

1 LOUIS A. LEONE (SBN 099874)
2 (Of Counsel)
3 BRIAN A. DUUS, ESQ. (SBN 263403)
4 JIMMIE E. JOHNSON, ESQ. (SBN 223344)
5 **LEONE ALBERTS & DUUS**
6 1390 Willow Pass Road, Suite 700
7 Concord, CA 94520-7913
8 Telephone: (925) 974-8600
9 Facsimile: (925) 974-8601
10 Emails: bduus@leonealberts.com
11 jjohnson@leonealberts.com

12 Attorneys for Defendant
13 SUPERINTENDENT KELLY STALEY,
14 in her official capacity

15 IN THE UNITED STATES DISTRICT COURT
16 EASTERN DISTRICT OF CALIFORNIA

17 AURORA REGINO,

18 Plaintiff,

19 vs.

20 SUPERINTENDENT KELLY STALEY, in
21 her official capacity; CAITLIN DALBY, in her
22 official capacity; REBECCA KONKIN, in her
23 official capacity; TOM LANDO, in his official
24 capacity; EILEEN ROBINSON, in her official
25 capacity; and MATT TENNIS, in his official
26 capacity,

27 Defendants.

Case No.: 2:23-cv-00032-JAM-DMC

**REPLY IN SUPPORT OF DEFENDANT
SUPERINTENDENT KELLY STALEY'S
MOTION TO DISMISS FIRST AMENDED
COMPLAINT**

(Fed. R. Civ. Proc. 12)

Date: June 27, 2023

Time: 1:30 p.m.

Crtrm.: 6

Judge: Hon. John A. Mendez

Complaint Filed: January 6, 2023

Trial Date: Not Yet Set

1 The Opposition is filled with policy arguments challenging the wisdom of AR 5145.3.
2 See e.g., Oppo. at 1:14-15 [“Socially transitioning every transgender-identifying child who asks
3 for it is a ‘one-size-fits-all’ approach that fails to account for each child’s unique situation.”]
4 And while reasonable minds may certainly differ as to whether Plaintiff’s policy preferences are
5 advisable, the courtroom is not the venue for that political debate. Those policy arguments need
6 to be addressed to a legislative body. On the other hand, the question for this Court, as a
7 judiciary body, is not whether it is a good idea for school districts to notify parents of a minor’s
8 gender identity and receive their consent before accepting alternative names and pronouns, but
9 whether the United States Constitution mandates such parental authority.

10 In one of its more notable arguments, the Opposition asserts, “According to the District, a
11 five-year old could go to a state-run health clinic complaining of sad thoughts and obtain a Zolofit
12 prescription.” Oppo. at 6:26-27. This argument, however, exemplifies the Opposition’s
13 confusion between constitutional mandates and public policy preferences. Few would disagree
14 that sound public policy likely favors a legislative body barring five-year-olds from unilaterally
15 securing Zolofit prescriptions, or with similarly limiting minors in the exercise of other
16 constitutional rights – which the United States Supreme Court has long held policy makers may
17 do subject to strict scrutiny judicial review. *Bellotti v. Baird*, 443 U.S. 622, 633-35 (1979);
18 *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 945-46 (9th Cir. 1997) (strict scrutiny
19 applies for laws affecting a minor’s constitutional rights). However, there is a significant
20 difference between the question of whether policy makers *should* limit the manner in which
21 minors obtain Zolofit prescriptions by affording parents notice and consent authority, and
22 whether the United States Constitution *mandates* such parental control. The former is a question
23 for a legislative body, the latter is a question for a judicial one – and controlling precedent
24 provides that not only is there no constitutional *mandate* for parental notice and consent, but
25 even where policy makers impose such authority based upon public policy *preferences*, children
26 must be afforded a procedural “bypass” of that control. *Bellotti*, 443 U.S. at 643-644
27 (legislatively-imposed parental notice requirement for abortions requires bypass provision).

