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12 UNITED STATES DISTRICT COURT
 13 SOUTHERN DISTRICT OF CALIFORNIA

15 ELIZABETH MIRABELLI, an
 16 individual, and LORI ANN WEST, an
 17 individual,

18 Plaintiffs,

19 v.

20 MARK OLSON, in his official capacity as
 21 President of the EUSD Board of
 22 Education, et al.,

23 Defendants.

Case No.: 3:23-cv-0768-BEN-WVG

**Plaintiffs’ Memorandum of Points &
 Authorities in Opposition to School
 District Defendants’ Motion to
 Dismiss [Fed. R. Civ. P. 12(b)(6)]**

Judge: Hon. Roger T. Benitez
 Courtroom: 5A
 Hearing Date: June 26, 2023
 Hearing Time: 10:30 a.m.

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INTRODUCTION

Pending before the Court are the parties’ cross motions: Plaintiffs Elizabeth Mirabelli and Lori Ann West’s motion for a preliminary injunction (ECF No. 5) and the Escondido Union School District (“EUSD”) Defendants’¹ Rule 12(b)(6) motion to dismiss. (ECF No. 7.) EUSD’s motion to dismiss is flawed for the simple reason that it misconstrues Plaintiffs’ claims, draws all inferences (whether reasonable or not) in EUSD’s favor, and finally ignores inconvenient pleaded allegations.

The Complaint, as framed, adequately pleads claims upon which relief can be granted—and indeed, persuasively pleads a clear violation of law. As stated in Plaintiffs’ motion for a preliminary injunction, courts across the country are already striking down policies like EUSD’s. *See, e.g., Ricard v. USD 475 Geary County, KS Sch. Bd.*, No. 5:22-cv-4015, 2022 WL 1471372 (D. Kan. May 9, 2022). Thus, the Court should deny EUSD’s motion to dismiss and grant Plaintiff Mirabelli and West’s motion for a preliminary injunction.

FACTUAL & PROCEDURAL BACKGROUND

Plaintiffs Elizabeth Mirabelli and Lori Ann West are long-time and devoted educators. They greatly love their work and find inspiring young children to be a fulfilling vocation. As a result they pour themselves into their work, and in their several decades teaching seventh and eighth grade children, they have received numerous accolades. (ECF No. 1, Compl., pp.20-23, ¶¶75-90.) But with the 2022-2023 school year, they discovered for the first time that they were expected to deceive parents by withholding information about a child’s gender identity. (Compl., pp.28-37, 67-113,

¹ The motion to dismiss was brought by the defendants associated with the Escondido Union School District (“EUSD”). (ECF No. 7-1, pp.1:19-2:6.) It was not joined by the defendants associated with the California Department of Education (“CDE”). As short-hand, the motion alternatively refers to the movants as the “School District Defendants” (ECF No. 7-1) or the “School Employee Defendants.” (ECF No. 7.) This brief will refer to them as “EUSD.” Further, unless otherwise noted, all quotations are “cleaned up” by omitting citations, quotation marks, brackets, ellipses, and emphasis; all emphasis is added. Page number references are to the ECF-generated page number contained in the header of each ECF-filed document.

1 ¶¶117-48 & Exs.1-9.) Presenting as a gender different from one’s biological sex in
2 public is called a “social transition” and is normally a reasoned medical decision made
3 by families in consultation with psychologists. (Compl., pp.25-26, ¶104; *see also* ECF
4 No. 5-2, Declaration of Dr. Erica E. Anderson, pp.24-34, ¶¶56-86.)

5 However, EUSD ordered that children alone can make the decision whether to
6 “socially transition” and that under the child’s “Right to Privacy” teachers had to
7 scrupulously avoid “outing” a child to his parents. (Compl., pp.28-37, 51-52, 67-113,
8 ¶¶117-48, 208-12 & Exs.1-9.) As shown by the discipline of a fellow teacher (Compl.,
9 pp.28-29, ¶117), failure to comply with these policies will lead to discipline, including
10 eventually termination. (Compl., p.32, ¶129.) This greatly bothered both Plaintiffs
11 Mirabelli and West because, both morally and religiously, they know that keeping this
12 information from parents is wrong. They believe that the relationship between parents
13 and children is sacred and should not be undermined through introducing deception
14 and distrust. (Compl., pp.20-27, 193-236, ¶¶75-111 & Exs.24-25.)

15 Moreover, in seeking the best for their gender incongruent students, Plaintiffs
16 Mirabelli and West believe that life-altering decisions like whether to “socially
17 transition” must be left in the hands of parents, not children alone. (*Id.*) Thus, they
18 sought a religious accommodation under Title VII and the California Fair Employment
19 & Housing Act. EUSD agreed to grant them a partial accommodation, such that they
20 could personally refer to students in a gender-neutral manner. But EUSD held firm on
21 its requirement that they participate in the deception of parents. (Compl., pp.44-53,
22 101-13, 250-75, ¶¶177-216 & Exs.7-9, 27-28.)

23 Thus, on May 26, 2023, Plaintiffs Mirabelli and West initiated this action. They
24 submitted a lengthy, 64-page complaint with 286 paragraphs. (Compl., pp.1-64.) That
25 complaint also attached thirty-two exhibits documenting the contours of EUSD’s
26 gender identity policies and the history of the parties’ negotiations. (Compl., pp.67-
27 275.) The Complaint coined the term of art “Parental Exclusion Policies” to
28 encompass the constellation of policies that require teachers to unhesitatingly accept a

1 student’s self-professed gender identity, begin using the student’s preferred name and
2 pronouns (even if instructed not to by a parent), and revert to a legal name and
3 biological pronouns when speaking with parents to avoid “outing” the student.
4 (Compl., p.37, ¶150.) The Complaint was verified by both Plaintiff Elizabeth Mirabelli
5 and Plaintiff Lori Ann West. (Compl., pp.65-66.)

6 The Complaint pleads four claims for relief. First, it pleads that EUSD’s
7 Parental Exclusion Policies violate the Free Speech Clause of the First Amendment by
8 compelling speech in a viewpoint discriminatory manner. (Compl., pp.53-56, ¶¶217-
9 39.) Second and third, the Complaint pleads that EUSD’s refusal to exempt Plaintiffs
10 Mirabelli and West from the Parental Exclusion Policies violates the Free Exercise
11 Clause of the First Amendment under two different theories. The Complaint pleads
12 that the policies are not neutral and generally applicable, because of their categorical
13 exemptions (Compl., pp.57-59, ¶¶240-58) and discretionary exemptions. (Compl.,
14 pp.60-63, ¶¶259-80.)² Fourth, the Complaint pleads a claim for declaratory relief that
15 the California Department of Education’s (“CDE”) Frequently Asked Questions page
16 on gender identity—which formed the basis of EUSD’s own policies—is not an
17 accurate recitation of California or federal law. (Compl., pp.63-64, ¶¶281-86.)

18 The Complaint names as defendants twenty-two individuals: ten associated with
19 EUSD (Compl., pp.7-9, ¶¶21-32), and twelve associated with the CDE. (Compl.,
20 pp.10-12, ¶¶33-46.) It seeks declaratory and injunctive relief, and actual and nominal
21 damages. (Compl., p.64, Prayer ¶¶A-C.) In early May, both EUSD and the CDE
22 waived service of summons. (ECF Nos. 3 & 4.) On May 23, 2023, EUSD filed the
23 present Rule 12(b)(6) motion to dismiss the Complaint. (ECF No. 7.) The CDE has
24 not yet filed a responsive pleading.

