "[i]t is not educators, but parents who have primary rights in the upbringing of children." *Gruenke*, 225 F.3d at 307. By adopting and applying the Policy, the District has overstepped its proper role.

Fourth, the District asserts that the right to family association is protected by the Fourteenth Amendment, and not the First. (Mot. at 21.) This is incorrect. While older Ninth Circuit case law noted that the Supreme Court has "most often" invoked the Fourteenth Amendment when discussing this right, *IDK, Inc. v. Cnty. of Clark*, 836 F.2d 1185 (9th Cir. 1988), the Ninth Circuit has never held it arises *only* under the Fourteenth Amendment in the family setting. And more recent cases hold that this right arises under "both the First and Fourteenth Amendments." *Keates v. Koile*, 883 F.3d 1228 (9th Cir. 2018); *see also Rotary Club*, 481 U.S. at 545 (observing that "the *First Amendment* protects . . . family relationships") (emphasis added).

Fifth, the District argues that the right to family association only (1) forbids "retaliation" and (2) protects the right of parents to "live and / or congregate" with their children. (Mot. at 21.) But as demonstrated, this right protects against actions that impact the "emotional bonds" between parent and child, drive a "wedge" in the family, and "deprive [parents] the opportunity to counter" influences on their children. *Supra* at 5 (collecting cases). The Policy does each of these things.

C. Strict Scrutiny Applies

The appropriate "level of scrutiny" and "whether the . . . policy can withstand such scrutiny" are both "fact-dependent inquiries that are unsuitable for resolution at the pleading stage." *Duronslet v. Cnty. of Los Angeles*, 266 F. Supp. 3d 1213, 1223 (C.D. Cal. 2017). For this reason, the Court should defer these questions until summary judgment. *Id.*

If the Court proceeds, strict scrutiny applies. First, strict scrutiny applies to Ms. Regino's

First Amendment claims. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *McCabe v. Sharrett*, 12 F.3d 1558, 1566 (11th Cir. 1994) (noting that "burdens on . . . intimate association rights[] are generally subjected to strict scrutiny"). Second, strict scrutiny also applies to Ms. Regino's substantive due process claims. The Supreme Court has held parental rights are "fundamental," which requires the application of strict scrutiny. *Glucksberg*, 521 U.S. at 720–21. Indeed, the Supreme Court has applied strict scrutiny to parental rights in everything but name. *Moore*, 431 U.S. at 499 (holding courts must "examine carefully the importance of the government interests advanced and the extent to which they are served by the challenged regulation") (plurality op.); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (requiring existence of "powerful countervailing interest" and close examination of "whether the means . . . are constitutionally defensible"); *see also Troxel*, 530 U.S. at 80 (Thomas, J., concurring) (applying strict scrutiny by name).

The Ninth Circuit has also applied strict scrutiny in parental rights cases. *Nunez*, 114 F.3d at 952 (evaluating whether "infringement is narrowly tailored to serve a compelling government interest"); *United States v. Wolf Child*, 699 F.3d 1082, 1092 (9th Cir. 2012) (requiring existence of "powerful countervailing interest"); *see also LA All. for Hum. Rts. v. City of Los Angeles*, No. LACV2002291DOCKESX, 2021 WL 4713179, at *4 (C.D. Cal. Apr. 26, 2021) ("[R]ights related to the family [are] afforded strict scrutiny."). Other circuit courts agree. *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 420 (6th Cir. 2019); *Gruenke*, 225 F.3d at 305–07; *Arnold*, 880 F.2d at 313; *Franz v. United States*, 707 F.2d at 582, 602–03 (D.C. Cir. 1983); *see also Doe v. Heck*, 327 F.3d 492, 519 (7th Cir. 2003) (applying "heightened scrutiny").

The District contends that the "shocks the conscience" test applies, but that test applies only to arbitrary "executive" action. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (high-speed police chase); *see also Brittain v. Hansen*, 451 F.3d 982, 987 (9th Cir. 2006) (aggressive police investigation). Here, Ms. Regino seeks prospective relief against a school policy—which is a "legislat[ive]" enactment—that infringes on her fundamental rights. *Lewis*, 523 U.S. at 846. Thus, strict scrutiny applies. *Id.* (noting that the legal standard differs "depending on whether it is legislation or a specific act of a governmental officer that is at issue"); *see also Hawkins v. Freeman*, 195 F.3d 732, 738–39 (4th Cir. 1999) (explaining difference between

legislative and executive action under *Lewis*); *McKinney v. Pate*, 20 F.3d 1550, 1557 n.9 (11th Cir. 1994) (same).

