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8 **UNITED STATES DISTRICT COURT**

9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10 ELIZABETH MIRABELLI, an individual, and  
LORI ANN WEST, an individual,

11 Plaintiffs,

12 v.

13 MARK OLSON, Superintendent of EUSD, et al.

14 Defendants.  
15

Case No.: 23CV0768 BEN WVG

**DEFENDANTS' OPPOSITION TO MOTION  
FOR PRELIMINARY INJUNCTION**

16 **I. INTRODUCTION**

17 Federal and State law permits a student to change their name and pronouns to be consistent  
18 with their gender identity, protects the privacy of student's gender identity, requires school employee  
19 to respect the student's request not to divulge their gender identity without the student's permission,  
20 and prohibits discrimination and harassment against students because of their gender identity. Two  
21 schoolteachers seek an injunction to permit them to discriminate against students whose gender  
22 identity does not match their birth identity, permit them to communicate to a parent using the legal  
23 name of the student notwithstanding the parents' and student's request, and permit them to notify  
24 parents of a student's request to be referred to by a name that is different than the legal name or a  
25 pronoun, notwithstanding the student's request.

26 The two schoolteachers filed this lawsuit, contending their religious beliefs permit them to  
27 discriminate against gender diverse students, after the school adopted a Policy respectful of students'  
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1 gender identity. The teachers object to the Policy and seek to inject the judicial branch into this  
2 legislative issue.

3 Schools are required to provide a safe place for children to learn. The law forbids  
4 discrimination against a child who questions their gender and encourages teachers to respect the  
5 child’s preferred gender. These two teachers assert the right of parents to be central in raising their  
6 children. That very significant Constitutional issue – regarding the parents’ right to raise their  
7 children—belongs to parents and is not at issue here, because these teachers do not assert their interest  
8 as parents; instead, they contend the Policy violates their personal free speech and religious rights.  
9 But, notwithstanding the importance of parents’ rights, one Federal District Court has denied an  
10 injunction against a very similar policy sought by a parent who contended she had a right to be  
11 informed of her child’s gender identity. “Plaintiff asks this Court to enjoin enforcement of school  
12 district regulation AR 5145.3, which broadly covers nondiscrimination and harassment as it applies to  
13 the school district's transgender students.” *Regino v. Staley* (E.D. Cal., Mar. 9, 2023, No.  
14 223CV00032JAMDMC) 2023 WL 2432920, at \*1. “For the reasons set forth below, the Court  
15 DENIES Plaintiff's motion.” *Id.*

16 The teachers are concerned about a hypothetical event where a student might want to use a  
17 non-conforming name and pronoun but does not want the parents to know they are non-conforming.  
18 Declaration of Tracy Schmidt, ¶ 6. If the parent asks the teacher directly whether their student is non-  
19 conforming, the teachers contend the school Policy requires them to lie, which violates their religious  
20 beliefs.

21 It is not true that the Policy, or the Regulation, or the training provided under the Schools’  
22 Policy required anyone to lie. Dec. of Tracy Schmidt, ¶ 6. To the contrary, the training focused on  
23 bringing the student and the parents together to work on the issue as a family. Dec. of Tracy Schmidt,  
24 ¶¶ 5, 6.

25 **II. PERTINENT FACTS**

26 **A. Plaintiffs’ Allegations**

27 Plaintiffs allege in 2020, Escondido Union School District (“EUSD”) enacted Administrative  
28 Regulation 5145.390, expanding upon its Board Policy 5145.3, which they allege “required

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1 certificated EUSD staff to unquestioningly accept a students’ transgender or gender nonconforming  
2 self-identification, begin referring to transgender or gender nonconforming students by their preferred  
3 names and pronouns, and hide that information from parents or caretakers, among other requirements.”

4 Comp. ¶ 116, p. 28:16-19. They attach the AR as Exhibit 4. They contend:

5 EUSD’s policies state that “revealing a student’s transgender status to individuals who do not  
6 have a legitimate need for the information, without the student’s consent” is prohibited, and “parents  
7 or caretakers” are, according to EUSD, individuals who “do not have a legitimate need for the  
8 information,” irrespective of the age of the student or the specific facts of the situation. Comp. ¶3, p.  
9 3:18-13.

10 They allege that the Policy prohibits teachers from respecting parents’ wishes. “According to  
11 EUSD, ‘we shall use a student’s preferred name and pronoun based upon student request,’ and so ‘a  
12 parent [is not] allowed to override a student’s request for different pronouns/alternate names.’” Comp.  
13 ¶ 5, p. 4:10-12 (Ex. 5).

14 The school district Policy is attached to the Complaint as Exhibit 2 and the Regulation is  
15 attached as Exhibit 3. The school district Policy seeks to protect the privacy of students who seek to  
16 keep their gender identity confidential. Comp. Ex. 4, Dec. of Tracy Schmidt, ¶ 6. The Plaintiffs allege  
17 that Policy violates their right to free speech and their religion.

18 There are two parts to the Plaintiffs’ objections. First, they object to the part of the Policy that  
19 requires them to respect a student’s request not to disclose the student’s new gender identity with one  
20 or both parents. The call that a “lie.” Second, apparently, Plaintiffs object that they are required to  
21 support a belief they disagree with when they are required to use the pronoun and name selected by a  
22 student, which are inconsistent with the student’s birth gender.

