Charles S. LiMandri, SBN 110841
cslimandri@limandri.com
Paul M. Jonna, SBN 265389
pjonna@limandri.com
Mark D. Myers, SBN 235719
mmyers@limandri.com
Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
Milan L. Brandon II, SBN 326953
mbrandon@limandri.com
LiMANDRI & JONNA LLP
P.O. Box 9120
Rancho Santa Fe, CA 92067
Telephone: (858) 759-9930
Facsimile: (858) 759-9938

Thomas Brejcha, *pro hac vice**
tbrejcha@thomasmoresociety.org
Peter Breen, *pro hac vice**
pbreen@thomasmorsociety.org
THOMAS MORE SOCIETY
309 W. Washington St., Ste. 1250
Chicago, IL 60606
Tel: (312) 782-1680
*Application forthcoming

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

Plaintiffs' Memorandum of Points & Authorities in Opposition to Defendant Newsom's and Defendant Bonta's Motions to Dismiss

[Fed. R. Civ. P. 12(b)(1)]

Judge:	Hon. Roger T. Benitez
Courtroom:	5A
Hearing Date:	April 1, 2024
Hearing Time:	10:30 a.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATUTES, REGULATIONS & RULES

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

Here we go again. Since February 2022, Plaintiffs Elizabeth Mirabelli and Lori Ann West have been living with the severe stress of being "face[d with] an unlawful choice along the lines of: 'lose your faith and keep your job, or keep your faith and lose your job.'" ECF No. 42, Order Denying Motions to Dismiss, at p.28 (Sep. 14, 2023). In October 2022—near the outset of the 2022-2023 school year—they requested a religious accommodation from having to directly lie to parents about their child's gender transition. *See* ECF No. 80, 1st Amend. Compl., p.45. But those requests were placed on the back burner and not decided on until March 2023. *See id.* at p.51. Plaintiffs then filed suit in April 2023, *see* ECF No. 1, opposed two pleadings challenges in June and July 2023, *see* ECF Nos. 10 & 28, opposed a third pleadings challenge in December 2023, *see* ECF No. 62, and are now opposing the fourth and fifth rounds of pleadings challenges—which are set for hearing in April 2024, one full year after this case was filed. *See* ECF Nos. 95 & 96.[1]

"As the saying goes, 'there is nothing new under the sun.'" *Nationstar Mortg. LLC v. Saticoy Bay LLC, Series 9229 Millikan Ave.*, 996 F.3d 950, 953 (9th Cir. 2021) (quoting *Ecclesiastes* 1:9). Legally, Defendants Newsom's and Bonta's motions to dismiss are a pure retread of the State Education Defendants' Motion to Dismiss,[2] briefed in July and August 2023, *see* ECF Nos. 23, 28, 30, 31, and denied by this Court in September 2023. *See* ECF No. 42. Factually, Defendants Newsom and Bonta argue that they are too attenuated from the facts—and therefore the Court should never have ordered them to be added. But as this Court stated at the last hearing, the State of

[1] Unless otherwise noted, all quotations are "cleaned up" by omitting citations, quotation marks, brackets, ellipses, and emphasis; all emphasis is added. Page number references are to the ECF-generated page number contained in the header of each ECF-filed document.

[2] Previously, the Defendants associated with the California Department of Education used the moniker "State Defendants." With the addition of Governor Newsom and Attorney General Bonta, they have begun using the more specific moniker "State Education Defendants."

California needs to "either fish or cut bait." ECF No. 75 at 4:25. The point of filing a First Amended Complaint was so that "we can have everybody who can be responsible, if you will, and who can be bound." *Id.* at 55:2-4. The evasions, finger-pointing, and double-talk needs to end. This Court should deny Governor Newsom's and Attorney General Bonta's motions to dismiss, award sanctions, and admonish all of the defendants that there should be no more serial Rule 12(b) motions—or Rule 12(c) motions. It is time to move this case forward.

PROCEDURAL HISTORY

On October 11, 2022, Plaintiffs Elizabeth Mirabelli and Lori Ann West submitted requests for a religious accommodation from the requirement of their employer, the Escondido Union School District ("EUSD"), that they withhold a students' gender identity or gender transition from their parents absent affirmative consent. *See* ECF No. 80, 1st Amend. Compl., pp.271-72 (Ex. 27), pp.283-86 (Ex. 28). As stated by both of them, they requested an accommodation from "[t]he 'Privacy' policy that prohibits teachers and staff from sharing a student's gender identity status with his or her parent or guardian without the student's permission, thereby requiring teachers to use different names or pronouns depending on with whom the teacher is speaking." *Id.* at 272, 285.

EUSD denied Plaintiffs' request for a religious accommodation, stating that "[t]he District follows guidance from the State of California School Boards Association as to their interpretation of the laws and what those protections mean at the local level." *Id.* at 267, 279-80. EUSD continued, stating "that the California Department of Education has the authority to interpret and define implications for public education. 'Frequently Asked Questions' (FAQs) have been developed to guide local Districts and their school board in implementing policy." *Id.* at 268. EUSD concluded with the statement that "[t]he nature of [their] request for exemptions also generate[s] the potential for discrimination and lack of compliance under the various laws described earlier." *Id.* at 268, 281.

Due to the denial of their religious accommodation request, on April 27, 2023, Plaintiffs initiated this action. *See* ECF No. 1, Compl. In light of EUSD's reference to the California Department of Education ("CDE"), Plaintiffs named as defendants the CDE's State Superintendent of Public Instruction and the eleven members of the CDE's State Board of Education. *Id.* at 10-12. Plaintiffs also explained that the CDE's interpretation of both state and federal law was completely flawed. *See id.* at 18-20 (discussing parental rights under the federal constitution), *id.* at 46-48 (discussing minor privacy rights under the California constitution, and provisions of the California Education Code). Plaintiffs concluded with the statement: "As stated above, it is clear that EUSD's Parental Exclusion Policy, as documented in AR 5145.3, is not required by any provision in California law." *Id.* at 53.

Plaintiffs named the State Education Defendants in an attempt to avoid the inevitable "agency smurfing" where government agencies all point the finger at each other, attempting to avoid liability and evade judicial review. *See Texas v. United States Dep't of Health & Hum. Servs.*, No. 7:23-cv-22, 2023 WL 4629168 (W.D. Tex. July 12, 2023). That is what immediately happened. In response to Plaintiffs' motion for a preliminary injunction, the EUSD Defendants' written response was that "[t]he California Department of Education Requires the Policy." ECF No. 16 at p.7:14. It argued that its "Policy is consistent with the CDE instruction to preserving the privacy of a student's gender identity, even against the inquiry of a parent." *Id.* at 7:17-18.

The State Education Defendants, in contrast, filed a motion to dismiss the complaint, for lack of standing, arguing that "EUSD is subject to general laws on nondiscrimination, unrelated to whether CDE has any FAQs on the subject." ECF No. 25-1 at p.14:4-5. The State Education Defendants continued, stating that Plaintiffs "conced[e] that the CDE's FAQS are non-binding." *Id.* at 14:18.

Plaintiffs then attempted to explain that both the CDE and EUSD were half-way correct. The CDE's Legal Advisory and FAQ page on Gender Identity relied on nondiscrimination, privacy, and equal protection principles. *See* Cal. Const. art. I, § I

(privacy clause); Cal. Const. art. I, § 7 (equal protection clause); Cal. Gov. Code § 11135 (government nondiscrimination provision); Cal. Educ. Code § 200 (education nondiscrimination provision). These could be enforced through litigation. That litigation could be brought by the State Superintendent himself, *see State Superintendent Dawson v. E. Side Union High Sch. Dist.*, 28 Cal. App. 4th 998, 1015 (1994), by the State Board of Education, *see State Board of Educ. v. Honig*, 13 Cal. App. 4th 720 (1993), or by other government officials. *See* ECF No. 36, Complaint, *Att'y Gen. Bonta v. Chino Valley Unified Sch. Dist.*, No. CIV SB 2317301 (Cal. Super. Ct., S.B. Cnty., Aug. 28, 2023).

This would require a court to agree with the State's understanding of the law—which may or may not be forthcoming. *Compare* Ex. 1, Preliminary Injunction Order, *Bonta v. Chino Valley Unified School District*, No. CIV SB 2317301 (Cal. Super. Ct., S.B. Cnty., Jan. 11, 2023); *with* Ex. 2, Notice of Ruling Denying Plaintiffs' Motion for Preliminary Injunction, *Mae M. v. Temecula Valley Unified Sch. Dist.*, No. CV SW 2306224 (Cal. Super. Ct., Riverside Cnty., Feb. 26, 2024).[3] To avoid this, these same statutes could be enforced by the CDE withholding state education funds (tens of millions of dollars) from school districts. *See* ECF No. 28, Opp. to Mot. Dismiss, pp.14-20. This would then place the burden on the school district to sue the

[3] Plaintiffs do not oppose Defendants' motion for judicial notice. *See* ECF No. 97. With respect to Exhibits 2-5—the CDE's Legal Advisory and FAQ page on gender identity, and Attorney General Bonta's legal guidance/alert—the same exhibits are attached to the First Amended Complaint. *Compare* ECF No. 97, Request for Judicial Notice, pp.29-53; *with* ECF No. 80, 1st Amend. Compl., pp.247-63, 310-27. With respect to Exhibit 1, the Complaint in *Bonta v. Chino Valley Unified Sch. Dist.*, No. CIV SB 2317301 (Cal. Super. Ct., S.B. Cnty., Aug. 28, 2023), it is not attached to the complaint. But it is already in the docket, *see* ECF No. 36 at pp.11-33, and the Court previously granted Plaintiffs' motion to take judicial notice of it. *See* ECF No. 39 at pp.22:1-24:7. All exhibits which Plaintiffs cite are also properly subject to judicial notice, and Plaintiffs request that the Court judicially notice them. *See, e.g., United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007) (a court "may take notice of proceedings in other courts, both within and without the federal judicial system"); *Asdar Group v. Pillsbury, Madison & Sutro*, 99 F.3d 289, 290 n.1 (9th Cir. 1996).

CDE. *See* Ex. 3, Investigation Report, *In re Investigation of Rocklin Unified Sch. Dist.*, CDE No. 2023-0202 (Feb. 1, 2024), *also available at* ECF No. 84 (threatening to withhold state education funds under Cal. Code Regs., tit. 5, § 4670).[4]

At the same time that this Court was considering Plaintiffs' motion for a preliminary injunction (filed in May 2023, granted in September 2023), the State of California was considering how to respond to several school districts which refused to adopt what the State calls a "Privacy Policy" and what Plaintiffs term a "Parental Exclusion Policy." Chino Valley Unified School District was the first to refuse such a policy, on July 20, 2023. *See* ECF No. 36 at pp.35-40. This was followed shortly thereafter by Murrieta Valley Unified School District, on August 10, 2023. *See id.* at 9.

In response, Governor Newsom held a press conference on the first day of school. *See* Ex. 4, Transcript of August 14, 2023 Press Conference. During that press conference, he repeatedly contrasted California with "the rest of the county," especially Florida, *id.* at pp.6:12-14, 8:8-12, 11:7-9, and then stressed how California is a leader in "parental engagement." *Id.* at pp.8:13-9:2, 10:22-28, 11:24-27. In response, reporters repeatedly asked him about his position on school districts rejecting Parental Exclusion Policies. *Id.* at p.12:12-17 (Politico), p.14:9-11 (Associated Press), p.15:19-23 (ABC), p.18:25-28 (KCRA).

He initially responded vaguely, stating: "we're working with legislative leaders. I'll be meeting with the speaker and the pro tem this evening. We'll be discussing it. I know that the LGBT caucus has, uh, got some language they're working on. I haven't had the privilege of looking at it. It's a work in progress." *Id.* at p.12:18-21. When pressed as to whether he had a position on the policies, he stated: "I have a position more broadly. Um, but we're defining the terms of, uh, our response, and engagement and I want to flesh that out, which is happening in real time before I opine more

[4] "Government investigation reports … are … judicially noticeable." *United States v. Kiewit Pac. Co.*, No. 12-cv-2698, 2013 WL 5770514, at *5 (N.D. Cal. Oct. 24, 2013); *accord Iorio v. Allianz Life Ins. Co. of N. Am.*, No. 05-cv-633, 2010 WL 11508761, at *7 (S.D. Cal. Jan. 27, 2010).

specifically." *Id.* at p.12:23-25. But, he concluded, "the assault on the LGBTQ community, the assault on the trans community, as I take very, very seriously. It has been a big cause in my life." *Id.* at p.13:7-8.[5]

Despite how seriously Governor Newsom takes "the assault on the trans community," *id.*, after meeting with the LGBT caucus on August 14, 2023, their bill was paused. As stated by LGBT Caucus Vice-Chair, Assemblymember Chris Ward, "[r]ecognizing the nuance and complexity of this work, we are continuing to refine our legislative approach." Ex. 5, Carolyn Jones & Alexei Koseff, *As culture wars escalate, California officials push back on conservative school board policies*, Cal Matters (Aug. 29, 2023).[6] Instead of legislation, which would be subject to a pre-enforcement challenge, on August 28, 2023, Attorney General Bonta filed a complaint against Chino Valley Unified School District in California Superior Court. *See* ECF No. 97 at 6-28. That lawsuit conspicuously raised only state law claims, presumably to avoid removal to federal court. On August 29, 2023, the Attorney General filed his *ex parte* application for a temporary restraining order, set for hearing on September 6. *See* Ex. 6, Motion.[7]

In his application for a TRO, Attorney General Bonta explained that "[m]inors have a legally protected and reasonable expectation of privacy in their gender identity, a core aspect of their autonomy." *See* Ex. 6 at § I.C, pp.22-25. AG Bonta analogized

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[5] Transcripts of press conferences are judicially noticeable. *See, e.g., Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 520 & n.4 (N.D. Cal. 2017); *Yoon v. United States*, No. 10-cv-1578, 2010 WL 11460000, at *3 (S.D. Cal. Dec. 7, 2010). If the Court desires, Plaintiffs can manually lodge a thumb drive containing an electronic file of the video recording of the press conference. However, doing so requires leave of court. *See Low v. Trump Univ., LLC*, No. 3:13-cv-2519, 2016 WL 4098195, at *2 (S.D. Cal. Aug. 2, 2016). Thus, if the Court requests a thumb drive, Plaintiffs will provide it. In the meantime, the video recording is available at: https://www.youtube.com/live/di-KJmPDpFE?si=F6wSvSkiaYjs1PFv&t=1745.

[6] Statements of government officials, reported by the press, are judicially noticeable. *Cnty. of Santa Clara v. Trump*, 267 F. Supp. 3d 1201, 1217 & n.10 (N.D. Cal. 2017).

[7] Court filings, generally, are judicially noticeable. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006).

gender identity to reproductive rights, stating that "[a] student's gender identity will likewise implicate the student's 'control over their personal bodily integrity,' 'serious long-term consequences in determining their life choices,' and an aspect of their identity 'so central' to a student's 'ability to define' their life." *Id.* at 23:24-27 (quoting *Am. Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307, 337 (1997)).

The next day, this Court held its hearing on the parties' cross-motions. At that August 30 hearing, the Court's very first question sought to clarify whether the CDE or the EUSD was right: "So which is it? Is the FAQ binding on the school district or not?" ECF No. 39 at 3:18-19. Counsel for the State Education Defendants responded that "[t]here's nothing in an FAQ itself, separate and apart from the particular statute and other laws that are cited there, that is binding on anyone." *Id.* at 4:1-14. Counsel for the EUSD Defendants disagreed, stating that its rules were "mandated by the State." *See id.* at 4:22-5:5, 38:17-20.

When the lawsuit against the Chino Valley Unified School District was brought to the Court's attention, the Court found it "troubling" and stated that "we shouldn't litigate cases sort of piecemeal." *Id.* at 15:7, 17:18-21. But the State Education Defendants stressed that "[t]he Attorney General is acting in its own capacity as the State's chief law enforcement officer. There's no other plaintiff in the case." *Id.* at 16:9-11. Nevertheless, in its subsequent order denying the State Education Defendants' motion to dismiss, the Court cited Attorney General Bonta's lawsuit against Chino Valley Unified as evidence that EUSD is correct that it is "compelled by the State to adopt and enforce" a Parental Exclusion Policy, such that "[i]f the plaintiffs succeed in proving their case, a permanent injunction against the state defendants will be necessary to accord full relief." ECF No. 42 at 31:8-32:13.

In subsequent *amicus* briefs, the State of California has continued to press its arguments. In *Bonta v. Chino Valley Unified School District*, after a TRO was granted, the CDE filed an *amicus* brief on October 18 on in support of a preliminary injunction, stating that "a student retains a reasonable expectation of privacy in their gender

identity with respect to non-disclosure to their parents at home, even if the student is open about their gender identity at school." Ex. 7 at 2:26-28. Similarly, in *Mae M. v. Temecula Valley Unified School District*, on December 13, 2023, the Attorney General filed an *amicus* brief which mirrored its prior brief in the *Chino* case. *See* Ex. 8 at pp.12:21-14:23 (arguing that children have a privacy interest in withholding their gender identity from their parents).

Then, at the January 8, 2024, hearing on the State Education Defendants' motion for judgment on the pleadings, they continued to argue that the FAQs were not binding. In response, the Court stated:

> The Court: … So I remember we had this discussion at our original hearing where the School District said, 'Look, we're doing what we're doing because the FAQ's require us to do it." And there was a little bit of ambivalence I think on the part of the State about whether or not the FAQ's are mandatory, and I never quite really got an answer…. So I'm a little bewildered—I can't figure out—but I think the State should either fish or cut bait. Are these FAQ's essentially state law that requires school districts to comply with the FAQ's, and that if they don't, are they in jeopardy of being sued or fined for not complying? So what's your answer, Counsel?

ECF No. 75 at 4:5-5:4. The State Education Defendants' General Counsel, Len Garfinkel, responded: "There's several pieces there, your honor. The first is—I believe I answered the question directly the last time, and I would answer it the same way today—they're not binding." *Id.* at 5:5-8. The Court responded:

> The Court: So then can you answer this for me: How is it that school districts are being sued or threatened for not following these FAQ's? … I mean you can't have it both ways, and that's what is troubling me. The California State Board of Education is saying, "Well, it's not binding, but the State Attorney General is saying, "Yes, it is binding."

Id. at 5:9-24. After going in circles with the State Education Defendants, attempting to understand how there was a meaningful difference between the statements (1) the Privacy Clause of the California Constitution is binding, and the FAQs accurately describe what it requires, and (2) the FAQs are binding, *see id.* at 5:25-14:21, the

Court ultimately stated: "I think we've gone far enough. I think you need to name them. I think you need to bring them in. And then, that way, we can have everybody who can possibly be responsible, if you will, and who can be bound. Right?" *Id.* at 54:25-55:8. As such, the Court ordered "Plaintiff to amend/serve the complaint to include the Attorney General and the State of California." ECF No. 72.

The next day, January 9, 2024, the CDE filed an *amicus* brief with the Ninth Circuit in *Regino v. Staley*, again reiterating that "a student has a legally protected privacy interest under the California Constitution with respect to information about the student's gender identity," including "with respect to non-disclosure to their parents at home, even if open about their gender identity at school." Ex. 9 at 7. Lastly, on February 1, 2024, the CDE issued a report to the Rocklin Unified School District stating that it would withhold state education funds if it did not withdraw its Parental Notification Policy because it "circumvents a student's determination of when and where to share private personal information regarding gender identification and expression … without regard for the nuances of the relation ship between the student and parent." Ex. 3 at 5.[8]

LEGAL STANDARD

A. Lack of Subject Matter Jurisdiction under Rule 12(b)(1)

A complaint over which there is a "lack of subject-matter jurisdiction" is subject to a motion to dismiss. Fed. R. Civ. P. 12(b)(1). Subject-matter jurisdiction can be challenged either "facially" or "factually," *i.e.*, based on the face of the complaint or upon asking the court to make disputed factual determinations. *Courthouse News Serv. v. Planet*, 750 F.3d 776, 780 & n.3 (9th Cir. 2014). Here, because Defendants do not clearly identify whether their motion is facial or factual, it is facial. *See Wichansky v. Zoel Holding Co., Inc.*, 702 F. App'x 559, 560-61 (9th Cir. 2017).

[8] The existence of this investigation was prefaced by Mr. Garfinkel at the January 10, 2024 hearing. *See* ECF No. 75 at 9:11-11:12 (discussing, as if hypothetically, a CDE investigation into a School District under the Uniform Complaint Procedure).

A facial attack under Rule 12(b)(1) is treated similarly to a pleading challenge under Rule 12(b)(6). *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). "To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. Where multiple conflicting inferences can be drawn from the evidence, "one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1160 (9th Cir. 2022) (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)). The "complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is implausible." *Id.* at 1159-60.

"For standing purposes, [the court must] accept as valid the merits of [plaintiffs'] legal claims." *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 298 (2022). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)).

The standard for dismissal under Rule 12(b)(6) is quite strict. The court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). In ruling on a motion to dismiss, the court can consider judicially noticeable material submitted by either the moving or nonmoving party. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1204 (N.D. Cal. 2014).

B. Reconsideration & Law of the Case Doctrine

Under the "law of the case" doctrine, a court should generally not "reconsider[] an issue that has already been decided *by the same court*, or a higher court in the identical case." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). "The doctrine is not a limitation on a tribunal's power, but rather a guide to discretion." *Id.* Thus, "[t]he law of the case doctrine does not preclude a court from reassessing its own legal rulings in the same case." *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1042 (9th Cir. 2018); *accord* Fed. R. Civ. P. 54(b). "[T]he law-of-the-case doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Radu v. Shon*, 62 F.4th 1165, 1176 (9th Cir. 2023) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988)).

As a guide to discretion, the law of the case doctrine counsels against reopening an issue unless "1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *In re Packaged Seafood Prod. Antitrust Litig.*, 635 F. Supp. 3d 1061, 1067 (S.D. Cal. 2022) (quoting *Alexander*, 106 F.3d at 876). Thus, the Local Rules provide that whenever "a subsequent motion … is made for the same relief" previously denied, the movant must establish via declaration "what new or different facts are claimed to exist" warranting a different result. S.D. Cal. CivLR 7.1(i)(1).

C. Sanctions under Section 1927 and the Court's Inherent Power

Any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Section 1927 sanctions may be upheld if an attorney's conduct was "reckless or in bad faith." *Cunningham v. Cty. of Los Angeles*, 879 F.2d 481, 490 (9th Cir. 1988); *see Lahiri v. Universal Music & Video Distribution Corp.*, 606 F.3d 1216, 1219 (9th Cir. 2010). An attorney acts in bad faith when he "delays or disrupts the

litigation." *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991). Bad faith may also consist of recklessly raising a frivolous argument. *See In re Keegan Mgmt. Co. Secur. Litig.*, 78 F.3d 431, 436 (9th Cir. 1996). Put differently, "[f]or sanctions to apply, if a filing is submitted recklessly, it must be frivolous, while if it is not frivolous, it must be intended to harass." *Id.* An attorney's bad faith is assessed under a subjective standard. *Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.2d 1112, 1118 (9th Cir. 2000). "Knowing or reckless conduct meets this standard." *Id.* (citing *MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1121-22 (9th Cir. 1991)).

Separately, "the district court has the inherent authority to impose sanctions for bad faith, which includes a broad range of willful improper conduct." *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001). "To impose sanctions under its inherent authority, the district court must make an explicit finding ... that counsel's conduct constituted or was tantamount to bad faith." *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1131 (9th Cir. 2002). Unlike under Section 1927, "mere recklessness, without more, does not justify sanctions under a court's inherent power." *Fink*, 239 F.3d at 992-94 (but also holding that "[s]anctions are available for a variety of types of willful actions, including recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose"). Sanctions under either 28 U.S.C. § 1927 or the Court's inherent authority can also be awarded for violations of the local rules. S.D. Cal. CivLR 83.1.[9]

ARGUMENT

In their separate motions, Governor Newsom and Attorney General Bonta raise the issue of *causation* both as an element of standing (traceability and redressability), and as an element of Sovereign Immunity (connection with the enforcement of the act). *See* ECF No. 95, Newsom Mot. to Dismiss, pp.17:7-19:28

[9] Sanctions may be awarded under both 28 U.S.C. § 1927 and the Court's inherent authority based on a request in an opposition brief. A separate noticed motion is not required. *See Harvey v. Cable News Network, Inc.*, 48 F.4th 257, 278 (4th Cir. 2022) (citing *Meathe v. Ret*, 547 F. App'x 683, 691 (6th Cir. 2013)).

(standing), pp.12:18-17:6 (immunity); ECF No. 96, Bonta Mot. to Dismiss, pp.10:2-19:15 (standing), pp. 19:16-21:22 (immunity).

In essence, this is all the same analysis. With respect to standing, "although traceability and redressability are separate inquiries, they were initially articulated as 'two facets of a single causation requirement.'" *Skyline Wesleyan Church v. California Dep't of Managed Health Care*, 968 F.3d 738, 749 n.8 (9th Cir. 2020) ("*Skyline*") (quoting *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984)). Further, "[t]he question of whether there is the requisite 'connection' between the sued official and the challenged law implicates an analysis that is 'closely related—indeed overlapping'—with the traceability and redressability inquiry." *Mecinas v. Hobbs*, 30 F.4th 890, 903 (9th Cir. 2022) (quoting *Culinary Workers Union, Loc. 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999)). Below, Plaintiffs first discuss the relevant legal principles, before applying those principles to this case.

I. DEFENDANTS NEWSOM AND BONTA ARE PROPER DEFENDANTS

A. Background Legal Principles

1. Traceability and Redressability as Elements of Standing

The role of the federal courts "is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Skyline*, 968 F.3d at 746 (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc)). "Standing" is one of "the justiciability doctrines that help [courts] adhere to that role." *Id.* (citing *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 848-49 (9th Cir. 2007)). "To satisfy the 'irreducible constitutional minimum' for standing, a plaintiff must establish 'three elements': (1) injury in fact (2) *that is fairly traceable to the challenged conduct of the defendant* and (3) that is *likely to be redressed* by a favorable decision." *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Under the traceability analysis, "[a] plaintiff must show that its 'injury is fairly

traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Id.* at 748 (quoting *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014)). "Purely 'self-inflicted injuries' are insufficient," *id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 415-18 (2013)), but "[w]e do not … 'require the defendant's action to be the sole source of injury.'" *Id.* (quoting *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1142 (9th Cir. 2013)).

"To establish redressability, a plaintiff must show that 'it is likely, as opposed to merely speculative, that its injury will be redressed by a favorable decision.'" *Id.* at 749 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). "It is not necessary to show 'a guarantee that the plaintiff's injuries will be redressed." *Id.* (quoting *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012)). "[R]edressability is lacking 'if the injury complained of is 'the result of the independent action of some third party not before the court.'" *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). "But a plaintiff does have standing when the defendant's actions produce injury through their 'determinative or coercive effect upon the action of someone else.'" *Id.* (quoting *Bennett*, 520 U.S. at 167).

2. The "Connection" Required to Avoid Sovereign Immunity

A sovereign entity is immune from suit absent its consent. As stated by the Supreme Court, "[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity." *Alden v. Maine*, 527 U.S. 706, 715 (1999) (quoting *Nevada v. Hall*, 440 U.S. 410, 414 (1979)). Sovereign Immunity "serves to avoid 'the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties.'" *Kohn v. State Bar of California*, 87 F.4th 1021, 1027 (9th Cir. 2023) (en banc) (quoting *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 58 (1996)).

"Thus, implementation of state policy or custom may be reached in federal court only because … *actions for prospective relief* are not treated as actions against the State."

Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985). But, under sovereign immunity, neither a state nor a state agency may "*be sued directly in its own name* regardless of the relief sought." *Id.* Thus the need to sue responsible government officials in their "official capacity." *Id.* at 167 n.14. When a government official is sued in his "official-capacity," the lawsuit is, "in all respects other than name, to be treated as a suit against the entity." *Id.* at 166. "It is *not* a suit against the official personally, for the real party in interest is the entity." *Id.*

Nevertheless, under this legal fiction, the "officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Ex parte Young*, 209 U.S. 123, 157 (1908); *see also, e.g.*, *Mecinas v. Hobbs*, 30 F.4th 890, 903 (9th Cir. 2022); *Coal. to Defend Affirmative Action v. Gov. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012). This "connection" can be shown specifically or generally. Thus, specifically, the plaintiff can meet his burden where "the state officer is shown to have a direct connection to the alleged harm" by "hav[ing] caused the plaintiffs' alleged injuries." *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1110 (E.D. Cal. 2002), *aff'd*, 353 F.3d 712 (9th Cir. 2003); *see also HRPT Properties Tr. v. Lingle*, 715 F. Supp. 2d 1115, 1126 (D. Haw. 2010) (discussing *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992)).

Where the connection is more general, "[t]he fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists." *Ex parte Young*, 209 U.S. at 157. "[T]hat connection 'must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit.'" *Governor Brown*, 674 F.3d at 1134 (quoting *Eu*, 979 F.2d at 704).

With respect to both a specific or general connection, similar to the

redressability analysis,"[f]or a suit to proceed under *Ex parte Young*, a plaintiff must show that an injunction against a particular official 'would significantly increase the likelihood' of relief, not that relief 'is a guarantee.'" *R.W. v. Columbia Basin Coll.*, 77 F.4th 1214, 1227 (9th Cir. 2023) (quoting *Mecinas*, 30 F.4th at 900). Immunity should be denied in the face of a material factual dispute. *Id.* at 1228.

3. The Backdrop of the California Educational System

In California, "[p]ublic education is an obligation which the State assumed by the adoption of the Constitution." *Butt v. State of California*, 4 Cal. 4th 668, 680 (1992). "The system of public schools, although administered through local districts created by the Legislature, is *one* system applicable to all the common schools." *Id.* (original emphasis). "Local districts are the State's agents for local operation of the common school system, and the State's ultimate responsibility for public education cannot be delegated to any other entity." *Id.* at 681.

The State's "power over the public school system is 'exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints.'" *Mendoza v. State of California*, 149 Cal. App. 4th 1034, 1052 (2007) (quoting *State Board of Educ. v. Honig*, 13 Cal. App. 4th 720, 754 (1993)). "The state's involvement is not limited to general legislative oversight but, rather, affects the day-to-day operations of local public schools." *Ass'n of Mexican-Am. Educators v. State of California*, 231 F.3d 572, 581 (9th Cir. 2000) (en banc).

To oversee this statewide educational system, under California law, "[t]here is in the state government a State Board of Education, consisting of 10 members, who are appointed by the Governor." Cal. Educ. Code § 33000. "[T]he Governor shall also appoint a student member to the state board." Cal. Educ. Code §33000.5(a). Initially, the State Board of Education included the "Governor, Surveyor-General, and the [State] Superintendent." *Honig*, 13 Cal. App. 4th at 730. This was later changed so that the Governor was no longer a member, but appointed members to the State Board. *Id.* at 731. Under this framework, "that part of the state educational

organization represented by the State Board of Education is *clearly responsible to the Governor* and the Legislature *for its acts*." *Id.* at 732 (quoting Mem. to Art. IX Com. Members, Const. Revision Com., p.3 (Nov. 22, 1966)); *accord Campaign for Quality Educ. v. State of California*, 246 Cal. App. 4th 896, 935 (2016) (Liu, J., dissenting from denial of review) ("The challenges facing California's K–12 education system remain within the purview of the Governor").

Similarly, the Attorney General is responsible to the Governor. "[T]he Attorney General may [not] determine, contrary to the views of the Governor, wherein lies the public interest." *People ex rel. Deukmejian v. Brown*, 29 Cal. 3d 150, 157 (1981). The Attorney General's authority is "[s]ubject to the powers and duties of the Governor," Cal. Const. art. V, § 13, and he must "report to the Governor." Cal. Gov. Code § 12522. *See Deukmejian*, 29 Cal. 3d 150 (on petition of Governor Brown, dismissing action filed by Attorney General Deukmejian).

B. There is a Fairly Traceable Connection Between Plaintiffs' Injury and Attorney General Bonta

With respect to Attorney General Bonta, without blushing, the State Defendants argue that "Plaintiffs' claims against the Attorney General should be dismissed in their entirety because Plaintiffs have failed to allege any past, present or future concrete injury traceable to the Attorney General sufficient to confer standing to sue him." ECF No. 96 at 10:4-6. Defendants continue: "For this same reason, any future injury to Plaintiffs caused by EUSD's hypothetical decision to defy a final judgment would not likely be redressed by granting them relief against the Attorney General." *Id.* at 19:27-28. Lastly, Defendants argue: "Plaintiffs' attempt to haul the Attorney General into court is barred by the Eleventh Amendment because the Attorney General does not have any direct connection to or responsibility for enforcement of any policy or law directly challenged in this lawsuit." *Id.* at 19:18-21.

To justify these arguments, Attorney General Bonta argues that, "this case remains at its core a local dispute between EUSD and Plaintiffs over the scope of

EUSD's Policy, which is not required by any state law enforced by the Attorney General." *Id.* at 20:20-23. The AG goes so far as to state that "Plaintiffs, the Attorney General, and the California Department of Education and State Board of Education defendants all agree that EUSD's current Policy is not required by any California law, whether enforced by the Attorney General or other State officials." *Id.* at 12:4-7. But this is belied by the AG's briefing in both the *Chino Unified* and *Temecula Valley Unified* cases. In both the Attorney General made clear that the Privacy Clause of the California Constitution forbids school districts from informing parents of their child's gender transition. *See* Ex. 6 at § I.C, pp.22-25; Ex. 8 at § I.C, pp.12-14. *That's* the policy at issue which Plaintiffs do not wish to abide by. Further, in denying the identical arguments raised by the State Education Defendants, the Court cited the *Chino Unified* case precisely to note that including other defendants "will be necessary to accord full relief." ECF No. 42 at 32:12. *That* was the rationale for naming the State Education Defendants in the case, and the rationale for naming the AG.

In his briefing, the AG states that schools may apparently adopt the middle ground of neither adopting a Parental Notification Policy or a Parental Exclusion Policy. *See* ECF No. 96 at 12:23-28 ("In [*Chino*], the Attorney General sued the school district for adopting a 'forced-disclosure' policy on the basis that the policy violated California constitutional and statutory protections for student privacy"). This is absolute misdirection. None of the AG's "guidance" envision allowing Plaintiffs an exception from Parental Exclusion Policies. *See* ECF No. 80, 1st Amend. Compl., p.325 (AG Bonta's Legal Alert).

Lastly, like the State Education Defendants in their original motion to dismiss, the AG states that "Plaintiffs concede [that EUSD's Parental Exclusion Policy] is not required by state law." ECF No. 96 at 10:16-17. And as before, this is not a silver bullet. If the AG agreed that lying to parents about their child's gender transition was "as foreign to federal constitutional and statutory law as it is medically unwise," ECF No. 42 at 18:3-4, that would be "the end of the story," and the all parties and the Court

would have "spent a lot of time doing a lot of stuff that [they] didn't really need to do." ECF No. 75 at 14:15-20. But that's not the AG's position, and in a pre-enforcement challenge, Plaintiffs can plead that California law does *not* require Parental Exclusion Policies, while challenging the AG's position that it does. *Peace Ranch, LLC v. Bonta*, 93 F.4th 482, 489 (9th Cir. 2024). Without an unequivocal about-face by the Attorney General, there is standing. *See id.* at 490 ("the Attorney General … refuses to disavow its intent to enforce").

C. There is a Fairly Traceable Connection Between Plaintiffs' Injury and Governor Newsom

As a general matter, "[b]ecause public education is ultimately a state obligation, and the supreme executive power of this State is vested in the Governor, the Governor is a proper defendant" in a case concerning the state education system. *Vergara v. State of California*, 246 Cal. App. 4th 619, 629 n.2 (2016) (citing *Butt*, 4 Cal. 4th at 680). *See, e.g., Vergara*, 246 Cal. App. 4th 619 (Governor Brown); *Campaign for Quality Educ.*, 246 Cal. App. 4th 896 (Governor Brown); *Mendoza*, 149 Cal. App. 4th 1034 (Governor Schwarzenegger). Indeed, as stated above, "the State Board of Education is *clearly responsible to the Governor*." *Honig*, 13 Cal. App. 4th at 732.

Indeed, because the State Board of Education is responsible to the California governor, Governor Newsom has not hesitated to go around them in enforcing California education policy. *See* Ex. 10, Press Release: Governor Newsom and Attorney General Bonta Demand Answers from Temecula School Board (Jun. 7, 2023); Ex. 11, Press Release: Governor Newsom and State Leaders: If Temecula School Board Won't Do Its Job, State Will (July 13, 2023); Ex. 12, Press Release: Governor Newsom Announces Contract to Secure Textbooks for Students in Temecula (July 19, 2023); Ex. 13; Press Release: Governor Newsom Issues Statement on Temecula Textbooks (July 21, 2023).[10]

[10] Governmental press releases are judicially noticeable. *In re Outlaw Lab'ys, LP Litig.*, 352 F. Supp. 3d 992, 1006 & n.5 (S.D. Cal. 2018).

Naming Governor Newsom as a defendant in this case is especially appropriate in light of the extreme finger-pointing that has been going on for a full year, resulting in this Court stating that amendment of the complaint was needed so that "we can have everybody who can be responsible, if you will, and who can be bound," ECF No. 75 at 55:2-4, and ordering Plaintiffs to name "the State of California" as a defendant. ECF No. 72. This order came in response to State Education Defendants' attempt to distance themselves from everything else done by the California government. With respect to the *Chino* case, Mr. Garfinkel argued that "the Attorney General does not … control the State Board. They don't control the CDE. All independent agencies. The CDE and State Board have not sued in the *Chino* case. That's the Attorney General's action." ECF No. 75 at 6:17-22. And with respect to the actions taken against the Temecula Unified School District, Mr. Garfinkel argued that was done by the Governor—not the CDE. ECF No. 39 at 128:23-129:6. With respect to the California education system, the buck stops with Governor Newsom. He is the last person "who can be responsible," ECF No. 75 at 55:2-4, and so must be joined to ensure redressability.

Moreover, Governor Newsom has taken a conscious role regarding the ongoing fights over Parental Exclusion Policies and Parental Notification Policies. As stated above, last August, when these issues were blowing up, Governor Newsom expressly stated that he was very aware of "the assault on the LGBTQ community, the assault on the trans community," which "I take very seriously, it has been a big cause in my life." *See* Ex. 4. Shortly thereafter, he killed the LGBTQ Caucus's legislation, Ex. 5, and instead Attorney General Bonta filed a lawsuit against the Chino Valley Unified School District, ECF No. 37, and the CDE opened an investigation into the Rocklin Unified School District. Ex. 3.

In light of Governor Newsom's direct ability to veto litigation by the Attorney General, *see Deukmejian*, 29 Cal. 3d at 157, the fact that the State Board of Education is responsible to him, *Honig*, 13 Cal. App. 4th at 732, and the fact that he had just killed a

legislative response, it is not "implausible," *Waln*, 54 F.4th at 1160, that he was involved in the decision making regarding California's byzantine, multi-pronged attack against parental rights in numerous forums, such that "it is likely, as opposed to merely speculative, that [Plaintiffs'] injury will be redressed," *Skyline*, 968 F.3d 749, by keeping Governor Newsom as a named defendant. This is especially the case in light of the various Defendants' refusals to be forthcoming on the facts, refusals to "either fish or cut bait," ECF No. 75 at 4:25, and refusals to answer the very simple question of whether a requirement to enact a Parental Exclusion Policy is "binding on the school district or not?" ECF No. 39 at 3:18-19.

However, with respect to the California governor specifically, only one case is directly on point. More than 40 years ago, the Ninth Circuit held that the California governor was not a proper defendant in a case seeking correction of "*de jure* segregation of the Los Angeles schools." *NAACP v. Los Angeles Unified Sch. Dist.*, 714 F.2d 946, 953 (9th Cir. 1983). There, however, the plaintiff did "not seek to enjoin the Governor from enforcing existing unconstitutional state laws." *Id.* In light of the California governor's education-related duties, in such a context, the Governor would likely be a proper defendant. *See id.* Instead, the plaintiff "hope[d] to require the Governor to take affirmative steps to eliminate the effects of laws long since repealed," which led to "*de jure* segregation of the Los Angeles schools," while also erroneously "admit[ting] [that] the Governor's powers in this area are limited to making general policy and budget recommendations." *Id.*

The plaintiff in *NAACP* was wrong in its understanding of state law. In the decades since, California courts have clarified the "plenary" role of the State, *Mendoza*, 149 Cal. App. 4th at 1052, which is not "limited to general … oversight," *Ass'n of Mexican-Am. Educators*, 231 F.3d at 581, such that the "State Board of Education is clearly responsible to the Governor," *Honig*, 13 Cal. App. 4th at 732, who "is a proper defendant." *Vergara*, 246 Cal. App. 4th at 629 n.2. In any event, in *NAACP*, there was no evidence that the Governor was even *aware* of the alleged

illegality. Here, Governor Newsom was very aware.

