NO. G064332

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

MAE M., *ET AL.*,
Plaintiffs-Appellants,
v.
JOSEPH KOMROSKY, *ET AL.*,
Defendants-Respondents.

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

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INTRODUCTION

To affirm the ruling of the court below, this Court would have to ignore controlling case law and the discrimination evident on the face of the Board's Resolution and Policy. It would have to work a radical alteration of established doctrines governing vagueness, students' right to receive information and ideas, basic educational equity, and discrimination on the basis of sex and gender. And it would have to bless the court below's failure to discuss, let alone analyze, *any* of the Plaintiff or expert declarations in Plaintiffs' over 1,000 pages of supporting evidence, and that court's decision to rely instead on the conclusory declaration of a single Defendant Board member.[1] In denying Plaintiffs' request for a preliminary injunction, the court below repeatedly applied the wrong legal standards and ignored Plaintiffs' uncontroverted evidence in its entirety. This Court should reverse.

ARGUMENT

I. The Resolution is unconstitutionally vague on its face.

A. The court below's vagueness ruling is reviewed *de novo*.

As an initial matter, the standard of review governing the lower court's decision on vagueness is *de novo*, not abuse of discretion. As the court below recognized, PI Op. 3, 6 CT 1670, Plaintiffs contend that the Resolution is vague on its face. The question before this Court, therefore, is whether "constitutional law was correctly interpreted and applied by the trial court." *San Diego Unified Port Dist. v. U.S. Citizens Patrol*, 63 Cal. App. 4th 964, 969 (1998) (quoting

[1] Defendant Joseph Komrosky was recalled, and Defendant Danny Gonzalez resigned, from the Board during the pendency of this litigation. Defendants Steven Schwartz and Allison Barclay—the two Board members who voted against the Resolution and Policy—have chosen to be represented by Lewis Brisbois, not Advocates for Faith & Freedom.

Cal. Ass'n Dispensing Opticians v. Pearle Vision Ctr., Inc., 143 Cal. App. 3d 419, 426 (1983)).

B. Heightened scrutiny applies to the Regulation because it affects speech.

The Board claims that Plaintiffs "apply the same standard" to assessing the Resolution's vagueness as the court below. Board Br. 20–21. But that's just not true. Rather, Plaintiffs first identify "the standard applied by the court below" as the "basic two-prong test" for vagueness. Opening Br. 20. Plaintiffs then explain that—by contrast—"vagueness challenges to laws affecting speech *are subject to a higher standard*" because they chill the free dissemination of information. *Id.* (emphasis added).

Although the Board acknowledges that "regulations touching on principles of speech necessitate greater specificity," Board Br. 22, it misunderstands the infringement at issue here. As Plaintiffs make clear, the speech right violated by the Resolution is *students'* right to receive information and ideas—a right guaranteed by the free speech clause of the California Constitution. Opening Br. at 23–24; *McCarthy v. Fletcher*, 207 Cal. App. 3d 130, 139, 144 (1989) (quoting *Bd. of Educ. v. Pico*, 457 U.S. 853, 864, 867–68 (1982)). Recognizing that the schoolhouse is where children acquire the critical thinking skills vital to democratic participation, courts vigilantly guard the right to receive information and ideas against partisan and racially discriminatory "laws that cast a pall of orthodoxy over the classroom." *White v. Davis*, 13 Cal. 3d 757, 769 (1975) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)); *see also Pico*, 457 U.S. at 868 ("[J]ust 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."). Notwithstanding

a school board's authority in the management of school affairs, therefore, its curriculum decisions must be made in accordance with students' entitlement to an education free of ideological censorship. *Infra* 19–20, 22.

The Board claims that the appellate court in *McCarthy* nevertheless "upheld a school board's decision to restrict student access to a book as well as the school board's decision to exclude the book from its curriculum." Board Br. 32. It did no such thing. Far from upholding the school board's decision, the *McCarthy* court held that—in light of officials' statements that the banned books were "anti-government, anti-God, and anti-religion"—the lower court erred by failing to "inquire[] into the trustees' motives" for exclusion, necessitating reversal and remand. 207 Cal. App. 3d at 135, 141.

Whereas the Board at least recognizes that heightened scrutiny applies to the Resolution, the court below did not. *See* PI Op. 2–4, 6 CT 1669–71 (no discussion of Resolution's impact on speech nor application of heightened scrutiny). It erroneously applied the ordinary test for vagueness, rather than the heightened scrutiny applicable to statutes affecting speech. *Id.* Therefore, even if the standard of review were abuse of discretion (and it is not), the court below abused its discretion by failing even to mention—much less apply—heightened scrutiny.

C. The Resolution is unconstitutionally vague on its face.

The Resolution prohibits teaching "Critical Race Theory or other similar frameworks" without defining either. 1 CT 236; *see* 1 CT 235–37. Although the Board now claims that the phrase "other similar frameworks" in fact refers to the "five specific elements of CRT and eight doctrines of CRT" listed in the Resolution, Board Br. 34, this makes no sense. The Board cannot simultaneously define "five specific elements of CRT and eight doctrines of CRT" as both Critical Race Theory *and* frameworks "similar" to Critical Race Theory

(and therefore verboten). A concept is part of Critical Race Theory or it isn't. The Board's strained construction renders its "other similar frameworks" language superfluous. *See* PI Op. 3, 6 CT 1670 ("The Resolution bans 'Critical Race Theory or other similar frameworks' in the classroom *and* bans 13 concepts derived from CRT.") (emphasis added).