23 93. Plaintiffs’ faith teaches that God immutably creates each person as male  
24 or female; these two distinct, complementary sexes reflect the image of God; and  
25 rejection of one’s biological sex is a rejection of the image of God within that person.

26 94. Plaintiffs also believe that they cannot affirm as true those ideas and  
27 concepts that they believe are not true, nor can they aid and abet the deception of  
28 others. Doing so, they believe, would violate biblical commands against dishonesty

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1 and lying.

2 95. Plaintiffs’ faith does not command them to affirmatively communicate  
3 their religious beliefs at school, and they do not seek to do so. However, their faith  
4 requires them to refrain from speaking in a manner that their faith instructs as  
5 immoral, dishonest, or harmful.

6 Comp. p. 24:11-21.

7 **B. The Policy and the Training Did Not Require Any Lie**

8 Contrary to the Plaintiffs position, the School District’s training did not instruct a  
9 person to lie, or even avoid the truth. Dec. of Tracy Schmidt, ¶ 6.

10 **III. LEGAL STANDARD FOR PRELIMINARY INJUNCTION**

11 An injunction is an equitable remedy. It “is not a remedy which issues as of course,”  
12 *Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337–338 (1933), or “to restrain an act the  
13 injurious consequences of which are merely trifling.” *Consolidated Canal Co. v. Mesa Canal Co.*, 177  
14 U.S. 296, 302 (1900). An injunction should issue only where the intervention of a court of equity “is  
15 essential in order effectually to protect property rights against injuries otherwise irremediable.”  
16 *Cavanaugh v. Looney*, 248 U.S. 453, 456, (1919). “The Court has repeatedly held that the basis for  
17 injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal  
18 remedies.” *Weinberger v. Romero-Barcelo* (1982) 456 U.S. 305, 311–312.

19 The first element is the absence of a legal remedy. Plaintiffs cannot meet the requirement on  
20 no legal remedy, because, if they are being mistreated in the workplace, they have a legal remedy in  
21 Title VII employment action or a state action for discrimination.

22 In addition to showing no remedy at law, plaintiffs seeking a preliminary injunction must  
23 establish (1) that they are likely to succeed on the merits, (2) that they are likely to suffer irreparable  
24 harm without injunctive relief, (3) that the balance of harms tips in their favor, and (4) that a  
25 preliminary injunction is in the public interest. *All for the Wild Rockies v. Cottrell*, 632 F.3d 1127,  
26 1131 (9th Cir. 2011) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)). Courts in the  
27 Ninth Circuit evaluate these factors through a “sliding scale approach.” *Id.* So, for example, “a stronger  
28 showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the

1 merits.” Id.

2 Here, these two schoolteachers have a remedy at law, they are not likely to suffer irreparable  
3 harm without the relief, and they are not likely to succeed on the merits.

4 **IV. ANALYSIS**

5 **A. The School’s Policies Are Consistent with State and Federal Law**

6 **1. Federal Law Protects Against Discrimination Because of Gender Identity**

7 In March, 2021, President Biden issued “Executive Order 14021 on Guaranteeing an  
8 Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation  
9 or Gender Identity.”

10 It is the policy of my Administration that all students should be guaranteed an educational  
11 environment free from discrimination on the basis of sex, including discrimination in the form of  
12 sexual harassment, which encompasses sexual violence, and including discrimination on the basis of  
13 sexual orientation or gender identity. For students attending schools and other educational institutions  
14 that receive Federal financial assistance, this guarantee is codified, in part, in Title IX of the Education  
15 Amendments of 1972, 20 U.S.C. 1681 et seq., which prohibits discrimination on the basis of sex in  
16 education programs or activities receiving Federal financial assistance.

17 Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (“Title IX”) prohibits  
18 discrimination based on sex in education programs and activities that receive federal financial  
19 assistance. Title IX states “No person in the United States shall, on the basis of sex, be excluded from  
20 participation in, be denied the benefits of, or be subjected to discrimination under any education  
21 program or activity receiving Federal financial assistance. . . .” 20 U.S.C. § 1681, subd. (a).

22 In evaluating Title IX claims, federal courts look to Title VII cases for guidance. *Franklin v.*  
23 *Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Patricia H. Berkeley. Unified Sch. Dist.*, 830  
24 F.Supp. 1288, 1290 (C.D. Cal. 1993). In *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000),  
25 the Ninth Circuit, relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), reasoned that “‘sex’  
26 under Title VII encompasses both sex—that is, the biological difference between men and women—  
27 and gender.” It explained that while earlier cases distinguished between “sex” and “gender,” the  
28 Supreme Court in *Price Waterhouse* abandoned that distinction and held that Title VII bars

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1 discrimination based on both an individual's sex and failure to conform to socially-constructed gender  
 2 expectations. Id. In *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 Fed.Appx. 492, 493 (9th Cir. 2009),  
 3 the Ninth Circuit reaffirmed that “it is unlawful to discriminate against a transgender (or any other)  
 4 person because he or she does not behave in accordance with an employer's expectations for men or  
 5 women.”

