No. 23-16031

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AURORA REGINO,

Plaintiff-Appellant

v.

Superintendent KELLY STALEY, in her official capacity,

Defendant-Appellee.

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

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APPELLANT'S OPPOSITION TO AMICUS CURIAE THE STATE OF CALIFORNIA'S REQUEST TO PARTICIPATE IN ORAL ARGUMENT

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Appellant Aurora Regino ("Ms. Regino") submits this Opposition to the Motion of Amicus Curiae the State of California (the "State") For Leave to Participate in Oral Argument (Dkt. 83). For the following reasons, the Court should deny the State's Motion.

INTRODUCTION

The State is not a party to this case—which is between Ms. Regino and Appellee (the "District") only—and it should not be granted the privilege of participating in oral argument. Despite having the opportunity to move for intervention in the district court, the State did not do so. Indeed, the district court considered and denied a motion to intervene from an outside advocacy group that supported the District. In so doing, the district court recognized that the District adequately represents the interests at stake in this case. Moreover, in other litigation involving a different California school district's parental secrecy policy, the State expressly *disclaimed* any responsibility for the policy in an attempt to have that case dismissed against it. The State should not be heard to speak out of both sides of its mouth, nor should the State be afforded the privilege of participating in litigation only when convenient to it. Finally, the State's Motion and Amicus Brief impermissibly seek to expand the record and misrepresent the operative facts and science at issue in this appeal. Indeed, a groundbreaking report released just last week through the United Kingdom's National Health Service conclusively refutes

the State's argument that Ms. Regino's Complaint does not plausibly allege social transitioning is a form of psychological treatment. There is no benefit in allowing the State to repeat its—and the District's—misrepresentations at oral argument. The Court should deny the State's Motion.

ARGUMENT

I. THE STATE IS NOT A PARTY TO THIS CASE AND SHOULD NOT BE ALLOWED TO PARTICIPATE IN ORAL ARGUMENT

Absent exceptional circumstances, only parties are allowed to participate in oral argument before this Court. Fed. R. App. P 29(a)(8) (allowing nonparties to participate in oral argument "only with the Court's permission"). The State fails to cite a single case in support of its request to participate in oral argument here. Instead, the State simply asserts that it has a "substantial interest" in this case because it has "supported" policies like the one adopted by the District. Mot. at 2. This assertion is insufficient to warrant granting the State the privilege of participating in oral argument here.

The State had the opportunity to seek intervention below, but it failed to do so. Moreover, another entity—the Genders and Sexualities Alliance Network (the "GSA Network"), an advocacy organization for LGBTQ+ youth—sought to intervene below, *see* GSA Network Mot. to Intervene (ECF 22), *Regino v. Staley*, No. 2:23-cv-00032 (E.D. Cal. Feb. 14, 2023), but the district court denied that motion, *see* Order Denying Mot. to Intervene (ECF 46), *Regino v. Staley*, No. 2:23-

cv-00032 (E.D. Cal. April 14, 2023). The GSA Network argued that it had a "direct and immediate interest" in this litigation because, among other things, it had active chapters in the District, which the GSA Network argued would be affected by a change to the Policy. GSA Network Mot. to Intervene at 7. The district court rejected this (and other) arguments, making the express factual findings that the GSA Network lacked "a significantly protectable interest in the instant case," and that "that [the District] will []adequately represent the GSA [Network]'s interests." Order Denying Mot. to Intervene at 6–7.

Similarly, the State argues it has a "substantial interest in the issues presented in this case." Mot. at 2. But the State does not identify any interest that the District does not already represent. The fact that the State may "support" the District is an insufficient ground to allow it to present oral argument; if the rule were otherwise, the State would be permitted to present oral argument in almost every case before this Court. Moreover, the State does not argue that the District inadequately represents any interest the State may have, nor could such an argument prevail, given the district court's express factual finding that the District's representation of the interests at stake is adequate. If the State wanted to participate in this litigation, it should have moved to intervene below. Having failed to do so, the State cannot now claim its interests are so significant that it should be granted a privilege typically afforded only to parties.

The State's Motion also highlights the duplicity of the State's position in litigation involving schools parental secrecy policies like the one at issue here. In another case currently pending in the Southern District of California involving a challenge to a school parental secrecy policy, the plaintiffs named California Department of Education officials as defendants. *See Mirabelli v. Olson*, No. 3:23-cv-00768-BENWVG, 2023 WL 5976992, at *1 (S.D. Cal. Sept. 14, 2023); *see also* Verified Complaint (ECF 1) at 10–12, *Mirabelli v. Olsen*, No. 3:23-cv-00768 (S.D. Cal. April 27, 2023). The State sought dismissal of the complaint, arguing the policy was not attributable to it because the school policy was not required by state law or regulation. *Mirabelli*, , 2023 WL 5976992, at *16. Instead, the State argued that because the California Board of Education had merely issued non-binding guidance to school districts on the question of parental secrecy, any constitutional violations resulting from such policies were not attributable to the State. *Id.* at *16; *see also* State-Level Defendants' Mot. to Dismiss (ECF 25) at 1–8, *Mirabelli v. Olsen*, No. 3:23-cv-00768 (S.D. Cal. June 27, 2023). Moreover, in response to the plaintiffs' Amended Verified Complaint, which named Governor Newsom and Attorney General Bonta as defendants, the Governor and Attorney General have filed Motions to Dismiss predicated on the same arguments the California Department of Education officials previously made. Newsom Mot. to Dismiss (ECF 95) at 10–12, *Mirabelli v. Olsen*, No. 3:23-cv-00768 (S.D. Cal. Feb. 23, 2024); Bonta Mot. to

Dismiss (ECF 96) at 5–14, *Mirabelli v. Olsen*, No. 3:23-cv-00768 (S.D. Cal. Feb. 23, 2024). Those Motions are pending.

