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Exempt from filing fees pursuant to Government Code section 6103.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Plaintiffs, **v.** **CHINO VALLEY UNIFIED SCHOOL DISTRICT,** Defendant.	Case No. CIV SB 2317301 **REPLY BRIEF IN SUPPORT OF THE PEOPLE OF THE STATE OF CALIFORNIA'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION** Date: September 6, 2023 Time: 8:30 a.m. Dept: S-27, Civil Limited & Unlimited Judge: Hon. Tom Garza Trial Date: Action Filed: August 28, 2023

INTRODUCTION

The People of the State of California (the People) have demonstrated their likelihood of success on the merits because Board Policy 5020.1's (the Policy) forced disclosure provisions, as identified in the People's complaint and opening brief, violate California's equal protection clause and state statutory gender identity and gender expression anti-discrimination provisions, as well as California's constitutional privacy protections; and the balance of harms—particularly ongoing harms to transgender and gender nonconforming students in CVUSD—weighs in favor of a temporary restraining order and preliminary injunction. Defendant fails to rebut the People's argument with respect to both the merits and the balance of harms. Defendant also overlooks that former CVUSD policy successfully accommodated parental interests without putting transgender and gender nonconforming students at risk. The Court should thus issue a temporary restraining order and an order to show cause as to why a preliminary injunction should not issue to enjoin the enforcement of the forced disclosure provisions of the Policy. (See Code Civ. Proc., § 527.)

ARGUMENT

For the Court's convenience, the People offer the following summary of their reply:

- Defendant does not address or respond to the People's equal protection claim under the California Constitution. The Policy's forced disclosure provisions expressly single out transgender and gender nonconforming students for different, adverse treatment from their cisgender peers. Strict scrutiny applies, and Defendant has not responded to this argument, let alone met its burden. This constitutional claim alone suffices to demonstrate the People's likelihood of success on the merits.
- Defendant all but ignores the People's detailed allegations of irreparable harm, supported by strong, admissible evidence.
- Defendant does not dispute that members of the CVUSD Board of Education (Board) expressed animus against transgender students in their statements at the July 20, 2023 Board meeting.

- Defendant misstates the legal standards for discrimination under Education Code section 200 and Government Code section 11135, conflating strict scrutiny—the standard to be applied in a challenge to the Policy, which is discriminatory on its face on the basis of gender, gender identity, and gender expression—with the standard for a peer-to-peer harassment claim, which requires severe and pervasive harassing conduct.
- Defendant argues that the People impermissibly delayed in challenging the Policy. In reality, the Attorney General opened the investigation and filed suit as expeditiously as possible after the Policy was passed. The Office of the Attorney General filed this request for TRO after it learned during the investigation, from multiple witnesses, of the ongoing, irreparable harm to CVUSD's LGBTQ+ students (see Johnson Decl., ¶¶ 4-6; McFarland Decl., ¶¶ 16, 26-27, 43, 46, 48; Crow Decl., ¶¶ 21-22, 31, 33-34; Hirst Decl., ¶¶ 16, 19-22; Chris R. Decl., ¶¶ 11-13, 26-27, 29, 31, 33-36, 40-47), and 14 days after it asked CVUSD to suspend enforcement of the Policy until a corresponding administrative regulation was issued that might provide short-term protection for students—which request the Board flatly denied at its August 17, 2023 meeting (see Tran Decl., ¶¶ 14, 16).

I. THE POLICY VIOLATES THE GUARANTEE OF EQUAL PROTECTION UNDER ARTICLE I, SECTION 7 OF THE CALIFORNIA CONSTITUTION

Defendant's opposition does not address the People's argument that the Policy violates the equal protection clause of the California Constitution. Because Defendant concedes the People's argument by failing to respond, the Court should find that the People have demonstrated a likelihood of success on the merits with respect to their constitutional equal protection claim. (See, e.g., *Sehulter Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address argument "is equivalent to a concession," citing numerous sources]; *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 ["The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived."].)