II. THE COURT SHOULD ORDER DEFENDANTS NEWSOM AND BONTA TO PAY PLAINTIFFS' REASONABLY INCURRED ATTORNEYS' FEES

As shown above, Defendants Newsom and Bonta's motions to dismiss are a frivolous, duplicative attack on the pleadings that fail to even address or distinguish this Court's well-reasoned opinions. In earnest, they are mere motions for reconsideration, but ones that fail to even identify any new law or facts warranting a departure from the Court's prior orders. This warrants sanctions under Section 1927 or this Court's inherent authority, and under S.D. Cal. CivLR 83.1.

As stated above, sanctions under both Section 1927 and the Court's inherent authority require a finding of "bad faith," but bad faith under each is defined slightly differently. A finding that a motion was intentionally filed for an improper purpose—such as a vindictive desire to harass or delay—is adequate under both standards. *Fink*, 239 F.3d at 992-94. But the easier standard of recklessly raising a frivolous argument is only sanctionable under Section 1927, *id.* at 993—so long as there is also a finding that the proceedings were wastefully "multiplie[d]." 28 U.S.C. § 1927.

A motion is frivolous and sanctionable for "rehashing legal arguments already rejected by the district court." *Hyde & Drath v. Baker*, 24 F.3d 1162, 1172 (9th Cir. 1994). Indeed, Courts regular award sanctions when a party's rehashing raises no new points worth considering. *See, e.g., Canon Bus. Sols., Inc. v. ASAP Copy & Print*, No. CV 12-10165, 2013 WL 12162442, at *3 (C.D. Cal. Apr. 24, 2013) (motion "simply repeated arguments that the Court considered and rejected" previously), *aff'd*, 643 F. App'x 650, 653 (9th Cir. 2016); *In re Flashcom, Inc.*, 503 B.R. 99, 131 (C.D. Cal. 2013) ("[R]elitigation of an issue that has already been decided without any new facts or law can justify sanctions"), *aff'd*, 647 F. App'x 689, 693 (9th Cir. 2016).

Indeed, even sanctions under the Court's inherent power—requiring a finding of bad faith—are appropriate because bad faith can be inferred from such a pointless motion. *Mayorga v. Ronaldo*, 656 F. Supp. 3d 1218, 1228 (D. Nev. 2023) (sanctions

because party "filed various motions and objections, repeating many of the same frivolous arguments the [c]ourt previously rejected"); *Miletak v. AT&T Servs., Inc.*, No. 12-cv-5326, 2020 WL 6497925, at *3 (N.D. Cal. Aug. 3, 2020) (the plaintiff "'knowingly or recklessly raise[d] a frivolous argument' in his most recent motion, and therefore acted in bad faith, given the Court's repeated rejections of the same argument in previous rulings.").

Here, with respect to Attorney General Bonta, sanctions are particularly appropriate because his argument is identical to the State Education Defendants' initial motion to dismiss. *See* ECF No. 25, State Educ. Defs. Mot. Dismiss. Both argue, essentially, that the CDE's Legal Advisory and FAQ page on gender identity is not *itself* law, and so could not have harmed Plaintiffs. *See* ECF No. 96, Atty. Gen. Bonta Mot. Dismiss, p.7:19-21 ("To be clear, the Attorney General has never previously taken the position, whether in legal filings or public statements, that the California Department of Education's FAQ guidance is binding."). In response to the Attorney General's indication that the new Defendants would be filing motions to dismiss instead of answers, Plaintiffs explained that "rehashing arguments that have already been soundly rejected will be a waste of time, forcing us to request sanctions." Ex. 14, Letter from Jonna to Soichet, p.4 (Feb. 1, 2024).

As a result of that letter, the parties met and conferred, but the Attorney General's office did not identify their actual arguments. Jonna Decl., ¶¶19-20. If they had, Plaintiffs would have explained that the State Education Defendants had already tried that argument, and lost. *See* ECF No. 39 at 9:7-12 ("Mr. Mandarano: … [W]hat we're saying is that essentially in place of, for example, challenging those privacy provisions of the constitution or statutory law that are mentioned in the FAQ, the plaintiffs are challenging the actual FAQ that cites to that authority."); ECF No. 42 at 32:1-13 (holding that State Education Defendants must remain in case to ensure redressability).

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With respect to Governor Newsom, again, the parties supposedly met and conferred but the Attorney General's office failed to identify any specifics. Jonna Decl., ¶20. If they had, Plaintiffs would have explained they did not "bring him into court simply because he is the governor," "based on his title alone." ECF No. 95, Gov. Newsom Mot. Dismiss, pp.14:17, 17:1-2. Rather, Plaintiffs would have explained that the State Education Defendants and the Attorney General are not actually "independent [of] and wholly separate from" the Governor, *id.* at 16:5-6, and there is judicially noticeable evidence that he is actually meddling here, Ex. 4, meaning that he is part of "everybody who can be responsible, if you will, and who can be bound." ECF No. 75 at 55:2-4.

As Plaintiffs predicted in their February 1, 2024, letter, Defendants Newsom's and Bonta's motions are nothing more than frivolous motions for reconsideration, rehashing the same points already exhaustively briefed, with no new facts or law. They can serve no practical purpose whatsoever except to harass Plaintiffs and delay this case. Under Section 1927, at the very least, Defendants Newsom and Bonta recklessly filed frivolous motions by failing to include any new law or facts warranting a departure from this Court's prior orders. Indeed, the Local Rules require counsel to submit a declaration specifically identifying the changed circumstances, which Defendants Newsom and Bonta ignored. S.D. Cal. CivLR 7.1(i)(1). Notably, nothing in CivLR 7.1 excuses Defendants Newsom and Bonta from compliance merely because they are repeating arguments previously made by separate party. *Id.* What matters is that the issues have already been adjudicated. Sanctions for violation of CivLR 7.1 are warranted, under CivLR 83.1, if nothing else.

But the response of Defendants Newsom and Bonta to Plaintiffs' request to meet and confer is strong evidence of bad faith. *Estakhrian v. Obenstine*, No. CV 11-3480, 2016 WL 6275599, at *3 (C.D. Cal. May 17, 2016) (as evidence of bad faith, noting that "plaintiffs made multiple attempts to meet and confer with Obenstine's counsel, which he refused to do"). If the parties had actually met and conferred,

identifying the actual arguments, Plaintiffs could have addressed all of Defendants Newsom's and Bonta's concerns—or explained why their motions were not proper.

Thus, the Court should award Plaintiffs their attorneys' fees incurred in preparing this opposition. In the alternative, the Court should issue a briefing schedule and order Defendants Newsom and Bonta to justify their motions and why sanctions should not be awarded. This brief was prepared by Attorneys Paul M. Jonna, Mark D. Myers, and Jeffrey M. Trissell, who respectively spent approximately 2.0, 2.2, and 23.6 hours preparing it (rounded down). Plaintiffs are being represented pro bono, and so no hourly rate is being charged to them. In similar pro bono cases, in the past several years, Courts have accepted or awarded Messrs. Jonna, Myers and Trissell's 2022 hourly rates of $1,140, $1,065, and $875 respectively, and Messrs. Jonna and Trissell's 2021 hourly rates of $850 and $690. See *DFEH v. Cathy's Creations, Inc.,* No. BCV-18-102633, 2023 WL 4147473 (Cal. Super. Ct., Kern Cnty., Apr. 3, 2023); *South Bay United Pentecostal Church v. Newsom*, No. 3:20-CV-865, 2021 WL 2250818 (S.D. Cal. June 1, 2021).

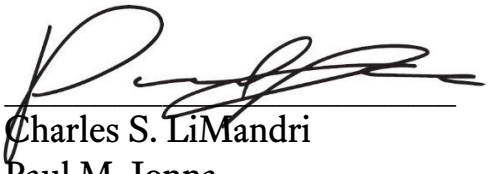
These rates are in line with judicially awarded rates in San Diego County. *See CliniComp Int'l, Inc. v. Cerner Corp.*, No. 17-cv-2479, 2023 WL 2604816, at *3 (S.D. Cal. Mar. 22, 2023) (awarding partner rates of $1,465-$1,055); *Orthopaedic Hosp. v. Encore Med., L.P.*, No. 3:19-cv-970, 2021 WL 5449041, at *15 (S.D. Cal. Nov. 19, 2021) (awarding $1,140 for a partner practicing law since 2009; and $875 for a fifth-year associate attorney). For purposes of this sanctions request, Plaintiffs request that the Court award sanctions using counsel's 2022 hourly rate, and thus award sanctions of $25,273. *See* Jonna Decl., ¶¶22-24.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Governor Newsom's and Attorney General Bonta's motions to dismiss, and award Plaintiffs their reasonably incurred attorneys' fees.

Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: March 18, 2024 By: 

Charles S. LiMandri
Paul M. Jonna
Mark D. Myers
Jeffrey M. Trissell
Milan L. Brandon II
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Elizabeth Mirabelli v. Mark Olson, President of the EUSD Board of Education, et al.

USDC Court Case No.: 3:23-cv-00768-BEN-WVG

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

- **Plaintiffs' Memorandum of Points & Authorities in Opposition to Defendant Newsom's and Defendant Bonta's Motions to Dismiss;**
- **Declaration of Paul M. Jonna, Esq., in Support of Plaintiffs' Opposition to Defendant Newsom's and Defendant Bonta's Motions to Dismiss.**

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

Len Garfinkel, Esq., General Counsel
Bruce Yonehiro, Assistant General Counsel
Paul Gant, Assistant General Counsel
Christopher Mandarano, Esq., Deputy Gen. Counsel
Virginia Cale, Deputy General Counsel
California Department of Education
1430 "N" Street, Suite 5319
Sacramento, CA 95814
Tel: 916-319-0860; Fax: 916-322-2549
E-Mail: lgarfinkel@cde.ca.gov
E-Mail: byonehiro@cde.ca.gov
E-Mail: pgant@cde.ca.gov
E-Mail: cmandarano@cde.ca.gov
E-Mail: vcale@cde.ca.gov
Attorneys for State Defendants

Daniel R. Shinoff, Esq.
Gil Abed, Esq.
Jack Sleeth, Esq.
Maurice Bumbu, Esq.
Artiano Shinoff
3636 Fourth Avenue, Suite 200
San Diego, CA 92103
Tel: 619-232-3122
E-Mail: Dshinoff@as7law.com
E-Mail: nlay@as7law.com
E-Mail: gabed@as7law.com
E-Mail: jsleeth@as7law.com
E-Mail: mbumbu@as7law.com
Attorneys for EUSD Defendants

Emmanuelle Soichet, Esq.
Darrell W. Spence, Esq.
Kevin L. Quade, Esq.
Deputy Attorney General
California Department of Justice
455 Golden Gate Ave., Ste. 1100
San Francisco, CA 94102-7004
E-Mail: emmanuelle.soichet@doj.ca.gov
E-Mail: darrell.spence@doj.ca.gov
E-Mail: kevin.quade@doj.ca.gov
Attorneys for Governor Gavin Newsom and Attorney General Ron Bonta

____ **(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 March 18, 2024, at Rancho Santa Fe, California.

Kathy Denworth

Charles S. LiMandri, SBN 110841
cslimandri@limandri.com
Paul M. Jonna, SBN 265389
pjonna@limandri.com
Mark D. Myers, SBN 235719
mmyers@limandri.com
Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
Milan L. Brandon II, SBN 326953
mbrandon@limandri.com
LiMANDRI & JONNA LLP
P.O. Box 9120
Rancho Santa Fe, CA 92067
Telephone: (858) 759-9930
Facsimile: (858) 759-9938

Thomas Brejcha, *pro hac vice**
tbrejcha@thomasmoresociety.org
Peter Breen, *pro hac vice**
pbreen@thomasmorsociety.org
THOMAS MORE SOCIETY
309 W. Washington St., Ste. 1250
Chicago, IL 60606
Tel: (312) 782-1680
*Application forthcoming

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

Declaration of Paul M. Jonna, Esq., in Support of Plaintiffs' Opposition to Defendant Newsom's and Defendant Bonta's Motions to Dismiss

[Fed. R. Civ. P. 12(b)(1)]

Judge:	Hon. Roger T. Benitez
Courtroom:	5A
Hearing Date:	April 1, 2024
Hearing Time:	10:30 a.m.

I, Paul M. Jonna, Esq., declare and state as follows:

1. I am an attorney at law duly licensed to practice in the State of California and in the Southern District of California. I am a Partner with LiMandri & Jonna LLP, and am counsel of record for Plaintiffs Elizabeth Mirabelli and Lori Ann West. The matters discussed below are based on my own personal knowledge. I could and would testify to them if called upon to do so in court.

AUTHENTICATION OF JUDICIALLY NOTICEABLE EXHIBITS

2. Attached hereto as **Exhibit 1** is a true and correct copy of the Preliminary Injunction Order, dated January 11, 2024, and entered in the case *The People of the State of California v. Chino Valley Unified School District*, Cal. Super. Ct., San Bernardino County, Case No. CIVSB2317301.

3. Attached hereto as **Exhibit 2** is a true and correct copy of the Notice of Ruling Denying Plaintiffs' Motion for Preliminary Injunction, dated February 26, 2024, and entered in the case *Mae M. v. Temecula Valley Unified Sch. Dist.*, Cal. Super. Ct., Riverside County, Case No. CV SW 2306224.

4. Attached hereto as **Exhibit 3** is a true and correct copy of the Investigation Report, dated February 1, 2024, and entered in the administrative investigation *In re Investigation of Rocklin Unified Sch. Dist.*, CDE Investigation No. 2023-0202.

5. Attached hereto as **Exhibit 4** is a true and correct copy of a certified transcript of the YouTube recording of Governor Newsom's Press Conference held on August 14, 2023, titled *Gov. Newsom And First Partner Siebel Newsom Highlight California's Education Transformation*, and available online at https://www.youtube.com/watch?v=di-KJmPDpFE.

6. Attached hereto as **Exhibit 5** is a true and correct copy of the news article by Carolyn Jones & Alexei Koseff, dated August 29, 2023, titled *As culture wars escalate, California officials push back on conservative school board policies*, and published

by Cal Matters, featuring a quote from LGBT Caucus Vice-Chair Assemblymember Chris Ward.

7. Attached hereto as **Exhibit 6** is a true and correct copy of The People of the State of California's Memorandum of Points and Authorities in Support of Ex Parte Application for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction, dated August 29, 2023, and filed in the case *The People of the State of California v. Chino Valley Unified School District*, Cal. Super. Ct., San Bernardino County, Case No. CIVSB2317301.

8. Attached hereto as **Exhibit 7** is a true and correct copy of Ex Parte Application of the California Department of Education for Leave to File Brief as Amicus Curiae in Support of Plaintiff's Motion for Preliminary Injunction, and [Proposed] Brief, dated October 18, 2023, and filed in the case *The People of the State of California v. Chino Valley Unified School District*, Cal. Super. Ct., San Bernardino County, Case No. CIVSB2317301.

9. Attached hereto as **Exhibit 8** is a true and correct copy of Attorney General's Ex Parte Application to File Brief of Amicus Curiae the State of California and Request for Judicial Notice in Support of Plaintiffs' Motion for Preliminary Injunction, dated December 13, 2023, and filed in the case *Mae M. v. Temecula Valley Unified Sch. Dist.*, Cal. Super. Ct., Riverside County, Case No. CV SW 2306224.

10. Attached hereto as **Exhibit 9** is a true and correct copy of Amicus Curiae Brief of California Department of Education in Support of Affirmance, dated January 9, 2024, and filed in the case *Regino v. Staley*, 9th Cir. Case No. 23-16031.

11. Attached hereto as **Exhibit 10** is a true and correct printout of Governor Newsom's Press Release, dated June 7, 2023, *Governor Newsom and Attorney General Bonta Demand Answers from Temecula School Board*, including accompanying letters, available online at https://www.gov.ca.gov/2023/06/07/temecula-school-board/.

12. Attached hereto as **Exhibit 11** is a true and correct printout of Governor Newsom's Press Release, dated July 13, 2023, *Governor Newsom and State Leaders: If*

Temecula School Board Won't Do Its Job, State Will, including a certified transcript of the accompanying video posted by Governor Newsom on X, as available online at https://www.gov.ca.gov/2023/07/13/temecula-do-your-job/.

13. Attached hereto as **Exhibit 12** is a true and correct printout of Governor Newsom's Press Release, dated July 19, 2023, *Governor Newsom Announces Contract to Secure Textbooks for Students in Temecula*, as available online at https://www.gov.ca.gov/2023/07/19/temecula-contract/.

14. Attached hereto as **Exhibit 13** is a true and correct printout of Governor Newsom's Press Release, dated July 21, 2023, *Governor Newsom Issues Statement on Temecula Textbooks*, as available online at https://www.gov.ca.gov/2023/07/21/temecula-curriculum-adoption/.

Request for Sanctions

15. For the reasons stated in Plaintiffs' opposition, the Court should award Plaintiffs their attorneys' fees incurred in preparing this opposition.

16. On January 29, 2024, my office filed Plaintiffs' First Amended Complaint in this action, naming Governor Gavin Newsom and Attorney General Rob Bonta as defendants. The next day, January 30, 2024, my office emailed three Deputy Attorneys General with whom we had previously litigated cases to ask that they help identify the DAG with whom we'd be working on this case, and ask that they waive personal service of the Complaint.

17. The next day, January 31, 2024, my office received a call from Deputy Attorney General Emmanuelle Soichet. Mr. Jeffrey Trissell took the call. DAG Soichet requested an extension of time for Governor Newsom and AG Bonta to file their anticipated motions to dismiss. The day after that, February 1, 2024, DAG Soichet sent an email with the same request.

18. My office responded with a letter dated February 1, 2024, a true and correct copy of which is attached as **Exhibit 14**. As we explained, we could not agree

to any extensions in light of the lengthy delays in this case, and we could not see any possible justification for a motion to dismiss. Thus, we explained that we would request sanctions if the Attorney General's office filed a motion to dismiss. We also explained that, because the AG would not agree to waive personal service without an extension of time to file the motions to dismiss, we would be personally serving the complaint.

19. On February 14, 2024, DAG Kevin Quade emailed my office, requesting a time to meet and confer about various issues, including the Governor's and Attorney General's forthcoming motions to dismiss. We scheduled that meet and confer for the next day, February 15, at 12:30 p.m. In advance of that call, DAG Quade explained in an email that circumstances unique to his clients made a duplicative Rule 12(b)(1) motion for lack of standing appropriate. I twice wrote asking him to explain what those circumstances were, but he refused to explain them. A true and correct copy of the parties' email chain, dated February 14, 2024, is attached as **Exhibit 15**.

20. On the call, DAG Quade reiterated that circumstances unique to his clients made a duplicative Rule 12(b)(1) motion for lack of standing appropriate, but still refused to provide any specifics as to what those circumstances were. I explained that I did not see how any such motion could be appropriate in light of the Court's prior ruling on the motions to dismiss and preliminary injunction, as well as the order requiring the addition of the two new defendants, but he had no response.

21. As explained in Plaintiff's opposition brief, the Governor's and Attorney General's motions to dismiss are indeed frivolous. Thus, the Court should award sanctions.

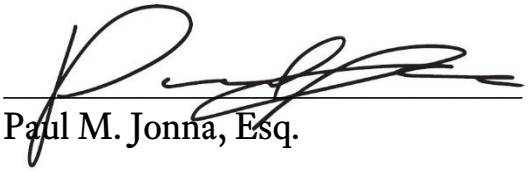
22. The brief was prepared by Attorneys Paul M. Jonna, Mark D. Myers, and Jeffrey M. Trissell, who respectively spent 2.0, 2.2, 23.6 hours preparing it. This does not include time spent by paralegals or any time spent after March 15, 2024. Plaintiffs are being represented *pro bono*, and so no hourly rate is being charged to them.

23. In similar *pro bono* cases, in the past several years, Courts have accepted or awarded my, Mr. Myers' and Mr. Trissell's 2022 hourly rates of $1,140, $1,065, and $875 respectively, and our my and Mr. Trissell's 2021 hourly rates of $850 and $690. *See DFEH v. Cathy's Creations, Inc.*, No. BCV-18-102633, 2023 WL 4147473 (Cal. Super. Ct., Kern Cnty., Apr. 3, 2023); *South Bay United Pentecostal Church v. Newsom*, No. 3:20-CV-865, 2021 WL 2250818 (S.D. Cal. June 1, 2021). The *DFEH* opinion provided a lower omnibus hourly rate by averaging yearly hourly rates over six years.

24. For purposes of this sanctions request, Plaintiffs request that the Court award sanctions using counsel's 2022 hourly rate, and thus award sanctions of $25,273. This includes $2,280 for 2.0 hours of my time, $2,343 for 2.2 hours of Mr. Myers' time, and $20,650 for 23.6 hours of Mr. Trissell's time.

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

Executed on March 18, 2024, in Rancho Santa Fe, California.



Paul M. Jonna, Esq.

EXHIBIT 1

ROB BONTA
Attorney General of California
MICHAEL L. NEWMAN
Senior Assistant Attorney General
LAURA L. FAER (SBN 233846)
JAMES F. ZAHRADKA II (SBN 196822)
Supervising Deputy Attorneys General
EDWARD NUGENT (SBN 330479)
GARY D. ROWE (SBN 165453)
ALEXANDER SIMPSON (SBN 235533)
XIYUN YANG (SBN 315187)
DELBERT TRAN (SBN 323993)
Deputy Attorneys General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 229-0110
E-mail: Delbert.Tran@doj.ca.gov
Attorneys for The People of the State of California

Fee Exempt Pursuant to Government Code § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

CHINO VALLEY UNIFIED SCHOOL DISTRICT,

Defendant,

and

NICHOLE VICARIO, ET AL.,

Defendants-Intervenors,

Case No. CIVSB2317301

~~[PROPOSED]~~ PRELIMINARY INJUNCTION ORDER

Date: October 19, 2023
Time: 8:30 a.m.
Dept: S-28
Judge: Hon. Michael A. Sachs
Trial Date:
Action Filed: August 28, 2023

On October 19, 2023, the Court held a hearing on the Court's Order to Show Cause as to Why a Preliminary Injunction Should Not Issue. Present at the hearing were Plaintiff People of the State of California ("Plaintiff"), Defendant Chino Valley Unified School District ("Defendant"), Intervenors Nichole Vicario et al. ("Intervenors"), Amici Curiae Elizabeth Mirabelli and Lori Ann West; Amicus Curiae California Department of Education; and Amici Curiae American Civil Liberties Union of Southern California and American Civil Liberties Union of Northern California, et al.

As stated during the October 19, 2023 hearing, the Court has reviewed the papers and evidence submitted to the Court, including: Plaintiff's Complaint; Plaintiff's Ex Parte Application for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction ("Plaintiff's Ex Parte Application"); Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Ex Parte Application; Plaintiff's Request for Judicial Notice in Support of the Plaintiff's Ex Parte Application; Plaintiff's Declarations in support of Plaintiff's Ex Parte Application; Defendant's Opposition to Plaintiff's Ex Parte Application; Defendant's Declarations in support of Defendant's Opposition to Plaintiff's Ex Parte Application; Defendant's Objections to the Evidence Filed in Support of Plaintiff's Ex Parte Application; Defendant's Request for Judicial Notice; Plaintiff's Reply to Defendant's Opposition; Plaintiff's Responses to Defendant's Objections; Plaintiff's Objections to Evidence Filed in Support of Defendant's Opposition to Plaintiff's Ex Parte Application; the Court's September 6, 2023 Temporary Restraining Order and Order to Show Cause as to Why a Preliminary Injunction Should Not Issue; Defendant's Opposition to Preliminary Injunction; Defendant's Declarations in support of Defendant's Opposition to Preliminary Injunction; Defendant's Evidentiary Objections to Plaintiff's Motion for Preliminary Injunction and Supporting Documents; Plaintiff's Reply in support of Preliminary Injunction; Plaintiff's Declarations in support of Preliminary Injunction; Plaintiff's Supplemental Request for Judicial Notice; Plaintiff's Responses to Defendant's Evidentiary Objections; Plaintiff's Evidentiary Objections to Evidence in Support of Defendant's Opposition to Preliminary Injunction; and Plaintiff's Evidentiary Objections to Dr. Erica E. Anderson Declaration.

The Court has also reviewed and considered the papers and evidence submitted to the Court, including: Intervenors' Ex Parte Application to Intervene ("Application to Intervene"); Intervenors' Memorandum of Points and Authorities in Support of Application to Intervene; Intervenors' Declarations in support of Application to Intervene; Plaintiff's Opposition to Application to Intervene; Intervenors' Reply in Support of Application to Intervene; Intervenors' Notice of Supplemental Authorities in Support of Application to Intervene; Plaintiff's Sur-Reply in Opposition to Application to Intervene; Intervenors' Proposed Opposition to Preliminary Injunction; Plaintiff's Proposed Reply to Intervenors' Proposed Opposition to Preliminary Injunction; Intervenors' Objections to Plaintiff's Supplemental Declarations and Request for Judicial Notice; Plaintiff's Responses to Intervenors' Objections to Plaintiff's Supplemental Declarations and Request for Judicial Notice; the Ex Parte Application to File an Amicus Brief for Elizabeth Mirabelli and Lori Ann West; the Amicus Brief by Elizabeth Mirabelli and Lori Ann West; the Ex Parte Application for Leave to File an Amicus Brief by the California Department of Education; the Amicus Brief by the California Department of Education; the Ex Parte Application for Leave to File an Amicus Brief by the American Civil Liberties Union of Southern California and the American Civil Liberties Union of Northern California and over twenty other organizations (collectively, "ACLU Amici"); the Amicus Brief by ACLU Amici.

Based upon the Court's review of the papers submitted in this action; argument presented to the Court at hearings; and upon sufficient cause being shown thereby, the Court hereby FINDS and ORDERS as follows:

PRELIMINARY INJUNCTION ORDER

The Court finds that Plaintiff, the People of the State of California, meets the standards to obtain a preliminary injunction under Code of Civil Procedure section 526, subdivision (a), with respect to subdivisions 1.(a) and 1.(b) of Chino Valley Unified School District ("Policy 5020.1") as follows:

- Plaintiff has demonstrated a likelihood that it will prevail on the merits of its Complaint with respect to subdivisions 1.(a) and 1.(b) of Policy 5020.1, as

subdivisions 1.(a) and 1.(b) are unconstitutional under the Equal Protection Clause (Cal. Const. Art. 1, § 7.)

- Plaintiff has also demonstrated that the relative balance of harms weighs in favor of a preliminary injunction with respect to subdivisions 1.(a) and 1.(b) of Policy 5020.1, as it is well-established that if a plaintiff demonstrates a likelihood of success related to a constitutional violation and injury, such a showing usually demonstrates irreparable harm, no matter how brief the violation. (*Baird v. Bonta* (9th Cir. 2023) 81 F.4th 1036, 1041.)

The Court finds that Plaintiff meets the standard to obtain a preliminary injunction under Code of Civil Procedure section 526, with respect to subdivision 1.(c), only as applied to students 18 years of age or older, as follows:

- Plaintiff has demonstrated a likelihood that it will prevail on the merits of its Complaint with respect to subdivision 1.(c) of Policy 5020.1, as applied to students 18 years of age or older, as these students have a protectable privacy interest, a reasonable expectation of privacy in that interest, disclosure under subdivision 1.(c) would constitute a serious invasion, and Defendant has shown neither a compelling interest nor set of interests that outweighs the privacy interest of students 18 years of age or older. (Cal. Const. Art. 1, § 1; *Mathews v. Becerra* (2019) 8 Cal.5th 756, 769.)
- Plaintiff has also demonstrated that the relative balance of harms weighs in favor of a preliminary injunction with respect to subdivisions 1.(c) of Policy 5020.1 as applied to students 18 years of age or older, as it is well-established that if a plaintiff demonstrates a likelihood of success related to a constitutional violation and injury, such a showing usually demonstrates irreparable harm, no matter how brief the violation. (*Baird v. Bonta*, *supra*, 81 F.4th at p. 1041.)

As a threshold inquiry under equal protection, the Court considers whether a classification affects two or more similarly situated groups in an unequal matter. *Taking Offense v. State* (2021)

66 Cal.App.5th 696, 722, review on other grounds granted Nov. 10, 2021, S270535.) Under this inquiry, the Court should not examine whether the persons are similarly situated for "all purposes," but whether they are similarly situated "for purposes of the law challenged." (*Ibid.*, citations omitted.)

The Court finds that transgender and gender nonconforming students are similarly situated compared to their cisgender peers, for purposes of subdivisions 1.(a) and 1.(b) of the Policy. For example, Defendant does not refute the proposition that all students, regardless of gender identity, may suffer suicidal ideation or social emotional health concerns.

The Court finds that subdivisions 1.(a) and 1.(b) of the Policy, on their face, discriminate on the basis of sex. (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17; *Woods v. Horton* (2008) 167 Cal.App.4th 658, 674.)

While Defendant asserts that these subdivisions would apply equally to a student that is transitioning and a student that is detransitioning, the Court finds that, even in this hypothetical scenario, subdivisions 1.(a) and 1.(b) are still only implicated based upon gender difference between the student's then-existing gender identity and a student's records. The Policy's use of and reliance upon discriminatory classifications is highlighted by the fact that a cisgender male student wanting to be called by a different, stereotypically male name—even the same name that a detransitioner seeks to use—would not be subjected to subdivisions 1.(a) and 1.(b) of the Policy. Discrimination based on gender classifications is built into the operative language of the Policy.

In California, discrimination against transgender individuals, specifically, is subject to strict scrutiny. (See *Taking Offense*, *supra*, 66 Cal.App.5th at pp. 721-726.) Under strict scrutiny, a defendant must show that it has a compelling interest that justifies the discriminatory classification and that the classification is necessary and narrowly tailored to further the compelling interest. (*People v. Son* (2020) 49 Cal.App.5th 565, 590.) Generally, a policy is narrowly tailored if there is no alternative means of adequately serving the compelling interest that would impose a lesser burden on the constitutional interest. (*Ibid.*) Only the "most exact connection between the justification and classification" will suffice. (*Woods v. Horton*, *supra*,

167 Cal.App.4th at p. 675.) The classification must appear "necessary rather than convenient," and the availability of gender neutral alternatives—"or the failure of the legislative body to consider such alternatives"—will be "fatal to the classification." (*Ibid.*)

The Court finds that Defendant does not meet its burdens under strict scrutiny. Defendant has asserted that Policy 5020.1 is intended to promote parental involvement and foster trust by informing them of student welfare concerns. With respect to concerns about student welfare, the fact that transgender or gender nonconforming students may have more mental health concerns as opposed to others is not sufficient to provide a compelling interest justifying a suspect classification. (*Woods v. Horton*, *supra*, 167 Cal.App.4th at p. 676 ["The greater need for services by female victims of domestic violence does not provide a compelling state interest in a gender classification"].) The Court further finds that the expert evidence submitted in this case establishes that there is nothing inherently wrong or pathologically wrong with being transgender or gender nonconforming; no evidence in the record supports the claim that being transgender, in and of itself, indicates a mental health problem.

The Court also finds that subdivisions 1.(a) and 1.(b) of Policy 5020.1 are not narrowly tailored because Defendant did not consider any gender-neutral alternatives, and there are sex-neutral alternatives and other narrowly tailored options to accomplish Defendant's purported goals. For example, Defendant could have adopted gender neutral policies directly tailored to existing problems related to bullying, mental health, and psychological distress, instead of singling out a protected group. These kinds of neutral alternatives are analogous to the less restrictive, gender-neutral funding alternatives recognized in *Woods v. Horton*, *supra*, 167 Cal.App.4th at pp. 674-676, which the Court of Appeal found sufficient to establish that a discriminatory policy failed strict scrutiny.

Because the Court finds that subdivisions 1.(a) and 1.(b) of Policy 5020.1 violate equal protection, the Court need not reach Plaintiff's privacy or other arguments with respect to these two subdivisions.

With respect to subdivision 1.(c) of Policy 5020.1, the Court finds that this subdivision is neutral on its face with respect to gender, as it applies to any student's request to change their

official or unofficial records. Additionally, the Court finds that while children generally have a right to privacy that covers the information disclosed under the Policy, the Court finds no reasonable expectation of privacy—nor serious invasion of privacy—with respect to subdivision 1.(c)'s application to minor students because this subdivision triggers when students make a voluntary decision to change their school records, a decision which need not be made in order to allow a student to proceed at school with the name and pronouns or access to facilities or programs consistent with their gender. The Court finds that subdivision 1.(c) of Policy 5020.1 is rationally related to legitimate government interests.

It is **ORDERED** that, pending final judgment in this action, Defendant and its agents, employees, assigns, and all persons acting in concert with it are restrained and enjoined from adopting, implementing, enforcing, or otherwise giving effect to: (1) Defendant's Board Policy 5020.1, subdivisions 1.(a) and (b) of the Policy in full; and (2) subdivision 1.(c) of the Policy, insofar as it applies to students 18 years of age or older.

Defendant is also **FURTHER ORDERED** to provide written notice of this order to all of Defendant's agents, employees, assigns, and all persons acting in concert with it and attach this Order thereto no later than 5 p.m. Pacific time on the first business day following issuance of this order. Defendant must promptly file a notice with the Court and serve it on all parties, indicating that Defendant has provided notice of this order and attaching a copy of the communication that Defendant provided.

SO ORDERED.

Dated: 1/11/24

Hon. Michael A. Sachs
San Bernardino Superior Court

EXHIBIT 2

ADVOCATES FOR FAITH & FREEDOM
Robert H. Tyler (SBN 179572)
btyler@faith-freedom.com
Mariah R. Gondeiro (SBN 323683)
mgondeiro@faith-freedom.com
25026 Las Brisas Road
Murrieta, California 92562
Telephone: (951) 304-7583

Attorneys for Attorneys for Defendant **Temecula Valley Unified School District**

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

MAE M., through her guardian ad !item Anthony M.; SUSAN C., through her guardian ad litem Sabrina; C.; GWEN S., through their guardian ad litem Ramona S.; CARSON L., through his guardian ad litem Nancy L.; DAVID P., through his guardian ad litem RACHEL P.; VIOLET B., through her guardian ad litem INEZ B.; STELLA B., through her guardian ad item INEZ B.; TEMECULA VALLEY EDUCATORS ASSOCIATION, AMY EYTCHISON, KATRINA MILES, JENNIFER SCHARF, and DAWN SIBBY,

Plaintiff(s)

v.

JOSEPH KOMROSKY, JENNIFER WIERSMA, DANNY GONZALEZ, ALLISON BARCLAY, and STEVEN SCHWARTZ, in their official capacities as members of TEMECULA VALLEY UNIFIED SCHOOL DISTRICT BOARD OF TRUSTEES, TEMECULA VALLEY UNIFIED SCHOOL DISTRICT, and DOES 1 - 20,

Defendant(s)

Case No.: CVSW2306224

DEFENDANTS' NOTICE OF RULING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TO EACH PARTY AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 23, 2024, at the hearing on Plaintiffs' Motion for Preliminary Injunction, the Court adopted its tentative ruling, attached as Exhibit A, denying Plaintiffs' request for a preliminary injunction as to both the Policy and the Resolution.

DATED: February 26, 2024

ADVOCATES FOR FAITH & FREEDOM

By: Mariah Gondeiro

Mariah R. Gondeiro, Esq.
Attorneys for Defendant **Temecula Valley Unified School District**

EXHIBIT “A”

Tentative Rulings for February 23, 2024
Department 6

To request oral argument, you must notify Judicial Secretary Charmaine Ligon at (760) 904-5722 and inform all other counsel no later than 4:30 p.m.

This court follows California Rules of Court, Rule 3.1308 (a) (1) for tentative rulings (see Riverside Superior Court Local Rule 3316). Tentative Rulings for each law & motion matter are posted on the Internet by 3:00 p.m. on the court day immediately before the hearing at https://www.riverside.courts.ca.gov/OnlineServices/TentativeRulings/tentative-rulings.php. If you do not have Internet access, you may obtain the tentative ruling by telephone at (760) 904-5722.

To request oral argument, no later than 4:30 p.m. on the court day before the hearing you must (1) notify the judicial secretary for Department 6 at (760) 904-5722 and (2) inform all other parties of the request and of their need to appear telephonically, as stated below. If no request for oral argument is made by 4:30 p.m., the tentative ruling **will become the final ruling** on the matter effective the date of the hearing. **UNLESS OTHERWISE NOTED, THE PREVAILING PARTY IS TO GIVE NOTICE OF THE RULING.**

TELEPHONIC APPEARANCES: On the day of the hearing, call into one of the below listed phone numbers, and input the meeting number:

- Call-in Numbers: 1 (833) 568-8864 (Toll Free), 1 (669) 254-5252 ,
  1 (669) 216-1590, 1 (551) 285-1373, or
  1 (646) 828-7666
- Meeting Number: 161 830 3643

Please **MUTE** your phone until your case is called and it is your turn to speak. It is important to note that you must call fifteen (15) minutes prior to the scheduled hearing time to check in or there may be a delay in your case being heard.

For additional information and instructions on telephonic appearances, visit the court's website at https://www.riverside.courts.ca.gov/PublicNotices/remote-appearances.php.

Riverside Superior Court provides official court reporters for hearings on law and motion matters only for litigants who have been granted fee waivers and only upon their timely request. (See General Administrative Order No. 2021-19-1) Other parties desiring a record of the hearing must retain a reporter pro tempore.

percentage of plans now than under the old rules. Department argues that the APA is not applicable.

In reply, Plaintiffs contend that they do not need to satisfy the heightened requirements for mandatory injunctive relief because they are only seeking to maintain the status quo. They reassert that the APA applies and that Department's argument that the APA is inapplicable lacks merit.

Analysis:

The purpose of a preliminary injunction is to preserve the status quo pending trial on the merits. In order to issue a preliminary injunction, the Court must balance the parties' interests. In balancing the parties' interests, the Court must exercise discretion "in favor of the party most likely to be injured . . . ." *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205. The Court is to consider two interrelated factors: (1) the injury to plaintiff in absence of the injunction verses the injury the defendant is likely to suffer if an injunction is issued (*Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 633); and (2) is there a reasonable probability that plaintiffs will prevail on the merits at trial. *Robbins*, *supra*, 38 Cal.3d at 206. "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." *Butt v. State of California* (1992) 4 Cal.4th 668, 678. It is the plaintiff's burden to "show all elements necessary to support issuance of a preliminary injunction." *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481. "An injunction properly issues only where the right to be protected is clear, injury is impending and so immediately likely as only to be avoided by issuance of the injunction." *E. Bay Mun. Util. Dist. v. Cali. Dep't of Forestry & Fire Prot.* (1996) 43 Cal.App.4th 1113, 1126. "[I]n order to obtain injunctive relief the plaintiff must ordinarily show that the defendant's wrongful acts threaten to cause irreparable injuries, ones that cannot be adequately compensated in damages." *Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352.

While the parties disagree about whether the injunction sought is prohibitory or mandatory and whether the APA applies or does not apply to the Department's auto-assignment, they both agree that the new auto-assignment formula used by the Department results in Plaintiff being assigned more individuals to their plan in 2024 than in 2023. An injunction is only properly issued where injury is impending. *E. Bay Mun. Util. Dist., supra,* 43 Cal.App.4th at 1126. No injury is impending. They will receive more new patients/clients under the new auto-assignment formula than the old formula. Plaintiffs argue that this formula may be changed in the future but this is speculative at most. They provide no evidence that Department is planning on changing the formula anytime soon. Due to this, the motion for preliminary injunction is denied because no injury is impending.

5.

CVSW2306224	M. VS KOMROSKY	MOTION FOR PRELIMINARY INJUNCTION

Tentative Ruling:

Motion for Preliminary Injunction

Defendants argue that the Teacher Plaintiffs lack standing to pursue this claim. This argument does not have merit. "Standing concerns a specific party's interest in the outcome of a lawsuit." (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247.) "To have standing, a party must be beneficially interested in the controversy; that is, he or she must have 'some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.'" (*Holmes v. California Nat. Guard* (2001) 90

Cal.App.4th 297, 315.) "This interest must be concrete and actual, and must not be conjectural or hypothetical." (*Iglesia Evangelica Latina, Inc. v. S. Pac. Latin Am. Dist. Of the Assemblies of God* (2009) 173 Cal.App.4th 420, 445; *Associated Builders and Contractor, Inc. v. San Francisco Airports. Com.* (1999) 21 Cal.4th 352, 362.) In this case, the Plaintiffs have a concrete and actual interest in the constitutional validity of the Resolution and Policy 5020.01 as they are directly impacted by each.

