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**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIV. THREE**

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

v.

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

APPEAL FROM RIVERSIDE COUNTY SUPERIOR COURT
ERIC KEEN, JUDGE – CASE NO. CVSW2306224

**BRIEF OF *AMICI CURIAE*
ELIZABETH MIRABELLI AND LORI ANN WEST
IN SUPPORT OF DEFENDANTS-RESPONDENTS**

LiMANDRI & JONNA LLP
special counsel for
THOMAS MORE SOCIETY
CHARLES S. LiMANDRI (#110841)
PAUL M. JONNA (#265389)
* JEFFREY M. TRISSELL (#292480)
P.O. Box 9120
RANCHO SANTA FE, CA 92067
858.759.9930 • FAX 858.759.9938
jtrissell@limandri.com

COUNSEL FOR *AMICI CURIAE*

**CERTIFICATE OF INTERESTED
ENTITIES OR PERSONS**

Amici curiae certify that they are not aware of any entity or person that Cal. Rules of Court, rule 8.208(e)(2), requires them to list in this Certificate.

Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: October 2, 2024

By: 

Charles S. LiMandri

Paul M. Jonna

Jeffrey M. Trissell

Attorneys for *Amici Curiae*

Elizabeth Mirabelli and

Lori Ann West

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INTEREST OF THE *AMICI*

Elizabeth Mirabelli and **Lori Ann West** are public school teachers in San Diego County, California, and plaintiffs in the federal action *Mirabelli, et al. v. Olson, et al.* (S.D. Cal. Apr. 27, 2023, No. 3:23-cv-768). In February 2022 they were informed of their school district’s new policies requiring teachers to facilitate a child’s gender transition without parental involvement or notice, which is based on guidance from the California Department of Education (“CDE”). They initially sought a religious accommodation under Title VII, and when that was denied, sought and obtained a federal preliminary injunction. The U.S. District Court for the Southern District of California enjoined enforcement of the policies on the basis that they violated the teachers’ First Amendment rights to freedom of speech and the free exercise of religion, and parents’ Fourteenth Amendment rights to direct the upbringing of their children.

Most recently, Mrs. Mirabelli and Mrs. West amended their complaint to add parent-plaintiffs and recast their complaint as a Fed. R. Civ. P. 23(b)(1)(A) and (b)(2) class action against Attorney General Rob Bonta and officials with the California Department of Education. Mrs. Mirabelli and Mrs. West now wish to present their story and arguments to this Court to explain how California’s guidance that school districts must adopt Parental Exclusion Policies came to be, and why school districts like Temecula Valley Unified School District are rightly pushing back and instead passing Parental Notification Policies.

INTRODUCTION

Relying on the “autonomy” privacy right of children to make decisions that “implicate ... control over their personal bodily integrity, [and] serious long-term consequences in determining their life choices,” both the California Attorney General and the California Department of Education have asserted that “schools are required to respect the limitations that a student places on the disclosure of their transgender status, including not sharing that information with the student’s parents.” (See Ex Parte Appl. for TRO, p.23, *People ex rel. Bonta v. Chino Valley Unified School Dist.* (Cal. Super. Ct., San Bernardino Cnty., Aug. 29, 2023, No. CIV SB 2317301);¹ California Dept. of Education, *School Success and Opportunity Act (Assembly Bill 1266) Frequently Asked Questions* (Jan. 29, 2016)².)

As a result of the state’s aggressive enforcement of its mandate, school districts across the state have been forced to adopt “Parental Exclusion Policies”—i.e., a policy requiring schools to socially transition a child to the opposite gender without informing the child’s parents—most often based on a model policy promoted by the CDE. Yet, as noted by a federal district court last year, “elevating a child’s gender-related choices to that of paramount importance, while excluding a parent from knowing of, or participating in, that kind of choice, is as foreign to federal

¹ Available at <https://oag.ca.gov/system/files/attachments/press-docs/Mem.%20of%20Ps%20%20As%20in%20Supp.%20of%20Mot.%20for%20TRO%20and%20OSC%20w%20filed%20caption%20page.pdf>.

² Available at <https://www.cde.ca.gov/re/di/eo/faqs.asp>.

constitutional and statutory law as it is medically unwise.”

(*Mirabelli v. Olson* (S.D. Cal. 2023) 691 F.Supp.3d 1197, 1212.)

That court’s preliminary decision remains as correct today as it was last year. As explained below, at its core, Temecula Valley Unified School District’s Parental Notification Policy protects the “varied rights as a unified whole” that make up the *right to have a family*: the right to “marry, establish a home and bring up children.” (*Obergefell v. Hodges* (2015) 576 U.S. 644, 668; quoting *Zablocki v. Redhail* (1978) 434 U.S. 374, 384).

Parental control over decision making for a minor child is a core aspect of this right, *for both the parent and the child*, because “parental authority” is crucial “to the child’s chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.” (*Bellotti v. Baird* (1979) 443 U.S. 622, 638-639 [plur. opn.].) Somehow California has forgotten that fundamental right, stripped parents and children of their fundamental rights, claimed children as “the mere creature of the state” (*Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* (1925) 268 U.S. 510, 535), and has unconstitutionally claimed the right “to declare by ipse dixit that controversial ideas are now uncontroversial.” (*Vlaming v. West Point School Board* (2023) 302 Va. 504, 569.)

This Court should affirm the trial court’s decision denying the plaintiff’s request for an unconstitutional preliminary injunction. The Parental Exclusion Policies which the plaintiffs prefer necessarily inflict “a trifecta of harm” on thousands of parents, children, and teachers:

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

(*Mirabelli, supra*, 691 F.Supp.3d at p.1222.)

ARGUMENT

Below *amici curiae* Elizabeth Mirabelli and Lori Ann West first discuss the history of their case, before explaining the underlying relevant constitutional law that has led several courts to reject Parental Exclusion Policies. The Parental Notification Policy at issue in this case is the flip-side of those policies which have been rejected by several courts. Likewise, this Court should confirm the importance of the parental right to direct the upbringing of one’s own children, and affirm Temecula Valley Unified School District’s right to pass policies protecting that right.

I. History of California’s Promotion of Parental Exclusion Policies and the *Mirabelli v. Olson* Action

A. California Adopts and Enforces Guidance Requiring Parental Exclusion Policies

In February 2013, the California Legislature introduced AB 1266, a bill which provided that “[a] pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities

consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.” (Assem. Bill No. 1266 (2013-2014 Reg. Sess.) as introduced Feb. 22, 2013.) The next month, March 2013, the National Center for Lesbian Rights (“NCLR”) reached out to the California Department of Education to provide them with a draft legal advisory on the rights of transgender students and model school policy to implement that bill, should it pass. (See Email from Asaf Orr, Esq., to Stephanie Papas and Alejandro Espinoza (Mar. 18, 2013, 4:32 p.m.) (on file with the author as CDE000160-61).)