While Defendant's failure to address the People's constitutional equal protection claim is sufficient reason to find the People's likelihood of success on the merits, it is worth briefly noting

that, in response to the People's claims under the Education Code and Government Code, Defendant argues that the Policy does not discriminate on the basis of gender, gender identity, or gender expression, and suggests the Policy is "facially neutral." (Opposition at p. 18.) This is transparently incorrect: the forced disclosure provisions target only the conduct of transgender and gender nonconforming students, and them alone. Subdivisions 1(a) and 1(b) of the Policy, for example, expressly condition forced disclosure on a student's request to use a name or pronouns, or access of programs or facilities, "that do not align with the student's biological sex or gender." (Board Policy 5020.1, § 1, subds. (a)-(b).) The forced disclosure provisions of the Policy plainly require parental notification only for transgender and gender nonconforming students—and not for their cisgender peers.

In this regard, the Policy is no different than a hypothetical policy that required parental notification when staff became aware that a student was dating someone of a different race or of the same sex. Such mandatory notification would clearly discriminate on the basis of race or sexual orientation. (See *In re Marriage Cases* (2008) 43 Cal.4th 757, 830-831, 857 [invalidating restriction of marriage under California law to opposite-sex couples]; *Perez v. Sharp* (1948) 32 Cal.2d 711, 715, 727, 731-732 [striking down California's ban on interracial marriage on equal protection grounds]; see also *Loving v. Virginia* (1967) 388 U.S. 1, 2, 11-12 [holding that Virginia's ban on interracial marriage violated the Equal Protection Clause]; cf. *Holcomb v. Iona College* (2d Cir. 2008) 521 F.3d 130, 139 [holding that employer who "disapproves of interracial association" violates Title VII by "taking adverse action"].) So too here, with regards to gender identity. As stated in the People's opening brief, such discrimination violates state constitutional equal protection, as well as Education Code section 220 and Government Code section 11135. (See People's Mem. of P. & A. in Supp. of Ex Parte App. for TRO at pp. 17-22.)

II. THE POLICY'S FORCED DISCLOSURE PROVISIONS VIOLATE STUDENT AUTONOMY AND PRIVACY

While the People's equal protection claim under the California Constitution (and their state statutory antidiscrimination claims) are sufficient to show their likelihood of success on the merits, their privacy claim is also likely to succeed.

Defendant incorrectly claims that the People argue for "an unfettered right to prevent professional educators from notifying [students'] parents and guardians of a significant part of their education." (Opposition at p. 11.) This is an obvious strawman: the People's complaint seeks an injunction against the Policy, not an affirmative injunction requiring CVUSD to adopt a policy prohibiting disclosure to parents. And, more significantly, as held by the California Supreme Court, a minor's constitutional right to privacy and autonomy is violated by a sweeping forced disclosure provision that burdens a minor's ability to express their core values and identity.[1] (See *Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 336-338.)

Defendant also suggests that transgender and gender nonconforming students do not have a reasonable expectation of privacy in their gender identity and expression at school because the Policy "applies to students who *openly request* to be identified or treated as a gender other than their biological sex or gender." (Opposition at p. 15.) However, simply because "an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information." (*U.S. Dept. of J. v. Reporters Com. for Freedom of Press* (1989) 489 U.S. 749, 770.) As the California Supreme Court has explained, individuals in our society play "multiple, often conflicting" social roles, and people may still "fear exposure . . . to those closest to them . . . . The claim is not so much one of total secrecy as it is of the right to *define* one's circle of intimacy." (*Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 25.) "It does not follow that disclosure in one context necessarily relinquishes the privacy right in all contexts"; rather, the privacy analysis requires a "reasonable expectation of privacy in *the circumstances*," and the specific context matters—disclosure of a student's transgender identity at school is different than the disclosures to parents required by the Policy. (See *Nguon v. Wolf* (C.D. Cal. 2007) 517 F.Supp.2d 1177, 1191, 1195-1196 [student had reasonable expectation of

[1] While Defendant narrowly characterizes this case as "invok[ing] 'informational privacy' interests, not 'autonomy privacy'" (Opposition at p. 15), privacy law does not support such a sharp distinction. As the California Supreme Court has explained: "Where the case involves an obvious invasion of an interest fundamental to personal autonomy," there must be a compelling interest "to overcome the vital privacy interest." (*Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 34.) And an intrusion into "autonomy privacy" can take the form of forced disclosure of information, as "disclosure of information . . . may have an impact on personal decisions and relationships" affecting a person's core autonomy. (*Id.* at p. 30.) This is just such a case.

privacy in sexual orientation with respect to parents, even if she was publicly homosexual at school].) Indeed, the forced disclosure provisions of the Policy are responsive to the fact that students may keep secrets at home that they otherwise share at school.

