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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

MARK OLSON, et al,

Defendants.

Case No.: 23CV0768 BEN WVG

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SCHOOL EMPLOYEE DEFENDANT’S MOTION TO DISMISS PLAINTIFFS COMPLAINT [FED. R. CIV. P. 12(b)(6)]

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

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I. INTRODUCTION

Two schoolteachers object because the school has asked them to be respectful of students who are experiencing confusion over their gender identity. The school did that because the state and federal government required the school to do that. The teachers object to governments’ policies and seek to inject the judicial branch into this legislative issue. This case raises very important issues for the Legislature. But this is not an issue for the Court.

Schools are required to provide a safe place for children to learn. The law forbids discrimination against a child who questions their gender and encourages teachers to respect the child’s preferred gender. But issues arise if the child does not want their parents to know their intent to change their gender identification. These two teachers assert the right of parents to be central in raising their children. That very significant Constitutional issue – regarding the parents’ right to raise their children—belongs to parents and is not at issue here, because these teachers do not assert their interest *as parents*; instead, they contend the policy violates their personal free speech and religious rights.

The problematic event occurs when a student wants to use a non-conforming name and pronoun but does not want the parents to know they are non-conforming. If the parent asks the teacher directly whether their student is non-conforming, the teachers contend the school policy requires them to lie, which violates their religious beliefs. Consequently, the principal factual issue is whether the policy requires the teachers to lie. Review of the policy and the training provided shows the policy does not ask the teachers to lie. It instructs them to tell the parent the question is not theirs to answer, or to refer the question to an Administrator. Declining to answer a question is not a lie. Referring a question to another person is not a lie. The remaining issue is whether any other aspect of the policy requiring respect for children’s gender-identification, such as using a student’s preferred pronoun or name, violates the teachers’ right to freedom of speech or religion.

II. PROCEDURAL STATUS

The two school-teacher Plaintiffs -- ELIZABETH MIRABELLI and LORI ANN WEST-- sued individuals associated with the Escondido Union School District (“school district”), but did not sue

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1 the school district. The school district employees are MARK OLSON, President of the EUSD Board
2 of Education; FRANK HUSTON, Vice President of the EUSD Board of Education; JOAN
3 GARDNER, member of the EUSD Board of Education; DOUG PAULSON, member of the EUSD
4 Board of Education; ZESTY HARPER, a member of the EUSD Board of Education; LUIS
5 RANKINS-IBARRA, Superintendent of EUSD; JOHN ALBERT, Assistant Superintendent of
6 EUSD; TRENT SMITH, Director of Integrated Student Services for EUSD; TRACY SCHMIDT,
7 Director of Integrated Student Supports for EUSD; and STEVE WHITE, Principal of Rincon Middle
8 School at EUSD. The Defendant employees of the school district are referred to herein as “School
9 Employees.”

10 Plaintiffs also sued The State Superintendent of Public Instruction and individuals associated
11 with the State of California and the California State Board of Education but did not sue the State.
12 Those employees are separately represented.

13 Plaintiffs identified four claims for relief:

- 14 1. Violation of Free Speech Clause of First Amendment to U.S. Constitution: Compelled
15 Speech & Viewpoint Discrimination;
- 16 2. Violation of Free Exercise Clause of First Amendment to U.S. Constitution: Not Generally
17 Applicable due to Categorical Exemptions;
- 18 3. Violation of Free Exercise Clause of First Amendment to U.S. Constitution: Not Generally
19 Applicable due to Discretionary Exemptions; and
- 20 4. Declaratory Relief. They seek declaratory relief and an injunction. They seek damages, but
21 have not presented a Government Claim.

22 **III. PERTINENT FACTS**

23 Plaintiffs allege in 2020, Escondido Union School District (“EUSD”) enacted Administrative
24 Regulation 5145.3, expanding upon its Board Policy 5145.3, which they allege “required
25 certificated EUSD staff to unquestioningly accept a students’ transgender or gender nonconforming
26 self-identification, begin referring to transgender or gender nonconforming students by their preferred
27 names and pronouns, and hide that information from parents or caretakers, among other requirements.”
28 Comp. ¶ 116, p. 28:16-19. They attach the AR as Exhibit 4. They contend:

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1 EUSD’s policies state that “revealing a student’s transgender status to
2 individuals who do not have a legitimate need for the information,
3 without the student’s consent” is prohibited, and “parents or caretakers”
4 are, according to EUSD, individuals who “do not have a legitimate need
5 for the information,” irrespective of the age of the student or the specific
6 facts of the situation.