A decision to grant or deny a preliminary injunction is not an ultimate adjudication of the dispute, but simply a provisional remedy intended to preserve the status quo pending a trial on the merits. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528; *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999; *Jamison v. Department of Transportation* (2016) 4 Cal.App.5th 356, 361.) The decision to grant or deny a request for a preliminary injunction rests in the sound discretion of the trial court, and its decision will not be reversed on appeal absent a showing of abuse of discretion. (*14859 Moorpark Homeowner's Assn. v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1402-03; *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.) When deciding whether to issue preliminary injunctions, the trial court considers two interrelated factors: the interim harm the applicant is likely to sustain if the injunction is denied as compared to the harm to the defendant if it issues, and the likelihood the applicant will prevail on the merits at trial. (*White v. Davis* (2003) 30 Cal.4th 528, 554; *Cohen* v. *Board of Supervisors* (1985) 40 Cal.3d 277, 286; *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205-06.) "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Butte v. State of California* (1992) 4 Cal. 4th 668, 678.)

A. Probability of Success

A preliminary junction is proper if it is "reasonably probable that the moving party will prevail on the merits." (*San Francisco Newspaper Printing Co., Inc. v. Sup. Ct. (Miller)* (1985) 170 Cal.App.3d 438, 442 (abuse of discretion to grant injunction where plaintiff lacks standing to sue); *Costa Mesa City Employees' Ass'n v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 309 (no injunction may issue unless there is at least "some possibility" of success).) In their moving papers, Plaintiffs argue they will prevail on the merits invalidating the Resolution under Count I (void-for-vagueness), Count II (infringement of right to receive information), and Count III (infringement of right to education) of the complaint, and they will prevail on the merits invalidating the Policy under Count VIII (gender discrimination).

1. The Resolution (Count I)

Teacher Plaintiffs allege the Resolution violates Article I, § 7(a) of the California Constitution because it is unconstitutionally vague. (FAC, ¶¶ 110-118, 152-156.) A person may not be deprived of life, liberty or property without due process of law. (Cal. Cont., art. I, § 7(a); see also U.S. Const., amend. XIV.) The void-for-vagueness doctrine, which derives from the due process concept of fair warning, bars the government from "enforcing a provision that 'forbids or requires the doing of an act that is so vague' that people of 'common intelligence must necessarily guess at its meaning and differ as to its application.' [Citations.]" (*People v. Hall* (2017) 2 Cal.5th 494, 500.) "A law is unconstitutionally vague if it fails to meet two basic requirements: (1) The regulations must be sufficiently definite to provide fair notice of the conduct proscribed; and (2) the regulations must provide sufficiently definite standards of application to prevent arbitrary and discriminatory enforcement." (*Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 495.)

"Only a reasonable degree of certainty is required, however." (*Ibid.*) "The analysis begins with 'the strong presumption that legislative enactments must be upheld unless their unconstitutionality clearly, positively, and unmistakability appears. A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical

construction can be given to its language. [Citations.]'" (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1107.)

Plaintiffs raise a facial challenge to the Resolution based on the void-for-vagueness doctrine. A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) A plaintiff seeking to void a statute as a whole for facial unconstitutionality cannot prevail "by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. Rather, the plaintiff must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*Vergara v. State of California* (2016) 246 Cal.App.4th 619, 643.) Here, Plaintiffs do not attempt to establish that the Resolution applied unconstitutionally to a particular person, the type of challenge made in an as-applied case. Instead, Plaintiffs seek to enjoin Defendants from "adopting, implementing, enforcing or otherwise giving effect" to the Resolution, i.e., from applying the Resolution to any person in any circumstance.

The Resolution states that the District values diversity, encourages culturally relevant and inclusive teaching practices, and condemns racism and "will not tolerate racism and racist conduct." The Resolution states Critical Race Theory ("CRT") is based on false assumptions, is fatally flawed, is a divisive and racist ideology, assigns generational and racial guilt, violates equal protection laws and views social problems as racial problems. The Resolution bans "Critical Race Theory or other similar frameworks" in the classroom and bans 13 concepts derived from CRT. (FAC, Ex. 1.) Topics that educators are prohibited from teaching include, for example, that "[r]acism is ordinary, the usual way society does business," "dominant society racializes different minority groups at different times, in response to different needs such as the labor market," "[i]ndividuals are either a member of the oppressor class or the oppressed class because of race or sex," or that "[a]n individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past or present by other members of the same race or sex," and "[a]n individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex." (Plaintiffs Compendium of Evidence ("Plaintiffs' COE"), Attachment A, Declaration of Mark Rosenblum ("Rosenblum Dec."), Ex. A, pp. 2-3.)

As referenced above, "A law is unconstitutionally vague if it fails to meet two basic requirements: (1) The regulations must be sufficiently definite to provide fair notice of the conduct proscribed; and (2) the regulations must provide sufficiently definite standards of application to prevent arbitrary and discriminatory enforcement." (*Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 495.)

Defendant Joseph Komrosky ("Komrosky") states in his declaration that the Board used "precising definitions, to avoid vagueness and ambiguity" as shown by "the five elements and the eight doctrines", the "Resolution does not interfere with the teaching of ethnic studies, history, or any other subject," and teachers "can still teach on accurate historical events and individuals, such as Dr. Martin Luther King, the Holocaust, and slavery." (Komrosky Dec., ¶¶ 6, 9.)

Komrosky points to Board Policy 6144 on "Controversial Issues" as a guideline for "teachers, students, administrators and parents" on controversial topics such as CRT. (*Id.*, ¶ 14, Ex. A.) It states, for example, that when a controversial issue is raised, "teachers should help students separate fact from opinion and warn them from drawing conclusions from insufficient data."

Here, the Resolution sets out five specific elements of Critical Race Theory which cannot be taught and sets out eight specific doctrines derived from Critical Race Theory that cannot be taught. This Court finds that for the purposes of determining probability of success on the issue of void for vagueness, the resolution is sufficiently definite to provide notice of the conduct

proscribed and standards of application in that the Resolution specifically delineates what "cannot be taught." Additionally, it seems clear to the Court that a person of ordinary intelligence would have a reasonable opportunity to know what is prohibited as what is prohibited is set out specifically in the Resolution. If a reasonable and practical construction can be given, the law will not be held void for uncertainty. (*Wirick, supra,* 93 Cal.App.4th at p. 420, 112 Cal.Rptr.2d 919.) It seems to the Court that most laws may have some vagueness to them, but it is for the courts to interpret the law.

Defendants correctly distinguish the cases cited by Plaintiffs, *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump* (N.D. Cal. 2020) 508 F.Supp.3d 521 and *Local 8027 v. Edelblut* (D.N.H. 2023) 651 F.Supp.3d 444 which are based on prohibitions in a statute/executive order that are similar, but not quite analogous to the prohibitions set forth in the Resolution. The cases also involve the federal due process clause, and are not binding on this Court. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120 fn. 3 (decisions of lower federal courts are not binding).)

Plaintiffs have failed to present sufficient evidence showing probability of prevailing on Count I under the void-for-vagueness doctrine. In balancing the "potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Butte v. State of California* (1992) 4 Cal. 4th 668, 678.).

The Court, having found that Plaintiffs are not likely to succeed on the merits, the showing by Plaintiff of interim-harm must be great.

The plaintiff must offer evidence of "irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (White v. Davis (2003) 30 Cal.4th 528, 554.) A plaintiff must make a "significant" showing of immediate irreparable injury to enjoin a public agency from performing its duties. (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Board*, supra, 23 Cal.App.4th at p. 1471.).

The Court finds that the balancing of these two factors, probability of prevailing and interim harm, favors denying the request for a Preliminary Injunction on the grounds of vagueness.

2. The Resolution (Count II)

Student Plaintiffs, Plaintiffs Rachel P., Inez B., Teacher Plaintiffs allege the Resolution violates Article I, Section 2(a) of the California Constitution Infringement of Right to Receive Information (FAC, ¶¶ 157-161.)

Plaintiff argue that the free speech clause of the California Constitution protects students' right to receive information and ideas, and schools must make curriculum decisions in accord with these "transcendent" imperatives. *McCarthy v. Fletcher*, 207 Cal. App. 3d 130, 139, 144 (1989) (quoting *Bd. of Educ. v. Pico*, 457 U.S. 853, 864, 867–68 (1982)); *Pico*, 457 U.S. at 867 (right to receive information and ideas is "an inherent corollary of the rights of free speech and press" under U.S. Constitution). The California Constitution thus requires a school board's removal of reading materials or ***topics*** from the curriculum to be "reasonably related to legitimate educational concerns" (*McCarthy,* 207 Cal. App. 3d at 146.) *emphasis added.*

A school board's decision to restrict classroom materials as part of a curriculum implicates the balance between a student's First Amendment rights and a state's authority in education matters. (*Hazelwood Sch. Dist. v. Kuhlmeier* (1988) 484 U.S. 260, 266.) School boards have broad discretion in the management of school affairs. (*Board of Education v. Pico* (1982) 457 U.S. 853, 864.) The Board's conduct does not offend the First Amendment so long as it is "reasonably related to legitimate pedagogical concerns." (*Kuhlmeier*, supra, 484 U.S. at p. 571.)

Defense argues, California does not require the teaching of CRT, and that the Resolution states "Notwithstanding the above restrictions, social science courses can include instruction about Critical Race Theory, provided that such instruction plays only a subordinate role in the

overall course and provided further that such instruction focuses on the flaws in Critical Race Theory."

The Court in *McCarthy* (207 Cal.App.3d 130) reasoned that "Since the court's discussion in *Hazelwood School Dist.* v. *Kuhlmeier, supra*, 484 U.S. 260 [98 L.Ed.2d 592, 108 S.Ct. 562] is not limited to a school newspaper but rather refers to a wide variety of "curriculum " decisions, we believe the standard applied in that case should also be applied to the curriculum decision made here. This conclusion acknowledges the deference which is given to local school authorities regarding ordinary educational matters. "'[T]he courts have traditionally been reluctant to intrude upon the domain of educational affairs, not only in recognition of their lack of educational competence in such matters, but also out of respect for the autonomy of educational institutions.'" (*Seyfried v. Walton, supra*, 668 F.2d 214, 218 (conc. opn. of Rosenn, J.).)

It does not appear to this Court that the Resolution seeks to deny access to information. Rather the Resolution seeks to limit instruction on the subject of CRT to a subordinate role within a lager instructional framework. Additionally, the Resolution allows CRT to be discussed, but must include its flaws. The Court finds that the Resolution is reasonably related to a legitimate pedagogical concern. The Resolution allows instruction in CRT, but specifically prohibits instruction on theories such as "only individuals classified as "white" people can be racist because only "white" people control society," or "racism is ordinary, the usual way society does business," or "an individual, by virtue of his or her race or sex, is inherently racist and/or sexist" or finally, that "an individual is inherently morally or otherwise superior to another individual because of race or sex."

Theories such as these (and others banned by the Resolution) which are precepts taught within Critical Race Theory would seem to lack any legitimate pedagogical concern and would not be reasonably related to legitimate educational concerns.

CA Education Code section 233.5 states that (a) Each teacher shall endeavor to impress upon the minds of the pupils the principles of morality, truth, justice, patriotism, and a true comprehension of the rights, duties, and dignity of American citizenship, and the meaning of equality and human dignity, including the promotion of harmonious relations, kindness toward domestic pets and the humane treatment of living creatures, to teach them to avoid idleness, profanity, and falsehood, and to instruct them in manners and morals and the principles of a free government. (b) Each teacher is also encouraged to create and foster an environment that encourages pupils to realize their full potential and that is free from discriminatory attitudes, practices, events, or activities, in order to prevent acts of hate violence, as defined in subdivision (e) of Section 233.

Theories such as an individual is inherently morally or otherwise superior to another individual because of race or sex, or that individuals are either a member of the oppressor class or the oppressed class because of race or sex, or an individual, by virtue of his or her race or sex, is inherently racist and/or sexist would seem to be incongruous with the Legislatures clear intent found in California Education Code 233.5. Indeed, teachers are to impressed on students principals of truth, the dignity of American citizenship and the meaning of equality and human dignity which includes the promotion of harmonious relations free from discriminatory attitudes.

The Court agrees with Defense. It has not been shown to the Court's satisfaction how the prohibition of instruction on 13 precepts found within a Theory, while still allowing instruction on the Theory itself, would infringe on the rights of students to receive information.

The Court finds that the balancing of the two factors, probability of prevailing and interim harm, favors denying the request for a Preliminary Injunction on this ground.

3. The Resolution (Count III)

Student Plaintiffs, Plaintiffs Rachel P., Inez B., Teacher Plaintiffs allege a violation of Article I, Section 7 and Article IV, Section 16(a) of the California Constitution Equal Protection – Infringement of the Fundamental Right to Education (FAC, ¶¶ 162-165.)

Plaintiffs argue that the continued enforcement of Resolution 21 will cause Temecula's academic program, as a whole, to fall below prevailing statewide standards (Mot at p. 34.) That the California Constitution guarantees students the right to receive an education "basically equivalent to that provided elsewhere throughout the State." *Butt*, 4 Cal. 4th at 685. A student's education is not "basically equivalent" when "the actual quality of the [school's] program, *viewed as a whole*, falls fundamentally below prevailing statewide standards," thereby demonstrating "a real and appreciable impact on the affected students' fundamental California right to basic educational equality" (*emphasis added*.)

Defendants respond in their opposition at page 10 that "Plaintiffs swing vague, conclusory accusations against the Resolution, but fail to demonstrate how the Resolution actually deprives students of a right to education or how the Resolution falls below statewide standards. For instance, Plaintiffs argue that the "'continued enforcement of Resolution 21 will cause Temecula's academic program, as a whole, to fall below prevailing statewide standards.'" (Mot. at p. 34.) Despite this flawed conclusion, Plaintiffs offer no analysis as to how the Resolution does this other than repeating vague, unsupported arguments. They argue that the Resolution conflicts with Education Code section 51220(b)(1) which requires curricula "'provide a foundation for understanding . . . human rights issues, with particular attention to the study of the inhumanity of genocide, slavery, and the Holocaust, and contemporary issues.'" (Mot. at p. 18.) Yet, nothing in the Resolution prohibits teachers from teaching on these topics. (Komrosky Decl., ¶ 9.)"

Citing *Butt v. State of California*, Defendants argue that "a finding of constitutional disparity depends on the individual facts. Unless the actual quality of the district's program, *viewed as a whole*, falls fundamentally below prevailing statewide standards, no constitutional violation occurs." (Id. at pp. 686-87.)

In *Butt*, parents of school children enrolled in a unified school district filed a class action for injunctive relief against the state and the district's board of education, seeking to prevent the district from closing its schools six weeks before the official end of the school year due to a projected revenue shortfall. The Court in *Butt* stated that "even unplanned truncation of the intended school term will not necessarily constitute a denial of "basic" educational equality. A finding of constitutional disparity depends on the individual facts. Unless the actual quality of the district's program, *viewed as a whole*, falls fundamentally below prevailing statewide standards, no constitutional violation occurs" (*Butt v. State of California* (1992) 4 cal.4th 668, 686-687)

This Court finds the rationale in *Butt* helpful when considering the issues in the case at bar. The State Supreme Court in *Butts* noted that "of course, the Constitution does not prohibit all disparities in educational quality or service. Despite extensive State regulation and standardization, the experience offered by our vast and diverse public-school system undoubtedly differs to a considerable degree among districts, schools, and individual students. These distinctions arise from inevitable variances in local programs, philosophies, and conditions. "'[A] requirement that [the State] provide [strictly] 'equal' educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. ...'" (*Hendrick Hudson Dist. Bd. of Ed. v. Rowley* (1982) 458 U.S. 176, 198 [73 L.Ed.2d 690, 707, 102 S.Ct. 3034].) Moreover, principles of equal protection have never required the State to remedy all ills or eliminate all variances in service."

The Court agrees with the Defense that the showing by the Plaintiffs that actual quality of the district's program, *viewed as a whole*, has fallen fundamentally below prevailing statewide

standards is insufficient. Additionally, evidence that students have been harmed by the Resolution or are receiving disparate treatment by the terms of the Resolution is insufficient to demonstrate likelihood of success on the merits. Further this Court finds that the Plaintiffs' claims of harm are conclusory and unfounded.

The Court finds that the balancing of the two factors, probability of prevailing and interim harm, favors denying the request for a Preliminary Injunction on this ground.

4. The Policy

Plaintiff Gwen S. and Teacher Plaintiffs allege the Policy violates the equal protection clause under Article I, § 7 of the California Constitution because it discriminates against transgender and gender nonconforming students. The equal protection clause requires the government "to treat all persons similarly situated alike or, conversely, to avoid all classifications that are 'arbitrary or irrational' and those that reflect 'a bare desire to harm a politically unpopular group.' [Citations]." (*Taking Offense v. State* (2021) 66 Cal.App.5th 696, 722.) Discrimination based on gender, which includes gender identity and gender expression, violates the equal protection clause, and is subject to strict scrutiny. (*Id.* at 723, 725-726; *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 564; see also Educ. Code § 210.7; Gov. Code § 12926.) Under strict scrutiny, the government must show that it has a compelling interest that justifies the discriminatory classification and that the classification is necessary and narrowly tailored to further the compelling interest. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 832; *People v. Son* (2020) 49 Cal.App.5th 565, 590.)

The Policy is a parental notification policy that requires District staff to notify parents/guardians when (among other things) a student is requesting to be treated or identified as a different gender, request to use a name that differs from their legal name, is physically injured on school property, is expressing suicidal ideation, and/or is being bullied, (FAC, Exhibit 2.) In the FAC, Plaintiffs challenge subsections 1(a)-(c) which requires written disclosure to parents or guardians when any District staff or employee learns that a student 1) is requesting to be identified or treated as a gender that differs from the student's biological sex or the gender listed on the student's birth certificate including any request by the student to use a name that differs from their legal name; 2) is accessing sex-segregated school programs and activities, including athletics, or using a bathroom, for a gender that differs from the student's biological sex or the gender listed on the student's birth certificate; and 3) is requesting to change any information contained in the student's records. (FAC, ¶ 141; Plaintiffs' COE, Attachment A, Rosenblaum Dec. Ex. B, at §§ 1(a)-(c).)

The first inquiry is whether a classification affects two or more similarly situated groups in an unequal manner. (*Taking Offense, supra,* 66 Cal.App.5th at 724.)

The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." (*In re Eric J.* (1979) 25 Cal.3d 522, 531, 159 Cal.Rptr. 317, 601 P.2d 549.) "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*Id.* at p. 530) The use of the term "similarly situated" in this context refers only to the fact that "'[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'" (*In re Roger S.* (1977) 19 Cal.3d 921, 934, 141 Cal.Rptr. 298, 569 P.2d 1286.)

"The 'similarly situated' prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny

is required in order to determine whether the distinction is justified." (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714, 63 Cal.Rptr.2d 173.)

In the case at bar, Policy 5020.01 requires school staff to notify in writing the parents of any student who makes a request under section 1(a)-(c). Notably, the Policy applies equally to all students within the district and does not apply disparately to two or more similarly situated groups. Plaintiffs' Motion does not address the issue of similarly situated.

The Amicus brief filed by the Chino Valley Unified School District argues that for discrimination claims, strict scrutiny only applies when a government "has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*Woods v. Horton* (2008) 167 Cal.App.4th 658, 670.) And that in the present case "children requesting to be socially transitioned are not similarly situated to children not requesting to be socially transitioned. The former group raises important issues about their health that the latter group does not. The policy does not address children who don't ask to be socially transitioned, regardless of their gender identity, because that inaction doesn't invoke the same need to involve parents in medical decisions being made about their children (Amicus Brief pp. 8, ln. 1).

Examples of a few similarly situated groups can be found in the following cases:

In *Perry v. Schwarzenegger* (2010) 704 F.Supp.2d 921 United States District Court, N.D. California the Court held that same sex couples and heterosexual couples seeking to marry are similarly situated for equal protection analysis. In striking down Proposition 8 the court conducted an extensive "similarly situated" analysis as part of its equal protection review, but the opinion does not contain the exact phrase "similarly situated," concluding instead that same-sex and opposite-sex couples are "situated identically," meaning both groups are seeking to marry, but the law treated the two similarly situated groups differently, allowing one group to marry and the other not.

In *Eisenstadt v. Baird* (1972) 405 U.S. 438 the Court invalidated Massachusetts statutes prohibiting the sale of contraceptives to unmarried persons and explained that "by providing dissimilar treatment for married and unmarried persons who are similarly situated, (those individuals who want to purchase contraception) the statutes violated the Equal Protection Clause."

Concluding that a statute violated equal protection if it treated the spouses of male and female service members differently for the purpose of benefits, the Court in *Frontiero v. Richardson* (1973) 411 U.S. 677 explained that "any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are similarly situated."

And finally, in *Califano v. Goldfarb* (1977) 430 U.S. 199 the Court concluded that a provision of the Social Security Act providing survivors' benefits to widows but not widowers "disadvantages women contributors to the social security system as compared to similarly situated men."

In contrast to these and other examples of groups that have been found to be similarly situated, there is only one group affected by Policy 5020.01 – Students.

Had the Policy required school staff to report to parents only when a transgender or gender nonconforming student made a request under sections 1(a)-(c), but not when a cisgender student made the request, then the Policy would be treating two groups of similarly situated students differently, but that is not the case here.

With regard to subdivision 1(c), the Policy is gender neutral and does not expressly single out transgender or gender non-conforming students, as it applies to any student's request to change their school official or unofficial records. Using the example above, a cisgender male who

not only wants to be *called by* a different, stereotypical male name but wants his school records *changed* to reflect the name, the Policy requires the District to notify parents of such request.

Thus, the Policy applies equally to cisgender and transgender/gender nonconforming students. A gender-neutral enactment is subject to the "rational relationship" test, and the burden is on the party attacking the enactment to establish constitutional invalidity. (*In re Marriage Cases, supra,* 43 Cal.4th at 435.) In this case, the District's purpose in involving parents in the decision-making process and restoring trust is furthered by mandatory parental notification when a student makes any of the request in section 1(a)-(c) of the Policy. The Policy is rationally related to legitimate governmental interests.

In the notice of motion, Plaintiffs indicated in footnote 1 that they also seek to enjoin subsection (5) of the Policy "insofar as it applies to transgender or gender diverse students." Subsection (5) requires parental notification of student involvement in protests, acts of violence or any other substantial disruption in the classroom or campus. Problematically, subsection (5) is not mentioned anywhere in the FAC. Plaintiffs do not allege it is discriminatory, violates their privacy rights or otherwise seek to invalidate subsection (5). Other than a footnote in the notice of motion seeking relief, there is also no argument in the moving brief as to subsection (5).

On the merits, subsection (5) is gender neutral, as the Policy applies to all students, not just transgender or gender nonconforming students. For example, any student (whether cisgender, transgender, or nonbinary) can be involved in a student protest, whether it promotes LGBTQ rights or CRT or partisan interests. The District's purpose of involving parents in their students' education is furthered by parental notification of any disruption in the classroom or campus – whether a student protest or an act of violence. Subsection (5) of the Policy is rationally related to legitimate governmental interests.

Plaintiffs have not presented sufficient evidence showing a probability of prevailing on Count VIII for violation of equal protection as to subdivisions 1(a)-(c) of the Policy or to subsection (5).

B. Balance of Harms

The plaintiff must offer evidence of "irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (*White v. Davis* (2003) 30 Cal.4th 528, 554.) Irreparable harm is where someone will be significantly hurt in a way that cannot later be repaired. (*People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater* (1981) 118 Cal.App.3d 863, 870-871.) A plaintiff must make a "significant" showing of immediate irreparable injury to enjoin a public agency from performing its duties. (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Board*, supra, 23 Cal.App.4th at p. 1471.)

As discussed above, it is this Court's finding that neither the Resolution nor Policy 5020.01 violate Plaintiffs' constitutional rights. Defense cites to *Maryland v. King* (212) 133 S. Ct. 1, 3 which holds that "[a]ny time a [government] is enjoined by a court from effectuating statutes enacted by the people, it suffers a form of irreparable injury."

Accordingly, the balance of harms weighs in favor of denying the request for a preliminary injunction as to both the Policy and the Resolution.

PROOF OF SERVICE

I am an employee in the County of Riverside. I am over the age of 18 years and not a party to the within entitled action; my business address is 25026 Las Brisas Road, Murrieta, California 92562.

On February 26, 2024, I served a copy of the following document(s) described as **DEFENDANTS' NOTICE OF RULING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** on the interested party(ies) in this action as follows:

SEE ATTACHED SERVICE LIST

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION.** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I transmitted copies of the above-referenced document(s) on the interested parties in this action by electronic transmission. Said electronic transmission reported as complete and without error.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am an employee in the office of a member of the bar of this Court who directed this service.

Susan Y. Kenney

SERVICE LIST

Mark Rosenbaum
mrosenbaum@publiccounsel.org
Amada Manaser Savage
asavage@publiccounsel.org
Mustafa Ishaq Filat
ifilat@publiccounsel.org
Kathryn Eidmann
keidmann@publiccounsel.org
Public Counsel

Scott Humphreys
humphreyss@ballardspahr.com
Elizabeth Schilken
schilkene@ballardspahr.com
Ballard Spahr LLP

Maxwell S. Mishkin
mishkinm@ballardspahr.com
Pro Hac Vice

EXHIBIT 3

CALIFORNIA DEPARTMENT OF EDUCATION

TONY THURMOND
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

1430 N STREET, SACRAMENTO, CA 95814-5901 • 916-319-0800 • WWW.CDE.CA.GOV

California Department of Education
Education Equity UCP Office
Investigation Report

Case Matter No. 2023-0202

Local Educational Agency: Rocklin Unified School District (RUSD)
Date Complaint Received by the CDE: September 7, 2023
Extension of Time Documented: November 6, 2023
Subject of Complaint: Discrimination on the basis of gender identity and expression
Report Mailed: February 1, 2024

INVESTIGATION PROCEDURES AND DETERMINATION

The California Department of Education (CDE) received a complaint requesting the CDE directly investigate an official action taken by the Rocklin Unified School District ("RUSD" or "District") School Board on September 6, 2023, that was alleged to be discriminatory as to a certain subset of students defined by characteristics protected under California Law. In response, the CDE engaged in a review of publicly available information and reached a determination that the complaint has merit, pursuant to Title 5 *CCR*, Section 4664(a)(5), consistent with the details found in the Conclusion section of this Investigation Report.

SUMMARY OF COMPLAINT AND ALLEGATION

On September 7, 2023, the CDE received written communication from the complainant, a Placer County educator. In that communication, the Complainant discussed concerns relative to an official action taken by the RUSD School Board on September 6, 2023. Pertinent to the California Department of Education (CDE), the complainant expressly stated:

> " Yesterday [September 6, 2023], Rocklin Unified School District (a model district for many other districts in Placer County) voted on and passed a new policy that will disproportionately impact the safety of LGBTQ+ students in Rocklin and is discriminatory against their right to a safe educational environment."

In that same communication the complainant specifically requested of the CDE:

> " I hope that you [the CDE] will look into this inequitable policy and see that it is discriminatory in nature towards our most marginalized students."

JURISDICTION

The CDE's jurisdiction to address the Complainant's request to determine whether the RUSD School Board's action on September 6, 2023, relative to "LGBTQ+ students" is discriminatory is set forth in subparagraph (F) of paragraph (1), of subdivision (a) of *Education Code* (*EC*) 33315 and paragraph (5) of subsection (a) of Title 5 of the *California Code of Regulations* (5 *CCR*), Section 4650.[1]

The CDE elected to directly intervene, determining that the policy in question (referred to as "Paragraph 21" or "P-21") raised serious questions as to whether its implementation would result in immediate denial of students' right to be free from discrimination. Additionally, the CDE determined that referring the complaint to the District would be futile inasmuch the District's Board itself had adopted the rule in question—P-21—and, therefore, District administrators are not in a position to make a final determination as to the legality of P-21.

PROCEDURES OF THE INVESTIGATION

The procedures undertaken in this investigation are governed by the Uniform Complaint Procedures (UCP) statute and regulations. In this case, the investigation consisted of a review of publicly available information from the RUSD's Board meeting on September 6, 2023, including review of the minutes, and the language of the amendment to add Paragraph 21 to Board Policy Manual, Regulation 5020 (P-21). No witnesses were interviewed as the adoption of P-21 was a formal action contained in the minutes of the Board meeting and publicly displayed on the district's website.

FINDINGS OF FACT

Pertinent to the allegation set forth above in the Summary of the Complaint and Allegation, the CDE makes the following findings of fact:

1. On September 6, 2023, in a regular meeting of the RUSD Board, the Board amended Board Policy Manual, Regulation 5020 (titled: "parent/Guardian Rights") to add Paragraph 21 to Regulation 5020.
   (This finding is based on the official RUSD website: View Regulation 5020: Parent Rights And Responsibilities (eboardsolutions.com).)

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[1] The relevant text of the applicable statutes and regulations are included in **Appendix A** attached to this report.

2. The content of P-21 reads as follows:

> *The rights of parents/guardians of district students include, but are not limited to, the following:*
>
> . . .
>
> *21. To be notified within three (3) school days when their child requests to be identified as a gender other than the child's biological sex or gender; requests to use a name that differs from their legal name (other than a commonly recognized nickname) or to use pronouns that do not align with the child's biological sex or gender; requests access to sex-segregated school programs and activities, or bathrooms or changing facilities that do not align with the child's biological sex or gender.*

(This finding is based on the official RUSD website: View Regulation 5020: Parent Rights And Responsibilities (eboardsolutions.com).)

3. The published September 6, 2023 RUSD Board minutes pertinent to P-21 are as follows:

7. Action Items - Regular Agenda

> *7.1 Action on Revisions to Administrative Regulation: AR5020 Parent Rights & Responsibilities and Administrative Regulation: AR5145.3 Nondiscrimination/Harassment*
>
> *Motion to take action on Revisions to Rocklin Unified School District Administrative Regulation: AR 5020 Parent Rights & Responsibilities and Administrative Regulation: AR 5145.3 Nondiscrimination/Harassment*
> *Motion by Dereck Counter, second by Tiffany Saathoff.*
>
> *Final Resolution: Motion Passes*
>
> *Yes: Dereck Counter, Rachelle Price, Tiffany Saathoff, Julie Hupp*
>
> *No: Michelle Sutherland*

(This finding is based on the official RUSD website: View Regulation 5020: Parent Rights And Responsibilities (eboardsolutions.com).)

APPLICABLE AUTHORITY

California has stated an intent to allow all persons in public schools to be free of discrimination based on characteristics enumerated in California law. Among other such protected characteristics, California expressly prohibits discrimination by public education agencies on the basis of gender, gender identity, gender expression and sexual orientation (*EC* Sections 200 and 220)

APPLICATION OF LAW TO FINDINGS OF FACT

As the *EC*, Section 220 makes clear, the prohibition against discrimination based on gender, gender identity, gender expression, and sexual orientation applies to *all persons* in public schools. Thus, the right to be free from discrimination applies to students. Paragraph 21 (P-21) on its face violates the prohibition against discrimination set forth in EC 220 for the reasons set forth below:

Summary of Analysis

The basis for determining that P-21 violates the non-discrimination provisions of *EC* Section 220 is that P-21, in its terms, effectively singles out, applies to and *only* affects a particular group of students defined by legally protected characteristics. The basis for finding noncompliance is discussed in detail below:

Facially discriminatory policy

Paragraph 21 (P-21) on its face fails to comply with the nondiscrimination requirements in *EC* Section 220. Specifically, P-21 requires specified school personnel to single out and report communications made exclusively by students who express a gender other than that identified at birth by:

1) requesting to be identified as a gender other than the child's biological sex or gender;
2) requesting to use a name or pronouns that do not align with the child's biological sex or gender; or
3) requesting access to sex-segregated school programs and activities, or bathrooms or changing facilities that do not align with the child's biological sex or gender.

The inherent nature of the communications school personnel are required to report makes such notification applicable *exclusively* to this class of students. That is to say, the nature of the communications subject to P-21 limits the rule's applicability to the students who identify with or express a gender other than that identified at birth. Indeed, the very content of the student communication subject to mandatory notification constitutes a self-identification of the student-speaker as a member of a class of

persons who fall within the statutory protections of *EC* Section 220 relative to non-discrimination. P-21 explicitly requires school personnel to contact parents, who are:

> *"[t]o be notified within three (3) school days when their child requests to be identified as a gender other than the child's biological sex or gender; requests to use a name that differs from their legal name (other than a commonly recognized nickname) or to use pronouns that do not align with the child's biological sex or gender; requests access to sex-segregated school programs and activities, or bathrooms or changing facilities that do not align with the child's biological sex or gender."*

Hence, the very content of the communication triggering the policy identifies the student as a person who identifies with or expresses a gender other than that identified at birth—a classification of personal characteristics protected by law. By its terms, the mandates of P-21 harms students by providing sensitive information that is unique to students who would otherwise fall within categories the state has deemed should not be singled out under *EC* Sections 200 and 220.

To further clarify, the policy mandates that sensitive often private information, which is unique to a class of students with protected characteristics, must be disclosed by school administrators even if the student does not consent to the parent disclosure. This policy circumvents a student's determination of when and where to share private personal information regarding gender identification and expression and it is required to be divulged without regard for the nuances of the relationship between the student and parent.

These harms and risks of harm to the students, their constitutional rights of privacy and the protections afforded by California's anti-discrimination policies are significant.

Also bearing on this analysis is the fact that the parental notification mandates of P-21 on their face do not further an educational or school administrative purpose. Nor does the policy imply any such purpose. It simply intervenes in personal student-parent relationship issues for purposes entirely extraneous to the educational needs of the student and the administrative needs of the school. Finally, given the mandatory notification requirements of P-21, students who may otherwise exercise their right to make any of the requests addressed in P-21 are more likely to forego their rights in order to avoid personal and family difficulty.

CONCLUSION

For the reasons discussed above, P-21 on its face fails to comply with *EC* Section 220's prohibitions against discrimination. The CDE finds the District's policy—P-21—*on its face* singles out and is directed exclusively toward one group of students *based on* that group's legally protected characteristics of identifying with or expressing a gender other than that identified at birth. And the application of that policy adversely impacts those students. Finally, P-21 does not expressly or implicitly provide any educational or school administrative purpose justifying either form of discrimination.

CORRECTIVE ACTIONS

The corrective actions addressing the findings of noncompliance are set forth in accordance with Title 5 *CCR* Section 4670.:

Corrective Actions Applicable to RUSD:

Within 5 school days of receipt of this Investigation Report:

1. The Superintendent or the Superintendent's designee must inform all school personnel subject to P-21 in writing that the CDE has determined the policy is inconsistent with *EC* Section 220 and for this reason the mandatory notification requirements set forth in P-21 may not be implemented.

2. The Superintendent or the Superintendent's designee must provide written notification to all students within the District that the mandatory notification requirements of P-21 will not be implemented.

Within 10 school days of receipt of this Investigation Report:

3. The Superintendent or the Superintendent's designee must provide CDE's EEUCPO with evidence of compliance with these corrective actions, which must include copies of the writings referred to in 1 and 2 above.

RIGHT TO RECONSIDERATION

Either party may request a reconsideration of this Investigation Report by making a request within **30 days of the date of this letter** to:

Education Equity Uniform Complaint Procedures Office
eeucpo@cde.ca.gov

Pursuant to Title 5, CCR section 4665, the Request for Reconsideration must specify and explain why:

(1) Relative to the allegation(s), the Department Investigation Report lacks material findings of fact necessary to reach a conclusion of law on the subject of the complaint, and/or

(2) The material findings of fact in the Department Investigation Report are not supported by substantial evidence, and/or

(3) The legal conclusion in the Department Investigation Report is inconsistent with the law, and/or

(4) In a case in which the CDE found noncompliance, the corrective actions fail to provide a proper remedy.

(Title 5, CCR section 4665 (a).)

EXHIBIT 4

Mirabelli v. Olson
USDC Case No. No. 3:23-cv-00768-BEN-VET

TRANSCRIPT OF GOV. NEWSOM AND FIRST PARTNER SIEBEL NEWSOM HIGHLIGHT CALIFORNIA'S EDUCATION TRANSFORMATION
August 14, 2023

…

N. CHAIRES ESPINOZA: Welcome everyone. I'm School Board President Nancy Chaires Espinoza. I'd like to welcome you to the Elk Grove Unified School District and to Miwok Village Elementary School. I'd like to thank Governor Newsom and the first partner for visiting Elk Grove Unified today. I would also like to congratulate our hard working staff, especially our teachers and principals, on a successful first day of school last week. The spirit with which our students have returned to campus is a testament to the welcoming and encouraging environment that they create. Elk Grove Unified is home to 68 schools that serve students from pre-K through adult education. We are proud to offer 31 preschool classes and 51 transitional kindergarten classes. We know the importance of early childhood education and how it serves as the foundation for a child's educational journey and sets the stage for lifelong learning. We value our partnership with our families because learning starts at home and continues at school. Our focus on the whole child means that our goal is to make sure all students and families feel connected and included on our campuses. We know a connected child is a successful child, and that behind every child is a parent or guardian doing their best under their particular circumstances. Elk Grove Unified provides many opportunities for students and families to feel connected with over 60 technical educ-, uh, Career Technical Education Academy and Pathway Programs to inspire our students, four Newcomer Welcome Centers for refugees and immigrants, and two Student and Family Empowerment Centers for those facing economic hardship, homelessness and food insecurity. We strive to provide students and families with the support they need, so they are able to thrive

both inside and outside of the classroom. These opportunities would not have been possible without the support of our school and district staff, our labor leaders and local partners, without the support of state leaders who fight and preserve our financial resources, even in the face of budget deficits. And for that, I would like to give my heartfelt thanks to the Governor of the great State of California. [Audience clapping] Next up, I'd like to welcome one of our key educational partners, Mr. James Sutter, Elk Grove Education Association President.

J. SUTTER: Good afternoon. First, I'd like to thank Governor Newsom and the first partner for taking the time to come to visit an Elk Grove School today to witness the incredible skills our educators utilize daily to make school a home for all of their students. A critical part of making school a home for our students is making connections. Today, the Governor and the first partner witnessed powerful connections being made amongst our students as they gathered in the classroom for community circle. In Elk Grove Unified, it is a priority amongst our educa-, educator-, educators to make sure all students feel a sense of belonging in our classrooms and at our schools, regardless of their individual circumstances. I'd also like to commend the Governor on his commitment to education funding. A budget puts action to our character, and it is clear through the Governor's actions that the children of our state are our priority. For decades, the research has shown that investment in our youngest learners is imperative. With Governor Newsom's commitment to pre-kindergarten programs, he has made an investment t-, in California that will, that will bear fruit for decades. Thank you for your time today. And I'd like to introduce Assemblymember Stephanie Wynn.

S. WYNN: Thank you, James. Stephanie Wynn, Assemblymember for District 10, and for this District here. We are so fortunate that we live here in California, and I'm gonna tell you the reason why. One is that we've got a governor that is invested in our children and our future. And I'm reminded of that when I'm here at the school and I walk into a classroom and I see, right there on the shelf, there's a book titled, Hair Love.

And it's an African American little girl with her father at the cover. I'm reminded of that when I see a book that says, where the corner of my eyes kiss. And it's o-, an Asian little girl talking about her eyes. And it's because of those books in the classroom that help our children to understand about culture differences. But not only that, it's about learning. Learning, folks. At the age of 12, I was given a dictionary. My six siblings and I use this dictionary all the way up unto today. This dictionary helped us get through school. This dictionary here helped an immigrant family's, English as a second language, low income, understand and value education. This dictionary here. And because we have a governor in the State of California that believes and invests in young children, that today you have standing in front of you a girl whose English is a second language group, grew up on every single public assistance program you can think of, is a legislator today in the State of California. Thank you so much, Governor and first partner, for all that you do for California, for all that you do for young kids, and for all that you do for our future. I'd now like to bring up our very own senator, Angelique Ashby.

A. ASHBY: What a proud day for the Sacramento region and right here in Elk Grove. I'm, never been prouder to be a Californian and the, the senator for this area. It's really fun to watch the Governor and the first partner see this amazing campus, full of diverse beautiful little children and equally diverse and amazing teachers. And I'm so proud to see the sense of self-establishing on our new campus already under tremendous leadership from a great principal and a great district. We started our day today here in a mental health circle. And, uh, they asked us if we noticed anything when we, when we did the quiet meditation. And, you know, I noticed two things, actually: That, that the two sets of people that were best at that meditation in the room were the kiddos, who had been doing it a long time, and the first partner, who also I know does that quite a bit. But the other three of us, we were pretty fidgety. And I was thinking, you know what? This might be helpful and beneficial to us. If, uh, if we, if we would start our day being mindful and if we would sit down and calm our

bodies so that our minds could do what they were built to do. I've been a mom a really long time. I have a son who's 28 years old but I also have a daughter who's ten. And my experience as a parent has been very different from start to finish. I started off as a single mom on food stamps, using subsidized income and subsidized childcare. And what that would have looked like to support me and my oldest son is very different than what it looks like to support me now. And what I appreciate about our governor, and about this state is that we are trying very hard to create a robust set of, uh, policies and procedures and, most importantly, resources that serve and meet the needs of families across California that are experiencing all different kinds of lives as they move through our great state and try to raise their children to be the best that they can be. I'm proud and honored to be a part of it. And really proud to introduce you -- I, I love our governor, but I get to introduce the, the next speaker who I am really, really enjoying spending time with. And, uh, she's so passionate about women, about moms. This month is really, there's a lot going on this month about working moms. And it's hard for me to even think of a working mom who works harder than she does. So let me introduce you to our first partner. And she is every bit the partner, too, works really hard for the State of California. Jennifer Siebel Newsom.