25 _____
26 ² EUSD incorrectly states that “Plaintiffs’ second and third claims for relief are
27 captioned the same.” (Mtn., p.19:23-25.) In fact, Plaintiffs’ second claim is titled:
28 “Not Generally Applicable due to *Categorical Exemptions*” (Compl., p.57:1-4), and
their third claim is titled: “Not Generally Applicable due to *Discretionary Exemptions*.” (Compl., p.60:1-4.)

LEGAL STANDARD

1
2 A complaint must provide “fair notice of the nature of the claim, but also
3 grounds on which the claim rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.3
4 (2007). “To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must
5 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
6 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,
7 550 U.S. at 570). A claim is facially plausible “when the plaintiff pleads factual content
8 that allows the court to draw the reasonable inference that the defendant is liable for
9 the misconduct alleged.” *Id.* at 678. The standard for dismissal Rule 12(b)(6) is quite
10 strict. “A complaint must not be dismissed unless it appears beyond doubt that the
11 plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff
12 to relief.” *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011). The court “accept[s]
13 factual allegations in the complaint as true and construe[s] the pleadings in the light
14 most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*,
15 519 F.3d 1025, 1031 (9th Cir. 2008).

ARGUMENT

16
17 **I. THE FOUR CLAIMS FOR RELIEF ARE ADEQUATELY PLEADED**

18 EUSD’s motion proceeds in reverse order. Its first four sections address
19 California and federal law on gender identity, and are then incorporated by reference
20 into its section attacking Plaintiffs’ fourth claim for declaratory relief. (Mtn., p.23,
21 § V.J (citing Mtn., pp.4-14, §§ V.A-E).) The motion then addresses Plaintiffs’ free
22 speech claim (Mtn., pp.14-19, §§ V.F-H) and Plaintiffs’ free exercise claims. (Mtn.,
23 pp.19-23, §§ V.I.) This brief will address the claims in the order pleaded.

24 **A. Plaintiffs Have Adequately Pleaded a Violation of the Free Speech**
25 **Clause through Compelled Speech and Viewpoint Discrimination**

26 EUSD raises two arguments against Plaintiffs’ free speech claim. First, EUSD
27 argues that its Parental Exclusion Policies do not actually require Plaintiffs to do
28 anything to which they object. (Mtn., pp.14-16, § V.F.) Second, EUSD argues that

1 Plaintiffs’ speech complying with (or refusing to comply with) its Parental Exclusion
 2 Policies is government speech for which Plaintiffs have no First Amendment rights.
 3 (Mtn., pp.16-19, §§ V.G-H.) Both arguments fail.

4 **1. Plaintiffs object to “betraying” parents through a lack of**
 5 **candor, not just “lying”**

6 EUSD’s first argument is that a necessary element of a compelled speech claim
 7 is that the compelled speech must be speech “to which the speaker objects.” (Mtn.,
 8 p.14:17-18.) Then, EUSD argues that Plaintiffs only object to lying (Mtn., p.14:25-26),
 9 but that the Parental Exclusion Policies do not actually require them to lie. (Mtn.,
 10 pp.14:26-11:22.) The key clause is that Plaintiffs *only object to lying*. But, unsurprisingly,
 11 EUSD cites nothing from the complaint to support this assertion. It is incorrect.

12 Throughout, the Complaint pleads a description of EUSD’s Parental Exclusion
 13 Policies, pleads that the policies require speech (or refraining from speech), and pleads
 14 that Plaintiffs *object to those policies*. Nowhere does the Complaint limit Plaintiffs’
 15 objection to reciting “a lie.” Rather, just as Plaintiffs object to using their speech to lie
 16 to parents, they object to using their speech to *betray* parents:

17 176. ... As teachers caring for children, [Plaintiffs] believe they have a
 18 very specific relationship with parents. They believe they have a religious
 19 and moral duty to provide parents with all information that is needed to
 20 properly care for and raise their children. They also believe that parents
 21 would expect that all such information would be shared and would feel
 betrayed if their child’s gender identity was specifically withheld.

22 (Compl., p.44, ¶176.) Even if the policies are only, as EUSD suggests in briefing, “an
 23 instruction to avoid the question” (Mtn., p.16:22), Plaintiffs object to *that*. Cf. *Escobar-*
 24 *Resendiz v. Garland*, No. 20-73807, 2022 WL 1599126, at *1 (9th Cir. May 20, 2022)
 25 (witness lacked “candor” when he “avoided answering questions”).

26 Even on its face, however, EUSD’s argument fails. In its motion, EUSD never
 27 defines a “lie.” To “lie” includes “*to create a false or misleading impression.*”
 28 2 WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 1305 (1976) (emphasis

1 added), or to “*give a deceitful impression.*” 1 FUNK & WAGNALLS NEW PRACTICAL
 2 STANDARD DICTIONARY 772 (1946) (emphasis added). Thus, at the very end of the
 3 factual allegations, the Complaint rightly pleads that anything other than perfect
 4 candor with parents is “a lie”:

5 211. The issue that arises when speaking with parents is that, as agents of
 6 EUSD, they would be directly communicating a different false message.
 7 According to EUSD, it has approximately five transgender or gender
 8 diverse children assigned to Mrs. Mirabelli’s classes and three
 9 transgender or gender diverse children assigned to Mrs. West’s classes.
 10 As an agent of EUSD, when speaking with parents, if Mrs. Mirabelli and
 11 Mrs. West refer to these students as “girls” without identifying them as
 “boys” or “nonbinary children” they would be communicating that
 EUSD does not believe they are boys or nonbinary—which is not what
 EUSD believes.

12 212. The only way to truthfully communicate with parents is to state, at
 13 the outset of any communication, the following: “I am calling about [legal
 14 name], who EUSD refers to as [preferred name].” Anything else—
 15 whether viewed through the lens of fraudulent concealment or affirmative
 16 misrepresentation—is a lie. Mrs. Mirabelli and Mrs. West have no desire
 17 to call parents to specifically report a child’s gender identity, and will only
 speak with parents about legitimate school business. But when speaking
 with parents, they cannot conceal relevant information.

18 (Compl., pp.51-52, ¶¶211-12.)

19 However framed, the Complaint cannot be read in such a way that Plaintiffs do
 20 not object to the Parental Exclusion Policies. Plaintiffs directly object to the speech that
 21 EUSD seeks to compel. (Compl., p.55, ¶¶227-28 (paragraphs in First Claim stating
 22 that Plaintiffs object to the compelled speech, without limiting objection to “lying”).)³
 23

24 ³ Moreover, Defendants’ policies do require teachers to make false statements of
 25 fact. If parents become curious about what a teacher is hiding and directly ask
 26 whether their child has socially transitioned at school, the teacher is instructed to
 27 reply that they can only discuss “information regarding the student’s behavior as it
 28 relates to school, class rules, assignments, etc.” (Compl., p.51, 110, ¶209 & Ex.9 at
 pp.2-4.) Teachers, of course, can and do discuss students’ behavior with their
 parents as it affects many other things such as the child’s social adjustment, physical
 and emotional health, and the like. (Compl., pp.37, 151, ¶151 & Ex.15 at ¶7.)

1 **2. Plaintiffs are speaking as private citizens, not public employees,**
 2 **due to the factual nature of their jobs and the constitutional**
 3 **limits on the government**

4 EUSD next argues that Plaintiffs lack any First Amendment rights because the
 5 speech at issue is EUSD’s speech—not Plaintiffs’ speech—which has been sold to
 6 EUSD in its role as employer under *Garcetti v. Ceballos*, 547 U.S. 410 (2006). (Mtn.,
 7 pp.16:24-19:21.) Importantly, neither *Garcetti* nor any other case cited by EUSD held
 8 on a Rule 12(b)(6) motion to dismiss that a government employee had waived his free
 9 speech rights.⁴ This is Question No. 2 in the Ninth Circuit’s *Eng* analysis. *See Eng v.*
 10 *Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009).