7 Comp. ¶3, p. 3:18-13.

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

12 The school district policy is attached to the Complaint as **Exhibit 2** and the Regulation is
13 attached as **Exhibit 3**. The school district policy seeks to protect the privacy of students who seek to
14 keep their gender identity confidential. Comp. Ex. 4. The Plaintiffs allege that policy violates their
15 right to free speech and their religion.

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

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

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

28 95. Plaintiffs’ faith does not command them to affirmatively communicate

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1 their religious beliefs at school, and they do not seek to do so. However, their faith
2 requires them to refrain from speaking in a manner that their faith instructs as
3 immoral, dishonest, or harmful.

4 Comp. p. 24:11-21.

5 **IV. LEGAL STANDARD**

6 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is proper when there is
7 either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable
8 legal theory. *See Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1990). Basic federal
9 pleading standards require a plaintiff to provide “fair notice” of the claims asserted and the “grounds”
10 on which they rest. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

11 In deciding a motion to dismiss under Rule 12(b)(6), the Court construes the complaint in the
12 light most favorable to the plaintiff and accepts all well-pled factual allegations as true to determine
13 whether the plaintiff can prove any set of facts to support a claim for relief. *Cahill v. Liberty Mut. Ins.*
14 *Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). However, “a court considering a motion to dismiss can
15 choose to begin by identifying pleadings that, because they are no more than conclusions, are not
16 entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The Court need not
17 accept as true “unreasonable inferences, unwarranted deductions of fact, or conclusory legal
18 allegations cast in the form of factual allegations.” *Bureerong v. Uvawas*, 922 F.Supp. 1450, 1462
19 (C.D. Cal. 1996). Nor should a court assume that the plaintiff can prove facts different from those
20 alleged. *Associated Gen. Contractors of Calif. v. Calif. State Council of Carpenters*, 459 U.S. 519,
21 526 (1983). “While legal conclusions can provide the framework of a complaint, they must be
22 supported by factual allegations.” *Ashcroft*, 556 U.S. at 679.

23 Instead, a plaintiff’s factual allegations “must be enough to raise a right to relief above the
24 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 545 (The Court may properly dismiss
25 a claim where a plaintiff has not “nudged [her] claims across the line from conceivable to plausible”).

26 **V. ANALYSIS**

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

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

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

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

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

20 In evaluating Title IX claims, federal courts look to Title VII cases for guidance. *Franklin v.*
21 *Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Patricia H. Berkeley. Unified Sch. Dist.*, 830
22 F.Supp. 1288, 1290 (C.D. Cal. 1993). In *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000),
23 the Ninth Circuit, relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), reasoned that “‘sex’
24 under Title VII encompasses both sex—that is, the biological difference between men and women—
25 and gender.” It explained that while earlier cases distinguished between “sex” and “gender,” the
26 Supreme Court in *Price Waterhouse* abandoned that distinction and held that Title VII bars
27 discrimination based on both an individual's sex and failure to conform to socially-constructed gender
28 expectations. *Id.* In *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 Fed.Appx. 492, 493 (9th Cir. 2009),

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1 the Ninth Circuit reaffirmed that “it is unlawful to discriminate against a transgender (or any other)
2 person because he or she does not behave in accordance with an employer's expectations for men or
3 women.”

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

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

18 **B. California Constitution Protects Privacy**

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

24 **C. 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
28 not disclose information deemed to be confidential pursuant to this

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1 section to the parents of the pupil when the school counselor has
2 reasonable cause to believe that the disclosure would result in a clear
3 and present danger to the health, safety, or welfare of the pupil.