The NCLR's draft legal advisory was meant to replace a prior legal advisory, issued by the California Department of Education in 2004, and so surveyed the breadth of law concerning transgender students. As relevant here, the draft legal advisory stated that, in light of a child's privacy rights under Cal. Const., art. I, § 1, “schools are required to respect the limitations that a student places on the disclosure of their transgender status, including not sharing that information with the student's parents.” (Draft Legal Advisory p.4 (Mar. 18, 2013) (CDE000165); see also Draft Model Policy p.3 (Mar. 18, 2013) (CDE000171).)

In August 2013, AB 1266 was signed into law (see Stats. 2013, ch. 85 [AB 1266] [eff. Jan. 1, 2014]; amending Ed. Code § 221.5, subd. (f)), and the California Department of Education began in earnest to review the NCLR's draft legal advisory. The legal advisory was ultimately divided into two parts: a legal advisory and a frequently asked questions page, and published in January 2016. (See California Dept. of Education, *Legal Advisory*

regarding application of California’s antidiscrimination statutes to transgender youth in schools (Jan. 29, 2016), <https://www.cde.ca.gov/re/di/eo/legaladvisory.asp>.)

The FAQ page retained the draft legal advisory’s reference to privacy rights, including the above quote, but expanded upon it, explaining that minors have both “autonomy privacy” rights as well as “informational privacy” rights—even as against their parents. The FAQ page also hyperlinked to model policies BP 5145.3 and AR 5145.3³ issued by the California School Boards Association (“CSBA”). These model policies were based on the NCLR’s model policy provided to the California Department of Education. (See Cal. Dept. of Ed., *School Success and Opportunity Act (Assembly Bill 1266) Frequently Asked Questions* (Jan. 29, 2016), <https://www.cde.ca.gov/re/di/eo/faqs.asp>.)

Later, when one school district rejected the California Department of Education’s legal advisory, which mandates Parental Exclusion Policies, and instead passed a Parental *Notification* Policy should a student request a social transition (gender transition as added to a long list of information that parents are notified about), the Department ordered them to rescind the policy and sued for enforcement of its order. As explained in that lawsuit, the Department has ultimate authority to order school districts to comply. (See Complaint, *California*

³ In California, a Board Policy (“BP”) is considered and passed by a school board; an Administrative Regulation (“AR”) is enacted by a school superintendent.

Dept. of Education v. Rocklin Unified School Dist. (Cal. Super. Ct., Placer Cnty., Apr. 10, 2024, No. S-CV-0052605).⁴

Similarly, when another school district rejected the legal advisory, the Attorney General sued them. The Attorney General did not seek to enforce the legal advisory itself, but rather the Privacy Clause of the California Constitution. (See Complaint, *People ex rel. Bonta v. Chino Valley Unified School Dist.* (Cal. Super. Ct., San Bernardino Cnty., Aug. 28, 2023, No. CIV SB 2317301).)⁵ In his briefing, Attorney General Bonta explained that “[m]inors have a legally protected and reasonable expectation of privacy in their gender identity, a core aspect of their autonomy.” (Ex Parte Appl. for TRO, p.23, *People ex rel. Bonta v. Chino Valley Unified School Dist.* (Cal. Super. Ct., San Bernardino Cnty., Aug. 29, 2023, No. CIV SB 2317301).) He continued, analogizing gender identity to reproductive rights: “[a] student’s gender identity will likewise implicate the student’s ‘control over their personal bodily integrity,’ ‘serious long-term consequences in determining their life choices,’ and an aspect of their identity ‘so central’ to a student’s ‘ability to define’ their life.” (*Id.* at p.23; quoting *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 337.)

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⁴ Available at <https://libertyjusticecenter.org/wp-content/uploads/CDE-vs-RUSD.pdf>.

⁵ Available at <https://oag.ca.gov/system/files/attachments/press-docs/Stamped%20-%20CVUSD%20Complaint.pdf>.

B. California’s Parental Exclusion Policies Are Adopted by Mrs. Mirabelli’s and Mrs. West’s School District

Over the next several years, California school districts slowly began adopting the State’s model BP 5145.3 and AR 5145.3. But practical issues did not arise for parents or teachers until after California students were forced into remote learning due to the COVID-19 pandemic. At that time, California saw an explosion of elementary and middle-school students identifying as transgender. This led Mrs. Mirabelli’s and Mrs. West’s school district to hold a district-wide staff training in February 2022 to explain its adoption of the State’s model BP 5145.3 and AR 5145.3. (See Second Amended Complaint, *Mirabelli, et al. v. Olson, et al.* (S.D. Cal. June 7, 2024, No. 3:23-cv-768) ECF No. 118-3.)

Mrs. Elizabeth Mirabelli and Mrs. Lori Ann West have had exemplary, decades-long teaching careers in K-8 public schools. They are both devout adherents of their religious traditions—Roman Catholic and Christian respectively—and have been a boon to the students they have taught.

Mrs. Mirabelli has taught middle-school English for more than 25 years. She received her Master’s Degree of Education from the University of California at San Diego. She also received two certifications as a National Board Certified Teacher by the National Board for Professional Teaching Standards, which is the highest level of teacher certification available, and has become a Master Teacher as understood by federal law. (See 20 U.S.C. § 9905(3).) Mrs. Mirabelli also became a District Trainer for her school district and served for five years as the Department Chair

for her middle school's English Language Arts Department. She has consistently received outstanding evaluations, has been named Teacher of the Year, and remains a respected member of the faculty.

Mrs. Lori Ann West's contributions to education have been no less commendable. For 30 years, she taught Physical Education and Adapted Physical Education to elementary, middle, and high school students in San Diego County. She is a two-time Escondido Elementary Educators Association ("EEEA") Teacher of the Year. Mrs. West has served her community with distinction as Department Chair in the Physical Education Department and was named Teacher of The Year for her innovative program for adaptive P.E. She also won the California Teachers Association WHO Award for her contributions to advance the teaching profession.

In accordance with their Catholic and Christian faiths, Mrs. Mirabelli and Mrs. West sincerely hold the religious belief that God created the human race male and female, each with an innate, purposeful, and complementary nature. Mrs. Mirabelli and Mrs. West believe that the human species is binary and that a person's physical and biological characteristics cannot be rejected without significant harm. Mrs. Mirabelli and Mrs. West also hold the belief that the parent-child relationship is ordained by God, and as such, holds a place of pre-eminence within the context of society. Further, they regard the family as the fundamental social unit of society, where children are nurtured in their development to adulthood.

These beliefs are quintessentially Christian. Mrs. Mirabelli and Mrs. West’s views on the role of the family in society, and the inherent nature of humans as male and female, extend to their professional duties. This is particularly relevant regarding honesty, whether that be with parents or in the example they set for students. They seek to partner with parents in the education of students, not replace them. As Christian educators in public schools, Mrs. Mirabelli and Mrs. West follow guidance from religious leaders.