11 **a. The Second Eng question is skipped in the academic context**
 12 **due to the constitutional protection for academic freedom**

13 First, EUSD attacks Plaintiffs’ assertion that the academia exception to *Garcetti*
 14 can apply in the context of public school teachers instead of university professors.
 15 (Mtn., pp.17:26-18:18.) If that exception applies, the second *Eng* question is simply
 16 skipped. *See Demers v. Austin*, 746 F.3d 402, 412-13 (9th Cir. 2014).

17 The Ninth Circuit in *Demers*, however, could not have been clearer. There, a
 18 professor was retaliated against for distributing drafts from an in-progress book and an
 19 accreditation plan for a Communications Department. The Ninth Circuit held as
 20 follows: “We conclude that *Garcetti does not*—indeed, consistent with the First
 21 Amendment, cannot—*apply to teaching* and academic writing that are *performed*
 22 *“pursuant to the official duties” of a teacher* and professor.” *Id.* at 412 (emphasis
 23 added). If the use of the term “teacher” was not clear, the Ninth Circuit later made
 24 clear that it meant a public school teacher: “Further, the degree of freedom an instructor
 25 should have in choosing what and how to teach will vary depending on whether the
 26 instructor *is a high school teacher* or a university professor.” *Id.* at 413 (emphasis added).

27 Requiring teachers to tell parents of the existence of an imaginary rule is to require
 28 them to say something that is literally untrue, i.e., to lie.

⁴ The only case EUSD cited which was decided on a motion to dismiss involved a reversal. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

1 That *Demers* extends the academia exception to public school teachers has
2 been recognized by several cases. *See, e.g., See Oyama v. Univ. of Hawaii*, 813 F.3d
3 850, 866 n.13 (9th Cir. 2015) (“In part due to considerations of academic freedom,
4 we have declined to extend *Garcetti* to the context of *public school teachers*.”)
5 (emphasis added); *Hodge v. Antelope Valley Cmty. Coll. Dist.*, No. CV 12-780, 2014 WL
6 12776507, at *5 n.4 (C.D. Cal. Feb. 14, 2014) (“The Ninth Circuit generally considers
7 five questions under the *Pickering* test, including whether the speech was performed
8 according to the employee’s official duties. *See Eng*, 552 F.3d at 1070. *Demers*,
9 however, effectively eliminated that inquiry with respect to *public school teachers* and
10 professors’ academic speech.”) (emphasis added).

11 EUSD next cites to the Sixth Circuit, which has not extended that exception to
12 the public school context. But courts in the Ninth Circuit are not bound by the Sixth
13 Circuit. Rather, a respected treatise identifies *Demers* as part of a circuit split, with the
14 Ninth and Fourth Circuits applying academic freedom to public school teachers, and
15 other circuits not doing so. *See* 1 RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST
16 AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 2:18 & n.22 (Oct.
17 2022 Update) (“Lower courts have reached mixed results on whether there should be
18 some kind of academic exception to the ‘official duties’ test of *Garcetti*, and if so,
19 whether it should only apply to higher education and under what circumstances.”).⁵

20 Finally, EUSD cites *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir.
21 2011). There, several years before *Demers*, the Ninth Circuit applied all five *Eng*
22 questions in a case involving a public school teacher. The teacher, Bradley Johnson,
23 was a math teacher ordered to take down banners from his classroom that celebrated
24 America’s religious heritage. The Ninth Circuit only made it through the first two
25

26 ⁵ *See Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 695 n.11 (4th Cir. 2007) (in case
27 brought by public school teacher: “The Court [in *Garcetti*] explicitly did not decide
28 whether this analysis would apply in the same manner to a case involving speech
related to teaching. *Id.* at 1962. Thus, we continue to apply the *Pickering-Connick*
standard as articulated in *Boring* to this appeal.”).

1 *Eng* questions, finding that under the second one (that would normally be omitted in
2 an “academic freedom” case), the teacher’s speech was the government’s speech
3 and so he had no First Amendment rights.

4 The vast majority of the Ninth Circuit’s analysis focused on the factual
5 analysis of whether Mr. Johnson “spoke as a private citizen” or as a “public
6 employee.” *Id.* at 966-70. This substantive analysis has since been directly abrogated
7 by the Supreme Court. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2424-25
8 (2022). Indeed, in *Kennedy*, the lower courts cited and relied heavily on *Johnson*’s
9 analysis, but were reversed by the Supreme Court. *See Kennedy v. Bremerton Sch. Dist.*,
10 869 F.3d 813, 823-30 (9th Cir. 2017) (appeal from orally denied preliminary
11 injunction); *Kennedy v. Bremerton Sch. Dist.*, 443 F. Supp. 3d 1223, 1233-37 (W.D.
12 Wash. 2020) (granting summary judgment).

13 On this substantive analysis, obviously this Court is bound by the Supreme
14 Court in *Kennedy*, not the Ninth Circuit in *Johnson*. *See Miller v. Gammie*, 335 F.3d
15 889, 900 (9th Cir. 2003) (en banc) (“[W]here intervening Supreme Court authority
16 is clearly irreconcilable with our prior circuit authority, ... district courts should
17 consider themselves bound by the intervening higher authority and reject the prior
18 opinion of this court as having been effectively overruled.”). However, in addition to
19 this substantive analysis, the Ninth Circuit in *Johnson* included a passing footnote
20 regarding “academic freedom.” In that footnote, the *Johnson* court stated:

21 We reject the contention that *Eng* step two, which is derived from
22 [*Garcetti v.*] *Ceballos*, does not apply to inquiries regarding teacher
23 speech. As the Sixth Circuit recognized in *Evans–Marshall*, [*Garcetti v.*]
24 *Ceballos*’s “academic freedom” carve-out applied to teachers at “public
colleges and universities,” not primary and secondary school teachers.

25 658 F.3d at 966 n.12. In this respect, the Ninth Circuit’s earlier *Johnson* is apparently
26 conflicting with the Ninth Circuit’s later *Demers* and *Oyama*.

27 The reason that the *Demers* court apparently did not feel bound by *Johnson* is
28 that passing comments in footnotes do not become law of the circuit. Rather, only

1 substantive analysis—such as occurred in *Demers*—is later binding:

2 Where a panel confronts an issue germane to the eventual resolution of
3 the case, and resolves it after reasoned consideration in a published
4 opinion, that ruling becomes the law of the circuit, regardless of whether
5 doing so is necessary in some strict logical sense. In other words, well-
6 reasoned dicta is the law of the circuit, but we are not bound by a prior
7 panel’s comments made casually and without analysis, uttered in passing
without due consideration of the alternatives, or done as a prelude to
another legal issue that commands the panel’s full attention.

8 *United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019) (cleaned up).

9 In *Demers*, the Ninth Circuit’s “full attention” was devoted to the academia
10 exception to the second question of the *Eng* analysis, and “after reasoned
11 consideration in a published opinion,” it decided to extend that exception to public
12 school teachers. *That* decision is binding law of the circuit.⁶

13 **b. *The government cannot make everything an employee says***
14 ***while on the job into government speech.***

15 EUSD next quotes, in two separate places, the same sentence from the Ninth
16 Circuit’s *Johnson* opinion. That sentence announces the broad holding that when a
17 “teacher[] goes to work and performs the duties he is paid to perform, he speaks not as
18 an individual, but as a public employee, and the school district is free to take legitimate
19 and appropriate steps to ensure that its message is neither garbled nor distorted.”
20 (Mtn., pp.18:19-24, 19:15-21 (quoting *Johnson*, 658 F.3d at 957).) EUSD also string
21 cites the out-of-circuit cases that *Johnson* relied on. (*See* Mtn., pp.18:25-19:13.)