4 Cal. Ed. Code § 49602, subd. (e).

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

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

18 Ed. Code, § 220.

19 **D. The California Department of Education Requires the Policy**

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

24 **1. May a student’s gender identity be shared with the student’s parents, other
25 students, or members of the public?**

26 A transgender or gender nonconforming student may not express their gender identity openly
27 in all contexts, including at home. **Revealing a student’s gender identity or expression to
28 others may compromise the student’s safety. Thus, preserving a student’s privacy is of**

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1 **the utmost importance. The right of transgender students to keep their transgender**
2 **status private is grounded in California’s antidiscrimination laws as well as federal and**
3 **state laws.** Disclosing that a student is transgender without the student’s permission may
4 violate California’s antidiscrimination law by increasing the student’s vulnerability to
5 harassment and may violate the student’s right to privacy.

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

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

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

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

18 **E. Plaintiffs Assertion of Parents’ Rights Misstates the Law**

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

25 The Ninth Circuit then adopted the Sixth Circuit’s position on this right:

26 Perhaps the Sixth Circuit said it best when it explained, “While parents
27 may have a fundamental right to decide whether to send their child to a
28 public school, they do not have a fundamental right generally to direct

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1 how a public school teaches their child. Whether it is the school
2 curriculum, the hours of the school day, school discipline, the timing
3 and content of examinations, the individuals hired to teach at the school,
4 the extracurricular activities offered at the school or, as here, a dress
5 code, these issues of public education are generally ‘committed to the
6 control of state and local authorities.’”

7 *Id.* (quoting *Blau v. Fort Thomas Public School Dist.* (6th Cir. 2005) 401 F.3d 381, 395–396).

8 But, notwithstanding the importance of parents’ rights, one Federal District Court has denied
9 an injunction against a very similar policy sought by a parent who contended she had a right to be
10 informed of her child’s gender identity. “Plaintiff asks this Court to enjoin enforcement of school
11 district regulation AR 5145.3, which broadly covers nondiscrimination and harassment as it applies to
12 the school district’s transgender students.” *Regino v. Staley* (E.D. Cal., Mar. 9, 2023, No.
13 223CV00032JAMDMC) 2023 WL 2432920, at *1. “For the reasons set forth below, the Court
14 DENIES Plaintiff’s motion.” *Id.*

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

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

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

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

28 On the face of AR 5145.3, there is no requirement for anyone to lie. The entire Regulation is

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1 attached to the Complaint as Exhibit 3. It is a long Regulation, but the pertinent part says:

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

7 1. Right to privacy: A student's transgender or gender-nonconforming
8 status is his/her private information and the district will only disclose
9 the information to others with the student's prior written consent, except
10 when the disclosure is otherwise required by law or when the district
11 has compelling evidence that disclosure is necessary to preserve the
12 student's physical or mental well-being. In the latter instance, the district
13 shall limit disclosure to individuals reasonably believed to be able to
14 protect the student's well-being. Any district employee to whom a
15 student discloses his/her transgender or gender-nonconforming status
16 shall seek the student's permission to notify the compliance officer. If
17 the student refuses to give permission, the employee shall keep the
18 student's information confidential, unless he/she is required to disclose
19 or report the student's information pursuant to this procedure, and shall
20 inform the student that honoring the student's request may limit the
21 district's ability to meet the student's needs related to his/her status as a
22 transgender or gender-nonconforming student. If the student permits the
23 employee to notify the compliance officer, the employee shall do so
24 within three school days.

25 As appropriate given the physical, emotional, and other significant risks
26 to the student, the compliance officer may consider discussing with the
27 student any need to disclose the student's transgender or gender-
28 nonconformity status to his/her parents/guardians and/or others,

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1 including other students, teacher(s), or other adults on campus. The
2 district shall offer support services, such as counseling, to students who
3 wish to inform their parents/guardians of their status and desire
4 assistance in doing so.

5 EUSD AR 5145.3, Comp. Ex. 3.

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

12 If a suspicious parent asks a teacher about whether their child
13 has socially transitioned at school, the teacher must simply respond that
14 “the inquiry is outside of the scope of the intent of their interaction” and
15 that they can only discuss “information regarding the student’s behavior
16 as it relates to school, class rules, assignments, etc.” (Ex. 9, pp.2-4.)
17 Even if a parent expresses concern, teachers are specifically “directed
18 to refrain from elaborating on their personal beliefs” regarding the
19 child’s gender confusion. (Ex. 9, p.2.)

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

21 The instruction to say a subject is outside of the scope of the discussion is not an instruction to
22 lie. It is not an instruction to state an opinion. It is an instruction to avoid the question.

