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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

PROTECT KIDS CALIFORNIA and JONATHAN ZACHRESON, Individually and on behalf of PROTECT KIDS CALIFORNIA Petitioners, v. ROB BONTA, in his official capacity as Attorney General of the State of California and DOES 1–50, inclusive, Respondents.	Case No. 24WM000034 Dept.: 36 Judge: Honorable Stephen Acquisto **PETITIONERS' REPLY BRIEF ON VERIFIED WRIT OF MANDATE; DECLARATORY RELIEF; VIOLATION OF FREE SPEECH (CAL. CONST., ART. 1, SEC. 2); VIOLATION OF FREE SPEECH (U.S. CONST., AMEND. I)** [*Filed with Petitioners' Objections to Respondent's Request for Judicial Notice and Declaration of Emily Rae*] Action filed: February 13, 2024 Hearing Date: April 19, 2024 Time: 1:30 p.m. Dept.: 36

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I. INTRODUCTION

Respondent's Opposition to Petitioners' Opening Brief misses the mark and provides support for Petitioners' position that Respondent provided a title and summary that violates: (i) Elections Code section 9051(e) – "a true and impartial statement of the purpose of the measure in such language that the ballot title and summary shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure;" (ii) Elections Code section 9004(a) – summary must provide the "chief purposes and points of the proposed measure" and (iii) Petitioners' First Amendment rights under the California Constitution and U.S. Constitution.

This court is tasked with deciding whether Respondent's obvious conflicts of interest, bias, and frequently-publicized disdain for every attribute of the Protect Kids California Ballot Initiative resulted in a biased title and summary intended to prejudice voters against the Initiative.

II. FACTUAL STATEMENT

The facts in this matter have been fully discussed in Petitioners' Opening Brief ("POB") and do not need repeating, excepting that Petitioners have now filed their Certification that 25% of the requisite signatures have been collected, pursuant to Elections Code section 9034. (Declaration of Emily Rae ("Rae Decl.") at ¶ 2.)

III. ARGUMENT

Respondent misrepresents state law and fails to address the false statements in the title and summary.

a. Trans-Identified Youths Do Not Have Rights that Force Schools to Deceive Parents.

The primary flaw with Respondent's argument is his title and summary inform voters that the measure restricts rights that are <u>not</u> currently held by trans-identified youth. There are no laws and no privacy rights for minors that permit them, in conjunction with their schools, to deceive parents. Similarly, existing case law is clear that schools cannot circumvent the directives of parents to prohibit their minor child from potentially placing themselves in harm's way in the case of a gender-confused female using a male bathroom or staying in overnight

accommodations with male bodies. Respondent has cited no statute or cases that reference a student's rights or school's rights to ignore or disregard parents' directions regarding appropriate accommodations for the parents' child (because none exist). Just as a child has no privacy right to dictate that a school not send home grades, a child has no statutory right to require a school to replace a parent's directive about accommodations for their child while entrusted to the school.

Similarly, Respondent has cited no law that provides a student has a right to privacy **from his or her parents** when that student announces to his teacher, or other school employees, that he or she is experiencing gender dysphoria, with the exception of school counselors. In fact, during the hearing in the case entitled *Mirabelli v. Olson*, California District Court, San Diego County, Case No. 3:23-cv-00768-BEN-WVG ("*Mirabelli*"), the attorney for the California Department of Education ("CDE") admitted the CDE's guidance—instructing schools to deceive parents when their student announces a transgender identity—is **not** law. (*See* Exhibit A to Rae Decl.) The *Mirabelli* court, in its September 15, 2023 preliminary injunction ruling, after providing a long dissertation on the history of parental rights pursuant to the Fourteenth Amendment, stated that there is no California law granting a privacy right to a minor from their parent regarding gender identity. (*See,* Exhibit B at pp.14-20 to Rae Decl.) The Court also accurately stated there were must first be an expectation of privacy before a right to privacy attaches. (*Id*.) The student, by notifying faculty, staff, and peers that he or she is seeking to use a different name or pronouns that do not align with his or her sex, or access facilities that do not align with his or her sex, is publicly exposing his or her gender identity. There can be no expectation of privacy—certainly not with their parents—as the *Mirabelli* court held. (*Id.*. at 19-20 (parents' rights are superior to those of their children).) Of note, the *Mirabelli* court described the school's secret social transition policy as:

> A trifecta of harm: It harms that child who needs parental guidance and possibly mental health intervention to determine if the incongruence is organic or whether it is the result of bullying, peer pressure, or a fleeting impulse. It harms that parents by depriving them of long recognized Fourteen Amendment right to care, guide and make health care decisions for their children. And finally, it harms [the

> religious teacher plaintiffs] but forcing [them] to conceal information they feel is critical for the welfare of their students. (*Id.* at 35.)

In *The People of the State of California, et al. v. Chino Valley Unified School District*, Case No. CIV SB 2317301 ("CVUSD lawsuit") in which Respondent is a plaintiff, the court denied plaintiffs' request for a preliminary injunction as to section 1.(c) of the Parental Notification Policy for students under the age of 18. In doing so, the court found the portion of the policy—section 1.(c)—requiring schools to notify parents if their minor children "request[] to change any information contained in the student's official or unofficial records" was unobjectionable and did not violate California law. The court reiterated these positions during a follow-up hearing held on February 16, 2024. (*See* Rae Decl., at ¶ 4.) The court found that section 1.(c) of the policy "is neutral on its face with respect to gender, as it applies to any student's request to change their official or unofficial records." The court also found "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." (*Id.* at ¶ 5.)

A third case, *Mae M. et al v. Komrosky et al*., Case No. CVSW2306224, involved the rights of parents to be informed when their student is identifying as a gender that misaligns to his or her biological body at school by requesting (1) 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; (2) access 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; or (3) to change any information contained in the student's records. In that case, the court denied plaintiffs' preliminary injunction on the grounds that the Parental Notification Policy was not discriminatory on its face. (*See* Exhibit D to Rae Decl.) The court found that there was no disparate treatment of two similarly situated groups – there was only one group: students. (*Id.*)

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b. Trans-Identified Youth Do Not Have the Right to Consent to Gender Treatments without Parental Consent.

Regardless of how Respondent couches it, socially transitioning a child is "an active intervention" that significantly impacts a youth's psychological functioning and long-term outcomes. (*See* Exhibit C to Rae Decl.) To that end, the expert witness in the *Mirabelli* case – a transwoman and formerly the President of US World Professional Association of Transgender Health – opined that parents must be involved in the significant decision to socially transition their child. (*See id.* at 10-14.) Teachers and schools are not licensed medical or mental health providers permitted to perform psychological interventions on children in their care at all, **let alone without parental consent**. Similarly, Respondent cites to no law that permits schools to provide students with body-modification clothing that can have long-lasting deleterious effects on students. (*See, e.g.*, Jarrett BA, Corbet AL, Gardner IH, Weinand JD, Peitzmeier SM. Chest binding and care seeking among transmasculine adults: A cross-sectional study. Transgender Health. 2018;3(1):170-178. Doi:10.1089/trgh.2018.0017 (studying 1200 females wearing chest binders and showing that 89% of these females experienced one health problem from binding); *see also* https://www.webmd.com/a-to-z-guides/what-is-chest-binding (finding permanent deformation and fraction to ribs is also a side-effect); Trussler, J.T. & Carrasquillo, R.J. (2020) Cryptoospermia Associated with Genital Tucking Behavior in Transwoman, Reviews in urology, 22(4), 170-173 and Debarbo, C.J.M (2020) Rare cause of testicular torsion in a transwoman, A case report: Urology Case Reports 33 (finding that male students who are given access to trans-tape at school to tuck their genitals, can be rendered infertile (heat harms sperm), experience testicular pain and torsion, skin irritation, dehydration and urinary tract infections).) Children do not have the right to consent to these actions – Respondent cites no authority to dispute this fact.

Based upon the aforementioned arguments, and failure by Respondent to provide any law that provides for a right of students to force teachers to lie to their parents, a right to privacy only as to their parents or that notification to parents is discrimination, this Court must order Respondent to revise the title and summary.

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c. Respondent Admits that the Parental Notification Aspect of the Initiative Has Exceptions; Therefore the Summary Contains False Information.

Respondent's summary states that there is no exception for student safety related to the parental notification aspect of the measure, however, Respondent admits there is an exception:

> [T]he only scenario in which a school official may be relieved of their parental notification obligations under the proposed measure is if a school counselor receives a confidential accommodation request from a student, who is 12 years or older. (Respondent's Opposition Brief ("ROB") at 21.)

In other words, there are clear statutory provisions which provide exceptions to parental notification for the purposes of student safety. This admission requires this Court to find that the summary is false, and order revisions.

The accommodation afforded the student is that the counselor during their sessions, calls the student by his or her preferred name and pronouns. The counselor is not permitted to share that information with others at the school except in very limited situations pursuant the Education Code section 49602, which the Initiative specifically does not change or eliminate.

d. Use of "Transgender Female" in the Summary is Confusing.

Respondent argues that because the decision in *Hecox v. Little* (9th Cir. 2023) 79 F.4th 1009 uses the terms "transwoman" and "transgender female" interchangeably, the average voter knows and understands that transgender female means a male who thinks he is a female. This argument is absurd. How many voters read case law? The word "female" is defined in the Cambridge dictionary as "belonging or relating to the sex that can give birth to young or produce eggs."[1] Britannica defines female as "of or relating to the sex that can produce young or

[1] https://dictionary.cambridge.org/us/dictionary/english/female# (last visited 4/15/24)

lay eggs."[2] Collins defines female as "any creature that can lay eggs or produce babies."[3] The Legislature was aware of the confusion of combining "transgender" with "female" when addressing males who are gender dysphoric in sports and, thus, defined it in *California Code of Regulations,* title 4, section 831. The 185 California regulations and 153 statutes that use the term "female" to refer to persons or animals whose bodies are developed for production of large gametes adds further credence to Petitioners' argument. And voters have already expressed confusion as to use of the term "transgender female." (*See* Erin Friday's Declaration to POB.)

e. Respondent still Ignores and Misrepresents the Initiative's Provided Exceptions and Expansive Definition of "Gender Affirming Health Care."

Respondent fails to fully address Petitioners' arguments about the permitted exceptions for gender-affirming health care, while at the same time acknowledging these exceptions in claiming that the prohibition applies "except in very narrow circumstances." (ROB, at 22.) This statement alone proves that Respondent is aware that the summary fails to include certain exceptions. More significantly, however, Respondent misrepresents the broad and unlimited nature of the statutory definition of "gender affirming health care" in Welfare and Institutions Code, section 16010.2(b)(3), and that Petitioners seek only to prohibit **specific types** of gender-affirming health care. Section 16010.2(b)(3) provides a broad definition of "gender affirming health care" with three examples, while clearly stating that gender affirming health care "is not limited to" those examples:

> (3) For purposes of this section, the following definitions apply:
>
> (A) "Gender affirming health care" means medically necessary health care that respects the gender identity of the patient, as experienced and defined by the patient, and **may**

[2] https://www.britannica.com/dictionary/female (last visited 4/15/24)

[3] https://www.collinsdictionary.com/us/dictionary/english/female#:~:text=You%20can%20refer%20to%20any,egg%20in%20April%20or%20May. (last visited 4/15/24)

include, but is not limited to, the following:

(i) Interventions to suppress the development of endogenous secondary sex characteristics.

(ii) Interventions to align the patient's appearance or physical body with the patient's gender identity.

(iii) Interventions to alleviate symptoms of clinically significant distress resulting from gender dysphoria, as defined in the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition.

(B) "Gender affirming mental health care" means mental health care or behavioral health care that respects the gender identity of the patient, as experienced and defined by the patient, and **may include, but is not limited to**, developmentally appropriate exploration and integration of identity, reduction of distress, adaptive coping, and strategies to increase family acceptance.

(W&IC, § 16010.2(b)(3) [emphasis added].)

Article 16 of the Initiative does not prohibit all gender affirming care or eliminate the statutory definition. Instead, it prohibits gender-affirming health care that permanently sterilizes minors, such as "puberty blockers, cross-sex hormones or surgical interventions for the purpose of stopping or delaying normal puberty…." Any other gender affirming health care that does not meet the specific definitions in Article 16 would still be permitted, and this list could be unlimited given the statutory qualifying language that the definition "is not limited to" the examples provided in Section 16010.2(3)(A)(i) – (iii). Some examples are: body contouring, hair removal, trachea shaving, period suppression, all that do not delay puberty or affect sterility.

In sum, it is both patently false and misleading for Respondent to summarize the third part of the Initiative as "prohibit[ing] gender-affirming health care for transgender patients under 18" when the Initiative provides clear exceptions, and only prohibits *specific types* of gender-affirming health care that cannot possibly encompass all of the options in an openly defined statute without limitations. Accordingly, the summary must be revised.

f. Respondent's Latitude Does Not Allow a Clearly Prejudicial Title.