[Audience clapping]

J. SIEBEL NEWSOM: Thank you, Senator. Good afternoon. What an honor to be here. This beautiful school, which is so deeply entrenched in its community, is a shining example of California's commitments to families. From TK to the Makerspace next door, to the amphitheater for communal gathering, to the beautiful green spaces for outdoor learning and play, Miwok Village is building on our goal as a state to provide students with the environment and opportunities in order to thrive. We're doing it through universal school meals, ensuring that no child goes hungry with two free meals a day. And through Farm to School, we're making sure that those meals are fresh, nutritious, delicious, locally sourced, and culturally competent,

while expanding science, environmental and nutrition education in school districts across the State. I've seen many of these programs up close. And the school gardens and culinary education classes have been game changers for kids and their families, as they take home what they've grown and learned in the classroom. It's thrilling to see Farm to School programming expand across Elk Grove Unified School District. And then through programs like Miwoks amazing transitional kindergarten classes, which got, we got to visit today, and before and after school programs for educating children and alleviating the financial burden that families bear when trying to find and pay for quality childcare. As a mother during the summer, this is a real issue, um, for all of us. But I'm especially proud of California's commitment to supporting the mental health of our young people, especially in our schools where children spend so much of their time. Given the rise of social media, I feel like I can speak for every parent about our shared concern about excessive time online and how it impacts kids mental wellbeing. Elk Grove's digital citizenship curricula, which encompasses education on media literacy, cyberbullying, online privacy and social and emotional learning and literacy is a necessary solution to address this problem. And all of this is in line with the Governor's multibillion dollar investment in the transformation of our youth behavioral health system. So I want to thank Miwok for doing your part to help address the youth mental health crisis. You're onsite mental health professionals across the District, thoughtful curricula that includes mindfulness and breathwork, your positive behavior intervention and support, and your commitment to fostering community and belonging, not just amongst the student body, but the parent body. It's incredible. It's essential. And so while other states limit their children and stifle their ability to reach their full potential through politically motivated book bans, racist and reductive refusals to teach history and the closing of school libraries -- can you imagine if this library wasn't here? In California, we're focused on the whole child, the family agenda, that includes the freedom to grow and thrive at the earliest of ages and throughout life. And we do

that by ensuring that California k-, children have the best environments in which to succeed. So now I get to introduce – very proud of this man – a huge champion for California's kids. My husband, our Governor, Gavin Newsom.

G. NEWSOM: Thank you. Thank you, Madam First Partner. Thank you all for taking the time to be here. And most importantly, thank you, Madam President. Um, thank you, Mr. President. Uh, thank you to the Assemblywoman and, uh, obviously, uh, the great senator from this District for being here, all of you, for taking the time to be here. Uh, we're here, uh, first day back to school for many Districts in the State. As you know well, we sort of have a rolling, uh, uh, calendar as it relates to back to school and we thought it appropriate to update you on, uh, where we are and where we've been as it relates to the issue of public education here in the State of California. I appreciate many of the comments that were stated in terms of reinforcing some of the work that is unique and distinctive here in the State of California that runs in contrast to what's happening across the rest of the country. Jen just highlighted, uh, the perversity, uh, that we are in a library as somehow an anomalous point to assert. And it's no longer an anomalous because you look at what's happening across this country where libraries quite literally are being shut down, where librarians are being threatened by criminal action for expressing themselves or providing resources, activities, uh, providing books for students that seek them. If you think I exaggerate, just Google what's happening in Houston, Texas. The school district was taken over and they're shutting down the libraries and detur-, turning them into detecto-, uh, de facto detention facilities. You cannot make this up. What you also cannot make up is how committed this State is to reforming and transforming public education. I think it's one of the biggest stories that, frankly, hasn't gotten the attention that it deserves. You heard from the President, uh, that we have advanced, uh, a brand new grade here in the State of California, TK for all. We just had the privilege and opportunity for caregivers, a cohort of just 24 students, student ratio, student-teacher ratios that are best in class,

best in nation, creating a brand new grade for anyone that seeks it. The principal made a point, sh-, one of the toughest, uh, uh, and emotional days is the first day of school for kindergarteners 'cause they feel disconnected because they come from home or come scattered from different sites in terms of caregivers and support. Uh, and this cohort, because last year, they established the first two cohorts of TK, was very familiar with their surroundings and they were happy to be at school. Mom, dad, were good. Uh, and it's exactly what was intended with the creation of this new grade. It's a multiyear commitment through 2025, uh, and our commitment is firm. And we have reimagined, uh, the paradigm from K through 12 now in the State of California, to pre-K, uh, to 12. We've also established a framework of engagement that's unique. One out of every four schools, that's the goal, we want to turn into community schools. In so many ways, this is already a community school. Four principle anchors of a community school. Foundationally, the most important anchor is family engagement, is parental engagement, home visits. This school's already advanced those frameworks, that strategy. But it's a $4.1 billion dollar, multiyear commitment, community schools, to provide in enrichment, to address, as we say, the whole person and provide the kind of quality supports and alternative choices and opportunities that you'll prov-, that the fanciest private school can possibly provide. That multiyear commitment has been reinforced and is firm here in the State of California. We are reimagining the school year. This is under resourced, I think, in mindshare. Nine hours a day, full enrichment. That's a commitment. Fully funded. $5 billion of new money, after school and summer school for all. We've been talking about that for decades. The commitment in the State is firm. The multiyear commitment through 2025, after school and summer school for all. We're doing it. Supporting teachers. 2.9 billion reasons I can lay claim to additional supports for professional development, to not just recruit new teachers, but to retain our workforce and provide them the quali-, quality supports that they deserve. Arts education. $3.3 billion of new grants. 3.3 billion in new grants for arts

and music. $938 million a year annual appropriation under Prop 20, aid of additional supports for music and arts and providing that kind of enrichment. That's happening now here in the State of California. Multiyear commitment. Again, transforming, reimagining, uh, public education here in the State of s-, California. We're doing the same in terms of high dose tutoring and learning, addressing the issue of learning loss. $7.9 billion last year, in 2022. $8 billion to address the issue of learning loss. You just look at the last three years, this is an exact number: $23.8 billion, to focus on the issue of literacy and learning loss and tutoring. And it was not a surprise to me; it may have been surprised you. I know it was a surprise to the Governor of Texas and the Governor of Florida, in particular. Folks out there in Florida did worse in every category in terms of learning loss than the State of California during the pandemic, which is an interesting fact that, again, I don't think is present out there in our public discourse. Nor is parental engagement. It's foundational. There is no state -- I'm gonna make this claim. It's not a claim. It's not an even an assertion; it's just a simple, fundamental fact. There is no state in America that supports local control and parental engagement like the State of California. No one comes close. It's written into our rules. Look at LCFF, Local Control Funding Formula. Look at the LCAP process. What is the LCAP process? It's the accountability plans that are required. What are accountability plans? They require parental engagement. They require parents to sign off before their kids come to school in terms of those plans. It requires on site parental advisory committees. Those committees not only advise, they consent to what is presented in front of the school board. And an LCAP plan that has to come in front of the school board and with the budget last year, has to be certified in a brief and a process that is public and inclusive at the school board level and the parental level. We just established that, and the budget has to be done by February 28 every single year. No school system in America requires more parental engagement and local control than the State of California. That is a point of pride. And it's a point of privilege for me to, uh, make that point because I don't think

that's part of what's often discussed and reported here in the State of California. That's why Jen was right, to refer to this as the family freedom agenda. Because we believe in the right to our kids to thrive. $4.7 billion for behavioral health investments in the State of California, zero to 25. New counselors, more support for the remarkable young folks that we just met here that are actually reaching out and going to homes to meet with the parents, directly to service their mental health needs, not just their children's mental health needs. I can't believe what I just read and you may have seen it. New Republic came out with a big article, Breaking Down Mitch McConnell. And everybody else, one of their top priorities in America, one of the top priorities in the United States of America, for a Republican Congress when they come back, according to Senate [inaudible], is to eliminate free meals. To eliminate free meals. Because, how dare our children have the nutrients they need to learn and thrive? It's a point of contrast and privilege. Couldn't work. What Jan and the legislature has done, that we've removed the stigma of a young child that may have a little debt and is embarrassed because they can't get school and chastised. You know, sort of differentiated. But none exists in California anymore. $800 million a year in additional resources. Because of Jen's work, we're building out kitchens, the physical infrastructure for those facilities that don't have them, coming up with the regional hubs for those facilities that can't have them because of constraints and providing a framework of nutrition where we mean business – Farm to School and focusing on local ag. No greater example than the local ag that's produced in and around this district. That's a point of contrast and pride. They're trying to shut down free meals. They eliminated free meals after COVID. Remember, they had a two years short period where they enhanced it. They su-, suthea-, enthusiastically cut it off and then we stepped in and enthusiastically increased it. Like, just New Mexico maybe the only the state that even approximates what the State of California -- there's simply no system in America that's transforming public education like the State of California. And if you think that's

just in the context of K through 12 and after school for all and summer school for all and the work we're doing reimagining the school year, even school start times and the work we're doing on mental health and creating a brand new grade. And the fact we're supporting teachers with all the professional development and arts and education and the like. Well, I haven't even gotten started. How about the fact that every single child, 3.4 million kids, got a career, career and college savings account when they entered the public education system? $1.9 billion, we put up that. Some kids got as much as $1,500. That doesn't exist anywhere else we know of, any jurisdiction in the world. It's a point of pride. Put into college, going in a career, going mindset. How about the dual enrollment program? 700 plus million dollars. Apprenticeship. Paid apprenticeship. Dual enrollments, getting into community college, free community college here in the State of California. How about the new commitments to higher education? Average $440 million of additional money every single year, 5% increases compounded. Commitment under our memorandum of understanding with the UCs and CSUs to address the full cost of attendance. Reduce the cost and the debt burden. Zero cost textbooks. $110 million to do open source textbooks. The work we did expand Cal Grants as it relates to the opportunities of community college. I can honestly continue. And the point is, I should because people need to know this. They deserve to know this. But right now, so much of our education is focused on, as my friend Ben Chida, who's been a big part of architecting this, said is the 10%. That's the shiny object if someone comes up here and protests. And that's probably two thirds of the questions I'm gonna get about education is about the protest today. Down in Temecula. Well, get this: They're protesting parental engagement. They're protesting the fact that for one year, 1,300 families engaged in the new social studies curriculum and 98.8% of them approved or were neutral about the adaptation of that curriculum. And they wanted to throw that all out at the last minute and change it. They came up to oppose parental engagement, while we're here celebrating it. That's Orwellian doublespeak. We're

talking about freedom to speak, freedom to teach; not creating a chilling effect where fear and anxiety are dominating. That's not freedom. Freedom's not found in fear and power; fulfilment of freedom is around social progress, social justice. That's what we're about. We're not ashamed about a young teacher that we just met, talking about social and emotional learning. By the way, that's how we were introduced today. Mindfulness and a teacher that's excelling with kids that are excelling, talking about social and emotional learning. We're not ashamed about that. It's not an establishment plot. Ron DeSantis may have asserted just as much. Of course, they're opposed to diversity. How dare he talk about inclusion. So it's a, it's a hell of a moment in American history. And I'm really proud 'cause I think we're on the right side of history. Oh, of course, we're not trying to rewrite history, either. No. I try to tell both sides of slavery. Really? Both sides of the Holocaust? How about the folks in Wisconsin that didn't even want to teach. They banned a book. Uh, I think they're fixing this but they banned a book on Japanese internment because, well, we didn't talk about the other side of Japanese internment. Really? Wow. Proud of our state. We've got a lot of work to do. I can't make up for COVID. Can't go like this and make up for a half century. We'd got to do better. We recognize we have to do better. And I'll close on this: We asked the experts. We said, what's the data tell us? If we were gonna come out and we were gonna create a parameter of reforming public education, what would it look like? And we've done it! They say, you've got to begin at the beginning or interventions come too late. People don't, aren't left behind; they start behind. We said, let's do TK for all. You've got to create a [inaudible] mindset. You've got a stress quality imagination. And that's why, on the front end and the back end, we've set up the framework of engagement. Got to support our teachers, got to provide more supports, got to provide more enrichment, more engagement, community, parental engagement. Done all that and I, I'm really proud of that. So that's the, that's the architecture of the next few years. I'm really excited about what the next few years mean for these young kids. And to sit there

with those young TK kids that were s-, better behaved than any of our four kids. Uh, and just imagine what their choice, their, their opportunities will look like as we fulfill this vision in the next few years. I'm very enlivened by that. And so, uh, I'm here in that light and that stead. Forgive the very long windedness, but it's a point of pride and privilege. But it's also pointed point because we, we believe in children's right to thrive. We, we believe in parents' rights to decide and support their kids. We, we believe, uh, that kids have the right to learn and, an-, and the right to succeed. And, uh, and that's what our agenda lays out. And, uh, that's why we're here on the first day. Not at school here in Miwok, but the first day of school for many Californians and Americans all across this country. With that, we're here to answer any questions.

B. JONES: Hi, Governor. Blake Jones with Politico. Um, you know, the Attorney General and the State Superintendent have condemned trans student policies coming out of Chino Valley Unified and, um, out of Murrieta, um, requiring schools to disclose, yeah, trans students identities to their parents. And I wonder, (a) what you think of those policies, and (b) whether you believe, um, school districts should have the authority to pass them?

G. NEWSOM: We, uh, we're working with legislative leaders. I'll be meeting with the speaker and the pro tem this evening. We'll be discussing it. I know that the LGBT caucus has, uh, got some language they're working on. I haven't had the privilege of looking at it. It's a work in progress.

B. JONES: So you don't have a position yet on [inaudible/crosstalk]?

G. NEWSOM: No. I, I have a position more broadly. Um, but we're defining the terms of, uh, our response and engagement and I want to flesh that out, which is happening in real time before I opine more specifically.

B. JONES: Gotcha. Is there anything you can say mo-, about your position more broadly?

G. NEWSOM: Well, I think my position is pretty well founded, um, as it relates to, uh, you know, uh, a-, you know, I, l-, l-, you may not even have been alive. I, I don't mean this in

pejorative sense; I mean it quite literally. I was, I was writing in the '70s when they did this Briggs Initiative where we, we basically said, if you're gay, you can't teach. There was a big ballot initiative. And I remember a guy, former Governor by the name of Reagan, who said you can't catch gay like you can measles. And then I remember f-, a year or so ago, press secretary of a Governor in Florida, um, in this century, in this decade, who talked about anyone who opposed the Don't Say Gay Bill are groomers. So the assault on the LGBTQ community, the assault on the trans community, as I take very, very seriously. It's been a big cause of my life. You may know I've been at this for some time. 2004, married 4,036 couples from 48 states, a-, countries around the world. Um, and, uh, and I think a little humility, a little decency is needed in these debates. Um, for grace of God, go any of us. I mean, a loved one, someone we care deeply about that is struggling with their identity, their gender identity. And I just think, um, little grace and humility. That's my answer to your question: Grace and humility is needed as we engage in this conversation. Uh, and I look forward to doing that in partnership with the legislature.

B. JONES: Um, you know, you've spoken about Florida a couple of times. I was wondering, uh, you know, with the discussed Fox debate, what, you know, been reported that he had an initially with having a studio audience. And I wondered, you know, kind of what your opposition is there?

G. NEWSOM: Um, I'm not for performative. All is, I want to engage in a real conversation. I don't want to play to a crowd. We've been pretty crystal clear. I mean, we look at the wh-, whole thing I agreed to and laid out the parameters of what we agreed to. So we've been crystal clear and transparent. And either it happens or it doesn't happen. And, uh, uh, you know, there's a lot of sideshows. That's just one of them. So, meanwhile, back in the library, we're here talking about K through 12 education reform. Pre-K to t-, 12 education reform.

B. JONES: Uh, one more thing. You may have seen reporting to that, um, in Alameda County, the DA's office, um, you know, hired a, you know, partner or boyfriend of the

DA Pamela Price. And I – yeah, no?

G. NEWSOM: I don't know anything about it.

B. JONES: [Inaudible/crosstalk], uh, yeah, okay. Well, I was wondering if you had any comment.

G. NEWSOM: Yeah. Yes, I literally don't know anything about it. Like actually, literally no clue. But I got to hear a rumor about it. I don't even know about it. Yeah.

FEMALE: [Inaudible/crosstalk].

G. NEWSOM: Someone will tell me right. Rod, tell me about that after.

S. AUSTIN: Hi, Governor, Sophie Austin with the Associated Press. I'm wondering if you can talk more broadly on the, the Chino and Murrieta policies, um, about when the State should get involved on those issues. And then I also wanted to ask a question about Native American tribes alleging that the State is breaking the law by not updating the Bay Delta Water Standards, which the federal Clean Water Act requires them to do.

G. NEWSOM: I'll have to get back to you on that. Uh, as it relates to the Chino, um, and I, I imagine, the Murrieta and maybe there's another district. I just refer to the, the comprehensive comments I just made. I don't have anything more to add. Uh, as it relates to the specifics around the, the Bay Delta issue, I'm not familiar with the specific concerns and, uh, obviously someone that, you may know this, uh, the first year I was in office, apologized, uh, for the first governor of the State of California in 1851, who gave his first speech and he talked about the war of extermination, and how he worked with federal soldiers, how he worked with state militia, and how he worked with vigilantes to reimburse them for exterminating and eliminating Native Americans. I created Truth & Healing Council, uh, as a follow up to that. That meets regularly. I take very seriously the issues around tribal sovereignty, um, nation to nation engagement. And have worked hard with the legislature and done some really remarkable things in terms of reparations as it relates to land transfers and the like. It's a way of expressing, not dissimilarly, to the previous question of value

proposition as it relates to perhaps the more specific issues, uh, that I'm not familiar with as it relates to this particular tribe and this particular assertion.

S. AUSTIN: What about voluntary agreements? The EPA is investigating the Water Board on this issue. Do you have an opinion on whether voluntary agreements are discriminatory?

G. NEWSOM: I don't which – I've been a, I've been – it depends which voluntary agreements. I engage in a plethora of voluntary agreements as it relates to water policy. I pursued them, uh, early on in the administration. We were very successful. In the last few years, particularly the last nine to 15 months, uh, as relates to engaging, uh, with water providers in a collaborative process so we can avoid litigation and all binaries, as it relates to the VAs, we as refer to them. And it's been a very successful process. As it relates to the iterative process around them, I'm very mindful of that. We're still pursuing a few remaining voluntary agreements. Again, if this is specifically in relationship to your query around this tribe and its assertions, I want to make sure, with clarity, uh, that I'm not aware of the details of those assertions. And I don't want to cast any connection on the broader scopes around VAs, which I broadly embrace, uh, into, um, any way suggest a point of view or bias in relationship to their concerns.

J. NGUYEN: Hi, Governor. Jeannie Nguyen with ABC 10, here in Sacramento. You mentioned a lot today about parental rights and getting their, um, uh, their rights. U-, there was a rally this morning at the Capitol. They a-, essentially said that they feel like they won't have any rights with a number of the bills that are going on in the legislature ri-, --

G. NEWSOM: Which bills were they're referring?

J. NGUYEN: There's a bunch of them. AB5 is one of them.

G. NEWSOM: [Inaudible/crosstalk].

J. NGUYEN: But majori-, majorly around like LGBTQ students and those trans-, transitioning. Can you give me a comment on that? Because they don't feel like they're gonna

have any rights as parents.

G. NEWSOM: I already said I don't know what their assertions specifically. What's their as-, -- I heard one of them on TV talked about we were sexualizing because a school board member of T-, Temecula. I, i-, what -- it's a remarkable statement. I imagine you guys drilled down and made a determination of what they were referring to. I, I'm not aware of any effort to sexualize a curriculum.

J. NGUYEN: They just don't want -- basically what they're, I'm paraphrasing what they were saying this morning, they feel like certain rights or certain ideologies are being shoved down their children's throat and they want to be able to control what their children are learning at school. And they feel like cer-, these, some of these [inaudible/crosstalk] –

G. NEWSOM: Well, they have a, they -- we have a responsibility as a state. It's laid out specifically as it relates to curriculum. They have, have to have a significant engagement with parents on changing curriculum. It's actually in statute. I hope they refer to that. The LCAP process requires parental engagement, parental advisory committees, school board engagement. In fact, it lays out in such specific terms parental rights, we actually have a Bill of Rights, of sorts, as it relates to the ability for, uh, an individual to, uh, volunteer, as many parents are, in their school, to observe a classroom, to review the curriculum once it's already established, not just in preparation of it being established as it was in Temecula. 1,300 families, over a year, were engaged in the development of that t-, curriculum. That's parental engagement, by definition. 98.8%. Forgive me for being precise, but I think, uh, one has to be precise. 99% supported or f-, or were simply agnostic. That's parental g-, -- I don't know what they're referring to. That's, that's, and I think one has a responsibility to draw to what specifically are you referring to. Is it the notion that if you reference someone being gay, that somehow that's sexualizing our kids? Is that the case was straight people as well? I mean, if you're straight, is that sexualizing? I don't, I mean, it's, it's rather perverse that I offer that as a rhetorical question, because you

go, of course not. So by defin-, -- I don't know what it is they're asserting. It's Orwellian doublespeak. Or it's just so profoundly ignorant that they've been ginned up outside agitators which I think perhaps is a combination of this. And I'm deeply empathetic because I, I watched some of these poor parents and they've been so misled by these organized groups. So I, I just hope they, uh, exercise their rights that are well established in the State of California. By the way, those rights go back to 2005, in the *Williamson* settlement. 2004, 2005. They're well-established, codified LCAP process. We reinforce them. The LC-, I mean, it's, uh, these things are points of pride. They should be celebrating them and modeling them for the rest of the country. Moms for Liberty may want to take a look at them. Of course they want to get rid of mental health professionals. Just, I guess, get more locked doors.

N. NIXON: Good afternoon, Governor. Nicole Nixon with CapRadio News. I actually wanted to ask you about the, uh, ongoing contract negotiations with the State Workers Union, SEIU Local 1000. Uh, they've been without a contract for over a month. And they also say that their pay has not kept pace with inflation. A few dozen lawmakers sent you, a, a letter today urging, a, a new contract that reflects better pay for these employees.

G. NEWSOM: A good idea.

N. NIXON: Do you have a comment –

G. NEWSOM: I support that. I support a new contract, and I believe in-, they deserve better pay. And we're in the middle of negotiations and I'm feeling optimistic. And I literally will say not one more word because I ain't gonna screw it up.

N. NIXON: Not even when that, uh, might happen?

G. NEWSOM: I appreciate your question. I think I said it all.

N. NIXON: Thank you.

MALE: Last question.

D. PARDO: Hi, Governor. Daniela Pardo with Spectrum News. Governor, about a year ago, you and the first partner announced that you wanted to add about 40,000 new behavioral

health counselors.

G. NEWSOM: 44,000.

D. PARDO: 44,000.

G. NEWSOM: You were listening.

D. PARDO: Where is the State at in meeting that goal?

G. NEWSOM: I'm so proud! [Inaudible/crosstalk]. Uh, that's a good question. I, I let me get back to you. I, uh, it's been challenging. I, we were talking right here. You're one of, what, sixty-three-, --

FEMALE: Thousand.

[Inaudible/talking in background]

G. NEWSOM: I can't even make this up.

[Inaudible/talking in background]

G. NEWSOM: It's been a struggle in the private sector, public sector and clearly here as well. The money is not the issue. Uh, we just have a lot of work to do. One of the insights, this is why I loved visiting today, forgive me for talking out loud. Um, because of the demand of the profession, what a lot of mental health professionals are looking for is more confidence in the long term commitments. They don't want to shift a profession and a career path, knowing it's just an episodic commitment. That was very helpful. Jen made the point of making sure that was reinforced when we were walking in. Did you hear that? And I thought it was very valuable. And so that's important. We've got the $4.7 billion we put up. We laid out the parameters of engagement. We've got a lot of grants that have already gone out in this space. Um, but, um, but we have a lot of work to do to recruit, uh, those, those professionals. Thank you.

A. ZAVALA: Just a quick -- I'm gonna just steal Daniela's follow up question. Ashley Zavala with KCRA. I just wanted to clarify what you told Blake earlier about meeting with the legislative leaders on how you can approach some of these school districts that are trying to implement essentially outing trans kids to their parent habit. So --

G. NEWSOM: I haven't; we-, I'm looking for-, -- they're back in session today. Let me be clear: I'm looking forward to that engagement.

A. ZAVALA: So, I mean, does that come in the form of, of legislation, is that, I mean –

G. NEWSOM: Well, I think they already have legislation….

A. ZAVALA: Okay.

G. NEWSOM: …that we're working on, which has not been shared with me. So I have not had a chance to see it.

A. ZAVALA: Okay. Uh, no changes to a B1078 or something. No, or that –

G. NEWSOM: Well, there's amendments to 1078. But 1078's a separate issue.

A. ZAVALA: Sure.

G. NEWSOM: Yeah. It has nothing -- I mean, 1078 I don't believe, uh – i-, uh, I think we have to dress issue book bans. This is getting out of control. I mean, it's – I, I, I think I'm living in another time and place. This is in-, -- I mean it's just crazy what's happening. Uh, and by the way, parents overwhelmingly – [inaudible] America's done survey after survey – overwhelmingly oppose book bans. If you care about parental engagement or parent rights, this is crazy. Just one person, without even reading a book, can eliminate a book and every other parent and child no longer can even read that book? Included in some place the Bible apparently, too. Apparently, that's too violent. Uh, Old Testament, there are aspects. Uh, I mean, God forbid, um, you know, we dream about the stars, reflect on our, you know, youth reading and regaling all things Shakespeare. They're trying to eliminate Shakespeare in Florida. It's too sexually charged. This is serious stuff. So I, you asked me about 1078. I, I hope we can address that in 1078. Um, Temecula made the right decision, um, as it relates to providing the parental right [chuckles] which they tried to take away, of having their kids have textbooks today. Because August 14 is their first day of school and Temecula. Some parents wanted to deny the rights of the parents and children to have a textbook. That was what the school board originally voted on. In the name of parental rights. I mean, Orwellian doublespeak. So fortunately,

they fixed that. But, uh, I'm concerned that could happen again. And we just want to be clear: The law is the law. See, local control is not willfully breaking the law. Tha-, that's not local control. Laws are well established, they're inclusive. People's representatives are part of that process of adjudicating or the public mood is. Lawsuits that enjoin certain rights and responsibilities are all part of that. Uh, that due process, well established here over the course of years. There's a lot of statutes that are well established in the State. Um, and unfortunately, they're trying to, to short fuse them. A few, few, few people, loud voices, that are trying to deny the rights of other parents and family and, and children. I, I don't think that's, uh, that's appropriate. With that, what is appropriate as we all get out of here. It's very warm in here. So, uh, I appreciate all of you taking the time. Thank you very much.

[End of recording]

PROOFREADER'S CERTIFICATE

I, Erica Lowther, owner of San Diego Transcription, certify that on March 7, 2024, I proofread all the transcript of the above-referenced recording, while listening to the recording from which the same was transcribed, and that said transcript as typed accurately reflects the spoken word, to the best of my ability to hear those recorded words and identify the persons speaking.

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

Executed on March 7, 2024, at San Diego, California.

ERICA LOWTHER

EXHIBIT 5

K-12 EDUCATION

As culture wars escalate, California officials push back on conservative school board policies


BY CAROLYN JONES AND ALEXEI KOSEFF
AUGUST 29, 2023

People show support for three statewide initiatives at a press conference at the state Capitol in Sacramento on Aug. 28, 2023. Photo by Rahul Lal for CalMatters

IN SUMMARY

Under a system that has long prioritized local control for school districts. state officials now are fighting some recent board decisions regarding LGBTQ students.

*Lea este artículo en **español**.*

California's culture wars escalated Monday as the state sued a school district over its transgender student policy, and a parents' group took the first step toward placing a trio of initiatives on next year's ballot that would restrict protections for transgender youth.

The moves follow highly publicized **incidents** last month in which state leaders attempted to rein in school boards they said had run afoul of civil rights laws. Under California's local control system, school boards have wide latitude to enact their own policies — a freedom that's now being tested as a handful of districts move to expand parental rights by limiting the rights of LGBTQ students.

Monday morning, Attorney General Rob Bonta filed a **complaint** against the Chino Valley Unified School District in San Bernardino County over its new **policy** requiring parental notification when students change their gender identity at school.

The complaint, filed in San Bernardino County Superior Court, seeks a temporary restraining order against enforcement of the policy, which Bonta referred to as the "forced outing" of transgender and gender nonconforming students, while the court determines whether it violates state law.

"It presents students with a terrible choice," the attorney general said at a news conference in Los Angeles. "Either walk back your rights to gender identity and gender expression, to be yourself, to be who you are, or face the risk of serious harm. Mental harm, emotional harm, physical harm."

The policy requires schools to notify parents when students request to be identified by a name or pronoun, or use facilities or participate in a program that does not align with the sex on their official records. Parents would be notified even if they do not have the student's permission.

> **"In its function, in its text and in its context, this policy is destructive, it's discriminatory and it is downright dangerous."**
>
> — ATTORNEY GENERAL ROB BONTA

Bonta said this could potentially put students with parents hostile to their gender expression in danger. He argued that the policy violates California's constitutional right to privacy, as well as the state's equal protection clause and state laws that guarantee students the equal right to an education regardless of their gender identity.

Citing comments from school board members who said transgender students were suffering from a mental illness and a perversion, Bonta said the policy was plainly discriminatory.

"In its function, in its text and in its context, this policy is destructive, it's discriminatory and it is downright dangerous," Bonta said. "It has no place in California, which is why we have moved in court to strike it down."

'Desperate attempt to stop us'

Sonja Shaw, Chino Valley's school board president, was undaunted by the lawsuit, and said the district's policy is legally sound.

"This is a desperate attempt to stop us, and quite honestly, it's embarrassing that Bonta is wasting so much time and money on this," Shaw said Monday. "Every time he does something like this, it's a gift, because it exposes who these people really are — extremists who want to come between students and their parents."

At a boisterous meeting July 20, the Chino Valley Unified board voted 4-1 to pass the policy requiring school staff to notify parents within three days of discovering that a child has changed their gender identity. That could include changing their name or pronouns, joining a single-sex team or club or using bathrooms or locker rooms that don't align with their gender at birth.

State Superintendent of Public Instruction Tony Thurmond attended the meeting to protest the policy, but police escorted him out when he spoke longer than his allotted time.

Andi Johnston, Chino Valley Unified communications director, said that the district's policy does actually include protections for students who might be at risk for abuse from parents. If a student believes they are in danger or may be abused, injured or neglected due to their parents knowing of their preferred gender identity, staff must notify police or child protective services and won't immediately notify parents.

Assemblymember Bill Essayli, a Corona Republican, speaks during a press conference at the state Capitol in Sacramento on Aug. 28, 2023. Photo by Rahul Lal for CalMatters

Chino Valley Unified was among the state's first districts to enact such a policy, which is based on a bill that's currently stalled in the Legislature. **Assembly Bill 1314**, proposed by Assemblymember Bill Essayli, a Republican from Riverside, would have reversed the state's current policy of protecting the privacy of LGBTQ students who might not be "out" at home. Because the chair of the Assembly education committee, Al Muratsuchi, declined to schedule the bill for a hearing, Essayli said he would contact school boards directly and urge them to pursue the issue.

Learn more about legislators mentioned in this story

R BILL ESSAYLI
State Assembly, District 63 (Corona)
Expand for more about this legislator

D CHRISTOPHER WARD
State Assembly, District 78 (San Diego)
Expand for more about this legislator

Since then, three other districts — Anderson Union High School District in Shasta County, and Murrieta Valley Unified and Temecula Valley Unified in Riverside County — have adopted similar policies. Several others have proposals in the works.

Going to the voters in 2024

A few hours after Bonta filed his lawsuit, the group Protect Kids California filed state paperwork to place **three initiatives** on the fall 2024 ballot that would require schools to notify parents when students alter their gender identity; restrict girls' locker rooms, bathrooms and sports teams to "biological" girls, based on the sex assigned them on their birth certificates; and ban surgery and hormone therapy for transgender minors.

"These initiatives are necessary because we have a Legislature that's out of touch with most Californians, so we're taking these issues directly to the voters," said Jonathan Zachreson, a Roseville City School District board member and president of Students First California, which is backing the initiatives.

> **"This is a desperate attempt to stop us, and quite honestly, it's embarrassing that Bonta is wasting so much time and money on this."**
>
> — SONJA SHAW, CHINO VALLEY SCHOOL BOARD PRESIDENT

The group has until April to gather close to 550,000 signatures per initiative to qualify for the ballot.

At a press conference Monday afternoon on the steps of the Capitol, backers of the initiatives said they were eager to return rights to parents, who they say are best suited to help their children.

"What we are concerned with is who gets to raise our kids, who gets to raise the next generation of students in the state of California," Essayli said. "Is it the government or is it their parents?"

At the end of the event, a group of young activists confronted one of the speakers but was then surrounded by backers of the initiatives. The activists wanted to know why adults were speaking on behalf of youth who'd be affected by the policies.

Impacts on young people

LGBTQ groups said both efforts — the proposed initiatives and the school board actions — are deeply harmful to LGBTQ students, and the state is right to intervene. The 2015 U.S. Trans Survey found that 10% of transgender people had faced violence from a family member due to their gender identity, and 15% had run away or been forced from their homes. In general, LGBTQ youth are more prone to depression and anxiety and are four times as likely to attempt suicide as their peers, according to the Trevor Project, which advocates for LGBTQ youth.

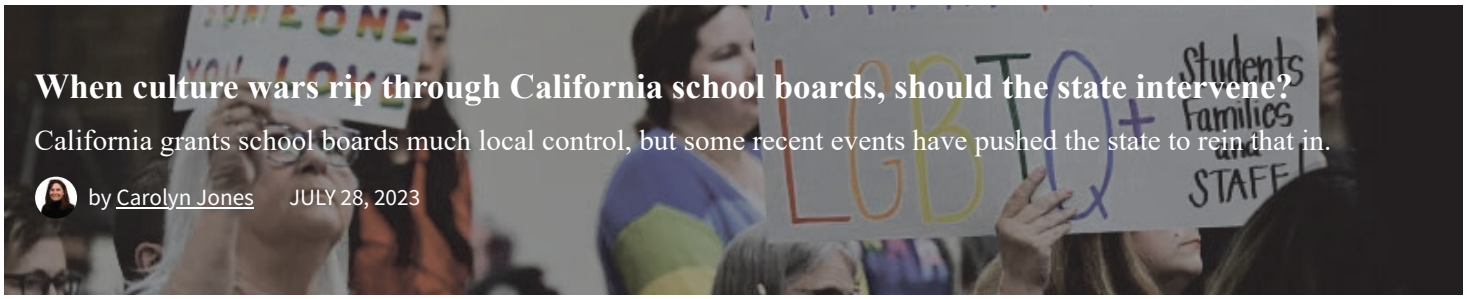
"These anti-LGBTQ policies are spreading like wildfire, and people need to realize the harmful impact that these policies have on young people," said Jorge Reyes Salinas, communications director for Equality California, a civil rights organization focusing on LGBTQ issues. "It's imperative that the state take action. … We're grateful that Bonta filed this suit to uphold the rights and dignity of LGBTQ students."

He said he's confident the ballot initiatives will fail, saying that most Californians oppose "hate and discrimination, especially when it comes to LGBTQ students. But we are ready to continue fighting, and we're not going to stop until we're victorious."

Meanwhile, members of the California Legislative LGBT Caucus, with help from Gov. Gavin Newsom, said they were continuing to craft a bill strengthening the rights of transgender students.

"Recognizing the nuance and complexity of this work, we are continuing to refine our legislative approach in this two-year

committed to assuring that every student feels safe and supported in their school environment and that teachers aren't forced into policing and outing students. We know that lives and careers are at stake here."



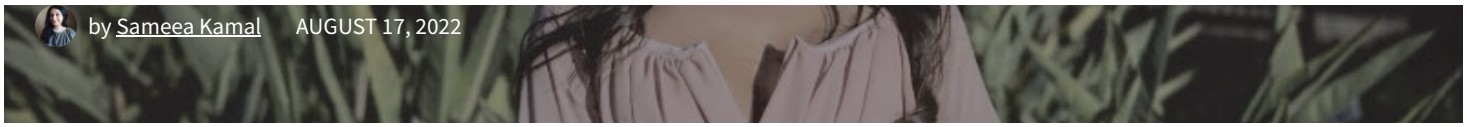


EXHIBIT 6

ROB BONTA
Attorney General of California
MICHAEL NEWMAN
Senior Assistant Attorney General
LAURA L. FAER (SBN 233846)
JAMES F. ZAHRADKA II (SBN 196822)
Supervising Deputy Attorneys General
EDWARD NUGENT (SBN 330479)
GARY D. ROWE (SBN 165453)
ALEXANDER SIMPSON (SBN 235533)
XIYUN YANG (SBN 315187)
DELBERT TRAN (SBN 323993)
Deputy Attorneys General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 229-0110
E-mail: Delbert.Tran@doj.ca.gov
Attorneys for The People of the State of California

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

CHINO VALLEY UNIFIED SCHOOL DISTRICT,

Defendant.

Case No. CIV SB 2317301

THE PEOPLE OF THE STATE OF CALIFORNIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION

Date: 9/6/2023
Time: 8:30 a.m.
Dept: S27
Judge: Hon. Thomas Garza
Trial Date:
Action Filed: August 28, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

REQUEST FOR LEAVE TO FILE OVERSIZED MEMORANDUM

The People of the State of California (the People) request leave of court to file this oversized Memorandum of Points and Authorities. (Rules of Court, rule 3.1113(e).) Good cause supports this request: the People seek emergency relief to prevent psychological, emotional, and physical injury to transgender and gender nonconforming students whom the policy at issue here has targeted for discriminatory treatment. In this Memorandum, the People: present the likelihood of success on the merits across two California constitutional provisions and two statutes; recount the record of animus expressed by the Chino Valley Unified School District (CVUSD or the District); and present the balance of harms, which requires presentation of factual evidence of how subdivisions of Board Policy 5020.1 affect transgender and gender nonconforming students and the school environment more broadly. In order to fully and fairly present these issues, the People request leave to file this oversized memorandum of 20 pages, which exceeds the default 15-page limit set by California Rules of Court, rule 3.1113(d) by five pages.

INTRODUCTION AND RELIEF REQUESTED

Just two-and-a-half weeks before the start of the 2023-2024 school year, CVUSD changed its long-standing policy and adopted Board Policy 5020.1 (Policy 5020.1), forcing school personnel to "out" transgender or gender nonconforming[1] students to their parents, even against the students' express wishes, or even when disclosure would foreseeably cause physical, emotional, or psychological harm to the student. By singling out transgender and gender nonconforming students, Policy 5020.1's forced disclosure provisions violate their California constitutional right to equal protection and statutory protections from discrimination. Policy 5020.1's forced disclosure provisions also infringe upon students' state constitutional right to privacy, depriving them of their fundamental ability to express who they are. And Policy 5020.1 serves no valid end, as preexisting policies already protected parent-child relationships by allowing students to initiate these conversations with their parents; allowing school personnel could encourage students to have these conversations with their parents; and creating counseling

[1] As used herein, the term "gender nonconforming," includes those whose gender identities are not solely male or female (gender non-binary).

programs advising students on how to have these conversations with their parents. The Policy's forced disclosure provisions thus do not foster the parent-child relationship, but instead reflect a discriminatory attack on already marginalized children.

This Court should issue a temporary restraining order and an order to show cause as to why a preliminary injunction should not issue to enjoin the enforcement of the Policy's forced disclosure provisions[2] and protect the District's students, many of whom have already suffered, and will continue to suffer, irreparable harm under the Policy. (See Code Civ. Proc., § 527.)

STATEMENT OF FACTS

I. TRANSGENDER AND GENDER NONCONFORMING STUDENTS ALREADY SUFFER EXTENSIVE DISCRIMINATION AND HARASSMENT THAT IMPACTS THEIR SCHOOLING

Transgender or gender nonconforming individuals are individuals whose gender identity does not align with the sex they were assigned at birth. (Declaration of Dr. Christine Brady (Brady Decl.), ¶ 20.) Though varying expressions of gender identity—including being transgender or gender nonconforming—are natural and rooted in human biology, pervasive gender identity norms have caused many to discriminate against transgender and gender nonconforming people. (See *id*., ¶¶ 20-24, 29, 75-80.)

