No. G064332

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

MAE M. THROUGH GUARDIAN AD LITEM ANTHONY M. et al.
PLAINTIFFS-APPELLANTS,
V.
JOSEPH KOMROSKY et al.,
DEFENDANTS-APPELLEES.

On Appeal from the Superior Court of Riverside, California
Case No. CVSW2306224
The Honorable Eric Keen
Department 6

BRIEF OF *AMICI CURIAE* LATINOJUSTICE PRLDEF, CALIFORNIA IMMIGRANT POLICY CENTER, AND ASIAN LAW CAUCUS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF INTERST OF *AMICI CURIAE*

LatinoJustice PRLDEF ("LatinoJustice"), formerly known as the Puerto Rican Legal Defense and Education Fund, was founded in 1972. Its mission is to protect the civil rights of Latinos and to promote justice for the pan-Latino community, including by protecting, serving and furthering its educational interests. LatinoJustice PRLDEF helped establish bilingual education in New York City, and it has since created pathways for success for Spanish-speaking children in public schools. Accordingly, LatinoJustice PRLDEF has an interest in these proceedings.

California Immigrant Policy Center ("CIPC") is a non-profit immigrants' rights organization that advocates for policies and legislation that uphold the dignity of immigrants and advance racial, social, and economic justice. CIPC has played a central and essential role in advancing local and statewide immigrant justice around a multitude of issues that impact immigrants and their families. Accordingly, CIPC has an interest in these proceedings.

Asian Law Caucus ("ALC") is the nation's first legal and civil rights organization serving low-income, immigrant, and underserved Asian American and Pacific Islander communities. ALC brings together legal services, community empowerment, and policy advocacy to fight for immigrant justice, economic security, and a stronger, multiracial democracy. Accordingly, ALC has an interest in these proceedings.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici curiae LatinoJustice PRLDEF ("LatinoJustice"), California Immigrant Policy Center ("CIPC"), and Asian Law Caucus (collectively, "*Amici Curiae*") respectfully submit this brief in support of Plaintiffs' Appeal of the Denial of Plaintiffs' Motion for Preliminary Injunction.

As explained below, Resolution 21 violates Temecula students' right to receive information and ideas under the California Constitution and the First Amendment of the U.S. Constitution, as well as their right to educational equality under the Equal Protection guarantees of the California Constitution. As a result of the resolution, students from Black, Latinx, Indigenous, Asian, and other communities of color ("BIPOC"), as well as LGBTQ students, are facing the elimination of critical content from their school curricula, the loss of opportunities for intercultural understanding, a toxic educational environment, and diminished preparation for higher education, the workforce, and civic engagement. While the Temecula Valley Unified School District ("TVUSD") Board of Trustees (the "Board") claims to respect and value the diversity of its students, its actual hostility toward diversity has been revealed in the resolution's ban on so-called "critical race theory." Resolution 21 is nothing more than a thinly veiled attempt by the Board to indoctrinate children with its partisan extremist views, while silencing all opposing voices.

ARGUMENT

I. Resolution 21 Is Part Of A Nationwide Attack On Diversity By Conservative Activists.

Resolution 21 is one of hundreds of content-based censorship laws, regulations, and policies pushed by extremist activists and legislators across the country for the purpose of eliminating from the nation's classrooms certain viewpoints—and even history—that they do not like. The strategy they have employed is to hijack and recast the term "critical race theory" (or "CRT") into an ill-defined and amorphous range of topics relating to social justice and equity, and then ban its teaching altogether—thus silencing a broad array of diverse viewpoints on the topics of race, sex, and gender identity. *See generally* CRT Forward, University of California Los Angeles School of Law, Critical Race Studies Program, https://crtforward.law.ucla.edu/about/.[1] In short, these activists and legislators—instead of letting their own ideas, theories, and narratives on these topics compete openly and fairly with those offered by BIPOC individuals, LGBTQ people, and their allies—seek to eliminate the competition altogether.

The recent proliferation of "anti-CRT measures" traces back to former president Donald Trump's Executive Order 13950 ("EO

[1] *Amici Curiae* do not agree with, or subscribe to, these efforts to recast "critical race theory" from its original definition in the legal academy into a vague "catch-all" to cover all ideas, theories, and concepts that conservative activists do not like. Nevertheless, to ease the discussion in this brief, *Amici Curiae* will use the term "CRT" to refer to the broader set of ideas, theories, and concepts that conservative activists have tried to group together under that label.

13950"), which was drafted in consultation with Christopher Rufo—a prominent conservative activist. Mr. Rufo openly admitted to redefining "critical race theory" to encompass unrelated and "unpopular" viewpoints, and then manufacturing an attack on this redefined "CRT" to advance his conservative agenda. *Id*.; Plaintiff's First Amended Complaint ("Complaint") ¶ 131, n.174. Mr. Rufo explained in a Tweet that the "goal" of his campaign "is to have the public read something crazy in the newspaper and immediately think 'critical race theory,'" and he boasted that "[w]e have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans."[2] *Id*.