While the Respondent has considerable latitude when drafting a title and summary, he is obligated to follow the law. The courts in *McDonough v. Superior Court* (2012) 204 Cal.App.4th

1169 and *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417 unequivocally held that the choice of words used in a ballot measure and related voting materials are critical. In fact, the court in *Huntington* held "context may show that a statement that, in one sense, can be said to be literally true can still be materially misleading." (*Huntington*, 94 Cal.App.4th at 1432.) Words that are not impartial and tip the scale violate the Elections Code and infringe on the awesome power of the citizens in California to utilize their constitutional rights to create law where the legislature has failed.[4]

i. Respondent admits ballot measures must be impartial.

Respondent recognizes that measures cannot be partial. (*See* ROB.) "Partial" is defined as language that signals to the voters the viewpoint of the government and how the electorate should vote, or which casts a disparaging light on the measure. (*Martinez v. Superior Court*, 142 Cal.App.4th 1245, 1248.) Respondent essentially ignores the cases (discussed below) that demonstrate one or two impartial words can mandate a revised title and summary. Respondent relegates a discussion on *McDonough* to a mere footnote, and then completely ignores the primary aspect of the court's order. (*See* ROB, at 25 fn. 6.)

The use of the term "RESTRICT," in and of itself, is prejudicial, and in combination with "rights" that do not exist, is misleading. Respondent's title and summary for the Initiative, which uses objectively negative language about "restricting rights," and which falsely describes that the Initiative as lacking exceptions for children's safety, makes it clear that Respondent wants voters to reject the Initiative. There is no question that the title and summary are partial.

In *McDonough*, the appellate court held that the word "REFORM" in the title – "PENSION REFORM" was partial. (24 Cal.App.4th at 1174.) The court explained that the word "REFORM" connotes that there is a defect with the existing pension system. As a result, the court compelled the City to replace "REFORM" with "MODIFICATION." The court also found that the summary was prejudicial and more substantially flawed in that it tied the "reform" to

[4] California's assemblymember Bill Essayli's bill - Assembly Bill 1314 (2023) - that would have required parents to be notified when their student is suffering from gender dysphoria was not even granted a hearing. It was killed without any public input.

"essential services" such as fire and police. (*Id.* at 1175.) The summary was untruthfully communicating to the electorate that it needed to approve the measure or lose essential services. Therefore, the court ordered that the phrase: "To protect essential services, including neighborhood police patrols, . . . be omitted. (*Id.* at 1176.)

In the earlier case of *Huntington Beach*, the court found a clear case of false, misleading and prejudicial language in a ballot measure. (94 Cal.App.4th 1417 at 1433-34.) The *Huntington Beach* court held that the word "EXEMPTION" was misleading, and insufficiently neutral to appear in the title. (*Id.*) The court also found that the word "EXEMPTION" signified that the power plant did not have at pay any utility tax, when indeed it did, and accepted the challenger's request to use "EXCLUSION. The use of the term "EXEMPTION" was held to be both untruthful and unfairly influential on the voter. (*Id.*)

Further, the court held that the language that asked the voter if the power plant should "pay the same utility tax" as residents and businesses was "a clear case" of misleading word play because it falsely indicated that residents and business pay the utility tax that the plant has not being paying. (*Id.* at 1434.) Simply put, the City word-smithed its measure to trick voters into believing that they were paying a tax that the power plant was not required to pay.

Likewise, the court held that the voter pamphlet that stated the power plant refused to sign a contract for use of the generated electricity solely in California was factually misleading because two of the four consistently operating units were dedicated to California energy needs. (*Id.* at 1435). The fact that it refused to sign the contract misled the voters into believing that none of the energy produced is used in California when this was not the case. (*Id.*).

Like the Attorney General, proponents of an initiative cannot lie or mislead the voters. The voters must be provided accurate language before they sign a petition. "An outright false or a statement that is objectively untrue" must be stricken. (*San Francisco Forty-Niners v. Nishioka* (1999) 75 Cal. App.4th 637, 649 [*cert. denied*].) A circulating petition cannot include false statements intended to mislead voters and induce them to sign.

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These cases are analogous to the case before this court. In addition to several provisions of the summary being patently false, the title is biased simply based on the use of the singular term "RESTRICTS" to describe a perceived loss of rights that do not exist.[5]

ii. The word "RESTRICTS" is negative and prejudicial.

The word "RESTRICTS" alone, has a negative connotation. Respondent **knows** the power and influence of using the term "restrict" versus neutral terms such as "limits," "affects," "modifies," or "changes". As stated in the opening brief, when Respondent wants to telegraph positivity and support, he knows to use the phrase "protect kids" even if the bill is "restricting" an activity cherished by students – the unfettered use of social media. (ROB at 13.) Respondent's enumerates ballot initiatives[6] in an attempt to demonstrate that Respondent's "consistency" in using terms like "restrict" for an initiative measure is not prejudicial. However, these examples prove Petitioners' point. As none of the listed initiatives were ever challenged in court to determine that the use of the word "restricts" is not biased, this list simply demonstrates that Respondent's office is committed to the use of biased language to prejudice voters against initiatives it disagrees with. Petitioner additionally notes that none of the listed initiatives use the phrase "restrict *rights*," which is additional evidence of how egregious Respondent's title for the instant measure has become.

Looking at Respondent's list of titles in the ROB, Initiative 15-0073 – SPEECH. HOLOCAUST DENIAL RESTRICTIONS … Restricts speech that . . ." This ballot initiative failed, as did all of the Initiatives related to abortion restrictions for minors (which were incidentally, contrary to then-current California administration's agenda), Initiative No. 11-0010 (PROHIBITS POLITICAL CONTRIBUTIONS . . . Restricts), and Initiative 09-0106 (PROHIBITS VOTING . . . restricts voting).[7] Thus, all of the initiatives with negative titles failed, supporting Petitioners' point that Respondent has a clear pattern of creating biased titles to prejudice voters against measures. Notably, the only initiative listed which did not use the word

[5] Respondent's implication that Petitioner's writ is anyway limited to the title is completely disingenuous. (ROB at p. 26)

[6] We ignore initiative No 23-0019, as that is the earlier submitted ballot initiative submitted by Petitioners.

"restrict," Initiative No. 07-0068: "LIMIT ON MARRIAGE" - passed.[8] The word "RESTRICT" did not appear anywhere in the initiative title or summary.

g. Respondent Misses the Mark How Free Speech Relates to Ballot Initiatives.

Respondent bizarrely believes that Petitioners' First Amendment right of free speech flows through the state Elections Code instead of through the U.S. Constitution. Whether or not state law required Respondent to prepare an unbiased title and summary would not change Petitioners' right under the First Amendment to circulate an initiative free from the biased interference of Respondent. Respondent also is seemingly arguing that he could write the ballot and summary however he pleases, without implicating Petitioners' free speech rights, while at the same time quoting cases that unambiguously held that ballot initiatives implicate free speech rights. (*See* ROB, at 29-32). Respondent then erroneously argues that "a circulating title and summary does not appear on any ballot," (*id.* at 30:7-8); however, this in inconsequential for the case at bar, and this is not true. First, the Initiative **needs to get on the ballot** and Respondent's current title and summary are jeopardizing this possibility. This is the focus of this action and where this court's analysis needs to focus. Second, the wording for a ballot initiative is never substantively different than the wording on a ballot.

The primary distinction between a ballot and a proposed ballot initiative supports Petitioners' argument that the biased title and summary is compelled speech, as unlike a ballot which is circulated by the government, a proposed ballot initiative is required to be provided by Petitioners to any potential signatory. Petitioners are not free to ignore or remove Respondent's biased language when attempting to gain a signature in support of the initiative. While Respondent attempts to distinguish cases on compelled speech which pertained to a generic statement that "[t]he Attorney General of California has prepared the following circulating title and summary of the chief purpose and points of the proposed measure," but those were not false or misleading which triggers a review under strict scrutiny.

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Language contained on a petition and the administration of the petition is afforded First Amendment protection: the initiative petition circulation "is core political speech for which First Amendment protection is at its **zenith**, political speech in the election arena is still subject to regulation to promote fair and honest elections." (*Forty-Niner, supra*, 75 Cal.App.4th at 647 (internal citation omitted, emphasis added).) In *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, 1227-28, the court found that a measure drafted by the City of Albany did not comply with the law because it was untruthful and "inclusion of language, overtly favoring a partisan position, … implicat[es] interests protected by the constitutional guarantee of equal protection and freedom of expression. The use of the ballot to favor a particular side in the election directly conflicts with the legislative intent to submit the measure to the voters in a concise and neutral manner." While the state can place rational limitations to safeguard the integrity of the ballot process, it cannot do so at the expense of Petitioners' first amendment rights. (*See Buckley v. American Constitutional Law Foundation, Inc*. (1999) 525 U.S. 182; *Meyer v. Grant* (1988) 486 U.S. 424.)

In *Buckley* and *Meyer,* the Supreme Court limited the state's infringement of the measure's proponents' First Amendment freedom of speech with the states' ballot-access controls. In *Buckley*, the Court held that requiring a petitioner gatherer to be registered to vote and to wear a badge with his name on it while gathering signatures was a burden on free speech that served no legitimate or compelling interest in preserving the integrity of the ballot measures process. (525 U.S. at 200). The Court explained:

> the First Amendment requires us to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas. *See Meyer*, 486 U.S., at 421. We therefore detail why we are satisfied that, as in *Meyer*, the restrictions in question significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions.

In *Meyer, supra*, 486 U.S. at 424, the Court held that the state's prohibition of paid signature gathers violated proponent's First Amendment rights, restraining core political speech.

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Respondent's reliance on *Caruso v. Yamhill ex rel. County Commissioner* (9th Cir. 2005) 422 F.2d 848 is inapposite. That case dealt with an administrative law that required the same warning statement on every ballot that proposed local option taxes. (*Id.* at 851). There, the court held such requirement was a reasonable, nondiscriminatory restriction because it applied to **all** tax measures. (*Ibid*.) Conversely, here, Respondent purposely used misleading and partisan language in the title and summary that specifically related to Petitioners' measure, and is forcing Petitioners to carry that partisan and untruthful message into the political discourse.

h. <u>The 180-Days Must Be Extended.</u>

If the 180-day clock is not reset, Petitioners are without a remedy. In fact, all petitioners who are given a misleading, false, or partisan title and/or summary will be required to gather signatures using the partisan title and summary to their detriment, at least for some time, which will incentivize the Attorney General to violate his obligations, knowing the court will "eat" up limited and precious time while deciding the dispute.[9] This result is counter to the charge of courts deciding electoral issues, which is "to construe the Elections Code to favor the people's awesome initiative power, 'the statutes [are] designed to protect the elector from confusing or misleading information . . . so as to guarantee the integrity of the process.'" (*Forty-Niners, supra*, 75 Cal.App.4th 637 at 644.)

The 180-day clock springs directly from Respondent's provision of the title and summary that is impartial, truthful and inclusive of the chief purposes and points. (*See* Elect. Code § 9208). Therefore, the clock should reset once Respondent issues a lawful title and summary. Moreover, during the course of the pandemic, the Secretary of State increased the time at least three times. (*See, e.g.*, *Heatlie et al. v. Padilla*, Sacramento Cty Sup. Ct. Case No. 34-2020-80003499 (recall of Gavin Newsom granted additional days); *Macarro v. Padilla*, Sacramento Cty Sup. Ct. Case No. 32-2020-80003404 (purpose granted additional 84 days); *Sangiacomo v. Padilla*, Sacramento Cty Sup. Ct. Case No. 34-2020-80003414 (purpose, granted additional 84 days).

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[9] This is especially when a Court fails to expediate the writ hearing.

Respondents' argument that the Secretary of State should have been a party to the Writ is without merit. The issue would not have been ripe until this Court ruled on the Respondent's title and summary, as the Secretary of State did not issue the partisan title or summary. Therefore, unless and until this Court grants Petitioners' Writ but rejects Petitioners' interpretation of the Elections Code (automatically generating a new 180-day window), Petitioners had no reason to involve the Secretary of State.

IV. CONCLUSION

For the reasons set forth above and in Petitioners' Opening Brief, the declarations, and exhibits submitted therewith and hereto,[10] this Court should GRANT Petitioners' Writ of Mandate and order Respondent to (1) rescind his November 29, 2023 circulating title and summary; (2) take no further action on the circulating title and summary except as stated herein; and (3) approve the proffered title and summary in the POB; and (4) give notice that the 180-day clock is reset from the date of this Court's order, or in conformance with the Order for the amount of time which Petitioner has been restricted with the use of the Respondent's biased title and summary.

Dated: April 15, 2024

LAW FIRM OF NICOLE PEARSON

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[10] Many of Respondent's arguments were addressed preemptively in Petitioners' Opening Brief. Due to space restrictions, those arguments are not further elaborated here. Silence as to any issue in this Reply should not be taken as a concession as to any of Respondent's positions.

