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NO. E083409

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

MAE M., *ET AL.*,
Plaintiffs-Appellants,

v.

JOSEPH KOMROSKY, *ET AL.*,
Defendants-Respondents.

Appeal from an Order of the Superior Court, Riverside County
The Honorable Eric Keen, Case No. CVSW2306224

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT

Case Name:	*MAE M., by and through her guardian ad litem Anthony M., et al. v. JOSEPH KOMROSKY, et al.*	Court of Appeal No.:	E083409

CERTIFICATE OF INTERESTED PARTIES, ENTITIES OR PERSONS

(Cal. Rules of Court, Rule 8.208)

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal as it is taken from an order denying the injunctive relief that Plaintiffs-Appellants sought below. *See* Code Civ. Proc. § 904.1(a)(6).

PRELIMINARY STATEMENT

As the result of an open campaign to inject national culture wars into their public schools, Temecula schoolchildren are receiving an education substantially impaired by ideological censorship. They are being irreparably harmed by a sweeping curriculum ban enacted by the Temecula Valley Unified School District ("TVUSD") Board of Trustees (the "Board"), which restricts access to concepts regarding racism and sexism and is depriving students of the capacity to engage in factual investigation, freely debate competing ideas, develop critical thinking skills, and learn about topics required under State curriculum standards. Because the constrained education Temecula students are receiving falls far short of California's curriculum standards, they are at a significant disadvantage compared to their peers across the State; and their teachers have found it increasingly difficult to do their jobs.

The Board's censorship hinders the learning of all schoolchildren. But it particularly injures children of color and LGBTQ children, stigmatizing (when not outright erasing) their identities, histories, and cultures. On top of this, the Board enacted a new policy requiring Temecula teachers and school staff to "out" transgender and gender nonconforming students to their parents, regardless of the abuse those students risk as a result of the disclosure.

Plaintiffs-Appellants appeal the court below's denial of a preliminary injunction to protect against these irreparable harms. Resolution No. 2022-23/21 ("Resolution 21" or the "Resolution") and Board Policy 5020.01 (the "Policy") violate the California Constitution and State law, including provisions that secure the rights to due process, to receive information, to basic educational equity, and to be free from discrimination on the basis of sex and gender.

To stop these violations, Plaintiffs—the Temecula Valley Educators Association and individual Temecula teachers, students, and parents—filed this lawsuit seeking a declaration that the Resolution and the Policy are unconstitutional and unlawful. Plaintiffs also moved for a preliminary injunction to prohibit the Board from implementing or enforcing the Resolution and the Policy in light of the irreparable harms they inflict on students and teachers.

The court below denied the motion in a decision premised on reversible legal errors. Compounding these errors—which alone require reversal—the court ignored Plaintiffs' more than 1,000 pages of supporting evidence, including declarations from the nation's foremost experts in education, child development, and gender. It relied instead on a single declaration from a Defendant Board member: a sparse, strained, and self-serving defense of the Resolution and the Policy. Had it applied the correct legal standards, the court would had to have found that (i) Plaintiffs are likely to prevail on the merits, and (ii) the balance of harms weighs decisively in favor of granting injunctive relief.

First, as to Plaintiffs' argument that the Resolution is unconstitutionally vague, the court below applied the wrong legal standard by ignoring binding precedent that governs vagueness challenges to laws that impact free speech. Courts apply heightened scrutiny to such restrictions because—as here—they chill speech well beyond their articulated scope. *See infra* 12–15. The court below's failure to apply the correct standard is reversible error.

Second, as to Plaintiffs' argument that the Resolution infringes on the constitutional right to receive information, the court again committed reversible error, flouting controlling case law that establishes that a school board's removal of classroom materials with "an intent to advance a political or religious ideology" lacks a legitimate educational purpose. *McCarthy v. Fletcher*, 207 Cal.

App. 3d 130, 141–47 (1989). The court also failed to address the extensive record evidence, including multiple expert declarations, demonstrating that the Resolution fails to serve *any* legitimate pedagogical purpose.

Third, as to Plaintiffs' argument that the Resolution denies Temecula students their fundamental right to basic educational equity, the court below committed reversible error by failing to recognize that a district's significant deviation from California curriculum standards *by definition* deprives its students of an education basically equivalent to that of their peers elsewhere in the State. Compounding its error, the court disregarded uncontroverted evidence demonstrating that the Resolution has caused, and will continue to cause, Temecula's academic program to fall far short of State requirements.

Fourth, as to Plaintiffs' argument that the Policy unconstitutionally discriminates against transgender and gender nonconforming students, the court below again applied the wrong legal standard when it declined to subject the Policy to strict scrutiny. As Plaintiffs have established, the Policy cannot survive rational basis review, let alone the strict scrutiny warranted by its facial discrimination.

The court below's repeated and reversible legal errors have prolonged the irreparable harms that Temecula students and teachers are suffering even now. Its legal analysis is fundamentally at odds with California constitutional doctrines protecting free speech, basic educational equity, and the right to be free from invidious discrimination. If upheld, the court's ruling would strike a severe blow to the constitutional rights of students and educators across the State. This Court should therefore reverse.

STATEMENT OF THE CASE

I. The Enactment of the Resolution and the Policy

In December 2022, Board members Danny Gonzalez,[1] Jennifer Wiersma, and Joseph Komrosky[2] enacted Resolution 21, which prohibits the teaching of a sweeping and ill-defined range of content referred to as "Critical Race Theory or other similar frameworks." I CT 235–38. The Resolution—authored by a Paso Robles lawyer who has dismissed systemic racism as a "myth" that is "peddle[d]" by "[r]ace hustler[s]," I CT 279, 285—bars teachers from using as "the basis for any instruction" concepts including "[r]acism is racial prejudice, plus power . . ." and "[r]acism is ordinary . . . ." I CT 236–37. The Resolution prohibits discussion of these and similar concepts, except to the extent it "focuses on the[ir] flaws." *Id.* at 237.

As the first major action by the Board's newly elected majority, the Resolution followed an openly ideological campaign, led by the Inland Empire Family PAC ("IEF PAC"), to flip school boards across Southwest Riverside County. II CT 468–70. While candidates, the Defendant Board members expressly denounced racial equity and LGBTQ rights, deriding the concept of equity as "this fluffy word that they use," III CT 644, and describing gender nonconformity as "horrible." II CT 581. Once in office, they rushed to enact the Resolution at their first meeting, violating their own bylaws and ignoring

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[1] Gonzalez resigned from the Board during the pendency of this litigation.