22 But the government *cannot* make everything an employee says while on duty into
23 government speech. This analysis from *Johnson* is the specific holding expressly
24 repudiated by the Supreme Court in *Kennedy*. As the High Court stated:

25 ⁶ EUSD also makes an ambiguous statement that Plaintiffs cited *Demers v. Austin*, 746
26 F.3d 402, 411-13 (9th Cir. 2014), to “incorrectly contend they are discussing matter
27 [sic] of public concern so that their discussion is protected.” (Mtn., p.17:26-27.) This
28 could appear to be a reference to the first *Eng* question, but *Demers* is only cited in the
complaint for its reference to the academia exception, and Plaintiffs expect that is
what EUSD is referring to. (*See* Compl., p.54, ¶ 223.)

1 In reaching its contrary conclusion, the Ninth Circuit stressed that, as a
2 coach, Mr. Kennedy served as a role model “clothed with the mantle of
3 one who imparts knowledge and wisdom.” 991 F.3d at 1015. The court
4 emphasized that Mr. Kennedy remained on duty after games. *Id.*, at
5 1016. Before us, the District presses the same arguments. See Brief for
6 Respondent 24. And no doubt they have a point. Teachers and coaches
7 often serve as vital role models. But this argument commits the error of
8 positing an “excessively broad job descriptio[n]” by treating everything
9 teachers and coaches say in the workplace as government speech subject
10 to government control. *Garcetti*, 547 U.S. at 424, 126 S.Ct. 1951.

11 *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2425 (2022). As the Supreme Court’s
12 citation to *Garcetti* itself makes clear, this was always the rule, and the Ninth Circuit in
13 *Johnson* and *Kennedy* had simply overlooked it.

14 Rather, the proper analysis appears in the opinions dissenting from the denial of
15 rehearing en banc in *Kennedy*—which were vindicated by the Supreme Court’s
16 reversal. As stated by Judge O’Scannlain, joined by six other Ninth Circuit Judges:

17 The Court took pains, however, to admonish ‘that employers can [not]
18 restrict employees’ rights by creating excessively broad job
19 descriptions.’ [*Garcetti*] at 424, 126 S.Ct. 1951. Tellingly, the Court
20 offered this admonition in direct response to Justice Souter’s concern
21 that “the government may well try to limit the English teacher’s
22 options,’ for example, ‘by the simple expedient of defining teachers’ job
23 responsibilities expansively, investing them with a general obligation to
24 ensure sound administration of the school.” *Id.* at 431 n.2, 126 S.Ct.
1951 (Souter, J., dissenting). To guard against such concerns, the Court
explained that the ‘proper inquiry’ into a public employee’s official job
duties ‘is a practical one,’ and that ‘the listing of a given task in an
employee’s written job description is neither necessary nor sufficient to
demonstrate that conducting the task is within the scope of the
employee’s professional duties for First Amendment purposes.’ *Id.* at
424–25, 126 S.Ct. 1951.”

25 *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 933–34 (9th Cir. 2021) (Statement of
26 O’Scannlain, J., joined by Callahan, Bea, R. Nelson, Collins, Lee, Vandyke, JJ.,
27 dissenting from denial of rehearing en banc); *see also id.* at 934 (“This epitomizes the
28 sort of reasoning *Garcetti* forbids.”); *id.* at 937 (“[I]f we heed *Garcetti*’s instruction to

1 inspect the functional *content* of an employee’s speech, it is easy to see the distinction
2 between private speech and official public speech”).

3 EUSD’s appeal to a broad, bright-line rule is understandable because oftentimes
4 “there is a genuine factual dispute between the parties regarding whether [the
5 plaintiff’s] speech ... was made as part of his [official] duties or as a private citizen,”
6 precluding determination as a matter of law. *Eng v. Cooley*, 552 F.3d 1062, 1073 (9th
7 Cir. 2009); *accord Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th
8 Cir. 2008) (“[T]he third element of the protected status inquiry—whether the
9 plaintiff spoke as a public employee or a private citizen—is a mixed question of fact
10 and law. We further conclude that the pleadings and evidence in this case present
11 genuine disputes of material fact regarding the scope and content of Posey’s job
12 responsibilities.”). But that bright-line rule has been expressly rejected by the Supreme
13 Court—in reversing the Ninth Circuit. It is both bad law and, in any event, could not
14 form the basis of a motion to dismiss in a mixed question of fact and law.

15 **c. *The government cannot force employees to violate parental***
16 ***rights as a condition of employment***

17 EUSD next contends that “Plaintiffs[’] Assertion of Parents’ Rights Misstates
18 the Law.” (Mtn., pp.13:18-14:14.) In the complaint, Plaintiffs pleaded that EUSD
19 cannot force teachers to use their speech to violate the Fourteenth Amendment
20 substantive due process parental rights to direct the upbringing of their children.
21 (Compl., p.56, ¶233; *see* Compl., pp.18-20, ¶¶68-74.) In its motion, EUSD rightly
22 notes that the controlling authority is *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th
23 Cir. 2005) (“*Fields I*”), *amended*, 447 F.3d 1187 (9th Cir. 2006) (“*Fields II*”).

24 *Fields* stands for the proposition that parental rights “do[] not include the right
25 to restrict the flow of information in the public schools,” and that “parents do not have
26 a fundamental due process right generally to direct how a public school teaches their
27 child.” *Fields II*, 447 F.3d at 1190. That’s it. To clarify its holding, the Ninth Circuit in
28 *Fields II* deleted the sentence from *Fields I* that parental rights “do[] not extend beyond

1 the threshold of the school door,” and replaced it with the statement that the “due
2 process right of parents to make decisions regarding their children’s education does
3 not entitle individual parents to enjoin school boards from providing information the
4 boards determine to be appropriate in connection with the performance of their
5 educational functions.” *Fields II*, 447 F.3d at 1190.

6 As pleaded in the complaint, “the interest of parents in the care, custody, and
7 control of their children[] is perhaps the oldest of the fundamental liberty interests
8 recognized by [the Supreme] Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000)
9 (plurality). And “[i]t is cardinal” that “the custody, care and nurture of the child
10 reside first in the parents, whose primary function and freedom include preparation for
11 obligations the state can neither supply nor hinder.” *Id.* at 65-66 (quoting *Prince v.*
12 *Massachusetts*, 321 U.S. 158, 166 (1944)). (Compl., pp.18-19, ¶¶69-71.) Neither *Fields I*
13 nor *Fields II* stand for any contrary proposition and, as pleaded, Plaintiffs have
14 adequately stated that EUSD’s policies would force them to violate parental rights.⁷

15 **B. Plaintiffs Have Adequately Pleaded a Violation of the Free Exercise**
16 **Clause through Categorical and Discretionary Exemptions**

17 In its motion to dismiss, EUSD attacks both of Plaintiffs’ free exercise claims on
18 the merits. (Mtn., pp.20:6-11, 21:25-22:5 (categorical exemptions); Mtn., pp.21:15-24,
19 22:6-15 (discretionary exemptions).) EUSD further argues that Plaintiffs’ religious

20 _____
21 ⁷ In its discussion of parental rights, EUSD cites an order denying a preliminary
22 injunction in a parental rights case. *See Regino v. Staley*, No. 2:23-cv-32, 2023 WL
23 2432920 (E.D. Cal. Mar. 9, 2023). In *Regino*, the court held “that Plaintiff has raised
24 serious questions that go to the merits of her case, namely what the bounds of the
25 parental right are to direct the upbringing of one’s children as they pertain to a child’s
26 gender identity and expression in school.” *Id.* at *4. But the court ultimately denied a
27 preliminary injunction due to the absence of irreparable harm: “A.S. has returned to
28 identifying as a girl despite the continuance of the Regulation,” and so “Plaintiff’s
general claims of emotional distress and fear that the district will apply the Regulation
against her children are vague.” *Id.* In other words, *Regino* is not particularly helpful to
either Plaintiffs nor Defendants here, no more than *Konen v. Caldeira*, a factually
similar case that a school district chose to settle instead of fight. *See Minute Entry,*
Konen v. Caldeira, No. 5:22-cv-5195, ECF No. 45 (N.D. Cal., Apr. 7, 2023).