Anti-CRT measures like EO 13952 and Resolution 21 arrived on the scene shortly after the racial reckoning and political consciousness ushered in by the Black Lives Matter movement, following the murder of George Floyd. Mr. Rufo and other conservative activists openly lamented the associated increase in social consciousness, and they sought ways to halt it in its tracks. *See* Christopher F. Rufo, *Critical Race Theory: What It Is and How to Fight It*, Imprimis, Vol. 50, n.3 (Mar. 2021) ("[C]ritical race theory has permeated the collective intelligence and decision-making process of American government, with no sign of slowing down"). They

[2] Since the issuance of EO 13950 in September 2020, "a total of 240 local, state, and federal government entities across the United States have introduced 777 anti-Critical Race Theory bills, resolutions . . . and other measures." CRT Forward, https://crtforward.law.ucla.edu/map/. Many of these enactments, including Resolution 21, copy EO 13950 verbatim. *See* Complaint ¶ 131.

realized that one effective way to prevent broader understanding of the pernicious and ongoing effects of racism is to shut down all discussions of certain lived experiences of BIPOC individuals—whether within governmental agencies, in the private sector, or in the public schools. And that is the driving force behind EO 13950 and Resolution 21. *See* Interactive Map - CRT Forward Tracking Project, University of California Los Angeles School of Law, Critical Race Studies Program, http://crtforward.law.ucla.edu/map/.

II. Resolution 21 Violates Temecula Students' Rights Under The First Amendment And Under The California Constitution.

A. The Federal and State Constitutions protect students' right to receive information, and limit school boards' discretion to make curricular decisions.

The right of students to "receive information and ideas" is a bedrock principle under both the California Constitution and the First Amendment to the U.S. Constitution.[3] The United States Supreme Court has held that while the right to receive ideas "follows ineluctably from the sender's First Amendment right to send them," it is also "[m]ore importantly . . . a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political

[3] The California Court of Appeal has explained that California's Liberty of Speech Clause ("Article I, section 2 of the state Constitution") "constitutes a protective provision more definitive and inclusive than the First Amendment," meaning that "[s]tate action violative of the First Amendment is, therefore, a fortiori violative of the state Constitution." *McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989, 994 n.2 (Ct. App. 1988). This brief will use the term "First Amendment" as a "shorthand identification of the free speech guarantees contained in both federal and state Constitutions." *Id*.

freedom." *Bd. of Educ., Island Trees Union School Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982). The Court has noted that "students too are beneficiaries of this principle," *id.* at 868—and that they do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" and "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 511 (1969).

The courts have thus repeatedly acknowledged the special importance of protecting students' right to receive ideas in the classroom setting. In *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967), the Supreme Court stated that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools . . . The classroom is peculiarly the 'marketplace of ideas.'" In *Pico*, the Court observed that access to ideas "prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Pico*, 457 U.S. at 868. And in *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250 (1957), the Court noted that without the academic freedom "to inquire, to study and to evaluate," "our civilization will stagnate and die." It should come as little surprise, then, that the courts have concluded that students are entitled to receive information and ideas in school, *both* as part of the curriculum (*i.e.*, "through classroom teaching and reading") *and* through additional resources that students can access at their discretion (e.g., books in the school library). *See McCarthy v.*

Fletcher, 207 Cal. App. 3d 130, 144 (Ct. App. 1989); *Pico*, 457 U.S. at 857, 867-69. Simply put, "'the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.'" *Pico*, 457 U.S. at 867 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

Although school boards *do* have the authority to make certain decisions about their curricula, such "discretion is not unfettered." *McCarthy*, 207 Cal. App. 3d at 146. Courts will generally uphold curriculum decisions challenged under the First Amendment if they "are reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *see also McCarthy*, 207 Cal. App. 3d at 145-46 (applying *Kuhlmeier* standard to curriculum decisions in California schools); *Smith v. Novato Unified Sch. Dist.*, 150 Cal. App. 4th 1439, 1452 (2007).

At the same time, both the First Amendment and the California Constitution bar school boards from making curriculum decisions that are based on the Board members' own political or social beliefs. *See McCarthy*, 207 Cal.App.3d at 146; *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Board decisions "cannot be motivated by an intent to prescribe what shall be orthodox in politics, nationalism . . . or other matters of opinion," *McCarthy*, 207 Cal.App.3d at 146 (quoting *Barnette*, 319 U.S. at 642), and "school authorities cannot substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make educational choices." *McCarthy*, 207 Cal. App. 3d at 146 (citing *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980)). Thus, curricular

restrictions that promote "a particular . . . ideological viewpoint" are *not* permitted, and are *not* reasonably related to a legitimate pedagogical concern. *Id.* at 140; *see also Pico*, 457 U.S. at 871 ("If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed . . . then petitioners have exercised their discretion in violation of the Constitution."). Finally, if a school board *does* ban material from the curriculum, "[t]he educational unsuitability of the [material], of course, must be the true reason for the [material's] exclusion and not just a pretextual expression for exclusion because the board disagrees with the religious or philosophical ideas expressed in the [material]." *McCarthy*, 207 Cal.App.3d at 144.