As example, the Catholic Church firmly recognizes that issues of gender confusion are complex and troubling: “To be sure, many people are sincerely looking for ways to respond to real problems and real suffering,” and “[t]he search for solutions to problems of human suffering must continue.” (Committee on Doctrine, *Doctrinal Note on the Moral Limits to Technological Manipulation of the Human Body*, U.S. Conference of Catholic Bishops (Mar. 20, 2023) pp.12-13.)⁶ But, as stated by the Vatican, “the concept of human dignity” should not be “misused to justify an arbitrary proliferation of new rights,” and “[d]esiring a personal self-determination, as gender theory prescribes, ... amounts to a concession to the age-old temptation to make oneself God, entering into competition with the true God of love revealed to us in the Gospel.” (V́ctor Manuel Cardinal Ferńandez, *Declaration*

⁶ Available at <https://www.usccb.org/resources/Doctrinal%20Note%202023-03-20.pdf>.

“Dignitas Infinita” on Human Dignity, Dicastery for the Doctrine of the Faith (Apr. 8, 2024) §§ 25, 57.)⁷

Most importantly, as stated by the Vatican, primary responsibility for dealing with the complex issues of gender confusion must rest with parents. Under the “principle of subsidiarity,” it is very important that educators do not preempt the role of parents: “Across th[e] educational alliance, pedagogical activity should be informed by the principle of subsidiarity: ‘All other participants in the process of education are only able to carry out their responsibilities in the name of the parents, with their consent and, to a certain degree, with their authorization.’” (Giuseppe Cardinal Versaldi, *“Male and Female He Created Them”: Towards a Path of Dialogue on the Question of Gender Theory in Education*, Congregation Catholic Education (Feb. 2, 2019) ¶46.)⁸

In light of this conflict, their first action was to ask how the school district would inform parents about these new policies. However, their school district confirmed via email that “[t]here have been conversations about using the training as part of mandated trainings at the start of each year. *At this time, parents/guardians will not receive it.*” (Email from Trent Smith to All EUSD Staff (Apr. 7, 2022, 8:05 p.m.), italics added.)

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⁷ Available at <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2024/04/08/240408c.html>.

⁸ Available at http://www.educatio.va/content/dam/cec/Documenti/19_0997_INGLESE.pdf.

The next semester, Fall 2023, Mrs. Mirabelli received the below email:

Gloria Torres <[REDACTED]@eusd.org> Mon, Aug 15, 2022 at 2:40 PM
To: [REDACTED]
Cc: [REDACTED]

Hi All,

Here is a full list with one addition highlighted below.

I have also added a few updates to our team doc based on the meetings I had with students. View the doc here.

[REDACTED]: Preferred name is [REDACTED] (pronouns are he/it). The parents are **NOT** aware so please use [REDACTED] and she/her when calling home.

[REDACTED]: Preferred name is [REDACTED] (pronouns are he/him). Mom is aware but dad is **NOT** aware, but student is okay with you using [REDACTED] (she/her) with both parents to make it as easy for you as possible when communicating home.

[REDACTED]: Preferred name is [REDACTED] (pronouns are they/them). Parents are **NOT** aware so please use [REDACTED] and she/her when calling home.

[REDACTED]: Preferred name is [REDACTED] (pronouns are he/him). Adults at home **NOT** aware, please use [REDACTED] and she/her when calling home.

[REDACTED]: Preferred name is [REDACTED] (pronouns are they/she). Mom is **NOT** aware so please use [REDACTED] and she/her when calling home.

[REDACTED]: Preferred name is [REDACTED] (pronouns are he/him). Dad and stepmom are **NOT** aware, please use [REDACTED] and she/her when calling home.

[REDACTED]: Preferred name is [REDACTED] (pronouns they/them). Mom IS aware and supportive :)

(Email from Gloria Torres to All Rincon Staff (Aug. 15, 2022, 2:40 p.m..))

Upon receipt of the email Mrs. Mirabelli experienced shock and dismay. She even doubted the validity of the directive because it was sent by a colleague. So she decided to ask her supervisor who confirmed that the email was to be regarded as a directive from the administration.

C. Mrs. Mirabelli and Mrs. West Receive Judicial Relief

As a result of the above email, Mrs. Mirabelli and Mrs. West requested a Title VII religious accommodation from their school district in October 2022, which was denied in February 2023. Then, in April 2024, they initiated a 42 U.S.C. § 1983 lawsuit for violations of their right to freedom of speech and free exercise of

religion and sought declaratory relief that California’s Parental Exclusion Policies violated parents’ Fourteenth Amendment rights to direct the upbringing of their children.

Because of retaliation at their school district, they were immediately placed on administrative leave. The retaliation started when Mrs. Mirabelli discovered sixteen malicious posters placed in her classroom. Two days later, the band teacher filmed and distributed a protest video of students waving transgender flags and singing “This is Me!” The video was blasted out via e-mail to all staff including teachers, administration, clerks, and custodians.

The same week a group of teachers coordinated a T-shirt protest and held classroom discussions about the lawsuit. An anonymous person also subscribed Mrs. Mirabelli’s and Mrs. West’s work email accounts to various LGBT organizations, resulting in over 150 emails being sent to the teachers’ email accounts. Soon after, a school clerk filed a frivolous complaint against Mrs. West, and it was later uncovered that the same person facilitated a protest in front of school grounds, and circulated a flier stating that Mrs. Mirabelli and Mrs. West were responsible for “slaughtering students.”

Two weeks after initiating their action, Mrs. Mirabelli and Mrs. West moved for a preliminary injunction. Although that motion was initially set for hearing on June 26, 2023, it was repeatedly continued and ultimately held on August 30, 2023. (See Transcript of Motion Hearing, *Mirabelli, et al. v. Olson, et al.* (S.D. Cal. Aug. 30, 2023, No. 3:23-cv-768) ECF No. 39.) At the

hearing, the District Judge explained that he had initially been skeptical of Mrs. Mirabelli's and Mrs. West's recitation of the facts:

I was basically tentatively leaning in [the school district's] direction because ... it struck me that what the school district was doing was limiting the teachers' discussion with the parents, saying "this is beyond your purview, you're not to talk to the parents about this, leave that to some other administrator," and then the administrator would talk to the parents and let the parents know what was going on. Then the parents could exercise their parental rights and go and say, "okay, here is how we're going to deal with it."

(*Id.* at 100, cleaned up.)