Even if the "other similar frameworks" banned by the Resolution *were* those concepts identified by the Board as constituent of Critical Race Theory (and they are not), the 13 enumerated concepts are themselves impossibly undefined. The Board's attempt to explicate what a teacher can and cannot teach about Dr. Martin Luther King, Jr.'s *Letter from a Birmingham Jail*—a text mandated under California content standards, 2 CT 348—is illustrative.

Written at the height of the Civil Rights Movement, *Letter from a Birmingham Jail* criticizes "white moderate[s]" for their failure to support nonviolent direct action to challenge segregation:

> I guess it is easy for those who have never felt the stinging darts of segregation to say wait. But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick, brutalize, and even kill your black brothers and sisters with impunity; when you see the vast majority of your 20 million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society; . . . when you are humiliated day in and day out by nagging signs reading "white" men and "colored" . . . then you will understand why we find it difficult to wait. [. . .]
>
> I had hoped that the white moderate would see this need [for direct action]. . . . I suppose I should have realized that few members of the oppressor race can understand the deep groans and passionate yearnings of the oppressed race, and still fewer have the vision to see that injustice must be rooted out by strong, persistent and determined action.

The *Letter* thus expresses King's grave disappointment with ostensible allies whose acceptance of the status quo was, he felt, partly to blame for racial violence and discrimination.

Letter from a Birmingham Jail articulates the concept—banned under the Resolution—that "[a]n individual, by virtue of his or her race . . . , bears responsibility for actions committed in the past or present by other members of the same race." 1 CT 237, prohib. (e). Specifically, the *Letter* asserts that white moderates, by virtue of their racial position and consequent lack of urgency to alter the status quo, share responsibility for the racist harms inflicted by their white contemporaries.

The Board claims that it is "nonsensical" for a teacher to believe that introducing this concept in *Letter from a Birmingham Jail* may run afoul of the Resolution. Board Br. 28. Instead, the Board argues, "the Resolution would simply prohibit the teacher from telling a white student they are morally guilty for any of the past atrocities committed by a student's ancestors or ancestors of the same race." *Id.* But the Resolution doesn't say that. The banned concept makes no mention of "a student's ancestors," moral guilt, or "atrocities," nor is it limited to actions that took place in the past. The Resolution's plain language does not support the Board's interpretation. And claiming that such interpretation is obvious does not make it so.

Similar uncertainty infects the remaining concepts, censorship of which runs headlong into California's curriculum standards. For example:

- Can a U.S. History teacher ask students to assess "the long-term costs of slavery, both to people of African descent and to the nation

at large?"[2] Discuss evidence of anti-Japanese animus in *Korematsu v. United States*?[3] Or would that violate the Resolution's ban on teaching that individuals are members of an "oppressed class because of race"?[4]

- Can that teacher discuss women's historical and contemporary struggles for wage equality,[5] or would this constitute teaching that individuals are members of an "oppressed class because of . . . sex"?[6]

- Can an English teacher assign "I, Too," by Langston Hughes?:[7]

> I, too, sing America.
>
> I am the darker brother.
> They send me to eat in the kitchen
> When company comes,
> But I laugh,
> And eat well,
> And grow strong.
>
> Tomorrow,
> I'll be at the table
> When company comes.
> Nobody'll dare
> Say to me,
> "Eat in the kitchen,"
> Then.

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[2] 1 CT 47.

[3] 2 CT 346.

[4] 1 CT 237, prohib. (b).

[5] 1 CT 47.

[6] 1 CT 237, prohib. (b).

[7] *See* 2 CT 345.

> Besides,
> They'll see how beautiful I am
> And be ashamed—
>
> I, too, am America.

> Or would this violate the Resolution's ban on teaching that "[a]n individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race"?[8]

The Resolution has no definitive answer to such questions. This is unsurprising, given that much of it is patterned after former President Trump's Executive Order 13950,[9] 2 CT 474, which a federal court preliminarily enjoined as unconstitutionally vague. *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 543, 545, 550 (N.D. Cal. 2020). That court found the order to be "so vague that it is impossible . . . to determine what conduct is prohibited," and the line between permissible and prohibited conduct to be "'so murky, enforcement of the [order] poses a danger of arbitrary and discriminatory application.'" *Id.* at 543–44 (citation omitted).

Similarly, a federal court found a state statute prohibiting public schoolteachers from teaching four "divisive concepts"—three of which echo concepts banned by Resolution 21—to be unconstitutionally vague. *Local 8027 v. Edelblut*, 651 F. Supp. 3d 444, 446–47, 461 (D.N.H. 2023). As with Resolution 21, which chills a substantial amount of legitimate speech because it fails to make clear whether a teacher may violate it by *implying* one of the 13 prohibited concepts, the statute enjoined in *Local 8027* did not state whether teachers

[8] 1 CT 237.

[9] The court below concluded, without explanation, that the Resolution's restrictions "are similar, but not quite analogous to" those of the Executive Order and another copycat statute. PI Op. 4, 6 CT 1671.

could be disciplined for introducing the banned concepts by implication:

> Consider, for example, the third banned concept, which bars an educator from teaching or advocating "[t]hat an individual should be discriminated against or receive adverse treatment solely or partly because of his or her . . . race." [Citation.] In the coming months, the Supreme Court will decide whether colleges and universities can continue to use race-conscious admission policies. The plaintiffs in those cases assert that such policies improperly favor Black applicants at the expense of white and Asian-American applicants, whereas the defendants argue that the policies are necessary to ensure diversity in higher education. If a high school teacher attempts to explain the diversity argument to her class during a discussion of the case, will she face sanctions for teaching a banned concept? We simply don't know.

