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 *Application forthcoming

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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' Ex Parte Application to
 Seal Manually Filed Video in Support
 of Motion for a Preliminary
 Injunction**

Judge: Hon. Roger T. Benitez
 Courtroom: 5A

1 **TO: THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF**
2 **RECORD:**

3 PLEASE TAKE NOTICE that Plaintiffs Elizabeth Mirabelli and Lori Ann
4 West, by and through counsel, will and hereby do apply to the Court for an order
5 sealing Manually Filed Electronic Exhibit 37, a short 2:31 minute video, submitted in
6 support of Plaintiffs’ Motion for a Preliminary Injunction.

7 This Application is made on the grounds that the video contains images of
8 minor children at Rincon Middle School. As a result, there is a compelling justification
9 for sealing the video to protect the children’s privacy. Plaintiffs have also submitted
10 redacted screenshots which satisfy the public’s legitimate interests in understanding
11 the context of the legal proceedings in this case.

12 This Application is supported by the accompanying Memorandum of Points and
13 Authorities, by the previously filed declarations of Plaintiffs Elizabeth Mirabelli and
14 Lori Ann West, and by such further argument and evidence that may be adduced at
15 any hearing on this matter.

16
17 Respectfully submitted,

18 LiMANDRI & JONNA LLP

19
20 Dated: May 17, 2023

21 By: 
22 Charles S. LiMandri
23 Paul M. Jonna
24 Mark D. Myers
25 Jeffrey M. Trissell
26 Milan L. Brandon II
27 Attorneys for Plaintiffs
28 Elizabeth Mirabelli & Lori Ann West

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MEMORANDUM OF POINTS & AUTHORITIES

In support of their motion for a preliminary injunction, Plaintiffs have manually filed a flash drive containing videos, one of which contains images of students at Rincon Middle School. (*See* Dkt. 5-5, Notice of Manual Filing, Elec. Ex. 37.) To protect those students’ privacy, Plaintiffs now apply to the Court for an order sealing the exhibit. Plaintiffs do not seek sealing of their other Electronic Exhibits Nos. 4 and 13, submitted on a separate flash drive.

LEGAL STANDARD

In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), the Supreme Court recognized “a general right to inspect and copy public records and documents, including judicial records and documents.” *Id.* at 597. The main reason for this general right is to accommodate “the citizen’s desire to keep a watchful eye on the workings of ... government.” *Id.* at 598. However, the Supreme Court also stated that “the right to inspect and copy judicial records is not absolute.” *Id.* at 589. “Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes,” such as “to gratify private spite or promote public scandal,” or to serve as a source of “business information that might harm a litigant’s competitive standing.” *Id.* (internal citations omitted).

Except for certain documents “traditionally kept secret,” federal courts begin a sealing analysis with “a strong presumption in favor of access to court records.” *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). A party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the “compelling reasons” standard. *Id.*; *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (applying compelling reasons standard to dispositive motions); *DISH Network, L.L.C. v. Sonicview USA, Inc.*, No. 09-cv-1553-L, 2009 WL 2579052, at *1 (S.D. Cal. Aug. 20, 2009) (treating motion for

1 preliminary injunction as dispositive for sealing analysis because the motion directly
2 addresses the merits and seeks injunctive relief before trial). That is, the party must
3 “articulate [] compelling reasons supported by specific factual findings,” *Foltz*, 331
4 F.3d at 1135, that outweigh the general history of access and the public policies
5 favoring disclosure, such as the “public interest in understanding the judicial
6 process.” *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995).

7 ARGUMENT

8 In support of their motion for a preliminary injunction, Plaintiffs submitted a
9 short 2:31 minute video created by the Rincon Middle School Band Teacher and
10 circulated to the entire Rincon Middle School staff. (*See* Dkt. 5-3, Mirabelli Decl.,
11 ¶¶14-17; Dkt. 5-4, West Decl., ¶¶13; Dkt. 5-5, Notice of Manual Filing, Elec. Ex. 37.)
12 In that video, the Band Teacher records approximately twenty students singing the
13 protest song “This is Me,” in apparent protest to this lawsuit. (Dkt. 5-3, Mirabelli
14 Decl., ¶14.) The middle-school students (ages approximately 11-13) are shown waving
15 various small Rainbow Pride flags, with one student wearing a large Rainbow Pride flag
16 as a cape. (*Id.*, ¶15.) Plaintiffs submit that this video shows a hostile culture at Rincon
17 Middle School where teachers misuse students as methods of retaliation, supporting
18 their motion for a preliminary injunction.¹