[2] Komrosky is subject to a recall vote at the time of this filing. Regardless of the final recall outcome, the policies will remain in effect unless all three remaining board members, including Wiersma, vote to rescind them. *See* Temecula Valley Unified Sch. Dist., TVUSD Governance Handbook 2023–2024, at 17 (2023), https://www.tvusd.k12.ca.us/Page/23375 ("Three members must vote in favor of any action to pass.").

vehement community opposition—glaring evidence of the lack of a legitimate educational purpose.[3]

The Resolution has cast a pall over Temecula's classrooms. Lacking clear guidance on what they can say in the classroom and facing severe, even career-ending penalties if they guess wrong,[4] teachers have been forced to "broadly self-censor," III CT 756–58, excluding from their classrooms any terms, concepts, and materials that could be construed as violating the Resolution's strictures. School leaders and the Temecula Valley Educators Association ("TVEA"), a plaintiff in this case, have been peppered with questions about what teachers can and cannot teach, but they themselves have no way of interpreting the Resolution's vague, far-reaching, and largely undefined restrictions. Forbidden from fully discussing racial injustice, Temecula's educators are stymied in their ability to guide their students' learning about difficult but essential topics including slavery, segregation, colonialism, and immigration.[5] At every level, teachers are witnessing the erosion of trust among their students, who rightfully question whether their instructors are answering their questions fully and honestly.

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[3] *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (noting that courts "must look to other evidence" to determine discriminatory intent).

[4] Resolution 2022-23/20 references regulations "which impose sanctions on any . . . employee who engages in racist conduct." III CT 641. Read in tandem with Resolution 21, which was passed concurrently and which characterizes "Critical Race Theory" as "a racist ideology" (and, by extension, the teaching of "Critical Race Theory or other similar frameworks" as "racist conduct"), I CT 235–36, Resolution 20 delineates the sanctions applicable to teachers who violate Resolution 21.

[5] Teachers are even afraid to respond to students' questions about the Resolution itself. III CT 758.

Under the Resolution, it is "impossible for TVEA educators to meet their professional obligations to their students *and* teach the concepts mandated by both State and District policy." III CT 801 (emphasis added). The Resolution directly conflicts with the State Board of Education's History-Social Science Content Standards ("HSS Standards"), I CT 289–II CT 357, and History-Social Science Framework ("HSS Framework"), II CT 359–76. It is irreconcilable with California's Teaching Performance Expectations, which *require* teachers to establish and maintain "inclusive learning environments" that "reflect diversity and multiple perspectives[] and are culturally responsive." IV CT 939–42. Rather than show "students how cultural perspectives inform and influence understandings of history," IV CT 940, however, the Resolution "mandates the teaching of a single, dominant cultural perspective on historical events, rejecting the realities lived by people of Color." IV CT 941.

After passing the Resolution, Defendant Board members targeted LGBTQ students with Policy 5020.01, which requires teachers and staff to "out" those who identify as transgender or gender nonconforming to their parents or guardians, regardless of whether students have a safe and supportive home environment.[6] Policy 5020.01 is identical to coercive outing policies

[6] The Policy, enacted at the start of the 2023–24 school year, mandates disclosure whenever educators or staff learn that a student is "[r]equesting 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 or any other official records"; when a student requests to go by a different name or pronouns; or when a student seeks to access "sex-segregated" school programs and facilities in accordance with their gender identity. I CT 240 (Policy 5020.01 § 1(a)–(b)). It further requires TVUSD employees to document forced disclosures in students' official records. I CT 241 (Policy 5020.01 § 5) ("The District employees who make such notification [as required in § 1] shall either keep a record of such notification (if written) or document such notification (if verbal) *and place*

adopted by Chino Valley Unified, which the San Bernardino Superior Court enjoined as facially discriminatory,[7] and Murrieta Valley Unified, which the California Department of Education determined was facially discriminatory in violation of the Education Code.[8] Defendant Board members also excised State-mandated curricular information on the LGBTQ rights movement, II CT 576–77, III CT 659–67; invoked a toxic, unfounded, and decades-old stereotype linking LGBTQ people to pedophilia, III CT 622–24; and banned the Pride flag from Temecula classrooms, II CT 546–52.

II. The Resolution's and the Policy's Harms to Students

The Resolution and the Policy deprive Temecula students of the education to which they are constitutionally entitled. Educational, neuroscientific, and sociological research confirms that *all* students benefit from a culturally responsive education, which affirms their backgrounds and identities in the classroom and enables them to "engage across differences of opinion" and "reflect on complex topics from more than one angle." III CT 810. By contrast, "being shielded from the reality of our country's racial history" keeps students from developing the cross-cultural competencies they

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the record or documentation in the student's official student information system." (emphasis added)).

[7] *People v. Chino Valley Unified Sch. Dist.*, No. CIV SB 2317301 (Cal. Super. Ct. San Bernardino Cnty., Sept. 6, 2023) (portal minute order).

[8] Cal. Dep't of Educ., Investigation Report, Discrimination on the Basis of Gender Identity and Expression, No. 2024-0048 (Apr. 10, 2024), https://www.pressenterprise.com/2024/04/11/murrieta-schools-ordered-to-stop-enforcing-transgender-policy/ (report embedded in article).

need to participate meaningfully in California's diverse workforce and democracy. IV CT 918.[9]

By denying students the freedom to grapple with new ideas in a supportive educational environment, the Resolution "endangers [their] emotional, social, and academic" growth "at a critical moment in their neurological development." III CT 816. Disturbingly, it restricts their learning based entirely on Defendant Board members' ideological preferences, depriving Temecula students of an education on par with their peers in other districts and diminishing their college and career readiness.

The Resolution and the Policy also expose students of color and LGBTQ students to toxic, identity-based stress. III CT 818–20. As Plaintiffs' expert Dr. Henry Louis Gates, Jr. explains, through the Resolution, "the Board condemns the lived realities of students of color as a controversial ideology," III CT 809–10, silencing discussion of students' "direct experience[s]" of systemic racism. III CT 786. Similarly, the Policy "institutionalize[s] norms that perpetuate and even encourage violence against LGBTQ youth," IV CT 1087–88, even as those students face an unprecedented rise in bullying and an "environment of hate." III CT 738. Following the Policy's passage, students have expressed fears of experiencing "abuse, violence, or even being kicked out of their home if they are forcibly outed." III CT 730. At least one transgender

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[9] *See* IV CT 942–45 (explaining how the Resolution silences important discussions and creates a hostile learning environment); V CT 1255–59 (noting that the Resolution is unsupported by *any* pedagogical research); V CT 1297–99 (explaining that the Resolution hinders instructional practices that improve minority student engagement and educational attainment); III CT 816–20 (explaining, from a neuroscientific perspective, how the Resolution deprives students of key developmental opportunities); III CT 893–95 (noting that the Resolution denies students the opportunity to learn to navigate our multicultural society).

student has already been kicked out after his parents discovered his name change in school records. *Id.* Such "identity-based stress . . . adversely impacts" not only students' education—limiting the mental resources they have available for schoolwork—but also "their emotional and physical health" and even "their brain development." III CT 818–19.