Id. at 461.

This uncertainty was exacerbated, the court went on, by the statute's lack of a scienter requirement and the severe penalties teachers faced for violating it. *Id.* at 460 ("[T]he Supreme Court 'has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*.'" (quoting *Colautti v. Franklin*, 439 U.S. 379, 395 (1979), abrogated on other grounds by *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 142 (2022))); *id.* ("The need for clarity is likewise paramount when a statutory provision authorizes severe consequences for a violator."). So too here. Because Resolution 21 has no scienter requirement, Temecula "teachers are not 'protected from being caught in [the statute's] net by the necessity of having a specific intent to commit' a violation." *Id.* at 460. (quoting *Papachris-*

tou v. City of Jacksonville, 405 U.S. 156, 163 (1972)). And they risk severe penalties, including dismissal,[10] if the Board disagrees with their interpretation of the Resolution's restrictions.

D. In the alternative, the court below's application of the wrong legal standard and wholesale disregard of the evidentiary record are independent abuses of discretion.

Even if the standard were abuse of discretion (and it is not), the court below abused its discretion by (1) applying the ordinary test for vagueness, rather than the heightened scrutiny required for laws that affect speech, discussed *supra*, and (2) ignoring ample and uncontroverted record evidence that the Resolution's ill-defined language denies Temecula teachers a reasonable opportunity to understand what they can and cannot teach.

The Board attempts to dismiss this evidence as isolated "anecdotes" from a handful of teachers. Board Br. 33. It is anything but. In addition to the declarations of individual Teacher Plaintiffs, *see* Opening Br. 22–23, the declaration of the Temecula Valley Educators Association ("TVEA") attests to the Resolution's sweeping chilling effects across the entire District. TVEA is a Plaintiff and a union representing over 1,425 educators who serve 30,000 students attending, *inter alia*, 18 elementary schools, six middle schools, and five high schools. 3 CT 801. Its members have "had to change their lesson plans; stop teaching books that address racial and other forms of inequality; censor their instruction and their answers to student questions on standards-mandated topics; and limit classroom conversations to avoid being reported." 3 CT 801–

[10] Resolution 21 states that Critical Race Theory and "other similar frameworks" are "racist," and District policies provide that any employee who engages in racist or discriminatory conduct "shall be subject to disciplinary action, up to and including dismissal." 1 CT 236, 269.

02. TVEA has been inundated with questions from teachers and administrators, all of whom are attempting to parse what the Resolution does and does not allow them to teach. 3 CT 802. And after the Resolution's adoption, "the vast majority of TVEA meetings have dealt with addressing the Resolution, and particularly . . . supporting teachers who fear losing their livelihoods if they are accused of violating it." *Id.* Plaintiffs' expert Dr. John Rogers, Professor of Education at the UCLA School of Education and Information Studies and Faculty Director of Center X, which houses UCLA's Teacher Education Program and Principal Leadership Program, testified that "[t]he chilling effect described in plaintiff teachers' declarations is entirely consistent" with his research findings, which show that teachers subject to curriculum bans "are remaining silent on an array of issues that they would otherwise teach, on topics as broad as 'race' and 'race and gender.'" 4 CT 988–89.

The court below failed even to acknowledge this evidence, much less address it. *See* PI Op. 2–4, 6 CT 1669–71 (no mention of any of Plaintiffs' supporting declarations). Instead, it relied entirely on the sole piece of evidence submitted by the Board—a self-serving declaration from a single Board member, Defendant Joseph Komrosky, which includes the following paragraph:

> In the Resolution, we made an intent to include numerous doctrines and tenets to ensure all students and teachers understood the Resolution. We used precising [sic] definitions, to avoid vagueness and ambiguity. This can be seen in the five elements and the eight doctrines listed.

6 CT 1515 ¶ 6. That's it. But a law doesn't pass constitutional muster just because its author says it does. Nor can the compelling declarations of individual teachers—and the TVEA on behalf of the District's teachers collectively—be countered by lawyers effectively rewriting the Resolution to state what it cannot

reasonably be construed to mean. The Board should have done its rewriting before enacting the Resolution. The court below's near-total disregard of the evidentiary record is an independent abuse of discretion.

II. The Resolution's bald advancement of the Board's ideological preferences renders it unconstitutional on its face.

A. The court below's ruling on the right to receive information is reviewed *de novo*.

To begin, the Board misapprehends the standard of review applicable to Plaintiffs' right to receive information claim. *See* Board Br. 35–36. It is *de novo*, because Plaintiffs assert that the Resolution lacks a legitimate pedagogical purpose on its face. Opening Br. 19, 24; *Hunter v. City of Whittier*, 209 Cal. App. 3d 588, 595–96 (1989) (*de novo* review applies "when it is contended that an ordinance or statute is unconstitutional on its face and that no factual controversy remains to be tried"). The court below based its holding on (i) the plain text of the Resolution, and (ii) its interpretation of California law as applied to that text. PI Op. 5, 6 CT 1672 ("It does not appear to this Court that the Resolution seeks to deny access to information. Rather the Resolution seeks to limit instruction on the subject of CRT to a subordinate role within a lager [sic] instructional framework."). Such decisions are reviewed *de novo*. *Hunter*, 209 Cal. App. 3d at 595 (where "the likelihood of prevailing on the merits depends upon a question of pure law," *de novo* review applies).