D. The Policy Does Not Satisfy Strict Scrutiny

The District attempts to justify the Policy on the grounds that (1) minor children have a "privacy right" to keep the District's social transitioning of them secret from their parents and (2) the Policy prevents "[child] abuse." (Mot. at 12, 17.) These arguments are without merit.

1. Student privacy from their parents is not a compelling governmental interest.

Privacy is not compelling because children have no privacy rights against their parents.

First, the Constitution gives heightened protection only to those rights that are "deeply rooted in this Nation's history and tradition and . . . essential to the concept of ordered liberty." *Glucksberg*, 521 U.S. at 720. The District makes no effort to establish that the novel privacy right it is advancing satisfies this standard. Indeed, the District's argument has no historical support whatsoever. *See* Blackstone, 1 *Commentaries on the Laws of England* at 440–41 (recognizing the obligation of children to parental "subjection and obedience"); Kent, 2 *Commentaries* on *American Law* at 207 (providing that children's duties to their parents include "obedience").

Second, the District cites cases involving *adults*' rights to keep certain personal information private (Mot. at 12), but those cases did not involve *minor children*. *Sterling v. Borough of Minersville*, 232 F.3d 190, 192 (3d Cir. 2000); *Nelson v. NASA*, 568 F.3d 1028, 1037–38 (9th Cir. 2009) (Wardlaw, J., concurring). "[T]he constitutional rights of children cannot be equated with those of adults." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Adults have the rights to marry, to engage in consensual sexual relations, and to own a handgun, for example, yet almost every state in the union has laws prohibiting children from engaging in these activities.

More importantly, the District is not asking the Court to create some abstract privacy right. Rather, it is asking the Court to create a new privacy right *in children against their parents*. Considering "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing," the Court should be particularly suspicious of arguments that seek to interpose the Constitution between

children and their parents. *Id.* at 640 (noting that "parental notice and consent are qualifications that typically may be imposed . . . on . . . important decisions" in children's lives). This conclusion is especially true here because of the significant long-term "medical, emotional, and psychological consequences" associated with social transitioning. *H.L. v. Matheson*, 450 U.S. 398, 411 (1981).

The cases requiring a judicial bypass of a parental consent requirement in the abortion context do not help the District either. (Mot. at 14 (citing, *inter alia*, *Bellotti*).) That requirement is no longer good law after *Dobbs*. Moreover, the Supreme Court has only ever required a judicial bypass to a parental consent requirement in the unique context of abortion, where the (former) right must be exercised within the short window of human gestation or lost forever. *Bellotti*, 443 U.S. at 642 ("A pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy."). The same is not true with social transitioning, which—like most life decisions—minor children can choose when they reach the age of majority. *Id.* (observing that no judicial bypass is required for marriage laws prohibiting minors from marrying because "[a] minor not permitted to marry before the age of majority is required simply to postpone her decision"). Moreover, even before *Dobbs* overruled *Roe v. Wade*, the Supreme Court upheld a parental notice requirement in an abortion statute. *H.L.*, 450 U.S. 398.

Third, the District contends that laws requiring parental consent must satisfy strict scrutiny (Mot. at 14, 15), but the case the District cites—*Nunez*—says nothing of the kind. Instead, *Nunez* involved a minor *curfew* ordinance, not a *parental consent* requirement. 114 F.3d at 952. Indeed, the Court in *Nunez* specifically took note of "minors' lack of rights *vis-à-vis [their] parents*." *Id.* at 944–95 (emphasis added). The District's argument that parental consent laws require strict scrutiny is entirely without support and antithetical to our constitutional traditions.

Fourth, the additional cases the District cites (Mot. at 12–13) also do not help it. *Thomas* and *Irwin* did not hold that minor children had privacy rights against their parents. Rather, they held that the scope of the *parental right* was not broad enough to be triggered on the unique facts of those cases. *Thomas*, 258 F. Appx. at *54; *Irwin*, 615 F.2d at 1169. Similarly, *John & Jane Parents 1 v. Montgomery County Board of Education* and *Doe v. Manchester School District* did not hold that minor children had privacy rights against their parents. Instead, they rejected the

argument that the scope of the *parental right* included the "right to be promptly informed of their child's gender identity." *Parents 1*, No. 8:20-3552-PWG, 2022 WL 3544256, at *7 (D. Md. Aug. 18, 2022) (on appeal); *see also Manchester Sch. Dist.*, No. 216-2022-CV-00117, at *5 (N.H. Sup. Ct. Sept. 5, 2022) (similar). As noted, Ms. Regino does not argue she has such a right here.