But when the government confirmed that there is no process for parents to ever be informed, the District Judge was amazed, and concluded he had to rule for Mrs. Mirabelli and Mrs. West:

I thought you were going to tell me, "well, if the teacher can't talk to the parent, then the parent can talk to the administrator and then the administrator will go talk to the parent and explain what's going on." But you're telling me that a five-year-old that says, "I don't want my parents to know," that's it, that's the end of the process. The only thing that changes is that if the child says to you, "I don't want my parents to know because they might spank me or worse," then your next step is to go to CPS. But there's no escape valve for the parents to ever know that this is what they're child is doing at school, right?

(*Id.* at 101.)

Two weeks later, the District Court issued a preliminary injunction in favor of Mrs. Mirabelli and Mrs. West. (*Mirabelli v. Olson* (S.D. Cal. 2023) 691 F.Supp.3d 1197.) The District Court began by detailing the expert declaration submitted by Dr. Erica Anderson, Ph.D., a transgender woman and expert in child

gender incongruence, who explained that “[c]oncealing from a parent the fact of a student's transitioning at school is not in the best medical interests of a student.” (*Id.* at p.1209.)

The District Court then surveyed the Supreme Court’s precedents regarding youthful impetuosity and the rights of parents to direct the upbringing of their children, as well as case law regarding application of the California constitutional right to privacy in the context of minors asserting privacy interests as against their parents. (*Id.* at pp.1209-1213.)

Finally, the District Court analyzed Mrs. Mirabelli’s and Mrs. West’s likelihood of success on the merits, primarily concluding that they would be likely to succeed because “[t]he reasons proffered by the defendants for the policy pass neither the strict scrutiny *nor the rational basis tests.*” (*Id.* at 1217, italics added.) In sum, the District Court concluded, California lacks any legitimate state interest in violating parents’ rights to direct the upbringing of their children and cannot order teachers to do so.

Instead of appealing, as indicated above, California has filed two enforcement actions against school districts in state court, which inspired the legal nonprofit here to also file its own action. (See *People ex rel. Bonta v. Chino Valley Unified School Dist.*, (Cal. Super. Ct., San Bernardino Cnty., Aug. 28, 2023, No. CIV SB 2317301); *California Dept. of Education v. Rocklin Unified School Dist.* (Cal. Super. Ct., Placer Cnty., Apr. 10, 2024, No. S-CV-0052605).) Nonetheless, this Court should reaffirm the federal constitutional rights of parents to direct the upbringing of their children.

II. The Constitution Protects Against Government Interference with the Right to Have a Family

Across the board, the Supreme Court has recently re-focused all constitutional inquiries towards a history and tradition analysis. (See, e.g., *Nat. Inst. of Family & Life Advocates v. Becerra* (2018) 585 U.S. 755, 768; *Moody v. NetChoice, LLC* (2024) 144 S.Ct. 2383, 2393 [Free Speech Clause]; *Espinoza v. Montana Dept. of Revenue* (2020) 591 U.S. 464, 482; *Wisconsin v. Yoder* (1972) 406 U.S. 205, 227 [Free Exercise Clause]; *Town of Greece v. Galloway* (2014) 572 U.S. 565, 575-577; *Kennedy v. Bremerton School Dist.* (2022) 597 U.S. 507, 535-536 [Establishment Clause]; *New York State Rifle & Pistol Assn., Inc. v. Bruen* (2022) 597 U.S. 1, 17; *U.S. v. Rahimi* (2024) 144 S.Ct. 1889, 1896-1897 [Right to Bear Arms]; *Dobbs v. Jackson Women’s Health Organization* (2022) 597 U.S. 215, 240 [Substantive Due Process].).

Under this analogical reasoning, the Court looks at whether the “challenged regulation is consistent with the principles that underpin our regulatory tradition,” by examining “[w]hy and how the regulation burdens the right.” (*Rahimi, supra*, 144 S.Ct. at p.1898, italics added.) Thus, if founding era laws burdened constitutional rights “to address *particular problems*,” contemporary laws addressing similar problems will likely be permissible, i.e., “the why.” (*Id.*, italics added.) But, even if the reason is permissible, the law may be impermissible if it burdens the constitutional right “to *an extent beyond* what was done at the founding,” i.e., “the how.” (*Id.*, italics added.) As applied here, legal precedents going back all the way to the founding make clear that both the “why” and “how” of Parental Exclusion Policies are

unconstitutional. Instead, school districts are constitutionally required to pass Parental Notification Policies.

A. Background on the Right to Freedom of Thought

“The Free Speech Clause of the First Amendment ... protect[s] the ‘freedom to think as you will and to speak as you think.’” (303 *Creative LLC v. Elenis* (2023) 600 U.S. 570, 584; quoting *Boy Scouts of America v. Dale* (2000) 530 U.S. 640, 660-661). Further, “freedom of speech ‘includes both the right to speak freely and the right to refrain from speaking at all.’” (*Janus v. AFSCME, Council 31* (2018) 585 U.S. 878, 892; quoting *Wooley v. Maynard* (1977) 430 U.S. 705, 714). “The framers ... [saw] freedom of speech both as an end and as a means. An end because the freedom to think and speak is among our inalienable human rights. A means because the freedom of thought and speech is indispensable to the discovery and spread of political truth.” (303 *Creative, supra*, 600 U.S. at pp.584-85, cleaned up.) Thus, “speech concerning public affairs is more than self-expression; it is the essence of self-government.” (*Snyder v. Phelps* (2011) 562 U.S. 443, 452.)

In light of this strong protection for freedom of thought, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” (*West Virginia Board of Education v. Barnette* (1943) 319 U.S. 624, 642.) “Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State not to attempt in a society constitutionally committed to the ideal of individual

liberty and freedom of choice.” (*Bellotti v. Baird* (1979) 443 U.S. 622, 638 [plur. opn.])

In schools, the government’s role is primarily teaching “future generations [to] understand the workings in practice of the well-known aphorism, ‘I disapprove of what you say, but I will defend to the death your right to say it.’” (*Mahanoy Area School Dist. v. B.L.* (2021) 594 U.S. 180, 190.) Thus, a governmental “system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.” (*Vlaming v. West Point School Board* (2023) 302 Va. 504, 565; quoting *Wooley, supra*, 430 U.S. at p.714). If certain speech “can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,” it cannot be restricted by the government. (*Snyder, supra*, 562 U.S. at p.453, cleaned up; accord *Janus, supra*, 585 U.S. at pp.913-914.)

B. Background on the Right to Have a Family

Under the Fourteenth Amendment, “[n]o State shall ... deprive any person of life, *liberty*, or property, without due process of law.” (U.S. Const., amend. XIV, § 1, italics added.) “[T]he Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned.” (*Griswold v. Connecticut* (1965) 381 U.S. 479, 488 [conc. opn. of Goldberg, J.]) As the Ninth Circuit recognized a hundred years ago, some rights are simply “given by the Almighty for beneficent

purposes.” (*Farrington v. Tokushige* (9th Cir. 1926) 11 F.2d 710, 713; quoting *Berea College v. Kentucky* (1908) 211 U.S. 45, 67 [dis. opn. of Harlan, J.])