B. The Board's intent to suppress ideas it disfavors is plain on the face of the Resolution.

The Board cannot deny Resolution 21's naked announcement of its ideological motivations. Nor did the court below. PI Op. 3, 6 CT 1670 (describing the Resolution's statement, *inter alia*, that Critical Race Theory "is a divisive and racist ideology"). At the outset, the Resolution's preamble declares that Critical

Race Theory is a false and "racist ideology" that "is rejected" by the Board because, in some members' subjective opinion: (1) it is "based on false assumptions about . . . America and its population"; (2) it is founded on an "artificial distortion of the traditional definition of 'racism'" that is "fatally flawed"; (3) it is "divisive" and "assigns moral fault to individuals solely on the basis of an individual's race and, therefore, is itself . . . racist"; (4) it "assigns generational guilt and racial guilt for conduct and policies that are long in the past"; (5) it "violates the fundamental principle of equal protection under the law"; and (6) it "views social problems primarily as racial problems and, thus, detracts from analysis of underlying socio-economic causes[.]" 1 CT 235–36.

After staking out its ideological opposition to certain viewpoints about race, racism, sex, and sex discrimination, the Resolution then prohibits teaching about those viewpoints—with the sole exception of instruction aligned with Defendant Board members' own ideology, *i.e.*, that "focuses on the flaws in Critical Race Theory." 1 CT 237. This is a "patently illegitimate educational purpose" for censoring curriculum. *McCarthy*, 207 Cal. App. 3d at 141–42, 144.

The Board openly admits that "the Resolution's stated purpose is to combat" what certain Board members believe to be a "racist ideology." Board Br. 38. Contrary to the Board's argument, Plaintiffs do not "ask this Court to ignore the stated purpose of the Resolution" because some other evidence demonstrates the Board's illicit purpose. *Id.* at 39. Plaintiffs assert that the Resolution's stated purpose *is itself illicit*, because a school board cannot restrict curriculum "motivated by an intent to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" *McCarthy*, 207 Cal. App 3d at 146 (quoting *Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943)).

Oblivious to the ideological biases proclaimed on the face of the Resolution, the Board attempts to artificially cabin *McCarthy*'s holding to curriculum

restrictions motivated by an intent to discriminate against a particular group of people. *E.g.*, Board Br. 40 ("Appellants cannot demonstrate the Resolution disproportionately targets a specific group of students either."); *id.* at 39 ("The Resolution's criticism of CRT is not tantamount to the Board criticizing specific groups of people."). But *McCarthy* doesn't say that. What it *does* say is this: "Our Constitution does not permit the official suppression of *ideas*." *McCarthy*, 207 Cal App. 3d at 140 (quoting *Pico*, 457 U.S. at 871). Whether students' right to receive information has been violated "depends upon the motivation behind petitioners' actions. . . . If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution." *Id.*

Here, we know that the Board members who enacted the Resolution "intended . . . to deny respondents access to ideas with which [they] disagreed" *because they tell us so*, in the Resolution itself, in their supporting declaration, and in their brief. *McCarthy*, 207 Cal App. 3d at 140 (quoting *Pico*, 457 U.S. at 871) (emphasis omitted); *supra* 18–19; 6 CT 1515 ¶ 5 ("The Board enacted this resolution as a proactive measure to protect students from the harmful social-political ideology embedded in CRT."); Board Br. 42 ("the purpose of the Resolution was to discourage an ideology that"—in the Board's view—"sought to disparage particular races"). Because its plain text "implicates the [Board] in the propagation of a particular . . . ideological viewpoint," the Resolution lacks a legitimate pedagogical purpose—and is therefore unconstitutional—on its face. *McCarthy*, 207 Cal App. 3d at 140 (quoting *Pratt v. Ind. Sch. Dist. No. 831, Forest Lake*, 670 F.2d 771, 776 (8th Cir. 1982)).

C. In the alternative, the court below's revision of the Resolution's text, disregard of *McCarthy*'s holding on ideological censorship, and failure to consider extensive evidence of the Board's illicit purpose are independent abuses of discretion.

Even if the Resolution were not discriminatory on its face (it is), such that the standard of review was abuse of discretion, the court below abused its discretion in at least three different ways.

First, as Plaintiffs have described, the court below reached its holding by revising the Resolution's expressly discriminatory text (requiring any instruction on Critical Race Theory to *focus* on its flaws) to read more neutrally (requiring such instruction to *include* those flaws). Opening Br. 24; *compare* Resolution 21, 1 CT 237 ("Notwithstanding the above restrictions, social sciences courses can include instruction about Critical Race Theory, . . . provided further that such instruction focuses on the flaws in Critical Race Theory."), *with* PI Op. 5, 6 CT 1672 ("[T]he Resolution allows CRT to be discussed, but must include its flaws."). The Board does the same, arguing incredibly that the Resolution "promotes open-mindedness and critical thinking because it allows the instruction of CRT so long as teachers include the flaws in Critical Race Theory." Board Br. 42.[11] The court below's misstatement of the Resolution is an abuse of discretion. *Cnty. of Kern v. T.C.E.F., Inc.*, 246 Cal. App. 4th 301, 316 (2016) ("abuse of discretion standard does not allow trial courts to make express or implied findings of fact without sufficient evidentiary support").