PROOF OF SERVICE

I am over the age of 18 and not a party to the within action. My business address is 3421 Via Oporto, Suite 201, Newport Beach, Calif. 92263. On Monday, April 15, 2024, I served the following document(s) on the interested parties in the following manner(s) as follows:

PETITIONERS' REPLY BRIEF ON VERIFIED WRIT OF MANDATE; DECLARATORY RELIEF; VIOLATION OF FREE SPEECH (CAL. CONST., ART. 1, SEC. 2); VIOLATION OF FREE SPEECH (U.S. CONST., AMEND.. I)

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/ X / Via Electronic Transmission. Pursuant to written agreement between the parties, by personally e-mailing the document(s) to the persons at the e-mail address(es). No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission. A physical copy will be provided upon request only.

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

Executed on April 15, 2024 Newport Beach, California.

Nicole Pearson

(Signature)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

PROTECT KIDS CALIFORNIA and JONATHAN ZACHRESON, Individually and behalf of PROTECT KIDS CALIFORNIA Petitioners, v. ROB BONTA, in his official capacity as Attorney General of California and DOES 1–50, inclusive, Respondents.	Case No. 24WM000034 Dept.: 36 Judge: Honorable Stephen Acquisto **DECLARATION OF EMILY RAE IN SUPPORT OF PETITIONERS' REPLY BRIEF ON VERIFIED PETITION FOR WRIT OF MANDATE, DECLARATORY RELIEF, VIOLATION OF FREE SPEECH (CAL. CONST., ART. 1, SEC. 2), VIOLATION OF FREE SPEECH (U.S. CONST., AMEND. I)** [*Reply and Petitioners' Objections to Respondents' Request for Judicial Notice filed concurrently herewith*] **Action filed: February 13, 2024** **Hearing Date: April 19, 2024** **Time: 1:30 p.m.** **Dept.: 36**

DECLARATION OF EMILY RAE

DECLARATION OF EMILY RAE

I, Emily Rae, declare as follows:

1. I am an adult over 18 years of age and am an attorney duly licensed to practice law before all courts of the State of California. I am counsel for Petitioners, Protect Kids California and Jonathan Zachreson in this action. This declaration is submitted in support of Petitioners' Reply Brief on Verified Writ of Mandate. The following facts are within my personal knowledge and, if called as a witness herein, I can and will competently testify thereto.

2. Petitioners have now filed their Certification that 25% of the requisite signatures have been collected, pursuant Elections Code section 9034.

3. I am an attorney of record and lead counsel representing Chino Valley Unified School District (the "District") in the lawsuit captioned *The People of the State of California, et al. v. Chino Valley Unified School District*, Case No. CIV SB 2317301 (the "CVUSD Action"), which is currently pending in the Superior Court of California, County of San Bernardino in Department S28 before the Honorable Michael Sachs.

4. On October 19, 2023, the court in the CVUSD Action held a hearing on the plaintiffs' motion for a preliminary injunction to enjoin the District from enforcing sections 1.(a), 1.(b), and 1.(c) of Board Policy 5020.1 (the "Policy"). At that hearing, the court granted the plaintiffs' request for a preliminary injunction as to sections 1.(a) and 1.(b) of the Policy, but denied the preliminary injunction as to section 1.(c) of the Policy for students under the age of 18 years old. In doing so, the Court found the portion of the Policy—section 1.(c)—requiring schools to notify parents if their minor children "request[] to change any information contained in the student's official or unofficial records" was unobjectionable and did not violate California law. The court reiterated these positions during a follow-up hearing held on February 16, 2024.

5. Specifically, the court found that, with respect to section 1.(c)'s application to minors, the policy "is neutral on its face with respect to gender, as it applies to any student's

request to change their official or unofficial records." The court also found "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." Finally, the court found that "subdivision 1.(c) of Policy 5020.1 is rationally related to legitimate government interests."

6. Exhibit A attached hereto is a true and correct excerpt from the hearing in the August 30, 2023 case entitled *Mirabelli v. Olson*, California District Court, San Diego County, case no. 3:23-cv-00768-BEN-WVG ("*Mirabelli*").

7. Exhibit B attached hereto is a true and correct copy of the September 15, 2023 ruling on the preliminary injunction in the *Mirabelli* case.

8. Exhibit C attached hereto is a true and correct copy of excerpts from the April 2024 Cass Review.

9. Exhibit D attached hereto is a true and correct copy of tentative ruling dated February 24, 2004 adopted by the court in the case entitled *Mae M. et al v. Komrosky et al*., Case No. CVSW2306224 (Superior Court Riverside County).

10. Exhibit E attached hereto is a true and correct copy of the California's Secretary of State qualification notice of the Limit Marriage measure.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 14th day of April 2024 in Pflugerville, Texas.

Emily Rae

Emily Rae
Attorney for Petitioners
PROTECT KIDS CALIFORNIA,
JONATHAN ZACHRESON

EXHIBIT “A”

09:55:16

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ELIZABTEH MIRABELLI, AN INDIVIDUAL, AND LORI ANN WEST, AN INDIVIDUAL,	.
PLAINTIFFS,	. NO.20-CV-0768
V.	. AUGUST 30, 2023
MARK OLSON, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE EUSD BOARD OF EDUCATION, ET AL.,	. 10:00 A.M. . SAN DIEGO, CALIFORNIA
DEFENDANTS.	.

09:55:16

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROGER T. BENITEZ
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
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CALIFORNIA DEPARTMENT OF EDUCATION
BY: CHRISTOPHER N. MANDARANO
LEONARD BRUCE GARFINKEL
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REPORTED BY STENOTYPE, TRANSCRIBED BY COMPUTER

09:55:16

SAN DIEGO, CALIFORNIA; AUGUST 30, 2023; 10:00 A.M.

-OOO-

THE CLERK: ONE ON CALENDAR, 23CV0768, MIRABELLI, ET AL., VERSUS OLSON, ET AL., MOTION HEARING.

THE COURT: ALL RIGHT. COUNSEL, PLEASE REGISTER YOUR APPEARANCES FOR THE RECORD. PLEASE SPEAK CLEARLY, LOUDLY AND INTO THE MICROPHONE, AND SPELL YOUR LAST NAME FOR MY REPORTER, STARTING WITH THE PLAINTIFFS.

MR. JONNA: PAUL JONNA FOR PLAINTIFFS, J-O-N-N-A. AND I'M HERE WITH MY COLLEAGUE JEFFREY TRISSELL, T-R-I-S-S-E-L-L, ALSO FOR THE PLAINTIFFS; AND MY TWO CLIENTS ARE HERE AS WELL LORI WEST, W-E-S-T, AND ELIZABETH MIRABELLI, M-I-R-A-B-E-L-L-I.

MR. BASEL: GOOD MORNING, YOUR HONOR. JESSE BASEL ON

10:15:57 BEHALF OF ESCONDIDO UNION SCHOOL DISTRICT, DEFENDANTS, AND THE DISTRICT EMPLOYEES. LAST NAME BASEL, B-A-S-E-L.

THE COURT: B-A-S --

MR. BASEL: YES, B-A-S-E-L.

THE COURT: E-R?

MR. BASEL: EXCUSE ME, YOUR HONOR?

THE COURT: E-R?

MR. BASEL: SORRY, B-A-S-E-L.

THE COURT: OKAY. SORRY.

MR. MANDARANO: GOOD MORNING, YOUR HONOR. CHRISTOPHER MANDARANO ON BEHALF OF THE CALIFORNIA DEPARTMENT OF

EDUCATION. THAT'S SPELLED M-A-N-D-A-R-A-N-O. I AM JOINED BY REBECCA FEIL. THAT'S SPELLED F-E-I-L, ALSO DEPUTY GENERAL COUNSEL, AND OUR GENERAL COUNSEL MR. LEN GARFINKEL, G-A-R-F-I-N-K-E-L.

THE COURT: OKAY. THANK YOU. BEFORE WE GO ANY FURTHER, I HAVE A COUPLE QUESTIONS I WANT TO ASK TO START WITH. NOW AS I UNDERSTAND IT, READING THE STATE'S MOTION TO DISMISS, THE STATE TAKES THE POSITION THAT THE STATE IS NOT COMPELLING THE SCHOOL DISTRICT TO HAVE THE RULE AND REGULATION THAT IS AT ISSUE HERE; SO MY UNDERSTANDING, THEY SAID THAT THE FAQ IS NOT BINDING; IS THAT CORRECT? LET'S HEAR FROM THE STATE.

MR. MANDARANO: YOUR HONOR, THAT IS NOT NECESSARILY OUR POSITION. WHAT WE HAVE STATED IS THAT THE PLAINTIFFS HAVE FAILED TO PLEAD ANY FACTS THAT WOULD ESTABLISH THAT THEY HAD STANDING WITH REGARD TO THE ACTUAL FAQ PAGE. THE PLAINTIFFS HAVE ARGUED THAT IT IS NOT AN OFFICIAL STATE INTERPRETATION OF CALIFORNIA LAW --

THE COURT: SO WHICH IS IT? IS THE FAQ BINDING ON THE SCHOOL DISTRICT OR NOT?

MR. GARFINKEL: THE FAQ'S CONTAIN WITHIN REFERENCES TO LAW --

THE COURT: BY THE WAY, I APPRECIATE IT IF YOU WOULD IDENTIFY YOURSELF FOR THE RECORD, THAT WAY MY COURT REPORTER DOESN'T HAVE TO GO BACK AND TRY TO FIGURE OUT WHO IS SAYING WHAT.

10:18:27

MR. GARFINKEL: I APOLOGIZE. LEN GARFINKEL FOR CALIFORNIA DEPARTMENT OF EDUCATION. AS MR. MANDARANO SAID, THE PLAINTIFFS HAVE TAKEN THE POSITION THAT THEY'RE NON-BINDING. IN RESPONSE TO YOUR QUESTION TO US, FAQ'S -- WE CAN'T MAKE LAW IN FAQ'S. FAQ'S CITE TO LAW IN PLACES. THEY CITE TO LAW ON PRIVACY. THEY CITE TO LAW ON DISCRIMINATION. THOSE LAWS, THE TEXT OF THOSE LAWS IS, OF COURSE, BINDING ON EVERYONE IN THE STATE.

WHEN THE STATE GIVES GUIDANCE FOR FAQ'S, THE STATE CANNOT MAKE LAW IN SETTING FORTH FAQ'S IN GUIDANCE. THAT IS GUIDANCE TO ASSIST LOCAL EDUCATION AGENCIES, LEA'S. THERE'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.

10:19:35

THE COURT: OKAY. IF I UNDERSTAND THE PLAINTIFF'S CASE, THEY'RE SAYING THAT THE SCHOOL DISTRICT HAS ENACTED CERTAIN RULES, AND THAT THE SCHOOL DISTRICT HAS SAID THAT THEY'RE ENACTING THESE RULES BECAUSE THE STATE IS MAKING THEM DO THIS. THAT'S MY UNDERSTANDING OF WHAT I READ SO FAR. SO I'M TRYING TO FIGURE OUT, YOU KNOW, WHO IS ON FIRST AND WHO IS ON SECOND.

SO MAYBE I'LL TURN TO THE SCHOOL DISTRICT AND ASK YOU: IS THE SCHOOL DISTRICT'S POSITION THAT THIS RULE THAT YOU'VE ADOPTED THAT SAYS THAT PARENTS ARE NOT ENTITLED TO NOTICE, THAT THAT RULE IS MANDATED BY THE STATE?

EXHIBIT “B”

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-00768-BEN-WVG

ORDER:

(1) GRANTING MOTION FOR PRELIMINARY INJUNCTION;

(2) DENYING MOTIONS TO DISMISS

[ECF Nos. 5, 7, 17, 25]

Plaintiffs Elizabeth Mirabelli and Lori Ann West ("Plaintiffs") are teachers with fifty-five years of experience between them in the Escondido Union School District ("EUSD"). They bring claims against members of the EUSD Board of Education and certain members of the EUSD administrative staff (collectively, "EUSD Defendants"), as well as members of the California State Board of Education and the State Superintendent (collectively, "State Defendants") for school district policies that violate the First Amendment to the United States Constitution, under 42 U.S.C. § 1983. Plaintiffs move

for a preliminary injunction and the EUSD Defendants and the State Defendants move to dismiss the claims. A hearing was held on August 30, 2023.

I. BACKGROUND

If a school student suffers a life-threatening concussion while playing soccer during a class on physical fitness, and the child expresses his feelings that he does not want his parents to find out, would it be lawful for the school to require its instructor to hide the event from the parents? Of course not. What if the child at school suffers a sexual assault, or expresses suicidal thoughts, or expresses aggressive and threatening thoughts or behavior? Would it be acceptable not to inform the parents? No. These would be serious medical conditions to which parents have a legal and federal constitutional right to be informed of and to direct decisions on medical treatment. A parent's right to make decisions concerning the care, custody, control, and medical care of their children is one of the oldest of the fundamental liberty interests that Americans enjoy. However, if a school student expresses words or actions during class that may be the first visible sign that the child is dealing with gender incongruity or possibly gender dysphoria, conditions that may (or may not) progress into significant, adverse, life-long social-emotional health consequences, would it be lawful for the school to require teachers to hide the event from the parents?