Under this protection of liberty, every American has the right “to marry, establish a home and bring up children.” (*Meyer v. Nebraska* (1923) 262 U.S. 390, 399.) “Marriage and procreation are fundamental to the very existence and survival of the race” and thus “one of the basic civil rights of man.” (*Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.) Because this constellation of rights complement each other, “[t]he [Supreme] Court has recognized these connections by describing the varied rights as a unified whole: ‘[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.’” (*Obergefell v. Hodges* (2015) 576 U.S. 644, 668; quoting *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), original alterations.)⁹

Strong protection of these rights is important because “evil or reckless hands” may wish to restrict them for the purpose of “caus[ing] ... types which are inimical to the dominant group to wither and disappear.” (*Skinner*, supra, 316 U.S. at p.541.) The “fundamental theory of liberty” thus “excludes any general power of the state to standardize its children” (*Pierce v. Society of the*

⁹ In its most recent major discussion of these rights, the Court reaffirmed them, stating that “our conclusion ... does not undermine them in any way” since they did not concern “the critical moral question posed by” “what the law at issue in this case regards as the life of an ‘unborn human being.’” (*Dobbs*, supra, 597 U.S. at pp.256-257.)

Sisters of the Holy Names of Jesus and Mary (1925) 268 U.S. 510, 535), or to standardize “family patterns” (*Moore v. East Cleveland* (1977) 431 U.S. 494, 506 [plur. opn.]), or to standardize family “communication” dynamics. (*Hodgson v. Minnesota* (1990) 497 U.S. 417, 452 [plur. opn.]) While the desire for “a homogeneous people” is understandable, it cannot come at the expense of parents’ “natural and inherent right to the nurture, control, and tutorship of their offspring, that they may be brought up according to the parents’ conception of what is right and just, decent, and respectable, and manly and noble in life.” (*Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce* (D. Or. 1924) 296 F. 928, 936-938, *affd.* (1925) 268 U.S. 510.) “Beliefs about such matters [as the meaning of existence] could not define the attributes of personhood were they formed under compulsion of the State.” (*Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 851.)

The Supreme Court has not definitively decided what standard of review applies to the right to raise children. (See, e.g., *Doe v. Heck* (7th Cir. 2003) 327 F.3d 492, 519.) But it has stated more generally that “[w]hen a fundamental right is at stake, the Government can act only by narrowly tailored means that serve a compelling state interest,” i.e., “strict scrutiny.” (*Dept. of State v. Muñoz* (2024) 144 S.Ct. 1812, 1821-1822.) And the Court has characterized “the interest of parents in the care, custody, and control of their children” as “perhaps the oldest of the fundamental liberty interests recognized by this Court.” (*Troxel v. Granville* (2000) 530 U.S. 57, 65 [plur. opn.]; see *id.* at p.80 [conc. opn. of

Thomas, J.] [stating that court ignored standard of review, but that appropriate standard is strict scrutiny]; see also *Brach v. Newsom* (9th Cir. 2021) 6 F.4th 904, 931 [applying strict scrutiny], vacated as moot on reh'g. en banc, (9th Cir. 2022) 38 F.4th 6.)

C. Background on the Right to Raise Your Children

A necessary corollary of the right to have a family is that parents have “the right of control” over their children. (*Meyer, supra*, 262 U.S. at p.400.) “Not only do parents have a constitutional right to exercise lawful control over the activities of their minor children, the law requires parents to do so.” (*Brekke v. Wills* (2005) 125 Cal.App.4th 1400, 1410.) Fifty years ago, summarizing its conclusion from fifty years before then, the Supreme Court explained that “[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established *beyond debate* as an enduring American tradition.” (*Yoder, supra*, 406 U.S. at p.232, italics added; citing *Meyer, supra*, 262 U.S. 390.)

As recognized by the Supreme Court, the historical understanding of parental authority extends back to the beginning of Western civilization. Three hundred years ago, in a treatise that would inspire the founding of the United States, John Locke held:

Children, I confess, are not born in this full state of equality, though they are born to it. Their parents have a sort of rule and jurisdiction over them when they come into the world, and for some time after, but it is but a temporary one. The bonds of this subjection are like the swaddling clothes they are wrapt up in and supported by in the weakness of their

infancy. Age and reason as they grow up loosen them till at length they drop quite off, and leave a man at his own free disposal.

(John Locke, Concerning Civil Government, Second Essay (1689) § 55.) The Supreme Court has often recognized that Locke’s writings inspired America’s founding principles. This applies especially in the context of parental rights: “In general, the most popular books in the Colonies on the eve of the American Revolution were not political discourses but ones concerned with child rearing.” (*Brown v. Entertainment Merchants Assn.* (2011) 564 U.S. 786, 825 [dis. opn. of Thomas, J.])

This right of “parental control over children” flows from concomitant responsibilities: “those who nurture [the child] and direct his destiny have the right, *coupled with the high duty*, to recognize and prepare him for additional obligations.” (*Bellotti, supra*, 443 U.S. at p.637 [plur. opn.]; quoting *Pierce, supra*, 268 U.S. at p.535, italics added.) “The duty to prepare the child for ‘additional obligations,’ referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship.” (*Yoder, supra*, 406 U.S. at p.233.) Control of “the child reside[s] first in the parents, whose *primary function and freedom* include preparation for obligations the state can *neither supply*,” in light of the First Amendment, “nor hinder.” (*Prince v. Massachusetts* (1944) 321 U.S. 158, 166, italics added.)

Procedurally, “there is a presumption that fit parents act in the best interests of their children” (*Troxel, supra*, 530 U.S. at p.68 [plur. opn.]), because “historically [the law] has recognized that natural bonds of affection lead parents to act in the best interests

of their children.” (*Parham v. J.R.* (1979) 442 U.S. 584, 602; citing 1 William Blackstone, Commentaries on the Laws of England (1765) p.447; 2 James Kent, Commentaries on American Law (1826) p.190.) Indeed, “[a] parent may curtail a child’s exercise of constitutional rights because a parent’s own constitutionally protected ‘liberty’ includes the right to ‘bring up children’ and to ‘direct the upbringing and education of children.’” (*In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1034; quoting *In re Roger S.* (1977) 19 Cal.3d 921, 928.)

The Supreme Court, however, has explained that parental control is not a limit on the child’s liberty—*but a fulfillment of it*: “[T]he tradition of parental authority is not inconsistent with our tradition of individual liberty [for a child]; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child’s chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.” (*Bellotti, supra*, 443 U.S. at pp.638-639 [plur. opn.].) The only exception ever identified by the High Court is the exercise of the right to an abortion, because of its “peculiar nature” and “unique character” that “effectively expires in a matter of weeks from the onset of pregnancy.” (*Id.* at pp.642, 644, fn.23, 650 [plur. opn.]; but see *Dobbs, supra*, 597 U.S. at pp.278-279 [explaining that this was an “unrestrained” expansion of the law].)