[11] By contrast, the Board argues elsewhere that "[a]ny action or statement beyond criticizing the flaws of Critical Race Theory would amount to endorsing racist ideologies . . . ." Board Br. 38.

Second, the court below ignored controlling case law establishing that curriculum restrictions that seek "to advance or inhibit" a particular ideological viewpoint are unconstitutional. *McCarthy*, 207 Cal. App. 3d at 140, 144. Although the court below acknowledged that a school board's decision to restrict curricular materials or topics must be "reasonably related to legitimate pedagogical concerns," PI Op. 5, 6 CT 1672, it failed entirely to recognize that the intent to suppress a particular ideological viewpoint—which is plain on the face of the Resolution and which the Board openly embraces—is a "patently illegitimate educational purpose." *McCarthy*, 207 Cal. App. 3d at 142.

The court below's disregard of the central holding in *McCarthy* is reversible error. Because of it, the court below justified its decision by reference to school boards' discretion over school affairs and "the deference which is given to local school authorities regarding ordinary educational matters." PI Op. 5, 6 CT 1672. The Board goes even further, relying on a 26-year-old federal case from the Fourth Circuit to claim that "[t]he 'makeup of the curriculum . . . is *by definition* a legitimate pedagogical concern.'" Board Br. at 41 (quoting *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998)) (emphasis added). That is not California law. *McCarthy* states unequivocally that "school authorities' discretion is not unfettered." 207 Cal. App. 3d at 146. And no school board "ha[s] the power to advance or inhibit" its own political or religious viewpoint "as a 'community value,'" regardless of "how prevalent or unpopular the orthodox view might be in the community." *Id.* at 144; *see also Pico*, 457 U.S. at 872 n.24, 875 (board members' statements, including that "I am basically a conservative in my general philosophy and feel that the community I represent as a school board member shares that philosophy," suggested intent "to impose upon the students of the Island Trees High School and Junior High School a political orthodoxy to which [board members] and their constituents adhered").

Third, even if the Resolution's illicit purpose were not glaring on its face (and it is), the court below failed even to mention—much less consider—voluminous record evidence demonstrating that the Board enacted the Resolution with no legitimate pedagogical purpose. Opening Br. 25, 27. The Board makes no attempt to argue otherwise.

Instead, the Board claims (i) that its failure to take all but one of the "basic steps" constituting the "policy development process" delineated in its own bylaws is, somehow, not procedurally irregular. 1 CT 244; Board Br. 36. In doing so, the Board conflates "normal" policymaking procedures with mandatory ones. But even if every step of the Board's "policy development process" is not required, the fact that the Board took essentially *none* of them—didn't gather fiscal information, didn't seek input from District staff or hold discussions to obtain public feedback, didn't consult with legal counsel, didn't have two readings before adopting the final policy[12]—is "the antithesis of those procedures that might tend to allay suspicions regarding [the Board's] motivations." *Pico*, 457 U.S. at 875.

The Board next contends (ii) that the Resolution does not conflict with State educational standards because the Board says it doesn't. Board Br. 37. That assertion is small comfort to Temecula teachers, who risk discipline if, for example, during instruction about the continuing impacts of slavery and segregation on Black communities, a student perceives the forbidden message that "racism is ordinary, the usual way society does business." 1 CT 236, prohib. (2). It belies the State's own determination, articulated in the record, that "Resolution 21 violates the curriculum and antidiscrimination requirements of the Education Code." 5 CT 1334. And it fails, like the opinion of the court below, to

[12] *See* 2 CT 480–523.

make any rejoinder *at all* to Plaintiffs' expert finding that the Resolution is irreconcilable with California's Teaching Performance Expectations. 4 CT 939–42 ¶¶ 15–23.

Finally, the Board asserts (iii) that the Resolution was not motivated by an illicit purpose because its sponsor says it wasn't. Board Br. 40 ("Appellants ask this Court to assume Defendants' motives in contradiction to Joseph Komrosky's declaration, where he explains the Board's intent behind the Resolution was to protect all students from racism and sexism."). That, obviously, is not the standard. *McCarthy*, 207 Cal. App. 3d at 144, 147 ("We do not interpret [*Hazelwood*] to mean that regardless of [its] religious, political or philosophical reasons . . . the board's exercise of discretion will be upheld so long as the board expresses some educational reason [for its action]."). If any self-serving statement by a board member were sufficient to prove an enactment's purpose, then no constitutional challenge—no matter how strong the record—could ever prevail. Thus, to prevent the "camouflag[ing]" of impermissible discrimination, courts assess whether the justification proffered by school authorities is merely a front for excluding ideas they disfavor. *Id.*; *see also Dibona v. Matthews*, 220 Cal. App. 3d 1329, 1341–45 (1990) (analyzing the "real" reasons for class cancellations notwithstanding the "legitimate pedagogical concern" that school authorities claimed in the declarations supporting their submissions).

Beyond the text of the Resolution itself, Plaintiffs adduced ample evidence of the Board's lack of a legitimate educational purpose and intent to suppress ideas disfavored by certain of its members,[13] including that:

[13] The Board relies on three cases over 100 years old to claim that courts may not inquire into legislative intent. Board Br. 40 (citing three cases unrelated to

- Multiple provisions of the Resolution are modeled on former President Trump's Executive Order 13950, which was entirely unrelated to K–12 education. 2 CT 472–78.