23 **2. Plaintiffs’ Speech at School Is Not Protected Speech**

24 **G. A Teacher’s Speech in the Classroom Is Not Protected Speech**

25 Arguendo, if the Court decides the school district’s Regulation, as applied, imposes some
26 obligation on the Plaintiffs’ speech, that speech is *not* protected. “We hold that when public employees
27 make statements pursuant to their official duties, the employees are not speaking as citizens for First
28 Amendment purposes, and the Constitution does not insulate their communications from employer

1 discipline.” *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

2 There is no doubt that a public-school teacher has certain First Amendment rights of freedom
3 of speech or expression. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Tinker v. Des Moines Ind.*
4 *Comm’ty. Sch. Dist.*, 393 U.S. 503, 506 (1969) [“[i]t can hardly be argued that either students or
5 teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”].
6 But the free speech rights of public employees, including teachers, are not unlimited. Those rights
7 have been restricted under the test established in *Pickering* and clarified in *Connick v. Myers*, 461 U.S.
8 138 (1983), and *Garcetti*, supra, 547 U.S. at p. 418.

9 The *Pickering* test provides a public employee with First Amendment protections only if (1)
10 the employee is speaking as citizen, (2) on a matter of public concern, and (3) the public entity has no
11 adequate justification for treating the employee differently from any other member of the general
12 public. *Garcetti*, supra, 547 U.S. at 418.

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

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

26 Plaintiffs incorrectly contend they are discussing matter of public concern so that their
27 discussion is protected, citing *Demers v. Austin*, 746 F.3d 402, 411-13 (9th Cir. 2014.) But *Demers*
28 *v. Austin* does not apply. Its analysis only applies to post-secondary education -- colleges and

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1 universities. And it recognizes the difference between universities and high schools education.
 2 “Further, the degree of freedom an instructor should have in choosing what and how to teach will vary
 3 depending on whether the instructor is a high school teacher or a university professor.” *Demers v.*
 4 *Austin*, supra, at 413.

5 The *Garcetti* court expressly left open the question of whether its gloss on the *Pickering* test
 6 should be applied to the world of public academia, where there are different free speech concerns,
 7 such as academic freedom. *Id.* at 425. To that end, the *Garcetti* court noted: “There is some argument
 8 that expression related to academic scholarship or classroom instruction implicates additional
 9 constitutional interests that are not fully accounted for by this Court’s customary employee-speech
 10 jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today
 11 would apply in the same manner to a case involving speech related to scholarship or teaching.” *Id.*

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

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

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

25 Primary and secondary schools hire teachers for their ability to convey the school district’s
 26 curriculum, not for their academic publications, as might occur at the university level. And teachers
 27 may not introduce their own views on a particular subject, but “must stick to the prescribed curriculum
 28 not only the prescribed subject matter, but also the prescribed perspective on that subject matter.”

1 *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477,479 (7th Cir. 2007). This is because
 2 “the school system does not regulate teachers' speech as much as it hires that speech. Expression is a
 3 teacher's stock in trade, the commodity she sells to her employer in exchange for a salary.” *Id.*; see
 4 also, *Borden v. Sch. Dist. of East Brunswick*, 523 F.3d 153, 171 (3d Cir. 2008) (holding under
 5 Pickering-based analysis that school could prohibit faculty participation in student-initiated prayer);
 6 *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 700 (4th Cir. 2007) (holding under a Pickering-based
 7 analysis that a school board did not infringe the rights of a teacher when it ordered him to remove
 8 religious material from a classroom bulletin board); *Brammer-Hoelter v. Twin Peaks Charter Acad.*,
 9 492 F.3d 1192,1204 (10th Cir. 2007); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir.
 10 2007); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477,479-80 (7th Cir. 2007) (applying
 11 Pickering-based test and holding that “the [F]irst [A]mendment does not entitle primary and secondary
 12 teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints,
 13 that depart from the curriculum adopted by the school system”).

14 **H. Plaintiffs’ Speech Is Curricular Speech**

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

22 **I. The Policy Does Not Violate the Plaintiffs Religion**

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

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

1 racial discrimination against gender non-conforming students?