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D. Background on the Right to Educate Your Children

Preparing one's children for adulthood includes the right and duty to "direct the education of children." (*Pierce, supra*, 268 U.S. at p.534.) "Comprehensive and all-pervading as the police power is, there are certain rights and certain relations beyond its scope. One of these is the right of a parent to educate his own child in his own way." (*Farrington, supra*, 11 F.2d at p.714.) At the time of the ratification of the Fourteenth Amendment, "[t]he concept of total parental control over children's lives extended into the schools." (*Brown, supra*, 564 U.S. at p.830 [dis. opn. of Thomas, J.]) "The history clearly shows a founding generation that believed parents to have complete authority over their minor children and expected parents to direct the development of those children.... Teachers and schools came under scrutiny, and children's reading material was carefully supervised." (*Id.* at pp.834-835 [dis. opn. of Thomas, J.])

Thus, numerous nineteenth and early twentieth century courts held that parents had a right, whether based on the Constitution or the common-law, to opt their children out of classes. (See, e.g., *Vollmar v. Stanley* (1927) 81 Colo. 276 [objection by Catholics to reading the King James Bible]; *Hardwick v. Fruitridge School Dist.* (1921) 54 Cal.App. 696 [religious objection to dance class].)¹⁰

¹⁰ (See also, e.g., *Kelley v. Ferguson* (1914) 95 Neb. 63 [objection to cooking class as unnecessary]; *Garvin County v. Thompson* (1909) 24 Okla. 1 [objection to singing lessons]; *Rulison v. Post* (1875) 79 Ill. 567 [objection to book-keeping class]; *Morrow v. Wood* (1874) 35 Wis. 59 [objection to geography course]; *Guernsey v. Pitkin* (1859) 32 Vt. 224 [objection to writing compositions].)

As succinctly explained by the court in *Vollmar*: “The parent has a [state law] right to have his children educated in the public schools of the state. He also has a constitutional right, as we have shown, to direct, within limits, his children’s studies. The school board, though with full power to prescribe the studies, cannot make the surrender of the second a condition of the enjoyment of the first.” (*Vollmar, supra*, 81 Colo. at 282, citations omitted.)

More recently, the Supreme Court has stated that it “has been the unmistakable holding of this Court for almost 50 years” that “students [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” (*Tinker v. Des Moines School Dist.* (1969) 393 U.S. 503, 506; citing *Meyer, supra*, 262 U.S. 390; *Pierce, supra*, 268 U.S. 510; *Barnette, supra*, 319 U.S. 624.) And most recently, the Supreme Court has reiterated its holding “that students do not ‘shed their constitutional rights to freedom of speech or expression,’ even ‘at the school house gate’” (*Mahanoy, supra*, 594 U.S. at p.187; quoting *Tinker, supra*, 393 U.S. at p.506), because children’s rights generally belong to their parents, *it is parents* who “delegate[] to school officials their own control of [their child],” under the doctrine of *in loco parentis*. (*Id.* at p.192.) But in the modern context of “compulsory” education, parents must *only* be “treated as having relinquished the measure of authority that the schools must be able to exercise in order to carry out their state-mandated educational mission.” (*Tatel v. Mt. Lebanon School Dist.* (W.D. Pa. 2023) 675 F.Supp.3d 551, 561, fn.7; quoting *Mahanoy, supra*, 594 U.S. at pp.198-200 [conc. opn. of Alito, J.]

Thus, as explained by the Ninth Circuit, parents may not object and modify curriculum school-wide, but “[m]aking intimate decisions and controlling the state’s dissemination of information regarding intimate matters are two entirely different subjects,” and schools may “not interfere with the right of the parents to make intimate decisions.” (*Fields v. Palmdale School Dist.* (9th Cir. 2006) 447 F.3d 1187, 1191 [*Fields II*].)

E. Background on the Right to Direct Healthcare of Children

The Fourteenth Amendment protects the right to refuse “unwanted medical treatment” (*Cruzan v. Missouri Dept. of Health* (1990) 497 U.S. 261, 278; citing *Jacobson v. Massachusetts* (1905) 197 U.S. 11, 24-30), and the right “to bodily integrity.” (*Washington v. Glucksberg* (1997) 521 U.S. 702, 720; citing *Rochin v. California* (1952) 342 U.S. 165.) This right protects against “‘forced medical treatment’ for the recipient’s benefit.” (*Health Freedom Defense Fund, Inc. v. Carvalho* (9th Cir. 2024) 104 F.4th 715, 725.)

With respect to the medical care of children, the constitution “permit[s] the parents to retain a substantial, if not the dominant, role in the decision.” (*Parham, supra*, 442 U.S. at p.604.) This right includes both “the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state.” (*Wallis v. Spencer* (9th Cir. 2000) 202 F.3d 1126, 1141.) Indeed, because of youthful impetuosity, “children rely on parents or other surrogates to provide informed permission for medical procedures that are essential for their care.” (*Mann v. County of San Diego* (9th Cir.

2018) 907 F.3d 1154, 1162, quotations omitted.) “Children, by definition, are not assumed to have the capacity to take care of themselves.” (*Schall v. Martin* (1984) 467 U.S. 253, 265, cleaned up.)

As a general rule, because of the “presumption that parents act in the best interests of their child,” any minimal “risk of error inherent in the parental decision” about a child’s medical treatment is ameliorated by the involvement of doctors. (*Parham, supra*, 442 U.S. at pp.606, 610.) Thus, alongside parents, “[w]hat is best for a child is an individual medical decision that must be left to the judgment of physicians in each case.” (*Id.* at p.608.) “The fact that a child may balk at hospitalization or complain about a parental [medical decision] ... does not diminish the parents’ authority to decide what is best for the child.” (*Id.* at p.605.) This presumption is key: “Some parents and judges will not care if their child is physically disciplined by a third person; some parents and judges will not care if a third person teaches the child a religion inconsistent with the parents’ religion; and some judges and parents will not care if the child is exposed to or taught racist or sexist beliefs. But many parents and judges will care, and, between the two, the parents should be the ones to choose whether to expose their children to certain people or ideas.” (*In re Custody of Smith* (1998) 137 Wash.2d 1, 21; *affd. sub nom. Troxel v. Granville* (2000) 530 U.S. 57.)

Of course, “the family itself is not beyond regulation in the public interest,” and “neither rights of religion nor rights of parenthood are beyond limitation.” (*Prince, supra*, 321 U.S. at

p.166.) But, “absent a finding of neglect or abuse, ... the traditional presumption that the parents act in the best interests of their child should apply.” (*Parham, supra*, 442 U.S. at p.604.) This is particularly important because “the burden of litigating ... can itself be so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child’s welfare becomes implicated.” (*Troxel, supra*, 530 U.S. at p.75 [plur. opn.], quotations omitted.) A regulation interfering with the medical decisions of parents with respect to their children “must fall *unless shown* to be necessary for or conducive to the child’s protection against some clear and present danger.” (*Prince, supra*, 321 U.S. at p.167, italics added.)