In the end, the District is able to cite only *one case* holding children have a privacy right against their parents in an arguably analogous situation. *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1191 (C.D. Cal. 2007) (sexual orientation); *see also C.N. v. Wolf*, 410 F. Supp. 2d 894 (C.D. Cal. 2005) (same case). But *Wolf* 's reasoning is hopelessly flawed. It did not consider whether the right it was creating satisfied *Glucksberg*, it did not reason by analogy from any other case involving minor's rights, and it did not evaluate a single parental rights case. Instead, it relied exclusively on *Sterling*, which, as noted, involved adults, not minors. 517 F. Supp. 2d at 1191.

Moreover, under *Wolf*, the right to privacy exists only when a child has a "reasonable expectation" of privacy. *Id.* In *Wolf*, the plaintiff had such an expectation because she had "come out" to only "five friends." *Id.* Here, by contrast, the Policy requires *everyone* in the school environment to refer to students by their new name and pronouns. (FAC Ex. F.) Thus, students have no reasonable expectation that their parents will not learn that the District is socially transitioning them. This is particularly true for Ms. Regino, who "engages with her children's schools to ensure that she is informed about what occurs in their lives." (FAC ¶ 17.)

Finally, *Wolf* concluded that children's privacy rights must yield to a "proper governmental interest." 517 F. Supp. 2d at 1193. Here, Ms. Regino is a fit parent who will do what is in her children's best interests. (FAC ¶¶ 17, 73–74.) Her parental rights thus outweigh any privacy right her children might have against her.

2. <u>The prevention of child abuse is speculative and irrationally overbroad.</u>

Under heightened scrutiny, the Court may look only at the Policy's "actual purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996). Here, the only "actual purpose" the District invoked was student privacy. Accordingly, the Court should disregard any other purpose.

In any event, the "prevention of child abuse" is irrationally overbroad. The Policy does not require the District to make a finding that students who want to be secretly socially transitioned

would otherwise be subject to child abuse. Rather, if the child requests secrecy, the Policy provides that secrecy is the rule and disclosure the exception. But the state "has no interest . . . in protecting children from their parents unless it has some reasonable evidence that the parent is unfit and the child is in imminent danger." *Wallis*, 202 F.3d at 1142 n.14; *see also Stanley*, 405 U.S. at 652 (holding dependency proceeding unconstitutional that failed to provide "a hearing designed to determine whether the father is unfit"). By presuming parents will harm their children, the Policy impermissibly reverses the constitutionally mandated presumptions of parental fitness and affinity that underlie the parental right. *Parham*, 442 U.S. at 603 (rejecting "statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse . . . [their] children") (emphasis in original); *Troxel*, 530 U.S. at 68 (holding unconstitutional state action that contravened presumption of parental fitness) (plurality op.); *Stanley*, 405 U.S. at 652 (same); *Heck*, 327 F.3d at 521 (same); *Ricard*, 2022 WL 1471372, at *8 (same).

E. The Policy Does Not Satisfy any Legal Standard

The Policy does not satisfy any legal standard that might arguably apply. Because Ms. Regino's children have no right to privacy against her, student privacy is not a legitimate government interest. *Supra* at I.D.1. And by assuming that all parents whose children want to be socially transitioned in secret are child abusers, the Policy is irrationally overbroad. *Supra* at I.D.2. Finally, for the same reasons, the Policy is deliberately indifferent to Ms. Regino's rights. *Gantt v. City of Los Angeles*, 717 F.3d 702, 707 (9th Cir. 2013) (noting that deliberate indifference shocks the conscience "[w]here actual deliberation is practical") (cleaned up).

II. THE POLICY VIOLATES MS. REGINO'S PROCEDURAL RIGHTS

The District does not argue that the Policy's procedures are adequate. Instead, it argues that Ms. Regino has no liberty interest and that procedural due process does not apply because the Policy is a general rule with wide application. (Mot. at 20.) These arguments are meritless.

A. The Policy Infringes Ms. Regino's Protected Liberty Interests

As discussed, the Policy deprives Ms. Regino of her fundamental rights. That is sufficient to trigger procedural due process. *Mullins v. State of Or.*, 57 F.3d 789, 795 (9th Cir. 1995) (noting that the "procedural component of the Due Process Clause protects . . . fundamental rights"). This

is true even if the Policy satisfies the applicable substantive standard of review. *United States v. Salerno*, 481 U.S. 739, 746 (1987) ("When government action depriving a person of . . . liberty . . . . survives substantive due process scrutiny, it must still be implemented in a fair manner.").