Additionally, Defendant cites *Nguon* to claim that a disclosure of a student's sexual orientation created "no violation of the student's privacy." (Opposition at p. 15.) However, Defendant omits the *Nguon* court's express qualification that "[t]his is simply not an instance where the defendants gratuitously and without a governmental purpose disclosed facts which would reflect on the plaintiff's sexual orientation." (*Nguon*, *supra*, 517 F.Supp.2d at p. 1196.) The Policy's forced disclosure provisions, by contrast, enact the very "gratuitous" disclosure of gender identity—for its own sake—that *Nguon* distinguished as unconstitutional.

III. THE POLICY'S FORCED DISCLOSURE PROVISIONS ADVANCE AN INVIDIOUS INTEREST, NOT A COMPELLING ONE

A. Defendant Misstates the Legal Standard for Discrimination Under the People's Statutory Claims

Defendant wrongly asks the Court to apply the standard for a harassment claim under the Education Code,[2] and a "burden-shifting framework" for "facially neutral" policies under Government Code section 11135. (Opposition at p. 18.) For a *discrimination* claim, however—which the People raise in their complaint—the Court must apply the proper standard. When, as here, a government entity uses a suspect classification in a policy, it must clearly identify its reasons, and "the burden of justification is both demanding and entirely upon the government [entity]." (*Connerly v. State Pers. Bd.* (2001) 92 Cal.App.4th 16, 36, 43; see also, e.g., *Mekan v. Johnson* (L.A. Superior Court Nov. 8, 2022) 2022 Cal.Super.LEXIS 86358, *39 [citing *Woods v. Horton* (2008) 167 Cal.App.4th 658, 678, for proposition that section 11135 claim requires "unlawful different treatment of similarly situated groups of persons"[3]].) "Because suspect

[2] Education Code section 201, subdivision (g), provides that the law "shall be interpreted as consistent with" Government Code section 11135, inter alia, except where it may grant more protections or impose additional obligations.

[3] Defendant also does not dispute that cisgender, transgender, and gender nonconforming students are similarly situated but treated differently under the Policy, or that the discrimination is occurring under a program or activity receiving state funding.

classifications are pernicious and are so rarely relevant to a legitimate governmental purpose, they are subjected to strict judicial scrutiny; i.e., they may be upheld only if they are shown to be necessary for furtherance of a compelling state interest and if they address that interest through the least restrictive means available." (*Connerly*, at p. 33 [citations omitted].) Specificity is required; generalized assertions of purpose are insufficient, and benign assertions are entitled to little or no weight. (*Id.* at p. 36.) And the government entity must have gathered and considered evidence of that purpose before it used the suspect classification. (*Id.* at pp. 36-38.)

If a compelling interest can be shown, the court must then scrutinize "the means chosen to address the interest." (*Connerly v. State Pers. Bd.*, *supra*, 92 Cal.App.4th at p. 37.) "Only the most exact connection between justification and classification will suffice"; that is, the classification must be "necessary"—not merely "convenient," "reasonable," or "efficient"—and the availability of neutral alternatives that do not rely on the suspect classification, or the failure to consider such alternatives, "will be fatal to the classification." (*Ibid.*)

B. Defendant Has Failed to Articulate a Sufficiently Specific Purpose to Support Its Claim That the Forced Disclosure Provisions Advance "Parental Interests"

Defendant claims that the Policy's forced disclosure provisions advance a compelling interest in parental rights. As explained by the People in their opening brief, this claim is a thin veneer for the invidious discrimination that in fact animates the Policy. (People's Mem. of P. & A. in Supp. of Ex Parte App. for TRO at pp. 19-20.) Defendant's argument fails for two further reasons: (1) under strict scrutiny, "[t]he mere recitation of a benign or legitimate purpose is entitled to little or no weight" (*Woods*, *supra*, 167 Cal.App.4th at p. 674 [citation omitted]), and (2) Defendant lacks sufficient specificity or a strong basis in evidence for its purported compelling interest. Here, Defendant's assertion of a parental interest to direct the upbringing of their children (Opposition at pp. 9-10) fails to justify the forced disclosure policy under the standard articulated in *Connerly* and *Woods*.