6 Similarly, other circuits have interpreted the sex discrimination provisions under Title IX and  
 7 Title VII to protect transgender individuals from discrimination. See, e.g., *Glenn v. Brumby*, 663 F.3d  
 8 1312, 1317 (11th Cir. 2011) (“[D]iscrimination against a transgender individual because of her gender-  
 9 nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.”);  
 10 *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (“[A] label, such as ‘transsexual,’ is not fatal  
 11 to a sex discrimination claim where the victim has suffered discrimination because of his or her gender  
 12 non-conformity.”); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000)  
 13 (holding that a transgender individual stated a claim for sex discrimination under the Equal Credit  
 14 Opportunity Act); *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1049 (7th Cir. 2017)  
 15 (granting a preliminary injunction and holding that the plaintiff had established a likelihood of success  
 16 under Title IX where the school denied a transgender boy access to the boy's restroom).

17 **2. California Protects Against Discrimination Because of Gender Identity**

18 **a. California Constitution Protects Privacy**

19 The right to privacy is protected by Article 1, section 1, of the California Constitution.  
 20 That privacy right applies to children and permits the child to keep significant secrets from a parent.  
 21 For example, the California Supreme Court has held that a child's privacy rights include the right to  
 22 obtain an abortion without state notification of their parents. *American Academy of Pediatrics v.*  
 23 *Lungren* (1997) 16 Cal.4th 307, 359,

24 **b. Statutes Protect Against Discrimination and Harassment**

25 The Education Code protects a range of private information provided to a school counselor,  
 26 even to the extent of prohibiting disclosure to parents in some circumstances.

27 Notwithstanding the provisions of this section, a school counselor shall not disclose  
 28 information deemed to be confidential pursuant to this section to the parents of the pupil when the

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1 school counselor has reasonable cause to believe that the disclosure would result in a clear and present  
2 danger to the health, safety, or welfare of the pupil. Cal. Ed. Code § 49602, subd. (e).

3 Students are protected against gender-identity discrimination by the Education Code. “No  
4 person shall be subjected to discrimination on the basis of ... gender, gender identity, gender  
5 expression, . . . sexual orientation, . . . in any program or activity conducted by an educational  
6 institution . . .” Ed. Code, § 220. “All pupils have the right to participate fully in the educational  
7 process, free from discrimination and harassment.” Ed. Code, § 201.

8 No person shall be subjected to discrimination on the basis of disability, gender, gender  
9 identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other  
10 characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal  
11 Code, including immigration status, in any program or activity conducted by an educational institution  
12 that receives, or benefits from, state financial assistance, or enrolls pupils who receive state student  
13 financial aid. Ed. Code, § 220.

14 **c. The California Department of Education Requires the Policy**

15 The California Department of Education (“CDE”) provides a website with Frequently  
16 Asked Questions (“FAQ”) on the subject of school policies related to gender identity. The guidance  
17 from the CDE is the source of the school district’s Policy. That Policy is consistent with the CDE  
18 instruction to preserving the privacy of a student’s gender identity, even against the inquiry of a parent:

19 6. May a student’s gender identity be shared with the student’s parents, other students, or  
20 members of the public?

21 A transgender or gender nonconforming student may not express their gender identity openly  
22 in all contexts, including at home. **Revealing a student’s gender identity or expression to others  
23 may compromise the student’s safety. Thus, preserving a student’s privacy is of the utmost  
24 importance. The right of transgender students to keep their transgender status private is  
25 grounded in California’s antidiscrimination laws as well as federal and state laws.** Disclosing that  
26 a student is transgender without the student’s permission may violate California’s antidiscrimination  
27 law by increasing the student’s vulnerability to harassment and may violate the student’s right to  
28 privacy.

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1 CDE FAQ No. 6; Comp. Exhibit 23, ¶ 6, p. 5/12. (Emphasis added.)

2 The California Department of Education specifically prohibits schools from sharing a student’s  
3 gender preference with the student’s parents in some rare circumstances.

4 Pursuant to the above protections, schools must consult with a transgender student to determine  
5 who can or will be informed of the student’s transgender status, if anyone, including the student’s  
6 family. **With rare exceptions, schools are required to respect the limitations that a student places  
7 on the disclosure of their transgender status, including not sharing that information with the  
8 student’s parents.** In those very rare circumstances where a school believes there is a specific and  
9 compelling “need to know,” the school should inform the student that the school intends to disclose  
10 the student’s transgender status, giving the student the opportunity to make that disclosure her or  
11 himself.