B. Resolution 21 violates students' First Amendment rights, because it attempts to impose the Board's ideological views on students and is not reasonably related to any legitimate pedagogical concern.

Resolution 21 impermissibly encroaches upon students' right to receive information by removing certain information and viewpoints relating to CRT from the classroom—based solely on the Board's ideological beliefs, and without any legitimate educational concern. *See McCarthy*, 207 Cal.App.3d at 145. The resolution therefore violates both the First Amendment and the California Constitution.

There is ample evidence for the conclusion that the Board passed Resolution 21 for the non-pedagogical reason—and "patently illegitimate educational purpose," s*ee McCarthy*, 207 Cal.App.3d at 142—of advancing its own ideological beliefs and opposition to CRT. *First*, as discussed above, the resolution is rooted in a nationwide

campaign orchestrated by extremists, and it is not some empirically justified policy grounded in actual pedagogical theory. *See supra* Section I. *Second*, the resolution reveals the Board's animus toward CRT, through its several false and baseless attacks thereon—including the claims that CRT is, *inter alia*, a "divisive ideology," that "assigns generational guilt and racial guilt," and that "assigns moral fault to individuals solely on the basis of an individual's race and, therefore, is itself a racist ideology." *See* Resolution 21 ("Res. 21"), at 1-2. Not surprisingly, the resolution cites absolutely no evidence or research to support these patently biased and untrue assertions. *Third*, the resolution states that "TVUSD desires to uplift and unite students by not imposing the responsibility of historical transgressions in the past," *id.* at 1, and yet it offers no explanation of what banning CRT has to do with that goal. Had the Board conducted an investigation and found one shred of evidence to suggest that banning CRT would "uplift and unite students," it presumably would have mentioned this in the resolution itself. *See Mae M. et al. v. Komrosky et al.*, No. CVSW2306224, Motion for Preliminary Injunction, at 11-12. That no such reference can be found raises the inference that the Board, in fact, conducted no investigation.

Even more telling, however, is the fact that the resolution selectively excises from the curriculum only *certain* ideas, and only *certain* viewpoints about CRT—demonstrating that this has *nothing* to do with any pedagogical purpose, and is instead *entirely* about the Board impermissibly attempting "to prescribe what shall be orthodox in politics" and "other matters of opinion." *McCarthy*, 207

Cal.App.3d at 146; *Barnette*, 319 U.S. at 642. For instance, the resolution bans teaching the idea that "the preservation of slavery was a material motive for independence from England." *See* Res. 21, at 3. Teachers are thus left free to discuss *other* motives for the United States' declaration of independence, but they must never mention the one motive that the Board wants to suppress and conceal. Similarly, Resolution 21 includes a notable exception for the circumstances in which CRT *can* be taught in Temecula schools. Specifically, the Board permits CRT to be included in the curriculum *as long as* (1) CRT plays a "subordinate role in the overall course," ***and*** (2) the instruction "focuses on the flaws" of CRT. *Id.* In other words, the Board is perfectly happy to have teachers denigrate, attack, and dismiss CRT to the point of "subordinating" it to second-class status, but all other perspectives on CRT—including those that are positive or even neutral—must be buried and never mentioned.

This leaves no doubt that the Board's true agenda in passing Resolution 21 is to indoctrinate children with its own views, "substitut[ing]" the Board's "rigid and exclusive" ideas on politics, history, and contemporary society for a more fulsome discussion that includes *all* perspectives on CRT. *See McCarthy*, 207 Cal.App.3d at 145; *Zykan*, 631 F.2d at 1306. This elimination of all but the politically biased opinions on CRT that the Board hopes to advance plainly lacks any "legitimate educational concerns" and exceeds the Board's "prerogative to make educational choices." *McCarthy*, 207 Cal.App.3d at 145-46. It also denies students access to complete and accurate information about CRT, replacing it with a partial and

distorted view thereof motivated by the partisan ideology of the Board. In short, Resolution 21 represents a gross violation of the right students have under the First Amendment to receive information and ideas. *See Pico*, 457 U.S. at 868.

Courts have struck down similar curriculum bans. In *González v. Douglas*, 269 F. Supp. 3d 948, 972 (D. Ariz. 2017), the court held that the state superintendent for education and state board of education violated students' First Amendment rights to receive information when they eliminated a district's Mexican-American Studies program. The court found that although the stated goal of the ban (to "reduce racism") was a "legitimate pedagogical objective," it was entirely "pretextual"—as the "defendants had no legitimate basis for believing that the [Mexican-American Studies] program was promoting racism such that eliminating it would reduce racism." *Id.* at 972-74. After considering the language and context of the ban, and finding that the superintendent's investigation into the program "was one-sided and yielded little evidence," the court concluded that "the statute was in fact enacted and enforced for narrowly political, partisan, and racist reasons." *Id.* at 973-974.