Transgender and gender nonconforming students, in particular, suffer from psychological, emotional, and physical harassment and abuse. (*Id*., ¶ 75-80 [transgender and gender nonconforming students are disproportionately bullied, physically victimized, or at risk of suicide due to lack of accepting environments].) While schools are typically supportive environments, schools that are not lead to serious harms. Students' experiences in California follow national trends. (*Id.*, ¶¶ 76-78 [transgender students in California reported substantially greater levels of

[2] Specifically, the People request this Court to enjoin the forced disclosure provisions of Policy 5020.1, i.e.: (1) subdivisions 1.(a) and (b) of the Policy in full; (2) subdivision 1.(c) of the Policy, insofar as it applies to transgender or gender nonconforming students' requests to change their name, pronouns, sex, or gender on unofficial records; and (3) subdivision 5 of the Policy, insofar as it applies to transgender or gender nonconforming students (a) requesting to be treated as a gender other than the student's biological sex or gender listed on the student's birth certificate or any other official records or (b) accessing sex-segregated school programs or activities that do not align with a student's biological sex or gender listed on the student's birth certificate or other official records. Hereinafter these provisions are referred to as "Policy 5020.1" or "the Policy."

bullying and physical victimization].) Given such discrimination, transgender students without a safe or affirming environment face greater risk of suicide and other mental health issues. (*Id.*, ¶¶ 32-34, 79-86.) Eighty-six percent of transgender youth reported suicidal thoughts, and 56 percent of transgender youth reported a previous suicide attempt. (*Id.*, ¶ 79.) Conversely, transgender youth who socially transition[3] have more positive mental health outcomes, mirroring their cisgender peers. (*Id.*, ¶¶ 40, 86.)

While many transgender and gender nonconforming students are blessed to have accepting parents, others are not so lucky. One in ten transgender youth surveyed said an immediate family member had been violent toward them because they are transgender, and 15 percent ran away from or were kicked out of their home because they were transgender. (*Id.*, ¶ 58.) Due to those risks, many transgender and gender nonconforming students are not "out" to their immediate families. Fewer than 40 percent of LGBTQ+ youth found their home to be gender-affirming. (*Id.*, ¶ 51.)

Recognizing the risks, the California Department of Education has, since at least 2014, issued statewide guidance generally recommending that school officials and staff members do not "out" students to their parents against the students' wishes. (People's Request for Judicial Notice (RJN), Ex. 9.) Based on this guidance, schools across the State, including CVUSD, have adopted their own versions of that regulation. (*Id.*, Ex. 7.) Indeed, CVUSD had a regulation protecting the privacy of its transgender and gender nonconforming students for at least six years. (*Ibid.*)

II. CHINO VALLEY BOARD POLICY 5020.1 SINGLES OUT TRANSGENDER AND GENDER NONCONFORMING STUDENTS FOR DISCRIMINATORY TREATMENT

A. Two-and-a-Half Weeks Before the Start of School, the CVUSD School Board Enacts Board Policy 5020.1's Forced Disclosure Provisions

The District's policy changed on July 20, 2023, when the District School Board (Board) held a public meeting to discuss adoption of the Policy, which requires school personnel to disclose a student's transgender identity—even against their express wishes—to the student's

[3] Social transitioning is the process by which transgender people publicly affirm their gender identity after coming out. (Brady Decl, ¶ 35.)

parents or guardians whenever school personnel "become aware" of the student's gender identity. (RJN, Ex. 1.)

Dozens of community members spoke at that meeting about the proposal. Those opposing the Policy included current and former LGBTQ+ students, teachers, parents, mental health professionals, and advocates who warned that the policy would endanger students. A current CVUSD student stated, "[t]his policy threatens my safety" and "tells me I don't belong." (RJN, Ex. 6 at p. 80:22-24.) The student explained:

> 52 percent of trans kids feel accepted at school, but only 35 percent feel accepted at home. That leaves a large gap there of kids who feel welcome at school but not at home. Feeling safe at school lessens suicide risk. If a student isn't out to their parent, [the Policy] shoves them "in the closet" at school.

(*Id.* at pp. 79:23-80:1-4.) Another current LGBTQ+ CVUSD student added, "[t]his policy will destroy the lives of kids who should not have to live in fear for being their true selves." (*Id.* at p. 84:13-15.)

Explaining the consequences of forced disclosure, a recent graduate from a CVUSD high school, who self-identified as queer, stated that "[Students] could be kicked out or attacked by their parents both physically and verbally. Their home life may become a living hell because of that [disclosure]." (*Id.* at p. 92:5-8.) Reaffirming those dangers with statistics, one current CVUSD student, who self-identified as queer, testified that "LGBTQ youth who experience parental rejection are eight times more likely to attempt suicide and six times more likely to report major depressive symptoms." (*Id.* at p. 137:10-13.)

Several adults read letters by LGBTQ+ students or individuals who feared for their safety. One read a letter from a transgender student that explained: "If a student is outed to their family without their consent, this could possibly result in abuse, hate crimes, getting kicked out of their homes, [and] in extreme cases, being murdered." (*Id.* at pp. 117:22-118:1.) Another letter from a transgender student raised "the continuous fear and pressure that [Policy 5020.1] put[s] upon all of us trans youth. . . . we're constantly in a state of panic, fearing the consequences of being outed. Some of us may even feel the need to hide our identities." (*Id.* at p. 121:19-122:2.)

A number of parents of current CVUSD students also expressed opposition to the Policy. One parent, who was also a "public school educator with 22 years of experience," identified the policy as "a flagrant attempt to isolate, shame, and otherwise alienate our LGBTQIA students, creating a hostile environment for them in public schools." (*Id.* at p. 81:8-14.) Another parent and former educator stated, "[t]his policy breaks down trust between parents, teachers, and students and exposes our most vulnerable students. . . . and they make all kids feel less safe. Kids cannot learn if they do not feel safe, period." (*Id.* at p. 83:8-14.) One former educator "know[s] students who left the district because they were outed," cautioning that "[t]hey will be put in . . . risky situations; they will be unhoused; they will have . . . suicidal tendencies if this policy is passed." (*Id.* at p. 147:16-22.)

Also speaking in opposition to the Policy, a school counselor on the Board of the National Association of Social Workers' California Chapter warned that the Policy "directly contradicts" social workers' "oath to do no harm in [t]heir work with students," including social workers' commitment to "put our students' safety and trust first." (*Id.* at p. 93:3-25.) Sounding similar notes, another individual speaking in opposition referenced research showing that "if parent notification was mandated," youth are "*less* likely to seek . . . counseling or medical services." (*Id.* at p. 125:11-25, emphasis added.) As one CVUSD teacher put it starkly: "This policy will out a student . . . putting them into a hostile household, which will further their mental degradation to the point where they will harm themselves. . . . This policy will kill somebody." (*Id.* at pp. 129:24-130:1-4.)

Meanwhile, some who spoke in support of the Policy claimed that transgender identity is a "mental illness," a "delusion," or a "damaging ideolog[y]." (See, e.g., *id.* at pp. 42:1-4, 119:18-24, 150:6-14.) After public comment, the Board echoed these statements. Board Member 1 stated, "there's always been man, woman; and then you have this transgender [identity] . . . it is really a dismantling of our humanity. And it is an illusion; it is a mental illness." (*Id.* at p. 176:7-12.) He expressed fear that "women are being erased" and claimed that the Policy was needed to "sav[e] children" from transgender identities "because we are losing a lot of them," likening the issues related to gender identity to a "death culture." (*Id.* at p. 176:24-25, 180:23-24.) Concluding,

Board Member 1 proclaimed, "[i]t's not going to end with transgenderism. . . . You got to put a stop to it." (*Id.* at p. 183:6-8.)

The Board President expressed "appreciat[ion]" for "each one of our board member's viewpoints," offering no repudiation of Board Member 1's comments. (*Id.* at p. 194:22-23.) She asserted that transgender and gender nonconforming individuals needed "non-affirming" parental actions so that they can "get better" (*id.*, p. 198:4-7); earlier in the meeting, she claimed the State Superintendent, by supporting policies protecting transgender or gender nonconforming students, was "proposing things that pervert children." (*Id.* at p. 75:1-6.) Board Member 2 agreed that the Policy was needed, stating that it was necessary to counter Karl Marx's call, in the *Communist Manifesto*, "for the abolition of the family" and prevent the creation of "the, quote unquote, 'new man'." (*Id.* at pp. 185:25-186:10.)

Board Member 4, the lone dissenter, expressed concern that "[i]f this policy passes, we will have, effectively, shut the door on students confiding to a staff member or a teacher," preventing the school from being "a supportive place." (*Id.* at pp. 188:13-22.) "So how good is this notification process if these students are, effectively . . . 'throw[n] . . . back into the closet . . . slamming the door?'" (*Id.* at pp. 189:7-8.)

The Board voted 4-1 to approve the Policy.

B. The Policy

The Policy states, in part, that a school's "[p]rincipal/designee, certificated staff, and school counselors" shall notify parents or guardians "in writing, within three days" whenever "any District employee, administrator, or certificated staff, becomes aware" that a student is:

> (a) Requesting to be identified or treated, as a gender . . . other than the student's biological sex or gender listed on the student's birth certificate or any other official records. This includes any request by the student to use a name that differs from their legal name (other than a commonly recognized diminutive of the child's legal name) or to use pronouns that do not align with the student's biological sex or gender listed on the student's birth certificate or other official records.
>
> (b) Accessing sex-segregated school programs and activities, including athletic teams and competitions, or using bathroom or changing facilities that do not align with the student's biological sex or gender listed on the birth certificate or other official records.

(RJN, Ex. 1.) In addition, the Policy requires tracking and recording of requests made by transgender and gender nonconforming youth and notice of changes in official records to parents. (*Id.*, Ex. 1, subd. 1(c) and 5.) The Policy also contains a paragraph identifying purported exceptions to its forced disclosure requirements:

> For purposes of this Board policy, Family Code Section 6924, Health and Safety Code Section 124260, and Education Code Section 49602(C), inclusion of parent(s)/guardian(s) is appropriate unless specifically prohibited by law. Nothing in this policy affects the obligations of the District's employees, administrators, and certificated staff as mandated reporters under Article 2.5 of the Child Abuse and Neglect Reporting Act Sections 11164-11174.3 of the Penal Code, and the District Policy 5141 and Administrative Regulations 5141.4(a)).

(*Id.*, Ex. 1, subd. 6.) According to a presentation by CVUSD's counsel at the July 20 Board meeting, CVUSD believes that this paragraph provides two exceptions to its forced disclosure policy: (1) when students 12 years old or older disclose their gender identity to a counselor or mental health professional during counseling or treatment; or (2) "if there is a reasonable suspicion that child abuse or child neglect could take place as a result." (*Id.*, Ex. 6, pp. 67:24-68:21, 69:16-21, 71:8-10.)

The referenced statutes do not provide the exceptions claimed by CVUSD's counsel: *First*, Article 2.5 of the Child Abuse and Neglect Reporting Act requires school personnel to report known or suspected child abuse to a child welfare agency or police department—it does not prohibit a school staff member from disclosing a student's transgender identity, even if the staff member knows that disclosure could cause harm. (See generally Penal Code, §§ 11164-11174.3.)[4] CVUSD Policy 5141.4 and Administrative Regulation 5141.4(a) similarly refer to mandatory reporting obligations, while Policy 5141 has no relevance; none of these policies or regulations prohibit disclosures that might cause abuse or neglect. (RJN, Exs. 2-4.) *Second*, Family Code Section 6924 and Health and Safety Code Section 124260, which address mental health treatment for minors, both default to including involvement of parents, protecting the privacy of a minor only at the mental health professional's discretion and for those 12 years or

[4] Section 11164, subdivision (b), of the Child Abuse and Neglect Reporting Act does not impose any legal duty that would prohibit disclosure. (See *Jacqueline T. v. Alameda Cty. Child Protective Servs*. (2007) 155 Cal.App.4th 456, 470.)

older. *Third*, while Education Code Section 49602 provides that personal information disclosed by a pupil 12 years or older while "receiving counseling from a school counselor . . . is confidential," the Policy cites to the provision's subdivision (c), which permits counselors to *report* information to parents if there is reasonable cause to "believe that disclosure is necessary to avert a clear and present danger to the health, safety, or welfare of the pupil."

C. The Attorney General's Investigation of the Policy Finds Harm Inflicted on Students

On August 4, 2023, pursuant to the Attorney General's authority under the state constitution and Government Code, the Department of Justice (DOJ) notified the District it was opening an investigation to determine the legality and effect of Policy 5020.1. (Declaration of Delbert Tran (Tran Decl., ¶ 8; Cal. Const., art. V, § 13; Gov. Code, §§ 11180 et seq.) As part of the investigation, DOJ interviewed District students, parents, teachers, and community members regarding Policy 5020.1 and its effects. (*Id.*, ¶ 9.)[5]

The Rainbow Youth Project, an LGBTQ+ organization working in Chino Valley, established a crisis hotline to collect reports related to the enactment of the Policy. (Declaration of Kristen Johnson (Johnson Decl.), ¶ 4.) It has communicated with and received over 60 reports from current students, parents, teachers, and community members in the District who fear harassment, bullying, and targeting based on their gender identity, expression, and/or nonconformity at school as a result of the Policy. (*Id.*, ¶ 5.) One student also identified an increased risk of suicidal ideation as a result of the Policy's passage. (*Id.*, ¶ 6(e).)

Several current teachers in the District aver that school personnel have already disclosed several students' gender identity to parents or guardians without the student's consent (see, e.g., Declaration of Andrea McFarland (McFarland Decl.), ¶¶ 16, 43.) A Chino Hills High School teacher, Gary Crow, states that one of his students was outed within the first two days of the school year, leaving her in tears. (Declaration of Gregory Crow (Crow Decl.), ¶ 21, 22.)

[5] Under Government Code section 11181, subdivision (h), DOJ may "[p]resent information or evidence obtained or developed from the investigation of unlawful activity to a court . . . in connection with any action or proceeding."

Current teachers also describe how the Policy has created a discriminatory environment that terrorizes transgender and gender nonconforming students. Andrea McFarland, another Chino Hills High School teacher, shared that since the enactment of the Policy, LGBTQ+ students are having hushed conversations about "which teacher might report them." (McFarland Decl., ¶ 46.) She described students telling her: "I feel like I'm not wanted." (*Id.*, ¶ 48.) One of her students, Jordan,[6] expressed fear that McFarland will now be forced to out Jordan to his parents—one of whom was hostile toward the LGBTQ+ community, had "an aggressive personality," and Jordan "did not feel safe." (*Id.*, ¶ 26, 27.) Crow, too, shared observations of a "significant change" in students at his high school. (Crow Decl., ¶ 31.) In previous years, students in the student-run LGBTQ+ club had "express[ed] their gender identity and other parts of their personality openly," with "enthusiasm," "energy and excitement." (*Id.*, ¶ 33.) After the Policy, students are now "withdrawn" and "no longer . . . speak[] up" about "LGBTQ+ rights." (*Id.*, ¶ 34.)

Kristi Hirst, a former educator and parent of current students at CVUSD, spoke numerous times with a student at Chino Hills High School, Morgan, who expressed fear of severe physical or emotional harm that the Policy would cause him. (Declaration of Kristi Hirst (Hirst Decl.), ¶¶ 16, 20-22.) Though Morgan had previously participated in his school's "Gender Support Plan"—which provided accommodations for his gender identity at school—he became fearful enough that he asked Hirst whether he should delete that plan (and all the accommodations included) before the start of the school year to avoid the even greater harm he would experience from forced disclosure. (*Id.*, ¶ 19.) Morgan also asked to have an anonymous statement read to the School Board at its July 20, 2023 meeting, stating that when he first "came out to a parent" about his transgender identity," he was "ridiculed heavily, yelled at, and called names" and "vile words . . . in public." (*Id.*, ¶ 21.)

Chris, a current student in the District, confirmed the imminent threats that he and other transgender students faced under the Policy. When a teacher refused to recognize Chris's gender identity, it caused him to withdraw completely from participating in class. (Declaration of Chris R. (Chris R. Decl.), ¶¶ 11-13.) Chris attended the July 20 Board meeting, and when they heard

[6] Students are referred to by pseudonyms herein to protect their privacy and safety.

comments made by Board member 1—that transgender identity is a "delusion" or "mental illness"—after several students, like Chris, had made their presence known during public comment, Chris felt that the Board member "was speaking to us, the trans kids in the audience . . . like he wanted us to know that we were an illness that needed to be cured. That we needed to be exterminated." (*Id*., ¶ 26.) The Board's policy and its statements made Chris R. feel physically threatened. (*Id*., ¶¶ 27, 29, 31, 40-46.)

Another transgender student informed Chris that though they usually ask their teachers to call them by a gender affirming nickname, the student was too afraid to do so this year, and was "struggling with depression and anxiety." (*Id*., ¶¶ 33-35.) Chris echoed that feeling, explaining how "extremely draining" it was to "hid[e] who I was . . . like I had a thousand pound weight on my shoulders." (*Id*., ¶ 36.) In Chris's words, "No kid wants to have to waste time that could be spent finishing their homework to attend a Board meeting to fight for their right to exist. . . . We don't deserve to be shoved back in the closet, forever afraid to express who we are." (*Id*., ¶¶ 45, 47.)

On August 14, 2023, the Attorney General served a letter on the District requesting the District halt implementation or enforcement of the Policy until after the District adopted an Administrative Regulation related to the policy. (Tran Decl., ¶ 14.) The District rejected the Attorney General's request. (*Id*., ¶ 16.)

To date, through its investigation of the Policy, DOJ has found, within the first two weeks of school, that the Policy has already forced school personnel to out transgender and gender nonconforming students, causing harm, and that the Policy threatens further immediate risk of severe, irreparable physical, emotional, and psychological harm to students. (*Id*., ¶ 4.)

ARGUMENT

The People seek a temporary restraining order and preliminary injunction to halt the forced disclosure provisions of CVUSD's Policy 5020.1. (See *ante*, at p. 8 fn. 2.) This policy has caused real, substantial harm to some of the State's most vulnerable children and youth—transgender and gender nonconforming students—and will cause further harm if this Court does not enjoin it. The Policy singles out transgender and gender nonconforming students for

discriminatory treatment. In doing so, it violates the California Constitution's guarantee of equal protection (Cal. Const. Art. 1, § 7); statutory prohibitions of discrimination based on gender expression and gender identity (Ed. Code, § 220; Gov. Code, § 11135); and the California Constitution's guarantee of privacy and autonomy (Cal. Const. Art. 1, § 1).

When deciding whether a temporary restraining order or preliminary injunction is appropriate, courts generally consider "two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*Tulare Lake Canal Co. v. Stratford Pub. Util. Dist.* (2023) 92 Cal.App.5th 380, 396 [cleaned up]; see also *Butt v. St. of Cal.* (1992) 4 Cal.4th 668, 677–678.) The greater Plaintiff's showing on one, the less must be shown on the other to obtain an injunction. (*Butt*, *supra*, 4 Cal.4th at p. 678.) Here, the Policy flagrantly violates state constitutional and antidiscrimination law, and the People's strong likelihood of success on the merits alone justifies interim relief. Moreover, the balance of harm weighs sharply in the People's favor, as interim relief must be granted to protect the State's students from the physical, psychological, or emotional trauma that the Policy has already inflicted, and continues to inflict, on transgender and gender nonconforming students.

I. THE PEOPLE HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Policy Violates California's Equal Protection Clause

1. The Policy expressly discriminates based on gender identity, requiring strict scrutiny review

Like all other people, transgender and gender nonconforming individuals have equal value and inherent dignity, deserving equal protection under the law. Yet the Policy explicitly and textually discriminates against them, treating them differently based on gender identity than their cisgender peers.[7] Education is a fundamental right in California under the equal protection clause (*Serrano v. Priest* (1971) 5 Cal.3d 584, 608–09, 616–17), and such discrimination and harassment denies or limits these students' equal access to education. Transgender or gender nonconforming

[7] Because the text of the Board's policy itself treats students differently based on their gender identity, there is no need to ferret out discriminatory intent from a facially neutral policy, using the method in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*. (1977) 429 U.S. 252.

individuals constitute a protected class under California's equal protection clause, and any governmental policy subjecting such individuals to disfavorable treatment is invalid unless it survives strict scrutiny. This is so for two independent reasons.

First, *gender identity* is an aspect of *gender*. (See Civ. Code, § 51, subd. (e)(5); Gov. Code, § 12926, subd. (r)(2); Ed. Code, § 210.7 [all defining "[s]ex" to include a person's "gender identity and gender expression"].) In California, discrimination based on gender is fully suspect, subject to strict scrutiny. (See *Catholic Charities of Sacramento, Inc. v. Sup. Ct.* (2004) 32 Cal.4th 527, 564.) Accordingly, the California Court of Appeal has treated discriminatory classifications based on gender identity as discrimination based on gender. (*Taking Offense v. State* (2021) 66 Cal.App.5th 696, 725–726, review on other grounds granted Nov. 10, 2021, S270535.) The United States Supreme Court recently echoed that conclusion, in a decision interpreting Title VII. (*Bostock v. Clayton Cty., Georgia* (2020) 140 S.Ct. 1731, 1741 ["[I]t is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex"].) Even before *Bostock*, "[m]any courts . . . have held that various forms of discrimination against transgender individuals constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes." (*Grimm v. Gloucester Cty. Sch. Bd.* (4th Cir. 2020) 972 F.3d 586, 608; see also *Hecox v. Little* (9th Cir., Aug. 17, 2023, No. 20-35813) 2023 WL 5283127, at *12 ["[D]iscrimination on the basis of transgender status is a form of sex-based discrimination. . . . subject to heightened scrutiny"].)

Second, discrimination against transgender and gender nonconforming individuals is subject to strict scrutiny because—based on the historical adverse treatment they have endured and the arbitrariness of that treatment—they are a protected class, just as the California Supreme Court held with respect to lesbian, gay, and bisexual individuals. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 843–844.) The invidious and prejudicial treatment to which transgender people have historically been subject is beyond dispute. (See *Whitaker By Whitaker* (7th Cir. 2017) 858 F.3d 1034, 1051 ["There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity"]; *Grimm*, *supra*, 972 F.3d 586, 611 [same].) And

being transgender bears no relationship to one's ability to perform or contribute to society. (See, e.g., *id*. at p. 612, citation omitted; *M.A.B. v. Bd. of Ed. of Talbot Cty.* (D. Md. 2018) 286 F.Supp.3d 704, 720.)

2. The Policy cannot survive strict scrutiny

The Policy can survive strict scrutiny only if the District meets its "burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 832 [cleaned up].) The District cannot meet its burden here.

To begin, members of the School Board who voted to enact the Policy made invidious statements—immediately before voting for adoption—that establish that the Board lacked a compelling purpose. Three of the four School Board members who voted to enact the policy stated their intent to discriminate against transgender and gender nonconforming students in the District. (See *ante*, at pp. 11–12.) Their goal was to "put a stop to" transgender identities, which they viewed as a "mental illness"; to be "non-affirming" so that transgender or gender nonconforming children could "get better." (*Ibid*.) Hostility to transgender individuals and those who do not conform to stereotypical gender norms lies at the heart of the policy. (Cf. *Grimm v. Gloucester Cty. Sch. Bd.*, *supra*, 972 F.3d 586, 615 [discriminatory transgender restroom policy failed to satisfy intermediate scrutiny because it was "adopted in the context of two heated Board meetings filled with vitriolic, off-the-cuff comments," revealing "misconception and prejudice"]; *Lyle v. Warner Bros. Television Prods*. (2006) 38 Cal.4th 264, 280–281 ["hostile, sexist statements"—including "derogatory comments"—"relevant to show discrimination on the basis of sex"]; *Lynn v. Regents of Univ. of California* (9th Cir. 1981) 656 F.2d 1337, 1343 fn. 5 [decisions motivated by discriminatory attitudes relating to sex are probative of discrimination].) These are not legitimate—much less compelling—governmental interests.

Moreover, the explicit text of the Policy itself reveals an invidious intent, stating that being transgender is a "mental health" issue that requires parental intervention "at the earliest possible time" because it could give rise to "instances of self-harm." (RJN, Ex. 1, at p. 1.) The policy thus relies on "outdated social stereotypes," which has "result[ed] in invidious laws or practices"—

precisely what strict scrutiny is designed to identify and counteract. (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 18.)

And as to the test's second prong, the Policy is not narrowly tailored to any non-discriminatory interest it might purport to advance. For instance, if CVUSD claimed the Policy intended to support students by ensuring parental support as they navigate their gender identity, the provisions of the Policy both belie and fail to fit that purpose.

First, the Policy lacks an exception for—or even consideration of—children who may face emotional, physical or psychological abuse at home as a result of disclosure of a student's gender identity to parents. (See *supra*, at pp. 6-7.) CVUSD's counsel claimed that the Policy creates an exception to forced disclosure where there is reasonable risk of parental abuse, yet the policy in fact provides no such exception, citing only to a reporting statute that provides no prohibition on disclosure. (*Ibid.*) *Second*, any narrow tailoring claimed by the District is further contradicted by the harm the Policy has inflicted and is continuing to inflict upon current CVUSD students. (See, e.g., Brady Decl., ¶¶ 54-75, 81-82, 89-95; Chris R. Decl., ¶¶ 22-47; Crow Decl., ¶¶ 19-36; McFarland Decl., ¶ 33-37, 43-58.) *Third*, the forced disclosure policy fails to accomplish even its stated goal of catalyzing parental intervention as early as possible; rather than increase student openness about their gender identity, it has the effect of caging students within themselves, quashing their expressions of gender identity at school for fear of forced disclosure. (See, e.g., Chris R. Decl., ¶¶ 32-38; Crow Decl., ¶ 34; McFarland Decl., ¶¶ 33-36.)

Because the District can neither articulate a non-invidious interest for Policy 5020.1 nor show how the policy is necessary to further non-discriminatory interests, the People are likely to prevail in asserting that the Policy fails strict scrutiny and violates equal protection. (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 831.)

B. The Policy Violates Statutory Prohibitions on Discrimination Based on Gender, Gender Expression, and Gender Identity

For the same reasons the Policy violates California constitutional equal protection, the Policy also violates California's Education Code and Government Code provisions that expressly prohibit discrimination in public schools on the basis of gender identity and gender expression.

Section 220 of the Education Code states, "No person shall be subjected to discrimination on the basis of . . . *gender, gender identity, [or] gender expression*" in any educational program that receives state financial assistance. (Emphasis added.) Government Code section 11135, subdivision (a), likewise provides that "no person in the State of California shall, on the basis of sex . . . be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that" receives state financial assistance. Subdivision (c) defines "sex" to "include[] a person's gender identity and gender expression."

As with equal protection, the Policy runs afoul of Education Code section 220's and Government Code section 11135's express commands not to discriminate on the basis of gender identity and gender expression. A law that categorically "presum[es]" the need for forced disclosures for one group but not another "reflect[s] . . . unexamined role stereotypes," plainly betraying a "statute . . . discriminatory on its face." (*Arp v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 395, 406–407.) Where "a plaintiff demonstrates that the challenged action involves disparate treatment through explicit facial discrimination, or a facially discriminatory classification, a plaintiff need not prove the malice or discriminatory animus of a defendant." (*Cmty. Sers., Inc. v. Wind Gap Mun. Auth.* (3d Cir. 2005) 421 F.3d 170, 177 [cleaned up].) Here, the Policy targets one group, and "that group alone" for discriminatory treatment, violating state antidiscrimination law. (*Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 89 [Unruh Act]; see also *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 35 [Unruh Act violation because "[sex]-based . . . differential treatment is precisely the type of practice prohibited"]; *Bangerter v. Orem City Corp.* (10th Cir. 1995) 46 F.3d 1491, 1500 [where policy "facially single[s] out" group and "appl[ies] different rules to them," it directly reveals "discriminatory intent and purpose"].)[8] This is a case in which "the decisionmaker . . . selected . . . a particular course of action . . . at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." (*Personnel Adm'r of Mass. v. Feeney* (1979) 442 U.S. 256, 279 [cleaned up].) The Policy thus violates these statutory antidiscrimination provisions because it burdens students with forced

[8] "[P]ertinent federal precedent" is persuasive when applying similar state antidiscrimination statutes. (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 354.)

disclosure based solely on gender identity and expression. And, though a showing of discriminatory animus is entirely unnecessary, the School Board also adopted the Policy for invidious reasons. (See *ante*, at pp. 11–12.)

This is a simple case of unlawful discrimination. (Cf. *Cnty. of Santa Barbara v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 211, 215.) "What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are" transgender and gender nonconforming. (*U.S. v. Windsor* (2013) 570 U.S. 744, 774.) The People have a substantial likelihood of prevailing on the merits of their statutory discrimination claims.

C. The Policy Violates Students' California Constitutional Right to Privacy

The California Constitution's express protection of the right to privacy (Cal. Const. Art. I, § 1) includes a guarantee of "autonomy privacy." (*Sheehan v. S.F. 49ers, Ltd*. (2009) 45 Cal.4th 992, 999.) The latter includes "making intimate personal decisions or conducting personal activities without observation, intrusion or interference." (*Ibid.*)

To demonstrate a violation of privacy rights, a plaintiff must show: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Mathews v. Becerra* (2019) 8 Cal.5th 756, 769.) If a plaintiff shows all three elements, a defendant must show that "the invasion of privacy is justified because it substantively furthers one or more countervailing interests." (*Ibid.*) A plaintiff, in turn, "may rebut" the assertion of countervailing interests by showing "there are feasible and effective alternatives . . . which have a lesser impact on privacy interests." (*Ibid.*) When a case involves "an obvious invasion of an interest fundamental to personal autonomy," a defendant must establish a "compelling interest" to overcome an individual's privacy interest (*ibid.*) and that the infringement is necessary to serve that compelling interest (*Lungren*, *supra*, 16 Cal.4th at pp. 356–357).

1. Minors have a legally protected and reasonable expectation of privacy in their gender identity, a core aspect of their autonomy

A student's gender identity is a legally protected autonomy interest. "[M]inors, as well as adults, possess a constitutional right of privacy under the California Constitution." (*Poway Unified Sch. Dist. v. Sup. Ct. (Copley Press)* (1998) 62 Cal.App.4th 1496, 1505.) And courts have repeatedly affirmed that an individual has a constitutionally protected privacy interest in their sexual orientation or gender identity. (See, e.g., *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 444–445 [describing "sexual orientation and conduct" as legally protected privacy interest]; *Powell v. Schriver* (2d Cir. 1999) 175 F.3d 107, 111–112 [transgender identity is an "excrutiatingly [*sic*] private and intimate" detail about oneself protected by the right to privacy].)

Moreover, the Policy intrudes upon a core aspect of students' privacy and autonomy—their ability to express their identity. In *American Academy of Pediatrics v. Lungren*, the California Supreme Court held that a law requiring parental consent before a minor could obtain an abortion violated minors' constitutional right to privacy. (*Lungren*, *supra,* 16 Cal.4th 307.) While parents generally have the "legal right (and obligation) to act on behalf of their child to protect their child's rights and interests," the Court observed that "[c]hildren are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent." (*Id.* at pp. 335, 337.) Because the decision to continue or terminate a pregnancy:

> has such a substantial effect on a pregnant minor's control over her personal bodily integrity, has such serious long-term consequences in determining her life choices, is so central to the preservation of her ability to define and adhere to her ultimate values regarding the meaning of human existence and life . . . we conclude that a minor who is pregnant has a protected privacy interest under the California Constitution.

(*Id.* at p. 337.) As with abortion, a student has "fundamental interests of their own" in their gender identity "that may diverge from the interests of the parent." (*Id.* at p. 337, citation omitted.) A student's gender identity will likewise implicate the student's "control over [their] personal bodily integrity," "serious long-term consequences in determining [their] life choices," and an aspect of their identity "so central" to a student's "ability to define" their life. (*Id.* at p. 337; see also Brady Decl., ¶ 15 ["Gender identity is not a choice. It is an essential part of one's

identity and being"]; see also *Mathews*, *supra*, 8 Cal.5th 756 at p. 774 [citing *Lungren*, *supra*, 16 Cal.4th at pp. 326, 338–339].)

For similar reasons, transgender students also have a reasonable expectation of privacy in their gender identity. A student's disclosure of their gender identity to persons of their choosing at school does not negate their reasonable expectation of privacy in their gender identity generally. (See *Mathews*, *supra*, 8 Cal.5th at p. 769 [requiring reasonable expectation of privacy "in the circumstances"].) "In a society in which individuals play multiple, often conflicting" social roles, people may still "fear exposure . . . to those closest to them . . . . The claim is not so much one of total secrecy as it is of the right . . . to choose who shall see beneath the quotidian mask." (*Hill v. Nat. Coll. Athletic Assn.* (1994) 7 Cal.4th 1, 25; see Brady Decl., ¶¶ 43-47 [only 21 percent of LGBTQ youth in California were "out" to all caregivers]; *C.N. v. Wolf* (C.D. Cal. 2005) 410 F.Supp.2d 894, 903 [student had reasonable expectation of privacy in sexual orientation with respect to parents, even if publicly homosexual at school].) Transgender and gender nonconforming students have a reasonable expectation of privacy with respect to how and when to disclose their identity.

2. The Policy's forced disclosure requirements seriously invade students' privacy and autonomy

The Policy constitutes a serious invasion of privacy. (See *Hill*, *supra*, 7 Cal.4th at p. 37.) A student's gender identity concerns "the most intimate aspects" of "thought and behavior" such that "[m]andatory reporting of such information is a severe invasion." (*Mathews*, *supra*, 8 Cal.5th at p. 780.) In a related context, California courts have described revelations of sexual orientation as a serious invasion of privacy, as disclosure of "sexual orientation and conduct" . . . "could prove to be highly embarrassing . . . and/or disruptive" of the victim's "relationship[s]," causing "great damage to both [the victim's] self-concept and to his professional image." (*Pettus*, *supra*, 49 Cal.App.4th at p. 445.)

Forced disclosure of a person's gender identity constitutes a violation of privacy that is just as serious as the forced disclosure of a person's sexual orientation. It can cause "great damage" to the individual, causing even greater harm than the career harm recognized by

California courts as a "serious invasion." (See, e.g., *Mathews*, *supra*, 8 Cal.5th at p. 780; see also Brady Decl., ¶¶ 54-64.) "LGBTQ youth who experience parental rejection," for example, "are eight times more likely to attempt suicide and six times more likely to report major depressive symptoms." (Brady Decl., ¶ 62.) And CVUSD teachers, students, and parents all report that the looming threat of forced disclosure has destroyed students' ability to freely express their core identity. (See, e.g., Chris R. Decl., ¶¶ 32-38; Crow Decl., ¶ 34; Hirst Decl., ¶ 16-25; McFarland Decl., ¶¶ 33-36.) In doing so, the policy seriously invades students' ability to make "intimate personal decisions or conduct[] personal activities without observation, intrusion or interference" (*Sheehan*, *supra*, 45 Cal.4th at p. 999), "shov[ing students] back in the closet," making them "forever afraid to express who [they] are." (Chris R. Decl., ¶ 47.)

3. The Policy does not further a compelling interest, and feasible and effective alternatives had already protected families and students with lesser intrusions upon privacy

As explained above, Policy 5020.1 cannot be justified by any compelling interest, and contradicts the aims of any such interest. (See *ante*, at pp. 19–20.) Further, feasible and effective alternatives better protect families, parents, and students—as enacted in many other school districts in the State. Under the California Department of Education's guidelines, districts have adopted policies protecting the privacy of transgender students, but encouraging the involvement of families and parents wherever possible, while equipping students with the tools to start these conversations in the time and manner of the family's choosing. (See, e.g., RJN, Ex. 9.) To the extent CVUSD is concerned with child safety, the preexisting policy in CVUSD—and in most other school districts—already included an exception that allowed disclosure where necessary to protect the safety and wellbeing of the child. (See, e.g., *id.*, Exs. 5, 7.) The Policy's forced disclosure provision thus singles out transgender students for little reason other than to apply discriminatory harm.

II. THE BALANCE OF HARMS REQUIRES INTERIM RELIEF TO PREVENT IRREPARABLE PHYSICAL, EMOTIONAL, AND PSYCHOLOGICAL HARM TO THE STATE'S STUDENTS

Because CVUSD's constitutional and statutory violations are apparent under California law, this Court need not reach the balance of harms. (*Pleasant Hill Bayshore Disposal, Inc. v.*

Chip-It Recycling, Inc. (2001) 91 Cal.App.4th 678, 696.) Even so, the balance of harms clearly calls for the Court to issue interim relief to protect the District's students.

The Policy has already caused irreparable physical, emotional, and psychological harm to students. (See *ante*, at pp. 14–16.) With each day, it continues to threaten students, both through future forced disclosures that will take place, and through the psychological and mental fear and terror it inflicts upon transgender students who can no longer openly express their identities without fear of being outed. (See *Am. Acad. of Pediatrics v. Van de Kamp* (1989) 214 Cal.App.3d 831, 847 [affirming preliminary injunction where trial court found a likelihood that law "will not protect minors from needless physical, psychological or emotional harm"]; see also *Butt*, *supra*, 4 Cal.4th 668, 693 [declarations by "District teachers" and experts establishing "severe and immediate academic disruption" established sufficient harm to merit preliminary injunction].)

Meanwhile, any claimed harm by the District is illusory. Preexisting policies already protected parent-child relationships by involving parents where possible, while still protecting the privacy of vulnerable children. (See *Van de Kamp*, *supra*, 214 Cal.App.3d 831, 848; cf. *Arizona Dream Act Coal. v. Brewer* (9th Cir. 2014) 757 F.3d 1053, 1068 [the "irreparable nature of Plaintiffs' injury is heightened by Plaintiffs' young age"].) Without the Policy, students would remain free, as they always had been before, to initiate these conversations with their parents. School personnel would remain free, as before, to encourage students to have these conversations with their parents. School districts would remain free, as before, to create counseling and support programs advising students on how to have these conversations with their parents. The Policy's forced disclosure provisions thus do not foster the parent-child relationship, but instead reflect a discriminatory attack on already marginalized children. (See *ante*, at pp. 11–12, 17–22.)

CONCLUSION

For these reasons, the court should grant the People of the State of California's motion.

Dated: August 28, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
MICHAEL L. NEWMAN
Senior Assistant Attorney General
LAURA L. FAER
JAMES F. ZAHRADKA II
Supervising Deputy Attorneys General

Delbert Tran

DELBERT TRAN
Deputy Attorney General
Attorneys for the People of the State of California

EXHIBIT 7

LEN GARFINKEL, State Bar No. 114815
General Counsel
BRUCE YONEHIRO, State Bar No. 142405
Assistant General Counsel
CHRISTOPHER MANDARANO, State Bar No. 263625
Deputy General Counsel
California Department of Education
1430 N Street, Suite 5319
Sacramento, California 95814
Telephone: 916-319-0860
Facsimile: 916-322-2549
Email: cmandarano@cde.ca.gov
Attorneys for Proposed Amicus Curiae California Department of Education

(The California Department of Education is a Public Entity and Exempt from Filing Fees Pursuant to Gov. Code § 6103)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA Plaintiffs, v. CHINO VALLEY UNIFIED SCHOOL DISTRICT, Defendants.	Case No. CIV SB 2317301 EX PARTE APPLICATION OF THE CALIFORNIA DEPARTMENT OF EDUCATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION Accompanying Documents: [PROPOSED] BRIEF OF AMICUS CURIAE OF CALIFORNIA DEPARTMENT OF EDUCATION IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION; DECLARATION OF CHRISTOPHER MANDARANO; [PROPOSED] ORDER Hearing Date: October 19, 2023 Time: 10:00 a.m. Department: S1 Judge: Hon. Michael A. Sachs [Dept. S28] Action Filed: August 28, 2023 Trial Date: February 26, 2024

To all parties and their attorneys of record:

APPLICATION TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 8.200(c) of the California Rules of Court, the California Department of Education (CDE) applies *ex parte* for leave to file a brief as *amicus curiae* in this matter, in support of Plaintiff's motion for preliminary injunction, to be heard on October 19, 2023, at 10:00 in Department S1 of the San Bernardino Justice Center. [1] A copy of the proposed *amicus curiae* brief is lodged/filed with this application as **Exhibit A.** Neither of the parties in this matter have authored the proposed *amicus curiae* brief, nor made any monetary contributions intended to fund the brief. (Rule 8.200(c)(3).

THE CDE'S PROPOSED AMICUS CURIAE BRIEF WILL ASSIST THE COURT IN ITS DETERMINATION AS TO THE ISSUANCE OF A PRELIMINARY INJUNCTION

The CDE is responsible for overseeing the education of all students, from early childhood to adulthood, who attend public schools in the State of California. An environment that is safe for all students and is free from discrimination is a critical component of the education of California's students.