III. The Litigation Below

Plaintiffs filed their original complaint in Riverside County Superior Court in August 2023, challenging the Resolution as unlawful and unconstitutional and seeking an order enjoining its enforcement. The Board later enacted the Policy, and Plaintiffs subsequently filed the operative First Amended Complaint, which challenges both the Resolution and the Policy.

In November 2023, Plaintiffs moved for a preliminary injunction to prevent the Board from enforcing the Resolution or the Policy during the pendency of this litigation. That same month, the Board filed a demurrer for failure to state a claim and a motion to strike under California's Anti-SLAPP Act, Code Civ. Proc. § 425.16. After Plaintiffs' motion for a preliminary injunction, the Board's demurrer, and the Board's anti-SLAPP motion were fully briefed, the court below first overruled in part the Board's demurrer and denied its anti-SLAPP motion.[10] One week later, it issued an order denying Plaintiffs' motion for a preliminary injunction.

Plaintiffs timely noticed an appeal from the order denying preliminary injunctive relief. For the reasons set out herein, this Court should reverse.

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[10] The court sustained the demurrer as to (i) Defendants' argument that the two parent plaintiffs lacked standing and (ii) Count Six, which alleged violation of Government Code § 11135.

SUMMARY OF ARGUMENT

The court below erred in five respects in denying Plaintiffs' motion for a preliminary injunction. Each of these errors is reversible.

First, the court erred in its conclusion that Plaintiffs have not shown a probability of prevailing in challenging the Resolution as unconstitutionally vague. The court did not apply the heightened scrutiny required for a vagueness challenge to a law that impacts speech, and it ignored the uncontroverted evidence that Temecula teachers do not know what the Resolution permits and what it proscribes.

Second, the court erred in its conclusion that Plaintiffs have not shown a probability of prevailing in challenging the Resolution as an unconstitutional infringement on the right to receive information. The court failed to recognize that the Board's purpose in enacting the Resolution was to suppress viewpoints at odds with its political ideology—a patently unlawful objective. It also ignored the uncontroverted evidence that the Board acted contrary to its own longstanding protocol when it passed the Resolution.

Third, the court erred in its conclusion that Plaintiffs have not shown a probability of prevailing in challenging the Resolution as an unconstitutional infringement on the right to education. The court failed to recognize that the Resolution causes Temecula's curriculum to fall fundamentally short of State content standards, and it again ignored the uncontroverted evidence that the Resolution lacks any legitimate educational purpose.

Fourth, the court erred in its conclusion that Plaintiffs have not shown a probability of prevailing in challenging the Policy as unconstitutionally discriminating against transgender and gender nonconforming students. Because the court erroneously categorized the Policy as gender-neutral, it failed to apply the

correct standard—strict scrutiny—and instead applied mere rational basis review.

Fifth, based on these errors, the court below wrongly concluded that the balance of harms weighs against the preliminary injunction that Plaintiffs seek.

For each of these reasons, this Court should reverse the ruling below and enter a preliminary injunction prohibiting the Board from enforcing the Resolution or the Policy while this litigation proceeds.

ARGUMENT

I. Standard of Review

De novo review applies to the denial of a preliminary injunction where "the likelihood of prevailing on the merits depends upon a question of pure law," such as "when it is contended that an ordinance or statute is unconstitutional on its face and that no factual controversy remains to be tried." *Hunter v. City of Whittier*, 209 Cal. App. 3d 588, 595–96 (1989). Here, Plaintiffs contend that the Resolution is unconstitutionally vague on its face, *infra* 11–14; that the Resolution's lack of a legitimate educational purpose is apparent on its face, *infra* 14–19; and that the Policy is unconstitutionally discriminatory on its face, *infra* 22–28. This Court must therefore determine whether "constitutional law was correctly interpreted and applied by the trial court." *San Diego Unified Port Dist. v. U.S. Citizens Patrol*, 63 Cal. App. 4th 964, 969 (1998) (quoting *Cal. Ass'n Dispensing Opticians v. Pearle Vision Ctr., Inc.*, 143 Cal. App. 3d 419, 426 (1983)). It need not resolve any factual controversy to conclude that the Resolution and Policy are facially unconstitutional.

Otherwise, this Court reviews the grant or denial of a preliminary injunction under the abuse of discretion standard. *Perez v. Hastings Coll.*, 45 Cal. App.

4th 453, 456 (1996). A trial court necessarily "abuses its discretion when it applies the wrong legal standards applicable to the issue at hand." *Zurich Am. Ins. Co. v. Superior Ct.*, 155 Cal. App. 4th 1485, 1493–94 (2007).

II. The Court Below Erred on Plaintiffs' Challenge to the Resolution as Unconstitutionally Vague

The court below erred in failing to recognize that the Resolution is unconstitutionally vague, an error principally due to its applying the wrong legal standard. For run-of-the-mill laws or regulations that affect only conduct, California courts apply a basic two-prong test to determine whether the challenged enactment is void for vagueness: (1) the law "must be sufficiently definite to provide fair notice of the conduct proscribed"; and (2) the law "must provide sufficiently definite standards of application to prevent arbitrary and discriminatory enforcement." *DeLisi v. Lam*, 39 Cal. App. 5th 663, 672 (2019). This is the standard applied by the court below. *See* PI Op. at 6.

But vagueness challenges to laws affecting speech are subject to a higher standard. Not only do they expose individuals to "arbitrary and discriminatory enforcement," vague restrictions that "abut upon sensitive areas of basic First Amendment freedoms" cast a chilling effect on expression, "inevitably lead[ing] citizens to 'steer far wider of the unlawful zone, . . . than if the boundaries of the forbidden areas were clearly marked.'" *Ketchens v. Reiner*, 194 Cal. App. 3d 470, 477 (1987) (cleaned up) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)); *see also Local 8027 v. Edelblut*, 651 F. Supp. 3d 444, 460 (D.N.H. 2023) ("The prospect of the chilling of constitutionally protected speech has led courts to apply a heightened standard when reviewing statutes that impose restrictions on speech." (cleaned up)).

California courts evaluating vagueness challenges to laws affecting speech therefore "demand[]" from those laws "an even greater degree of specificity," because vague standards "may chill the exercise of" constitutionally-protected free speech rights. *Franklin v. Leland Stanford Junior Univ.*, 172 Cal. App. 3d 322, 347 (1985); *see Pryor v. Mun. Ct.*, 25 Cal. 3d 238, 251 (1979) ("[V]ague statutory language, resulting in inadequate notice of the reach and limits of the statutory proscription, poses a specially serious problem when the statute concerns speech, for uncertainty concerning its scope may then chill the exercise of protected First Amendment rights."); *Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 688 (2012) (quoting *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976)) ("Stricter standards are required where a statute has a potentially inhibiting effect on speech, because the free dissemination of ideas may be the loser." (cleaned up)).