- The Resolution's condemnation of Critical Race Theory in its Preamble is taken verbatim from a curriculum ban adopted in 2021 by the Paso Robles Joint Unified School District ("PRJUSD") and authored by Christopher Arend, a Paso Robles lawyer and then-PRJUSD Board president, whom the Board subsequently hired as a consultant. 1 CT 187, 5 CT 1332.

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speech that are 131, 109, and 139 years old, respectively). (One of these cases, *Soon Hing v. Crowley*, is an 1885 chestnut in which the U.S. Supreme Court refused to examine whether a San Francisco ordinance restricting the operations of public laundries—primarily run by Chinese immigrants due to their discriminatory exclusion from other occupations—was motivated by anti-Chinese animus. 113 U.S. 703 (1885)).)

That is not the law—nor has it been for decades—that governs free speech and other constitutional infringements. *E.g.*, *Pico*, 457 U.S. at 871 ("[W]hether petitioners' removal of books from their school libraries denied respondents their First Amendment rights *depends upon the motivation behind petitioners' actions*. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette*." (first emphasis added)); *McCarthy*, 207 Cal. App. 3d at 140 (same); *see also, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (equal protection violation requires showing that "discriminatory purpose was a motivating factor"); *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 263 (2016) (discriminatory reapportionment requires showing that "illegitimate considerations were the predominant motivation" for minor population deviations); *United States v. Windsor*, 570 U.S. 744, 774 (2013) (invalidating federal statute "[t]he principal purpose" of which was "to demean those persons who are in a lawful same-sex marriage"); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").

- The Resolution codifies the ideological viewpoints of Arend, who has dismissed systemic racism as a "myth" that is "peddle[d]" by "[r]ace hustler[s]," and who traffics in offensive anti-Black stereotypes, for example, attributing "arrests of blacks" not to "racial prejudice" but to "socio-economic and cultural causes, such as the gangster sub-culture, poverty, poor education, growing up in homes without a father, etc." 1 CT 279, 285.

- The Board spent $15,000 in public monies to hire Arend to "train[]" District staff on the Resolution, during which training Arend used the phrase "play stupid games, win stupid prizes" to assert that Black victims of police violence are to blame for their own killings and injuries. 5 CT 1461–62; 3 CT 735 ¶ 9.

- As Defendant Komrosky attested, the Board "hired professionals from across the country to hold workshops to explain the dangers of certain tenets of CRT to teachers in the District." 6 CT 1515 ¶ 7.

- During a school board campaign event, Defendant Board member Gonzalez told the audience:

> [F]ifteen days after the death of George Floyd they sign a resolution in Temecula Valley reaffirming their commitment to promote equity, right? . . . And we know that equity is this fluffy word that they use. . . . And it essentially means that we're going to . . . disseminate [critical race theory] through every part of this education system.

  3 CT 644.

- In a campaign interview, Defendant Board member Wiersma stated that "every skin color has . . . been a slave" and that students of color would only be "held back" if they "have a chip on their shoulder":

> [W]hat's so interesting to me is that every skin color has both been a slave and owned a slave. And so when you look at that, and where we are in the world today, trafficking, slavery still exists. . . . They're going to be held back only if we get mixed up in these conversations where kids walk away feeling like they're bitter and have a chip on their shoulder.

  2 CT 571.

- Prior to enacting the Resolution, the Board failed to make any findings of fact as to either (i) classroom instruction in the District on topics related to Critical Race Theory or race or sex discrimination, or (ii) whether Temecula students were harmed by such instruction. *See* 2 CT 480–523.

- Dr. Tyrone Howard, President of the American Educational Research Association—the largest national interdisciplinary research association devoted to the scientific study of education and learning—testified that he is "not aware of *any* research supporting the pedagogical value of curricular restrictions like Resolution 21." 5 CT 1255 ¶ 8 (emphasis added).

- As experts in education and health attest, the Resolution harms all Temecula students by chilling instruction on subjects including race and sex discrimination, and particularly harms students of color and LGBTQ students by exposing them to toxic, identity-based stress. *See* 1 CT 188–91 (citing declarations).

The court below did not acknowledge *any* of this evidence, much less analyze its effect on the validity of the Resolution. Nor did the Board counter with any of its own evidence beyond Defendant Komrosky's post-hoc justifications. This is no accident. The Board's record is so bare *because they have no evidence* of legitimate pedagogical grounds for banning the concepts they disfavor. The court below's wholesale failure to address the evidentiary record is an independent abuse of discretion. *Cnty. of Kern*, 246 Cal. App. 4th at 316.

D. As with the Resolution, the Board's censorship of instruction on the LGBTQ rights movement has no legitimate pedagogical purpose.

Tellingly, neither the court below nor the Board has even attempted to defend the Board's decision to shelve Lesson 12 of the State-approved fourth-grade *Social Studies Alive* curriculum pending the Board's identification of substitute curriculum which "exclude[s] sexualized topics of instruction." 2 CT 576–77. The record is clear that what the Board condemns as "sexualized" material is, in fact, a brief supplemental discussion of the LGBTQ rights movement that

makes no reference to sexual activity. 3 CT 745–46. The Board's censorship is therefore a thinly-veiled attempt to impose its anti-LGBTQ ideology on Temecula students—a fact the Board doesn't even bother to deny.