F. Background on the Rights of Minors as Against their Parents

“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.” (*Bellotti, supra*, 443 U.S. at p.634 & fn.12 [plur. opn.].) But, when minors are involved, “constitutional principles [are] applied with sensitivity and flexibility” such that the breadth of a minor’s rights depend on the specific right at issue. (*Id.* at pp.634-638 & fn.14.) “The law does not give to children many rights given to adults, and provides, in general, that children can exercise the rights they do have only through and with parental consent.” (*Hodgson, supra*, 497 U.S. at p.482 [conc. opn. of Kennedy, J.].) Under that general rule, minors must “wait until the age of majority before being permitted to exercise legal rights independently.” (*Bellotti, supra*, 443 U.S. at p.650 [plur. opn.].) For example, “[a] minor not permitted to marry before the age of majority is required simply to

postpone her decision.” (*Id.* at p.642.) As one court aptly put it: “We categorically reject the absurd suggestion that [the boyfriend’s] freedom of association trumps a parent’s right to direct and control the activities of a minor child, including with whom the child may associate.” (*Brekke, supra*, 125 Cal.App.4th at p.1410.)

Even when core rights are involved, the Supreme Court has explained that requiring parental consent before a minor exercises her rights is constitutionally permissible so long as there is a “judicial bypass” mechanism. (*Hodgson, supra*, 497 U.S. at p.479 [conc. opn. of Scalia, J.].) And “[a]lthough the Court has held that parents may not exercise an absolute, and possibly arbitrary, veto over that decision, it has never challenged ... that the decision should be made after notification to and consultation with a parent.” (*Id.* at p.445 [opn. of Stevens, J., joined by O’Connor, J.], cleaned up; see also *id.* at p.496 [conc. opn. of Kennedy, J., joined by Rehnquist, White, Scalia, JJ.] [“The difference between notice and consent was apparent to us before and is apparent now.”].)

G. The Codification of Parental Rights in FERPA

In 1974, Congress enacted the Family Educational Rights and Privacy Act (“FERPA”) (20 U.S.C. § 1232g, 34 C.F.R. § 99), “to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records.” (*Gonzaga University v. Doe* (2002) 536 U.S. 273, 278.) Its sponsor, Senator James Buckley, “discovered that since students and their parents generally were not permitted to view their school records, students could be victimized by errors that were

put into their transcripts and other records.” (Long, *Privacy in the World of Education: What Hath James Buckley Wrought?* (Feb. 1998) 46 R.I. Bar J. 9.) Thus, FERPA “assure[s] parents of students ... access to their educational records” and “protect[s] such individuals’ rights to privacy by limiting the transferability of their records without their consent.” (*Frazier v. Fairhaven School Com.* (1st Cir. 2002) 276 F.3d 52, 67-68; quoting 120 Cong. Rec. 39,862 (1974) (joint statement of Sens. Pell and Buckley explaining major amendments to FERPA), original ellipses.)

The statute defines “education records” broadly as “records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” (20 U.S.C. § 1232g(a)(4)(A).) But it does not include teachers’, administrators’, or other employees’ own records, campus police records, and counseling records for individuals over the age of eighteen. (*Id.* at subd. (a)(4)(B).) As explained in the legislative history, this definition is intentionally broad:

The proposed amendments define “education records” in order to make clear what documents and other material parents and students will have access to ... [The] intent to be that, except as provided in the definition, *parents and students should have access to everything in institutional records maintained for each student in the normal course of business and used by the institution in making decisions that affect the life of the student.* (*Belanger v. Nashua School Dist.* (D.N.H. 1994) 856 F.Supp. 40, 49; quoting 120 Cong. Rec. 39,858-59 (1974), original emphasis; see also *id.* [further legislative history].)

Thus, as “education records,” courts have ordered schools to provide juvenile court records not created by the school, but kept in a child’s file (*Belanger, supra*, 856 F.Supp. at p.50), records of a psychologist interviewing children to investigate claims of abuse (*Parents Against Abuse In Schools v. Williamsport Area School Dist.* (Pa. Commw. Ct. 1991) 594 A.2d 796, 803), a “disciplinary referral” form regarding bullying (*K.L. v. Evesham Board of Education* (App. Div. 2011) 423 N.J. Super. 337, 363-364), records regarding an investigation into an athlete trading memorabilia for tattoos (*ESPN v. Ohio State University* (2012) 132 Ohio St.3d 212, 218), a video recording showing a student altercation (*Central Dauphin School Dist. v. Hawkins* (Pa. Commw. Ct. 2021) 253 A.3d 820, 830-831, *affd.* (Pa. 2022) 286 A.3d 726), and recordings of a meeting discussing potential expulsion of a student. (*Lewin v. Cooke* (4th Cir. 2002) 28 F.App’x 186, 193.) In line with this broad interpretation, even noncustodial parents retain the right to examine their child’s education records. (*Page v. Rotterdam-Mohonasen Central School Dist.* (1981) 441 N.Y.S.2d 323, 325; *cf.* also *Fay v. South Colonie Central School Dist.* (2d Cir. 1986) 802 F.2d 21, 33.)

Under FERPA, (1) parents have an absolute right to access their child’s education records (20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. §§ 99.10-99.12); (2) parents have the right to an appeals process and formal hearing to correct inaccuracies in those records (20 U.S.C. § 1232g(a)(2); 34 C.F.R. §§ 99.20-99.22); (3) parents have the right to opt their child out of directory services (which would include the child’s name) (20 U.S.C. § 1232g(a)(5)(B); 34

C.F.R. § 99.37); and (4) parents have the right to be notified by the school district of these and other rights. (20 U.S.C. § 1232g(e); 34 C.F.R. § 99.7). When any aspect of California law conflicts with FERPA, it is preempted. (*Rim of the World Unified School Dist. v. Superior Court* (2002) 104 Cal.App.4th 1393, 1399.)

H. The Contours of the Privacy Protection of the California Constitution

The California Constitution provides that “all people are born free and independent and have inalienable rights, including the right to life, liberty, privacy, property, and safety.” (Cal. Const., art. I, § 1.) Under the “privacy” provision, “[l]egally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information (‘informational privacy’); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference (‘autonomy privacy’).” (*Hill v. NCAA* (1994) 7 Cal.4th 1, 35.)

