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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

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

Plaintiffs,

v.

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

Defendants.

Case No. CVSW2306224
Honorable Irma Poole Asberry

PLAINTIFFS' OPPOSITION TO DEFENDANTS' ANTI-SLAPP MOTION

***Filed concurrently with*:**
Declaration of Scott Humphreys

Date: January 24, 2024
Time: 8:30 a.m.
Location: Department 5
Riverside Superior Court
4050 Main Street
Riverside, CA 92501

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I. INTRODUCTION

This lawsuit challenges actions taken by the Temecula Valley Unified School District ("TVUSD") Board of Trustees (the "Board") to censor Temecula educators and deprive Temecula students of their fundamental right to an education. The Board's challenged actions—enacting Resolution No. 2022-23/21 (the "Resolution") and Board Policy 5020.01 (the "Policy")—violate provisions of the California Constitution and State law that secure the rights to education and to receive information, to due process, to privacy, and to be free from discrimination on the basis of race, sex, gender identity, and sexual orientation. To prevent these harms, Plaintiffs—the Temecula Valley Educators Association, as well as individual Temecula teachers, students, and parents—filed this lawsuit and seek an order declaring that the Resolution and the Policy are unconstitutional and unlawful. Plaintiffs have also filed a motion for preliminary injunction ("PI Motion") that is set for hearing on January 24, 2024, to obtain an order enjoining Defendants from implementing or enforcing the Resolution and the Policy.

The Board responded by moving to strike Plaintiffs' First Amended Complaint ("FAC") under California Code of Civil Procedure ("CCP") § 425.16, which protects against "Strategic Litigation against Public Participation" or "SLAPP" suits. Defendants' Motion fails on multiple grounds.

First, as a categorical matter, the anti-SLAPP statute cannot be invoked against lawsuits like this one, where Plaintiffs are litigating in the public interest and do not seek relief greater than the public would receive. CCP § 425.17(b). This statutory limit on anti-SLAPP motions dooms the Board's Motion from the outset, making it "frivolous" within the meaning of CCP § 425.16(c)(1), which mandates an award of attorneys' fees and costs to Plaintiffs.

Second, this lawsuit does not satisfy the first prong of the anti-SLAPP test. To qualify as a SLAPP suit, a complaint must arise out of Defendants' exercise of free speech or petitioning the government, CCP § 425.16(e), but Plaintiffs' claims arise out of the Board's actions *as a governmental body* in enacting the Resolution and the Policy, not out of the Board's or its members' speech.

Third, even if this Anti-SLAPP Motion were not categorically barred (it is), and even if Plaintiffs' claims arose out of the Board's speech (they do not), the Anti-SLAPP Motion would still

fail the second prong of the anti-SLAPP test because Plaintiffs have demonstrated a probability of prevailing in this action. Plaintiffs' pending PI Motion—which is supported by approximately 1,000 pages of evidentiary materials, including declarations by the plaintiffs and a dozen expert witnesses—conclusively establishes that Plaintiffs are *likely* to prevail on the merits in this case, which more than satisfies Plaintiffs' burden to "demonstrate [their] claims have at least minimal merit." *Park v. Bd. of Trs. of Cal. State Univ.*, 2 Cal. 5th 1057, 1061 (2017) (internal marks omitted).

Plaintiffs respect the important role that the anti-SLAPP statute serves in "encourag[ing] continued participation in matters of public significance." CCP § 425.16(a). But the statute should not be abused, and it certainly should not be weaponized, as the Board attempts to do here, to chill Plaintiffs' efforts to protect their constitutional and statutory rights by seeking relief from this Court. For all these reasons, the Court should deny the Anti-SLAPP Motion, and award Plaintiffs their attorneys' fees and costs for having to defend against the frivolous motion.

II. ARGUMENT

"Code of Civil Procedure section 425.16, commonly known as the anti-SLAPP statute, provides that a cause of action arising from an act in furtherance of a person's constitutional right of petition or free speech in connection with a public issue is subject to a special motion to strike, unless the plaintiff establishes a probability of prevailing on the claim." *Aguilar v. Mandarich Law Grp., LLP*, 87 Cal. App. 5th 607, 619–20 (2023). Code of Civil Procedure § 425.17, however, exempts certain types of lawsuits from the scope of the anti-SLAPP statute. As relevant here, "[t]he Legislature designed subdivision (b) of section 425.17 to prevent the use of the anti-SLAPP device against specified public interest actions," specifically, "public interest and class action lawsuits brought solely in the public interest or on behalf of the general public," so long as certain conditions are met. *The Inland Oversight Comm. v. Cty. of San Bernardino*, 239 Cal. App. 4th 671, 676 (2015) (cleaned up).