12 CDE FAQ No. 7; Comp. Exhibit 23, ¶ 7, p. 6/12. (Emphasis added.)

13 **d. Plaintiffs Assertion of Parents’ Rights Misstates the Law**

14 The Ninth Circuit Court of Appeals has explained that parents are vested with the right to  
15 choose where their children obtain an education. But “once parents make the choice as to which school  
16 their children will attend, their fundamental right to control the education of their children is, at the  
17 least, substantially diminished. *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204 (9th Cir. 2005).  
18 Parents are not vested with the power to determine how a school “will provide information to its  
19 students or what information it will provide, in its classrooms or otherwise.” *Id.* (emphasis added).  
20 The Ninth Circuit then adopted the Sixth Circuit’s position on this right:

21 Perhaps the Sixth Circuit said it best when it explained, “While parents may have a  
22 fundamental right to decide whether to send their child to a public school, they do not have a  
23 fundamental right generally to direct how a public school teaches their child. Whether it is the school  
24 curriculum, the hours of the school day, school discipline, the timing and content of examinations, the  
25 individuals hired to teach at the school, the extracurricular activities offered at the school or, as here,  
26 a dress code, these issues of public education are generally ‘committed to the control of state and local  
27 authorities.’” *Id.* (quoting *Blau v. Fort Thomas Public School Dist.* (6th Cir. 2005) 401 F.3d 381, 395–  
28 396).

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**B. The Regulation Does Not Violate the Plaintiffs’ Right to Free Speech**

**1. First, The Regulation Does Not Require Any Lie**

A compelled speech claim has three elements. “[A] party must establish (1) speech, (2) that is compelled by governmental action, and (3) to which the speaker objects. [citation]. If the three elements are satisfied, strict scrutiny is triggered.” *Dep’t of Fair Emp’t and Hous. v. Cathy’s Creations, Inc.*, No. BCV-18-102633, 2022 WL 18232316, at \*13 (Cal. Super. Dec. 27, 2022) (citing *Taking Offense v. State*, 66 Cal. App. 5th 696, 709 (2021)). “Compelling individuals to mouth support for views they find objectionable violates [the First Amendment’s] cardinal constitutional command, and in most contexts, any such effort would be universally condemned.” *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, \_ U.S. \_, 138 S. Ct. 2448, 2463 (2018).

Plaintiffs’ Free Speech claim hinges upon the assertion that Regulation requires them to lie and “mouth” opinions they do not hold. But that is not true. It is not true that the Policy or the Regulation requires anyone to lie. Nor does it require the Plaintiffs to “mouth support” for views they find objectionable.

On the face of AR 5145.3, there is no requirement for anyone to lie. The entire Regulation is attached to the Complaint as Exhibit 3. It is a long Regulation, but the pertinent part says:

To ensure that transgender and gender-nonconforming students are afforded the same rights, benefits, and protections provided to all students by law and Board policy, the district shall address each situation on a case-by-case basis, in accordance with the following guidelines:

- 1. Right to privacy: A student's transgender or gender-nonconforming status is his/her private information and the district will only disclose the information to others with the student's prior written consent, except when the disclosure is otherwise required by law or when the district has compelling evidence that disclosure is necessary to preserve the student's physical or mental well-being. In the latter instance, the district shall limit disclosure to individuals reasonably believed to be able to

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1 protect the student's well-being. Any district employee to whom a  
 2 student discloses his/her transgender or gender-nonconforming status  
 3 shall seek the student's permission to notify the compliance officer. If  
 4 the student refuses to give permission, the employee shall keep the  
 5 student's information confidential, unless he/she is required to disclose  
 6 or report the student's information pursuant to this procedure, and shall  
 7 inform the student that honoring the student's request may limit the  
 8 district's ability to meet the student's needs related to his/her status as a  
 9 transgender or gender-nonconforming student. If the student permits the  
 10 employee to notify the compliance officer, the employee shall do so  
 11 within three school days.

12 As appropriate given the physical, emotional, and other significant risks  
 13 to the student, the compliance officer may consider discussing with the  
 14 student any need to disclose the student's transgender or gender-  
 15 nonconformity status to his/her parents/guardians and/or others,  
 16 including other students, teacher(s), or other adults on campus. The  
 17 district shall offer support services, such as counseling, to students who  
 18 wish to inform their parents/guardians of their status and desire  
 19 assistance in doing so.

20 EUSD AR 5145.3, Comp. Ex. 3.

21 As applied, the school did not require anyone to lie, either. Plaintiffs allege the school provided  
 22 training, and nowhere in that training is there any requirement to lie. Plaintiffs attached a transcript  
 23 of the training provided by the school to the teachers as Exhibit 4 to the Complaint. It does not include  
 24 any requirement to state any fact that is false, i.e. to lie. There is a requirement to protect the privacy  
 25 rights of students who wish to keep private their name and pronoun as they make the decisions related  
 26 to gender-identity transition. Plaintiffs allege they were instructed,

27 If a suspicious parent asks a teacher about whether their child  
 28 has socially transitioned at school, the teacher must simply respond that

1 “the inquiry is outside of the scope of the intent of their interaction” and  
 2 that they can only discuss “information regarding the student’s behavior  
 3 as it relates to school, class rules, assignments, etc.” (Ex. 9, pp.2-4.)  
 4 Even if a parent expresses concern, teachers are specifically “directed  
 5 to refrain from elaborating on their personal beliefs” regarding the  
 6 child’s gender confusion. (Ex. 9, p.2.)

7 Comp. p. 4:1-7, citing from Exhibit 9.

8 The instruction to say a subject is outside of the scope of the discussion is not an instruction to  
 9 lie. It is not an instruction to state an opinion. It is an instruction to avoid the question. Nevertheless,  
 10 neither the Policy nor the training suggested teachers lie to parents. Dec. of Tracy Schmidt, ¶ 6.