The same conclusion applies in the present case, though arguably with even greater force. As in *González*, the Board has provided no legitimate basis for believing that the banned content was creating the identified problem (i.e., "imposing the responsibility of historical transgressions in the past"), such that eliminating it would achieve the stated goal of "uplift[ing] and unit[ing] students." Indeed, while the defendants in *González* at least went through the motions of

conducting an investigation, the Board here does not appear to have done even that much. Furthermore, the *González* defendants eliminated the Mexican-American program in its entirety, but Resolution 21 allows teachers to discuss CRT only as long as they attack it. This type of selective presentation of a topic—filtered through the hyper-partisan and extremist views of the Board—is precisely the type of First Amendment violation that the courts have consistently said cannot stand. *See, e.g.*, *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 875-76 (D. Kan. 1995) (finding that school board violated the First Amendment when it "removed [book from school libraries] because [it] disagreed with ideas expressed in the book and . . . intended to deny students . . . access to those ideas"); *McCarthy*, 207 Cal.App.3d at 135 (noting that the removal of books from curriculum to "protect and advance the Christian ideology" would be "a patently illegitimate educational purpose").

C. In denying Plaintiffs' motion for a preliminary injunction, the lower court erred in its analysis of Plaintiffs' First Amendment claim.

The lower court's denial of Plaintiffs' motion for preliminary injunction is to be reviewed *de novo*, because the court's ruling was based on statutory construction of the Resolution and an interpretation of a state statute. *Millennium Rock Mortg., Inc. v. T.D. Serv. Co.*, 179 Cal. App. 4th 804, 808 (2009) ("[W]hen review of a preliminary injunction involves purely a question of law or statutory interpretation, the standard of review is de novo"); Order on PI Motion at 9 (holding that "it does not appear to this Court that the Resolution seeks to deny access to information" and interpreting the

Resolution's precepts to violate the CA Education Code section 233.5).

The court erred in its analysis of the Plaintiffs' First Amendment claim. First, the court incorrectly found that there is no denial of access to information because (a) CRT can be taught in a "subordinate role," and (b) "the Resolution allows CRT to be discussed, but must include its flaws." Order on PI Motion at 9. But the actual language of the Resolution states that instruction on CRT can only play a subordinate role in the curriculum *provided that* "*such instruction* ***focuses*** *on the flaws in Critical Race Theory*." *See* Resolution at 3. This is very different than the lower court's suggestion that the Resolution allows CRT to be discussed fully and freely, as long as its flaws are also included.

As explained in detail above, providing students a curriculum that focuses on only *critiques* of CRT – while omitting all other views, including favorable ones – denies students access to complete and accurate information about CRT and offends their fundamental right to receive information under the First Amendment. Moreover, the required focus on the flaws lays bare the Board's underlying motive, which is not simply to eliminate CRT from the classroom, but rather to advance the Board's ideologically motivated attack on CRT – thereby indoctrinating children and "substitut[ing]" the Board's views in lieu of presenting *all* perspectives on the topic. *See McCarthy*, 207 Cal.App.3d at 146; *Zykan*, 631 F.2d at 1306. The Resolution thus lacks a "legitimate educational concern[]" and exceeds the Board's "prerogative to make educational choices." *McCarthy*, 207 Cal.App.3d at 145-46. In short, under a proper

analysis of students' First Amendment right to receive information, the preliminary injunction should have been granted.

III. Resolution 21 Violates The Equal Protection Clause Of The California Constitution.

A. The California Constitution grants students a fundamental right to educational equality, and laws resulting in unequal education are subject to strict scrutiny.

The California Constitution (a) obligates the state to "provide for a system of common schools by which a free school shall be kept up and supported in each district…," California Constitution, Article IX, § 5, and (b) guarantees that no person may be "denied equal protection of the laws." *Id.*, Article I, § 7(a) (the "Equal Protection Clause"). As a result, the California Supreme Court has held that:

> the California Constitution makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students of particular districts. The State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity.

Butt v. State of California, 4 Cal. 4th 668, 685 (1992). In short, California has a constitutional duty to provide public education "available to all on equal terms." *Serrano v. Priest*, 5 Cal. 3d 584, 606 (1971) ("Serrano I").

In *Butt*, a group of parents filed suit seeking to enjoin the State of California and the Richmond Unified School District (the

"District") from closing local schools six weeks earlier than originally scheduled, due to a budget shortfall. The parents argued, *inter alia*, that the early closure would result in District students receiving an education unequal to that provided to students in other districts in the state, and that this would violate the equal protection guarantee of the California Constitution. The court noted that while the state constitution "does not prohibit all disparities in educational quality or service," it *is* violated if the education that is provided "falls fundamentally below prevailing statewide standards"—such that the challenged state law, if left in place, would have "a real and appreciable impact on the affected students' fundamental California right to basic educational equality." *Butt*, 4 Cal 4th at 686-688. After considering the evidence proffered by the parents—including the testimony of teachers that the "early closure would prevent them from completing instruction and grading essential for academic promotion, high school graduation, and college entrance"—the court concluded that the planned closure would, in fact, create an unconstitutional educational disparity. *Id.* at 687-688. The court thus affirmed the lower court's order entering a preliminary injunction. *Id.* at 704.