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

3 Plaintiffs claim the school’s policy prohibited the free exercise of their religion. U.S. Const.
4 amend. I. Under this guarantee, Plaintiffs must “show[] that a government entity has burdened [their]
5 sincere religious practice pursuant to a policy that is not ‘neutral’ or ‘generally applicable.’” *Kennedy*
6 *v. Bremerton School District* (2022) __ U.S. __, 142 S.Ct. 2407, 2421, 2422. General applicability
7 requires, among other things, that the laws be enforced evenhandedly. *Id.* at 2423; see also *Apache*
8 *Stronghold v. United States*, 38 F.4th 742, 770 (9th Cir. 2022) (“[A] law is not ‘generally applicable’
9 if the law ‘impose[s] burdens only on conduct motivated by religious belief’ in a ‘selective manner.’”
10 (second brackets in original) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508
11 U.S. 520, 533, 543, (1993)); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015).

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

15 Mrs. Mirabelli and Mrs. West remain committed—in light of their
16 faith—to prevent transgender students from being bullied or harassed.
17 They have no intention to, and will not, harass or tolerate harassment of
18 transgender or gender diverse students. **But a requirement that Mrs.**
19 **Mirabelli and Mrs. West actively deceive parents and hide their**
20 **child’s gender confusion from them, and a strict prohibition against**
21 **Mrs. Mirabelli and Mrs. West even responding to questions from**
22 **parents about gender identity, will never be acceptable.**

23 Comp. p. 52, ¶ 215.

24 But it is not a lie to avoid answering a question, in that very rare situation where a child does
25 not want their parent to know their gender identity is different. It is not a lie to refer a parent’s question
26 to an administrator or limit the subject matter to education issues. The California Department of
27 Education does not think it is a lie: “With rare exceptions, schools are required to respect the
28 limitations that a student places on the disclosure of their transgender status, including not sharing that

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1 information with the student’s parents.” CDC FAQ # 7, Comp. Ex. 26, 6/12.

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

3 The right to exercise one's religion freely, however, “does not relieve an individual of the
4 obligation to comply with a valid and neutral law of general applicability on the ground that the law
5 proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Emp’t Div. v. Smith*,
6 494 U.S. 872, 879 (1990) (internal quotation marks omitted).

7 A neutral law of general application need not be supported by a compelling government
8 interest even when “the law has the incidental effect of burdening a particular religious practice.”
9 *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (“*Lukumi*”), 508 U.S. 520, 531, 113 S.Ct. 2217,
10 124 L.Ed.2d 472 (1993). Such laws need only survive rational basis review. *Miller v. Reed*, 176 F.3d
11 1202, 1206 (9th Cir.1999). For laws that are not neutral or not generally applicable, strict scrutiny
12 applies. See *Lukumi*, 508 U.S. at 531–32, 113 S.Ct. 2217 (“A law failing to satisfy these requirements
13 must be justified by a compelling governmental interest and must be narrowly tailored to advance that
14 interest.”).

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

17 The mere existence of an exemption that affords some minimal
18 governmental discretion does not destroy a law's general applicability.
19 See *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643,
20 651 (10th Cir.2006) (“Consistent with the majority of our sister circuits,
21 ... we have already refused to interpret *Smith* as standing for the
22 proposition that a secular exemption automatically creates a claim for a
23 religious exemption.”)

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

25 The Plaintiffs contend the policy is not neutral and not applied generally in two ways. First,
26 they argue it does not apply to some employees. “As outlined above, the policies apply to
27 approximately 1,000 certificated teachers, but do not apply to more than 115 credentialed
28 administrative staff, 740 classified support staff, or 17,000 students.” Comp. p.58, ¶ 258. But that is

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

6 Second, they contend the policy has discretionary exceptions. Comp. p. 60-61, ¶¶ 266-270.
7 But the discretion only applies to issues related to discipline. The staff was told that refusing to address
8 the student by the name and the pronoun consistent with their gender identity was one of the
9 discriminatory or harassing actions that could subject the person to discipline. Comp. Ex. 4, p. 6.
10 Plaintiffs argued that “harassment” had elements that required discretion to analyze. Comp. p. 61, ¶¶
11 268-270. That is not an exception to the policy requiring respect for the student’s gender identity or
12 respect for the student’s privacy. It is an exception to discipline for a person who violated the policy
13 based upon circumstances. Similarly, the policy did not cover “inadvertent slips or honest mistakes.”
14 Comp. p. 61, ¶270. That also is not an “exception” but is part of a consistent policy against *intentional*
15 discrimination against a student because of gender identity.