"Whether a lawsuit falls within [this] public interest exception is a threshold issue, and [courts] address it prior to examining the applicability of section 425.16." *Id.* at 675. If this "public interest exception" applies, then the case is categorically "exempt from the anti-SLAPP statute, and thus, a trial court may deny the defendants' special motion to strike without determining whether the plaintiff's causes of action arise from protected activity, and if so, whether the plaintiff has

established a probability of prevailing on those causes of action." *Tourgeman v. Nelson & Kennard*, 222 Cal. App. 4th 1447, 1460 (2014). If the public interest exception does not apply, then an anti-SLAPP motion is "evaluated through a two-step process. Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims arise from protected activity in which the defendant has engaged. If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least minimal merit." *Park*, 2 Cal. 5th at 1061 (cleaned up).

Here, the Board's Anti-SLAPP Motion fails at each stage of this analysis: (1) it is barred by the "public interest exception" as a threshold matter; (2) the Board cannot carry its burden to demonstrate that the action arises out of protected activity; and (3) Plaintiffs have already shown that their claims in this action are meritorious. The Court should deny the Motion accordingly. Indeed, because the Board asks the Court only to strike the entire FAC, with no request in the alternative for narrower relief, if the Court finds that the Motion fails as to even one of Plaintiffs' claims, then the Court can and should deny the Motion in full. *See Park v. Nazari*, 93 Cal. App. 5th 1099, 1109 (2023) ("If a defendant wants the trial court to take a surgical approach, whether in the alternative or not, the defendant must propose where to make the incisions.").

A. The "Public Interest Exception" Bars This Anti-SLAPP Motion

Eleven years after enacting the Anti-SLAPP statute, CCP § 425.16, the California Legislature "enacted section 425.17 to curb the 'disturbing abuse' of [that] statute." *Club Members for an Honest Election v. Sierra Club*, 45 Cal. 4th 309, 316 (2008). It did so in part by creating an exception that makes the anti-SLAPP law categorically inapplicable to lawsuits "brought solely in the public interest or on behalf of the general public" so long as three enumerated conditions are satisfied. CCP § 425.17(b). Because this lawsuit satisfies each of those conditions, the public interest exception applies and the Anti-SLAPP Motion fails.

First, Plaintiffs do not seek "any relief greater than or different from the relief sought for the general public or a class of which the plaintiff[s] [are] member[s]." CCP § 425.17(b)(1). In analyzing this prong, courts "rely on the allegations of the complaint because the public interest exception is a threshold issue based on the nature of the allegations and scope of relief sought in the prayer." *Tourgeman*, 222 Cal. App. 4th at 1460. Here, Plaintiffs have asked this Court only to

(1) declare that the Resolution and the Policy violate the California Constitution and California law; (2) enjoin the Board from implementing or enforcing the Resolution and the Policy; and (3) award Plaintiffs their costs and reasonable attorney's fees. FAC at 64–65 (prayer for relief).[1] That is precisely the type of relief that satisfies this first condition of the public interest exception. *See Found. for Taxpayer & Consumer Rights v. Garamendi*, 132 Cal. App. 4th 1375, 1380 (2005) (condition satisfied where plaintiffs alleged legislation was "invalid and unconstitutional" and "sought to enjoin defendants . . . from implementing or enforcing" it); *Tourgeman*, 222 Cal. App. 4th at 1461 (same where plaintiff "did not seek damages or restitution on behalf of himself or the class or the general public" and where "the sole remedy that [plaintiff] sought was injunctive relief directed at preventing respondents from engaging in [unlawful] practices in the future").

Second, this lawsuit, "if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons." CCP § 425.17(b)(2). Evaluating whether this condition is satisfied requires "examining [the] complaint to determine whether [plaintiff's] lawsuit is of the kind that seeks to vindicate public policy goals." *Tourgeman*, 222 Cal. App. 4th at 1463. Here, Plaintiffs seek to enforce, *inter alia*, the constitutional rights to receive information, education, privacy, and equal protection under the law, *see* FAC ¶¶ 151–202 (causes of action), and Plaintiffs' success in this lawsuit will therefore benefit Temecula Valley students, parents, educators, and taxpayers. That squarely satisfies the second condition of the public interest exception. *See Tourgeman*, 222 Cal. App. 4th at 1461 (second condition satisfied where plaintiff seeks "injunctive relief to benefit the general public in the future by ensuring that respondents comply with state and federal statutory law").

Third, "[p]rivate enforcement is necessary and places a disproportionate financial burden on the plaintiff[s] in relation to [their] stake in the matter." CCP § 425.17(b)(3). As to the necessity of private enforcement, where "no public entity has sought to enforce the rights plaintiffs seek to vindicate in their lawsuit," that "fact alone is a sufficient basis to conclude the action is 'necessary,' within the meaning of the public interest exception." *Inland Oversight Comm.*, 239 Cal. App. 4th at

[1] The statute expressly provides that "[a] claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision." CCP § 425.17(b)(1).

676; *see also Tourgeman*, 222 Cal. App. 4th at 1464–65 (same, and observing that "the *possibility* that a public entity might bring a lawsuit to vindicate certain rights does not demonstrate that a private plaintiff's action to vindicate such rights was not necessary where, as here, the public entity has not filed such a lawsuit") (emphasis in original). Private enforcement is therefore necessary here.