28 ///

ARGUMENT**I. MANN AND WALLIS DO NOT HOLD THAT MINORS ARE INCAPABLE OF MAKING THEIR OWN VOLUNTARY TREATMENT DECISIONS**

Unfortunately, the Opposition miscites relevant case law decisions to an extent that is eye-raising. As one example, Plaintiff quotes *Mann v. Cnty. of San Diego*, 907 F.3d 1154, 1162 (9th Cir. 2018) as allegedly reading, with a bracketed substitution: “children [are unable] to provide informed permission for medical procedures.” *Oppo.*, at 4:16-18 (bracketed language proffered in Opposition). However, aside from the fact that this bracketed language would run contrary to applicable law in the context of voluntary treatments sought by minors – a question well-worn in the abortion context, see e.g., *Bellotti*, 443 U.S. at 643-644; the *Mann* decision actually reads that it is involuntary, investigatory physical examinations conducted on minors at the direction of the State that violates the parents’ rights under the Fourteenth Amendment to the United States Constitution *in addition to* the child’s rights under the Fourth Amendment unless a parent consents to the procedure because “children *rely on parents or other surrogates* to provide informed permission for medical procedures....” 907 F.3d at 1162 (emphasis added). In short, Plaintiff’s bracketed substitution of “are unable” is significantly inaccurate.

Plaintiff similarly misquotes *Wallis v. Spencer*, 202 F.3d 1126, 1141-42 (9th Cir. 2000) as purportedly holding that she has the “right to make ‘medical decisions for [her] children,’” *Oppo.* at 3:24-26; when in fact, *Wallis* is likewise limited to State-directed investigatory medical procedures. “We agree with the Second Circuit ... that the Constitution assures parents that, in the absence of parental consent, physical examinations of their child may not be undertaken for investigative purposes at the behest of state officials [absent court approval].” *Id.* at 1141 (internal grammatical marks and citation omitted). In short, nothing in *Mann* nor *Wallis* challenges the right of a child to voluntarily seek treatment confidentially. And while detailing every other distorted case citation is beyond the limits of the instant brief, it is notable that these two examples are well-accompanied throughout the Opposition.

In a similar vein, the Opposition expressly opposes the District’s request that this Court take judicial notice of the WPATH Standards of Care as an authoritative source for the definition

1 of term “transition,” *Oppo.*, at 2:26-28; yet, then asks this Court to take notice of the very same
 2 WPATH Standards of Care as an authoritative source for the definition of the term “treatment.”
 3 Specifically, the Opposition reads, “[T]he Ninth Circuit and other courts have concluded that
 4 social transitioning constitutes ‘treatment.’ *Edmo v. Corizon, Inc.* 935 F.3d 757, 770 (9th Cir.
 5 2019). . . .” *Oppo.*, at 4:2-4. Aside from the fact that *Edmo* does not address whether “social
 6 transitioning” constitutes “treatment” to any extent – as Plaintiff defines “social transitioning” to
 7 mean “the active affirmation of a person’s transgender identity,” FAC, ¶ 2; that portion of the
 8 Ninth Circuit opinion cited by the Opposition reads: “[M]any of the major medical and mental
 9 health groups in the United States—including the American Medical Association... recognize
 10 the WPATH Standards of Care as representing the consensus of the medical and mental health
 11 communities regarding the appropriate treatment for transgender and gender dysphoric
 12 individuals. . . . The WPATH Standards of Care identify the following evidence-based treatment
 13 options of individuals with gender dysphoria . . . (1) ‘changes in gender expression and role
 14 (which may involve living part time or full time in another gender role, consistent with one’s
 15 gender identity). . . .’ *Edmo*, at 769-770. While inconsistent arguments may be tolerated, if not
 16 welcomed, in the political arena; it has no place in court.

17 **II. THE KANSAS COURT DID NOT HOLD PARENTS ARE ENTITLED TO**
 18 **PIERCE THE GENDER IDENTITY PRIVACY RIGHTS OF MINORS**

19 The Opposition asserts that a district court in Kansas has determined that parents must be
 20 consulted regarding what name their transgender children use at school. *Oppo.*, at 5:5-8. Not so.
 21 In *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, 2022 U.S. Dist. LEXIS 83742 (D. Kan. May 9,
 22 2022), a school district employee challenged a rule prohibiting her from disclosing to parents the
 23 alternative names used by their transgender children. The district court issued a preliminary
 24 injunction against the rule, finding that it likely violated the employee’s freedom of religion –
 25 specifically the Christian tenant “prohibit[ing] dishonesty and lying.” *Id.* at *9-13. Determining
 26 that the rule infringed upon the employee’s fundamental religious rights, the Kansas court found
 27 strict scrutiny review appropriate. In turn, applying that level of scrutiny, the Kansas court then
 28 held that the District had not articulated a compelling enough reason to stop the employee from

1 disclosing the alternative names because parents have “the right ... to have an opinion and to
2 have a say in what a minor child is called and by what pronouns they are referred.” *Id.* at *16-
3 21. Notably, in contrast, the instant case does not concern a teacher seeking to exercise her
4 religious freedoms. Rather, this case concerns a parent wishing to pierce the constitutionally-
5 protected privacy rights of her child. To that end, the Kanas court did not make any
6 determination on such a question, nor did it employ Ninth Circuit precedent anywhere in the
7 analysis it did provide. See generally, *Ricard*, 2022 U.S. Dist. LEXIS 83742.