11 To the contrary, the evidence is that the training required a case-by-case approach with a  
 12 student if the student wanted their gender identity to be kept from a parent. Dec. of Tracy Schmidt, ¶  
 13 5.

## 14 **1. Plaintiffs’ Speech at School Is Not Protected Speech**

### 15 **a. A Teacher’s Speech in the Classroom Is Not Protected Speech**

16 Arguendo, even if the Court decides the school district’s Regulation, as applied, imposes some  
 17 obligation on the Plaintiffs’ speech, that speech is *not* protected. “We hold that when public employees  
 18 make statements pursuant to their official duties, the employees are not speaking as citizens for First  
 19 Amendment purposes, and the Constitution does not insulate their communications from employer  
 20 discipline.” *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

21 There is no doubt that a public-school teacher has certain First Amendment rights of freedom  
 22 of speech or expression. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Tinker v. Des Moines Ind.*  
 23 *Comm’ty. Sch. Dist.*, 393 U.S. 503, 506 (1969) [“[i]t can hardly be argued that either students or  
 24 teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”].  
 25 But the free speech rights of public employees, including teachers, are not unlimited. Those rights  
 26 have been restricted under the test established in *Pickering* and clarified in *Connick v. Myers*, 461 U.S.  
 27 138 (1983), and *Garcetti*, *supra*, 547 U.S. at p. 418.

28 The *Pickering* test provides a public employee with First Amendment protections only if (1)

1 the employee is speaking as citizen, (2) on a matter of public concern, and (3) the public entity has no  
2 adequate justification for treating the employee differently from any other member of the general  
3 public. *Garcetti*, supra, 547 U.S. at 418.

4 The *Garcetti* case clarified the first prong of the *Pickering* test -- whether a public employee  
5 is speaking as a citizen. In *Garcetti*, an assistant district attorney wrote a memo to his supervisor  
6 recommending dismissal of a particular criminal case because the affidavit police used to obtain a  
7 critical search warrant was inaccurate. *Garcetti*, supra, 547 U.S. at 414. The assistant D.A. was  
8 criticized by his supervisors for writing the memo and demoted. *Id.* at 415. He then sued his employer  
9 under 42 U.S.C. § 1983 for retaliation in violation of his First Amendment rights. *Id.* The *Garcetti*  
10 court upheld the use of the *Pickering* test to determine the public employee's free speech rights in the  
11 workplace. *Garcetti*, 574 U.S. at 418.

12 In clarifying the definition of “citizen” under the first prong of the *Pickering* test, the *Garcetti*  
13 court explained that the focus should not be on the content of the speech, but on the role the speaker  
14 occupied when the speech was made. *Garcetti*, supra, 574 U.S. at 421. Using that standard, Court held  
15 that “when public employees make statements pursuant to their official duties, the employees are not  
16 speaking as citizens for First Amendment purposes.” *Id.*

17 Plaintiffs incorrectly contend they are discussing matter of public concern so that their  
18 discussion is protected, citing *Demers v. Austin*, 746 F.3d 402, 411-13 (9<sup>th</sup> Cir. 2014.) But *Demers*  
19 *v. Austin* does not apply. Its analysis only applies to post-secondary education -- colleges and  
20 universities. And it recognizes the difference between universities and high schools education.  
21 “Further, the degree of freedom an instructor should have in choosing what and how to teach will vary  
22 depending on whether the instructor is a high school teacher or a university professor.” *Demers v.*  
23 *Austin*, supra, at 413.

24 The *Garcetti* court expressly left open the question of whether its gloss on the *Pickering* test  
25 should be applied to the world of public academia, where there are different free speech concerns,  
26 such as academic freedom. *Id.* at 425. To that end, the *Garcetti* court noted: “There is some argument  
27 that expression related to academic scholarship or classroom instruction implicates additional  
28 constitutional interests that are not fully accounted for by this Court's customary employee-speech

1 jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today  
2 would apply in the same manner to a case involving speech related to scholarship or teaching.” *Id.*

3 Such “academic freedom” concerns are not present at the high-school level. For example, in  
4 *Evans-Marshall v. Board of Educ.*, 624 F.3d 332 (6th Cir. 2010), the Sixth Circuit explained that  
5 “‘academic freedom’ ... does not readily apply to in-class curricular speech at the high school level”  
6 but applies more at the university level. *Evans-Marshall*, *supra*, 624 F.3d at 343-344.

7 The Ninth Circuit has agreed with the Sixth Circuit, noting that *Garcetti*’s “‘academic freedom’  
8 carve-out applied to teachers at public colleges and universities, not primary and secondary school  
9 teachers.” *Johnson v. Poway Unified School Dist.* (9th Cir. 2011) 658 F.3d 954, 966.