As to relative burden, "[t]he relevant inquiry is whether the cost of the plaintiffs' legal victory transcends their personal interest." *Tourgeman*, 222 Cal. App. 4th at 1465 (cleaned up). This lawsuit places a disproportionate financial burden on Plaintiffs in relation to their stake in the case, because Plaintiffs do not "seek *any* financial benefit from the lawsuit," while they "could reasonably have anticipated that [they] might be found liable for an adverse award of costs." *Id.* at 1466.

Because this lawsuit satisfies all three conditions of the public interest exception, the anti-SLAPP statute is inapplicable. The Court should deny the Board's frivolous Motion and award Plaintiffs their attorneys' fees and costs pursuant to CCP § 425.16(c)(1).

B. The Anti-SLAPP Motion Fails Because This Lawsuit Arises Out of the Board's Acts of Governance, Not Its Speech or Petitioning

The Anti-SLAPP Motion fails on the additional basis that Plaintiffs' claims do not arise out of protected speech or petitioning activity. CCP § 425.16(e). None of the cases that the Board cites holds otherwise, and controlling authority *that the Board itself cites* clearly rejects the Board's arguments on this point, further proving that the motion is frivolous under Section 425.16(c)(1).

First, the Board asserts that its members' comments and votes amount to protected activities, and that this lawsuit "relies on the comments and votes of the individual board members who voted in support of [the] Resolution and Policy as evidence of the invalidity of those measures." Mot. at 6. The California Supreme Court has squarely rejected this exact argument.

In *Park v. Board of Trustees of California State University* (cited at Mot. 6–7), plaintiff was an assistant professor who sued for national origin discrimination after being denied tenure. The Board of Trustees moved to strike under California's anti-SLAPP law, arguing that the claim "arose from its decision to deny him tenure and the numerous communications that led up to and followed that decision." 2 Cal. 5th at 1061. The trial court denied the anti-SLAPP motion but the Court of Appeal reversed, reasoning—as the Board urges here—that the tenure decision "rested on communications

the University made in the course of arriving at that decision," and that "[s]uch communications were in connection with an official proceeding, the tenure decisionmaking process, and so were protected activity for purposes of the anti-SLAPP statute." *Id.* at 1061–62. The Supreme Court reversed, holding that "a claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity," and that "a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." *Id.* at 1060.

Applying this rule, the California Supreme Court concluded that the trial court had correctly denied the anti-SLAPP motion because the claim arose out of "the denial of tenure itself and whether the motive for that action was impermissible." *Id.* at 1068. As the Court explained: "The tenure decision may have been communicated orally or in writing, but that communication does not convert [the] suit to one arising from such speech," and a "dean's alleged comments may supply evidence of animus, but that does not convert the statements themselves into the basis for liability." *Id.* The Court emphasized "the distinction between a government entity's decisions and the individual speech or petitioning that may contribute to them," *id.* at 1071, and it observed:

> [T]o read the "arising from" requirement differently, as applying to speech leading to an action or evidencing an illicit motive, would, for a range of publicly beneficial claims, have significant impacts the Legislature likely never intended. Government decisions are frequently arrived at after discussion and a vote at a public meeting. Failing to distinguish between the challenged decisions and the speech that leads to them or thereafter expresses them would chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power.

Id. at 1067 (cleaned up). In claiming that this lawsuit arises from Board members' comments about and votes on the Resolution and the Policy, the Board advances the exact theory that the Supreme Court rejected in *Park*. Indeed, *Park* instructs that Plaintiffs' claims here arise not out of speech or petitioning by the Board members, but out of the Resolution and Policy themselves.[2]

[2] The Board cites *Schwarzburd v. Kensington Police Protection & Community Services District Board*, 225 Cal. App. 4th 1345 (2014), for the proposition that a claim can give rise to an anti-SLAPP motion when it arises out of protected "First Amendment voting and legislative deliberative activities." *See* Mot. at

Second, the Board argues that the Resolution and the Policy are "speech-related" because the Resolution "regulates speech regarding CRT concepts in TVUSD classrooms" and the Policy "regulates speech between TVUSD and parents regarding students' gender identities." Mot. at 5. That argument fails according to the very authority on which the Board itself relies. The Board cites *San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association*, 125 Cal. App. 4th 343 (2004), for the proposition that "a public entity's speech-related enactment may implicate its exercise of free speech for anti-SLAPP purposes." Mot. at 5. But the court in *San Ramon Valley* explained that such a "speech-related" act would be one in which a board *itself* decides *to participate* in speech, such as by "authoriz[ing] participation in a campaign to amend state pension laws, or [by] becom[ing] actively involved in a voter initiative seeking such changes." 125 Cal. App. 4th at 357. Here, by contrast, the Board itself is not participating in speech—rather, the Board argues that the Resolution and Policy are "speech-related" merely because each one "regulates" speech *made by others*, not by the Board itself. Mot. at 5.[3] Thus, even if "speech-related enactments" could in theory give rise to an anti-SLAPP claim—and to be clear, that remains "an open question," *see Hastings*, 92 Cal. App. 5th at 333—the Resolution and the Policy still would not qualify as "speech-related enactments" as courts have defined them.