8 **III. AR 5145.3 DOES NOT TREAT PARENTS AS “THE ENEMY”**

9 The Opposition next argues that AR 5145.3 violates Plaintiff’s right to intimate human
10 relationships because it allegedly “treats [Plaintiff] as the enemy, impermissibly driving a
11 ‘wedge’ into the parent-child relationship.” *Oppo.* at 6:4-5. The argument is meritless. AR
12 5145.3 not only (1) does not direct any school personnel to counsel against parental disclosure;
13 but, in fact, (2) provides for disclosure even when a minor exercises their constitutionally-
14 protected right to privacy “when necessary to preserve the student’s physical or mental well-
15 being;” and (3) expressly provides for consulting the student “[a]s appropriate given the
16 student’s need for support any need to disclose the student’s transgender ... status ... to the
17 student’s parents/guardians....” Request for Judicial Notice, No. 1. In short, AR 5145.3
18 authorizes District personnel to pursue every legally-permissible manner of notifying parents of a
19 minor’s transgender status even when the minor has advised that they want that status to remain
20 confidential. AR 5145.3 does not select the child’s gender identity – the minor does. AR 5145.3
21 does not decide whether to keep that information confidential – the minor does. The District
22 does not alter the parent’s relationship with the child – it merely maintains the status quo as
23 already shaped by the minor.

24 **IV. THE OPPOSITION ADMITS THAT AR 5145.3 IS A LEGISLATIVE ACT**

25 As set forth in the moving papers, Plaintiff has no right to procedural due process as it
26 concerns AR 5145.3 (aside from the general norms of rule-making) because it was a legislative
27 act. To that end, the Opposition admits that AR 5145.3 was indeed a legislative rule-making.
28 *Oppo.*, at 9:24-25 (“Here, Ms. Regino seeks prospective relief against a school policy – which is

1 a ‘legislat[ive]’ enactment....”) However, the Opposition then tries to avoid the fact that
2 Plaintiff lacks procedural due process protections by characterizing AR 5145.3 as “creating an
3 ‘established state procedure’ governing case-by-case adjudications....” Oppo. at 14:15-17. The
4 contention lacks merit. Consistent with the definition provided by Black’s Law Dictionary,
5 courts have found that an “adjudication” only “occur[s] in two instances: when a case or dispute
6 is settled through judicial means, and when there is a determination of guilt or liability.”
7 *Sunsites-Pearce Fire Dist. v. Azar*, 2020 U.S. Dist. LEXIS 123380, *19-20 (D. Ariz., July 14,
8 2020). AR 5145.3 does not concern any judicial determinations. Rather, the regulation merely
9 requires District employees to follow the gender identity and privacy directions of its students.

10 **V. THE FAC DOES NOT CHALLENGE AR 5145.3 AS OVERBROAD**

11 Finally, the Opposition challenges AR 5145.3 as “overbroad”. Oppo. at 15:14-26.
12 However, nowhere does the FAC raise such an allegation. See generally, FAC. “Raising what is
13 essentially a new cause of action in an opposition brief to a motion to dismiss is improper....”
14 *Provencio v. Vazquez*, 258 F.R.D. 626, 639 (E.D. Cal. 2009). Moreover, “to be overbroad a
15 statute must reach a substantial amount of constitutionally protected conduct.” *United States v.*
16 *Gilbert*, 813 F.2d 1523, 1531 (9th Cir. 1987) (internal grammatical marks and citation omitted).
17 The Opposition asserts that AR 5145.3 is overbroad because it “presum[es] that all parents of
18 every child who wants to socially transition in secret are abusive..., most of whom are fit....”
19 Oppo., at 15:21-26. However, again, the Opposition confuses the issue. Every minor has a
20 constitutionally-protected privacy right to their gender identity information. AR 5145.3 protects
21 that right. AR 5145.3 is not designed solely to address abusive parents. No parent, abusive or
22 not, has a right to pierce the privacy rights of minors.

23
24 Dated: May 16, 2023

LEONE ALBERTS & DUUS

25 /s/ Jimmie E. Johnson
26 BRIAN A. DUUS, ESQ.
27 JIMMIE E. JOHNSON, ESQ.
28 Attorneys for Defendants