10 In *Johnson*, a schoolteacher hung banners expressing religious phrases in his math classroom;  
11 the school instructed him to remove them. *Johnson*, *supra*, at 958-959. “When Bradley Johnson, a high  
12 school calculus teacher, goes to work and performs the duties he is paid to perform, he speaks not as  
13 an individual, but as a public employee, and the school district is free to “take legitimate and  
14 appropriate steps to ensure that its message is neither garbled nor distorted.” *Johnson*, *supra* at 957,  
15 citing, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

16 Primary and secondary schools hire teachers for their ability to convey the school district’s  
17 curriculum, not for their academic publications, as might occur at the university level. And teachers  
18 may not introduce their own views on a particular subject, but “must stick to the prescribed curriculum  
19 not only the prescribed subject matter, but also the prescribed perspective on that subject matter.”  
20 *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477,479 (7th Cir. 2007). This is because  
21 “the school system does not regulate teachers’ speech as much as it hires that speech. Expression is a  
22 teacher’s stock in trade, the commodity she sells to her employer in exchange for a salary.” *Id.*; see  
23 also, *Borden v. Sch. Dist. of East Brunswick*, 523 F.3d 153, 171 (3d Cir. 2008) (holding under  
24 Pickering-based analysis that school could prohibit faculty participation in student-initiated prayer);  
25 *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 700 (4th Cir. 2007) (holding under a Pickering-based  
26 analysis that a school board did not infringe the rights of a teacher when it ordered him to remove  
27 religious material from a classroom bulletin board); *Brammer-Hoelter v. Twin Peaks Charter Acad.*,  
28 492 F.3d 1192,1204 (10th Cir. 2007); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir.

1 2007); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477,479-80 (7th Cir. 2007) (applying  
 2 Pickering-based test and holding that “the [F]irst [A]mendment does not entitle primary and secondary  
 3 teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints,  
 4 that depart from the curriculum adopted by the school system”).

5 **b. Plaintiffs’ Speech Is Curricular Speech**

6 There can be no doubt that Plaintiffs’ objection to speaking, or refraining from speaking as the  
 7 Regulation required, related to speech within the scope of their duties as a teacher. It was not speech  
 8 as a private citizen, but was “government speech,” required by the school district Policy. When  
 9 Plaintiffs go to work and perform the duties they are paid to perform, they speak not as individuals,  
 10 but as public employees, and the school district is free to “take legitimate and appropriate steps to  
 11 ensure that its message is neither garbled nor distorted.” *Johnson*, supra at 957, citing, *Rosenberger v.*  
 12 *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

13 **The Policy Does Not Violate the Plaintiffs’ Religion**

14 Plaintiffs’ second and third claims for relief are captioned the same: “Violation of Free  
 15 Exercise Clause of First Amendment to U.S. Constitution: Not Generally Applicable due to  
 16 Categorical Exemptions.” Each claim is similar.

17 **ISSUES:** Does the school’s Policy actually burden the Plaintiffs’ religious beliefs? If so, does  
 18 a policy designed to prevent discrimination and harassment that incidentally burdens religion violate  
 19 the free exercise clause of the Constitution? Stated more broadly, can a religious belief serve to permit  
 20 discrimination?

21 **1. The School’s Policy Does Not Burden Plaintiffs’ Religion**

22 Plaintiffs claim the school’s Policy prohibited the free exercise of their religion. Under the  
 23 First Amendment, Plaintiffs must “show[ ] that a government entity has burdened [their] sincere  
 24 religious practice pursuant to a policy that is not ‘neutral’ or ‘generally applicable.’” *Kennedy v.*  
 25 *Bremerton School District* (2022) \_\_ U.S. \_\_, 142 S.Ct. 2407, 2421, 2422. General applicability  
 26 requires, among other things, that the laws be enforced evenhandedly. *Id.* at 2423; see also *Apache*  
 27 *Stronghold v. United States*, 38 F.4th 742, 770 (9th Cir. 2022) (“[A] law is not ‘generally applicable’  
 28 if the law ‘impose[s] burdens only on conduct motivated by religious belief’ in a ‘selective manner.’”

1 (second brackets in original) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508  
2 U.S. 520, 533, 543, (1993)); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015).

3 First, the school’s Policy does not actually burden the Plaintiffs’ free exercise of their religious  
4 beliefs. They allege the Policy requires them to lie when they must not disclose to the parent a  
5 students’ preferred name and pronoun without the student’s permission. Comp. p. 51, ¶¶ 208-211.

6 Mrs. Mirabelli and Mrs. West remain committed—in light of their faith—to prevent  
7 transgender students from being bullied or harassed. They have no intention to, and will not, harass or  
8 tolerate harassment of transgender or gender diverse students. **But a requirement that Mrs.  
9 Mirabelli and Mrs. West actively deceive parents and hide their child’s gender confusion from  
10 them, and a strict prohibition against Mrs. Mirabelli and Mrs. West even responding to  
11 questions from parents about gender identity, will never be acceptable.** Comp. p. 52, ¶ 215.

12 But it is not a lie to avoid answering a question, in that very rare situation where a child does  
13 not want their parent to know their gender identity is different. It is not a lie to refer a parent’s question  
14 to an administrator or limit the subject matter to education issues. The California Department of  
15 Education does not think it is a lie: “With rare exceptions, schools are required to respect the  
16 limitations that a student places on the disclosure of their transgender status, including not sharing that  
17 information with the student’s parents.” CDC FAQ # 7, Comp. Ex. 26, 6/12.