1 beliefs are not actually burdened (Mtn., pp.20:2-21:1), and that denying an exemption
 2 to Plaintiffs satisfies strict scrutiny. (Mtn., pp.22:21-23:9.) As in *Ricard*, where a
 3 preliminary injunction was granted on the Free Exercise Clause, all of the arguments
 4 fail. *See Ricard*, 2022 WL 1471372, *7-8 & nn.11-12.

5 **1. Plaintiffs object to the Policies on religious grounds.**

6 Like with its free speech argument, EUSD begins its free exercise argument by
 7 asserting that Plaintiffs “allege the policy requires them to lie when they must not
 8 disclose to the parent a students’ preferred name and pronoun without the student’s
 9 permission,” but that “it is not a lie to avoid answering a question.” (Mtn., p.20:13-
 10 24.) But, as discussed above, it is a dictionary definition of a “lie” to create a
 11 “misleading impression.” (*See* § I.A.1, *supra*.) In any event, Plaintiffs pleaded broadly
 12 that “Plaintiffs’ religious faith precludes them from observing the Parental Exclusion
 13 Policy” (Compl., pp.57, 60, ¶¶245, 263 (citing Compl., pp.20-27, § II, ¶¶75-111)),
 14 because “Plaintiffs understand that their role as teachers is complementary to, and not
 15 a substitute for, the parents’ role as the primary caregivers for their children.”
 16 (Compl., p.26, ¶108.) Both Plaintiffs Mirabelli and West believe that the parent-child
 17 relationship is sacred, was ordained by God, and that they cannot interfere with it. (*See*
 18 Compl., pp.21-23, ¶¶80-83, 90.)

19 This belief is more than plausible. Indeed, the Vatican’s Congregation for
 20 Education issued its own guidance document for Catholic educators to make clear that
 21 decisions concerning childhood gender incongruence must be made by parents—*not*
 22 *teachers*. (*See* Compl., p.22, ¶83 (quoting Compl., pp.226-29, Ex. 25 at ¶¶36-42).) This
 23 is not a novel theological concept, but one that has existed for more than three
 24 thousand years: “And the Lord spoke all these words: ... Honor thy father and thy
 25 mother.” *Exodus* 20:1-12 (Douay-Rheims). In any event, even if Plaintiffs’ religious
 26 beliefs were not traditional and long-standing, Plaintiffs have pleaded that the policies
 27 violate their religious beliefs, which is sufficient: “[R]eligious beliefs need not be
 28 acceptable, logical, consistent, or comprehensible to others in order to merit First

1 Amendment protection.” *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021).

2 **2. The Parental Exclusion Policies Trigger Strict Scrutiny**
 3 **Because of their *De Facto* Categorical Exemptions for**
 4 **Classified Staff, Administrative Staff, and Students.**

5 The Complaint pleads that “*in practice*,” EUSD’s Parental Exclusion Policies
 6 only bind teachers—excluding thousands of students and administrative staff.
 7 (Compl., p.58, ¶248 (citing Compl., pp.33-35, 119-46, ¶¶135-143 & Exs.11-13).) But, a
 8 policy or regulation will fail the general applicability requirement if it is “not applied in
 9 an evenhanded, across-the-board way.” *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct.
 10 2407, 2423 (2022). EUSD responded with the conclusory statement that:

11 Neither the Policy (Ex. 2) nor the Regulation (Ex. 3) excludes any adult
 12 or student. “The Regulation broadly applies to all acts relate to school
 13 activity or to school attendance occurring with a district school...”
 14 Comp. Ex. 2. It is true that the District provided training to teachers that
 15 it did not provide to custodians, but that was because teachers are on the
 16 front line of communication with parents. The policy requiring respect
 17 for gender diverse students applies to everyone.

18 (Mtn., p.22:1-5.)⁸

19 The only case cited by EUSD concerning categorical exemptions was vacated
 20 (without EUSD noting as much) long before its brief was filed. (*See* Mtn., p.20:7-10
 21 (quoting *Apache Stronghold v. United States*, 38 F.4th 742, 770 (9th Cir. 2022), *reh’g en*
 22 *banc granted, opinion vacated*, 56 F.4th 636 (9th Cir. 2022)).) In any event, the law on
 23 categorical exemptions is clear. In *Tandon* and *South Bay*, the Supreme Court
 24 recognized that government actions—there selective burdens on worship—that
 25 “treat *any* comparable secular activity more favorably than religious exercise” trigger
 26 strict scrutiny under the Free Exercise Clause. *Tandon v. Newsom*, 141 S. Ct. 1294,
 27 1296 (2021) (emphasis in original) (citing *Roman Catholic Diocese of Brooklyn v.*
 28 *Cuomo*, 141 S. Ct. 63, 67-68 (2020)). Governmental action is not generally applicable

⁸ Even if the policy facially applies to everybody on school campuses, the policy likely could not be enforced against students for a myriad of reasons. *See* Cal. Educ. Code § 49091.12(a) (“A pupil may not be compelled to affirm or disavow any particular personally or privately held world view, religious doctrine, or political opinion.”).

1 if the government “impose[s] more stringent regulations on religious” activity than
2 secular activity. *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717
3 (2021) (Statement of Gorsuch, J.); *see id.* (Barrett, J., concurring).⁹

4 In ruling on a motion to dismiss, the court must generally accept as true
5 plaintiff’s assertion that comparable secular activity has been exempted from the
6 policy. *See Lowe v. Mills*, ___ F.4th ___, No. 22-1710, 2023 WL 3642081, at *6 & n.10
7 (1st Cir. May 25, 2023) (medical exemptions to vaccine mandate made it not generally
8 applicable when “[d]rawing all reasonable inferences in the plaintiffs’ favor”). Thus,
9 at the motion to dismiss stage, the issue is whether Plaintiffs have plausibly pleaded
10 that “the District permitted secular conduct that contravened the legitimate
11 government interests underlying the policy to the same degree that Plaintiff’s
12 [requested exemption] would have done.” *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152,
13 1159 (9th Cir. 2022) (reversing grant of motion to dismiss).

14 At best, EUSD’s argument could be construed as: “because teachers are on the
15 front line of communication with parents,” it only needed to provide training to
16 teachers (not students or staff), to arrive at an acceptable, across-the-board level of
17 “respect for gender diverse students.” (Mtn., p.22:3-5.) But that draws inferences in
18 EUSD’s favor—not Plaintiffs’ favor. The proper inference is that EUSD refused to
19 provide training to students or staff for the administrative and political purpose of
20 avoiding a leak and public relations headache—to prevent parents from learning of the
21 policies. (*See Compl.*, pp.34, 140-41, ¶138 & Ex.12.) Further, EUSD has not only failed
22 to train “custodians” (Mtn., p.22:4), but all administrative staff at the main office.
23 (*Compl.*, p.34, ¶139.) There is no possible justification for failing to train *them*.

24 Where multiple conflicting inferences can be drawn from the evidence, “one

25 ⁹ The reasoning in Justice Gorsuch’s statement was joined by four other Justices,
26 making it a binding opinion. *See, e.g., Brach v. Newsom*, 6 F.4th 904, 933 n.26 (9th Cir.
27 2021), *reh’g en banc granted, opinion vacated*, 18 F.4th 1031 (9th Cir. 2021); *Roman*
28 *Catholic Archbishop of Washington v. Bowser*, 531 F. Supp. 3d 22, 42 n.15 (D.D.C.
2021); *id.* at 32 n.5; *accord Tandon*, 141 S. Ct. at 1296-97 (citing Justice Gorsuch’s
statement as binding authority).