16 There are no exceptions in the application of the policy and the policy is applied generally,
17 consequently, the policy need only survive rational basis review. *Miller v. Reed*, 176 F.3d 1202, 1206
18 (9th Cir.1999). The school’s policy of respecting a student’s privacy and gender identity, and keeping
19 their gender identity private upon request, is rationally related to the purpose of preventing
20 discrimination and harassment.

21 **3. The Policy Meets the Strict Scrutiny Test**

22 The Policy requires all staff to protect the privacy of students, consistent with their
23 Constitutional right to privacy, to protect the student’s safety and emotional security. That is a
24 compelling interest. The state has a compelling interest “of the highest order” in eradicating sex
25 discrimination. *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 626. The Supreme Court found
26 that discrimination on the basis of “sex” includes discrimination on the basis of sexual orientation or
27 transgender status. *Bostock v. Clayton County* (2020) — U.S. —, 140 S.Ct. 1731, 1741. The
28 California Supreme Court also recognized that the state has a compelling interest “in ensuring full and

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1 equal access to medical treatment irrespective of sexual orientation.” *North Coast Women's Care*
2 *Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145, 1158. The governmental purpose of
3 protecting at-risk students from harm is a compelling governmental interest and the Policy of
4 protecting the student’s privacy, even from the parents in rare instances, is narrowly tailored, meeting
5 the strict scrutiny test.

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

10 **J. The California Department of Education Authorities Support the Policy**

11 The Fourth Claim for Relief contends the California Department of Education’s legal
12 authorities do not support the advice given to schools by the FAQ. The CDE’s FAQ pages are attached
13 to the Complaint as Exhibit 26. The policy is amply supported by the legal authorities identified above
14 in Section A of this brief.

15 **K. The School Employees Are Entitled to Qualified Immunity**

16 Plaintiffs seek nominal and actual damages. Comp. p. 64:14. In the event the court denies the
17 motion to dismiss, the school employee defendants are entitled to qualified immunity.

18 Qualified immunity seeks to guarantee that public officials who are subjected to suit are on notice
19 that their actions were unlawful. *Hope v. Pelzer*, 536 U.S. 730 (2002). In order to make a determination
20 regarding qualified immunity, a court may first determine that, given the facts alleged and, in the light
21 most favorable to the plaintiff, the official's conduct violated the plaintiff's constitutional right. *Saucier*
22 *v. Katz*, 533 U.S. 194, 195 (2001). If a constitutional right was violated, then it must be determined that
23 the right was clearly established. This determination rests upon the specific context of the case, and not
24 a broad general proposition. *Id.* Moreover, the court must inquire as to whether it would be clear to a
25 reasonable official that his or her conduct was unlawful in the given situation. *Id.* In *Pearson v. Callahan*,
26 555 U.S. 223 (2009), the Court held that a court may determine which prong of the analysis should be
27 addressed first in light of the circumstances.

28 Here, it is indisputable that the entire issue of gender-identity rights is anything but clear. There

1 is no possibility that the school employees could have known that complying with their employer’s
2 policy could have violated the Plaintiffs’ right to free speech or religion. Consequently, if the Court
3 denies the motion to dismiss, or grants the motion with leave to amend, the Court should order that
4 the individual defendants are entitled to immunity from all damages.

5 **VI. CONCLUSION**

6 Based upon the foregoing, it is respectfully requested that this Court sustain Defendants’
7 motion to dismiss Plaintiffs’ Complaint under Federal Rule of Civil Procedure 12(b)(6). If the Court
8 denies any part of the motion to dismiss, the Court is requested to order that the individual defendants
9 ae entitled to immunity from all damages.