State laws that subject individuals to "disparate treatment [that] has a real and appreciable impact on a fundamental right or interest" are subject to the strict scrutiny standard of review. *See Butt*, 4 Cal. 4th at 685-86. Education has repeatedly been recognized as a fundamental interest under the California Constitution. *Serrano I*, 5 Cal. 3d at 608-609; *Serrano v. Priest*, 18 Cal. 3d 728, 765-766 (1976) ("Serrano II"); *Butt*, 4 Cal. 4th at 686. Therefore, laws that create educational inequalities are subject to strict scrutiny. *See Butt v. State*

of California, 4 Cal. 4th 668, 683 (1992) ("'[I]n applying our state constitutional provisions guaranteeing equal protection of the laws we shall continue to apply strict and searching judicial scrutiny' to claims of discriminatory educational classifications") quoting *Serrano II,* 18 Cal.3d at 767. In order to survive strict scrutiny review, a law must have a compelling state interest and be necessary to further that purpose. *Serrano I*, 5 Cal. 3d at 597.

B. Resolution 21 has resulted in an education for Temecula students that falls fundamentally below prevailing statewide standards, and has had a real and appreciable impact on the students' fundamental right to basic educational equality.

Resolution 21—through its selective expungement of the various ideas, perspectives, histories, and lived experiences of diverse communities that it groups together under the label "CRT"—has created an educational experience for Temecula students that falls substantially and fundamentally short of prevailing statewide standards viewed as a whole. Despite the nationwide surge in anti-CRT measures, only 9 out of 939 California school districts—less than 1%—have enacted such a ban. *See* Interactive Map - CRT Forward Tracking Project, University of California Los Angeles School of Law, Critical Race Studies Program, http://crtforward.law.ucla.edu/map/. This means that students in *over 99%* of California school districts are being exposed to the full range of enriching ideas and illuminating perspectives on a panoply of subjects that include CRT—while students in Temecula are not. It also means that the numerous harms that Resolution 21 has visited upon Temecula students, discussed in greater detail below, are not

being experienced by the overwhelming majority of the state's students. Resolution 21 is accordingly having a "real and appreciable impact" on Temecula students' fundamental right to "basic educational equality." *Butt*, 4 Cal. 4th at 688.

1. Resolution 21 creates an educational environment hostile to diverse students.

Resolution 21 has created a hostile environment for diverse students. Passage of the resolution, coupled with the enactment of another Board policy forcing educators to "out" transgender students, has emboldened members of the community to verbally attack diverse students for their identities and beliefs. In one instance, student protestors were harassed by fellow students, who called them "freaks," "fucking liberals," and slurs like the "f-slur" and "N-word." *See* Declaration of Rachel Dennis ("Dennis Decl.") ¶ 6. As another example, certain parents in the TVUSD created an Instagram account to "publicly humiliate and harass" trans students, by posting photos of, misgendering, and deadnaming them and calling them "mentally ill." Dennis Decl. ¶ 7; *see also* Eytchison Decl. ¶ 27 (teacher attributing the significant rise in transphobia in her classroom to the "climate in Temecula . . . fostering an environment of hate that is hurting my students"). Resolution 21 thus harms diverse students by clearly communicating that neither they nor their ideas are welcome in their own schools and communities.

The resolution also prevents teachers from addressing overt instances of racism that may arise in the classroom. Kohli & Pizarro Decl. ¶ 29. For example, if a student were to utter a racial slur in class,

the teacher would be unable to discuss the violent history of the word, why it is offensive, or how the student's use of the term invokes that painful history. *See id*. Given all of this, the teacher may choose to avoid addressing the slur at all and simply move on—leaving students targeted by the slur isolated, vulnerable, and without recourse. *See id.* Additionally, teachers themselves have been harassed, intimidated, and verbally attacked as a result of the resolution, serving only to increase the odds that they will be reluctant to enter the fray when these types of incidents arise. *See* Declaration of Amy Eytchison ("Eytchison Decl.") ¶ 9 (recounting a teacher training on the resolution that "belittled Black victims of police brutality," and caused such offense that "a Black staff member left the room in tears"); Inez B. Decl. ¶ 8 ("I have seen . . . a Black educator getting told to leave the country"). The resolution thus deprives all students, including those who may use racial slurs, of "important teaching moments." Kohli & Pizarro Decl. ¶ 29.

2. Resolution 21 eliminates critical and enriching content from the curriculum and adversely affects TVUSD's ability to recruit and retain teachers.

Resolution 21 directly degrades the quality of the education provided in Temecula in two significant ways, one relating to the content of the curriculum and the other pertaining to the professionals charged with delivering a proper education to the students.

Resolution 21 removes vital content from the curriculum, by "constrain[ing] [teachers'] ability to teach California's academic content standards" in a way that is "directly at odds" with "evidence-

based" professional teaching standards. Eytchison Decl. ¶¶ 7-8; Declaration of Dawn Sibby ("Sibby Decl.") ¶ 8-9; Declaration of Dr. Rita Kohli and Dr. Marcos Pizarro ("Kohli & Pizarro Decl.") ¶¶ 17-18. For example, teachers can no longer "create classroom environments that support the discussion of sensitive issues (e.g. social, cultural, race, and gender issues)" in accordance with the state's professional standards and expectations, given Resolution 21's demand that they stay silent about "racism's definition, pervasiveness, and even existence." *See* Kohli & Pizarro Decl. at ¶¶ 19-20. Likewise, teachers cannot implement the state expectation that they "ask questions and structure academic instruction to help students recognize implicit and explicit bias and subjectivity in historical actors," given that Resolution 21 prohibits them from stating—or even insinuating—that racism and bias ever existed in the first place. *Id*. at ¶¶ 19-23 ("Resolution 21 . . . throws research and practice-driven state content standards and TPEs out of the window, replacing the research-backed expertise of educational experts with certain Board member's ideological positions and opinions").