Plaintiffs Elizabeth Mirabelli and Lori Ann West are two teachers at Rincon Middle School, which is part of EUSD. Mrs. Mirabelli teaches English, and Mrs. West teaches physical education. According to the Complaint, both have been named "Teacher of the Year" at different times while teaching for EUSD. The district is a public school district with approximately 16,000 students in kindergarten through eighth grades. As a government-created entity it is obligated to follow the laws of the State of California and the California Constitution as well as the laws of the United States and the U.S. Constitution. Local school districts have traditionally been guided by local school boards familiar with the needs and opportunities of the local community. In the process of providing a public education for Escondido's school-age children, EUSD hires, trains,

and supervises teachers and as part of their duties its teachers must communicate from time to time with the parents of students.

One current subject that EUSD faces in its community is how to address changing concepts of gender identification, gender diversity, gender dysphoria, gender incongruence, and self-transitioning among its student body. Gender dysphoria[1] is a clinically diagnosed incongruence between one's gender identity and assigned gender. If untreated, gender dysphoria may lead to anxiety, depression, eating disorders, substance abuse, self-harm, and suicide. *Eknes-Tucker v. Marshall*, No. 2:22-cv-184-LCB, 2022 WL 1521889, at *1 (M.D. Ala. May 13, 2022). Plaintiffs allege in their Complaint that EUSD has a newly adopted policy of: (1) school-wide recognition of a student's newly expressed gender identification, and (2) when communicating with a student's parents, an enforced requirement of faculty confidentiality and non-disclosure regarding a student's newly expressed gender identification. The policy is known as AR 5145.3.

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[1] According to DSM-5, the criteria for Gender Dysphoria is:
A marked incongruence between one's experienced/expressed gender and natal gender of at least 6 months in duration, as *manifested by at least two of the following*:
A. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics)
B. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics)
C. A strong desire for the primary and/or secondary sex characteristics of the other gender
D. A strong desire to be of the other gender (or some alternative gender different from one's designated gender)
E. A strong desire to be treated as the other gender (or some alternative gender different from one's designated gender)
F. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's designated gender)
The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.

The result of the new EUSD policy is that a teacher ordinarily may not disclose to a parent the fact that a student identifies as a new gender, or wants to be addressed by a new name or new pronouns during the school day – names, genders, or pronouns that are different from the birth name and birth gender of the student. Under the policy at issue, accurate communication with parents is permitted *only if* the child first gives its consent to the school. A teacher who knowingly fails to comply is considered to have engaged in discriminatory harassment and is subject to adverse employment actions.

EUSD has other formal policies that are consistent with existing law but are in tension with the new policy. For example, BP 0100(7) states that, "Parents/guardians have a right and an obligation to be engaged in their child's education and to be involved in the intellectual, physical, emotional, and social development and well-being of their child." Compl. Exh. 15(7). And BP 4119.21(9) states that, "Being dishonest with students, parents/guardians, staff, or members of the public, including . . . falsifying information in . . . school records" is inappropriate employee conduct. Compl. Exh. 14 (9). Both existing policies BP 0100(7) and BP 4119.21(9) are consistent with federal constitutional rights but appear to be at odds with AR 5145.3.

The plaintiffs in this action are two experienced, well-qualified, teachers. The teachers maintain sincere religious beliefs that communications with a parent about a student should be accurate; communications should not be calculated to deceive or mislead a student's parent. The teachers also maintain that parents enjoy a federal constitutional right to make decisions about the care and upbringing of their children. The teachers allege a well-founded fear of adverse employment action should they violate the EUSD gender identification confidentiality policy by communicating accurately to a student's parents her own observations or concerns, as a teacher, about the student's gender incongruence.

The plaintiffs bring a facial and as-applied challenge to the EUSD policy, and seek a preliminary injunction to enjoin the defendants from taking any adverse employment action against them in the event that they violate the gender identification confidentiality

policy. Because the plaintiffs have shown a likelihood of success on the merits as applied to them, a preliminary injunction would restore the status quo ante, and the other preliminary injunction factors tip in the plaintiffs' favor, the motion for preliminary injunction is granted.

II. LEGAL STANDARDS

Federal Rule of Civil Procedure 65 governs the issuance of preliminary injunctions. Plaintiffs seeking injunctive relief must show that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Baird v. Bonta*, __F.4th __, 2023 WL 5763345, *2 (9th Cir. Sept. 7, 2023). "It is well-established that the first factor is especially important when a plaintiff alleges a constitutional violation and injury. If a plaintiff in such a case shows he is likely to prevail on the merits, that showing usually demonstrates he is suffering irreparable harm no matter how brief the violation." *Id.* at *3 (citations omitted). "And his likelihood of succeeding on the merits also tips the public interest sharply in his favor because it is 'always in the public interest to prevent the violation of a party's constitutional rights.'" *Id.* (citations omitted). The Ninth Circuit evaluates "these factors on a sliding scale, such 'that a stronger showing of one element may offset a weaker showing of another.' When the balance of equities 'tips sharply in the plaintiff's favor,' the plaintiff must raise only 'serious questions' on the merits—a lesser showing than likelihood of success." *Fellowship of Christian Athletes v. San Jose Unified School District et al*, No. 22-15827, 2023 WL 5946036, at *35 (9th Cir. Sept. 13, 2023) (en banc) (citations omitted).

III. DISCUSSION

Since 2003, EUSD has maintained a nondiscrimination policy and a policy against discriminatory harassment that prohibits, *inter alia,* harassment based on a student's actual or perceived gender identity. *See* BP 0410 and BP 5145.3. Those policies are not questioned here. However, on August 13, 2020, during the COVID-19 pandemic and

related school shutdowns, it is alleged that EUSD adopted Administrative Regulation ("AR") 5145.3. AR 5145.3 gives definition to what is considered discriminatory harassment under BP 5145.3. Compl. at ¶¶ 115-116. It is this regulation (AR 5145.3) and its application that is at the center of this controversy.

It is alleged that AR 5145.3 was not discussed at a public school board meeting. It is alleged that AR 5145.3 was not passed upon by the EUSD Board of Trustees. It is alleged that AR 5145.3 was not widely circulated to all staff. Rather, it is alleged that AR 5145.3 was adopted by school district administrative staff, without fanfare, and without opportunity for parental or public input. In fact, apparently few even knew of its existence or significance until February 3, 2022. On that day it is alleged that EUSD held a district-wide video conference meeting for certificated staff (*i.e.*, teachers) regarding the rights of gender diverse students under the newly adopted AR 5145.3, *et al*. Compl. at ¶¶ 118 and Exh. 4.

Among the policy points discussed was an instruction that a teacher who knew of a student's transgender status and revealed that status to "individuals who do not have a legitimate need for the information," the teacher's communication would be considered discriminatory harassment. *Parents* were specifically identified as individuals who do not have a legitimate need for the information. And the presentation made it clear that a student's consent to reveal gender information is required, regardless of the age of the student. Compl. at ¶ 129.

According to the Complaint, the February 2022, training presentation was conducted by Defendant Tracy Schmidt, Director for Integrated Student Supports, and introduced by Albert Ngo, Director of Certificated Human Resources. In the presentation, Schmidt describes the rights of "protected students." Schmidt says,

> "So, now, lets go through what these rights [of protected students] are. And this is taken from our own adopted EUSD policy on discrimination and harassment. So, first off, determining gender identity. The school or District shall accept the student[']s assertion of their gender identity and begin to

> treat the student immediately, consistently with that gender identity. The student's assertion is enough. There is no need for a formal declaration. There's no requirement for *parent or caretaker agreement or even for knowledge* for us to begin treating that student consistent with their gender identity. Students also have a right to privacy. A student's status is their private information, and the District shall only disclose the information to others with the student's prior consent. When disclosure of a student's gender identity is made to a District employee by a student, that employee shall seek the student's permission to share with others including *parents* or . . . caretakers. The main take away is this: It always comes back to the student's comfort. If one wants to take any action to share a student's status, they must be granted that permission, and *that includes parents*, caretakers, other teachers, administrators, even support staff. You have to seek out permission first."

Compl. at Exh. 4, p 3-4 (emphasis added). Schmidt then describes actions deemed to be discrimination or harassment -- which includes revealing a student's gender diverse status to people without a legitimate need for the information. Schmidt says that parents are included among those who do not have a legitimate need to know. Schmidt instructs that discrimination/harassment includes, "revealing a student's transgender status or gender diverse status to individuals who do not have a legitimate need for the information without the student's consent, and *this includes parents* or caretakers." Compl. at Exh. 4, p 7 (emphasis added).

In August 2022, at the outset of the new school year, the plaintiffs received emails from school staff with a list of students with student-preferred names and pronouns. The list included directions on whether or not said names and pronouns were to be disclosed to the students' parents. Compl. at ¶¶ 163-164; Exh. 23. For example, Mirabelli received an email with a list of students and entries such as: "[student name]: Preferred name is [redacted] (pronouns are he/him). Dad and stepmom are NOT aware, please use [redacted] and she/her when calling home."

Both plaintiffs sought relief from EUSD in the form of a religious accommodation. Although it did not contest the sincerity of their religious convictions, EUSD did not extend that accommodation to the plaintiffs for communications with parents. *See e.g.,* Compl. Exh. 7 (Letter from attorney for EUSD, dated Feb. 8, 2023) ("Finally, (4) teachers are required to follow the 'privacy' policy that requires them to not share a student's gender identity status with their parent or guardian without the student's permission."); Compl. Exh. 9 (Letter from attorney for EUSD, dated Mar 10, 2023) ("Question (1): What if a parent directly asks [the teachers] to reveal a student's gender identity? Clarification. Your clients should respond that that [sic] the inquiry is outside the scope of the intent of their interaction and state that the intent of the communication, may involve behavior as it relates to school and class rules, assignments, etc. If your clients have questions about questions from parents related to gender identification or equity laws/regulations, they should contact the principal, who will provide the necessary guidance.").

Consequently, when it comes to communicating with parents, the plaintiffs have been told by EUSD through its attorneys that they can say only: "*the inquiry is outside the scope of the intent of [my] interaction and state that the intent of the communication, may involve behavior as it relates to school and class rules, assignments, etc*." Teachers may refer the parent to the school principal, but the principal will not disclose more information either, without the student's consent. Without a student's consent (regardless of the student's age), the school district operates within a veritable cone of silence. Parents are left outside. This was explained at the hearing.

> EUSD Attorney: Yes. So ultimately, though, to go back to your question, if a child went through this whole process, and then we get to a parent, and the teacher is not being told to lie but saying this is beyond my purview; they speak to an administrator; ultimately, an administrator would respect the child's wishes not to disclose and respect their privacy.

Hearing Transcript, at 98. It is alleged that neither plaintiff Mirabelli nor plaintiff West have a desire to telephone parents to specifically report a child's gender identification; on the other hand, to be consistent with their sincerely-held religious beliefs, they cannot conceal pertinent information that can impact the health and well-being of a student or affirmatively mislead a student's parent. Compl. at ¶ 212.

EUSD responds in part, that AR 5415.3 is required by California law as explained and communicated through the California Department of Education's publication titled *Frequently Asked Questions* about the School Success and Opportunity Act (Assembly Bill 1266) (hereinafter "FAQs"). Compl. Exh. 4; Hearing Transcript at 26. Page 5 of the FAQs provides an answer to the question, "May a student's gender identity be shared with the student's parents, other students, or members of the public?" It says,

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

FAQs page 7 explains that if a student chooses to be addressed by a name or pronoun all school district personnel are required to use said chosen name/pronoun. The student's age is not a factor, "as children as early as age two are expressing a different gender identity."

To this end, the state Department of Education's FAQs contemplate a sort of double set of books to be kept by a school district – specifically for transgender or gender nonconforming students. For example, FAQs page 6 says, "it is strongly recommended that schools keep records that reflect a transgender student's birth name and assigned sex

(e.g., copy of the birth certificate) apart from the student's school records. Schools should consider placing physical documents in a locked file cabinet in the principal's or nurse's office." And at FAQs page 7, "[i]f the school district has not received documentation supporting a legal name or gender change, the school should nonetheless update all unofficial school records (e.g. attendance sheets, school IDs, report cards) to reflect the student's name and gender marker that is consistent with the student's gender identity."

The upshot of the Board of Education direction seems to be that once a student, whether in kindergarten, eighth grade, or somewhere in between, expresses a desire to be called by a new name or new pronouns, school faculty and staff are to refer to that student by the newly preferred indicators. "Unofficial" school records such as attendance sheets, school IDs, and report cards are to be changed. From that point forward, the student may go through each school day with the faculty and staff addressing the student in person and on records according to the changed moniker.

However, under the antidiscrimination policy, a teacher is not permitted to inform the parents of this change without the student's consent. Classroom teachers who are in the best position to observe the student and forms the opinion that the intellectual or social health and well-being of the student may be at risk related to gender nonconformance or dysphoria, under the antidiscrimination policy, is not permitted to inform the parents without the student's consent. Regarding gender confidentiality and nondisclosure, FAQs page 6 says, "schools must consult with a transgender student to determine who can or will be informed of the student's transgender status, if anyone, including the student's family. With rare exceptions, schools are required to respect the limitations that a student places on the disclosure of their transgender status, *including not sharing that information with the student's parents*." (Emphasis added.)