Moreover, even if Ms. Regino's parental rights were not "fundamental" (and they are), they would still be closely related enough to fundamental rights that they trigger procedural due process protections. *Kerry v. Din*, 576 U.S. 86, 109–10 (2015) (collecting cases noting existence of nonfundamental liberty interests) (Breyer, J., dissenting); *see also Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) (holding United States citizen "has a protected liberty interest in the visa application of her alien spouse" despite the fact such interest is not fundamental).

B. The Policy Creates a Procedurally Deficient Adjudicatory Process

A legislative body is typically not required to provide notice and an opportunity to be heard before "adopt[ing]" a generally applicable rule of law through lawful means. *See Bi-Metallic Inv. Co. v. State Bd. Of Equalization*, 239 U.S. 441, 445-46 (1915) (emphasis added)); *see also Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 968 (9th Cir. 2003) (rejecting right to "hearing prior to the enactment of [city] ordinances"). When, by contrast, a provision of law creates an "established state procedure" governing case-by-case adjudications, the procedure itself must comply with procedural due process. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 432 (1982) (holding claim-adjudication process for employee termination procedurally deficient); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 544–45 (1985) (same); *Stanley*, 405 U.S. at 649 (same for dependency proceeding). The only exception to this rule is for laws that are "self-executing," *Texaco, Inc. v. Short*, 454 U.S. 516, 535 (1982); that is, laws that "uniformly affect[] all similarly situated citizens" immediately upon enactment, *E.E.O.C. v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1509 (9th Cir. 1990).

Here, Ms. Regino does not contend that she was entitled to notice and an opportunity to be heard *before* the Policy went into effect. Rather, she alleges that the Policy's adjudicatory framework is procedurally deficient. (FAC ¶¶ 119–22.) Moreover, the Policy is not "self-executing" because it requires a "case-by-case" adjudication. (FAC Ex. F at 5.) Accordingly, the Court should reject the District's argument that procedural due process does not apply.

III. THE POLICY IS FACIALLY INVALID

A. The Policy is Facially Invalid under *Salerno*

The Policy is invalid in all of its applications under *Salerno*. 481 U.S. 739. The District argues the Policy is constitutional where parental disclosure of students' social transition could lead to child abuse (Mot. at 16), but the Policy does not require the District to make a determination that the child is likely to be abused before mandating secrecy. Instead, the District presumes harm based on nothing more than the child's desire for secrecy. (FAC Ex. F at 5.) As a result, the District indiscriminately mandates secrecy regardless of whether the student is any real danger. Because of this structural flaw, the Policy is unconstitutional in all of its applications. *Stanley*, 405 U.S. at 654 (holding statute invalid that presumed all unwed fathers were unfit despite the fact some unwed fathers would, in fact, be unfit); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 789 (9th Cir. 2014) (holding statue precluding pre-trial release facially invalid despite the existence of "persons who could be detained consistent with due process under a different categorical statute").

B. The Policy is Unconstitutionally Overbroad

The overbreadth doctrine applies to Ms. Regino's facial First Amendment claim. *Ams. for Prosp. Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021); *Corso v. Fischer*, 983 F.Supp.2d 320, 335 (S.D.N.Y. 2013). Under this doctrine, a statute is facially invalid when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Ams. for Prosp. Found.*, 141 S. Ct. at 2387. The Policy fails this test.

The Policy is unconstitutionally overbroad for the same reasons it is facially invalid under *Salerno*. Moreover, even if the Policy did not violate *Salerno* (and it does) the Policy's presumption that all parents of every child who wants to socially transition in secret are abusive would still violate the overbreadth doctrine. The result of that presumption is that parents, most of whom are fit, are kept in the dark simply because some small subset of parents might be abusive. This renders the Policy unconstitutional in "a substantial number of its applications" under the overbreadth doctrine. *Ams. for Prosp. Found.*, 141 S. Ct. at 2387.

CONCLUSION

For the foregoing reasons, the Court should deny the District's Motion to Dismiss.

Respectfully submitted,

Dated: May 9, 2023

DHILLON LAW GROUP INC.
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PROOF OF SERVICE

I, Harmeet K. Dhillon, hereby certify that on May 9, 2023, I electronically filed the above documents with the Clerk of the Court using CM/ECF, which will send electronic notification of such filing to all registered counsel.

By: */s/ Harmeet K. Dhillon*

Harmeet K. Dhillon