1 advanced by defendant and the other advanced by plaintiff, both of which are plausible,
 2 plaintiff’s complaint survives a motion to dismiss under Rule 12(b)(6).” *Waln*, 54
 3 F.4th at 1160 (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)). The
 4 “complaint may be dismissed only when defendant’s plausible alternative explanation
 5 is so convincing that plaintiff’s explanation is implausible.” *Id.* at 1159-60. Here,
 6 Plaintiffs’ allegations are not *implausible*, and so the motion must be denied.

7 **3. The Parental Exclusion Policies Trigger Strict Scrutiny**
 8 **Because of their Discretionary Exemptions if the Violation Had**
 9 **a “Legitimate” Purpose.**

10 As a second basis for triggering strict scrutiny, the Complaint pleads that by
 11 excusing “legitimate” violations, “the Parental Exclusion Policies invite EUSD
 12 officials to decide which reasons for not complying with them are worthy of
 13 solicitude.” (Compl., p.61, ¶270 (citing Compl., p.35-37, ¶¶144-48 & Exs.3-4).) But
 14 where a regulation “invites the government to decide which reasons for not complying
 15 with the policy are worthy of solicitude,” strict scrutiny is triggered. *Fulton v. City of*
Philadelphia, 141 S. Ct. 1868, 1878-79 (2021). EUSD’s attack is twofold.

16 **First**, EUSD argues that “the discretion only applies to issues related to
 17 discipline.” (Mtn., p.22:7.) Thus, it only has unfettered discretion to decide to not
 18 discipline a teacher for refusing to comply with the Parental Exclusion Policies. (*See*
 19 *Mtn.*, p.22:12-13 (“It is an exception to discipline for a person who violated the policy
 20 based upon circumstances.”).) This is an oddly circular argument. Plaintiffs, too,
 21 would like to be exempted from any discipline for refusing to deceive parents. *See*
 22 KENNETH J. VANDEVELDE, THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL
 23 REASONING 11 (2d ed. 2011) (“An ancient maxim of the law holds that ‘where there is
 24 no remedy, there is no right.’ To say that I have a certain right arguably is an
 25 insignificant statement unless I can enforce that right”).

26 **Second**, EUSD appears to alternatively argue that its discretion is limited solely
 27 to excusing compliance when the violation was inadvertent. (Mtn., p.22:13-15.) In this
 28 respect, EUSD cites the Ninth Circuit’s decision in *Stormans*, which noted that where

1 “the exemptions at issue are tied directly to limited, particularized, business-related,
 2 objective criteria, they do not create a regime of unfettered discretion that would
 3 permit discriminatory treatment of religion or religiously motivated conduct,” and
 4 therefore do not trigger strict scrutiny. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1082
 5 (9th Cir. 2015); *see also id.* (“What makes a system of individualized exemptions
 6 suspicious is the possibility that certain violations may be condoned when they occur
 7 for secular reasons but not when they occur for religious reasons.”).

8 It is, again, reasonable for EUSD to attempt to shoehorn its Parental Exclusion
 9 Policies into *Stormans*’ analysis, but EUSD’s description of its own policies is
 10 factually incorrect. As pleaded in the complaint, “EUSD’s policies define ‘revealing
 11 a student’s transgender status or gender diverse status to individuals who do not have
 12 a *legitimate* need for the information without the student’s consent, and this includes
 13 parents or caretakers,’ as ‘*harassment* of our gender diverse students.’” (Compl.,
 14 p.35, ¶144 (quoting Compl., pp.89-90, Ex.4 at pp.6:25-26, 7:15-17).) This includes
 15 “when the disclosure is otherwise required by law or when the district has
 16 compelling evidence that disclosure is necessary to preserve the student’s physical or
 17 mental well-being.” (Compl., p.81, Ex.3 at p.5.)

18 Whether the term “good cause” or “legitimate” is used,¹⁰ this is
 19 quintessentially a paradigm creating unfettered discretion for “the government to
 20 decide which reasons for not complying with the policy are worthy of solicitude.”
 21 *Fulton*, 141 S. Ct. at 1878-79. Nowhere does EUSD limit what can constitute a
 22 “legitimate need for the information” —it only provides illustrative examples.

23 4. The Parental Exclusion Policies Cannot Satisfy Strict Scrutiny

24 The question next becomes whether, “[t]aking the allegations in the complaint
 25 as true, as we must,” EUSD can show that “its restrictions on the plaintiff’s protected
 26

27 ¹⁰ Or the terms “unnecessary,” *Church of the Lukumi Babalu Aye, Inc. v. City of*
 28 *Hialeah*, 508 U.S. 520, 537 (1993), or “consistent with sound” policies. *Blackhawk v.*
Pennsylvania, 381 F.3d 202, 210 (3d Cir. 2004) (Alito, J.).

1 rights serve a compelling interest and are narrowly tailored to that end.” *Waln*, 54
2 F.4th at 1163 (quoting *Kennedy*, 142 S. Ct. at 2426). Like any other allegations, pleaded
3 allegations of a scientific or medical nature must also be accepted as true. *Jones v.*
4 *Johnson*, 781 F.2d 769, 772 n.1 (9th Cir. 1986), *overruled on other grounds by Peralta v.*
5 *Dillard*, 744 F.3d 1076 (9th Cir. 2014); *see also Ferrari v. Nat. Partners, Inc.*, No. 15-cv-
6 4787, 2016 WL 4440242, at *5 (N.D. Cal. Aug. 23, 2016).

7 EUSD points to four compelling interests: (1) protecting children’s
8 constitutional right to privacy (Mtn., p.22:22-24; *see* Mtn., p.11:18-23); (2) eradicating
9 sex discrimination, which includes gender identity discrimination (Mtn., p.22:24-27);
10 (3) ensuring full and equal access to medical treatment regardless of sexual orientation
11 (Mtn., pp.22:27-23:2), and (4) protecting at-risk students from harm. (Mtn., p.23:2-3.)
12 EUSD then concludes that its Parental Exclusion Policies are narrowly tailored
13 because “[t]here is no alternative method of” satisfying these interests “when the
14 student does not want a parent to know.” (Mtn., p.23:6-9.)

15 **First**, EUSD’s “‘justification[s]’ for interfering with First Amendment rights
16 ‘must be genuine, not hypothesized or invented *post hoc* in response to litigation.’”
17 *Kennedy*, 142 S. Ct. at 2432 n.8. Thus, EUSD needed to cite where in its policies the
18 above four interests are identified—but it didn’t. In its actual documents, EUSD’s
19 only asserted interests are: (1) compliance with state and federal law (Compl., p.46,
20 253, 265, ¶187, Ex.27 at p.3, Ex.28 at p.3); and (2) “creat[ing] safe and inclusive
21 campuses,” to “uphold[] a positive and diverse culture in our District.” (Compl.,
22 p.29, 84, ¶119, Ex.4 at p.1:11-12.)

23 **Second**, with respect to student’s right to privacy in the California Constitution,
24 EUSD cites a plurality opinion of the California Supreme Court striking down a statute
25 requiring an unemancipated minor to receive parental consent prior to obtaining an
26 abortion. According to the California Supreme Court, constitutional privacy rights do
27 not emerge solely when a child reaches majority, and so the parental consent
28 requirement unconstitutionally interfered with a minor’s right to obtain an abortion.

1 *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 359 (1997) (plurality).