## 18 **2. The School’s Policy Is Neutral and Applied Generally**

19 The right to exercise one’s religion freely, however, “does not relieve an individual of the  
20 obligation to comply with a valid and neutral law of general applicability on the ground that the law  
21 proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Emp’t Div. v. Smith*,  
22 494 U.S. 872, 879 (1990) (internal quotation marks omitted).

23 A neutral law of general application need not be supported by a compelling government  
24 interest even when “the law has the incidental effect of burdening a particular religious practice.”  
25 *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (“*Lukumi*”), 508 U.S. 520, 531, 113 S.Ct. 2217,  
26 124 L.Ed.2d 472 (1993). Such laws need only survive rational basis review. *Miller v. Reed*, 176 F.3d  
27 1202, 1206 (9th Cir.1999). For laws that are not neutral or not generally applicable, strict scrutiny  
28 applies. See *Lukumi*, 508 U.S. at 531–32, 113 S.Ct. 2217 (“A law failing to satisfy these requirements

1 must be justified by a compelling governmental interest and must be narrowly tailored to advance that  
2 interest.”).

3 The tests for “[n]eutrality and general applicability are interrelated, and ... failure to satisfy one  
4 requirement is a likely indication that the other has not been satisfied.” *Id.* at 531, 113 S.Ct. 2217.

5 The mere existence of an exemption that affords some minimal governmental discretion does  
6 not destroy a law's general applicability. See *Grace United Methodist Church v. City of Cheyenne*,  
7 451 F.3d 643, 651 (10th Cir.2006) (“Consistent with the majority of our sister circuits, ... we have  
8 already refused to interpret *Smith* as standing for the proposition that a secular exemption  
9 automatically creates a claim for a religious exemption.”)

10 *Stormans, Inc. v. Wiesman* (9th Cir. 2015) 794 F.3d 1064, 1082.

11 The Plaintiffs contend the Policy is not neutral and not applied generally in two ways. First,  
12 they argue it does not apply to some employees. “As outlined above, the policies apply to  
13 approximately 1,000 certificated teachers, but do not apply to more than 115 credentialed  
14 administrative staff, 740 classified support staff, or 17,000 students.” Comp. p.58, ¶ 258. But that is  
15 not true. Neither the Policy (Ex. 2) nor the Regulation (Ex. 3) excludes any adult or student. “The  
16 Regulation broadly applies to all acts relate to school activity or to school attendance occurring with  
17 a district school . . .” Comp. Ex. 2. It is true that the District provided training to teachers first, but  
18 that was because teachers are on the front line of communication with parents. Dec. of Schmidt, ¶ 2.  
19 The District provided training to all staff generally and additional one-on-one training to office staff  
20 who would be directly dealing with changes in the records. *Id.* at 2. The Policy is generally applicable  
21 in that it prohibits all discrimination without reference to motivation. The Policy requiring respect for  
22 gender diverse students applies to everyone.

23 Second, they contend the Policy has discretionary exceptions. Comp. p. 60-61, ¶¶ 266-270.  
24 But the discretion only applies to issues related to discipline. The staff was told that refusing to address  
25 the student by the name and the pronoun consistent with their gender identity was one of the  
26 discriminatory or harassing actions that could subject the person to discipline. Comp. Ex. 4, p. 6.  
27 Plaintiffs argued that “harassment” had elements that required discretion to analyze. Comp. p. 61, ¶¶  
28 268-270. That is not an exception to the policy requiring respect for the student’s gender identity or

1 respect for the student’s privacy. It is an exception to discipline for a person who violated the Policy  
 2 based upon circumstances. Similarly, the Policy did not cover “inadvertent slips or honest mistakes.”  
 3 Comp. p. 61, ¶270. That also is not an “exception” but is part of a consistent policy against *intentional*  
 4 discrimination against a student because of gender identity.

5 There are no exceptions in the application of the Policy and the Policy is applied generally,  
 6 consequently, the Policy need only survive rational basis review. *Miller v. Reed*, 176 F.3d 1202, 1206  
 7 (9th Cir.1999). The school’s Policy of respecting a student’s privacy and gender identity, and keeping  
 8 their gender identity private upon request, is rationally related to the purpose of preventing  
 9 discrimination and harassment.

### 10 **3. The Policy Also Meets the Strict Scrutiny Test**

11 The Policy requires all staff to protect the privacy of students, consistent with their  
 12 Constitutional right to privacy, to protect the student’s safety and emotional security. That is a  
 13 compelling interest. The state has a compelling interest “of the highest order” in eradicating sex  
 14 discrimination. *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 626. The Supreme Court found  
 15 that discrimination on the basis of “sex” includes discrimination on the basis of sexual orientation or  
 16 transgender status. *Bostock v. Clayton County* (2020) — U.S. —, 140 S.Ct. 1731, 1741. The  
 17 California Supreme Court also recognized that the state has a compelling interest “in ensuring full and  
 18 equal access to medical treatment irrespective of sexual orientation.” *North Coast Women's Care*  
 19 *Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145, 1158. The governmental purpose of  
 20 protecting at-risk students from harm is a compelling governmental interest and the Policy of  
 21 protecting the student’s privacy, even from the parents in rare instances, is narrowly tailored, meeting  
 22 the strict scrutiny test.