As the California Supreme Court has explained, "differentiating between individual speech that contributes to a public entity's decision and the public entity decision itself" advances the same goal of making it easier for "private citizens and associations [to] exercis[e] their rights to seek changes in government policy" that led to the enactment of the anti-SLAPP statute in the first place.

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6. But the Board fails to mention that the court found such a motion proper only where the voting and discussion *itself* constituted the alleged wrongdoing – *i.e.*, where "[t]he gravamen of [the] suit is that defendants violated Board policy by voting in a manner inconsistent with Board policy to extend [a given] meeting, and by discussing and voting on a matter . . . that was not properly noticed." *Schwarzburd*, 225 Cal. App. 4th at 1355. Plaintiffs make no such allegations about the Board members' votes or discussions in this case.

[3] The Board also cites *Hastings College Conservation Committee v. Faigman*, 92 Cal. App. 5th 323 (2023), *review denied* (Sept. 20, 2023), for the proposition that the court "assum[ed] that [an enactment] is a 'speech-related' measure and that plaintiffs' challenge to its enactment may be subject to an anti-SLAPP motion." Mot. at 5. But the court made that assumption only to explain that, even if this theory were correct (an issue on which the court did not opine), those particular movants were not even the proper parties to claim the SLAPP law's theoretical protection. *Hastings*, 92 Cal. App. 5th at 333.

Park, 2 Cal. 5th at 1071, n.4. Thus, because Plaintiffs' claims challenge the Resolution and the Policy, not the Board members' speech or other expressive activity, the Board cannot carry its burden to demonstrate that this lawsuit arises out of protected activity. The Anti-SLAPP Motion should therefore be denied.

C. The Anti-SLAPP Motion Fails Because Plaintiffs Have Demonstrated a Likelihood of Success on the Merits

Even if this Court were to conclude (A) that the public interest exception does not apply and (B) that Plaintiffs' claims arise out of the Board's speech or petitioning activity rather than its acts of governance, the Anti-SLAPP Motion still fails because Plaintiffs' pending PI Motion demonstrates that their claims "have at least minimal merit." *See Park*, 2 Cal. 5th at 1061 (internal marks omitted). Indeed, the PI Motion and supporting evidence make clear that Plaintiffs are *likely* to prevail on their claims, which more than satisfies the anti-SLAPP standard.

Count 1 (violation of Cal. Const. Art. I, §7(a)) (void for vagueness): Plaintiffs are likely to prevail on Count 1 because (1) the Resolution does not provide teachers a reasonable opportunity to know what it prohibits; (2) the Resolution invites arbitrary enforcement because officials have no clear guidelines for determining when it is violated; and (3) the Resolution's vagueness causes teachers to self-censor on a much wider range of topics than if its prohibitions were clearly defined. PI Mot. at 30–32; *see* Decl. of Mark Rosenbaum (Compendium Attachment ("Att."). A), ¶ 2 (10) and Ex. F thereto (51); Decl. of Amy Eytchison (Att. C), ¶¶ 7–13 (514–16); Decl. of Katrina Miles (Att. D), ¶¶ 5–6 (531–32); Decl. of Dawn Sibby (Att. E), ¶¶ 6–11 (536–38); Decl. of Jennifer Scharf (Att. F), ¶¶ 4, 7, 9 (543–45); Decl. of Edgar Diaz (Att. M), ¶¶ 9–10 (582).[4] As to Defendants' claim that "[t]he Teacher Plaintiffs do not explain how any of the challenged elements or doctrines are ambiguous," Mot. at 8, the PI Motion shows that claim to be erroneous as well. Mot. at 8;, *see* PI Mot. at 30–32

Count 2 (violation of Cal. Const. Art. I, § 2(a)) (right to receive information):

[4] Plaintiffs filed the Compendium, consisting of Attachments A-W, in support of the Motion for Preliminary Injunction on November 29, 2023. Rather than re-file the Compendium in opposition to Defendants' Anti-SLAPP Motion, Plaintiffs respectfully incorporate the Compendium by reference. After each citation to a declaration excerpt or exhibit, in parentheses is the corresponding page number(s) of the Compendium when viewed in Portable Document Format (PDF).

Defendants argue they will prevail on Count 2 because they have "broad discretion in the management of school affairs" and their "conduct does not offend the First Amendment so long as it is 'reasonably related to legitimate pedagogical concerns.'" Mot. at 8 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)). Defendants' argument fails at the outset because it addresses only the First Amendment to the U.S. Constitution, even though Plaintiffs' claim is brought exclusively under the California Constitution. But even setting that aside, Plaintiffs have shown that they are likely to prevail on this count because the Resolution is not supported by *any* legitimate pedagogical purpose and was instead motivated by Board members' political disagreement with concepts they claim are derived from—or "similar" to—so-called "critical race theory." More specifically, Plaintiffs have shown that the Resolution is partisan on its face;[5] it was enacted without the Board making any findings of fact establishing that it would benefit students;[6] it harms students in intent and effect by denying them the right to receive information about their and their peers' histories, cultures, and identities;[7] it was adopted in violation of the Board's own policymaking procedures; and it was preceded and followed by open expressions of racial and anti-LGBTQ hostility by Defendant Board members and their advisor.[8]