Here, Plaintiffs contend that the Resolution is unconstitutionally vague on its face, triggering *de novo* review. The Resolution is anything but specific: in addition to banning 13 named concepts—which are themselves vague[11]—the Resolution prohibits teaching "Critical Race Theory or other similar frameworks" without bothering (i) to identify those frameworks or (ii) to explain what makes a framework "similar" to critical race theory (and thus verboten).

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[11] For example, teachers can only guess at whether asking students to read Dr. Martin Luther King, Jr.'s *Letter from a Birmingham Jail*—which is mandated by State curriculum standards, II CT 348, and which criticizes the inaction of "white moderate[s]"—would result in penalties for teaching that an individual "bears responsibility for actions committed in the past or present by other members of the same race[.]" *See Edelblut*, 651 F. Supp. at 446–47 (holding similar statute unconstitutionally vague where "a teacher could unknowingly violate [it] by making a statement that does not expressly endorse a banned concept but that could be understood to imply it").

Nor did the court below's opinion provide any clarity on that front. Concluding that the Resolution was sufficiently clear because it "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," PI Op. at 7, the court failed even to mention the Resolution's essentially boundless ban on teaching "similar frameworks."

Even if this Court were to review for abuse of discretion, the court below abused its discretion by applying the wrong legal standard, *i.e.*, the ordinary test for vagueness,[12] rather than the heightened test that applies to statutes impacting speech, *supra*. *Zurich*, 155 Cal. App. 4th at 1493. Moreover, the court ignored ample record evidence that Temecula teachers are so confused by the vague language of the Resolution that they in fact do not know what it permits and what it prohibits. Plaintiff Dawn Sibby, a history teacher, has tried without success to gain clarity on what the Resolution permits her to say in her classroom. III CT 757. The TVEA is having to "field countless questions from teachers and administrators regarding what they can and cannot teach, and what questions they can and cannot answer, under the Resolution." III CT 802. In the absence of clear and specific standards, educators regularly engage in self-censorship. Teachers are avoiding using the word "white" when discussing subjects like Jim Crow segregation and European imperialism, and

[12] Even under the ordinary test for vagueness applied by the court below, the Resolution fails. As Temecula teachers' confusion demonstrates, the Resolution is not "sufficiently definite to provide fair notice of the conduct proscribed." *DeLisi*, 39 Cal. App. 5th at 672. Moreover, because the Resolution (i) fails to define what actions constitute teaching the banned concepts and (ii) prohibits without explanation the teaching of other "similar" frameworks, it does not "provide sufficiently definite standards of application to prevent arbitrary and discriminatory enforcement." *Id.*

restricting their answers when students ask about anti-Black violence. III CT 751–52; III CT 757. They are skirting discussion of subjects such as the origins of inequities in the American legal system that affect low-income people, people with disabilities, and people of color. III CT 764. That the Resolution is too vague to give adequate notice of what it permits and what it prohibits is a matter of record in this case.

In sum, the Resolution fails *de novo* review because it is unconstitutionally vague on its face. In the alternative, the court below's application of the wrong legal standard and wholesale disregard of the evidentiary record constitute independent abuses of discretion. This Court should reverse and conclude that Plaintiffs are likely to prevail on Count I.

III. The Court Below Erred in Ruling That the Resolution Does Not Infringe on the Constitutional Right to Receive Information

The court below further erred in concluding that Plaintiffs were unlikely to prevail on the merits of their claim that the Resolution unconstitutionally infringes on the right to receive information. 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,* 207 Cal. App. 3d at 139, 144 (quoting *Bd. of Educ. v. Pico,* 457 U.S. 853, 864, 867–68 (1982)).[13] To comport with the

[13] The California Constitution's free speech provision "is at least as broad as and in some ways is broader than the comparable provision of the federal Constitution's First Amendment." *Beeman v. Anthem Prescription Mgmt., LLC*, 58 Cal. 4th 329, 341 (2013) (quoting *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 958–59 (2002)) (cleaned up). Thus, while "federal decisions interpreting the First Amendment are not controlling" in applying the State Constitution, "[o]ur case law interpreting California's free speech clause has given respectful consideration to First Amendment case law for its persuasive value." *Id.*

California Constitution, therefore, a school board's removal of reading materials or topics from the curriculum must be "reasonably related to legitimate educational concerns." *Id.* at 146. Notwithstanding its other authority, a school board cannot impose a curriculum restriction "motivated by an intent to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" *Id.* (quoting *Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943)). Indeed, intent to advance a political or religious ideology is a "patently illegitimate educational purpose." *Id.* at 142, 147 (curriculum changes that discriminate based on viewpoint are unconstitutional).

De novo review applies "when it is contended that an ordinance or statute is unconstitutional on its face and that no factual controversy remains to be tried." *Hunter*, 209 Cal. App. 3d at 595–96. Here, it is plain from the face of the Resolution that the Board intended to suppress viewpoints with which certain members disagree—*i.e.*, any viewpoints similar to or supportive of the notion that "racism is ordinary," for example. The Resolution expressly provides that any "instruction about Critical Race Theory" offered in TVUSD must "focus[] on the flaws" of that theory. I CT 237. Notably, the court below rephrased that text, stating incorrectly that the Resolution requires any instruction on the 13 banned concepts characterized by the Board as elements of critical race theory to "*include*" their flaws (a neutral presentation), PI Op. at 9 (emphasis added), rather than "*focus*" on their flaws (a negative presentation), I CT 237 (emphasis added). The Resolution doesn't say that. Nor does it, in the words of the court below, "allow[] instruction on the Theory itself." PI Op. at 9. Rather, the Resolution permits only *criticism* of the 13 concepts Defendant Board members disfavor. *See Parr v. Mun. Ct.,* 3 Cal. 3d 861, 865, 867 (1971) (discriminatory intent behind unconstitutional ordinance was "indelibly

expressed" in accompanying legislative declaration, which stated city council's purpose of discouraging "undesirable and unsanitary" "hippies" from gathering in public). Such viewpoint discrimination is a "patently illegitimate educational purpose" for censoring curriculum. *McCarthy,* 207 Cal. App. 3d at 141–42, 144.

Even if this Court were to review for abuse of discretion, the court below again abused its discretion by (i) incorrectly stating the text of the Resolution, as described *supra*; (ii) ignoring *McCarthy*'s holding that prescribing what shall be orthodox in politics is a patently illegitimate educational purpose that a pretextual statement of intent cannot cure, 207 Cal. App. 3d at 141–42, 144; and (iii) disregarding ample record evidence of Defendant Board members' illegitimate educational purpose.