III. Temecula's censored curriculum falls fundamentally below prevailing statewide standards.

The Board contends that its Resolution does not "cause[] the District to fall below academic standards" because "California does not require the teaching of CRT." Board Br. 45. But this misses the point entirely: Plaintiffs do not argue that their education falls fundamentally below State academic standards because their teachers are forbidden from teaching Critical Race Theory. Rather, they demonstrate—as an uncontroverted matter of record—that the Resolution's undefined terms and severe penalties are chilling their teachers from introducing topics that *are* encompassed within the Education Code and State curriculum standards. For example:

- The Resolution's prohibition on teaching that individuals are part of an "oppressed class because of race" constrains Teacher Plaintiff Amy Eytchison's ability to teach fourth-grade State content standards, including "how labor during the mission period harmed Native American communities, how controversies over the expansion of slavery impacted California's bid for statehood, and how hostility toward Chinese and Japanese laborers led to anti-Asian exclusion movements." 3 CT 734–35 ¶¶ 7–8. She and her fellow teachers have had to "water down or completely avoid certain topics, lest a student take offense[.]" 3 CT 735–36 ¶ 12.

- Teacher Plaintiff Jennifer Scharf, who heads the English Department at Temecula's Greak Oak High School, has had "multiple teachers" ask "whether the Resolution permits them to continuing assigning Toni Morrison's *Beloved*, and if so, how they can meaningfully teach the novel without talking about racial oppression and its lasting impacts." 3 CT 763 ¶¶ 3–4.

- Following the Resolution, Teacher Plaintiff Katrina Miles is the only sixth

grade teacher at her school who has continued to teach *Roll of Thunder, Hear My Cry*, a Newbery Award-winning novel about a Black family's struggle against racism in 1930s Mississippi. Although Ms. Miles—the sole Black educator at her school—"personally experienced racial segregation" while growing up in southeast Texas, she "strictly adhered to the text to avoid" sharing her own experience with her students. 3 CT 751–52 ¶ 6.

- The Resolution has hindered Teacher Plaintiff Dawn Sibby's teaching of 10th Grade World History, including the concept that European powers "justified their conquests by asserting arguments of racial hierarchy and cultural supremacy, offering a vision of civilization in contrast to what they argued were 'backward' societies," 3 CT 757 ¶ 8, lest a student construe such instruction to mean that "[a]n individual should feel discomfort . . . on account of his or her race," 1 CT 237, prohib. (f).

As discussed *supra* 16–17, these are not one-off examples. The Temecula Valley Educators Association attests that teachers across the District have altered their lesson plans, ceased to teach books addressing "racial and other forms of inequality," curtailed classroom discussions, and restricted both their teaching of and "answers to student questions on" topics mandated under State academic standards. 3 CT 801–02 ¶ 6.

Contrary to the Board's characterization, this evidence is neither vague nor conclusory. What *is* conclusory is Defendant Komrosky's two-sentence statement—the sole piece of evidence on this question cited by the court below (which also happens to be the sole piece of evidence offered on this question by the Board)—that "[t]he Resolution does not interfere with the teaching of ethnic studies, history, or any other subject, nor is it antithetical to the teaching of ethnic studies. Teachers can still teach on accurate historical events and individuals, such as Dr. Martin Luther King, the Holocaust, and slavery." 6 CT 1516 ¶ 9; *see* PI Op. 6, 6 CT 1673 ("[N]othing in the Resolution prohibits teachers from teaching on these topics. (Komrosky Decl., ¶ 9.)"); Board Br. 45 (same).

But as the State recognized in its amicus brief, it is the sweeping breadth of the Resolution itself—not the Resolution as construed by its sponsor—that runs headlong into California's academic standards. *E.g.*, 5 CT 1330 ("[U]nder prohibition (h), students "cannot be taught" about the connection between slavery and the "founding" or "independence" of the United States, directly restricting information about the country's early history."); 5 CT 1331 (describing how the Resolution's prohibitions "broadly bar the teaching of many chapters of U.S. history (and current events) in which the Nation sought to overcome racial or gender inequality," including the "government's treatment of Native Americans," "the history of the Fourteenth Amendment, the lives of Black Americans during Reconstruction, . . . the purpose and work of the Freedmen's Bureau," "the women's suffrage movement and the Nineteenth Amendment," and "efforts to address disproportionate police violence against Black Americans"). The State also enumerated the multiple "curriculum and antidiscrimination requirements of the Education Code" that the Resolution violates. 5 CT 1334–35 (describing how Resolution 21 contravenes Education Code sections 220, 243, 51204.5, 51501, and 60040).

There are 939 school districts in the State of California, only seven of which had adopted curriculum bans on Critical Race Theory or other ostensibly "divisive concepts" at the time Plaintiffs filed their preliminary injunction motion. 2 CT 463, 466. This means that Temecula's teachers are operating under a curriculum ban—with its resultant chilling effects—that has no parallel in over 99 percent of California school districts. Temecula's censored curriculum—and consequently, the education received by its students—is a clear outlier.[14]

[14] The Board's argument that the Resolution does not deny Temecula students

As Dr. Rogers testified, if Resolution 21 remains in place, access to "accurate information about race, gender, and sexual orientation, as well as discrimination based on those characteristics, in U.S. history and society . . . will turn on the fortuity of district assignment—whether a student lives just inside the district's boundaries or on the next street over—and Temecula students will be left behind the majority of their peers in the State." 4 CT 990 ¶¶ 15–16. The gaps in their learning will follow them into higher education, where "[t]heir incomplete understanding of U.S. history and society will place them at a significant disadvantage in college courses—particularly in the University of California and California State University systems, where racial and gender literacies are often prerequisites to meaningful classroom engagement." 4 CT 990–91 ¶ 16.