2 But California privacy rights require a careful and fact-intensive weighing of the
3 facts. Thus, the opinion of Justice Kennard, concurring in the judgment only, made
4 clear that he only agreed that the statute was unconstitutional because it applied to
5 children over the age of 14 years. *Id.* at 361, 372-75 (Kennard, J., concurring in the
6 judgment). In other words, the opinion says nothing about the constitutional privacy
7 rights of children *under* the age of 14 years. *Id.* EUSD fails to engage in the complicated
8 analysis of whether privacy rights are violated. The Complaint, however, pleads that
9 complicated analysis and concludes that they are not. (Compl., pp.47-48, ¶¶192-95.)
10 Here, “because [the government] bears the risk of uncertainty, [this] ambiguous proof
11 will not suffice.” *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 799-800 (2011).

12 **Third**, EUSD contends that it has a compelling interest in eradicating sex and
13 gender identity discrimination (Mtn., p.22:24-27), but it is unclear how being truthful
14 with parents about their child’s gender identity is sex or gender identity discrimination.
15 Assuming *arguendo* that this conduct can be labelled “discrimination,” this broadly
16 formulated interest is inadequate. The government may not assert generally that it has
17 an interest in preventing “serious mental, financial, and emotional harm on
18 transgender individuals,” but must show that denying an exception here is necessary
19 to achieve that goal. *Green v. Miss United States of Am., LLC*, 52 F.4th 773, 791 (9th
20 Cir. 2022). The issue “is not whether [EUSD] has a compelling interest in enforcing
21 its non-discrimination policies generally, but whether it has such an interest in denying
22 an exception to [Plaintiffs here].” *Id.* at 792 (quoting *Fulton*, 141 S. Ct. at 1877). Yet
23 EUSD has made no effort to explain why an exception cannot be given.

24 **Fourth**, EUSD asserts that it has an interest in ensuring full and equal access to
25 medical treatment regardless of sexual orientation. (Mtn., pp.22:27-18:2.) Again, the
26 logic of this assertion is not clear. However, it appears that EUSD is asserting that
27 parents may interfere with EUSD engaging in the “active intervention” of socially
28 transitioning their child to a new gender, with its “significant effects on the child or

1 young person in terms of their psychological functioning.” (Compl., pp.25-26, ¶104.)
2 This argument seems to dovetail with EUSD’s privacy argument—that children have
3 a constitutional privacy right to certain medical treatment that could be frustrated if
4 parental consent were required. *See Edmo v. Corizon, Inc.*, 935 F.3d 757, 770 (9th Cir.
5 2019) (“evidence-based treatment options for individuals with gender dysphoria”
6 include “changes in gender expression and role”); (ECF No. 5-2, Declaration of Dr.
7 Erica E. Anderson, pp.12-19, ¶¶29-38 (discussing how “social transition” is a
8 “psychotherapeutic intervention,” not “harmless ‘exploration’”).)

9 But, as a general matter, parents have the constitutional right under the
10 Fourteenth Amendment right to make “medical decisions for their children.” *Wallis v.*
11 *Spencer*, 202 F.3d 1126, 1141-42 (9th Cir. 2000) (citing *Parham v. J.R.*, 442 U.S. 584,
12 602 (1979)); *accord Mann v. Cnty. of San Diego*, 907 F.3d 1154, 1162 (9th Cir. 2018)
13 (“‘parental consent is critical’ in medical procedures involving children ‘because
14 children rely on parents or other surrogates to provide informed permission for
15 medical procedures that are essential for their care.’”). Even if children had a privacy
16 right under the California Constitution to obtain gender-identity related medical care
17 without parental knowledge or consent (which they do not), the U.S. Constitution’s
18 guarantee that parents have the right to make medical decisions for their children
19 would supersede. U.S. Const., art. VI, cl. 2; *cf. Espinoza v. Montana Dep’t of Revenue*,
20 140 S. Ct. 2246, 2254 (2020) (striking down provision in Montana Constitution as
21 violative of U.S. Constitution).

22 ***Fifth***, EUSD asserts that it has a compelling interest in “protecting at-risk
23 students from harm,” with the risk of harm shown by the simple fact that “the student
24 does not want a parent to know.” (Mtn., p.23:2-9.) This argument is irrationally
25 overbroad. EUSD’s Parental Exclusion Policies do not require a finding that students
26 who want to be socially transitioned would be subject to child abuse if their parents
27 were informed. But such a finding is absolutely required. The government “*has no*
28 *interest whatever* in protecting children from their parents unless it has some reasonable

1 evidence that the parent is unfit and the child is in imminent danger.” *Wallis*, 202 F.3d
 2 at 1142 n.14; *see also Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (holding dependency
 3 proceeding unconstitutional that failed to provide “a hearing designed to determine
 4 whether the father is unfit”). Indeed, the California Education Code similarly requires
 5 a finding that a “disclosure would result in a clear and present danger to the health,
 6 safety, or welfare of the pupil” before information can be withheld from parents. Cal.
 7 Educ. Code § 49602.

8 By presuming that gender diverse children are at risk of harm from their parents,
 9 EUSD’s policies reverse the constitutionally mandated presumptions of parental
 10 fitness and affinity that underlie the parental right. *Parham*, 442 U.S. at 603 (rejecting
 11 “statist notion that governmental power should supersede parental authority in *all*
 12 cases because *some* parents abuse ... [their] children”) (emphasis in original); *Troxel*,
 13 530 U.S. at 68 (holding unconstitutional state action that contravened presumption of
 14 parental fitness) (plurality); *accord Stanley*, 405 U.S. at 652; *Doe v. Heck*, 327 F.3d 492,
 15 521 (7th Cir. 2003); *Ricard*, 2022 WL 1471372, at *8.

16 **C. Plaintiffs Have Adequately Pleaded a Claim for Declaratory Relief**

17 Plaintiffs’ fourth claim is for declaratory relief. Specifically, Plaintiffs seek a
 18 declaration that EUSD’s Parental Exclusion Policies are not required by state or
 19 federal law, or are superseded by the U.S. Constitution. (Compl., pp.3-64, ¶¶281-86.)
 20 EUSD responds by contending that its policies are required by the CDE’s Frequently
 21 Asked Questions page on gender identity which, EUSD asserts, accurately summarizes
 22 the law. (Mtn., p.23, § V.J (citing Mtn., pp.4-14, §§ V.A-E).)¹¹

23 But nothing in any of EUSD’s lengthy recitation of background law actually
 24 supports its Parental Exclusion Policies. Plaintiffs agree that discrimination on the basis
 25 of gender identity is generally prohibited by federal law (Mtn., pp.9-11, § V.A) and
 26 California law. (Mtn., pp.11-12, § V.C.) Thus, Plaintiffs do not seek to discriminate on

27
 28 ¹¹ That FAQ page is non-binding and not subject to any judicial deference. *See Am. Nurses Assn. v. Torlakson*, 57 Cal. 4th 570, 588 (2013).

1 the basis of gender identity. The *only* basis that EUSD actually cites to support its
 2 Parental Exclusion Policies (or the CDE’s FAQ page) is the California Constitution’s
 3 privacy guarantee (Mtn., p.11, § V.B.) But, as stated above, whether that privacy right
 4 would apply here is a very fact-intensive analysis that EUSD has simply not engaged
 5 in; and, in any event, it would most likely be superseded by parental rights under the
 6 U.S. Constitution. (*See* § I.B.4, *supra*.) On this motion, the claim for declaratory relief
 7 cannot be dismissed.