The California Constitution provides no right for parents to compel school personnel to report that students are members of a protected class. Defendant invokes the rights of parents under Education Code section 51101 "to be informed by the school, and to participate in the

education of their children" (Opposition at p. 10), but none of the "right[s]" and "opportunit[ies]" enumerated in section 51101 address or require disclosure of sensitive, private information about a student's gender identity or gender expression (see Ed. Code, § 51101, subds. (a)-(b)). Nor do Defendant's parenthetical citations of Education Code sections 48980 and 48911 fare any better; these statutes relate to topics such as individualized instruction, attendance, and suspension—not the disclosure of information such as a student's gender identity.

Moreover, any such parental notice must yield to compelling state interests, here protecting children from emotional, psychological, and physical harm. (*Jonathan L. v. Superior Court* (2008) 165 Cal.App.4th 1074, 1104 [there is "no dispute that the child's safety is a compelling governmental interest"]; *In re Marilyn H.* (1993) 5 Cal.4th 295, 307 [the "welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect"]; *In re Roger S.* (1977) 19 Cal.3d 921, 928 [noting that a parental right can be limited "'if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens'"] [citations omitted]; see also *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1465 [fundamental right of equal access to public education, warranting strict scrutiny of legislative and executive action that is alleged to infringe on that right]; *Brennon B. v. Superior Court* (2022) 13 Cal.5th 662, 681 ["[T]he management and controls of the public schools [is] a matter of state care and supervision, and local districts are the State's agents for local operation of the common school system."] [citations omitted].)

C. Defendant Lacks a Strong Basis in Evidence to Claim a Compelling Interest in Advancing Parental Rights

Additionally, Defendant lacks a "strong basis in evidence" to claim any compelling interest in protecting students or parental interests. (See *Coral Constr., Inc. v. City & Cnty. of San Francisco* (2010) 50 Cal.4th 315, 336; *Connerly v. State Pers. Bd.*, *supra*, 92 Cal.App.4th at p. 38.) A strong basis in evidence requires statistical evidence or anecdotal evidence about the harm to be remedied. (See *Assoc. Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dept. of Transp*. (9th Cir. 2013) 713 F.3d 1187, 1196.) Defendant has provided neither.

Indeed, Defendant's prior policy for the past six years reveals that the Policy's forced disclosure provisions are in no way compelled by purported parental rights. (This further demonstrates that the Policy is not necessary—and thus is not narrowly tailored—to further Defendant's purported interest in securing parental rights.) A previous CVUSD administrative regulation, which incorporated California Department of Education guidance, protected transgender and gender nonconforming students' privacy while involving parents whenever possible, and there is no indication that it caused any claim, let alone liability, for CVUSD. (See People's Request for Jud. Notice, Exhibit 5, at p. 212 [repealed text of former CVUSD administrative regulation, providing that "a student's transgender or gender nonconforming status is his/her private information and the District shall only disclose the information to others with the student's prior written consent, except when the disclosure is otherwise required by law or when the District has compelling evidence that disclosure is necessary to preserve the student's physical or mental well-being"].)

Without the Policy, schools would remain free—as they had under the previous administrative regulation—to disclose a student's gender identity to their parents with the student's consent. Without the Policy, schools could still disclose a student's gender identity to their parents, even without the student's consent, if there was a compelling need to protect the student's well-being. Without the Policy, students could still initiate conversations about their gender identity with their parents; school personnel could still encourage such conversations; and CVUSD could still create counseling and support programs advising students on how to have such conversations with their parents. And without the Policy, all these goals could be achieved without threatening students with forced disclosure and its attendant harms.