Count 3 (violation of Cal. Const. Art. I, § 7 and Art. IV, § 16(a)) (right to education): Defendants assert that "Plaintiffs cannot prevail on the merits of Count 3 because they define the class of students solely by reference to their alleged shared harm," whereas "[t]o claim an equal protection violation, group members must have some pertinent common characteristic other than

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[5] PI Mot. at 12–14; *see* Decl. of Mark Rosenbaum (Att. A), ¶ 2 (10) and Ex. A thereto (17–20).
[6] PI Mot. at 11–12, 21; *see* Decl. of Tyrone Howard (Att. V), ¶ 8 (1033).
[7] PI Mot. at 14–17; *see* Rosenbaum Decl. (Att. A), ¶ 2 (10–15) and Exs. I–O thereto (139–242); Decl. of Katrina Miles (Att. D), ¶¶ 6–10 (531–32); Decl. of Dawn Sibby (Att. E), ¶ 8 (537); Decl. of Jennifer Scharf (Att. F), ¶ 7 (544); Decl. of Gwen S. (Att. G), ¶¶ 10–11 (550–51); Decl. of Mae M. (Att. H), ¶ 7 (557); Decl. of Carson L. (Att. I), ¶¶ 5–6 (561–62); Decl. of Susan C. (Att. J), ¶ 5 (566); Decl. of Henry Louis Gates (Att. N), ¶¶ 11, 15–17 (588–90); Decl. of Mary Helen Immordino–Yang (Att. O), ¶¶ 8–17 (596–600); Decl. of Prudence Carter (Att. P), ¶¶ 12–17 (673–75); Decl. of Uma Jayakumar (Att. Q), ¶ 13 (697); Decl. of Rita Kohli & Marcos Pizarro (Att. R), ¶¶ 22–23 (721); Decl. of Tyrone Howard (Att. V), ¶¶ 8, 13–20 (1033–37); Decl. of Thomas Dee (Att. W), ¶¶ 8–12 (1075–76).
[8] PI Mot. at 19–24; *see* Decl. of Mark Rosenbaum (Att. A), ¶ 2 (10–15) and Exs. C (26); D (31–32, 37–38); E (43–44); G (61–69); R (249–51); T (268, 287–304); X (352); Z (362–64); BB (373–74); CC (378); DD (383); and MM (424)); Decl. of Amy Eytchison (Att. C), ¶ 9 (515).

the fact that they are allegedly harmed by the challenged act or law." Mot. at 9. But the common characteristic here is that these Plaintiffs study or teach or raise children *in the Temecula Valley Unified School District*, and both cases the Board cites in support of its argument on Count 3 recognize that geography *is* a proper common group characteristic. *See Altadena Libr. Dist. v. Bloodgood*, 192 Cal. App. 3d 585, 590–91 (1987) (citing *Gordon v. Lance*, 403 U.S. 1, 4 (1971)); *Vergara v. State of Cal.*, 246 Cal. App. 4th 619, 647(2016). The California Constitution "prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students of *particular districts*." *Butt v. State of California*, 4 Cal. 4th 668, 685 (1992) (emphasis added). As Plaintiffs have shown, the Resolution will deny Temecula students an education equivalent to that provided elsewhere throughout the state, which violates their fundamental right to education under the California Constitution.[9]

Count 4 (violation of Cal Const. Art. I, § 7 and Art. IV, § 16(a)) (discrimination – race): Defendants argue that this antidiscrimination claim fails because "the Resolution does not explicitly discriminate between separate or distinct classifications of people" and "[t]he text of the Resolution belies any intent to discriminate," such that Plaintiffs "cannot demonstrate intentional discrimination on the basis of race." Mot. at 9. But the Supreme Court has held that courts may look beyond the text of the Resolution to *infer* discriminatory intent. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977).[10] Here, such discriminatory intent can be inferred from several factors. First, Plaintiffs have put forward extensive evidence that the Resolution has a disparate impact on students and teachers of color.[11] *See id.* at 266. Second, the Resolution's passage was the result of a series of procedural irregularities.[12] *See id.* at 267. Third, statements from Board

[9] PI Mot. at 32–35; *see* Decl. of Mark Rosenbaum (Att. A), ¶ 2 (10–15), and Exs. A (17–19), H (116, 133); I (145–47, 150, 154); P (244–45); Q (247); Y (357–58); AA (368); BB (373–74); CC (378); DD (383); NN (427); and PP (449, 478, 481) thereto; Decl. of Amy Eytchison (Att. C), ¶¶ 19–25 (516–18); Decl. of Rachel P. (Att. K), ¶¶ 3, 6–9 (571–73); Decl. of Inez B. (Att. L) ¶¶ 3, 7 (576–77); Decl. of Uma Jayakumar (Att. Q), ¶ 10 (696); Decl. of Rita Kohli and Marcos Pizarro (Att. R), ¶¶ 15–23 (718–21); Decl. of John Rogers (Att. S), ¶¶ 16–17 (769–70); and *supra* note 8.