8 **II. THE DETERMINATION OF QUALIFIED IMMUNITY IS NOT RIPE**

9 EUSD lastly raises the issue of qualified immunity. (Mtn., pp.23-24, § V.K.)
 10 “Qualified immunity is an affirmative defense to damage liability; it does not bar
 11 actions for declaratory or injunctive relief.” *The Presbyterian Church (U.S.A.) v.*
 12 *United States*, 870 F.2d 518, 527 (9th Cir. 1989). Under that doctrine, unless the
 13 violation of law was clearly established, the governmental official is only subject to an
 14 injunction, and is immune to damages liability under 42 U.S.C. § 1983. *Id.*

15 When a complaint adequately pleads a constitutional violation, it is inadvisable
 16 to adjudicate qualified immunity on the pleadings. *See San Diego Minutemen v.*
 17 *California Bus. Transp. & Hous. Agency’s Dep’t of Transp.*, 570 F. Supp. 2d 1229, 1242
 18 (S.D. Cal. 2008) (citing *Morley v. Walker*, 175 F.3d 756, 761 (9th Cir. 1999)). Indeed,
 19 “[w]hile courts may consider qualified immunity at the pleadings stage, the Ninth
 20 Circuit has noted that ‘[d]etermining claims of qualified immunity at the motion-to-
 21 dismiss stage raises special problems for legal decision making.’” *NAACP of San*
 22 *Jose/Silicon Valley v. City of San Jose*, 562 F. Supp. 3d 382, 395 (N.D. Cal. 2021)
 23 (quoting *Keates v. Koile*, 883 F.3d 1228, 1234 (9th Cir. 2018)). This is especially the
 24 case when “the courts [are] called upon to decide far-reaching constitutional
 25 questions on a nonexistent factual record.” *Id.* (quoting *Kwai Fun Wong v. United*
 26 *States*, 373 F.3d 952, 957 (9th Cir. 2004)). Deferring on the issue “does not prejudice
 27 whether some of Plaintiffs’ claims may ultimately fail under a qualified immunity
 28 analysis after discovery in this matter.” *Donahoe v. Arpaio*, 869 F. Supp. 2d 1020,

1 1068 (D. Ariz. 2012), *aff'd sub nom. Stapley v. Pestalozzi*, 733 F.3d 804 (9th Cir. 2013).

2 “To be ‘clearly established,’ ‘existing precedent must have placed the
3 statutory or constitutional question beyond debate.’” *Dodge v. Evergreen Sch. Dist.*
4 *#114*, 56 F.4th 767, 783 (9th Cir. 2022) (quoting *White v. Pauly*, 580 U.S. 73, 79
5 (2017)). The court must “frame the issues presented ... at a level commensurate
6 with the specific factual and legal context of the case.” *Id.* at 783-84. But “a plaintiff
7 need not produce ‘a case directly on point.’” *Id.* at 784 (quoting *Ashcroft v. al-Kidd*,
8 563 U.S. 731, 741 (2011)). Rather, “a general constitutional rule already identified in
9 the decisional law may apply with obvious clarity to the specific conduct in question,
10 even though ‘the very action in question has not previously been held unlawful.’” *Id.*
11 at 784 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997); *Anderson v.*
12 *Creighton*, 483 U.S. 635, 640 (1987)).

13 On qualified immunity, EUSD’s argument boils down to a single sentence:
14 “Here, it is indisputable that the entire issue of gender-identity rights is anything but
15 clear.” (Mtn., p.23:28.) This single sentence is inadequate.

16 With respect to Plaintiffs’ free speech claim, Plaintiffs object to using different
17 pronouns for students in different contexts (*i.e.*, in class v. when speaking with
18 parents), and especially object to doing so as part of an intentional effort to deceive
19 parents. (Compl., p.55, ¶¶227-28.) Plaintiffs pleaded that EUSD has no legitimate
20 interest in forcing Plaintiffs to speak (or not speak) in a manner calculated to (1)
21 enforce ideological conformity among its staff (Compl., p.55, ¶232), or (2) violate
22 parental rights to direct the upbringing of their children. (Compl., p.56, ¶233.) With
23 respect to Plaintiffs’ free exercise of religion claim, the issue is that EUSD is requiring
24 Plaintiffs to comply with its Parental Exclusion Policies while categorically excluding
25 *thousands* of others, and *anybody else* who has a “legitimate” reason for violating it.
26 (Compl., pp.33-37, ¶¶135-48.)

27 The various cases cited in Plaintiffs’ complaint, above, and in their motion for a
28 preliminary injunction fully support that it is clearly established that EUSD cannot

1 enforce ideological conformity among its staff, *see Janus v. Am. Fed'n of State, Cnty., &*
2 *Mun. Emps., Council 31*, 138 S. Ct. 2448, 2473 (2018) (the government cannot impose
3 “a blanket requirement that all employees subsidize [or engage in] speech with which
4 they may not agree”), cannot force its staff to provide medical care to children without
5 parental consent or knowledge, *Wallis*, 202 F.3d at 1141-42 (citing *Parham*, 442 U.S. at
6 602), and cannot exclude thousands of individuals from a policy, but refuse to provide
7 a similar exemption to people of faith. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1300-01
8 (10th Cir. 2004) (“It was clearly established by the Supreme Court that if a defendant
9 has in place a system of individualized exemptions, it must extend that system to
10 religious exemptions or face strict scrutiny review.”).

11 Indeed, the Ninth Circuit has held that “several ... cases[] clearly establish that
12 disagreement with a disfavored political stance or controversial viewpoint, by itself, is
13 not a valid reason to curtail expression of that viewpoint at a public school.” *Dodge*, 56
14 F.4th at 786. Plaintiffs’ “right to express political views, even as a public-school
15 teacher, is clearly established.” *Id.* at 787; *accord Roe v. San Jose Unified Sch. Dist. Bd.*,
16 No. 20-cv-2798, 2021 WL 292035, at *17 (N.D. Cal. Jan. 28, 2021) (“*Alpha Delta* and
17 *Truth* clearly established that viewpoint-discriminatory application of a valid
18 nondiscrimination policy violates the First Amendment”). In the absence of
19 meaningful briefing from EUSD, this court should follow other courts dealing with
20 gender identity issues in public schools and deferred on the issue of qualified immunity
21 pending summary judgment. *See, e.g., Tatel v. Mt. Lebanon Sch. Dist.*, No. CV 22-837,
22 2022 WL 15523185, at *28 (W.D. Pa. Oct. 27, 2022) (“*Tatel I*”), *recons. den.*, No. CV
23 22-837, 2023 WL 3740822, at *2, *15-19 (W.D. Pa. May 31, 2023) (“*Tatel II*”).

24 CONCLUSION

25 For the foregoing reasons, Plaintiffs respectfully request that this Court deny
26 EUSD’s motion to dismiss and grant Plaintiffs’ motion for a preliminary injunction.

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Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: June 12, 2023

By:



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CERTIFICATE OF SERVICE

Elizabeth Mirabelli v. Mark Olson, President of the EUSD Board of Education, et al.
USDC Court Case No.: 3:23-cv-00768-BEN-WVG

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; my business address is P.O. Box 9120, Rancho Santa Fe, California 92067, and that I served the following document(s):

- **Plaintiffs’ Memorandum of Points & Authorities in Opposition to School District Defendants’ Motion to Dismiss [Fed. R. Civ. P. 12(b)(6)].**

on the interested parties in this action by placing a true copy in a sealed envelope, addressed as follows:

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X **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Rancho Santa Fe, California in the ordinary course of business. The envelope was sealed and placed for collection and mailing on this date following our ordinary practices. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

X **(BY ELECTRONIC MAIL)** I served a true copy, electronically on designated recipients via electronic transmission of said documents.

X **(BY ELECTRONIC FILING/SERVICE)** I caused such document(s) to be Electronically Filed and/or Service using the ECF/CM System for filing and transmittal of the above documents to the above-referenced ECF/CM registrants.

I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct.

Executed on June 12, 2023, at Rancho Santa Fe, California.



Kathy Denworth