An *amicus curiae* brief is relevant in this matter for multiple reasons. The ability of students to access all aspects of a public education in California is implicated by the subject matter of this litigation and the Plaintiff's motion for a preliminary injunction. As the state agency with ultimate responsibility for the education of California's students, the CDE has a legitimate interest in a judicial determination as to the legality of the type of policy at issue in this matter.

More specifically, Defendant Chino Valley Unified School District (CVUSD) recently adopted a policy which mandates that school personnel inform the parents if their student requests to be identified or treated as a gender other than their biological sex or gender. This blanket forced 'outing'

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[1] The California Rules of Court do not specify a procedure for seeking permission to file an amicus curiae brief in Superior Court. Counsel for amici curiae have therefore followed the rules governing appellate litigation. In addition, as directed by the clerk of Department S28, counsel file this ex parte application for leave to file the proposed amici curiae brief. The CDE previously filed a "Request for Leave" to file an amicus curiae brief in the previous department, S-27, on September 26, 2023, and re-filed its "Request" on October 2, 2023, in Department S-23, but re-files it here with a formal "Ex Parte Application.

policy violates students' constitutional rights to privacy and to be free from discrimination based on protected characteristics.

Moreover, CVUSD's policy not only fails to *advance* the mission of the CDE and the educational pursuits of students but, instead, detracts from those goals. If CVUSD is permitted to implement and enforce their policy, it will violate the privacy rights of transgender or gender non-conforming students, result in discrimination against such students, and have the overall effect of eroding what should be a safe and supportive learning environment for all students.

For these reasons, and as more fully discussed in the proposed *amicus curiae* brief, the CDE requests that this Court enter an order permitting the filing of the CDE's attached *amicus curiae* brief. The proposed *amicus curiae* brief is attached to this motion as **Exhibit A,** the supporting Declaration of Christopher Mandarano is attached to this motion as **Exhibit B,** and the proposed order granting the CDE's *ex parte* application to file its *amicus curiae* brief is attached to this motion as **Exhibit C.**

Dated: October 16, 2023

Respectfully submitted,

LEN GARFINKEL
General Counsel
BRUCE YONEHIRO
Assistant General Counsel

By: Christopher N. Mandarano

CHRISTOPHER MANDARANO
Deputy General Counsel
Attorneys for California Department of Education

EXHIBIT A

LEN GARFINKEL, State Bar No. 114815
General Counsel
BRUCE YONEHIRO, State Bar No. 142405
Assistant General Counsel
ANDREA M. CHRISTENSEN, State Bar No. 165029
Deputy General Counsel
California Department of Education
1430 N Street, Suite 5319
Sacramento, California 95814
Telephone: 916-319-0860
Facsimile: 916-322-2549
Email: achristensen@cde.ca.gov
Attorneys for California Department of Education

(Defendant is a Public Entity and Exempt from Filing Fees Pursuant to Gov. Code § 6103)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA Plaintiffs, v. CHINO VALLEY UNIFIED SCHOOL DISTRICT, Defendants.	Case No. CIV SB 2317301 [PROPOSED] AMICUS CURIAE BRIEF OF CALIFORNIA DEPARTMENT OF EDUCATION IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION Date: October 13, 2023 Time: 8:30 a.m. Dept.: ~~S-27~~ S-28 Judge: ~~Hon. Thomas Garza~~ Hon. Michael A. Sachs Trial Date: None Action Filed: August 28, 2023

I. INTRODUCTION AND BACKGROUND

The California Department of Education (CDE) strives to provide a world-class education for all students, from early childhood to adulthood. A critical component of the foundation for such an education is an environment that is safe for all students and is free from discrimination, including bias based on gender, gender identity, or gender expression.

Chino Valley Unified School District (CVUSD) recently adopted Board Policy 5020.1. Pertinent here, the Chino policy requires school personnel to inform the parents, in writing and within three days, if a student requests to be identified or treated as a gender other than their biological sex or

gender, even absent student consent. The forced outing policy violates students' constitutional right to privacy rights and their right to be free from discrimination based on protected characteristics.

Through the Attorney General's Office, the People of the State of California have sued CVUSD for declaratory and injunctive relief related to this policy. To prevent harm to students while the lawsuit is pending, this Court granted a temporary restraining order on September 6, 2013 and set a hearing on an Order to Show Cause for October 13, 2023, as to why it should not issue a preliminary injunction precluding implementation of the subject portions of the policy.

The subject portions of the policy not only fail to *advance* the mission of CDE or the educational pursuits of students but will instead actually detract from those goals. If CVUSD is permitted to implement and enforce this policy, it will violate the privacy rights of transgender or gender non-conforming students, result in discrimination against transgender or gender non-conforming students, and have the overall effect of eroding what should be a safe and supportive learning environment for all students. Therefore, the CDE respectfully submits this amicus curiae brief to the Court, to support the issuance of the preliminary injunction sought by the People in this matter.

II. DISCUSSION

A. The policy on its face disregards the privacy rights of students, and compliance with it will violate such rights.

As noted above, CVUSD Board Policy 5020.1, in pertinent part, requires district personnel to inform the parents, in writing and within three days, if a student requests to be identified or treated as a gender other than their biological sex or gender, even absent student consent. To comply with this policy is to violate the student's constitutionally protected rights of privacy.

A claim for an invasion of privacy requires (1) a legally protected privacy interest, (2) a reasonable expectation of privacy, and (3) a serious invasion of the privacy interest. *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal.4th 1, 40 (1994). First, under the California Constitution, students have a legally protected privacy interest in information as to their sexual orientation. *C.N. v. Wolf*, 410 F.Supp.2d 894, 903 (C.D. Cal. 2005); see Cal. Const., Art. I, §1. Second, a student retains a reasonable expectation of privacy in their gender identity with respect to non-disclosure to their parents at home, even if the student is open about their gender identity at school. *Nguon v. Wolf*, 517 F. Supp. 2d 1177,

1191 (C. D. Cal. 2006) ("It does not follow that disclosure in one context necessarily relinquishes the privacy right in all contexts."). That is, students have a reasonable expectation of privacy as to their gender identity even if they are "out" at school because the fact that an event is not wholly private does not negate the individual's interest in limiting disclosure or dissemination of the information. *Id.*

Third, disclosure by a school, to a parent, of their child's sexual orientation supports a claim that a student suffered a serious invasion of their privacy interest. *Nguon v. Wolf*, 517 F. Supp. 2d at 1191. Coming out is an intensely personal decision. Outing -- revealing a person's gender identity to a third party without the individual's consent -- can be harmful. Unfortunately, many transgender students do not have home environments that are affirming and accepting.

B. CVUSD's "forced outing" policy on its face discriminates against transgender and gender-nonconforming students

California law requires that schools provide all students in public schools, regardless of their gender, gender identity or gender expression, with equal rights and opportunities. Educ. Code § 200. All students have the right to participate fully in the educational process, free from discrimination and harassment. Educ. Code § 201(a). Public schools have an affirmative obligation to combat sexism and other forms of bias. Educ. Code § 201(b). Local educational agencies (LEAs) must adopt policies on suicide prevention that specifically address the needs of lesbian, gay, bisexual, transgender or questioning (LGBTQ) youth. Educ. Code § 215(a)(3)(D). The legislature has tasked the CDE with providing resources to support LGBTQ students, including policies and procedures to protect the privacy of LGBTQ students. Educ. Code § 218(c)(1)(I). No student shall be discriminated against based on gender, gender identity or gender expression. Educ. Code § 220. LEAs must adopt policies that prohibit discrimination based on gender, gender identity or gender expression. Educ. Code § 234.1(a).

CVUSD's disclosure policy singles out transgender and gender-nonconforming students for different and detrimental treatment, targeting non-consensual disclosure to parents of their private information relating to their protected characteristic. This policy is harmful to transgender and gender-nonconforming students, and violates California's anti-discrimination laws.

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Transgender students are entitled to protection from discrimination based on their gender identity. Experts recognize that it is very important for transgender youth to have their gender recognized and validated. Transgender students are entitled to protection from harmful stereotyping that they are confused, or that they are mistaken, or that their status is temporary. *Protecting Transgender Youth after Bostock: Sex Classifications, Sex Stereotypes, and the Future of Equal Protection*, 132 Yale L.J. 1149, 1190-1196 (2023). Being transgender is not a psychiatric condition. *Grimm v. Gloucester County School Board*, 972 F.3d 586, 594 (4 Cir. 2020); *Foote v. Town of Ludlow*, 2022 WL 18356421 at *5 (D. Mass. 2022). It is one's gender identity, and it is entitled to protection from discrimination under California law.

Addressing a student using their preferred name and pronouns simply accords the student the basic level of respect expected in schools where discrimination on the basis of gender identity is not permitted. *Foote* at *5. Chosen name use at school should be encouraged and supported, as it is associated with decreased depressive symptoms and suicidal ideation among transgender youth. *Challenges Facing LGBTQ Youth*, 24 Geo. Journal of Gender and Law 417, 434 (2023). However, forced outing to parents without consent will discourage transgender and gender non-conforming students from chosen name and pronoun use at school, which is detrimental to them. If transgender students fear that chosen name and pronoun use at school will be revealed to parents without student consent, they may be reluctant to request chosen name and pronoun use at school, which may increase depressive symptoms and suicidal ideation. A transgender child could hardly feel safe in an environment where expressing their gender identity resulted in the automatic disclosure to parents, regardless of their own wishes or the consequences of the disclosure. Thus, disclosure to the parents of a student's intent to socially transition to another gender, without consent, discriminates against the student on the basis of gender identity.

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III. CONCLUSION

For the above reasons, the California Department of Education supports the Attorney General's request for an injunction against CVUSD's policy of forced disclosure of students' gender identity to parents without consent.

Dated: September 25, 2023

Respectfully submitted,

By: Len Garfinkel

LEN GARFINKEL
General Counsel
Attorneys for Amicus Curiae
California Department of Education

Exhibit B

LEN GARFINKEL, State Bar No. 114815
General Counsel
BRUCE YONEHIRO, State Bar No. 142405
Assistant General Counsel
CHRISTOPHER MANDARANO, State Bar No. 263625
Deputy General Counsel
California Department of Education
1430 N Street, Suite 5319
Sacramento, California 95814
Telephone: 916-319-0860
Facsimile: 916-322-2549
Email: cmandarano@cde.ca.gov
Attorneys for Proposed Amicus Curiae California Department of Education

(The California Department of Education is a Public Entity and Exempt from Filing Fees Pursuant to Gov. Code § 6103)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA Plaintiffs, v. CHINO VALLEY UNIFIED SCHOOL DISTRICT, Defendants.	Case No. CIV SB 2317301 DECLARATION OF CHRISTOPHER MANDARANO ACCOMPANYING DOCUMENTS: EX PARTE APPLICATION OF THE CALIFORNIA DEPARTMENT OF EDUCATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION; [PROPOSED] BRIEF OF AMICUS CURIAE CALIFORNIA DEPARTMENT OF EDUCATION IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION; [PROPOSED] ORDER Hearing Date: October 19, 2023 Time: 10:00 a.m. Department: S1 Judge: Hon. Michael A. Sachs [Dept. S28] Action Filed: August 28, 2023 Trial Date: February 26, 2024

I, Christopher Mandarano, declare:

1. I am a deputy general counsel for the California Department of Education ("CDE"), proposed *amicus curiae* in this matter. I make this declaration based on my own personal knowledge. I could and would competently testify to the foregoing if called as witness in this matter.

2. The CDE hereby applies for leave of court to file the [Proposed] Brief of Amicus Curiae of the California Department of Education in Support of Plaintiff's Motion for Preliminary Injunction, which is attached as Exhibit A to the CDE's *Ex Parte* Application filed concurrently herewith.

3. The Plaintiff in this matter is the State of California, represented by Deputies Attorney General Delbert Tran, Alexander Simpson, Laura Faer, James Zahradka, Edward Nugent, Xiyun Yang, Gary Rowe, and Shonise Flowers, whose address, emails, and telephone number are: 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102-7004, delbert.tran@doj.ca.gov, Alexander.Simpson@doj.ca.gov, Laura.Faer@doj.ca. gov, James.Zahradka@doj.ca.gov, Edward.Nugent@doj.ca.gov, Xiyun.Yang@doj.ca.gov, Gary.Rowe@doj.ca.gov, and Shonise.Flowers@doj.ca.gov (415) 229-0110.

4. The Defendant in this matter is the Chino Valley Unified School District, represented by Anthony DeMarco and William Deidrich of Atkinson, Andelson, Loya, Ruud & Romo, and by Emily Rae of Liberty Justice Center. Anthony DeMarco's address, email, and telephone number are: 20 Pacifica, Suite 110, Irvine, California 92618-3371, ademarco@aalrr.com, and (714) 785-4497. William Diedrich's address, email, and telephone number are: 3880 Lemon St., Suite 250, Riverside, California 92501, wdiedrich@aalrr.com, and (951) 403-1949. Emily Rae's address, email, and telephone number are: 440 Wells Street, Unit 200, Chicago, Illinois 60654, erae@ljc.org, and (312) 637-2280.

5. In compliance with Rule 3.1203 of the California Rules of Court, on October 16, 2023, at 2:30 p.m., my legal secretary, Elisa Ramirez, notified the counsel set forth in paragraph 4 by above by email that I would be appearing *ex parte* on October 19, 2023, at 10:00 a.m., in Department S1 of the Superior Court of the State of California, County of San Bernardino, requesting that the CDE be granted leave to file an *amicus curiae* brief in this matter.

I declare under the penalty of perjury of the laws of the State of California that the foregoing is true and correct, executed this 16th day of October, 2023, in Cathedral City, California.

By: Christopher N. Mandarano
CHRISTOPHER MANDARANO

Exhibit C

LEN GARFINKEL, State Bar No. 114815
General Counsel
BRUCE YONEHIRO, State Bar No. 142405
Assistant General Counsel
CHRISTOPHER MANDARANO, State Bar No. 263625
Deputy General Counsel
California Department of Education
1430 N Street, Suite 5319
Sacramento, California 95814
Telephone: 916-319-0860
Facsimile: 916-322-2549
Email: cmandarano@cde.ca.gov
Attorneys for Proposed Amicus Curiae California Department of Education

(The California Department of Education is a Public Entity and Exempt from Filing Fees Pursuant to Gov. Code § 6103)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA Plaintiffs. v. CHINO VALLEY UNIFIED SCHOOL DISTRICT, Defendants.	Case No. CIV SB 2317301 [PROPOSED] ORDER GRANTING THE CALIFORNIA DEPARTMENT OF EDUCATION LEAVE TO FILE AN AMICUS BRIEF ACCOMPANYING DOCUMENTS: EX PARTE APPLICATION OF THE CALIFORNIA DEPARTMENT OF EDUCATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION; [PROPOSED] BRIEF OF AMICUS CURIAE CALIFORNIA DEPARTMENT OF EDUCATION IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION; DECLARATION OF CHRISTOPHER MANDARANO Hearing Date: October 19, 2023 Time: 10:00 a.m. Department: S1 Judge: Hon. Michael A. Sachs [Dept. S28] Action Filed: August 28, 2023 Trial Date: February 26, 2024

[PROPOSED] ORDER GRANTING CDE LEAVE TO FILE AMICUS BRIEF

The application of the California Department of Education (CDE) for leave to file a brief as *amicus curiae* in this matter having been considered, and good cause appearing therefor.

IT IS HEREBY ORDERED that the CDE is granted leave to file a brief as *amicus curiae* in this matter; and that the brief attached as Exhibit A to the CDE's *Ex Parte* Application is deemed filed and served as of the date of this order.

Date: _____ By: _____
The Honorable Michael A. Sachs

LEN GARFINKEL, State Bar No. 114815
General Counsel
BRUCE YONEHIRO, State Bar No.142405
Assistant General Counsel
ANDREA CHRISTENSEN, State Bar No.165029
Deputy General Counsel
California Department of Education
1430 N Street, Suite 5319
Sacramento, California 95814
Telephone: 916-319-0860
Facsimile: 916-322-2549
achristensen@cde.ca.gov
Attorneys for California Department of Education

(Defendant is a Public Entity and Exempt from Filing Fees Pursuant to Gov. Code § 6103)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA Plaintiffs, v. CHINO VALLEY UNIFIED SCHOOL DISTRICT, Defendants.	Case No. CIV SB 2317301 PROOF OF SERVICE

I, the undersigned, state that I am a citizen of the United States, over the age of 18 years, a resident of the State of California, and not a party to the within action. My business address is 1430 N Street, Room 5319, Sacramento, California 95814.

On October 16, 2023, I served the:

- Ex Parte Application to File Amicus Brief
- Exhibit A [Proposed] Amicus Curiae Brief of CDE ISO Mtn for Preliminary Injunction
- Exhibit B Declaration of Chris Mandarano
- Exhibit C [Proposed] Order Granting the CDE Leave to File an Amicus Brief

by email as follows:

Anthony DeMarco Atkinson, Andelson et al. 20 Pacifica Irvine, CA 92618 Email: ademarco@aalrr.com	**Delbert Tran** Deputy Attorney General 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102 Email: Delbert.Tran@doj.ca.gov
William Diedrich Atkinson, Andelson et al. 3880 Lemon Street Suite 350 Riverside, CA 92501 Email: wdiedrich@aalrr.com	**Shonise Flowers** Deputy Attorney General 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102 Email: Shonise.Flowers@doj.ca.gov
Alexander Simpson Deputy Attorney General 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102 Email: Alexander.Simpson@doj.ca.gov	**Laura Faer** Deputy Attorney General 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102 Email: Laura.Faer@doj.ca. gov
James Zahradka Deputy Attorney General 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102 Email: James.Zahradka@doj.ca.gov	**Edward Nugent** Deputy Attorney General 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102 Email: Edward.Nugent@doj.ca.gov
Gary Rowe Deputy Attorney General 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102 Email: Gary.Rowe@doj.ca.gov	**Xiyun Yang** Deputy Attorney General 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102 Email: Xiyun.Yang@doj.ca.gov
Emily Rae Liberty Justice Center 440 N. Wells St., Suite 200 Chicago, IL 60654 Email: erae@libertyjusticecenter.org	

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of October 2023 at Sacramento, California.

Elisa Ramirez Digitally signed by Elisa Ramirez Date: 2023.10.16 14:58:39 -07'00'

ELISA RAMIREZ

EXHIBIT 8

ROB BONTA
Attorney General of California
MICHAEL L. NEWMAN
Senior Assistant Attorney General
LAURA L. FAER (SBN 233846)
JAMES F. ZAHRADKA II (SBN 196822)
Supervising Deputy Attorneys General
JONATHAN BENNER (SBN 318956)
EDWARD NUGENT (SBN 330479)
Deputy Attorneys General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 229-0113
Fax: (510) 622-2270
E-mail: Edward.Nugent@doj.ca.gov
Attorneys for [Proposed] Amicus Curiae the Attorney General ex rel. the State of California

Exempt from filing fees pursuant to Government Code section 6103.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

MAE M. ET AL., Plaintiffs, **v.** **JOSEPH KOMROSKY ET AL.,** Defendants.	Case No. CVSW2306224 **ATTORNEY GENERAL'S EX PARTE APPLICATION TO FILE BRIEF OF AMICUS CURIAE THE STATE OF CALIFORNIA AND REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Date: December 13, 2023 Time: 8:30 a.m. Dept: 05 Judge: Hon. Irma P. Asberry Trial Date: TBD Action Filed: August 2, 2023

APPLICATION TO FILE BRIEF OF AMICUS CURIAE

AND REQUEST FOR JUDICIAL NOTICE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD PLEASE TAKE NOTICE that on December 13, at 8:30 a.m., or as soon thereafter as counsel can be heard, in Department 5 of the Riverside Historic Courthouse, located at 4050 Main Street, Riverside, CA 92501, proposed amicus curiae, the State of California, by and through Rob Bonta, Attorney General of the State of California, will and hereby does move this Court, on an ex parte basis, pursuant to California Rules of Court, rules 3.1200 to 3.1207, for the Court to grant the Attorney General's request for leave to file the attached Brief of Amicus Curiae on behalf of the State of California in Support of Plaintiffs' Motion for Preliminary Injunction, to be heard on January 24, 2023, at 8:30 a.m., in the same department of this Court. Proposed amicus curiae specifically seeks leave of the Court to submit the attached concurrently filed brief explaining why the Court should grant Plaintiffs' motion for preliminary injunction. Proposed amicus curiae additionally request that the Court take judicial notice pursuant to Evidence Code sections 451, 452, and 453, and California Rules of Court, rule 3.1306(c), of the records identified below.

Counsel for Plaintiffs have informed the Attorney General's Office that they do not intend to oppose the Attorney General's ex parte application. The Attorney General's Office has not received a response from Defendants' counsel at time of filing.

THE PROPOSED BRIEF WOULD ASSIST THE COURT IN DECIDING THIS MATTER

Pursuant to Rules 8.200(c) and 8.520(f) of the California Rules of Court,[1] proposed amicus curiae respectfully submits this application for leave to file a brief in the present action in support of Plaintiffs' Motion for Preliminary Injunction. Proposed amicus curiae respectfully contends that this brief would assist the Court in deciding this matter by expanding on the harms at stake

[1] While this Court has inherent power to determine whether to allow amicus curiae briefs (see, e.g., *In re Marriage Cases* (2008) 43 Cal.4th 757, 791 fn. 10 ["the superior court, in exercising its traditional broad discretion over the conduct of pending litigation, retain[s] the authority to determine the manner and extent of . . . participation as amici curiae that would be of most assistance to the court"]), the California Rules of Court do not specify a procedure for seeking permission to file an amicus curiae brief in Superior Court. In appellate cases, "[t]he Attorney General may file an amicus curiae brief without the presiding justice's [or Chief Justice's] permission." (Cal. Rules of Court, rule 8.200, subd. (c)(7); rule 8.520, subd. (f)(8).) However, out of an abundance of caution, the Attorney General has opted to submit this ex parte application. (See Cal. Rules of Court, rule 8.200, subd. (c); rule 8.520, subd. (f).)

and the likelihood that Plaintiffs will prevail on the merits. The proposed amicus curiae brief will address the unlawful nature and substantial negative effects of Temecula Valley Unified School District's (TVUSD) challenged Policy 5020.01 and Resolution 21 and related curriculum restrictions, and the irreparable harm that will occur absent immediate injunctive relief. The proposed brief is attached to this application. Additionally, pursuant to Rule 3.1204 of the California Rules of Court, the accompanying Declaration of Jonathan Benner contains the required ex parte notice to counsel for the parties. No party or counsel for any party authored the proposed amicus curiae brief, nor did any outside entity fund its preparation.

INTEREST OF AMICUS CURIAE

California's Constitution establishes the Attorney General's role as "the chief law officer of the State," and charges the Attorney General "to see that the laws of the State are uniformly and adequately enforced." (Cal. Const., art. V, § 13.) The State of California has a compelling interest in fostering safe, supportive, and inclusive schools for all children to learn, thrive, and grow into educated members of California's diverse democracy. (See, e.g., Cal. Const., art. I, § 28, subd. (a)(7) ["students . . . have the right to be safe and secure in their persons"]; Ed. Code, § 35183, subd. (a)(1) [same]; Ed. Code, § 220 [prohibiting discrimination and harassment on the basis of gender identity and expression].) Moreover, education is a fundamental right in California under the state equal protection clause (*Serrano v. Priest* (1971) 5 Cal.3d 584, 608-609, 616-617), and the State has an interest in ensuring that school district policies do not unconstitutionally burden that right. Further, public school districts are state agents, and the Attorney General, as the State's chief law officer, has a strong interest in ensuring that school districts do not violate the constitutional and statutory rights of public school students. (See *Brennon B. v. Sup. Ct.* (2022) 13 Cal.5th 662, 681 ["[T]he management and control of the public schools [is] a matter of state care and supervision, and [l]ocal districts are the State's agents for local operation of the common school system."] (internal quotation marks and citations omitted).) The State also has a compelling interest in protecting child welfare (see, e.g., *In re Marilyn H.* (1993) 5 Cal.4th 295, 307 [the "welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect"]), including the welfare of students who may face emotional,

physical, or psychological abuse at home as a result of a school official being forced to reveal the student's gender identity to their parents, even against the student's express request.

Safe, supportive, and inclusive school environments are critical for all students to thrive academically and emotionally, and they are particularly important for transgender and gender nonconforming students, who are among the most vulnerable when they lack a supportive or gender-affirming school environment. A school policy that forces teachers and other staff to "out" transgender and gender nonconforming students against their wishes and even when such disclosure will put the student at reasonable risk of emotional, psychological, or physical harm violates those students' rights to equal protection, nondiscrimination, and privacy, and undermines the State's compelling interests in protecting their well-being and equal access to education.

In addition, ensuring that all students see diverse perspectives reflected in their curriculum is critical to allowing students to develop a strong sense of identity, cultivate an understanding and respect for others, and ultimately grow into contributing members of our diverse democracy. When school curricula do not include content that reflects the history, culture, and experience of students of all racial, ethnic, and gender backgrounds, the students who are not represented suffer academically and emotionally.

Board Policy 5020.01 and Resolution 21, enacted by the TVUSD Board of Trustees and challenged by Plaintiffs in this litigation, interfere with the State's compelling interests in fostering safe, supportive, and inclusive schools; upholding students' rights under the California Constitution and Education Code; and protecting the welfare of California's public school students. The State of California respectfully submits this brief to show how Policy 5020.01's forced disclosure provisions violate transgender and gender nonconforming students' right to equal protection and nondiscrimination and invade their right to privacy, thereby causing and threatening to cause physical, emotional, psychological, and academic harm. The State's proposed amicus brief also shows that Resolution 21 and related restrictions—which censor curricula based on non-legitimate reasons and remove diverse perspectives, roles, and contributions from instruction—infringe upon students' right to receive information under the

California Constitution, violate the inclusive curricular requirements of the Education Code, and discriminate against students on the basis of race, color, and ethnicity.

REQUEST FOR JUDICIAL NOTICE

On October 19, 2023, the Superior Court for San Bernardino County preliminarily enjoined the Chino Valley Unified School District (CVUSD) from enforcing a forced-disclosure policy identical to TVUSD's Board Policy 5020.01. (*People of the St. of Cal. v. Chino Vy. Unified Sch. Dist.* (Super. Ct. San Bernardino Cty., 2023, No. CIVSB2317301).) The CVUSD policy, attached to the accompanying Declaration of Jonathan Benner (Benner Declaration) as Exhibit C, is an "enactment[]" of a "public entity in the United States" and is thus subject to judicial notice under section 452, subdivision (b) of the Evidence Code. Excerpts from the transcript of the preliminary injunction hearing are attached as Exhibit D to the Benner Declaration, and the court's minute order is attached as Exhibit E; both are appropriately judicially noticed as "[t]he decisional . . . law of this state." (Evid. Code, § 451, subd. (a); see also § 452, subd. (c) [providing for judicial notice of "[o]fficial acts of the . . . judicial departments . . . of any state"].)

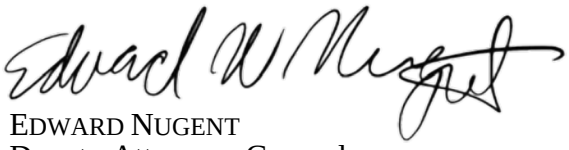
CONCLUSION

For these reasons, the Court should grant the Attorney General's ex parte application to file the attached brief of amicus curiae the State of California in support of Plaintiffs' motion for preliminary injunction and grant judicial notice of the requested materials.

Dated: December 12, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
MICHAEL L. NEWMAN
Senior Assistant Attorney General
LAURA L. FAER
JAMES F. ZAHRADKA II
Supervising Deputy Attorneys General
JONATHAN BENNER



EDWARD NUGENT
Deputy Attorneys General
Attorneys for [Proposed] Amicus Curiae the Attorney General ex rel. the State of California

ROB BONTA
Attorney General of California
MICHAEL L. NEWMAN
Senior Assistant Attorney General
LAURA L. FAER (SBN 233846)
JAMES F. ZAHRADKA II (SBN 196822)
Supervising Deputy Attorneys General
JONATHAN BENNER (SBN 318956)
EDWARD NUGENT (SBN 330479)
Deputy Attorneys General
State Bar No. 330479
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 229-0113
Fax: (510) 622-2270
E-mail: Edward.Nugent@doj.ca.gov
Attorneys for [Proposed] Amicus Curiae the Attorney General ex rel. the State of California

Exempt from filing fees pursuant to Government Code section 6103.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

MAE M. ET AL., Plaintiffs, **v.** **JOSEPH KOMROSKY ET AL.,** Defendants.	Case No. CVSW2306224 **[PROPOSED] BRIEF OF AMICUS CURIAE THE ATTORNEY GENERAL EX REL. THE STATE OF CALIFORNIA IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Date: January 24, 2024 Time: 8:30 a.m. Dept: 05 Judge: Hon. Irma P. Asberry Trial Date: TBD Action Filed: August 2, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

The Attorney General, as the chief constitutional officer charged with enforcing the laws of the State of California, respectfully submits this brief as amicus curiae on behalf of the State in support of Plaintiffs' motion for a preliminary injunction. Plaintiffs seek to enjoin two enactments of the Temecula Valley Unified School District (TVUSD) Board of Trustees: the forced disclosure provisions of Board Policy 5020.01 (Declaration of Jonathan Benner (Benner Decl.), Ex. A), and Resolution No. 2022-23/21 (Benner Decl., Ex. B), including the Board's restriction of curricular materials. Both enactments interfere with the State's compelling interest in fostering safe, supportive, and inclusive schools for children of all gender, ethnic, racial, and other backgrounds. Policy 5020.01's forced disclosure provisions violate transgender and gender nonconforming students' right to equal protection and nondiscrimination and invade their right to privacy, thereby causing and threatening to cause physical, emotional, psychological, and academic harm. Resolution 21—by censoring curricula to remove diverse perspectives, roles, and contributions—infringes upon "students' right to receive information and ideas through classroom teaching and reading" (*McCarthy v. Fletcher* (1989) 207 Cal.App.3d 130, 144) and violates the inclusive curricular requirements of the Education Code. In the interests of upholding California's Constitution and statutes, and preventing irreparable harm to public school students, the State offers this brief to assist the Court's consideration of the important issues here.

ARGUMENT

I. POLICY 5020.01 VIOLATES STUDENTS' RIGHTS TO EQUAL PROTECTION AND PRIVACY UNDER CALIFORNIA LAW

Education is a fundamental right under California's equal protection clause. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 608-609, 616-617; Cal. Const., art. I, § 7.) By singling out transgender and gender nonconforming[1] students, Policy 5020.01's forced disclosure provisions violate these students' state constitutional right to equal protection and statutory protections from discrimination. The Policy also infringes upon students' state constitutional right to privacy,

[1] As used herein, the term "gender nonconforming" includes students whose gender identities are not solely male or female (gender non-binary); these students may use "they/them" pronouns.

depriving them of their fundamental ability to express who they are. And because it represents a discriminatory attack on already marginalized children—denying or limiting their equal access to education, and causing psychological, emotional, and other harm—the Policy serves no valid interest. Indeed, in a suit brought by the State, the San Bernardino Superior Court has twice found that Chino Valley Unified School District's (CVUSD) identical Board Policy 5020.1 is facially discriminatory in violation of California's equal protection clause, and accordingly granted a temporary restraining order and preliminary injunction against its forced disclosure provisions.[2]

A. Policy 5020.01 Violates California's Equal Protection Clause

1. The Policy expressly discriminates based on gender identity, requiring strict scrutiny review

Policy 5020.01's text expressly discriminates against transgender and gender nonconforming students, treating them differently than their cisgender peers based on gender identity. Such adverse treatment is subject to strict scrutiny, for two independent reasons.

First, *gender identity* is an aspect of *sex* and *gender* (see Civ. Code, § 51, subd. (e)(5); Gov. Code, § 12926, subd. (r)(2); Ed. Code, § 210.7 [all defining "[s]ex" to include a person's "gender identity and gender expression"]), protected characteristics subject to strict scrutiny in California (see *Catholic Charities of Sacramento, Inc. v. Sup. Ct.* (2004) 32 Cal.4th 527, 564). The U.S. Supreme Court has similarly held that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." (*Bostock v. Clayton Cty.* (2020) 140 S.Ct. 1731, 1741.)

Second, discrimination against transgender and gender nonconforming individuals is subject to strict scrutiny because—based on the history of arbitrary and adverse treatment they have endured—they are a protected class, just as the California Supreme Court held with respect to lesbian, gay, and bisexual individuals. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 843-844; see also, e.g., *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.* (7th Cir. 2017) 858 F.3d

[2] CVUSD's Policy 5020.1, excerpts from the preliminary injunction hearing, and the preliminary injunction minute order are attached to the Declaration of Jonathan Benner as Exhibits C, D, and E, respectively.

1034, 1051 ["There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity"].)

2. Policy 5020.01 cannot survive strict scrutiny

Policy 5020.01 fails strict scrutiny because TVUSD cannot meet its "burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose" (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 832 [cleaned up]), and are "narrowly tailored" to do so (*Connerly v. St. Personnel Bd.* (2001) 92 Cal.App.4th 16, 36, 44; see also *Rotary Club of Duarte v. Bd. of Dirs.* (1986) 178 Cal.App.3d 1035, 1067 [sex discrimination constitutes "great and irreparable" injury, warranting injunctive relief], affd. *sub nom. Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte* (1987) 481 U.S. 537; *Hillman v. Britton* (1980) 111 Cal.App.3d 810, 826 ["repress[ion]" of "constitutional rights" creates "irreparable harm" necessitating preliminary injunction]; *Baird v. Bonta* (9th Cir. 2023) 81 F.4th 1036, 1040, 1042 [constitutional violation constitutes irreparable injury].).

The District lacks a compelling interest because the explicit text of Policy 5020.01 targets only the conduct of transgender and gender nonconforming students. For example, it expressly conditions forced disclosure on a student's request to use a name or pronoun, or access programs or facilities, "that do not align with the student's biological sex or gender." (Ex. A at p. 1.) Policy 5020.01 thus singles out transgender and gender nonconforming students for forced disclosure, and not their cisgender peers. The Policy's text also reveals its invidious nature, stating that being transgender is a "mental health" issue to justify forced disclosure. (*Ibid.*) This shows the Board's reliance on an "outdated social stereotype[]"—viz., that transgender identity is a mental illness—"result[ing] in invidious laws or practices." (See *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 18; see also, e.g., *Williams v. Kincaid* (4th Cir. 2022) 45 F.4th 759, 767 [transgender identity on its own does not support a diagnosis of gender dysphoria or any other mental illness under the DSM-5]; *Grimm v. Gloucester Cty. Sch. Bd.* (4th Cir. 2020) 972 F.3d 586, 594 [transgender identity is "not a psychiatric condition," and the American Psychiatric

Association and World Health Organization do not classify transgender identity as a mental illness].[3]) This is precisely what strict scrutiny is designed to identify and prohibit.

As recently held by the San Bernardino Superior Court in a case brought by the State against CVUSD's identical forced disclosure policy, this facial discrimination is sufficient reason to find a likelihood of success on the merits and justifies a preliminary injunction. (Ex. D at p. 32.) "Discrimination is built into the operative language of the policy," the court explained at the preliminary injunction hearing, "since a child's requests or actions are treated differently based upon their gender incongruity, meaning sex is a determining factor. That's a suspect classification that does require strict scrutiny." (*Id.* at p. 27; see also Ex. E.) Even if CVUSD had a compelling interest, the court held, its policy could not survive strict scrutiny, because "less restrictive" and "[g]ender-neutral alternatives are available and were available"—which CVUSD failed to even consider. (Ex. D at p. 31.) Indeed, the court found the policy sufficiently discriminatory on its face that it was not necessary to rely on CVUSD Board members' statements of animus. (See *id.* at p. 39.)

While the facially discriminatory text of Policy 5020.01 is sufficient reason to issue a preliminary injunction (see *Arp v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 395, 407), members of the TVUSD Board who voted for the Policy have also made invidious statements evincing their intent to discriminate against the District's transgender and gender nonconforming students. For example, during the meeting at which Policy 5020.01 was passed, the Board President, who voted for the Policy, invoked harmful stereotypes of diverse gender identities, pathologizing transgender people as lifelong "medical patient[s]" who will become sterile due to "all the drugs and surgeries" and "will struggle to find a mate," and categorizing transgender identity as a "lifestyle or behavior" of which he disapproved.[4] During interviews prior to passage, the Board President similarly described transgender identity and acceptance as "horrible" and

[3] See also Castro-Peraza et al., *Gender Identity: The Human Right of Depathologization* (Mar. 2019) 16 Internat. J. of Environmental Research & Pub. Health 978 ("Defining gender diversity as an illness or otherwise abnormal is unfounded, discriminatory, and without demonstrable clinical utility").

[4] TVUSD, *AUG 22 2023 Governing Board Meeting*, YouTube (Aug. 25, 2023) (hereafter Aug. 22 TVUSD Board Meeting), at 6:22:59, 6:25:43 <https://tinyurl.com/4jj98m7w> (as of Dec. 11, 2023).

"evil."[5] Hostility towards, or outdated stereotypes about, those who do not conform to gender norms are not legitimate—much less compelling—governmental interests for policymaking. (*Sail'er Inn, Inc. v. Kirby*, *supra*, 5 Cal.3d at p. 22; see also *Lyle v. Warner Bros. Television Prods.* (2006) 38 Cal.4th 264, 280-281 ["hostile, sexist statements"—including "derogatory comments"—are "relevant to show discrimination on the basis of sex"]; *Grimm v. Gloucester Cty. Sch. Bd.*, *supra*, 972 F.3d at p. 615 [transgender restroom policy failed intermediate scrutiny in part due to "vitriolic" remarks, which revealed "misconception and prejudice"].)

Nor is Policy 5020.01 narrowly tailored to any non-discriminatory interest it might purport to advance. For instance, even if TVUSD claimed Policy 5020.01 was intended to help students navigate their gender identity by ensuring parental support, it lacks "the most exact connection" to fit that purpose. (See *Connerly v. St. Personnel Bd.*, *supra*, 92 Cal.App.4th at p. 37.)

First, Policy 5020.01 lacks an exception for—or even consideration of—children who may face emotional, physical, or psychological abuse at home as a result of their gender identity being revealed to their parents against their express request,[6] and the "welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307; see also *Cleveland v. Taft Union High Sch. Dist.* (2022) 76 Cal.App.5th 776, 799 [school district has a duty to protect students from harm by third parties].)

Second, any purported narrow tailoring is further contradicted by the identified harms Policy 5020.01 has inflicted and continues to inflict upon TVUSD students.[7] And studies bear out students' experiences: one in ten transgender individuals have experienced violence at the hands of an immediate family member on account of being transgender; 15 percent ran away or were

[5] Our Watch, *ie Family PAC Draft—Meet School Board Candidates of Menifee, Temecula, Murrieta, and Lake Elsinore*, YouTube (Mar. 2, 2022), at 0:42:34 <https://tinyurl.com/2wbb456y> (as of Dec. 11, 2023); Our Watch, *Dr. Joseph Komrosky // TVUSD School Board Candidate // School Board Series*, YouTube (Sept. 13, 2022), at 5:47 <https://tinyurl.com/mr2dryx9> (as of Dec. 11, 2023); see also Jen Wiersma (@jen4tvusd), Instagram (Oct. 29, 2022) <https://tinyurl.com/3tcc8fmy> (as of Dec. 11, 2023) (Board member who voted for Policy 5020.01 stating that "children should never be exposed to . . . gender ideology and preferences").

[6] The mandated reporter provisions cited in section 6 of the Policy do not forbid disclosure, even when there is a reasonable risk of parental abuse. Thus, the Policy requires disclosure, even when school staff know that disclosure could result in emotional, physical, or psychological harm.

[7] See, e.g., Aug. 22 TVUSD Board Meeting, *supra*, at 1:16:50, 4:59:12, 5:11:18, 5:22:39, and 5:56:32 (statements of TVUSD students, parents, and teacher explaining threats of forced disclosure).

kicked out of their home because they were transgender; fewer than 40 percent of LGBTQ+ youth identified their home as supportive of their identity; and "coming out" to adverse parents has been shown to increase the risks of major depressive symptoms, suicide, homelessness, and drug use.[8]

Third, the forced disclosure policy fails to accomplish even its stated goal of promoting parental involvement; rather than fostering students' openness about their gender identity, Policy 5020.01 forces students to hide their gender identity at school for fear of forced disclosure and its consequences, which can have serious psychological health effects.[9] And as discussed below, gender-neutral and less restrictive alternatives are available but were not considered, which is "fatal" to the Policy. (*Connerly v. St. Personnel Bd., supra*, 92 Cal.App.4th at p. 37.)