As to (iii), the court ignored Defendant Board members' failure to adhere to normal policymaking procedures in passing the Resolution, which is highly suggestive of the lack of a legitimate pedagogical purpose. *See Pico,* 457 U.S. at 874, 875 (school board's failure to "employ[] established, regular, and facially unbiased procedures" to remove books from libraries suggested decision was not motivated by "constitutionally valid concerns"). These procedures require the Board, after "identify[ing] the need for a new policy," to "fully inform" itself about the particular issue. I CT 244. This often includes collecting "fiscal data, staff[,] and public input" and reviewing related TVUSD and California School Boards Association ("CSBA") policies; holding "discussions during a public Board meeting" about staff recommendations, community expectations, and the policy's expected impact "on student learning and well-being, equity, governance, and the district's fiscal resources and operational efficiency"; and requesting that legal counsel review the draft policy. *Id.* After the Board undertakes this process, the Superintendent or her

designee (not the Board) must "develop and present a draft policy for a first reading at a public Board meeting. At its second reading, the Board may take action on the proposed policy." *Id.*

Here, there is no indication that prior to enacting the Resolution, the Board assessed fiscal data, invited or reviewed input from District staff, or examined TVUSD or CSBA policies. Nor is there any indication that the Board consulted the District's legal counsel before drafting the Resolution. Nor did the Board discuss in a public meeting the Resolution's impact on student outcomes, course offerings, or the District's ability to operate effectively. Members of the Board, not the Superintendent, authored the Resolution, and the Board enacted the Resolution at the newly elected majority's first meeting, rather than hold a first reading to solicit public input before a second reading and vote. Defendant Board members' manner of adopting the Resolution was therefore "highly irregular and ad hoc—the antithesis of those procedures that might tend to allay suspicions regarding [their] motivations." *Pico,* 457 U.S. at 875; *see also Arlington Heights,* 492 U.S. at 267 ("evidence that improper purposes are playing a role" may include "[d]epartures from the normal procedural sequence" and "[s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached"). The court below did not even *mention* these procedural irregularities, let alone articulate how the Resolution could have a valid purpose in spite of them.

The court below also failed to explain how a Resolution that conflicts with State standards could nevertheless further legitimate educational concerns. For example, Education Code § 51220 provides that all middle and high school social science curricula "*shall* 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." Ed. Code § 51220(b)(1) (emphasis added). However, any TVUSD teacher leading a discussion about slavery or Jim Crow—or the continuing impacts thereof on Black communities—risks discipline if a student perceives a message that "[a]n individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race" or that "[r]acism is ordinary, the usual way society does business."[14] I CT 236–37. Once more, the court below failed even to acknowledge this conflict, let alone articulate how the Resolution could have a legitimate pedagogical purpose despite such incongruence.

Finally, public comments by Board members Gonzalez, III CT 644, and Wiersma, II CT 571, as well as by Christopher Arend, the consultant the Board hired to teach District staff about the Resolution, III CT 735, strongly suggest that racial animus "infected" the decision to adopt and enforce the Resolution. *González v. Douglas*, 269 F. Supp. 3d 948, 965 (D. Ariz. 2017). The court below did not discuss these odious comments or their effect on the validity of the Resolution.

The Board's censorship of instruction on the LGBTQ rights movement likewise lacks a legitimate educational purpose. Specifically, Defendant Board members voted to shelve Lesson 12 of the State-approved fourth-grade *Social Studies Alive* curriculum until they could identify "substituted age-appropriate curriculum" which "exclude[s] sexualized topics of instruction." II CT 576–77;

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[14] Similarly, discussion of other contemporary issues such as affirmative action or immigration policy is highly likely to intersect with topics such as unconscious bias, white privilege, and systemic racism, which would trespass on the Resolution.

III CT 659–67. This supposedly "sexualized" material is a brief supplemental discussion of the LGBTQ rights movement that does not in any way reference sexual activity. III CT 744–48. Defendant Board members' spurious concern about nonexistent "sexualized topics" in Lesson 12 is a pretext for imposing their anti-LGBTQ ideology on Temecula students. II CT 468–70; II CT 581–83.

In sum, because the text of the Resolution evinces its purpose to discriminate based on viewpoint, it is facially unconstitutional, obviating the need for any factual determination. But even if this Court were to reach the facts, the court below's misstatement of the Resolution, disregard of controlling law, and failure to address (much less analyze) overwhelming record evidence—the Resolution's lack of factual support, its direct conflict with State curriculum standards, the procedural abnormalities of its passage, and Defendant Board members' comments manifesting racial animus—constitute an abuse of discretion.

IV. The Court Below Erred in Ruling That the Resolution and Curriculum Censorship Do Not Infringe on the Fundamental Right to Education

The court below further erred in concluding that Plaintiffs were unlikely to prevail on the merits of their claim that the Resolution and the Board's censorship of information about the LGBTQ rights movement unconstitutionally infringe on the fundamental right to education. The court failed to recognize that in matters of curriculum, the "prevailing statewide standard"—the benchmark against which denial of the fundamental right to education is measured, *Butt v. State of California*, 4 Cal. 4th 668, 687 (1992)—is established by California's statutes and academic content standards. *Serrano v. Priest*, 5 Cal. 3d 584, 596 (1971) (California Constitution requires statewide "educational system [to]

be uniform in terms of the prescribed course of study and educational progression from grade to grade"); *see Shaw v. Los Angeles Unified Sch. Dist.*, 95 Cal. App. 5th 740, 749 (2023) (plaintiffs could establish prevailing statewide standard by reference to statute setting out "the requirements for distance learning, including '[c]ontent aligned to grade level standards that is provided at a level of quality and intellectual challenge substantially equivalent to in-person instruction'").

Notwithstanding its acknowledgment that students are denied a "basically equivalent" education where "the actual quality" of their district's academic program, "viewed as a whole, falls fundamentally below prevailing statewide standards," *see* PI Op. at 10, the court below erred by ignoring that an education not aligned with State statutes and academic content requirements necessarily falls fundamentally short of prevailing statewide standards. *See* Ed. Code § 60119(a)(1)(A) (requiring all public schools to have sufficient textbooks "aligned to the content standards adopted by the state board" and "consistent with the content and cycles of the curriculum framework adopted by the state board"); *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1137–38 (1999) (charter schools did not violate California constitutional requirement of a statewide school system that is '"uniform in terms of the prescribed course of study"' because "their education programs must be geared to meet the same state standards" (quoting *Serrano*, 5 Cal. 3d at 596)). And the undisputed evidence demonstrates that the Board's censorship has rendered Temecula an outlier with respect to State academic standards.[15]

[15] As of November 29, 2023, only seven of the state's 939 school districts had adopted curriculum bans targeting critical race theory or other purportedly "divisive concepts." *See* UCLA School of Law, *CRT Forward*, https://crtforward.law.ucla.edu/map/ [https://perma.cc/SCZ4-MXL5] (last visited Nov. 29,

Because it erroneously concluded that an education not aligned with State content requirements may still be "basically equivalent" to an education aligned with those requirements, the court below failed to apply the strict scrutiny that *Serrano* and its progeny require for laws impinging on the fundamental right to education. *Serrano*, 5 Cal. 3d at 608–09; *Shaw*, 95 Cal. App. 5th at 76. This failure to apply the correct standard is another abuse of discretion. *See Zurich*, 155 Cal. App. 4th at 1493.