23 The Policy and Regulation are narrowly tailored. There is no alternative method of meeting  
 24 the requirement to keep the student’s gender identity private when the student does not want a parent  
 25 to know except the careful referral to experts with the purpose of assisting the student to work through  
 26 the process of informing their parents.

### 27 **The California Department of Education Authorities Support the Policy**

28 The Fourth Claim for Relief contends the California Department of Education’s legal

1 authorities do not support the advice given to schools by the FAQ. The CDE’s FAQ pages are attached  
2 to the Complaint as Exhibit 26. The Policy is amply supported by the legal authorities identified above  
3 in Section A of this brief.

4  
5 **CONCLUSION**

6 Students’ privacy in their gender identity is protected by Federal and California law. Plaintiffs’  
7 religious beliefs do not permit them to discriminate against students because of their gender identity.  
8 And the school’s interest in protecting the privacy and safety of students justifies any burden on their  
9 religion.

10 It is not true that they are required to lie, but any speech they are required to make is not  
11 protected by the First Amendment because it is speech within the scope of their employment as  
12 teachers, not protected by the First Amendment. *Johnson v. Poway Unified School Dist.* (9th Cir.  
13 2011) 658 F.3d 954, 957. Consequently, the Plaintiffs are not likely to prevail. The Court is  
14 respectfully requested to deny Plaintiffs’ Motion for a Preliminary Injunction. rt sustain Defendants’  
15 motion to dismiss Plaintiffs’ Complaint under Federal Rule of Civil Procedure 12(b)(6).

16  
17 Dated: June 12, 2023

ARTIANO SHINOFF

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7  
8 **UNITED STATES DISTRICT COURT**  
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10 ELIZABETH MIRABELLI, an individual, and  
LORI ANN WEST, an individual ,

11 Plaintiffs,

12 v.

13 MARK OLSON, in his official capacity as  
14 President of the EUSD Board of Education, et al

15 Defendants.

Case No.: 23CV0768 BEN WVG

**DECLARATION OF TRACY SCHMIDT  
IN OPPOSITION TO MOTION FOR  
PRELIMINARY INJUNCTION**

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

ARTIANO SHINOFF

17 I, Tracy Schmidt, declare as follows:

18 1. At all times relevant hereto, I was employed by the Escondido Union School District  
19 (hereafter "District") as the Director, Integrated Student Services. I was responsible for, and led, the  
20 team that provided the training for staff on BP 5145.3 and AR 5145.3.

21 2. The training was much broader and deeper than the Plaintiffs' Complaint and Motion  
22 make it sound. We provided training to all staff who might have contact with students on the rights  
23 and protections afforded to gender diverse students. In January 2018, we provided training to all  
24 certificated staff on the dedicated certificated professional development days. "Certificated staff" are  
25 all of the employees required to have credentials, such as schoolteachers and administrators. The  
26 training was conducted by the YMCA, Our Safe Place team and was focused on supporting the rights  
27 of LGBTQ+ youth. The YMCA Our Safe Place team offered the same training that June 2018 to all  
28 classified staff. Classified staff are all the employees who support teaching, such as the clerks,

ARTIANO SHINOFF

1 secretaries, custodians and groundskeepers.

2 3. We also provided more individualized training with selected staff who would have  
3 more focused interactions with students and parents on issues related to gender, gender identity, and  
4 gender expression, such as office staff who would be involved with changing records or responding  
5 to questions about records, and administrators, social workers, and counselors, who would be expected  
6 to face more complex questions and issues. We also provided more specific training and guidance to  
7 students, staff, and parents in individual circumstances.

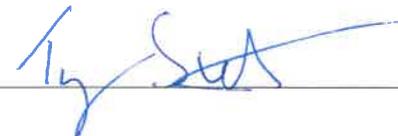
8 4. We suggested using neutral words such as “your child” or “your student” and “their”  
9 instead of gender specific pronouns in any circumstances.

10 5. In any case where a student showed any concern about a parent learning about their  
11 gender identity, we worked with the student to help them resolve their concern by talking the issue  
12 through. We wanted the student to understand how important it would be for the parent to be aware  
13 of their preferred identity in order for them to have that supportive network at home. We also advised  
14 the student that it would be very likely that the parent would become aware if they were choosing to  
15 use a different name or pronoun at school than at home, particularly if the student requested that the  
16 school wide record be changed. We would then focus on working with the student to make that  
17 communication less stressful.

18 6. The training revolved around the student’s right to provide consent prior to personal  
19 information on their gender identity being disclosed to any party. The District policy does not ask  
20 anyone to lie, it simply provides the student the opportunity to make the decision on to whom, how,  
21 and when their gender identity is disclosed. If hypothetically, a student was not ready to disclose an  
22 aspect of their gender identity to a parent, we would make every effort to respect the student’s right to  
23 privacy.

24 I declare under penalty of perjury under the laws of the State of California that the foregoing  
25 is true and correct.

26 Dated: June 12, 2023

27 By:   
28