B. Policy 5020.01 Violates Statutory Prohibitions on Discrimination

Just as Policy 5020.01 violates equal protection under the California Constitution, it also violates California antidiscrimination statutes. Section 220 of the Education Code prohibits "discrimination on the basis of . . . gender, gender identity, [or] gender expression" in any educational program that receives state financial assistance. (See also Gov. Code, § 11135, subds. (a) & (c) [prohibiting recipients of state financial assistance from discriminating based on, inter alia, sex, gender identity, or gender expression].) The Policy violates these express statutory protections by facially discriminating against transgender and gender nonconforming students on the basis of their gender identity and expression (see, e.g., *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 39 ["express language of [antidiscrimination statute] provides a clear and objective standard . . . to determine legality"]), and it cannot withstand strict scrutiny (*ante*, at pp. 9-12.)

C. Policy 5020.01 Violates the California Constitutional Right to Privacy

The constitutional right to privacy under article I, section 1 protects "autonomy,"[10] which includes "making intimate personal decisions or conducting personal activities without

[8] James et al., *Report of the 2015 U.S. Transgender Survey*, Nat. Ctr. for Transgender Equality (Dec. 2016) p. 65; The Trevor Project, *2022 Nat. Survey of LGBTQ on Youth Mental Health* (2022) p. 20; Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults* (Jan. 2009) 123 Pediatrics 346.

[9] Pachankis et al., *Sexual Orientation Concealment and Mental Health: A Conceptual and Meta-Analytic Review* (Oct. 2020) 146 Psychological Bull. 831.

[10] Policy 5020.01 also implicates students' rights to informational privacy, since "disclosure of information . . . may have an impact on personal decisions and relationships" affecting a person's core autonomy. (*Hill v. Nat. Coll. Athletic Assn.* (1994) 7 Cal.4th 1, 30.) This is just such a case.

observation, intrusion or interference." (*Sheehan v. S.F. 49ers, Ltd.* (2009) 45 Cal.4th 992, 999.) A privacy violation consists of "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by the defendant constituting a serious invasion of privacy." (*Mathews v. Becerra* (2019) 8 Cal.5th 756, 769.) In cases involving "an obvious invasion of an interest fundamental to personal autonomy," a defendant must show that the infringement is necessary to serve a "compelling interest." (*Ibid*; *Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 329, 340). A plaintiff may then rebut such an assertion by showing the existence of feasible, effective, and less invasive alternatives. (*Mathews*, at p. 769.)

1. Minors have a legally protected interest and reasonable expectation of privacy in their gender identity, a core aspect of their autonomy

A student's gender identity is a legally protected autonomy interest. "[M]inors, as well as adults, possess a constitutional right of privacy under the California Constitution." (*Poway Unified Sch. Dist. v. Sup. Ct.* (1998) 62 Cal.App.4th 1496, 1505.) And courts have repeatedly affirmed that an individual has a constitutionally protected privacy interest in their sexual orientation or gender identity. (See, e.g., *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 444-445 [describing "sexual orientation and conduct" as legally protected privacy interest].)

The Policy invades a core aspect of students' privacy and autonomy: their ability to express their identity. While parents may generally "act on behalf of their child to protect their child's rights and interests," the California Supreme Court has held that "[c]hildren . . . have fundamental interests of their own that may diverge from the interests of the parent." (*Am. Acad. of Pediatrics v. Lungren*, *supra*, 16 Cal.4th at pp. 336-337.) As with the right to obtain an abortion without parental consent, a student's gender identity is "central" to their "values" and "life." (*Id.* at p. 337; see also *Mathews v. Becerra*, *supra*, 8 Cal.5th at p. 774 [citing *Lungren*, at pp. 326, 338-339].)

Transgender and gender nonconforming students also have a reasonable expectation of privacy in choosing how and when to disclose their gender identity: choosing to disclose one's gender identity at school does not negate one's reasonable expectation of privacy generally. (See *Mathews v. Becerra*, *supra*, 8 Cal.5th at p. 769 [requiring reasonable expectation of privacy "in the circumstances"].) As the California Supreme Court has explained, "[t]he claim is not so much

one of total secrecy as it is of the right to *define* one's circle of intimacy," and people may still "fear exposure . . . to those closest to them." (*Hill v. Nat. Coll. Athletic Assn.*, *supra*, 7 Cal.4th at p. 25; *C.N. v. Wolf* (C.D. Cal. 2005) 410 F.Supp.2d 894, 903 [student had reasonable expectation of privacy in sexual orientation with respect to parents, even if publicly homosexual at school].)

2. Forced disclosure seriously invades students' privacy and autonomy

The Policy is a serious invasion of privacy. (See *Hill v. Nat. Coll. Athletic Assn.*, *supra*, 7 Cal.4th at p. 37.) A student's gender identity concerns "the most intimate aspects" of "thought and behavior," such that "[m]andatory reporting of such information is a severe invasion." (*Mathews v. Becerra*, *supra*, 8 Cal.5th at p. 780.) In a related context, California courts have described revelations of "sexual orientation and conduct" as a serious invasion of privacy that "could prove to be highly embarrassing . . . and/or disruptive" to the victim's relationships, "caus[ing] great damage to both [the victim's] self-concept and to [their] image." (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 444-445.) Forced disclosure of one's gender identity is an equally serious privacy violation. (See *ante*, at pp. 11-12 & fn. 8 [studies detailing risks of violence, homelessness, suicide, and other harms associated with forced disclosure of gender identity].)

3. The Policy is not necessary to support a compelling interest

As explained *ante* at section I(A)(2), Policy 5020.01 is rooted in outdated stereotypes and animus, neither of which can be a compelling interest. Further, feasible and effective alternatives that better protect families, parents, and students have been in place without incident in many other school districts for years. School districts, including TVUSD itself,[11] have adopted policies and regulations protecting the privacy of transgender and gender nonconforming students (with an exception for cases in which disclosure is necessary to protect a student's health or safety), and providing resources, support, and counseling for students and families to facilitate conversations.

II. RESOLUTION 21 VIOLATES CALIFORNIA'S CONSTITUTION AND EDUCATION CODE

The State also has a strong interest in challenging Resolution 21, which violates students' rights by censoring school curricula and books to remove references to the diverse perspectives, roles, contributions, and history of members of protected groups, in violation of California law.

[11] TVUSD Administrative Regulation 5145.3 <https://tinyurl.com/76zhruzk> (as of Dec. 11, 2023).

A. Resolution 21, Including Restriction of Social Studies Curricular Material, Violates Article I, Section 2 of the California Constitution

The guarantees of free speech and press under article I, section 2 of the California Constitution encompass "students' right to receive information and ideas through classroom teaching and reading." (E.g., *McCarthy v. Fletcher*, *supra*, 207 Cal.App.3d at pp. 144, 146, fn. 3; see also *Smith v. Novato Unified Sch. Dist.* (2007) 150 Cal.App.4th 1439, 1465 [even brief loss of free speech rights constitutes irreparable injury].) Given this right, a curriculum restriction must be "reasonably related to legitimate educational concerns." (*McCarthy*, at pp. 141, 146 [bare ideological opposition to *One Hundred Years of Solitude* as a classroom or curricular resource was not reasonably related to a legitimate educational concern]; see also *Arce v. Douglas* (9th Cir. 2015) 793 F.3d 968, 983 [restrictions on "a student's access to materials otherwise available may be upheld only where they are reasonably related to legitimate pedagogical concerns"].) Further, a legitimate educational concern must be the true reason for the removal, "not just a pretextual expression for exclusion because the board disagrees with the religious or philosophical ideas expressed in the books." (*McCarthy*, at p. 144.)

1. Resolution 21 unlawfully limits students' ability to learn about and discuss a broad range of topics

Resolution 21 directly censors accurate, historically significant educational material for no legitimate educational purpose—in violation of article I, section 2. Resolution 21's terms are sweeping and chilling, censoring a broad swath of American history and specifying a number of ideas and topics that "cannot be taught." (Ex. B, pp. 2-3.) For example, under prohibition (h), students "cannot be taught" about the connection between slavery and the "founding" or "independence" of the United States, directly restricting information about the country's early history. (*Id.* at p. 3.) Similarly, prohibition (b) states that students "cannot be taught" that individuals are members of an "oppressor" or "oppressed class because of race or sex," while prohibition (d) prevents schools from discussing that an individual should "receive favorable treatment due to the individual's race or sex," and prohibition (2) censors the idea that "[r]acism is ordinary, the usual way society does business."

These prohibitions broadly bar the teaching of many chapters of U.S. history (and current events) in which the Nation sought to overcome racial or gender inequality, and would likely restrict foundational historic texts like the speeches and writings of Martin Luther King Jr. (some of which analyze segregation in terms of "oppressor" and "oppressed"), as well as seminal court rulings. (See, e.g., King, Letter from Birmingham Jail (1963) [describing the "oppressor" and "oppressed" races in the context of segregation]; *Brown v. Bd. of Ed*. (1954) 347 U.S. 483, 494 ["separating the races is usually interpreted as denoting the inferiority" of one group to the other, creating racial hierarchy].) Similarly, students cannot meaningfully learn about or discuss our government's treatment of Native Americans, given prohibitions (2) and (b). (See, e.g., *Haaland v. Brackeen* (2023) 599 U.S. 255, 298-299 (conc. opn. of Gorsuch, J.) [describing federal government's "dark[] designs" of "destroying tribal identity and assimilating Indians" into "the dominant race," creating "a now-familiar nightmare for Indian families"].) Students may not receive information about the history of the Fourteenth Amendment, the lives of Black Americans during Reconstruction, or the purpose and work of the Freedmen's Bureau, due to prohibition (d). (See, e.g., *Jones v. Alfred H. Mayer Co.* (1968) 392 U.S. 409, 422-436 [discussing history of Civil Rights Act of 1866].) So too with the women's suffrage movement and the Nineteenth Amendment, or Supreme Court cases recognizing the lengthy history of discrimination against women and providing recompense, as prohibitions (b) and (d) encompass sex as well as race. (See, e.g., *Arp v. Workers' Comp. Appeals Bd.*, *supra*, 19 Cal.3d at pp. 403-404 [statute "could be upheld on the theory that after centuries of economic discrimination against females, men and women simply are not similarly situated with respect to economic factors"].) And likewise with recent history and current events: students may be prevented from learning, for example, about efforts to address disproportionate police violence against Black Americans (e.g., *Leaders of a Beautiful Struggle v. Balt. Police Dept.* (4th Cir. 2021) 2 F.4th 330, 347 [Black communities are "over-policed" and suffer "increased exposure to incidents of police violence"]) or ongoing segregation in schools (e.g., *People v. Sausalito Marin City Sch. Dist.* (Super. Ct. S.F. City and County, 2019, No. CGC-19-578227) [judgment against school district that "knowingly and

intentionally maintained and exacerbated existing racial segregation, and had established an intentionally segregated school" within last decade]).

2. Resolution 21 is not related to a legitimate pedagogical concern

Such sweeping curricular restrictions run afoul of article I, section 2 because Resolution 21 seeks to impose "rigid and exclusive indoctrination" (*McCarthy v. Fletcher*, *supra*, 207 Cal.App.3d at p. 146), and was enacted out of animus against equitable curricula that present diverse and inclusive perspectives, rather than legitimate pedagogical concerns, such as reducing racism in schools. (Cf. *Arce v. Douglas*, *supra*, 793 F.3d at pp. 983-984, 986 [ethnic studies curriculum can "offer great value to students," and restrictions on students' access to material must reasonably relate to "legitimate pedagogical concerns," such as reducing racism].)

In addition, Board members who voted in favor of Resolution 21 have made statements revealing their ideological opposition to diverse and inclusive perspectives in education. During the meeting at which the Board adopted Resolution 21, for example, one Board member downplayed the significance of slavery in U.S. history, asserting that "every skin color has both been a slave and owned a slave," and criticized CRT as "uniquely un-American."[12] And in the course of implementing Resolution 21, the Board hired a consultant to train TVUSD staff on CRT, including "the specific content of the resolution."[13] The hired consultant has dismissed the persistence of systemic racism after the passage of civil rights legislation in the 1960s as a "myth,"[14] and has espoused invidious stereotypes about Black Americans, attributing the

[12] TVUSD, *December 13, 2022 - 6:00 PM - Open Session - TVUSD Governing Board Meeting*, YouTube (Dec. 13, 2022), at 5:33:19 <https://tinyurl.com/bb8jtvm9> (as of Dec. 11, 2023).

[13] TVUSD, *Regular Meeting of the Board of Trustees of the Temecula Valley Unified School District 03/14/2023 - 4:00 PM*, Item O.2, "Consultant Agreement: Arend Law Firm" (Mar. 14, 2023) <https://tinyurl.com/43tnyhb7> (as of Dec. 11, 2023). This consultant also drafted another school district's resolution prohibiting the teaching of CRT, on which the TVUSD Board modeled Resolution 21. (Shuman, *Paso Robles School Board Bans Aspects of Critical Race Theory in Classrooms*, San Luis Obispo Tribune (Aug. 11, 2021) <https://tinyurl.com/26cjekvn> [as of Dec. 11, 2023].)

[14] Arend, *The Myth of "Systemic Racism"*, Cal Coast News (Sept. 2, 2020) (hereafter "Myth") <https://tinyurl.com/3rum9xzs> (as of Dec. 11, 2023). But enforcing this viewpoint, as Resolution 21 does, would limit, e.g., discussion of studies like these: Abel & Burger, *Unpacking Name-Based Race Discrimination*, IZA - Institute of Labor Economics (June 2023) (finding systematic discrimination against job applicants with distinctively Black names); Jones & Schmitt, *A College Degree Is No Guarantee*, Center for Economic and Policy Research (May 2014), p. 1 (unemployment rate for Black college graduates double rate for college graduates in general, and more than half of Black graduates employed in jobs that do not require college degree, "reflect[ing] ongoing racial discrimination in the labor market").

disproportionate arrest rate of Black Americans to "the gangster sub-culture, poverty, poor education, growing up in homes without a father, etc."[15] (Another Board member, after noting his "many conversations" with the hired consultant about CRT, described the consultant as "an expert."[16]) TVUSD hosted a "workshop" on CRT, which was billed as being "led by a diverse panel of experts"; however, all of the panelists, including TVUSD's consultant, were "in disagreement with CRT," and the Board President later stated that the workshop's aim was to "raise awareness of the potential harms of CRT and its associated tenets."[17]

During the July 18, 2023 Board meeting, the Board President continued down the path of censorship, asserting that "there is an intrinsic moral evil when we allow obscenity, pornography, vulgarity, and erotica in our school district" which "must be dealt with"; he then listed 16 books—including *The Bluest Eye* by Toni Morrison and *The Kite Runner* by Khaled Hosseini—and demanded to know "the names of who put these books in our libraries," threatening to disclose them "for accountability, transparency to the public."[18] Another Board member suggested forming a committee to "flag" or "eliminate" potentially "objectionable" books.[19] And a TVUSD official has informed the California Department of Justice that, at the Board's direction, TVUSD has restricted students' access to all of the hundreds of biographies included as supplemental social studies materials, in order to censor a biography of San Francisco Supervisor Harvey Milk, California's first openly gay elected official and an LGBTQ+ rights leader.[20] The Board restricted this material even though TVUSD educators have found no "sexualized" content

[15] "Myth," *supra.*

[16] TVUSD, *March 14, 2023 - 6:00 PM - Open Session - TVUSD Governing Board Meeting*, YouTube (Mar. 14, 2023), at 2:55:35 <https://tinyurl.com/mu5tj7s2> (as of Dec. 11, 2023).

[17] TVUSD, *Temecula Valley Unified School District Governing Board Hosts Expert Panel Workshop* (Mar. 10, 2023) <https://tinyurl.com/4ummc6pd> (as of Dec. 11, 2023); TVUSD, *Statement from the TVUSD Board President and Board Clerk in Response to Recent Media Reports on the March 22, 2023, Special Meeting* (Mar. 23, 2023) <https://tinyurl.com/3944zr2a> (as of Dec. 11, 2023); Nelson, *California School District Hires Anti-Critical Race Theory Consultant*, Fox News (Mar. 20, 2023) <https://tinyurl.com/wuscx3pt> (as of Dec. 11, 2023).

[18] TVUSD, *July 18, 2023, 6:00 PM - Open Session - TVUSD Governing Board Meeting*, YouTube (July 18, 2023), at 3:15:34 <https://tinyurl.com/4v2shnwv> (as of Dec. 11, 2023).

[19] *Id.* at 3:19:23.

[20] TVUSD, *Special Meeting of the Board of Trustees of the Temecula Valley Unified School District 07/21/2023 - 7:00 PM*, Item G.2, "TCI Elementary Social Science Curriculum" (July 21, 2023) <https://tinyurl.com/5dp985k4> (as of Dec. 11, 2023); Emails from TVUSD Assistant Superintendent to Cal. Dept. of Justice (Nov. 27 & Dec. 7, 2023) (Benner Decl., Exs. F-G).

in any of the restricted biographies,[21] thereby intentionally removing a wide swath of information about historical figures from the curriculum without a legitimate educational reason. (See, e.g., *McCarthy v. Fletcher, supra*, 207 Cal.App.3d at p. 146.) Accordingly, Resolution 21 violates students' right to receive information in violation of article I, section 2 and should be enjoined.

B. Resolution 21 Violates the California Education Code

Resolution 21 violates the curriculum and antidiscrimination requirements of the Education Code. The FAIR Education Act, as amended by AB 1078, requires curricula to cover "the role and contributions" of men, women, and numerous racial and ethnic groups, inter alia, "to the economic, political, and social development of California and the United States of America, with particular emphasis on . . . contemporary society." (Ed. Code, § 51204.5.) School boards must only approve instructional materials that "accurately portray" the "role and contributions" of these groups "to the total development of California and the United States." (Ed. Code, § 60040.) And school boards may not prohibit instructional material on the basis that it "contains inclusive and diverse perspectives" (Ed. Code, § 51501, subd. (b)) or "includes a study of the role and contributions of any individual or group" (Ed. Code, § 243, subd. (a)). Prohibiting instruction on the latter basis also constitutes "discrimination." (*Id.*, subds. (a)-(b) [citing Ed. Code, § 220].)

Because these prohibitions censor curricular materials that accurately portray the historical roles and contributions of diverse groups, and restrict discussion of current events, Resolution 21 is especially harmful for students of color. When school curricula do not include content that reflects the history, culture, and experience of all students, research shows that the students who are not represented suffer academically and emotionally.[22] Resolution 21 limits the opportunity of students of color to see figures like themselves represented in their curriculum, and in so doing, threatens them with negative educational impacts.

[21] See, e.g., Pls.' Mot. for Prelim. Inj., Eytchison Declaration, Ex. C.

[22] E.g., Adam, *When Authenticity Goes Missing: How Monocultural Children's Literature Is Silencing the Voices and Contributing to Invisibility of Children from Minority Backgrounds* (2021) (hereafter *Monocultural Children's Literature*) Educ. Sciences, vol. 11, art. 32 <https://tinyurl.com/mwb6hyzx> (importance of children seeing their culture represented in curricula, and absence of diverse perspectives "contribute[s] to prejudice and discrimination"). While all students benefit from diverse, equitable, and accurate curricula—which the Resolution impedes—Resolution 21 inflicts a particular educational harm that specifically results from finding themselves and the history of people of color underrepresented in their curricula (see *Monocultural Children's Literature*, *supra*).

Notwithstanding the recital that Resolution 21 shall not "require any staff member to violate local, state, or federal law," it threatens to diminish or erase the "role and contributions" of people of color, and women, in TVUSD curricula. As explained above in section II(A)(1), Resolution 21 restricts or bars teaching students about significant figures, movements, and events in California and U.S. history, including the civil rights movement, Native American history, and the women's suffrage movement. By censoring curricula and materials that contain inclusive and diverse perspectives and that portray the role and contributions of women and people of color in the United States and California, Resolution 21 would violate California law by prohibiting "a study of the role and contributions of any individual or group" to our State's and Nation's history (Ed. Code, § 243, subd. (a)); violate Education Code section 220's antidiscrimination provision; and, to the extent it prohibits materials like the "Letter from Birmingham Jail" included in approved instructional materials, violate Education Code section 51501, subdivision (b). The Court should therefore enjoin Resolution 21.

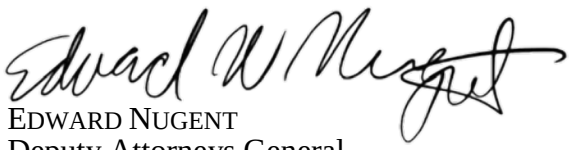
CONCLUSION

For the reasons above, the Court should grant Plaintiffs' Motion for Preliminary Injunction against both Policy 5020.01 and Resolution 21 and related curriculum restrictions.

Dated: December 13, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
MICHAEL L. NEWMAN
Senior Assistant Attorney General
LAURA L. FAER
JAMES F. ZAHRADKA II
Supervising Deputy Attorneys General
JONATHAN BENNER



EDWARD NUGENT
Deputy Attorneys General
Attorneys for [Proposed] Amicus Curiae the State of California

EXHIBIT 9

Case No. 23-16031

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AURORA REGINO,
Plaintiff — Appellant,
v.

KELLY STALEY, Superintendent,
Defendant — Appellee

and

CAITLIN DALBY, REBECCA KONKIN, TOM LANDO, EILEEN ROBINSON, and MATT TENNIS
Defendants-Appellees

On Appeal from the United States District Court
for the Eastern District of California
District Court No. 2:23-CV-00032-JAM-DMC
The Honorable John A. Mendez

AMICUS CURIAE BRIEF OF CALIFORNIA DEPARTMENT OF EDUCATION

IN SUPPORT OF AFFIRMANCE

All Parties Have Consented to This Filing. FRAP 29(a).

LEN GARFINKEL, State Bar No. 114815
General Counsel
California Department of Education
1430 N Street, Room 5319
Sacramento, California 95814
Telephone: 916-319-0860
Facsimile: 916-322-2549
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

California Statutes

Law Review Articles

Constitutional Provisions

Other Authorities

I. INTEREST OF AMICUS CURIAE

Amicus curiae the California Department of Education (CDE) is the state department of education as described in California Education Code Section 33300 et seq., with the responsibilities and authority set forth therein.

California law emphasizes the rights of LGBTQ students and also provides certain roles for the CDE and the State Superintendent of Public Instruction (SSPI) in supporting them. Cal. Educ. Code § 200 (schools must provide all students with equal rights regardless of gender identity); Cal. Educ. Code § 201(a) (all students have the right to participate fully and be free from discrimination); Cal. Educ. Code § 201(b) (schools must combat sexism); Cal. Educ. Code § 215(a)(3)(D) (local educational agencies, known as LEAs, must adopt policies on suicide prevention that specifically address the needs of LGBTQ students); Cal. Educ. Code § 218(c)(1)(I) (CDE must provide resources to support LGBTQ students including policies to protect privacy); Cal. Educ. Code § 218.3(b)(3)(A), (B), (G) (Per Assembly Bill 5 passed in 2023, CDE must develop an online training for staff about LGBTQ students, including creating safe and supportive learning environments, identifying students subject to or at risk of lack of acceptance at home, and protecting privacy); Cal. Educ. Code § 219(c)(1) (Per Senate Bill 857 passed in 2023, the SSPI shall convene an advisory task force to identify needs of LGBTQ students and make recommendations to address their well-being including

their mental health and feelings of safety and support); Cal. Educ. Code § 220 (students are protected from discrimination based on gender identity); Cal. Educ. Code § 234.1(a) (LEAs must adopt policies that prohibit discrimination based on gender identity).

Consistent with its role, amicus curiae submits this brief that supports LGBTQ students' rights and addresses the lack of a fundamental parental right to know of a student's change of gender identity at school.

All parties have consented to the filing of this amicus brief pursuant to Federal Rule of Appellate Procedure 29(a)(2).

This brief was not authored in whole or in part by any party's counsel. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

Amicus curiae the CDE joins defendants-appellees in supporting affirmance of the District Court's decision.

II. ARGUMENT

A. The District Court Correctly Found That Parents Do Not Have A Substantive Due Process Right To Be Informed Of Their Students' Change Of Gender Identity At School

The District Court correctly found that parents do not have a constitutional right to be informed of their child's transgender identity (or to give consent before

a school may refer to a transgender child by their preferred name or pronouns). *Regino v. Staley*, 2023 WL 4464845 at *3 (E.D. Cal.). Parents *do* have a fundamental right to choose their child's educational forum. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). But having chosen an educational forum, parents do not have a fundamental right to dictate matters such as curriculum or school policies. *Fields v. Palmdale School District*, 427 F.3d 1197, 1200 (9th Cir. 2005), *opinion affirmed and amended in part on denial of rehearing*, 447 F.3d 1187 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 725 (2006). As the Ninth Circuit explained in *Fields*:

> Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but also would be impossible to satisfy. *Fields*, 427 F.3d at 1206.

While the Supreme Court did state in *Troxel v. Glanville*, 530 U.S. 57, 65 (2000) that parents have a fundamental right to direct their child's care, custody or control, the Ninth Circuit has emphasized that *Troxel* did not establish a parent's right to dictate the actions or inactions of a public school system. See *Parents for Privacy v. Barr*, 949 F.3d 1210, 1230 (9th Cir. 2020) (*Troxel* "did not address the extent of parents' rights to direct the policies of the public schools that their children attend."). As the court stated in *Parents for Privacy*, "Plaintiffs fail to cite any Supreme Court authority showing that parents' substantive due process rights

under the Fourteenth Amendment encompass a right to direct the curriculum, administration or policies of public schools." *Id.* at 1232.

Nor do parents have a fundamental right to disclosure of their students' gender identity on the grounds that referring to a student by their chosen name and pronouns is "medical care." Parents *do* have specific rights with respect to directing their children's medical care. *Parham v. JR*, 442 U.S. 584, 603 (1979). And *some* transgender individuals can experience gender dysphoria, i.e., emotional distress related to not being able to express their true gender identity. *Grimm v. Gloucester County School Board*, 972 F.3d 586, 612 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *Karnoski v. Trump*, 926 F.3d 1180, 1187 n. 1 (9th Cir. 2019) ("In *some* instances, the discordance between one's gender identity and birth-assigned sex can be associated with clinically significant distress, known as gender dysphoria") (emphasis supplied). However, importantly, being transgender itself is not a medical or psychiatric condition. *Grimm,* 972 F.3d at 594, 612-613; *Doe v. Boyertown Area School District*, 276 F. Supp. 3d 324, 367 (E.D. Penn. 2017), *aff'd*, 897 F.3d 518 (3d Cir 2018), *cert. denied*, 139 S. Ct. 2636 (2019). *Foote v. Town of Ludlow*, 2022 WL 18356421 at *5 (D. Mass.). Transgender students are entitled to protection from harmful stereotyping that they are confused, or that they are mistaken, or that their status is temporary. *Protecting*

Transgender Youth after Bostock: Sex Classifications, Sex Stereotypes, and the Future of Equal Protection, 132 Yale L.J. 1149, 1190-1196 (2023).

Plaintiff-Appellants would require the court to establish a new fundamental constitutional right for a parent to be informed of a student's change in gender identity at school. However, courts must proceed with utmost care when considering establishing new substantive due process rights. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Parental rights are not absolute or unlimited. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

The District Court correctly rejected as conclusory the allegation that permitting social transitioning at school constitutes medical treatment. *Regino v. Staley*, 2023 WL 4464845 at *3. As the court stated in *Foote*:

> Addressing a person using their preferred name and pronouns simply accords the person the basic level of respect expected in a civilized society generally, and, more specifically, in Massachussetts public schools where discrimination on the basis of gender identity is not permitted . . . This is true regardless of a person's age, provided the individual does not have a fraudulent purpose for using a new preferred name or pronouns. *Foote*, 2022 WL 18356421 at *5.

In summary, this case bears a much closer resemblance to cases involving parent challenges to curriculum and other public school policy decisions than to cases involving "care, custody or control" generally, or medical care specifically. The District Court was correct not to fashion a new substantive due process right.

B. The District Court Correctly Found That Chico's Policy Survives Rational Basis Review

The District Court correctly found that because Chico's nondisclosure policy does not implicate a fundamental right, it is subject to rational basis review, that is, whether it is reasonably related to a legitimate government purpose. *Regino v. Staley,* 2023 WL 4464845 at *4 (E.D. Cal.); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988); *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).

1. Legitimate government purpose

The District Court correctly found that Chico had identified legitimate government purposes for its nondisclosure policy:

> . . . [T]he Defendant has demonstrated a legitimate state interest in creating a zone of protection for transgender students and those questioning their gender identity from adverse hostile reactions, including, but not limited to, domestic abuse and bullying; this is in line with the Regulation's general purpose to combat discrimination and harassment against students. *Regino,* 2023 WL 4464845 at *4:

States have a strong interest in protecting the lives and health of children within their borders. *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 607 (1982). Protecting the psychological well-being of transgender youth is a legitimate state interest. *Tingley v. Ferguson*, 47 F.4th 1055, 1078 (9th Cir. 2022), *cert. denied*, 2023 WL 8531854 (2023). The gender identity of children who identify as transgender must be honored out of respect for the individual. *Tingley*, 47 F.4th at 1084.

A school district has legitimate interests in protecting LGBTQ students' rights to privacy, freedom from discrimination and health and safety as guaranteed by federal and state statutes and constitutional provisions.[1]

As for privacy, a student has a legally protected privacy interest under the California Constitution with respect to information about the student's gender identity. *C.N. v. Wolf*, 410 F. Supp. 2d 894, 903 (C.D. Cal. 2005); see Cal. Const., Art. I, § 1. A student retains a reasonable expectation of privacy in their gender identity with respect to non-disclosure to their parents at home, even if open about their gender identity at school. *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1191 (C. D. Cal. 2006) ("It does not follow that disclosure in one context necessarily relinquishes the privacy right in all contexts."); *U.S. Dept. of J. v. Reporters Com. for Freedom of Press*, 489 U.S. 749, 770 (1989) (simply because "an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information.")

As for discrimination, federal and state law protects transgender persons from discrimination based on their gender identity. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020) (discrimination based on gender identity is

[1] Courts have even described the government's interest in protecting LGBTQ persons from discrimination as compelling. See, e.g., *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (government has compelling interest in preventing misgendering of LGBTQ residents in long term care); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d at 529 (school district had compelling interest in protecting transgender students from discrimination).

sex discrimination under Title VII); *Grabowski v. Arizona Board of Regents*, 69 F.4th 1110, 1113 (9th Cir. 2023) (discrimination on the basis of gender identity is sex discrimination under Title IX); see also Cal. Educ. Code § 220 (recognizing gender identity and gender expression as protected characteristics for purposes of state anti-discrimination laws).

As for health and safety, coming out is an intensely personal decision. Outing -- revealing a person's gender identity to a third party without the individual's consent -- can be harmful. If transgender students fear that chosen name and pronoun use at school will be revealed to parents without student consent, they may be reluctant to request chosen name and pronoun use at school. A transgender student could hardly feel safe in an environment where expressing their gender identity resulted in the automatic disclosure to parents, regardless of their own wishes or the consequences of the disclosure. Yet it is important for transgender youth to have their gender recognized and validated, as chosen name use is associated with decreased depressive symptoms and suicidal ideation among transgender youth. *Challenges Facing LGBTQ Youth*, 24 Geo. Journal of Gender and Law 417, 434 (2023); see *Bates v. Paksereshi*, 2023 WL 7546002 at *6, n. 3 (D. Or.) (noting that 45% of LGBTQ youth have seriously considered suicide).

2. Rational relationship

The District Court correctly found that Chico's nondisclosure policy bears a rational relationship to these legitimate government purposes of promoting the protection of student rights to privacy, freedom from discrimination, and safety and well-being.

III. CONCLUSION

For the reasons stated above, amicus curiae California Department of Education respectfully requests that the Court affirm the District Court's decision.

Dated: January 9, 2024

By: /s/ Len Garfinkel
LEN GARFINKEL
General Counsel
Attorney for Amicus Curiae
California Department of Education

CERTIFICATE OF COMPLIANCE

Appellate Case No. 23-16031

I certify that the attached amicus brief is proportionately spaced, has a typeface of 14 points or more, and contains 2,125 words, which is less than one-half the maximum permissible length of the brief it supports (Defendant-Appellees' Responding Brief).

Dated: January 9, 2024

By: /s/ Len Garfinkel
LEN GARFINKEL
General Counsel
Attorney for Amicus Curiae
California Department of Education

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2024, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: January 9, 2024

By: /s/ Len Garfinkel
LEN GARFINKEL
General Counsel
Attorney for Amicus Curiae
California Department of Education

EXHIBIT 10

Governor Newsom and Attorney General Bonta Demand Answers from Temecula School Board

Published: Jun 07, 2023

SACRAMENTO – Governor Gavin Newsom and California Attorney General Rob Bonta today issued a joint statement urging the Temecula Valley Unified School District Board of Education (Board) to provide information regarding its process and decision-making related to the Board's decision to reject the Social Studies Alive program for grades 1 through 5 on May 16, 2023. The curriculum, recommended by district staff and adopted by the State Board of Education, is in line with the FAIR Act's requirements. In light of this, Attorney General Bonta has sent a letter today to Superintendent McClay and Board President Komrosky expressing concern over the Board's actions, and seeking information regarding its decision.

"In the Golden State, our kids have the freedom to learn — and there are consequences for denying that freedom," **said Governor Gavin Newsom**. "California is closely watching the actions of malicious actors seeking to ban books, whitewash history, and demonize the LGBTQ+ community in Temecula and across the state. If the law is violated, there will be repercussions."

"We urge the Board to adhere to the FAIR Act's provisions and provide a comprehensive social sciences curriculum that reflects our diverse state and nation. This should include accurate representations of historical figures like Harvey Milk and not be influenced by personal bias," **said Attorney General Rob Bonta**. "Restricting what our children are taught in school based on animus or ideological opposition contradicts our societal values. The Board needs to explain its decision making, and moving forward will need to ensure students have access to a wide range of ideas and perspectives."

Attorney General Bonta's letter emphasizes that local educational agencies have a legal obligation to implement a social sciences curriculum highlighting the contributions of various groups, including gay, bisexual, and transgender Americans. Furthermore, it highlights that a decision to remove or reject curriculum materials reflecting these identities may constitute unlawful discrimination. Concerning statements made by Board members during the May 16 meeting, including allegations about LGBTQ+ community leader Harvey Milk, the Attorney General's letter expresses deep concern about the potential discriminatory intent.

To investigate the Board's process and rationale for rejecting Social Studies Alive, the letter requests the Board produce various documents, including instructional materials assessment and adoption policies, documents related to the proposed adoption of Social Studies Alive, and any complaints related to the program no later than June 22. The letter sent by Attorney General Bonta can be found here. Today's action follows the statewide letter issued on June 1 by Governor Newsom, Attorney General Bonta and Superintendent Thurmond on "Educational Rights and Requests to Remove Instructional Materials," which is available on the California Department of Education website.

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ROB BONTA
Attorney General

State of California
DEPARTMENT OF JUSTICE

300 SOUTH SPRING STREET, SUITE 1702
LOS ANGELES, CA 90013

Telephone: (213) 269-6280
Facsimile: (916) 731-2129
E-Mail Address: Michael.Newman@doj.ca.gov

June 7, 2023

SENT VIA E-MAIL

Dr. Jodi McClay, Superintendent
Dr. Joseph Komrosky, Board President
Temecula Valley Unified School District Board of Education
31350 Rancho Vista Road
Temecula, CA 92592
Email Address: jmcclay@tvusd.us
Email Address: jkomrosky@tvusd.us

RE: Information Request Regarding May 16, 2023 Board Action Rejecting Elementary Social Science Curriculum

Dear Superintendent McClay and Board President Komrosky:

We write to express our serious concern regarding the Temecula Valley Unified School District Board of Education ("Board")'s vote on May 16, 2023 to reject district staff's recommendation to adopt *Social Studies Alive* for use as a history-social science program for grades 1 through 5. Consistent with the June 1, 2023 joint letter that Governor Newsom, Attorney General Bonta, and Superintendent of Public Instruction Thurmond sent all local educational agencies on this topic, a copy of which is enclosed for ease of reference, we request that you provide the Department of Justice with information related to the basis for the Board's action, as detailed below.

Social Studies Alive is a State Board of Education-adopted social studies curriculum program. As Temecula Valley district staff advised the Board, the program complies with the FAIR Act, which, as explained in the June 1 letter, requires local educational agencies to administer a representative social sciences curriculum that provides instruction on "the role and contributions of specified groups, which include gay, bisexual, and transgender Americans to the development of California and the United States and "the role of these groups in contemporary society."[1]

Moreover, state law prohibits discrimination on the basis of protected characteristics, which include sexual orientation.[2] A local educational agency's decision to remove or reject curriculum materials on the basis that the materials discuss or reflect these characteristics and identities may constitute unlawful discrimination.

[1] Ed. Code, § 51204.5.
[2] Ed. Code, § 220.

We are particularly concerned about statements made by Board members during the May 16 meeting, which included allegations about Harvey Milk, whose life is discussed in supplemental materials included in *Social Studies Alive*. Not only could such statements reflect that the decision was motivated by a desire to erase from the history taught to students the contributions of a prominent and respected gay rights activist and leader, but they also suggest that the Board's action may have been tainted by discriminatory animus. Moreover, the invocation of a long-standing, but discredited, trope designed to demonize members of the LGBTQ community is likely to contribute to creating (if not intended to create) a hostile environment for LGBTQ students and staff, in violation of their civil rights.

To better understand the basis for the Board's rejection of *Social Studies Alive* as an adopted curriculum program and to determine whether the Constitution or laws of the state have been violated, you are requested to provide to the Attorney General's Office by June 22, 2023, the following materials:

- All policies and procedures for the assessment and adoption of instructional materials, including assessments of their suitability for students;
- All policies and procedures related to the removal or discontinuation of instructional materials;
- Documents and communications related to the proposed adoption of *Social Studies Alive*, including the materials shared as part of the public review period and any comments or feedback received during the public review period;
- Documents and communications reflecting the basis for the Board's rejection of *Social Studies Alive*, including any briefing materials provided to Board members about agenda item O.5 of the May 16 Board meeting, any notes or other materials prepared by Board members regarding the agenda item, and any communications between Board members and members of the public about *Social Studies Alive* and/or the agenda item; and
- Any complaints received related to *Social Studies Alive*, including complaints received related to statements made during the May 16 Board meeting or the Board's rejection of *Social Studies Alive*.

If you have any questions regarding these requests, please do not hesitate to reach out to the undersigned.

Sincerely,

Michael L. Newman
Senior Assistant Attorney General
Civil Rights Enforcement Section

For ROB BONTA
Attorney General

Encl. June 1, 2023 letter, entitled "Educational Rights and Requests to Remove Instructional Materials"

Governor of the State of California

Gavin Newsom,
Governor of California

1021 O Street, Suite 9000
Sacramento, CA 95814
916-445-2841

Office of the Attorney General

Rob Bonta,
Attorney General

1300 I Street, Suite 1142
Sacramento, CA 95814
916-445-9555

California Department of Education

Tony Thurmond,
State Superintendent of Public Instruction

1430 N Street
Sacramento, CA 95814
916-319-0800

June 1, 2023

Dear California County and District Superintendents and Charter School Administrators and School Principals:

Educational Rights and Requests to Remove Instructional Materials

As we close this school year and look to the next, communities across California and the nation are being confronted with threats that invoke a darker past. In the first half of the 2022–23 school year alone, 1,477 books were banned nationally, with teachers and librarians threatened with prison time for shelving the wrong book.[1] As state leaders elected to represent the values of all Californians, we offer our response in one shared voice: Access to books—including books that reflect the diverse experiences and perspectives of Californians, and especially those that may challenge us to grapple with uncomfortable truths—is a profound freedom we all must protect and cultivate.

This letter outlines key considerations to assist you with fielding requests within your community while you continue to support your students and their educational rights.

I. The Constitution Restricts the Removal of Books From Libraries and Curricula

As the Supreme Court stated over 50 years ago: "It can hardly be argued that … students … shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[2] Freedom of speech includes the right to receive information and ideas, including those that are controversial, unpopular, or offensive to some.[3] "[T]he

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[1] https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/

[2] *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 506.

[3] *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico* (1982) 457 U.S. 853, 866–867 ("The right of freedom of speech and press ... necessarily protects the

function of books and other literary materials, as well as of education itself, is to stimulate thought, to explore ideas, [and] to engender intellectual exchanges."[4]

While local educational agencies[5] "have broad discretion in the management of school affairs," this discretion "must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."[6] Therefore, while a local educational agency or administrator may remove books and other materials from a school library because of their educational suitability, pervasive vulgarity or profanity, or factual inaccuracies, it "may not remove books from school library shelves simply because [officials] dislike the ideas contained in those books… ."[7]

For example, "If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books."[8] Similarly, students' rights would also be violated "if an all-white school board, motivated by racial animus, decided to remove all books authored by [people of color] or advocating racial equality and integration."[9]

These principles also apply to decisions about school curricula. Curricular decisions must be based on legitimate pedagogical interests and not an attempt at "rigid and exclusive indoctrination"; "to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"; or because of ideological opposition.[10] And removing materials from curricula or libraries may also violate the First Amendment, even when prompted by complaints from parents or threats of lawsuits.[11]

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right to receive it. … It would be a barren marketplace of ideas that had only sellers and no buyers.") (internal citations omitted); *Monteiro v. Tempe Union High School Dist.* (9th Cir. 1998) 158 F.3d 1022, 1029–1032.