Had the court applied strict scrutiny and required the Resolution and the Board's restriction of curricular materials on the LGBTQ rights movement to be both necessary and narrowly tailored to further a compelling state purpose, the Resolution would plainly fail Plaintiffs' basic educational equity challenge.

First, uncontroverted record evidence demonstrates that the Resolution and curricular restriction on information about the LGBTQ rights movement further no legitimate—much less compelling—purpose. The Resolution itself, the procedural irregularities leading up its passage, the Resolution's conflict with State standards and educational best practices, and decisionmakers' comments all establish that Defendants acted out of illicit ideological motivations, rather than to further any legitimate pedagogical purpose. *See supra* 15–19.

Second, even if the Board's stated purposes to address racism and protect students from "sexualized" material were not pretextual (and they are), the Resolution and curricular restriction would still fail strict scrutiny because they are

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2023). As Plaintiffs' expert Dr. John Rogers explains: "If Resolution 21 is allowed to stand, access to [State-mandated curriculum] will turn on the fortuity of district assignment—whether a student lives just inside the district's boundaries or on the next street over—and Temecula students will be left behind the majority of their peers in the State." IV CT 990.

neither necessary nor narrowly tailored to those respective aims. Rather, undisputed record evidence demonstrates that the Resolution in fact exacerbates racial inequity by denying students of color access to inclusive instruction and curricular content that have been shown to engage and support them.[16] Likewise, uncontroverted evidence—the censored curricular materials themselves—demonstrates that the textbook language condemned by the Board as "sexualized" is in fact a brief supplemental discussion of the LGBTQ rights movement that does not in any way reference sexual activity. III CT 745–46. Instead, as Plaintiffs' expert declarations make clear, the Board's removal of information about the LGBTQ rights movement from TVUSD's curriculum harms LGBTQ students by (i) exacerbating escalated harassment, IV CT 991–92; (ii) worsening "identity-based stress," which in turn limits LGBTQ students' "educational potential and hinder[s] their social and emotional health," III CT 820; and (iii) making it "difficult, if not impossible, for students" who

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[16] IV CT 942–45 (Resolution "prevents teachers from cultivating a welcoming classroom environment for students of Color"); IV CT 917–18 (Resolution prevents teachers from introducing subjects that speak to students' experiences and hinders efforts to build community); III CT 818 (Resolution exacerbates the identity-based stress that students of color face); V CT 1297–99 (Resolution prevents teachers from using instructional practices shown to improve engagement and educational attainment among students of color). Because of the Resolution, teachers have excluded material relevant to students of color. III CT 751–52 (teacher, despite being the only Black teacher at her school, cannot discuss important current issues with students); III CT 756–57 (teacher has altered her lesson plans, even avoiding the term "white"); III CT 796–97 (daughter's ability "to connect her coursework with her own background and experiences will be severely restricted"); III CT 781 (class "stopped having discussions [about racism] that connect to the present"); III CT 764 (teacher could not discuss "persistent inequalities [in the criminal justice system] or draw connections to current events").

identify as LGBTQ to build community or "receive support from their teachers." IV CT 917–18. Because the court below abused its discretion in applying the wrong standard to Plaintiffs' basic educational equity challenge, and because applying the proper standard would show that the Resolution violates Plaintiffs' fundamental right to education, this Court should reverse and conclude that Plaintiffs are likely to prevail on Count III.

V. The Court Below Erred in Ruling That the Policy Does Not Discriminate on the Basis of Sex and Gender

The court below further erred in declining to apply strict scrutiny to the Policy. Unlike its federal counterpart, California constitutional law subjects policies that discriminate based on sex or gender to strict scrutiny—a reflection of the California Supreme Court's understanding that one's sex or gender "frequently bears no relation to ability to perform or contribute to society." *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 17–18 (1971). "[P]articularly [where] made with respect to a fundamental interest," *id.* at 18—here, education—classifications based on sex or gender "trigger[] the highest level of scrutiny." *Catholic Charities of Sacramento, Inc. v. Sup. Ct.*, 3 Cal. 4th 527, 564 (2004).

Discrimination based on gender identity is a form of sex and gender discrimination. *See* Ed. Code § 210.7 (defining sex to include "gender identity and gender expression"); Gov. Code § 12926 (same); *Taking Offense v. State of California*, 66 Cal. App. 5th 696, 725–26 (2021), *review on other grounds granted* Nov. 10, 2021, S270535. Policies subjecting transgender and gender nonconforming students to unfavorable treatment are therefore invalid unless they can withstand strict scrutiny.

In assessing Plaintiffs' equal protection challenge, the court below applied rational basis review rather than the strict scrutiny required for laws that

discriminate on the basis of gender identity. This purely legal error necessitates *de novo* review. *Hunter*, 209 Cal. App. 3d at 595–96. But even if this Court were to review for abuse of discretion, the court below's application of the wrong legal standard is an abuse of discretion *per se*. *Zurich*, 155 Cal. App. 4th at 1493.

The court's decision to apply rational basis review rather than strict scrutiny rested on two fundamental errors.

First, the court held, without basis, that the Policy is facially neutral. PI Op. at 12. But the Policy expressly discriminates on the basis of sex and gender: It specifically requires TVUSD staff to notify parents when a student "requests to be identified or treated as a gender . . . *other than the student's biological sex or gender* listed on the student's birth certificate or any other official records," including by using "pronouns *that do not align with the student's biological sex or gender*." I CT 240 (Policy 5020.01 § 1(a)) (emphases added). The Policy also requires disclosure when a student requests to access "sex-segregated school programs and activities," like "bathrooms or changing facilities *that do not align with the student's biological sex or gender* listed on the birth certificate or other official records." I CT 240 (Policy 5020.01 § 1(b)) (emphasis added).

By its terms, therefore, the Policy subjects students to disparate treatment based on their "biological sex or gender." I CT 240 (Policy 5020.01 §§ 1(a)–(b)). In *Bostock v. Clayton County*, the United States Supreme Court held that an employer discriminates on the basis of sex when it "fires [a] male employee for no reason other than the fact he is attracted to men"—that is, "for traits or actions it tolerates in his female colleague." 140 S. Ct. 1731, 1741 (2020). Similarly, the Policy mandates parental disclosure when a transgender student takes actions that, if taken by a cisgender student (one whose gender

aligns with their sex assigned at birth), would not trigger disclosure. For example, the Policy is triggered when a transgender boy (a person who was assigned female at birth but identifies as a boy) uses the boys' restroom, but not when a cisgender boy (a person who was assigned male at birth and identifies as a boy) uses that restroom. As the San Bernardino Superior Court explained when it enjoined Chino Valley Unified's identical policy, "[d]iscrimination is built into the operative language of the policy since a child's requests or actions are treated differently based upon their gender incongruity, *meaning sex is a determining factor*." *People v. Chino Valley Unified Sch. Dist.*, No. CIV SB 2317301, 27:18–21 (Cal. Super. Ct. San Bernardino Cnty., Oct. 19, 2023) (Reporter's Transcript of Oral Proceedings) ("CVUSD Tr.") (emphasis added). The Policy thus "singles out" students for disclosure "based . . . on the [student's] sex [assigned at birth]." *Bostock*, 140 S. Ct. at 1741.