A. Medical Opinion

The government approach articulated in AR 5145.3 is dramatically inconsistent with respected medical opinions. The plaintiffs in this case provide a declaration from an

expert in the field of children and adolescents dealing with gender-identity related issues. *See* Declaration of Dr. Erica E. Anderson, Dkt. 5-2. Dr. Erica E. Anderson, is a well-credentialed clinical psychologist with forty years of experience. As part of her clinical practice, Anderson has seen and supported hundreds of children and adolescents for gender-identity-related issues, many of which have transitioned socially, medically, or both, to a gender identity that differs from their natal sex. *Id*. at ¶ 3. Anderson describes herself as a transgender woman. *Id.* at ¶ 5. Anderson's testimony is summarized in the following excerpts:

"A child or adolescent who exhibits a desire to change name and pronouns should receive a careful professional assessment prior to transitioning;" "A request to change name and pronouns may be the first visible sign that the child or adolescent may be dealing with gender dysphoria or related coexisting mental-health issues;" "Parental involvement is necessary to obtain professional assistance for a child or adolescent experiencing gender incongruence, to provide accurate diagnosis, and to treat any gender dysphoria or other coexisting conditions;" "A school-facilitated transition without parental consent interferes with parents' ability to pursue a careful assessment and/or therapeutic approach prior to transitioning, prevents parents from making the decision about whether a transition will be best for their child, and creates unnecessary tension in the parent-child relationship. Nor is facilitating a double life for some children, in which they present as transgender in some contexts but cisgender in other contexts, in their best interests." *Id*. at ¶ 8.

Anderson opines, "a social transition represents one of the most difficult psychological changes a person can experience. [And] embarking upon a social transition based solely upon the self-attestation of the youth without consultation with parents and appropriate professionals is unwise." *Id*. at ¶ 42. Opining directly on the point of concern for the plaintiffs/teachers, Anderson says, "to place teachers in the position of accepting without question the preference of a minor and further direct such teachers to withhold the information from parents concerning their

minor children is hugely problematic." *Id*. at ¶ 43. Anderson continues, "it can be appropriate for parents to say 'no' to a social transition (whether at school or elsewhere) to, among other things, allow time for assessment and exploration with the help of a mental health professional before making such a significant change. Part of parents' job is to help their children avoid making bad decisions." *Id*. at ¶ 60. Concerning medical standards, the World Professional Association for Transgender Health's ("WPATH") Standards of Care ("SOC") 7 and 8 recognize, "it is appropriate for parents to decide whether to 'allow' a social transition for their children. Neither SOC 7 nor SOC 8 suggest that school personnel should decide whether a minor should socially transition, let alone doing so and hiding this information from parents." *Id.* at ¶ 60.

Parental involvement is not optional for correct medical diagnosis of gender incongruence. After all, "Parents are often the only people who have frequently and regularly interacted with a child or adolescent throughout the child's or adolescent's entire life, and therefore they have a unique view of the child's development over time. Indeed, parents often have more knowledge than even the child or adolescent does of whether their child or adolescent exhibited any signs of gender incongruence or gender dysphoria during the earliest years of life." *Id*. at ¶ 65. Consequently, as Anderson explains, "parental involvement is a critical part of the diagnostic process to evaluate how long the child or adolescent has been experiencing gender incongruence, whether there might be any external cause of those feelings, and a prediction of how likely those feelings are to persist." *Id*. at ¶ 66. Anderson continues,

> And, as WPATH notes, "a parent/caregiver report may provide critical context in situations in which a young person experiences very recent or sudden self-awareness of gender diversity and a corresponding gender treatment request, or when there is concern for possible excessive peer and social media influence on a young person's current self-gender concept."
>
> . . .
>
> Indeed, WPATH's SOC 8 recommends "involving parent(s) or primary caregiver(s) in the assessment process … in almost all

> situations," and adds that "including parent(s)/caregiver(s) in the assessment process to encourage and facilitate increased parental understanding and support of the adolescent may be one of the most helpful practices available."

Id. at ¶¶ 68-69. Concealing from a parent the fact of a student's transitioning at school is not in the best medical interests of a student, according to Anderson. "By facilitating a social transition at school over the parents' objection, a school would drive a wedge between the parent and child. Similarly, facilitating a double life for some children, in which they present as transgender in some contexts but cisgender in other contexts, is not in their best interest." *Id*. at ¶¶ 77-78. After all, "[c]ircumventing, bypassing, or excluding parents from decisions about a social transition undermines the main support structure for a child or adolescent who desperately needs support." *Id.* at ¶ 80.

Anderson's opinion regarding EUSD's confidentiality and parental exclusion policies is,

> contrary to widely accepted mental health principles and practice. I am not aware of any professional body that would endorse EUSD's policies which envision adult personnel socially transitioning a child or adolescent without evaluation of mental health professionals and without the consent of parents or over their objection.
>
> Rather, when a child presents with a desire to use a new name or pronouns, the very first step should be a careful professional assessment by a mental health professional with expertise in child gender incongruence. The first step should not be, as EUSD's policies provide, the immediate and unhesitating affirmance of the child's request without parental involvement or knowledge.

Id. at ¶¶ 82-83. Anderson concludes,

> EUSD's policies are contrary to best practices regarding maintaining the relationship between parents and their children. Best mental health practices abhor activity that drives a wedge between parents and children, creating distrust and tension. In all cases, parental consent is required to provide medical and

> psychological treatment to minors. In part, this is because the science of mental health recognizes that the best evidence regarding a minor's mental and emotional well-being comes from first-hand accounts by parents, rather than biased accounts from immature children.

Id. at ¶85.

To sum up, the plaintiffs correctly understand that the EUSD policy of confidentiality and non-disclosure to parents explicated by AR 5414.3 is not conducive to the health of their gender incongruent students. Anderson's expert opinion is unrebutted. As such, for purposes of a motion for preliminary injunction, it is entitled to substantial weight.

B. Youthful Impetuosity

Though it does not require the wisdom of a Supreme Court Justice to see, the Supreme Court recognizes that youth tend to make impetuous and ill-considered life decisions. "First, as any parent knows and as the scientific and sociological studies . . . tend to confirm, 'a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citations omitted). In the same vein, and perhaps especially true in the school setting, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* And "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* at 570 (citation omitted). "Indeed, notes the Court, "the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Id*.

C. Federal Constitutional Rights of Parents

Although the plaintiffs ultimately seek a declaration that EUSD's AR 5415.3 policy violates state law, a decision on that claim need not be made in order to grant

preliminary injunctive relief. This is because the plaintiffs also correctly understand that EUSD's policies are in direct tension with the federal constitutional rights of parents to direct the upbringing and education of their children. The interpretation of federal constitutional rights is plainly committed to both state and federal courts and is a subject upon which federal courts may decide legal questions with authority. Indeed, it is the duty of federal courts to do so.

The United States Supreme Court has historically and repeatedly declared that parents have a right, grounded in the Constitution, to direct the education, health, and upbringing, and to maintain the well-being of, their children. In *Troxel v. Granville*, 530 U.S. 57, 67-68 (2000), the Court remarked, "the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment." The Court commented that the principle, first formulated in *Myer* and *Pierce*, "long ha[s] been interpreted to have found in Fourteenth Amendment concepts of liberty an independent right of the parent in the 'custody, care and nurture of the child,' free from state intervention."

Beginning with *Myer v. Nebraska*, 262 U.S 390, 400 (1923), the Court said, "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. . . . Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life."

In *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), the Court acknowledged "the liberty of parents and guardians to direct the upbringing and education of children under their control," and said, "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

In *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), the Court pointed out that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the

parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court recounted that it "has frequently emphasized the importance of the family, and explained, "[t]he rights to conceive and to raise one's children have been deemed 'essential.'"

In *Parham v. J.R.*, 442 U.S. 584, 604 (1979), the Court declared, "[o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is 'the mere creature of the State' and, on the contrary, asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare their children for additional obligations.'" The Court continued, "[t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Id.* (citations omitted). "The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Id*. at 603. The *Parham* court recognized the parental right to be involved in -- and even override their child's opinion on -- the need for medical care or treatment.

> Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure. Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.

Parham, 442 U.S. at 603-04 ("The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child.").

In *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), the Court recognized that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . ."

In *Hodgson v. Minnesota*, 497 U.S 417, 447 (1990) (plurality), the Court said, "[a] natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference."

In *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 529 (2007), the Court said, "it is not a novel proposition to say that parents have a recognized legal interest in the education and upbringing of their child."

These are not strange or novel notions. The United States Court of Appeals for the Ninth Circuit recently acknowledged, yet again, the continuing vitality of a parent's constitutionally protected interest in raising a child. In *David v. Kaulukukui*, 38 F.4th 792, 799 (2022), the court observed, "[t]he interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court. Our caselaw has long recognized this right for parents and children under the Fourth and Fourteenth Amendments." (citations omitted).

The constitutional right of parents to direct their child's education is further protected through Congressional policy, as exemplified by the Family Educational Rights and Privacy Act ("FERPA") (20 U.S.C. § 1232g; 34 CFR part 99). FERPA requires schools to provide parents the opportunity and the right to inspect and review their child's education records (34 CFR 99.10 - 99.12). FERPA speaks to the Congressional elevation of the importance of parents being involved in their child's education. That involvement includes more than academics and extends to matters of health. The privacy right of a child, according to FERPA, takes second place to his or her parents' right to know.

In the end, EUSD's policy of elevating a child's gender-related choices to that of paramount importance, while excluding a parent from knowing of, or participating in, that kind of choice, is as foreign to federal constitutional and statutory law as it is medically unwise.

D. State Law Right to Privacy

EUSD responds that the policy is required by state law. AR 5145.3 is not a state statute. Rather, the argument goes that AR 5145.3 gives meaning to a child's state right to privacy as applied to the school setting. A state's highest court is the final arbiter of the meaning of state law and federal courts look to decisions of a state's highest court for binding interpretations. *Hewitt v. Joyner*, 940 F.2d 1565 (9th Cir. 1995). Where there are none, federal courts look to decisions from state appellate courts for guidance in predicting the decision of the state's highest court. In *American Academy of Pediatrics v. Lungren*, 16 Cal.4th 307, 315 (1997), California's Supreme Court observed that the "requirement that medical care be provided to a minor only *with the consent of the minor's parent or guardian* remains the general rule, both in California and throughout the United States." (Emphasis added.) It did note the existence of several statutory exceptions to the general rule (*i.e.*, "medical emancipation" statutes)[2] permitting minors to obtain specific types of medical services without a parent's consent, however gender transitioning is not among the exceptions.

Concerning the California's state constitutional right to privacy for minors and regulations like AR 5415.3, the state's highest court has not had occasion to issue a binding interpretation, and no state appellate court decisions have been identified. Whether a child's state law right to privacy includes a right of confidentiality from their own parents after the child has expressed a desire to be publicly (at school) known by a

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[2] These are described as "statutes that authorize minors, without parental consent, to obtain medical care only for specific, designated conditions, without authorizing the minor to consent to medical care for other medical needs." *Id*. at 316.

new name and referred to by new pronouns, seems unlikely. After all, one element of a right to privacy is a reasonable expectation of privacy. 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.

While the Court is unaware of state appellate court decisions recognizing a child's right to quasi-privacy about their gender identity expressions, and none placing such a right above a parent's right to know, there are decisions describing parents' rights and obligations. For example, in *Brekke v. Wills*, 125 Cal.App.4th 1400 (Cal. App. 2005), a California court of appeal made clear that a parent's rights are superior to a child's rights. "We categorically reject the absurd suggestion that defendant's freedom of association trumps a parent's right to direct and control the activities of a minor child, including with whom the child may associate. *Id*. at 1410 (citations omitted). "The liberty interest ... of parents in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests recognized by the United States Supreme Court." *Id.* (quoting *Troxel*, 530 U.S. at 65). *Brekke* continues, "[w]hether a child likes it or not, parents have broad authority over their minor children." *Id.* *Brekke* then lays out parents' obligations regarding children. "Not only do parents have a constitutional right to exercise lawful control over the activities of their minor children, the law requires parents to do so." *Id.* at 1410-11 (citing Cal. Penal Code, § 272, subd. (a)(1), (a)(2) [parents of a child "under the age of 18 years shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child" so as not to "encourage" or "cause" the child to "become or to remain a person within the provisions of Section 300 [juvenile dependency], 601 [habitually disobedient or truant], or 602 [juvenile delinquency] of the Welfare and Institutions Code" and are subject to criminal punishment for a violation of that duty]; Ed.Code, §§ 48260.5, subds. (b), (c); 48293 [parents who fail to compel their child's attendance at school are subject to criminal prosecution]; *see also* Civ.Code, § 1714.1 [parents may be liable for the torts of their

minor child]; Gov.Code, § 38772, subd. (b) [parents are jointly and severally liable with their minor child for the child's defacement of property by graffiti]; Ed.Code, § 48904, subd. (a) [parents are liable for damages caused by the willful misconduct of their minor child in injuring or killing a pupil or school employee or volunteer, or in damaging property belonging to a school or school employee]; Pen.Code, § 490.5, subd. (b) [parents may be liable for petty theft committed by a minor child under their custody and control].)