[4] *Monteiro v. Tempe Union High School Dist.*, *supra*, at p. 1032.

[5] Ed. Code, § 56026.3.

[6] *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, *supra*, 457 U.S. at p. 864.

[7] *Id.* at p. 872; *McCarthy v. Fletcher* (1989) 207 Cal.App.3d 130, 144.

[8] *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, *supra*, 457 U.S. at p. 871.

[9] *Ibid*.

[10] *McCarthy v. Fletcher*, *supra*, 207 Cal.App.3d at p. 146; *Monteiro v. Tempe Union High School Dist.*, *supra*, 158 F.3d at p. 1029 fn. 8.

[11] *Monteiro v. Tempe Union High School Dist.*, *supra*, 158 F.3d at p. 1029 ("[A] student's First Amendment rights are infringed when books that have been determined by the school district to have legitimate educational value are removed from a mandatory reading list because of threats of damages, lawsuits, or other forms of retaliation.").

"Our Constitution does not permit the official suppression of *ideas*,"[12] yet that appears to be what is happening here. "[I]f we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes," then local educational agencies and school officials must abide by the First Amendment.[13]

II. Education and Exposure to Various World Views Are Vital for our Youth

Education is essential to prepare our youth for civic participation and to instill the values needed to maintain our democracy.[14] As California's own Constitution recognizes, the "diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people… ."[15] Moreover, since before the days of *Brown v. Board of Education*,[16] formal education has played an essential role in the struggle for civil rights and in building understanding of differences as well as shared values. Schools "bring together members of different racial and cultural groups and, hopefully, help them to live together 'in harmony and mutual respect.'"[17]

"Those who choose the books and literature that will influence the minds and hearts of our nation's youth and those who teach young people in our schools bear an awesome responsibility."[18] This responsibility must neither be taken lightly nor used for inappropriate, political, or partisan ends.

III. California Education Code Requires Local Educational Agencies to Provide a Representative and Unbiased Curriculum and Protects a Student's Right to Freedom of Speech

Local educational agencies must provide students a representative social sciences curriculum that provides instruction on "the role and contributions of both men and women, Native Americans, African Americans, Mexican Americans, Asian Americans, Pacific Islanders, European Americans, lesbian, gay, bisexual, and transgender Americans, persons with disabilities, and members of other ethnic and cultural groups" to the development of California and the United States and "the role of these groups in contemporary society."[19] Any instructional materials adopted by a local educational

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[12] *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, *supra*, 457 U.S. at p. 871 (emphasis in original); see also *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion… .").
[13] *West Virginia State Board of Education) v. Barnette*, *supra*, 319 U.S. at p. 637.
[14] See *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. at p. 864 (quoting *Ambach v. Norwick* (1979) 441 U.S. 68, 76–77).
[15] Cal. Const., art. IX, § 1.
[16] *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.* (1954) 347 U.S. 483.
[17] *Hartzell v. Connell* (1984) 35 Cal.3d 899, 908 (internal citations omitted).
[18] *Monteiro v. Tempe Union High School Dist.*, *supra*, 158 F.3d at p. 1032.
[19] Ed. Code, § 51204.5.

agency must "accurately portray the cultural and racial diversity of our society," including the roles and contributions of these groups.[20]

Schools may not adopt textbooks or other materials or provide or sponsor instruction or activities that promote discriminatory bias against or that reflect adversely on persons on the basis of race, ethnicity, nationality, gender, gender identity, gender expression, religion, disability, sexual orientation, immigration status, or any other protected characteristic.[21] California law strictly prohibits discrimination on any of these bases.[22] A local educational agency's removal of materials on the basis that the materials discuss or reflect these characteristics and identities may constitute unlawful discrimination. A complaint of discrimination based on a protected characteristic may be filed with a local educational agency and appealed to the California Department of Education (CDE).[23]

California law also prohibits instructional materials that contain any "sectarian or denominational doctrine" or other propaganda.[24]

In addition to requiring local educational agencies to provide a representative and unbiased curriculum in these ways, the *Education Code* provides robust protections for student speech, including protections beyond those guaranteed by the Constitution. California students:

> ... have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not the publications or other means of expression are supported financially by the school or by use of school facilities.[25]

Only expression that is obscene, libelous, or slanderous or that "so incites pupils as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school" may be prohibited.[26] Prior restraint of any other type of expression violates the law, including in "material prepared for official school publications," like school newspapers.[27] Furthermore, local educational agencies must

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[20] Ed. Code, § 60040.
[21] Ed. Code, §§ 51500, 51501, 60044. Section 51500 also prohibits teachers from providing instruction "which reflects adversely upon persons because of their race, sex, color, creed, handicap, national origin, or ancestry."
[22] Ed. Code, § 220.
[23] Ed. Code, § 33315, subd. (a).
[24] Ed. Code, § 60044.
[25] Ed. Code, § 48907, subd. (a).
[26] *Ibid*.
[27] *Id.*, subd. (d).

"adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place, and manner" of speech activities.[28]

For further guidance, please refer to the CDE's recent publication, "Guidance on Removal of Instruction or Instructional Materials," which is available on the CDE Curriculum Frameworks and Instructional Resources web page at https://www.cde.ca.gov/ci/cr/cf/index.asp.

IV. Possible Requests for Information

If your local educational agency does remove or ban instructional materials from classrooms or libraries, you may be requested to provide the Attorney General's Office with materials to allow it to analyze your agency's actions and procedures. These materials may include the following:

- All policies and procedures related to the First Amendment and freedom of speech;
- All policies and procedures for the assessment of instructional materials, library books, and other materials for students, including assessments of their suitability for students;
- All policies and procedures related to the removal or discontinuation of instructional materials or the removal of any books or other materials from school libraries and/or classrooms;
- All documents and communications related to the materials, including those reflecting the basis for their removal or assessments of their suitability for students; and
- Any complaints received related to the materials.

Please be prepared to respond to requests for information in the event the Attorney General's Office reaches out.

Sincerely,

GAVIN NEWSOM
Governor

ROB BONTA
Attorney General

TONY THURMOND
State Superintendent of Public Instruction

[28] *Id.*, subd. (b).

EXHIBIT 11

Governor Newsom and State Leaders: If Temecula School Board Won't Do Its Job, State Will

Published: Jul 13, 2023

WHAT YOU NEED TO KNOW: California will secure textbooks for students in Temecula if the local school board fails to take action at its next board meeting and the state will enact legislation to impose fines on any school district that fails to provide adequate instructional materials.

SACRAMENTO – Governor Gavin Newsom, joined by Superintendent of Public Instruction Tony Thurmond, Senate President pro Tempore Toni G. Atkins, Assembly Speaker Robert Rivas, and Assemblymember Dr. Corey Jackson today announced the State of California will begin the process of securing textbooks for students in the Temecula Valley Unified School District and enact legislation to fine school districts for failure to provide adequate instructional materials. Elementary students in Temecula are slated to begin the school year on August 14, 2023, without enough textbooks for every student because of the school board's decision to reject a widely used social studies curriculum.

"Cancel culture has gone too far in Temecula: radicalized zealots on the school board rejected a textbook used by hundreds of thousands of students and now children will begin the school year without the tools they need to learn," **said Governor Newsom**. "If the school board won't do its job by its next board meeting to ensure kids start the school year with basic materials, the state will deliver the book into the hands of children and their parents — and we'll send the district the bill and fine them for violating state law."

"I am glad to join in this action with Governor Newsom today and

thank him for his leadership in calling for Temecula's school board to reverse course to prevent further harm to students," **said State Superintendent Thurmond**. "Inclusive education promotes the academic achievement and social development of our students. School Districts should not ban books in California, especially as it harms students of color and LGBTQ+ youth. AB1078 lays out the structure for today's action and I am proud to have sponsored this bill to protect our students from the harmful effects of book banning, exclusion of inclusive textbooks and discrimination."

"Censoring learning materials based on bigotry and ignorance prevents our students from getting a good education," **said Senate President pro Tempore Toni G. Atkins (D-San Diego)**. "Culture war extremism doesn't belong in the debate of how to teach our children and school districts should always put students first. That's why I'm pleased the Governor is stepping in to make sure the children in Temecula have textbooks to start the year, and I look forward to working with the Governor and the assembly on a clear legislative solution. We have a duty to help eliminate ignorance in all its forms."

"The antics of the Temecula Valley Unified School District are intolerable and damaging to its students' opportunities to grow, prosper, and succeed," **said Assembly Speaker Robert Rivas**. "Book bans betray the most basic of California's core values. I hope the members of the school board are able to reflect on their decisions and come to make better decisions for our children's futures."

"Book banning is not acceptable and will not stand in California," **said Assemblymember Dr. Corey Jackson**. "It is my honor to have the Governor's support of Assembly Bill 1078. This sends a clear message that such actions will not be tolerated. We stand united in our commitment to protect our students' access to diverse educational materials and ensure an inclusive educational environment. We will not go backward. We will meet this historical moment."

Temecula Valley Unified School District's current curriculum is outdated and in violation of state law. Students in the district are

outdated and in violation of state law. Students in the district are forced to use a textbook published in 2006. In the process of acquiring updated textbooks for students in grades one through five on May 16, 2023, school board President Joseph Komrosky asserted false claims about the instructional materials. The board voted by a 3-2 majority to reject the adoption of the new social studies curriculum that was recommended by teachers representing every elementary school in the district and overwhelmingly supported by parents and community members. The textbook, one of four standard programs approved by the state, is routinely and widely used across hundreds of school districts in California.

Following the school board's decision, Governor Newsom and state leaders wrote a letter to school districts statewide highlighting the legal obligations of districts and joined California Attorney General Rob Bonta in demanding information and answers from the board. The administration also began working with the Legislature and Superintendent Thurmond to advance AB 1078 (Jackson) to strengthen state law to ensure students in California have access to adequate instructional materials. Among other provisions, AB 1078 would:

- Require a two-thirds supermajority vote for a school board to remove instructional materials or curriculum;
- Establish a process for the California State Department of Education to purchase adequate standards-aligned instructional materials for a district, if the district has failed to provide them for students; and
- Institute a funding penalty for school districts that do not sufficiently provide standards-aligned instructional materials.

California provides instruction and support services to roughly 5.9 million students in grades transitional kindergarten through twelve in more than 1,000 districts and over 10,000 schools throughout the state. Under Governor Newsom's leadership, education funding is at a record high in California, totaling $129.2 billion in the 2023-24 budget.

budget.

Governor Newsom released a video to Temecula parents that can be viewed here.

https://twitter.com/CAgovernor/status/1679570621582446592?s=20

Mirabelli v. Olson
USDC Case No. No. 3:23-cv-00768-BEN-VET

TRANSCRIPT OF GOV. NEWSOM JULY 13, 2023 POST ON X

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G. NEWSOM: Hi, everybody. It's, uh, Gavin Newsom, father of four, with two young elementary school kids. And I want to talk to the parents of the Temecula School District. Uh, we've been paying close attention, as I know you have, particularly with school, uh, coming up on August 14. Um, you're worried, I'm worried, we're all worried, uh, about access, uh, to information, access to, uh, the latest social studies books that are being made available, quite literally, to hundreds of thousands of kids all throughout the State of California, but are being denied to the kids of the Temecula District. Uh, that social studies book has been censored by the local school board. Um, I know that's created a lot of anxiety. The last thing we need is more anxiety, anymore stacking stress. So I want you to know that we're moving forward, the State is moving forward in purchasing and procuring those social studies books. Your kids have the freedom to learn and you have the freedom to access those books, the same books that hundreds of thousands of other kids throughout the state are accessing. So, rest assured, we'll be sending those books down in very short order. And let's do our best, all of us, to soften the edges, uh, of these debates and to make sure that we provide accurate information and the freedom for our kids to learn. That, after all, is the California way.

[End of recording]

PROOFREADER'S CERTIFICATE

I, Erica Lowther, owner of San Diego Transcription, certify that on March 7, 2024, I proofread all the transcript of the above-referenced recording, while listening to the recording from which the same was transcribed, and that said transcript as typed accurately reflects the spoken word, to the best of my ability to hear those recorded words and identify the persons speaking.

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

Executed on March 7, 2024, at San Diego, California.

ERICA LOWTHER

EXHIBIT 12

Governor Newsom Announces Contract to Secure Textbooks for Students in Temecula

Published: Jul 19, 2023

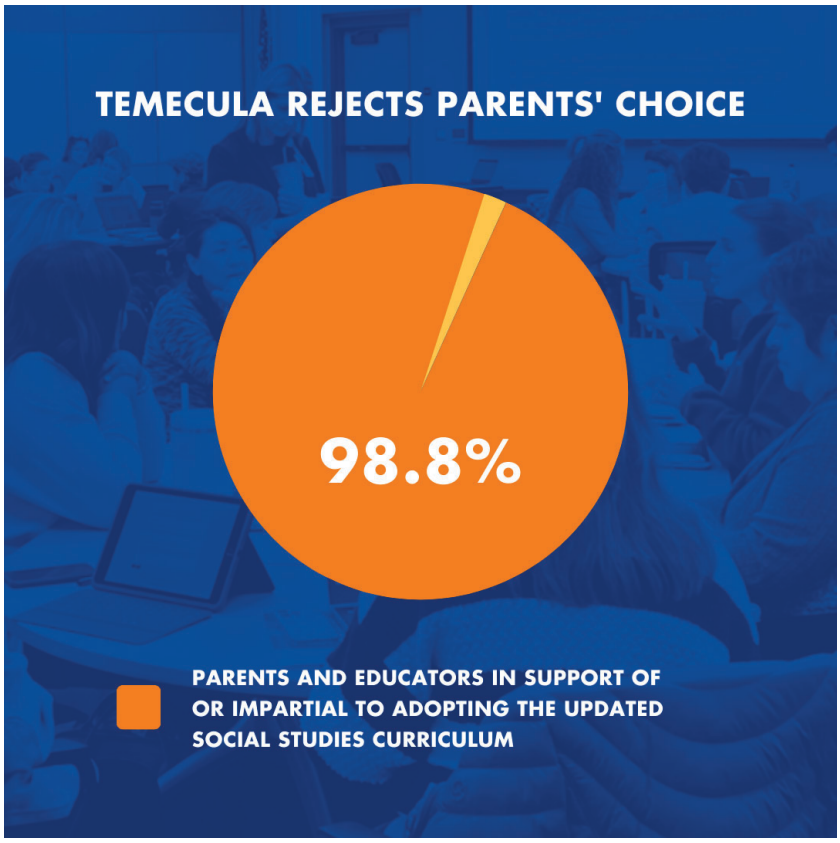
WHAT YOU NEED TO KNOW: California is entering into a contract to secure textbooks for students in Temecula following the local school board's failure to provide adequate instructional materials.

SACRAMENTO – Following the Temecula Valley Unified School District's failure to adopt an updated social studies curriculum, today Governor Gavin Newsom announced the state is entering into a contract to secure textbooks to ensure students in the district begin the school year with access to up-to-date books and materials that comply with state law. Elementary students in Temecula are slated to begin the school year on August 14, 2023, without proper instructional materials – in violation of state law – because of the school board's 3-2 majority's repeated decision to reject an updated curriculum.

"The three political activists on the school board have yet again proven they are more interested in breaking the law than doing their jobs of educating students — so the state will do their job for them," **said Governor Newsom**. "California will ensure students in Temecula begin the school year with access to materials reviewed by parents and recommended by teachers across the district. After we deliver the textbooks into the hands of students and their parents, the state will deliver the bill — along with a $1.5 million fine — to the school board for its decision to willfully violate the law, subvert the will of parents, and force children to use an out-of-print textbook from 17 years ago."

Due to the board majority's inaction, students in the district are forced to use a textbook published in 2006. According to the district's own documents published online, the district is out of compliance with at least

three separate state laws and frameworks with its current curriculum. Last week, the Governor and state leaders demanded the school district follow the law and adopt an updated curriculum. Yesterday, July 18, 2023, the school board again voted by a 3-2 majority to reject the adoption of a new social studies curriculum that was recommended by teachers representing every elementary school in the district and reviewed by parents and community members.



The textbook the state is securing on behalf of the school district is part of one of the four standard programs approved by the state and is routinely and widely used across hundreds of school districts in California. During the last academic year, the curriculum was piloted by nearly 1,300 families in Temecula classrooms and was recommended by teachers representing every elementary school in the district and overwhelmingly supported by parents and community members. Materials were available for public and parent review for months. According to the school district, during the community feedback period, 98.8% of parents, educators, and community members expressed being supportive or impartial to the adoption.

The Governor is working with the Legislature and Superintendent of Public

Instruction Tony Thurmond to enact legislation to impose fines on any school district that fails to provide adequate instructional materials. California provides instruction and support services to roughly 5.9 million students in grades transitional kindergarten through twelve in more than 1,000 districts and over 10,000 schools throughout the state. Under Governor Newsom's leadership, education funding is at a record high in California, totaling $129.2 billion in the 2023-24 budget.

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EXHIBIT 13

Governor Newsom Issues Statement on Temecula Textbooks

Published: Jul 21, 2023

SACRAMENTO – Following the Temecula Valley Unified School District governing board's decision Friday to adopt an updated social studies curriculum that was approved by local parents and teachers, Governor Gavin Newsom issued the following statement:

"Fortunately, now students will receive the basic materials needed to learn.

"But this vote lays bare the true motives of those who opposed this curriculum. This has never been about parents' rights. It's not even about Harvey Milk – who appears nowhere in the textbook students receive. This is about extremists' desire to control information and censor the materials used to teach our children.

"Demagogues who whitewash history, censor books, and perpetuate prejudice never succeed. Hate doesn't belong in our classrooms and because of the board majority's antics, Temecula has a civil rights investigation to answer for."

Friday's decision by the school board to adopt an up-to-date history and social studies curriculum comes following multiple demands by Governor Newsom. Following a series of prior actions, earlier this week the Governor announced the state would fine the school district and enter into a contract to secure textbooks if the board failed to adopt a legally-compliant social study curriculum.

The Temecula Valley Unified School District board majority's actions are being investigated by the California Department of Education. On June 7, 2023, Attorney General Bonta and Governor Newsom announced an inquiry into the district by the California Department of Justice related to civil rights violations.

###

EXHIBIT 14

LiMANDRI & JONNA LLP

CHARLES S. LiMANDRI†*
PAUL M. JONNA†

MARK D. MYERS
JEFFREY M. TRISSELL†
JOSHUA A. YOUNGKIN
ROBERT E. WEISENBURGER
MILAN L. BRANDON II
JOHANNA DELEISSEGUES

BRIAN D. MILLER
MICHAEL J. ALTI
RICHARD SALPIETRA

Of Counsel

MAILING ADDRESS:

POST OFFICE BOX 9120
RANCHO SANTA FE, CALIFORNIA 92067
TELEPHONE: (858) 759-9930
FACSIMILE: (858) 759-9938

WEBSITE: www.limandri.com

PHYSICAL ADDRESS:

16236 SAN DIEGUITO ROAD
BUILDING 3, SUITE 3-15
RANCHO SANTA FE, CA 92091

KATHY DENWORTH
Office Administrator

*BOARD CERTIFIED CIVIL TRIAL ADVOCATE
ADMITTED TO THE DISTRICT OF COLUMBIA BAR
ADMITTED TO THE NEW YORK BAR
†ADMITTED TO THE U.S. SUPREME COURT

February 1, 2024

VIA EMAIL ONLY:
emmanuelle.soichet@doj.ca.gov

Emmanuelle Soichet, Esq.
Deputy Attorney General
California Department of Justice
455 Golden Gate Ave., Ste. 1100
San Francisco, CA 94102-7004

Re: *Mirabelli & West v. Olson*, No. 3:23-cv-0768-BEN (S.D. Cal. Apr. 27, 2023)

Dear Ms. Soichet:

This letter is sent in response to your call of January 31, 2024, and email of February 1, 2024. As Mr. Trissell indicated, we generally try to exchange professional courtesies. As he explained, our main concern here is the delay that has been caused by prior unnecessary motion practice. At this stage, we intend to promptly proceed with discovery and then summary judgment; additional unnecessary delay will prejudice our clients. Mr. Trissell did not agree to any extensions or a negotiated briefing schedule, making clear that all decisions have to be made by our team together.

If you study the docket, you'll see that we filed this case on April 27, 2023, ECF No. 1, and very shortly thereafter filed a motion for a preliminary injunction set for hearing on June 26, 2023. ECF No. 5. Our original hope was to get an injunction over the summer so that we could get our clients back in the classroom for the entirety of the 2023-2024 school year. However, shortly after we filed, Judge Benitez *sua sponte* continued the hearing four weeks to July 17, 2023. ECF No. 22.

After we served the Complaint, the Escondido Union School District defendants ("EUSD") quickly responded with a Rule 12(b)(6) motion to dismiss, set for hearing on the same day as our preliminary injunction motion. We welcomed this so that the case could quickly become at issue. *See* ECF No. 7. But the California Department of Education defendants ("CDE") waited the full 60 days, until June 27, 2023, to file their motion to dismiss—which raised only standing issues. ECF No. 25. That caused Judge Benitez to continue the hearing again, consolidating all three motions for hearing on August 21, 2023. ECF No. 27. The hearing was then continued twice more, until it finally occurred on August 30, 2023. *See* ECF Nos. 29, 35.

Once we finally got our preliminary injunction issued on September 14, 2023, and the two motions to dismiss were denied, *see* ECF No. 42, EUSD continued to refuse to bring our clients back into the classroom—keeping them on paid administrative leave. So we were forced to twice extend the responsive pleading deadline as we considered adding additional claims against EUSD. *See* ECF Nos. 43, 44, 48, 49. For both motions, the Court simply signed our proposed orders, but for the second one, added that "[n]o further extensions will be granted by the Court." ECF No. 49.

EUSD and the CDE thus only answered on November 13, 2023, ECF Nos. 51, 52, and we only got Plaintiff West back in the classroom in January of this year, after filing a contempt application. *See* ECF Nos. 59, 60, 73. Because of unnecessary delay, Plaintiff West missed over half of the year, and is now on a substitute teacher rotation because her class is being taught by someone else—because she was not there at the beginning of the year. Plaintiff Mirabelli has been repeatedly hospitalized with stress-induced neuropathy relating to severe anxiety resulting from the defendants' aggressive push-back and delay tactics.

After they answered, the CDE immediately filed a Rule 12(c) motion for judgment on the pleadings. *See* ECF No. 53. Judge Benitez took that motion under submission and has not yet ruled, but at the hearing, he *sua sponte* ordered Plaintiffs to file a First Amended Complaint naming Attorney General Bonta and Governor Newsom as defendants. *See* ECF No. 72. At the hearing, the CDE requested longer than 14 days to file their amended answer. Like before, Judge Benitez said that there would be no extensions. *See* ECF No. 75 at p.55.

Getting to this point has been extremely difficult for plaintiffs, for many practical reasons, and so we have grown weary of needless delay. Thus, as Mr. Trissell explained on the phone, when we saw the CDE's Rule 12(c) motion for judgment on the pleadings, we felt we had to request sanctions. Our basis for sanctions is briefed in ECF No. 62, so we direct you to it. Primarily, under 28 U.S.C. § 1927, the court can sanction any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously." This does not require finding an intent to harass, but merely recklessly raising a frivolous argument. And a motion is frivolous when it merely "rehash[es] legal arguments already rejected by the district court." *Hyde & Drath v. Baker*, 24 F.3d 1162, 1172 (9th Cir. 1994).

I will also note that the provision in the Local Rules regarding applications for reconsideration is not limited to a party re-raising an argument *he* has already made. Rather, whenever a motion has been made by *any* party, and decided by the court, *any* party who re-raises similar issues must explain why reconsideration is appropriate. *See* S.D. Cal. CivLR 7.1(i).

In your email, you "proposed to accept service by email on behalf of the Governor and Attorney General with the understanding that the Attorney General and plaintiffs will file a joint stipulation with the court for the following: an extension of up to 30 days on the Attorney General's responsive pleading," in addition to the standard 21 days. Fed. R. Civ. P. 12(a)(1)(A)(i). *See* Email from Soichet to Trissell (Feb. 1, 2024, 7:01 a.m.). Then, you stated, "given your concerns, my clients would alternatively be willing to accept by email and sign a waiver of service form that will afford the Governor and Attorney General 60 days from today to file their responsive pleadings." *Id*. However, it is unclear to us how permitting the Attorney General 60-days to file a responsive pleading, instead of 51-days, addresses our concerns about delay.

Your email also proposes a negotiated briefing schedule where Plaintiffs' opposition to the Attorney General's motion to dismiss would be due 30 days after filing, and the Attorney General's reply would be due 21 days after the opposition. Under the Local Rules, regardless of when a motion is filed, a reply is due 7 days prior to the noticed hearing and the opposition is due 14 days prior. *See* S.D. Cal. CivLR 7.1(e).

In light of the above, and upon further consideration of the issues, we cannot agree to your proposed schedule. Under the above schedule, the Complaint would be deemed served today, February 1, 2024, and the Attorney General would then have 60 days to file a Rule 12(b)(6) motion to dismiss—until April 1, 2024. Our opposition would be due on May 1, 2024, your reply would be due on May 22, 2024, and a hearing would be set for some time thereafter in June. Instead, we will be personally serving the Complaint tomorrow, giving you until February 23, 2024 to file a responsive pleading. Because of Judge Benitez's repeated denials of further extensions of the time to file answers, we cannot agree to a further extension.

With respect to your responsive pleading, we respectfully urge you to file an answer instead of a motion to dismiss. Judge Benitez's order denying the prior two motions to dismiss is quite comprehensive. *See* ECF No. 42. In it, he denied the CDE's arguments that they were not proper defendants because of their distance from the facts here, and he rejected EUSD's arguments that Plaintiffs had failed to properly state their claims.

In light of Judge Benitez's rejection of the CDE's arguments on standing, and his express order to add Governor Newsom and Attorney General Bonta as defendants, it seems odd to us that you could raise an argument that your clients should not be in this case because they are "differently situated" than the current defendants. *See* Email from Soichet to Trissell (Feb. 1, 2024,

7:01 a.m.). However, we would be interested in meeting and conferring with you over whatever those arguments are.

Separate from that, it would seem that a motion to dismiss would simply be targeted at whether Plaintiffs have adequately pleaded their claims. But we do not see how any such motion could be successful, in light of the prior briefing and argument. Perhaps most importantly, the motion to dismiss order states that "the reasons proffered by the defendants for the policy pass neither the strict scrutiny nor the rational basis tests." ECF No. 42 at p.27:11-12. That should be dispositive.

The order also explains at length how the policies at issue violate the Fourteenth Amendment rights of parents to direct the upbringing of their children, *id*. at pp.14-18, and how children's privacy rights are not violated. *Id.* 42 at p.19 ("[A] student who announces the desire to be publicly known in school by a new name, gender, or pronoun and is referred to by teachers and students and others by said new name, gender, or pronoun, can hardly be said to have a reasonable expectation of privacy or expect non-disclosure."); p.20 ("California appellate courts recognize that parents have constitutional rights and legal responsibilities and that generally a parent's rights are superior to a right of privacy belonging to their child.").

On the Free Exercise claims, the Court held that Plaintiffs' religious beliefs were sincere, *id*. at p.23, and burdened. *Id*. at p.24. And the Court held that the discretionary exemptions inherent to the policies triggered strict scrutiny: "There are no standards written in the policy for determining what is a 'legitimate need[,]' only that it requires a case by case decision.... This is the very definition of a discretionary exemption." *Id*. at pp.26-27 (brackets in original).

On Plaintiffs' Free Speech claim, the Court held that the "teachers could also make out a freedom of speech claim if the policy compels them to violate the law or deliberately convey an illegal message. Here, … the policy of AR 5145.3, as presented to the faculty, and EUSD's response to the plaintiffs' request for accommodations, appears to demand that these teachers communicate misrepresentations to parents about the names and pronouns adopted by their students. As discussed above, that would likely be unlawful and in derogation of the constitutional rights of parents." *Id*. at p.23 (italics omitted).

Thus, we do not think any motion to dismiss targeted to the adequacy of the pleadings would be meritorious, and would instead be a waste of both the parties' and the Court's resources. To avoid unnecessary briefing, we would invite you to provide us with your anticipated arguments in advance, so that we can meet and confer over them. As we explained to the CDE the last time around, if you intend to actually raise new issues, unique to your clients, then that is perfectly appropriate. But rehashing arguments that have already been soundly rejected will be a waste of time, forcing us to request sanctions.

Please also note that your initial disclosures will be due 30 days after service of the Complaint. Fed. R. Civ. P. 26(a)(1)(D). I note this because, as another one of the many instances of delay in this case, both EUSD and the CDE served their initial disclosures late, after we inquired as to why they had not been served. Further, in advance of the ENE on February 28, 2024, the parties agreed at the Rule 26(f) conference that Plaintiffs would circulate a draft Joint Discovery Plan on February 9, 2024, which we will send to you as well.

Respectfully submitted,

LiMANDRI & JONNA LLP

Paul M. Jonna

PMJ/jmt

cc: Daniel R. Shinoff, Esq., dshinoff@as7law.com
Jack M. Sleeth, Esq., jsleeth@as7law.com
Gil Abed, Esq., gabed@as7law.com
Maurice A. Bumbu, Esq., mbumbu@as7law.com
Nopealey Lay, nlay@as7law.com

Len Garfinkel, Esq., lgarfinkel@cde.ca.gov
Christopher N. Mandarano, Esq., cmandarano@cde.ca.gov
Virginia G. Cale, Esq., vcale@cde.ca.gov

Darrell W. Spence, Esq., darrell.spence@doj.ca.gov
Kevin L. Quade, Esq., kevin.quade@doj.ca.gov

EXHIBIT 15

From: Paul Jonna
To: Kevin Quade; Daniel Shinoff; Christopher Mandarano
Cc: Charles Limandri; Mark Myers; Jeffrey Trissell; Jack Sleeth; Gil Abed; Maurice Bumbu; Nopealey Lay; Len Garfinkel; Virginia Cale; Darrell Spence; Emmanuelle Soichet
Subject: RE: [EXTERNAL] RE: Mirabelli v. Olson - Meet & Confer
Date: Wednesday, February 14, 2024 5:13:33 PM
Attachments: image001.png

Thanks Kevin. If you can explain the circumstances unique to the Governor and AG re the 12(b)(1) arguments, we would appreciate more information before the call. Otherwise, we will look forward to discussing with you tomorrow.

Paul M. Jonna | Partner
LiMANDRI & JONNA LLP | P.O. Box 9120 | Rancho Santa Fe, CA 92067
Tel: (858) 759-9930 |Direct: (858) 759-9133 |Fax: (858) 759-9938
pjonna@limandri.com | www.limandri.com

From: Kevin Quade <Kevin.Quade@doj.ca.gov>
Sent: Wednesday, February 14, 2024 2:58 PM
To: Paul Jonna <pjonna@limandri.com>; Daniel Shinoff <DShinoff@as7law.com>; Christopher Mandarano <CMandarano@cde.ca.gov>
Cc: Charles Limandri <climandri@limandri.com>; Mark Myers <mmyers@limandri.com>; Jeffrey Trissell <jtrissell@limandri.com>; Jack Sleeth <JSleeth@as7law.com>; Gil Abed <GAbed@as7law.com>; Maurice Bumbu <mbumbu@as7law.com>; Nopealey Lay <nlay@AS7Law.com>; Len Garfinkel <LGarfinkel@cde.ca.gov>; Virginia Cale <VCale@cde.ca.gov>; Darrell Spence <Darrell.Spence@doj.ca.gov>; Emmanuelle Soichet <Emmanuelle.Soichet@doj.ca.gov>
Subject: RE: [EXTERNAL] RE: Mirabelli v. Olson - Meet & Confer

Hi Paul – On the motions to dismiss, we're making 12(b)(1) arguments based on lack of standing to sue either the Governor or the Attorney General, as well as arguments that both Defendants are covered by 11th Amendment immunity. Though the Court previously rejected such arguments with respect to the State Education Defendants, we think there are specific circumstances unique to the Governor and Attorney General that dictate an opposite result.

On the ENE conference continuance, the court's initial order scheduling the conference states that requests for continuance should be done via Joint Motion, which we understand in the Southern District is essentially a

stipulation. Since the ENE conference ordinarily doesn't happen until after a Defendant files an answer to the complaint (within 45 days under the local rules) it would be counterproductive to hold the conference on February 28, 2024. We were just recently served with the FAC and are on the clock for our responsive pleading, so there has been no time to consider the factors (let alone the required documents) that go into the ENE conference.

On discovery, we think it makes sense to hold off, at least as to Defendants Newsom and Bonta, for a brief time to allow the court to rule on the MTDs. Those motions is likely dispositive as to whether either Defendant is a proper party in the case. Should discovery proceed on the timeline outlined in your requests and one or both Defendants are later dismissed from the case, the work of both parties that went into the discovery process will necessarily have been wasted. Moreover, since your clients have obtained a preliminary injunction that safeguards their interests during the pendency of the case, there is little urgency that justifies pressing ahead with discovery in the face of these concerns.

Look forward to speaking with you and everyone else tomorrow.

Kevin

From: Paul Jonna <pjonna@limandri.com>
Sent: Wednesday, February 14, 2024 11:55 AM
To: Kevin Quade <Kevin.Quade@doj.ca.gov>; Daniel Shinoff <DShinoff@as7law.com>; Christopher Mandarano <CMandarano@cde.ca.gov>
Cc: Charles Limandri <climandri@limandri.com>; Mark Myers <mmyers@limandri.com>; Jeffrey Trissell <jtrissell@limandri.com>; Jack Sleeth <JSleeth@as7law.com>; Gil Abed <GAbed@as7law.com>; Maurice Bumbu <mbumbu@as7law.com>; Nopealey Lay <nlay@AS7Law.com>; Len Garfinkel <LGarfinkel@cde.ca.gov>; Virginia Cale <VCale@cde.ca.gov>; Darrell Spence <Darrell.Spence@doj.ca.gov>; Emmanuelle Soichet <Emmanuelle.Soichet@doj.ca.gov>
Subject: RE: [EXTERNAL] RE: Mirabelli v. Olson - Meet & Confer

Kevin:

It would help make the call more productive if you could send us more information via email before we speak. For example, perhaps you can at least summarize the issues you intend to raise in the motions to dismiss. Thanks.

Paul M. Jonna | Partner
LIMANDRI & JONNA LLP | P.O. Box 9120 | Rancho Santa Fe, CA 92067
Tel: (858) 759-9930 |Direct: (858) 759-9133 |Fax: (858) 759-9938
pjonna@limandri.com | www.limandri.com

From: Kevin Quade <Kevin.Quade@doj.ca.gov>
Sent: Wednesday, February 14, 2024 10:31 AM
To: Daniel Shinoff <DShinoff@as7law.com>; Christopher Mandarano <CMandarano@cde.ca.gov>
Cc: Paul Jonna <pjonna@limandri.com>; Charles Limandri <climandri@limandri.com>; Mark Myers <mmyers@limandri.com>; Jeffrey Trissell <jtrissell@limandri.com>; Jack Sleeth <JSleeth@as7law.com>; Gil Abed <GAbed@as7law.com>; Maurice Bumbu <mbumbu@as7law.com>; Nopealey Lay <nlay@AS7Law.com>; Len Garfinkel <LGarfinkel@cde.ca.gov>; Virginia Cale <VCale@cde.ca.gov>; Darrell Spence <Darrell.Spence@doj.ca.gov>; Emmanuelle Soichet <Emmanuelle.Soichet@doj.ca.gov>
Subject: RE: [EXTERNAL] RE: Mirabelli v. Olson - Meet & Confer

Thank you everyone for the quick response. Let's do tomorrow at 12:30. I'll send the calendar invite to everyone on this email.

Kevin

From: Daniel Shinoff <DShinoff@as7law.com>
Sent: Wednesday, February 14, 2024 10:22 AM
To: Christopher Mandarano <CMandarano@cde.ca.gov>
Cc: Paul Jonna <pjonna@limandri.com>; Kevin Quade <Kevin.Quade@doj.ca.gov>; Charles Limandri <climandri@limandri.com>; Mark Myers <mmyers@limandri.com>; Jeffrey Trissell <jtrissell@limandri.com>; Jack Sleeth <JSleeth@as7law.com>; Gil Abed <GAbed@as7law.com>; Maurice Bumbu <mbumbu@as7law.com>; Nopealey Lay <nlay@AS7Law.com>; Len Garfinkel <LGarfinkel@cde.ca.gov>; Virginia Cale <VCale@cde.ca.gov>; Darrell Spence <Darrell.Spence@doj.ca.gov>; Emmanuelle Soichet <Emmanuelle.Soichet@doj.ca.gov>
Subject: Re: [EXTERNAL] RE: Mirabelli v. Olson - Meet & Confer

11-2 tomorrow works for me as well.
Daniel
Sent from my iPhone

On Feb 14, 2024, at 10:14 AM, Christopher Mandarano <CMandarano@cde.ca.gov> wrote:

We can also be available tomorrow between 11 AM and 2 PM.

Chris Mandarano, Deputy General Counsel
Legal, Audits and Charters Branch
California Department of Education
1430 N Street, Suite 5319
Sacramento, CA 95814-5901
Phone: 916-319-0288
Fax #: 916-322-2549
cmandarano@cde.ca.gov

From: Paul Jonna <pjonna@limandri.com>
Sent: Wednesday, February 14, 2024 10:12 AM
To: Kevin Quade <Kevin.Quade@doj.ca.gov>; Charles Limandri <climandri@limandri.com>; Mark Myers <mmyers@limandri.com>; Jeffrey Trissell <jtrissell@limandri.com>; dshinoff@as7law.com <dshinoff@as7law.com>; jsleeth@as7law.com <jsleeth@as7law.com>; gabed@as7law.com <gabed@as7law.com>; mbumbu@as7law.com <mbumbu@as7law.com>; nlay@as7law.com <nlay@as7law.com>; Len Garfinkel <LGarfinkel@cde.ca.gov>; Christopher Mandarano <CMandarano@cde.ca.gov>; Virginia Cale <VCale@cde.ca.gov>
Cc: Darrell Spence <Darrell.Spence@doj.ca.gov>; emmanuelle.soichet@doj.ca.gov <emmanuelle.soichet@doj.ca.gov>
Subject: [EXTERNAL] RE: Mirabelli v. Olson - Meet & Confer

I have an all day mediation Friday, but could speak tomorrow between 11am-2pm PT.

Paul M. Jonna | Partner
LIMANDRI & JONNA LLP | P.O. Box 9120 | Rancho Santa Fe, CA 92067
Tel: (858) 759-9930 |Direct: (858) 759-9133 |Fax: (858) 759-9938
pjonna@limandri.com | www.limandri.com

<image002.png>

From: Kevin Quade <Kevin.Quade@doj.ca.gov>
Sent: Wednesday, February 14, 2024 10:10 AM
To: Paul Jonna <pjonna@limandri.com>; Charles Limandri <climandri@limandri.com>; Mark Myers <mmyers@limandri.com>; Jeffrey Trissell <jtrissell@limandri.com>; dshinoff@as7law.com; jsleeth@as7law.com; gabed@as7law.com; mbumbu@as7law.com; nlay@as7law.com; lgarfinkel@cde.ca.gov; cmandarano@cde.ca.gov; vcale@cde.ca.gov
Cc: Darrell Spence <Darrell.Spence@doj.ca.gov>; Emmanuelle Soichet <Emmanuelle.Soichet@doj.ca.gov>
Subject: Mirabelli v. Olson - Meet & Confer

Good morning counsel – We're looking to schedule a meet and confer in the next couple days to discuss a number of filings that we're preparing on behalf of Defendants Newsom and Bonta. Specifically, we'd like to discuss our position and get everyone's response with respect to the following potential filings:

- Motions to Dismiss under Rule 12(b)(1) filed separately for Defendants Newsom and Bonta
- A Joint Motion/stipulation to continue the ENE Conference now scheduled for February 28, 2024
- A Joint Motion/stipulation to extend Defendants Newsom and Bonta's deadlines for responding Plaintiffs' written discovery requests, or in the alternative, an *ex parte* application for stay of discovery pending resolution of the anticipated MTDs
- Any additional discovery topics pursuant to Rule 26

We are hoping to have this omnibus meet and confer either tomorrow or Friday and are pretty flexible to try and work with the parties' schedules. Please let me know your availability and I will send out an invite for a time that hopefully works for everyone. Thank you!

Kevin

<image003.png>

KEVIN L. QUADE
Deputy Attorney General
Health, Education, and Welfare
Office of the Attorney General | Department of Justice | State of California
1300 I Street, Sacramento, California 95814
T. 916.210.7693

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