The court below nevertheless concluded that a facially discriminatory policy would "require[] school staff to report to parents *only* when a transgender or gender nonconforming student ma[kes] a request under sections 1(a)–(c), but not when a cisgender student ma[kes] the request." PI Op. at 12 (emphasis added). That is not the law.

The California Supreme Court has recognized that a statute targeting a protected group—even if that group is not expressly named—is facially discriminatory. *In re Marriage Cases*, 43 Cal. 4th 757, 839, 857 (2008) (statute limiting marriage to "between a man and a woman" "properly must be viewed as *directly classifying and prescribing distinct treatment on the basis of sexual orientation*" (emphasis added)). A statute restricting marriage to "a man and a woman" by definition targets only LGBTQ individuals. *Id.* Similarly, a disclosure requirement applicable only to students who (i) "request[] to be identified or treated as a

gender" other than that assigned on their birth certificate, or (ii) seek to access "sex-segregated" programs not aligned with their assigned gender, *by definition* targets only transgender and gender nonconforming students, I CT 240 (Policy 5020.01 §§ 1(a)–(b)), because a student who takes either of these actions is at minimum gender nonconforming. V CT 1130–31. Such a policy cannot and does not "appl[y] equally to cisgender and transgender/gender nonconforming students." PI Op. at 13; *see Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 681 (2006) (holding that a "law classifying individuals by race and then imposing some kind of burden . . . on the basis of the classification is subject to strict scrutiny . . .").

Second, the court below erred by applying the "similarly situated" standard to a facially discriminatory statute. PI Op. at 11–12 ("The first inquiry is whether a classification affects two or more similarly situated groups in an unequal manner."). The California Supreme Court has held that, for facial discrimination claims, "courts no longer need to ask at the threshold whether the two groups are similarly situated." *People v. Hardin*, 15 Cal. 5th 834, 849 (2024) (application of the "similarly situated" analysis to facially discriminatory statutes "creates an unnecessary threshold obstacle to the adjudication of potentially meritorious constitutional challenges").[17]

[17] Even if the similarly situated requirement applied here (and it does not), transgender and gender nonconforming students *are* similarly situated to their cisgender peers with respect to the Policy's purpose. "[B]oth groups are seeking to" participate in school activities consistent with their gender, "but the law treat[s] the two similarly situated groups differently, allowing one group to [participate] and the other not." PI Op. at 12 (citing *Perry v. Schwarzenegger*, 704 F. Supp. 2d 291 (N.D. Cal. 2010)). This would remain so even if—as the court below stated without evidence—transgender and gender nonconforming students were more likely to face certain health issues. *See Taking Offense*, 66 Cal.

Because the court below erroneously declined to apply strict scrutiny, it did not address whether the Board established, as the law requires, both "a *compelling* interest which justifies the law" *and* that "the distinctions drawn by the law are *necessary* to further its purpose." *In re Marriage Cases*, 43 Cal. 4th at 832 (cleaned up). The Board has done neither.

First, the Policy lacks a compelling interest because it expressly discriminates against transgender and gender nonconforming students. *See Arp v. Workers' Comp. Appeals Bd.*, 19 Cal. 3d 395, 407 (1977); CVUSD Tr. 32:1–14 (facial discrimination is sufficient to find a likelihood of success on the merits). The Policy's text reveals its discriminatory intent, invoking outdated social stereotypes, V CT 1131, IV CT 1085–86; equating transgender identity and gender nonconforming behavior with mental illness; and characterizing gender transition as "self-harm." I CT 240; *Sail'er Inn*, 5 Cal. 3d at 18. In enacting the Policy, the Board and its supporters disparaged transgender and gender nonconforming people as lifelong "medical patient[s]," III CT 707; "gender confused," III CT 608; suffering from a "mental medical disorder," III CT 612; and the product of a "destructive agenda," III CT 617. The Board passed the Policy as

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App. 5th at 725 (rejecting argument that transgender and nontransgender residents are not similarly situated because the former are more likely to be assigned a room inconsistent with their gender identity); *Woods v. Horton*, 167 Cal. App. 4th 658, 671 (2008) (rejecting argument that men and women are not similarly situated with respect to domestic violence programs because fewer men are affected).

Although *Hardin* involved a Fourteenth Amendment challenge, nothing in the Court's analysis suggests that its holding is limited to federal equal protection guarantees. 15 Cal. 5th at 847 n.2 (quoting *People v. Chatman*, 4 Cal. 5th 277, 288 (2018)) ("[W]e see 'no reason to suppose' that federal equal protection analysis would yield a result different from what would emerge from analysis of the state Constitution.").

part of a wave of anti-LGBTQ measures, which included its excision of State-mandated curricular content on the LGBTQ movement, *supra*; its ban on Pride flags in Temecula classrooms, II CT 546–52; and its rejection of a proposed resolution prohibiting discrimination, bullying, and harassment of all students, including LGBTQ students, II CT 552–53.

The Board's rationale for the Policy—described by the court below as "involving parents in the decision-making process and restoring trust"—is undercut by Plaintiffs' uncontroverted evidence that the Policy has damaged, rather than restored, parents' trust in the District. PI Op. at 13. The Policy requires the disclosure and permanent documentation of students' gender identity or expression regardless of whether particular parents would actually welcome such action. Indeed, Defendant Board members enacted the Policy *over the protests of parents* who pointed out that such intrusions would endanger students within their own families. For example, a mother of a transgender son warned that the Policy would force District staff to out children to unsupportive parents such as her son's father, who is openly anti-trans and "harasses trans kids online for fun." III CT 638. Another parent underscored: "Not every home is safe. Not every parent is safe." III CT 712.

Second, even if the Board could identify a compelling purpose (and it cannot), the Policy still fails strict scrutiny because it is neither necessary nor narrowly tailored.