The resolution's removal of content creates others issues as well. For example, California will soon require all high school students to take an ethnic studies class as a prerequisite to graduation. *See* Complaint ¶ 115 (citing Cal. Educ. Code § 51225.31(G)(i)). Resolution 21 makes it impossible for Temecula educators to teach such a class, depriving students of both a valuable educational opportunity and the ability to satisfy a graduation requirement. Similarly, the resolution threatens the ability of Temecula schools to

offer courses that provide Advanced Placement ("AP") credit for students to apply toward a college degree. The College Board, which administers the AP Program, has stated that, "[i]f a school bans required topics from their AP courses, the AP Program removes the AP designation from that course and its inclusion in the AP Course Ledger provided to colleges and universities." *See* Complaint ¶ 86, n. 93. Any such loss of AP accreditation would harm all Temecula students, but perhaps none more so than the first-generation college applicants who benefit significantly from having AP credits—both in the application process and once at college.

Not only does Resolution 21 expressly stamp out of the curriculum essential content about the history, culture, and social dynamics of our democracy, but it is also causing Temecula teachers to omit certain content from their classrooms—even if not clearly required to do so by Resolution 21—for fear of becoming ensnared in the Resolution's vast and nebulous scope. *See* Sibby Decl. ¶ 7 ("Due to the Resolution's lack of clarity on what is prohibited from being taught, I am forced to broadly self-censor during my instruction to avoid coming into potential conflict with the law"); Eytchison Decl. ¶ 12 ; *see also Snatchko v. Westfield LLC*, 187 Cal. App. 4th 469, 495 (Cal. Ct. App. 2010) ("[A] vague law may have a chilling effect, causing people to steer a wider course than necessary in order to avoid the strictures of the law"). Thus, even though the Resolution on its face mentions only "race" and "sex," it is eliminating virtually all discussions of race, sex, gender identity, and sexual orientation from the classroom.

This self-censorship by teachers has taken many forms. In one instance, a teacher skipped "over a math problem . . . because the prompt included two dads." *Id*. ¶ 12; Declaration of Gwen S. ("Gwen Decl.") ¶ 8. As another example, every single sixth-grade teacher—other than Katrina Miles, the sole Black teacher—pulled *Roll of Thunder, Hear My Cry* from his/her course curriculum. Declaration of Katrina Miles ("Miles Decl.") ¶ 6. Even Ms. Miles herself, who lived through racial segregation, "took pains to change" her lesson plans and censor words referring to racial groups, like "white," from the classroom discussion. *Id*. And because the Resolution fails to specify the consequences for violating its strictures, teachers are fearful that their careers may be at risk for even the slightest misstep, Sibby Decl. ¶ 11, leading to even broader self-censorship.

In addition to causing the exclusion of key content from the curriculum, Resolution 21 also promises to "hinder [TVUSD's] ability to attract and retain highly qualified teachers." Declaration of Dr. Uma Jayakumar ("Jayakumar Decl.") ¶ 10 (finding that 54% of teachers surveyed would not work in a state with such a ban). As explained above, Temecula teachers are being put in the intractable position of having to satisfy professional standards and state expectations on the educational content to be provided to their students, while also trying not to run afoul of Resolution 21's prohibitions. The fact that the resolution provides no clear limits on its proscriptions makes this task all the more difficult. Teachers are thus reporting significant "anxiety" in the classroom, "[d]ue to the uncertainties regarding what is and is not permissible to discuss."

Eytchison Decl. ¶ 11; Sibby Decl. ¶ 10 ("The Resolution has created a tense and hostile work environment"). Given all of this, it is a near certainty that Resolution 21 will—over time—make it increasingly difficult for the TVUSD to recruit and keep teachers. And this will lead, of course, to additional deterioration in the quality of the education provided to Temecula students when viewed as a whole.

3. Resolution 21 diminishes intercultural understanding.

The resolution also presents another serious harm, which is that it prevents students from beneficial exposure to diverse viewpoints. As explained by plaintiffs' expert Dr. Tyrone Howard, "[s]tudents benefit from both exposure to the histories and experiences of others (windows) and seeing themselves reflected in their curriculum (mirrors)." Declaration of Dr. Tyrone Howard ("Howard Decl.") ¶ 9. Resolution 21 denies students both of these opportunities.