Conversely, CVUSD is bound by a duty of care to protect its students. (See, e.g., *Cleveland v. Taft Union High School Dist.* (2022) 76 Cal.App.5th 776, 799 [citations omitted].) By forcing disclosure of a transgender or gender nonconforming student's gender expression or gender identity—even against a student's wishes, and with no exception for situations involving a potential threat of parental violence—the Policy risks breaching the duty of care CVUSD owes its students. Defendant fails to address the severe dangers to transgender and gender nonconforming

students if they are outed against their will, dismissing the dangers posed by the Policy as merely causing "some students [to] feel unsafe or uneasy." (Opposition at p. 19.) As the People have shown, however, the Policy has already harmed CVUSD students, and continues to threaten irreparable physical, mental, and emotional harm as long as it is in place. (People's Mem. of P. & A. in Supp. of Ex Parte App. for TRO at pp. 14-16; Johnson Decl., ¶¶ 4-6; McFarland Decl., ¶¶ 16, 26-27, 46, 48; Crow Decl., ¶¶ 21-23, 26, 31, 33-34; Hirst Decl., ¶¶ 16, 19-22; Chris R. Decl., ¶¶ 25-28, 31, 33, 47.) And broader trends underscore the threat the Policy poses: only 37 percent of LGBTQ+ youth identified their home as supportive of their identity; one in ten transgender individuals have experienced violence at the hands of an immediate family member; 15 percent ran away or were kicked out of their home because they were transgender; and coming out to adverse parents has been shown to increase the risks of major depressive symptoms, suicide, homelessness, and drug use. (See Brady Decl., ¶¶ 51, 58-59, 62 & fn. 14.) Defendant also ignores the stigmatic injury inflicted by the passage of the Policy: transgender and gender nonconforming students' knowledge that the CVUSD Board seeks to erase their identity and "put a stop" to "transgenderism."[4] (People's Mem. of P. & A. in Supp. of Ex Parte App. for TRO at pp. 11-12; Chris R. Decl., ¶¶ 24-28 [CVUSD Board Member's comments "felt like an attack" and signaled that transgender and gender nonconforming youth "were an illness that needed to be cured"].) This overwhelming evidence of ongoing and imminent harm is more than enough to meet the standard for a temporary restraining order and preliminary injunction.

As previously explained, the Policy's forced disclosure provisions are not narrowly tailored precisely because of the harm they inflict on students. As the U.S. Supreme Court observed, "[i]t is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens." (*Prince v. Massachusetts* (1944) 321 U.S. 158, 165.)

[4] Defendant also suggests that "complaints of discrimination, bullying, or harassment," or the "statutory process" for responding to an educator's "reasonable belief that abuse or neglect of a child could take place in the home" suffice to redress the harms of the Policy. (Opposition at p. 6.) Parents, however, are not subject to the Uniform Complaint Procedures, and the Policy contains no exception to its forced disclosure provisions, even for situations in which school staff reasonably believe a student will face abuse for being outed as transgender or gender nonconforming.

IV. THE PEOPLE RESPONDED EXPEDITIOUSLY TO THE POLICY'S ACTUAL AND THREATENED HARMS

Defendant wrongly argues that the People delayed in taking action against the Policy, evincing a lack of urgency. (Opposition at pp. 6, 11-12.) However, the People reasonably hoped that CVUSD would not pass the Policy after reviewing the Attorney General's July 20, 2023 letter advising against its enactment, thereby avoiding the need for litigation. And as soon as the Board passed the Policy, the People responded quickly by opening an investigation and interviewing students, parents, teachers, and organizations supporting LGBTQ+ students; filing a complaint; and requesting a temporary restraining order and preliminary injunction. The People also asked CVUSD to suspend enforcement of the Policy until the Board adopted a corresponding administrative regulation; the Board refused this request. Simply put, Defendant has no basis to contend that the People created an emergency by "sitting on [their] hands" (Opposition at p. 12); the only emergency in this case is that created by the Policy, and the People have responded with commensurate urgency.

CONCLUSION

For these reasons, the Court should grant the People of the State of California's motion.

Dated: September 5, 2023

Respectfully submitted,

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