Notwithstanding their purported intent to promote students' "social-emotional success," I CT 240, Defendant Board members chose to mandate disclosure regardless of student consent and refused to create an exception for students at risk of emotional, psychological, or physical harm. Though presented with abundant evidence that nonconsensual disclosure exposes

transgender and gender nonconforming students to discrimination, harassment, and abuse, Defendant Board members made no attempt to ensure that the Policy would avoid inflicting these harms.[18] Predictably, the prospect of forced outing has already driven many students to suppress their identities, *see, e.g.*, III CT 769–70, depriving them of the opportunity to build trusting relationships with their teachers. Far from promoting student mental health, I CT 240, the Policy has subjected LGBTQ students in Temecula to "daily anxiety and depression and to fear for their and their friends' safety," III CT 729, with one facilitator of a local LGBTQ safe space reporting that she has directed multiple Temecula students to a mental health crisis hotline since the Policy's enactment, III CT 730.

As discussed *supra*, the Policy's failure to include exceptions also undercuts its purported justification of "foster[ing] trust between" parents and the District. I CT 240. In light of heightened animus toward the LGBTQ community,[19] parents may understandably oppose the Policy's documentation of their children's gender identity and expression—documentation accessible to teachers, administrators, and other staff—which could subject their children to discrimination or harassment at school. But the Policy does not allow those parents to opt out of its provisions.

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[18] As students at the August 22 Board meeting warned, the Policy increases students' risk of being "beaten, abused, [or] manipulated with electroshock therapy by their family" or being "brought . . . to the brink of suicide." III CT 629; III CT 633.

[19] *See* III CT 729 (LGBTQ youth have been harassed by both other youth and adults); III CT 769–72 (LGBTQ students are often the target of slurs and mockery at school, even from teachers); III CT 738 (gender nonconforming students subject to unprecedented bullying).

Even if this Court declines to review *de novo*, the court below's failure to apply strict scrutiny is an abuse of discretion. *Zurich*, 155 Cal. App. 4th at 1493. The Board failed to carry its burden to articulate a compelling purpose for the Policy and demonstrate that the Policy is necessary and narrowly tailored to advance that purpose. Had the court applied the correct standard, it would have found that Plaintiffs are likely to prevail on Count VIII.

VI. The Court Below Erred in Ruling on the Balance of Harms

The court below's two-sentence analysis of the balance of harms rests primarily on its erroneous conclusion that the Board has not infringed Plaintiffs' constitutional rights. PI Op. at 13. But as described *supra*, the Board's actions are even now trespassing on those rights, and the existence of these infringements, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Ketchens*, 194 Cal. App. 3d at 480 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). By contrast, Defendant Board members would suffer no harm—let alone irreparable harm—from an order enjoining their unconstitutional acts. *See Tahoe Keys Prop. Owners' Ass'n v. State Water Res. Control Bd.*, 23 Cal. App. 4th 1459, 1471 (1994) (court may enjoin public officials' unconstitutional or void acts); *NetChoice, LLC v. Bonta*, No. 22-CV-08861-BLF, 2023 WL 6135551, at *22 (N.D. Cal. Sept. 18, 2023) ("[T]he proposition that '[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury' . . . has no application here, where . . . the [government] has not made a showing that the challenged statute passes constitutional muster.").

The court below also ignored entirely the significant and ongoing injuries detailed in 11 Plaintiff declarations, 12 expert declarations, and the *amici curiae*

brief filed by the ACLU Foundation of Southern California on behalf of 25 legal and research organizations.[20] The undisputed evidence demonstrates that Student Plaintiffs are being deprived of an education on par with that of their peers across the State, placing them at a significant disadvantage as they prepare for college, careers, and civic engagement. *See supra* 18–22. Across the district, Teacher Plaintiffs face severe, even career-ending penalties for guessing incorrectly whether the Resolution's ill-defined provisions permit or prohibit instruction on a given topic. *See supra* note 4 and accompanying text. And LGBTQ students—whose schools and homes have been transformed by Board policies into hostile, unsafe environments—are suffering enormous identity-based stress that deleteriously impacts their education, their mental and physical health, and even "their brain development." III CT 818. These harms to Plaintiffs outweigh any conceivable harm to Defendant Board members. *See Robbins v. Super. Ct.*, 38 Cal. 3d 199, 205 (1985) ("If the denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the

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[20] These 25 organizations are: the American Civil Liberties Union of Southern California, the American Civil Liberties Union of Northern California, Asian Americans Advancing Justice Southern California, the California LGBTQ Health & Human Services Network, Equal Justice Society, Equality California, the Family Assistance Program, Genders & Sexualities Alliance Network, GLSEN, the Inland Empire Prism Collective, Lambda Legal Defense and Education Fund, Inc., the LGBTQ Center OC, the LGBTQ Community Center of the Desert, Legal Services of Northern California, the Los Angeles LGBT Center, Planned Parenthood of the Pacific Southwest, Public Advocates, Inc., Public School Defenders Hub, the Rainbow Pride Youth Alliance, the Sacramento LGBT Center, the Safe Schools Project of Santa Cruz County, the Transgender Law Center, TransFamily Support Services, TransYouth Liberation, and the Trevor Project.

preliminary injunction.”). The court below’s failure to grant the preliminary injunction was an abuse of discretion.

CONCLUSION

For the foregoing reasons, this Court should reverse the ruling below and order the court below to enter the preliminary injunction requested by Plaintiffs-Appellants.

Dated: June 14, 2024

Respectfully submitted,

PUBLIC COUNSEL

By:

MARK ROSENBAUM
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By:

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CERTIFICATE OF COMPLIANCE

The foregoing **PRINCIPAL BRIEF OF PLAINTIFFS-APPELLANTS** complies with the type-volume limitation of Local Rule 8.204(c) because it contains 11,079 words and was prepared in 14-point Garamond, a proportionally spaced typeface, using Microsoft Word. Finally, the electronic brief was subject to a virus scan and no virus was detected prior to its submission.

Dated: June 14, 2024

Respectfully submitted,

PUBLIC COUNSEL

By: ____________________________
MARK ROSENBAUM
Attorney for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 610 South Ardmore Avenue, Los Angeles, California 90005.

On the date set forth below, I served one true copy of the following document(s) described as **PRINCIPAL BRIEF OF PLAINTIFFS-APPELLANTS** on the interested parties in this action as follows:

☒ **BY FIRST-CLASS UNITED STATES MAIL:** Pursuant to CRC R.8.212(c)(1), a true and correct copy of the foregoing was mailed to the Superior Court of Riverside County clerk for delivery to the trial judge, addressed as follows:

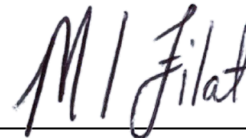
Superior Court of California, County of Riverside
Attn: Dept. 6, Honorable Eric A. Keen
4050 Main Street
Riverside, CA 92501

☒ **BY ELECTRONIC FILING / SERVICE:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by TrueFiling.

- Julianne Fleischer (jfleischer@faith-freedom.com)
- Michelle Soto (Michelle.Soto@lewisbrisbois.com)

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

Executed on June 14, 2024 at Los Angeles, California.



Mustafa Filat