In an about-face from its position in *Mirabelli*, the State now argues that its interest in these policies is so "significant" that it should be granted the privilege of participating in oral argument here. These positions are fundamentally at odds with each other, and the Court should not countenance the State speaking out of both sides of its mouth.

II. THE STATE'S MOTION AND AMICUS BRIEF IMPERMISSIBLY EXPAND AND MISREPRESENT THE OPERATIVE FACTS

The State's Motion and Amicus Brief also add to and misrepresent the facts and science at issue in this case, further counseling against allowing it to participate at oral argument. *See Corrie v. Caterpillar, Inc*., 503 F.3d 974, 978 n.3 (9th Cir. 2007) ("[An] amicus may not generally introduce new facts at the appellate stage."); *Ministry of Def. of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 773 (9th Cir. 1992) (noting that courts should not "go outside the record to consider new facts submitted by a non-party"); *Tatel v. Mt. Lebanon Sch. Dist.*, No. CV 22-837, 2024 WL 980070, at *3 (W.D. Pa. Mar. 7, 2024) (holding amici's participation in a case must reflect the "actual factual record"). Because the court below granted the District's Rule 12(b)(6) Motion to Dismiss, the only facts before this Court are those alleged in Ms. Regino's Complaint and those contained in matters that are properly the subject of judicial notice. This includes the Complaint's well-pleaded allegation

that "socially transitioning" children constitutes a form of psychological treatment with serious and potentially life-long implications for the child. ER-59–62 ¶¶ 33–50.

In its Motion and Amicus Brief, the State attempts to inject page upon page of additional factual allegations into this case that were not set forth in the Complaint and that are not the proper subject of judicial notice. Mot. at 2–3; Amicus Brief of California, *et al*. (Dkt. 46) at 2, 13–15, 17–24, 27–30 (asserting numerous factual allegations not set forth in the Complaint). These extraneous factual allegations are not properly before the Court, and the State should not be given the opportunity to expound upon them at oral argument.

The State's extraneous factual allegations also ignore the scientific evidence surrounding social transitioning. For example, the State argues the District's Parental Secrecy Policy is not unconstitutional because social transitioning simply requires schools in the District to "respect[] a transgender student's name and pronouns." *Id.* In addition to parroting the District's argument on this point, Appellee's Resp. Br. (Dkt. 39) at 32–35, this argument ignores the well-pleaded factual allegations in the Complaint supporting the plausible inference that social transitioning is more than just a neutral act done out of "respect," but is rather a powerful psychological intervention in a child's life.

Just last week, Dr. Hilary Cass, the former President of the United Kingdom's

Royal College of Paediatrics and Child Health, released the final version of her long-awaited report investigating the treatment of transgender and gender nonconforming youth in the U.K.[1] The U.K.'s National Health Service ("NHS") commissioned the Report in 2020 to study the effectiveness of so-called "gender affirming care" for youth at the NHS. The Report, which was sharply critical of the NHS's prior practices, has received international headlines for its implications on the treatment of transgender and gender nonconforming youth.[2] Though the State—like the District—argues the Parental Secrecy Policy is merely about "respecting" transgender students' choices, Mot. at 2, the Cass Review concludes the exact opposite: that social transitioning is "an active intervention because it may have significant effects on [youth] in terms of their psychological functioning and longer-

[1] Dr. Hilary Cass, *Independent review of gender identity services for children and young people*, available online at https://cass.independent-review.uk/home/publications/final-report/ (last visited April 12, 2024) ("the Cass Review"). Contemporaneous with the filing of this Opposition, Ms. Regino is filing a Request for Judicial Notice asking the Court to take notice of the Cass Review, both for purposes of this Opposition and on the merits of Ms. Regino's appeal.

[2] Josh Parry, *Hilary Cass: Weak evidence letting down children over gender care*, BBC (April 10, 2024), https://www.bbc.com/news/health-68770641; Suzanne Moore, *Trans children have been lied to by adults – the Cass report may now see the legal dam break*, Telegraph (April 10, 2024), https://www.telegraph.co.uk/columnists/2024/04/09/cass-report-trans-children-have-been-lied-to-by-adults/; Denis Cambell, *et al., Thousands of children unsure of gender identity 'let down by NHS', report finds*, The Guardian (April 10, 2024), https://www.theguardian.com/society/2024/apr/10/thousands-of-children-unsure-of-gender-identity-let-down-by-nhs-report-finds.

term outcomes." Cass Review at 158; *see also id.* at 164 ("[S]ex of rearing seems to have some influence on eventual gender outcome[.]"). For this and other reasons, the Report concludes that "parents should be actively involved in decision making [involving social transitioning] unless there are strong grounds to believe that this may put the child or young person at risk." *Id.*

This is precisely the argument Ms. Regino makes here. Social transitioning is a form of psychological treatment with serious and potentially life-long implications for the child. Under the Constitution, parents have the fundamental right to prevent the government from secretly facilitating this treatment for their children absent an individualized showing that parental disclosure will put the child at risk of harm. The State's attempts to misrepresent the implications of social transitioning on the lives and wellbeing of children counsel against allowing it to participate at oral argument, particularly considering the District is already advancing that exact (incorrect) argument. Repetition of an argument that flies in the face of well-pleaded allegations that accurately depict the current state of scientific understanding does not advance the truth-seeking process.

CONCLUSION

For the foregoing reasons, Ms. Regino respectfully asks this Court to DENY the State of California's Motion to Participate in Oral Argument.

April 15, 2024

Respectfully submitted,

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