Another California court of appeal made it clear that, in a similar Fourth Amendment context, a child's right to privacy and to object to a warrantless search of his room must give way to a parent's superior right to consent. *See In re D.C.*, 188 Cal.App.4th 978 (Cal.App. 2010). The appellate court wrote,

> [The minor] Appellant argues the officers' failure to honor his objection to their entry constituted a violation of his constitutional rights, noting minors are entitled to the protections of the Constitution and, in particular, the search and seizure provisions of the Fourth Amendment. While there is no question minors are entitled to the protection of the Fourth Amendment, adults and minors are not necessarily entitled to the same degree of constitutional protection.

Id. at 989-90 (citations omitted). *In re D.C.* explains why. "To fulfill their duty of supervision, parents must be empowered to authorize police to search the family home, even over the objection of their minor children." *Id.* at 990. A child's right to privacy may be superior to other, unrelated individuals. Nevertheless, 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.[3]

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[3] In the case of a child's home bedroom, where a child ordinarily has a high expectation of privacy as to others, parents have the stronger case to authorize a search over the child's objection.

> "When the child is a minor, there is an even stronger case for apparent authority in a parent to consent to the search of the

IV. LIKELIHOOD OF SUCCESS ON THE MERITS

In their motion for preliminary injunction, plaintiffs claim their First Amendment rights to free speech and the free exercise of religion are being violated. Tangentially, plaintiffs claim that the federal constitutional rights of parents of school district students are being violated. As an initial impression, it would seem so. However, no parents have joined as plaintiffs at this time. Moreover, at least for purposes of their preliminary injunction motion, plaintiffs are not claiming to stand in the place of parents. Consequently, the issue is not resolved here.

A. Section 1983 liability

Local government units such as public school districts are included among those persons to whom 42 U.S.C. § 1983 applies. "Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). The language of § 1983 "plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." *Id*. at 692; *cf. United States v. Town of Colo. City*, 935 F.3d 804, 808 (9th Cir. 2019) (same).

B. Freedom Speech Clause

Plaintiffs first claim for relief asserts that EUSD's policy conflicts with their own constitutional right to freedom of speech. They argue that their right to speak freely on

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> child's bedroom. Unlike the parents of adult children, the parents of minor children have legal rights and obligations that both permit and, in essence, require them to exercise common authority over their child's bedroom… Most fundamentally, parents have the "responsibility" to support their minor children (Fam. Code, § 3900) and must "exercise reasonable care, supervision, protection, and control" over their conduct."

In re D.C., 188 Cal.App.4th at 984 (quoting *Brekke*, 125 Cal.App.4th at 1410).

matters of public concern do not end at the schoolhouse door and that the policy forces them to adhere to an ideological orthodoxy (with which they directly disagree), as a condition of their employment. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 506 (1969).

It is clear from the supporting documents that plaintiffs have a direct disagreement with the policy. However, the argument that they may speak freely on matters of curricular speech is foreclosed by *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011). *Johnson* considered the speech of a high school math teacher whose expression took the form of posters about history on his classroom walls. There, the court "recognize[d] that 'expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary.'" *Id*. at 967. "Certainly, Johnson did not act as a citizen when he went to school and taught class, took attendance, supervised students, or regulated their comings-and-goings; he acted as a teacher—a government employee," according to *Johnson*. *Id.* The court explained that because the speech was that of a school teacher, the speech belonged not to the teacher, but to the school district. "Because the speech at issue owes its existence to Johnson's position as a teacher, Poway acted well within constitutional limits in ordering Johnson not to speak in a manner it did not desire." *Id.* at 970. *Johnson* concluded, "[a]ll the speech of which Johnson complains belongs to the government, and the government has the right to 'speak for itself.' When it does, 'it is entitled to say what it wishes,' 'and to select the views that it wants to express.'" *Id.* at 975.

Here, like *Johnson,* the plaintiffs are public school government teachers. The plaintiffs are not asserting that they are simply acting ad hoc as citizens when they go to school and teach class, take attendance, supervise students, or regulate their comings-and-goings, as employees. These activities are part of their employee duties. Included among their duties as teachers is the duty to communicate with a student's parents from time to time about the student's school performance. It is difficult to say that their speech during the school day as teachers is their own and not the school district's during the regular

course of their employment duties. Consequently, at least where the teachers' compelled speech takes place during the school day on curricular matters in carrying out the duties of their positions, *Johnson* appears to foreclose a freedom of speech claim.[4]

The teachers could make out a freedom of speech claim if they are compelled to speak in accordance with the school policy in casual, non-school contexts. Here, neither plaintiff has said that they have been conversing with parents in casual, non-school settings where the AR 5145.3 policy stifled their speech. 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 plaintiffs' come closest to making out a successful freedom of speech claim on the merits. This is because the policy of AR 5145.3, as presented to 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. The merits of the first claim for relief for violation of the Free Speech Clause can be decided later, however, because the teachers' second and third claims for relief are sufficiently clear to be entitled to preliminary injunctive relief.

C. Free Exercise Clause

The plaintiffs' second and third claims for relief assert that EUSD's policy requiring non-disclosure (or parental exclusion) violates their right to the free exercise of religion as guaranteed by the First Amendment. Both Mirabelli and West hold sincere religious beliefs. Their beliefs are well-articulated, integrated, and comprehensive. Their beliefs are better described and developed than mentioned in the limited space here. In

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[4] Plaintiffs argue that *Johnson* is no longer controlling law, citing to *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014) and *Oyama v. University of Hawaii*, 813 F.3d 850 (9th Cir. 2015). However, these cases address issues of "academic freedom" in the post-secondary education context, which the Court is not convinced apply in this instance.

short, Mirabelli believes that the relationship between parents and children is an inherently sacred and life-long bond, ordained by God, in which the parents have the ultimate right and responsibility to care for and guide their children. Compl. at 257. In a similar vein, West believes that the relationship between parents and their child is created by God with the intent that the parents have the ultimate responsibility to raise and guide their child. Both Mirabelli and West believe that God forbids lying and deceit. Compl. at 269-70.

EUSD preliminarily argues that AR 5145.3 does not infringe on plaintiffs' religious beliefs at all because the policy does not require plaintiffs to "lie" to parents. But that cannot be fairly said when the policy requires plaintiffs to conceal from parents, by misdirection and substitution, accurate information about their child's use of a new name, gender, or pronouns at school. It is one thing if the policy merely delegated the task of talking with parents about a student's gender incongruence to dedicated, trained personnel. It is quite another to require teachers to withhold this information with the knowledge that the information will be *impossible for the parents to obtain* from the school. It is that aspect which infringes on the plaintiffs' free exercise of their religious beliefs. *See* Hearing Transcript, at 100.

"The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that 'Congress shall make no law . . . prohibiting the free exercise' of religion.'" *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021); C*hurch of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993) (same). "Nor may the government 'act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.'" *Fellowship of Christian Athletes,* 2023 WL 5946036, at *38 (quoting *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018)). To avoid violating the Constitution, "the government must demonstrate that 'a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.'" *Id*. (quoting *Lukumi*, 508 U.S. at 546). And while "religious beliefs need not be

acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection,"[5] in this case Mirabelli's and West's beliefs are logical, acceptable, consistent, and align with federal constitutional principles, state law, and EUSD policies BP 4119.21(9) (required honesty) and BP 0100(7) (right to parental involvement).

"Distilled, Supreme Court authority sets forth three bedrock requirements of the Free Exercise Clause that the government may not transgress, absent a showing that satisfies strict scrutiny. First, a purportedly neutral 'generally applicable' policy may not have 'a mechanism for individualized exemptions.' Second, the government may not 'treat . . . comparable secular activity more favorably than religious exercise.' Third, the government may not act in a manner 'hostile to . . . religious beliefs' or inconsistent with the Free Exercise Clause's bar on even 'subtle departures from neutrality.' The failure to meet any one of these requirements subjects a governmental regulation to review under strict scrutiny." *Fellowship of Christian Athletes*, 2023 WL 5946036, at *40-41 (citations omitted).

Under the First Amendment, a plaintiff makes out her case if she shows "that a government entity has burdened her sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1159 (9th Cir. 2022) (quoting *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022)). General applicability requires, among other things, that the laws be enforced in an evenhanded manner. *Id*. (citations omitted). "A government policy will fail the general applicability requirement if it 'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way,' or if it provides 'a mechanism for individualized exemptions.' Failing either the neutrality or

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[5] *Fulton,* 141 S. Ct. at 1876 (quoting *Thomas v. Review Bd. of Ind. Employment Security Div*., 450 U. S. 707, 714 (1981)).

general applicability test is sufficient to trigger strict scrutiny." *Kennedy,* 142 S. Ct. at 2422 (citations omitted).

1. General Applicability.

"A law is not generally applicable if it 'invites' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 141 S. Ct. at 1877 (citations omitted). Moreover, "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given." *Id.* at 1879 (citations omitted). That is so because such a policy "'invites' the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id*.

Categorical exemptions. EUSD argues the policy is generally applicable because it provided training on the policy to all staff – not just to teachers. However, this does not appear to be wholly accurate. EUSD cites the declaration of its trainer, Tracy Schmidt. EUSD Oppo. Dkt 16 at 16. But Schmidt declares that she trained all certificated staff in January 2018 and classified staff in June 2018. *See* Declaration of Schmidt, Dkt 16-1 at ¶2. Yet, AR 5145.3 was adopted two years later (in 2020), and the first training on AR 5145.3 specifically took place in 2022. To date, the only evidence presented supports the teachers claim: that training regarding AR 5145.3 was limited to full-time teachers. Evidence is lacking showing the policy is being applied to instructional aides, substitute teachers, office staff, or non-teaching administrators.

Discretionary exemption. EUSD next asserts that the policy is generally applicable because the only exceptions in the policy are "exceptions to discipline" for teachers who violate the policy. EUSD Oppo at 17. Not only is potential disciplinary action exactly the harm plaintiffs seek to prevent, but this argument tends to prove the plaintiffs' point. Under the policy, communications to parents are deemed discrimination/harassment when EUSD decides that the parent lacks a legitimate need for the information. 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 means whether disciplinary action is taken

by EUSD depends on an undefined *ad hoc* determination of whether the parent receiving gender-related information has a legitimate reason to be informed. This is the very definition of a discretionary exemption. "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877. "Properly interpreted, *Fulton* counsels that the mere existence of a discretionary mechanism to grant exemptions can be sufficient to render a policy not generally applicable, regardless of the actual exercise." *Fellowship of Christian Athletes*, 2023 WL 5946036, at *43 (citation omitted).

2. Scrutiny.

The reasons proffered by the defendants for the policy pass neither the strict scrutiny nor the rational basis tests. "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546.

EUSD contends that the government purpose of protecting gender diverse students from (an undefined) harm is a compelling governmental interest and the policy of non-disclosure to parents is narrowly tailored. EUSD Oppo at 17. This argument is unconvincing. First, both the Ninth Circuit and the Supreme Court have found overly broad formulations of compelling government interests unavailing. *See Green v. Miss United States of Am., LLC*, 52 F.4th 773, 791-92 (9th Cir. 2022) (citation omitted) (identifying the issue as "not whether [the government] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [plaintiff]."). Second, keeping parents uninformed and unaware of significant events that beg for medical and psychological experts to evaluate a child, like hiding a gym student's soccer concussion, is precisely the type of inaction that is likely to cause greater harm and is not narrowly tailored.

The record includes an instance where a substitute teacher, unaware of a student's preferred name, referred to the student by the student's official name, which was met

with laughter by the class. One would think that a teacher would want to inform the parents about such an event. If the child really does have gender incongruence, then being the subject of laughter and potential ridicule could have profound effects. If informed, the parents could do something, whether it be arranging counseling or holding at home discussions. On the other hand, if the child is acting to amuse himself or herself, or others, or to be disruptive and discourteous, the parents could also do something to approach the problem. Either way, ignoring the issue or concealing it within the school universe disregards plaintiffs' right to free exercise in particular, and parents' constitutional rights in general. Ignoring a problem is seldom an appropriate solution.

EUSD has at best articulated an overly broad state interest, as applied to these plaintiffs. EUSD has not demonstrated a narrowly tailored policy, tailored so as not to unnecessarily impinge on the plaintiffs' free exercise rights. EUSD's blanket prohibition on the plaintiffs' (and any EUSD employee's) accurate communications, in all instances, with all parents, of all of their assigned students, does not fit the notion of narrow tailoring. EUSD has not offered any showing that it has genuinely considered less restrictive measures than those implemented here, although plaintiffs offered at least six different potential accommodations. As such, EUSD's policy as applied to the plaintiffs fails at least the tailoring prong of the strict scrutiny test. *Cf. Fellowship of Christian Athletes*, 2023 WL 5946036, at *56.