[10] California "relies on principles elucidated under the Fourteenth Amendment when considering its own Constitution's equal protection rights." *Collins v. Thurmond*, 41 Cal. App. 5th 879, 893 (2019).

[11] PI Mot. at 14–17; *see also supra* note 8.

[12] PI Mot. at 19–22; *see* Decl. of Mark Rosenbaum (Att. A), ¶ 2 (10–15) and Exs. C (26); Ex. D (31–

members and supporters of the Resolution clearly reflect racial animus.[13] *See id.* at 268. Plaintiffs have therefore demonstrated a likelihood of prevailing on this claim.

Count 5 (violation of Cal. Const. Art. I, § 7 and Art. IV, § 16(a)) (discrimination – sexual orientation, gender identity, and sex): Defendants assert that Plaintiffs cannot prevail on this antidiscrimination claim, either, because "[t]he removal of certain books does not show an intent to discriminate, specifically when the Board members emphasize that their decisions are not due to animus towards a specific group of people but a desire to protect parental rights." Mot. at 10. But once again, courts may infer discriminatory intent, and such discriminatory intent can be inferred here from the evidence that the Resolution and Defendants' decision to remove curricular content related to LGBTQ civil rights have a disparate impact on LGBTQ students.[14] Discriminatory intent may also be inferred from the procedural irregularities that pervaded the Resolution's passage,[15] and from the statements of Board members and supporters of the Resolution that clearly reflect animus toward LGBTQ people.[16] *See Vill. of Arlington Heights*, 429 U.S. at 266–68; *Collins*, 41 Cal. App. 5th at 893. Plaintiffs have therefore demonstrated a likelihood of prevailing on this antidiscrimination claim as well.

Count 6 (violation of Cal. Gov. Code § 11135) (discrimination – protected characteristics):[17] Defendants claim this statutory antidiscrimination claim fails on the grounds that

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32, 37–38); Ex. E (43–44); Ex. T (268, 287–304).

[13] PI Mot. at 22–24; *see* Decl. of Mark Rosenbaum (Att. A), ¶ 2 (10–15) and Exs. G (61–69); R (249–51); X (352); Z (362–64); and MM (424) thereto; Decl. of Amy Eytchison (Att. C), ¶ 9 (515).

[14] PI Mot. at 14–17, 24–29; *see* Decl. of Mark Rosenbaum (Att. A), ¶ 2 (10–15) and Exs. W (347–48); Y (357–58); AA (368); BB (373–74); DD (383); HH (402–04); NN (427); OO (439–447); and PP (449, 478–481) thereto; Decl. of Rachel Dennis (Att. B), ¶¶ 4–5 (508–09); Decl. of Amy Eytchison (Att. C), ¶¶ 19–25, 27 (516–18) and Exs. A–C thereto (521–22, 525–26, 528); Decl. of Katrina Miles (Att. D), ¶ 7 (532); Decl. of Dawn Sibby (Att. E), ¶¶ 14–16 (539); Decl. of Jennifer Scharf (Att. F), ¶ 12 (545); Decl. of Gwen S. (Att. G), ¶¶ 4–16 (549–52); Decl. of Mae M. (Att. H), ¶¶ 4, 11 (556, 558); Decl. of Carson L. (Att. I), ¶ 12 (563); Decl. of Susan C (Att. J), ¶¶ 6, 11 (566–68); Decl. of Edgar Diaz (Att. M), ¶¶ 5, 8, 10 (581–82); Decl. of John Rogers (Att. S), ¶ 19 (770–71).

[15] PI Mot. at 19–22; *see supra* note 12.

[16] PI Mot. at 26–29; *see* Decl. of Mark Rosenbaum (Att. A), ¶ 2 (10–15) and Exs. R (249–51); W (347–48); Z (362–64); BB (373–74); DD (383); and HH (402–04) thereto.

[17] Government Code § 11135(a) prohibits discrimination "on the basis of race … ethnic group identification … sex, sexual orientation, [or] color" in any program that is funded by or receives financial assistance from the state. *Id.* TVUSD receives state funding; Decl. of Scott Humphreys, Ex.

the "claim is moot" and that Plaintiffs "have not met their burden in establishing disparate impact." Mot. at 10. Defendants do not elaborate on the bare assertion that the "claim is moot,"[18] and it is undisputed that the Resolution remains in effect and continues to harm Plaintiffs. For another, as discussed with respect to Counts 4 and 5, Plaintiffs have shown that the Resolution causes a disparate impact on students of color and LGBTQ students.[19]