10
11 Dated: May 23, 2023

ARTIANO SHINOFF

12
13
14 By: _____
15 Daniel R. Shinoff
16 Maurice A. Bumbu
17 Attorney for Defendants School Employees
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6 Attorney for Defendant School Employees

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, et al,

14 Defendants.

Case No.: 23CV0768 BEN WVG

**SCHOOL DISTRICT DEFENDANTS
MOTION TO DISMISS PLAINTIFFS'
COMPLAINT
[FED. R. CIV. P. 12(b)(6)]**

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

JURY TRIAL DEMANDED

15
16
17
18 **TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:**

19 Please take notice that on June 26, 2023 at 10:30 a.m., or as soon thereafter as the matter may
20 be heard in Department 5A of the above-entitled court, located at 221 West Broadway, San Diego,
21 California, 92101, individual Defendants, MARK OLSON, in his official capacity as President of the
22 EUSD Board of Education; FRANK HUSTON, in his official capacity as Vice President of the EUSD
23 Board of Education; JOAN GARDNER, in her official capacity as a member of the EUSD Board of
24 Education; DOUG PAULSON, in his official capacity as a member of the EUSD Board of Education;
25 ZESTY HARPER, in her official capacity as a member of the EUSD Board of Education; LUIS
26 RANKINS-IBARRA, in his official capacity as Superintendent of EUSD; JOHN ALBERT, both in
27 his personal capacity and in his official capacity as Assistant Superintendent of EUSD; TRENT
28 SMITH, both in his personal capacity and in his official capacity as Director of Integrated Student

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1 Services for EUSD; TRACY SCHMIDT, both in her personal capacity both in her personal capacity
2 and in her official capacity as Director of Integrated Student Supports for EUSD; STEVE WHITE,
3 both in his personal capacity and in his official capacity as Principal of Rincon Middle School at
4 EUSD, (collectively, "School Employee Defendants"), for themselves alone, will and hereby do move
5 the Court for an order dismissing the Complaint, filed against them on April 27, 2023, pursuant to
6 Federal Rule of Civil Procedure 12(b)(6).

7 This Motion to Dismiss is based upon the grounds that all of the claims fail because the school
8 policies do not violate the Plaintiffs' rights of speech or religion, so that the complaint does not state
9 claims for which relief may be granted. In addition, in the event the Court denies any part of this
10 motion, these Defendants seek an order that they are entitled to qualified immunity against all claims
11 for damages.

12 The motion is further based upon this Notice and upon the attached Memorandum of Points
13 and Authorities, filed herewith; upon the Complaint and the documents attached thereto, upon the
14 records and files in this action; and upon such further evidence and argument as may be presented
15 prior to or at the time of hearing on the motion.

16 Dated: May 23, 2023

ARTIANO SHINOFF



17
18 By: _____
19 Daniel R. Shinoff
20 Maurice A. Bumbu
21 Attorney for Defendants MARK OLOSN, et al
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ARTIANO SHINOFF

1 **PROOF OF SERVICE**

2 **(FOR THE SOUTHERN DISTRICT OF CALIFORNIA)**

3 I am and was at all times herein mentioned over the age of 18 years and not a party to the
4 action in which this service is made. At all times herein mentioned I have been employed in the
County of San Diego in the office of a member of the bar of this court at whose direction the service
5 was made. My business address is 3636 Fourth Avenue, Suite 200, San Diego, California 92103.

6 On May 23, 2023, I served the following document(s):

7 **1. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
SCHOOL EMPLOYEE DEFENDANT’S MOTION TO DISMISS PLAINTIFFS’
8 **COMPLAINT**

9 **2. SCHOOL DISTRICT DEFENDANTS MOTION TO DISMISS PLAINTIFFS’**
COMPLAINT

10 **BY ELECTRONIC SERVICE** via e-mail without electronic error on May 23, 2023, by
11 Nopealey Lay at nlay@as7law.com.

12 **BY ELECTRONIC SERVICE** On the date executed below, I served the document(s) listed
above via Court's System Filing.

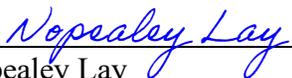
13 Charles S. LiMandri, Esq
14 Paul M. Jonna, Esq
15 Jeffrey M. Trissell, Esq
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20 **Attorneys for Plaintiffs, ELIZABETH**
21 **MIRABELLI and LORI ANN WEST**

22
23 I declare under penalty of perjury under the laws of the State of California that the above is
true and correct.

24 Executed on May 23, 2023, at San Diego, California.

25
26 
Nopealey Lay