In the end, Mirabelli and West face an unlawful choice along the lines of: "lose your faith and keep your job, or keep your faith and lose your job." *Cf. Keene v. City & Cnty. of San Francisco*, U.S. App. LEXIS 11807, *6 (9th Cir. May 15, 2023). Yet, "[r]espect for religious expressions is indispensable to life in a free and diverse Republic." *Kennedy*, 142 S. Ct. at 2432-33. The only meaningful justification the District offers for its insistence that the plaintiffs not reveal to parents gender information about their own children rests on a mistaken view that the District bears a duty to place a child's right to privacy above, and in derogation of, the rights of a child's parents. The Constitution neither mandates nor tolerates that kind of discrimination. The plaintiffs

have demonstrated a strong likelihood of success on the merits for their free exercise claim against EUSD.

In their opposition briefing, the state defendants do not argue the merits of plaintiffs' First Amendment claims for relief. Instead, the state defendants argue the plaintiffs lack Article III standing and that state defendants enjoy Eleventh Amendment immunity. These are addressed *infra* in the discussion on the motions to dismiss.

D. Remaining *Winter* Factors

The plaintiffs have succeeded in demonstrating a likelihood of success on the merits, which is the first and most important factor for awarding a preliminary injunction. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. The remaining factors easily tip towards the plaintiffs, as well.

"[A] finding that the plaintiff is likely to succeed on the merits of [a constitutional] claim sharply tilts in the plaintiff's favor both the irreparable harm factor and the merged public interest and balance of harms factors." *Baird v. Bonta*, 2023 U.S. App. LEXIS 23760, *15 (citations omitted). It is black letter law that the deprivation of constitutional rights "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Fellowship of Christian Athletes*, 2023 WL 5946036, at *56 (describing the principle as "axiomatic"). Moreover, "'irreparable harm is relatively easy to establish in a First Amendment case' because the party seeking the injunction 'need only demonstrate the existence of a colorable First Amendment claim.'" *Id*. (citation omitted). Plaintiffs have accomplished that in this case. Under 42 U.S.C. § 1983, the plaintiffs may be entitled to an award of money damages for past mental anguish, cancellation of summer teaching contracts, and constitutional damages, after proof at trial. These are reparable harms. However, without an injunction, it is certain that plaintiffs will continue to suffer present and future irreparable constitutional harm due to the existence of the

state and EUSD policies and the fact that plaintiffs have involuntarily been placed on administrative leave from their teaching positions.

When the nonmovant is the government, the last two *Winter* factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Fellowship of Christian Athletes*, 2023 WL 5946036, at *57 ("Where, as here, the party opposing injunctive relief is a government entity, the third and fourth factors—the balance of equities and the public interest—"merge."). Here, the balance of the equities favor issuance of a preliminary injunction as the defendants have not established that they will be harmed if an injunction preserving the status quo ante stands while further proceedings take place for a final judgment on the merits. Finally, the public interest is always furthered by enjoining unconstitutional policies. *Riley's Am. Heritage Farms v. Elsasser,* 32 F.4th 707, 731 (9th Cir. 2022) ("it is always in the public interest to prevent the violation of a party's constitutional rights.").

V. MOTIONS TO DISMISS[6]

Both groups of defendants move to dismiss the Complaint.

A. *State Defendants*

In their motion to dismiss and opposition to plaintiffs' motion for preliminary injunction, the state defendants do not argue the merits of AR 5145.3. Instead, the state defendants argue the plaintiffs lack Article III standing and that state defendants enjoy Eleventh Amendment immunity. The briefing makes fair arguments. However, statements at the hearing and subsequent litigation by the state against another school district seriously undercut their arguments.

The state defendants argue that plaintiffs lack standing because the FAQs page at issue does not directly affect the plaintiffs. Counsel for EUSD at the hearing, in contrast, twice said that EUSD adopted AR 5145.3 precisely because of the state's FAQs page.

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[6] For purposes of a motion to dismiss, the Court assumes the facts pled in the complaint are true. *Mazarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

First, at the outset of the hearing counsel was asked, "Is the school district's position that this rule that you've adopted that says that parents are not entitled to notice, that that rule is mandated by the state?" Counsel responded, "Yes, we are taking that position." Hearing Transcript at 3. Later, a similar question was asked and the same answer was given. "The Court: Okay. So to cut to the chase, you're telling me that this rule exists because the state is telling the school board that they must do this; am I correct? EUSD Attorney: Yes, your honor." Hearing Transcript at 37.

The state defendants maintain that the State Board of Education FAQs publication is not a state law but only attempts to describe state law. EUSD, on the other hand, considers itself bound by the statements in the FAQs publication as a matter of law. Suggesting that EUSD is correct in its characterization, the Attorney General for the State of California recently relied on the FAQs publication in suing a school district for violating state law.

The Attorney General filed a lawsuit against another California public school district and obtained a temporary restraining order stopping school employees from disclosing gender identification information to the parents of students. *See People v. Chino Valley Unified School Dist*., San Bernardino Superior Court Case No. CIV SB 2317301 (filed Aug. 28, 2023). In its Complaint, the Attorney General asserts that the school district is violating state law by adopting a policy of notifying parents whenever a student requests to be identified as a gender other than the student's biological sex or gender listed on a birth certificate. Complaint, ¶67. As part of the Complaint filed against the Chino Valley Unified School District, the Attorney General specifically refers to the same FAQs publication identified in this proceeding. The Complaint asserts, "the California Department of Education has issued statewide guidance since at least 2014, generally recommending that school officials and staff members not 'out' student to their parents or guardians against the student's wishes. (Cal. Dept. of Ed., Frequently Asked Questions, https;//www.cde.ca.gov/re/di/eo/faqs.asp.)." Complaint, ¶ 37 (emphasis added).

The state Board of Education, the state Department of Education, the Superintendent of Public Instruction and the Attorney General are all arms of the State of California. The state defendants do not argue otherwise. They agree that "[i]n California, the 'State' includes state offices, officers, departments, boards and agencies." *See* State-Level Defendants Mot., Dkt. 25 at 9 (citing Cal. Govt. Code § 900.6). The attorney for EUSD asserts that the District is compelled by the State to adopt and enforce AR 5145.3 based on the State's FAQs page. The Attorney General, another arm of the state, is currently suing another school district for not following the State's FAQs page and its rationale. With no evidence to the contrary at this point, it must be concluded that the State is the driving force behind EUSD's alleged violations of plaintiffs' constitutional rights. If the plaintiffs succeed in proving their case, a permanent injunction against the state defendants will be necessary to accord full relief. Therefore, plaintiffs have Article III standing.

The state defendants also assert that they enjoy Eleventh Amendment immunity from suit. Insofar as the defendants are sued in their official capacities they are treated as arms of the State of California, and because the state has not waived its immunity from suit, the state defendants are correct. However, to the extent that plaintiffs seek only prospective injunctive relief to remedy an ongoing violation of federal or constitutional law, there is no immunity. *See Ex parte Young*, 209 U. S. 123, 159-160 (1908).

Here, the state defendants named are not arbitrarily chosen governmental officers with only general responsibilities but are the officers and board members responsible for and empowered to change state education policy. "A plaintiff seeking injunctive relief in a § 1983 action against the government 'is not required to allege a named official's personal involvement in the acts or omissions constituting the alleged constitutional violation.' Instead, 'a plaintiff need only identify the law or policy challenged as a constitutional violation and name the official within the entity who can appropriately respond to injunctive relief.'" *Riley's Am. Heritage Farms*, 32 F.4th at 732 (citation omitted). Therefore, the *Ex parte Young* exception applies and the motion to dismiss on

the basis of Eleventh Amendment immunity is denied. *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2197 (2022) ("So usually a plaintiff will sue the individual state officials most responsible for enforcing the law in question and seek injunctive or declaratory relief against them." (citation omitted)); *Pennhurst State School & Hospital v. Halderman,* 456 U.S. 265, 275 (1986).

B. *Escondido Union School District Defendants*

The EUSD defendants also move to dismiss for failure to state a claim. Additionally, they seek qualified immunity. Rule 12(b)(6) permits dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) may occur where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable, plausible claim. In contrast, a complaint may survive a motion to dismiss if, taking all well pled factual allegations as true, it contains enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The EUSD defendants repeat their arguments regarding the merits from the preliminary injunction briefing, claiming that EUSD's policies are consistent with state and federal law. As a preliminary matter, that is not wholly accurate, but the question is to be fully and finally determined later in the case. These are issues of law and fact that are to be decided later on a fuller record. The claims as articulated in the Complaint, at the time the Complaint was filed, describe plausible claims of violations of constitutional rights of free speech and free exercise sufficient to merit further proceedings. There is a sufficient question to raise plausible claims for relief and permit the claims to proceed. *See* generally discussion on likelihood of success on the merits, *supra*. The EUSD defendants will have the opportunity to assert their defenses more forcefully and completely on summary judgment or at trial. However, at this juncture, the motion to dismiss for failure to state a claim is denied.

Finally, the EUSD defendants ask for a ruling that they are entitled to qualified immunity. Certainly, "a plaintiff seeking injunctive relief for an ongoing First

Amendment violation (e.g., a retaliatory policy) may sue individual board members of a public school system in their official capacities to correct the violation." *Riley's Am. Heritage Farms*, 32 F.4th at 732. The EUSD defendants posit that "[t]here is no possibility that the school employees could have known that complying with their employer's policy could have violated the Plaintiffs' right to free speech or religion." *See* School Employee Defendants' Mot., Dkt 17 at 18-19. There is no evidence presented with the motion to support this factual assertion. The EUSD defendants, or some of them, may be entitled to qualified immunity after a motion for summary judgment or a trial on the merits. Without testimony on a full record, however, qualified immunity in this case is unwarranted. Therefore, the motion to dismiss and for qualified immunity is denied.

C. *Objections to judicial notice of miscellaneous documents*

All parties make objections to miscellaneous documents attached to, or made supplements to, their pleadings. The objections are overruled.

VI. CONCLUSION

A request to change one's own name and pronouns may be the first visible sign that a child or adolescent may be dealing with issues that could lead to gender dysphoria or related coexisting mental-health issues. Communicating to a parent the social transition of a school student to a new gender — by using preferred pronouns and non-conforming dress — is called discrimination/harassment by the defendants, despite having little medical or factual connection to actual discrimination or harassment. Plaintiffs Elizabeth Mirabelli and Lori Ann West have represented in their pleadings that they are committed to treating all transgender or gender diverse children with kindness, respect, and love. They are entitled to preliminary injunctive relief from what the defendants are requiring them to do here, which is to subjugate their sincerely-held religious beliefs that parents of schoolchildren have a God-ordained right to know of significant gender identity-related events. There are, no doubt, some teachers that have

no disagreement with AR 5145.3. This injunction does no violence to their constitutional rights.

Parental involvement in essential to the healthy maturation of schoolchildren. The Escondido Union School District has adopted a policy without parent input that places a communication barrier between parents and teachers. Some parents who do not want such barriers may have the wherewithal to place their children in private schools or homeschool, or to move to a different public school district. Families in middle or lower socio-economic circumstances have no such options. For these parents, the new policy appears to undermine their own constitutional rights while it conflicts with knowledgeable medical opinion. An order enjoining the new district policy is in the better interests of the entire community, as well as the plaintiff teachers.

The school's policy is a trifecta of harm: it harms the child who needs parental guidance and possibly mental health intervention to determine if the incongruence is organic or whether it is the result of bullying, peer pressure, or a fleeting impulse. It harms the parents by depriving them of the long recognized Fourteenth Amendment right to care, guide, and make health care decisions for their children. And finally, it harms plaintiffs who are compelled to violate the parent's rights by forcing plaintiffs to conceal information they feel is critical for the welfare of their students -- violating plaintiffs' religious beliefs.

THEREFORE, IT IS ORDERED THAT:

1. The Plaintiffs' Motion for Preliminary Injunction is GRANTED. The Escondido Union School District Defendants, the State Defendants, and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, and those who gain knowledge of this injunction order, or know of the existence of this injunction order, are enjoined from enforcing against Plaintiffs Mirabelli or West, EUSD AR 5145.3 or the associated official policy described in the California Department of Education's FAQs page on gender identity-related disclosures

by teachers to parents, and are to restrain any governmental employee or entity from taking any adverse employment actions thereupon against Plaintiffs Mirabelli or West, until further Order of this Court.

2. The EUSD Defendants' Motion to Dismiss is DENIED (Dkt Nos. 7 & 17).

3. The State-Level Defendants' Motion to Dismiss is DENIED (Dkt No. 25).

IT IS SO ORDERED.

Dated: September 14, 2023

HON. ROGER T. BENITEZ
United States District Judge

EXHIBIT “C”

The Cass Review

Independent review of gender identity services for children and young people

Independent review of gender identity services for children and young people: Final report

April 2024

12. Social transition

12.1 Through discussions with stakeholders, it is clear that social transition is a cause of concern for many people, and our remarks about social transition were some of the most quoted parts of the Review's interim report.

12.2 The approach taken to social transition is very individual but it is broadly understood to refer to social changes to live as a different gender such as altering hair or clothing, name change and/or use of different pronouns. There is a spectrum from relatively limited gender non-conforming changes in appearance in adolescence to young people who may have fully socially transitioned from an early age and be 'living in stealth' (that is, school friends/staff may be unaware of their birth-registered sex).