Like with federal constitutional rights, minors’ state constitutional rights must be tailored to their unique circumstances. “As a general matter, parents during a child’s minority have the legal right (and obligation) to act on behalf of their child to protect their child’s rights and interests, and in most instances this general rule would apply to interests of the minor that are protected by the state constitutional right of privacy as well as to other rights and interests of the minor.” (*American*

Academy of Pediatrics v. Lungren (1997) 16 Cal.4th 307, 335-336 & fns.19-20.)¹¹

With respect to “informational privacy,” while an individual has privacy interests in his sexual orientation when it is not publicly known (*Sipple v. Chronicle Publishing Co.* (1984) 154 Cal.App.3d 1040, 1047; *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1701-1702), or knowledge is limited to “five friends” (*Nguon v. Wolf* (C.D. Cal. 2007) 517 F.Supp.2d 1177, 1191), there can be no objectively reasonable expectation of privacy regarding matters that are known by the entire school community. (See *Vo v. Garden Grove* (2004) 115 Cal.App.4th 425, 448 [“A person’s physical features are not ‘confidential,’ nor are activities on the premises of a public” location]; *Sipple, supra*, 154 Cal.App.3d at pp.1047-1048.) Thus, “[a] student who announces the desire to be publicly known in school by a new name, gender, or pronoun and is referred to by teachers and students and others by said new name, gender, or pronoun, can hardly be said to have a reasonable expectation of privacy or expect non-disclosure.” (*Mirabelli v. Olson* (S.D. Cal. 2023) 691 F.Supp.3d 1197, 1212.)

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¹¹ In *Lungren*, the California Supreme Court adopted the U.S. Supreme Court’s approach of recognizing this general rule before accepting a carve out for the right to obtain an abortion as unique because it is “a decision that cannot be postponed until adulthood.” (16 Cal.4th at 337, citing *Bellotti, supra*, 443 U.S. at p.642.)

III. This Court Should Affirm

As stated above, the Ninth Circuit has affirmed that schools may “not interfere with the right of the parents to make intimate decisions.” (*Fields v. Palmdale School Dist.* (9th Cir. 2006) 447 F.3d 1187, 1191 [*Fields II*].) Thus, a federal judge in the Southern District of California rightly recognized that a “policy of elevating a child’s gender-related choices to that of paramount importance, while excluding a parent from knowing of, or participating in, that kind of choice, is as foreign to federal constitutional and statutory law as it is medically unwise.” (*Mirabelli v. Olson* (S.D. Cal. 2023) 691 F.Supp.3d 1197, 1212.)

The court continued, stating that such a policy “harms the parents by depriving them of the long recognized Fourteenth Amendment right to care, guide, and make healthcare decisions for their children.” (*Id.* at p.1222.) The court further noted that these parental rights were “exemplified” by FERPA, which “speaks to the Congressional elevation of the importance of parents being involved in their child’s education.” (*Id.* at p.1212.) Finally, the court concluded that “[t]he reasons proffered by the defendants for the policy pass neither the strict scrutiny nor the rational basis tests” because “keeping parents uninformed and unaware of significant events ... is precisely the type of inaction that is likely to cause greater harm and is not narrowly tailored.” (*Id.* at p.1218.)

The rights of parents are so fundamental that no application of any specific test has been needed for at least three trial courts to intuit that parental rights include the right to both notice *and*

consent regarding a child’s social transition. (*Tennessee v. Cardona* (E.D. Ky. June 17, 2024, No. 2:24-cv-72) 2024 WL 3019146, at *30-31 [enjoining new Title IX rules because they “bind administrators to treat such children ‘consistent with [their] gender ident[ies]’ on school grounds, even if that conflicts with parental preferences”]; *Ricard v. Geary County Unified School Dist.* 475 (D. Kan. May 9, 2022, No. 5:22-cv-4015) 2022 WL 1471372, at *8 [discussing parental right to “contest[] the use of pronouns for their child”]; *T.F. v. Kettle Moraine School Dist.* (Wis. Cir. Ct., Waukesha Cnty., Oct. 3, 2023, No. 21-cv-1650) 2023 WL 6544917 [discussion violation of “parental autonomy right to direct the care for their child”].)¹²

Two other courts have held that parents at least have the right to not be lied to—under both the Fourteenth Amendment and FERPA. (*Willey v. Sweetwater County School Dist. No. 1* (D. Wyo. 2023) 680 F.Supp.3d 1250, 1278-1280 & fn.12; *Doe v. Madison Metropolitan School Dist.* (Wis. Cir. Ct., Dane Cnty., Sep. 28, 2020, No. 20-cv-454).)¹³ In continuity with precedent, this Court should validate the importance of the parental right to direct the

¹² Available at <https://will-law.org/wp-content/uploads/2023/10/94-2023-10-03-Decision-and-Order.pdf>. The court in *T.F.* focused extensively on parents’ right to direct the medical care of their children. Although parental rights do not turn on whether a social transition is healthcare, it is noteworthy that “changes in gender expression and role” is an “evidence-based treatment option[] for individuals with gender dysphoria.” (*Edmo v. Corizon, Inc.* (9th Cir. 2019) 935 F.3d 757, 770.) As the court in *T.F.* recognized, that “treatment” decision must be made by parents—not children alone.

¹³ Available at <https://adfmedialegalfiles.blob.core.windows.net/files/Doe-MMSD-PartialInjunctionOnAppeal.pdf>.

upbringing of one's own children, and vindicate the Temecula Valley School District's right to pass policies protecting that interest.

CONCLUSION

The Court should affirm.

Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: October 2, 2024

By: 

Charles S. LiMandri

Paul M. Jonna

Jeffrey M. Trissell

Attorneys for *Amici Curiae*

Elizabeth Mirabelli and

Lori Ann West

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(1), the text of this brief consists of 8,968 words as counted by the word processing program (Microsoft Word) used to generate the brief.

Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: October 2, 2024

By: _____



Charles S. LiMandri
Paul M. Jonna
Jeffrey M. Trissell
Attorneys for *Amici Curiae*
Elizabeth Mirabelli and
Lori Ann West

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury that the following statements are true and correct:

1. I am over the age of 18 years and am not a party to the within action. My business address is Post Office Box 9120, Rancho Santa Fe, California 92067.
2. I certify that I electronically filed the foregoing **Brief of Amici Curiae Elizabeth Mirabelli And Lori Ann West in Support of Defendants-Respondents**, with the Clerk of the Court for the Fourth Appellate District, Division Three, by using the appellate TrueFiling system on October 2, 2024.
3. I certify that all participants in this case are registered TrueFiling users and that service will be accomplished by the appellate TrueFiling system.
4. I certify that I caused such document(s) to be sealed in envelopes, and with the correct postage thereon fully prepaid, either deposited with the United States Postal Service or placed for collection and mailing following ordinary business practices on October 2, 2024, addressed as follows:

Riverside County Superior Court
4050 Main Street
Riverside, CA 92501

I declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct. Executed on October 2, 2024, at Rancho Santa Fe, California.



Kathy Denworth