Count 7 (violation of Cal. CCP § 526a) (unlawful expenditure of taxpayer funds): Defendants argue that Plaintiffs cannot prevail on Count 7 for two reasons. First, Defendants wrongly argue that Plaintiffs "have alleged no facts demonstrating an 'actual or threatened expenditure of public funds' in implementing the Resolution." *See* Mot. at 11. In fact, Plaintiffs have alleged that, among other things, the Board "in March 2023[] approv[ed] the expenditure of $15,000 of District monies to hire Christopher Arend … as a consultant to train TVUSD staff." Declaration of Scott Humphreys Ex. 4 (Minutes of 3/14/23 Board meeting, § O.2.); Ex. 3 (Agenda for 3/14/23 Board meeting, § O.2. report); *see* FAC ¶ 20. During this training, Arend "used the phrase 'play stupid games, win stupid prizes' to assert that Black victims of police violence are to blame for their own killings and injuries." PI Mot. at 2. Second, Defendants assert that CCP § 526a "does not apply to agency discretionary decisions" and that the "Resolution is compliant with state law and . . . TVUSD has the discretion to make its own educational decisions." Mot. at 11–12. But the Resolution does *not* comply with California law or the California Constitution, *see generally supra*, and the Board has acted well outside the scope of its discretion in enacting such an unlawful resolution. Plaintiffs have therefore demonstrated a likelihood of success on Count 7.

Count 8 (violation of Cal. Const. Art. I, § 7) (discrimination – sexual orientation, gender identity, and sex): Defendants assert that this antidiscrimination claim arising out of the Policy fails because it "applies equally to all students who wish to transition from their gender listed on their birth certificate" and because Plaintiffs "do not allege evidence of intent to discriminate."

5 (TVUSD 2023-24 Adopted Budget Final Report, p. 1); *see* FAC ¶ 177.

[18] As explained in Plaintiffs' Opposition to the Demurrer, Defendants' mootness argument fails because the relevant passages in *Collins v. Thurmond*, 41 Cal. App. 5th 879 (2019), upon which the Demurrer relies, apply only to State-level government defendants. *See* Opp. to Demurrer at 8.

[19] PI Mot. at 14–17; *see supra* notes 8 and 15.

Mot. at 12. To the contrary, Plaintiffs have shown that the Policy *expressly* discriminates against transgender and gender nonconforming students, singling them out for forced disclosure based on discredited social stereotypes.[20] The Policy is therefore subject to strict scrutiny, which it cannot survive because no compelling interest supports the Policy and the Policy is not narrowly tailored to serve even those specious justifications that have been proffered by members of the Board.[21]

Count 9 (violation of Cal. Const. Art. I, § 1) (right to privacy): Defendants argue that this State constitutional challenge to the Policy fails principally because the U.S. Court of Appeals for the *Fifth* Circuit has held "that a student has no privacy right *under the Fourteenth Amendment* that precludes school officials from discussing private sexual matters with parents." Mot. at 13 (citing *Wyatt v. Fletcher*, 718 F.3d 496, 499 (5th Cir. 2013)). *California* courts applying the *California* Constitution, however, have recognized that individuals have protected autonomy and informational privacy interests in their sexual orientation and gender identity. *See, e.g.*, *Pettus v. Cole*, 49 Cal. App. 4th 402, 444–45 (1996) (describing "sexual orientation and conduct" as constitutionally protected privacy interest); *see Leibert v. Transworld Systems, Inc.*, 32 Cal. App. 4th 1693, 1701 (1995) ("[T]he details of one's personal life, including sexuality . . . fall within a protected zone of privacy.") (internal marks omitted). A student can retain "a legally protected privacy interest in information about her sexual orientation" even where "she is openly gay at school," such that disclosure of the student's sexual orientation to her parents can amount to "a serious invasion of her privacy." *C.N. v. Wolf*, 410 F. Supp. 2d 894, 903 (C.D. Cal. 2005). Plaintiffs have therefore demonstrated a probability of success on their privacy claim.[22]

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[20] PI Mot. at 35–36; Decl. of Mark Rosenbaum (Att. A), ¶ 2 (10) and Ex. B thereto. Further, adoption of the Policy was motivated by discriminatory intent. *Id.*, ¶ 2 and Exs. R (249–51), W (347–48), Z (362), EE (388), FF (392), GG (397), and QQ (487) thereto; Decl. of Scott Humphreys, ¶ 2, Exs. 1–2 (web page of Inland Empire Family PAC).

[21] PI Mot. at 36–40; *see* Decl. of Mark Rosenbaum (Att. A), ¶ 2 (10) and Exs. B (22–23) (policy contains no exception for students for whom disclosure would likely result in emotional, psychological, or physical harm); II (409); JJ (413); KK (418); and RR (492) thereto; Decl. of Rachel Dennis (Att. B), ¶¶ 710 (509–10); Decl. of Jeremy Goldbach (Att. T), ¶¶ 9–10, 12–13, 16 (864–68); Decl. of Sabra Katz-Wise & Sari Reisner (Att. U), ¶¶ 16–18, 20–21, 28–29 (910–11, 914).

[22] *See* Decl. of Mark Rosenbaum (Att. A), ¶ (10) and Exs. B (22–23) and SS (497) thereto; Decl. of Rachel Dennis (Att. C), ¶ 11 (511); Decl. of Gwen S. (Att. G), ¶ 6 (549–50); Decl. of Jeremy Goldbach (Att. T), ¶15 (868); Decl. of Sabra Katz-Wise & Sari Reisner (Att. U), ¶17, 24–25 (910, 912–13).