12.3 There are different views on the benefits versus the harms of early social transition. Some consider that it may improve mental health and social and educational participation for children experiencing gender-related distress. Others consider that a child who might have desisted at puberty is more likely to have an altered trajectory, culminating in medical intervention which will have life-long implications.

12.4 One key difference between children and adolescents is that parental/carer attitude and beliefs will have an impact on a child's ability to socially transition, whereas adolescents have more personal agency.

12.5 Social transition may not be thought of as an intervention or treatment, because it is not something that happens in a healthcare setting and it is within the agency of an adolescent to do for themselves. However, in an NHS setting it is important to view it as an active intervention because it may have significant effects on the child or young person in terms of their psychological functioning and longer-term outcomes.

12.6 Although the focus of the Review is on support from point of entry to the NHS, no individual journey begins at the front door of the NHS, rather in the child's home, family and school environment. The importance of what happens in school cannot be under-estimated; this applies to all aspects of children's health and wellbeing. Schools have been grappling with how they should respond when a pupil says that they want to socially transition in the school setting. For this reason, it is important that school guidance is able to utilise some of the principles and evidence from the Review.

International practice

12.7 The University of York's review of international guidelines (Hewitt et al: Guidelines 2: Synthesis) found that most guidelines recommend providing information about the benefits and risks of social transition but vary in whether the recommendations apply to both children and adolescents or just to children.

12.8 WPATH 8 guidance has moved from a 'watchful waiting' approach for children to a position of advocating for social transition as a way to improve children's mental health.

12.9 Several guidelines recommend that social transition should be framed in a way that ensures children can reconsider or reconceptualise their gender feelings as they grow older.

12.10 Several guidelines discuss education about the risks and benefits of binders and packers, and safe use as appropriate.

EXHIBIT “D”

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.

1.

CVRI2101382	BERNAL VS BERRY	MOTION FOR LEAVE TO AMEND COMPLAINT ON COMPLAINT FOR BREACH OF CONTRACT/WARRANTY

Tentative Ruling:

This motion is unopposed. Motion is granted. Plaintiff is ordered to file the First Amended Complaint within 14 days of this order.

2.

CVRI2101992	HOME, CARE ASSISTANCE OF CALIFORNIA, LLC vs SCRUTON	Motion to Compel Production of Documents re: Deposition Subpoena for Production of Business Records

Tentative Ruling:

This motion is unopposed. Motion is granted. Defendant/Cross-Complainant is ordered to file a proposed order for the Court's signature. Moving party to provide notice of ruling.

3.

CVRI2304998	THE BENNIE G. TRAPP, JR vs MAHAM CORP	Motion to Strike Complaint on 1st Amended Complaint for Other Complaint

Tentative Ruling:

This is a malicious prosecution action. Plaintiffs Bennie G. Trapp, Jr. ("Trapp") and The Bennie G. Trapp, Jr. Special Needs Trust allege that Trapp is a quadriplegic veteran of the US Army and US Air Force who is paralyzed from the neck down, save for minimal use of his hands. On December 29, 2016, Trapp entered into a Residential Lease Agreement ("Lease") with defendant Maham Corp. to rent property located at 12860 Perris Blvd., Unit D-7 in Moreno Valley, where Trapp had lived for 24 years prior. The Lease contained two options to purchase the property. Trapp exercised both options to purchase the property, the first in 2018 for $110,000 and then a second in 2019 for $169,000, both of which Maham breached. Trapp filed a civil lawsuit seeking specific performance for the sale of the property ("Civil Action").

In retaliation, Maham filed a meritless unlawful detainer action to evict Plaintiffs, *Maham Corp. v. Trapp*, UDMV 2200659 ("UD Action"), based on allegations that the defendants knew were false at the time they were made. In the UD Action, Maham claimed Trapp tampered with the circuit breaker box without any evidence whatsoever and was harboring an illegal subtenant despite knowing that the subtenant was Trapp's lawful live-in caregiver pursuant to the ADA and the Fair Housing Act. Maham lost the UD Action and then lost the Civil Action.

Plaintiffs allege defendants Sayid Ali and Jawad Afzal are the owners of Maham and that they were represented in the UD Action by counsel William E. Windham ("Windham" or "Defendant") of the Law Office of William E. Windham ("Windham APC"). Plaintiffs filed the original complaint on September 20, 2023, and the operative First Amended Complaint ("FAC") on October 5, 2023 alleging: 1) malicious prosecution; 2) abuse of process; and 3) treble damages (Civil Code § 3345(a), (b).) Plaintiffs seek punitive damages.

Defendant Windham now moves to strike punitive damages, arguing that there are insufficient facts showing oppression, fraud or malice as the FAC only alleges conclusory facts. Plaintiffs oppose, arguing that there are sufficient facts showing malice. In the Reply, Defendant

argues that he was not counsel to Maham in the Civil Action and refutes the allegations in the FAC.

Analysis:

I. Meet and Confer Requirement

Defendant has satisfied its obligation to meet and confer in accordance with CCP § 435.5 and has filed an appropriate declaration in accordance with CCP § 435.5(a)(3).

II. On the Merits

The court may, upon a motion made pursuant to CCP §435:

(a) Strike out any irrelevant, false, or improper matter inserted in any pleading.

(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.

(CCP § 436.) On a motion to strike, as with a demurrer, "the court treats as true the material facts alleged in the complaint, as well as any facts which may be implied or inferred from those expressly alleged." (*Washington Int'l Ins. Co. v. Superior Court* (1998) 62 Cal. App. 4th 981, 984, n. 2).

Defendant moves to strike punitive damages. A motion to strike is the proper vehicle to attack a punitive damage claim where facts alleged may not rise to the level of fraud, malice or oppression. (CCP §§ 435-436; *Truman v. Turning Point of Central Calif., Inc*. (2010) 191 Cal.App.4th 53, 63.) Plaintiffs may recover exemplary or punitive damages where it is proven that "the defendant has been guilty of oppression, fraud or malice." (Cal. Civ. Code §3294(a).)

"Not only must there be circumstances of oppression, fraud or malice, but facts must be alleged in the pleading to support such a claim." (*Grieves v. Superior Court* (1984) 157 Cal. App. 3d 159, 166.) "[A] conclusory characterization of defendant's conduct as intentional, willful and fraudulent is a patently insufficient statement of 'oppression, fraud, or malice, express or implied,' within the meaning of section 3294." (*Brousseau v. Jarrett* (1977) 73 Cal. App. 3d 864, 872.) "Malice" means either defendant intended to cause injury to plaintiff or defendant's conduct was "despicable" and carried on with a willful and conscious disregard of the rights and safety of others. (Civil Code § 3294(c)(1).) "Oppression" is "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. (Civil Code § 3294(c)(2).) "Despicable conduct" is conduct that is "so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 715.) The pleading must contain factual allegations of wrongful motive, intent, or purpose. (*Cyrus v. Haveson* (1976) 65 Cal. App. 3d 306, 317.)

Punitive damages may be awarded in a civil action for malicious prosecution. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 (flagrant abuse of the judicial process by the filing of fabricated claims in order to force the settlement or abandonment of a legitimate claim, is precisely the type of tortious conduct that an award of punitive damages is designed to deter).)

In this case, Plaintiffs allege the defendants, including Windham, knowingly and intentionally filed a meritless UD Action in retaliation for Plaintiffs having filed the Civil Action, to prevent Plaintiffs from exercising their option to purchase the subject property, and to evict Trapp – a disabled and quadriplegic veteran - from his residence of 24 years. (FAC, ¶¶ 22-27.) In the UD Action, Maham falsely alleged Trapp tampered with the circuit breaker box despite having no evidence in support, and falsely alleged Trapp was harboring an illegal subtenant despite knowing that the subtenant was Trapp's lawful live-in caregiver pursuant to the ADA and the Fair Housing Act. (FAC, ¶¶ 28-32.) Plaintiffs allege: "All Defendants, including but not limited to Windham and

Windham APC, knew or should have known that trying to evict a disabled quadriplegic tenant, who is current on rent and not otherwise in breach, solely or primarily due to the presence of a legally protected caregiver as the disabled tenant's subtenant shocks the conscience, is outrageous, is knowingly and patently malicious, as it is designed to expose an innocent disabled tenant to the potentially life-threatening conditions that attend and follow upon eviction." (FAC, ¶ 31.) These facts are sufficient to support malice and punitive damages.

Defendant Windham argues that he was not involved in the Civil Action, disputes what happened in the Civil Action, denies that he had actual notice of the status of Trapp's caregiver, and contends that he did in fact believe that the UD Action had merit. Defendant improperly relies on extrinsic facts set forth in his own declaration which are outside the four corners of the pleading. In ruling on a motion to strike, the trial court assumes the truth of the allegations in the complaint. (*Clause v. Sup. Ct. (Pedus Services, Inc.)* (1998) 67 Cal.App.4th 1253, 1255.)

DENY the motion.

4.

CVRI2306995	INLAND EMPIRE HEALTH PLAN vs MICHELLE BAASS	Hearing on Preliminary Injunction

Tentative Ruling:

Inland Empire Health Plan and San Francisco Health Plan (collectively "Plaintiffs") have healthcare plans in California. They assert that the California Department of Health Care Services ("Department") has enacted regulations regarding how Medi-Cal patients are assigned health care plans when the Medi-Cal beneficiary has not personally selected a health plan. They assert that under the rules currently applied by the Department, they are auto-assigned rates exceeding 70 percent in Riverside County and 60 percent in San Bernardino County. They allege that the Department unveiled a new auto-assignment algorithm that will result in Defendants receiving far fewer Medi-Cal members. They argue that these changes were not made pursuant to the requirements in the Administrative Procedure Act ("APA").

The complaint asserts the following causes of action: (1) injunctive relief, (2) writ of mandamus, and (3) declaratory relief.

Plaintiffs seek a preliminary injunction enjoining Department from implementing the changes to the auto-assignment algorithm. They argue that there is no harm in keeping the status quo. They contend that they will be irreparably harmed if the relief sought is not granted. Plaintiffs contend they will likely prevail on their claims because Department failed to comply with the APA when adopted its changes to the auto-assignment algorithm. In supplemental points and authorities filed by Plaintiffs, they argue that the quality metrics proposed by Department to determine how to auto-assign new Medi-Cal beneficiaries to plans is improper because they were not adopted in compliance with the APA.

In the oppositions, Department contends the new algorithm is already being used and granting the request for preliminary injunction would alter the status quo. It argues that Plaintiffs have failed to establish harm because they do not establish that they are entitled to any number of auto-assignments and their claim of monetary harm is speculative. It asserts that the Department's Health Plan Enrollment system must be programed at least 6 weeks prior to enrollment being effective. As such, it asserts that it cannot just stop the auto-assignment program percentages already programmed from January through March. It contends it cannot revert to the earlier iteration of the program because new plans have been added and have left the region at issue. In the supplemental opposition, it argues that mandatory relief is sought and Plaintiffs cannot meet the heightened requirements for such relief. It asserts that Plaintiffs get a higher

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.

EXHIBIT “E”

State of California

SECRETARY OF STATE

June 2, 2008

TO: ALL COUNTY CLERKS/REGISTRARS OF VOTERS (CCROV 08195)

Pursuant to Section 9033 of the Elections Code, I hereby certify that on June 2, 2008, the certificates received from the County Clerks or Registrars of Voters by the Secretary of State established that the LIMIT ON MARRIAGE. CONSTITUTIONAL AMENDMENT. (#1298), has been signed by the requisite number of qualified electors needed to declare the petition sufficient. LIMIT ON MARRIAGE. CONSTITUTIONAL AMENDMENT. (#1298), is, therefore, qualified for the next statewide election.

LIMIT ON MARRIAGE. CONSTITUTIONAL AMENDMENT. Amends the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local government: The measure would have no fiscal effect on state or local governments. This is because there would be no change to the manner in which marriages are currently recognized by the state. (Initiative 07-0068.)

IN WITNESS WHEREOF, I hereunto set my hand and affix the Great Seal of the State of California this 2nd day of June, 2008.

Debra Bowen

DEBRA BOWEN
Secretary of State

PROOF OF SERVICE

I am over the age of 18 and not a party to the within action. My business address is 3421 Via Oporto, Suite 201, Newport Beach, Calif. 92263. On Monday, April 15, 2024, I served the following document(s) on the interested parties in the following manner(s) as follows:

DECLARATION OF EMILY RAE IN SUPPORT OF PETITIONERS' REPLY BRIEF ON VERIFIED PETITION FOR WRIT OF MANDATE, DECLARATORY RELIEF, VIOLATION OF FREE SPEECH (CAL. CONST., ART. 1, SEC. 2), VIOLATION OF FREE SPEECH (U.S. CONST., AMEND. I)

Malcolm Brudigam
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Counsel for Respondent ROB BONTA

/ X / Via Electronic Transmission. Pursuant to written agreement between the parties, by personally e-mailing the document(s) to the persons at the e-mail address(es). No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission. A physical copy will be provided upon request only.

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

Executed on April 15, 2024 Newport Beach, California.

Nicole Pearson

(Signature)