The resolution denies all Temecula students "windows" into the histories and experiences of others. Classrooms play a pivotal role in exposing students to a wide variety of competing viewpoints. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 868 (1982) (". . . just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members"). The resolution prevents diverse students from sharing the full extent of their lived experiences, and it prohibits teachers from facilitating meaningful discussions in

which the rich multitude of perspectives present in the classroom can be freely exchanged among students. This is an enormous loss, because "[w]hen accurate information about the experiences of Black people, other people of color, and members of the LGBTQ community is excised from schools, all students are deprived of an understanding of the challenges that these groups have overcome to strengthen our democracy and how these struggles continue today." Howard Decl. ¶ 10. This deprivation is certainly felt acutely by non-diverse students, who are denied the opportunity to hear key perspectives from *any* of their diverse classmates. But it is also felt by students who may be diverse in certain aspects (e.g., an Asian cisgender male), who can no longer hear the unique perspectives of students who are diverse in *other* respects (e.g., a Black trans female).

The resolution also denies "mirrors" to diverse students, because it restricts them from learning about their own cultures and histories in the classroom. For example, plaintiff Inez B. laments that because of Resolution 21, her daughters of Mexican descent may no longer learn about civil rights activists like Jovita Idar, who championed the cause of Mexican-Americans and Mexican immigrants. Declaration of Inez B ("Inez B. Decl.") ¶ 4. It is important for students to see themselves and their communities reflected in the school curriculum in order to thrive. *See* Arce v. Douglas, 793 F.3d 968, 986 (9th Cir. 2015) (finding that ethnic studies courses "offer great value to students," as they "benefit from a greater understanding of their history"); Declaration of Dr. Thomas Dee ("Dee Decl.") ¶¶ 8-12. Indeed, when educators employ culturally

relevant pedagogy in their curricula, diverse students are more likely to attend school, to get higher grades, to earn more credits, to graduate, and to attend college. Howard Decl. ¶¶ 15-16, Declaration of Dr. Thomas Dee ("Dee Decl.") ¶ 10. Resolution 21, by banning culturally informed education, threatens to drive all of these metrics in the opposite direction.

4. Resolution 21 leaves graduates of Temecula schools ill-equipped for higher education, the workforce, and civil engagement.

Courts recognize the important role that exposure to diverse viewpoints in the classroom plays in preparing students to become active and informed citizens. *See Pico*, 457 U.S. at 868. But "[r]ather than teaching students to grapple with challenging issues like racial inequality, Resolution 21 demands that schools deny the existence of these issues in our society." Howard Decl. ¶ 8. As a result, Temecula students will be woefully unprepared when they are later forced to confront, perhaps for the first time, issues that were censored from their classrooms. As plaintiff Carson L. notes, "You can't prepare for something if you can't learn about it in school." Complaint ¶ 86. Thus, Temecula students who attend college will be ill-equipped to engage in meaningful classroom discussion because they lack, for instance, foundational historical knowledge and exposure to various literary classics. It could also hinder college applications given that colleges seek well-rounded students who can contribute to and engage effectively in the diverse learning environment of a university. Those who enter the workforce will likely struggle, as employees need to "have cross-cultural competencies like the ability to consider others'

perspectives and collaborate effectively with colleagues from a wide range of backgrounds." Jayakumar Decl. ¶ 13. This could impact hiring and interview competencies as well as the ability of Temecula graduates to interact with customers in client-facing industries or navigate diverse workplaces. And those who come to view the racism, homophobia, transphobia, and other forms of hatred that are now so openly on display in Temecula as normal or acceptable will certainly not fare well in future civil engagement. Simply put, Resolution 21 denies Temecula students the chance to grow and prepare for the future alongside their peers in other districts. All these effects, taken together and "viewed as a whole," *Butt*, 4 Cal. 4th at 687 (1992), downgrade the quality of Temecula's educational program to below prevailing state standards.

C. The lower court erred in its analysis of Plaintiffs' Equal Protection claim.

Plaintiffs' equal protection claim is analyzed under the abuse of discretion standard. *Upland Police Officers Assn. v. City of Upland*, 111 Cal. App. 4th 1294, 1300 (2003) (the abuse of discretion standard is otherwise applied to denials of a preliminary injunction that do not rest on statutory interpretation or a pure question of law).

The lower court erred in its analysis of Plaintiffs' Equal Protection claim and improperly denied the preliminary injunction by ignoring extensive evidence of harm, and by failing to apply the actual holding of *Butt*. In its summary order, the lower court ignores the extensive evidence of harm substantiated in 11 Plaintiff declarations, 12 expert declarations, *amici curiae* briefing from legal experts, and scientific and academic literature. These harms are only further

amplified by the evidence discussed in detail in this brief. The court also cherry-picked from *Butt*, relying heavily on dicta suggesting that not all disparities amount to a constitutional violation (as acknowledged in the foregoing analysis), while ignoring a proper analysis of *Butt*'s actual holding that the school district's policy—like the policy here—did in fact violate the Constitution. As described in detail above, the Resolution—through its selective excision from the school district's curriculum of the ideas, perspectives, and histories of diverse communities grouped under the banner of "CRT"—has deprived students of an education equivalent to that offered in the vast majority of districts across the state that do *not* have such a ban, thus providing an educational experience for Temecula students that falls substantially and fundamentally short of prevailing statewide standards viewed as a whole. Under a proper analysis of *Butt* and the state's equal protection guarantees, the preliminary injunction should have been granted.