Count 10 (violation of Cal. Ed. Code §§ 200 *et seq.*) (discrimination – protected characteristics):[23] Finally, Defendants assert that Plaintiffs cannot prevail on this statutory antidiscrimination challenge to the Policy because Education Code § 200 "only applies to behavior so severe and pervasive that it has a systemic effect of denying the victim equal access to an educational program or activity." Mot. at 13. But the record in this case now reflects that, indeed, "Since the policy's adoption, Temecula students have reported increasingly hostile climates for LGBTQ+ students," that "Temecula students are hiding their identities to avoid forced disclosure and documentation," that "[t]eachers have seen an unprecedented rise in anti-transgender bullying, involving children as young as fourth graders," and that "[s]tudents are also reporting a rise in peer bullying, including the use of anti-LGBTQ+ slurs towards LGBTQ+ students."[24] Plaintiffs have therefore demonstrated a probability of prevailing on this statutory antidiscrimination claim as well. In sum, through the PI Motion and extensive evidence filed in support, Plaintiffs have shown that each of their claims in this case has "at least minimal merit." *Park*, 2 Cal. 5th at 1061. Even if this case were not subject to the public interest exception, and even if Plaintiffs' claims arose out of the Board's protected activity, therefore, the Anti-SLAPP Motion should still be denied.

III. Plaintiffs Are Entitled to a Mandatory Award of Attorneys' Fees and Costs

The anti-SLAPP statute provides that "[i]f the court finds that a special motion to strike is frivolous," then "the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to [CCP] Section 128.5." CCP § 425.16(c)(1). Section 128.5(a), in turn, "authorizes the trial court to award 'reasonable expenses, including attorney's fees' when an opposing party has acted frivolously," and Section 128.5(c) "provides that expenses may only be awarded if notice is given 'in a party's moving or responding papers' and after an 'opportunity to be heard.'" *Changsha Metro Grp. Co., Ltd. v. Xufeng*, 57 Cal. App. 5th 1, 8 (2020).

[23] Education Code § 200 provides in relevant part that the state's policy is to afford equal rights to all persons in public schools, regardless of gender, gender identity or gender expression. Section 220 prohibits discrimination on the basis of gender, gender identity or gender expression in any program or activity by an educational institution that receives state financial assistance.

[24] Decl. of Sabra Katz-Wise and Sari Reisner (Att. U), ¶ 25 (912–13); *see* Decl. of Gwen S. (Att. G), ¶ 6 (549–50); Decl. of Jeremy Goldbach (Att. T), ¶ 11 (866–67).

Here, the Board's Anti-SLAPP Motion is frivolous for all the reasons set out in this brief. Particularly egregious are the facts that CCP § 425.17(b) categorically excludes this public interest lawsuit from the anti-SLAPP statute, and that the very authority Defendants cite in support of their argument that this lawsuit "arises out of protected speech or petitioning activity," holds the opposite. *See supra* §§ II.A., II.B. An award of fees and costs is mandatory under these circumstances. *See Garamendi*, 132 Cal. App. 4th at 1389 (affirming fee award to plaintiffs where defendant frivolously "brought the anti-SLAPP motion even though the complaint was exempt under the 'public interest' exception of section 425.17," defendant "also failed to carry its burden of proof of showing [the] claim arose from [its] actions in furtherance of its right of petition or free speech," and plaintiffs "demonstrated the probability of prevailing on their claim").

This request for attorneys' fees and costs is made against both Defendants ***and*** their attorneys. *See, e.g.*, *Decker v. U.D. Registry, Inc.*, 105 Cal. App. 4th 1382, 1392 (2003) (award of costs and attorneys' fees for a frivolous anti-SLAPP motion is determined under CCP § 128.5, which provides that attorneys' fees may be assessed against a party, the party's attorney, or both); *Changsha Metro Grp.*, 57 Cal. App. 5th at 8 (Under Section 128.5(c) "expenses may only be awarded if notice is given 'in a party's moving or responding papers' and after an 'opportunity to be heard.'").

Though not required to do so, Plaintiffs provided notice to Defendants and their attorneys on December 20, 2023 that the Anti-SLAPP Motion was frivolous and must be withdrawn, and that Plaintiffs would have "no choice but to seek all costs and attorneys' fees incurred in defending against the frivolous anti-SLAPP motion against both Defendants and their attorneys" if the Board insisted on maintaining this frivolous Motion. *See* Decl. of Scott Humphreys, Ex. 6 (Dec. 20, 2023 email to the Board's counsel). Defendants and their counsel refused to withdraw the Anti-SLAPP Motion. Plaintiffs will submit a separate, noticed fee motion setting forth their total attorneys' fees and costs incurred if the Court agrees that the Anti-SLAPP Motion was frivolous.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Anti-SLAPP Motion. Because the Motion is frivolous, Plaintiffs further request that the Court award them their reasonable attorneys' fees and costs.

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Respectfully submitted,

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