19 _____
20 ¹ Plaintiffs’ retained expert Dr. Erica Anderson—a recognized leader in the field of
21 treating children with gender incongruence or gender dysphoria—has noted that
22 recent surveys of children indicate a recent dramatic increase in gender identity
23 confusion. (Dkt. 5-2, Anderson Decl., ¶¶14-15.) This increase is particularly notable
24 among natal females. (*Id.*, ¶¶17-18.) Dr. Anderson also notes that the World
25 Professional Association for Transgender Health’s (“WPATH”) Standards of Care,
26 Version 8 (2022), states that the causes of this phenomenon have not been adequately
27 studied, but concludes that “susceptibility to social influence impacting gender may be
28 an important differential to consider.” (*Id.*, ¶19 (quoting WPATH SOC8 at S45).)
Here, where Rincon Middle School is experiencing an explosion of transgender youth,
all natal females, “social influence” from the Band Teacher may be a particularly
relevant cause. (Dkt. 1, Compl., ¶158 (Plaintiffs had no transgender students in the
2021-2022 school year); ¶¶167, 211 (Plaintiffs have eight transgender students, all
natal females, in the 2022-2023 school year).)

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2 However, Plaintiffs fully accept that these students have very important privacy
3 rights. Thus, Plaintiffs request that the Court seal the video. The Federal Rules
4 recognize that minor's privacy interests are particularly important. *See* Fed. R. Civ. P.
5 5.2(a)(3). As a result, courts have not hesitated to seal photographs of children. *See,*
6 *e.g., Beas-Campo v. Case*, No. CV-23-00199, 2023 WL 3306485, at *2 (D. Ariz. May 5,
7 2023); *United States v. Gomez-Marentes*, No. CR20-0092-JCC-19, 2022 WL 2805614,
8 at *1 (W.D. Wash. July 18, 2022); *Hollowell v. Arizona Dep't of Child Safety*, No. CV-
9 15-02045, 2016 WL 1593814, at *4 (D. Ariz. Apr. 20, 2016); *Mubita v. Blades*, No. 1:08-
10 CV-00310, 2015 WL 2064476, at *4 (D. Idaho May 4, 2015). This is especially
11 appropriate in the case of transgender or gender diverse children. *Tingley v. Ferguson*,
12 47 F.4th 1055, 1069-70 (9th Cir. 2022), *cert. petition docketed* No. 22-942 (Mar. 28,
13 2023) (transgender children would satisfy standards for pseudonymous litigation);
14 *D.T. v. Christ*, 552 F. Supp. 3d 888, 897 (D. Ariz. 2021) (noting court had sealed
15 photograph of natal male/transgender female child).

16 Plaintiffs are also not requesting that the Court seal more than necessary to
17 preserve the children's privacy. Plaintiffs have submitted an un-sealed exhibit
18 containing screenshots of the video with the children's identities obscured. (*See* Dkt. 5-
19 3, Mirabelli Decl., Ex.37, at ECF pp.31-34.) This exhibit satisfies any legitimate interest
20 the public has in viewing public court records as it adequately conveys the substance of
21 the video without violating students' privacy. *See Stone Brewing Co., LLC v.*
22 *Millercoors LLC*, No. 3:18-CV-00331-BEN, 2019 WL 13164179, at *4 (S.D. Cal. Nov.
23 5, 2019) (“[T]he Court finds that ... the parties' [] Motions to Seal are narrowly
24 tailored such that they do not impede upon the public's ability to understand the
25 nature of the proceedings and the factual basis for the parties' claims.”).

26 Here, the public's only interest is in understanding the judicial process, which
27 is being adequately served by knowing the general nature of what the video depicts.
28 The public has no interest in knowing the identity of the children or what they look

1 like. Who they are and what they look like will not form any part of the analysis
2 concerning the video’s relevance.

3 In contrast, showing the children’s images could result in improper use and
4 would prejudice them. This case has already drawn a good deal of public attention,
5 and has been covered in the media. (See Dkt. 5-4, West Decl., ¶5.) It involves a
6 controversially and socially divisive issue, and making the children’s images public
7 would invite people on both sides of the issue to harass them or use them against
8 their will as part of a public debate. The children’s band teacher’s decision to use
9 them as tools or puppets in the debate was not done with the minor children’s
10 informed consent or that of their parents, and should not continue further than it
11 already has.

12 **CONCLUSION**

13 For the foregoing reasons, Plaintiffs respectfully request that this Court grant
14 their application to seal Electronic Exhibit 37, which they are manually filing with this
15 Court via delivery of a flash drive.

16
17 Respectfully submitted,

18 LiMANDRI & JONNA LLP

19
20 Dated: May 17, 2023

21 By:



22 Charles S. LiMandri
23 Paul M. Jonna
24 Mark D. Myers
25 Jeffrey M. Trissell
26 Milan L. Brandon II
27 Attorneys for Plaintiffs
28 Elizabeth Mirabelli & Lori Ann West

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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’ Ex Parte Application to Seal Manually Filed Video in Support of Motion for a Preliminary Injunction.**

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 May 17, 2023, at Rancho Santa Fe, California.



Kathy Denworth