D. Resolution 21 cannot survive strict scrutiny.

The detrimental effects of Resolution 21 described above have plainly had a "real and appreciable impact on the affected students' fundamental California right to basic educational equality." *See Butt*, 4 Cal 4th at 686-688; *see supra* Section II.A. As discussed above, the *Butt* Court found this standard met by the early closure of Richmond schools, in part due to teacher testimony that the closure would preclude them from "completing instruction . . . essential for academic promotion, high school graduation, and college entrance." *Id*. Resolution 21 creates this same problem, in that it threatens to prevent

Temecula schools from providing (1) educational content expected in state standards and soon to be required for graduation from high school, (2) courses that will provide students with Advanced Placement credit, and (3) the education, exposure and tools required to succeed in higher education, the workforce and civil engagement. *See supra* Section II.B.1–II.B.4. The district's policy in both *Butt* and in the present case similarly deprive students of access to a statewide standard in curricular content, jeopardizing their right to an equal education. The resolution has also compromised the quality of education in Temecula by introducing a myriad of other serious problems, as explained in detail above. *Id.* Given that students in over 99% of the state's school districts are not being subjected to any of these harms, Temecula students are suffering from an unconstitutional denial of "an education basically equivalent to that provided elsewhere throughout the State." *Butt*, 4 Cal. 4th at 685.

Because Resolution 21 results in disparate treatment that impacts a fundamental right or interest, i.e., education, it is subject to strict scrutiny. *See supra* Section II.A; *Butt*, 4 Cal. 4th at 685-686. The resolution can accordingly be upheld only if it can be shown to be necessary to achieving a compelling state interest. *Serrano I*, 5 Cal. 3d at 597. It cannot.

The text of the resolution states that the Board "has the legal authority to determine the curriculum taught in the TVUSD," and that it "can require teachers to teach" that curriculum. Res. 21, at 2. But while the government may have some interest in vesting in local school boards control over certain matters relating to the public

schools, the California Supreme Court has held that that this desire for "local control" is *not* a compelling state interest that can justify the provision of unequal educational opportunity. *Serrano I*, 5 Cal. 3d at 620 ("local fiscal choice" is not a compelling state interest); *Serrano II,* 18 Cal. 3d at 768-769 ("local control of fiscal and educational matters" is not a compelling state interest); *Butt,* 4 Cal. 4th at 688 (same). Therefore, the Board's interest in controlling the curriculum in the TVUSD is not a compelling state interest that justifies Resolution 21.

The resolution also contains a number of "whereas" clauses that appear to set forth little more than generalized goals and aspirations, such as: (1) "[s]tudents deserve a high-quality education and experience . . ."; (2) "[t]he TVUSD desires to uplift and unite students by not imposing the responsibility of historical transgressions in the past . . ."; (3) the TVUSD "will not tolerate racism and racist conduct . . . ." Res. 21, at 1. But even if one were to treat these statements as articulations of a state interest, the problem is that there is *no* clearly expressed or remotely discernible relationship between the ban embodied in the resolution and the furtherance of any of the stated objectives. Indeed, as demonstrated above, Resolution 21 is actually *undermining* each of these goals, by degrading the quality of education, dividing and fostering anxiety and isolation in students, and enabling racism and racist conduct. Thus, Resolution 21 is neither necessary for, nor even conducive to, achieving any of the aspirations set forth in its "whereas" clauses.

Resolution 21 accordingly cannot survive strict scrutiny, and it must be stricken as a violation of Temecula students' fundamental right to educational equality under the California Constitution.

IV. CONCLUSION

For the reasons stated above, the Court should reverse the lower court's Denial of Plaintiffs' Motion for Preliminary Injunction.

DATED: October 2, 2024

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CERTIFICATE OF COMPLIANCE

I, Nitin Subhedar, am counsel for *Amici Curiae* LatinoJustice PLRDEF, California Immigrant Policy Center, and Asian Law Caucus, and I certify that the attached brief has a typeface of 13 points or more and contains 7,590 words, as determined by a computer word count.

DATED: October 2, 2024

/s/ Nitin Subhedar
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PROOF OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is 1999 Avenue of the Stars, Suite 3500, Los Angeles, CA 90067. On October 2, 2024, I served the following document(s) described as:

BRIEF OF *AMICI CURIAE* LATINOJUSTICE PRLDEF, CALIFORNIA IMMIGRANT POLICY CENTER, AND ASIAN LAW CAUCUS IN SUPPORT OF PLAINTIFFS-APPELLANTS

on the interested parties in this action as follows:

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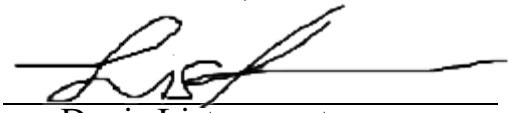
The Hon. Eric Keen
Superior Court of California
County of Riverside
30755-D Auld Rd, Murrieta, CA 92563

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this proof of service is executed at Los Angeles on October 2, 2024.



Denis Listengourt