The Court's holding, premised wholly on the say-so of the Resolution's sponsor and reached without addressing *any* of Plaintiffs' evidence, is reversible error. So too is the court below's failure to apply strict scrutiny to the Board's curriculum censorship, Opening Br. 30–32, an argument that the Board does

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their fundamental right to an education because it "applies to all students equally" betrays its fundamental misunderstanding of the governing standard. Plaintiffs challenge the interdistrict disparity between students in the Temecula Valley Unified School District and students elsewhere in the State. *Butt v. State of California*, 4 Cal. 4th 668, 687 (1992) (disparity in length of school term between Richmond Unified School District and "everywhere else in California"); *see also Vergara v. State of California*, 246 Cal. App. 4th 619, 647 (2016) ("In *Butt*, the classes were the students of the Richmond Unified School District, who would be harmed by the closing of schools, and the students outside that district."); *Shaw v. Los Angeles Unified Sch. Dist.*, 95 Cal. App. 5th 740, 766–67 (2023) (plaintiffs challenging Los Angeles Unified School District's distance learning policies successfully alleged interdistrict discrimination).

not address at all, *see* Board Br. 43–45. *Butt*, 4 Cal. 4th at 692 ("Because education is a fundamental interest in California, denials of basic educational equality on the basis of district residence are subject to strict scrutiny.").

IV. The Policy violates California's Equal Protection Clause.

A. The court below's ruling on the Policy is reviewed *de novo*.

As a threshold matter, *de novo* review applies to the ruling below because Plaintiffs allege that the Policy facially discriminates on the basis of sex and gender. Opening Br. 33–34; *Hunter*, 209 Cal. App. 3d at 595–96.

B. The Policy facially discriminates on the basis of sex and gender.

The court below's conclusion that the Policy is facially neutral is irreconcilable with both the U.S. Supreme Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), and the Policy's own text: Subdivision 1(a) triggers forced disclosure whenever a student "requests to be identified or treated as a gender . . . *other than the student's biological sex or gender*[,]" including by using "pronouns *that do not align with the student's biological sex or gender*." 1 CT 240, subd. (1)(a) (emphases added). Subdivision 1(b) likewise requires disclosure whenever a student seeks to access programs or activities "*that do not align with the student's biological sex or gender*." 1 CT 240, subd. (1)(b) (emphasis added).

Neither the court below nor the Board in its opposition even mentioned *Bostock*—much less tried to distinguish it—and for good reason: *Bostock* precludes the interpretation of the Policy that the Board asks the Court to adopt here. In *Bostock*, the Supreme Court held that an employer discriminates on the basis of sex when it "penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth" (and vice versa). 590 U.S. at 660. That is precisely what the Policy does: It penalizes a stu-

dent identified as one sex at birth for actions that it tolerates in a student identified as another sex at birth.

Take, for example, two students, A and B, both of whom request to use the boys' bathroom. If Student A is a person assigned male at birth, there is no forced disclosure. But if Student B is a person assigned female at birth, there is. Just as in *Bostock*, the Policy penalizes Student B for taking an action—requesting to use the boys' bathroom—that it tolerates in Student A, solely by virtue of their differing sexes assigned at birth. *Cf. People v. Chino Valley Unified Sch. Dist.*, No. CIV SB 2317301, 27:18–21 (Cal. Super. Ct. San Bernardino Cnty., Oct. 19, 2023) (Reporter's Transcript of Oral Proceedings) (enjoining identical statute because "[d]iscrimination is built into the operative language of the policy, since a child's requests or actions are treated differently based upon their gender incongruity [with their sex assigned at birth] . . . .").

The Board claims that a student who "detransitions" (*i.e.*, reverts back to a gender identity aligned with their sex assigned at birth) triggers the same notification as a student who transitions (*i.e.*, identifies as a gender not aligned with their sex assigned at birth). Board Br. 51. But that's just not true. If Student C, a person assigned male at birth, "detransitions" and therefore reverts back to a male gender identity, the Policy would not require disclosure. 1 CT 240, subd. (1) (requiring disclosure only where, *inter alia*, a student "[r]equest[s] to be identified . . . as a gender . . . *other than the student's biological sex or gender*" (emphasis added)). But if Student D—another student assigned male at birth—transitions to a female gender identity, that *would* trigger disclosure, due to the incongruity between that gender identity and Student D's sex assigned at birth. *Cf. Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608–09 (4th Cir. 2020) (listing cases holding that "various forms of discrimination against transgender people constitute

sex-based discrimination [under] the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes").

On its face, therefore, the Policy treats each of these pairs of students disparately on the basis of sex. And because sex encompasses gender, the Policy also facially discriminates on that basis. *See* Civ. Code § 51 ("sex" includes gender); Gov. Code § 12926 (same); Ed. Code § 210.7 (same).[15] The California Department of Education, in findings issued following the opening brief, reached fundamentally the same conclusion. Cal. Dep't Educ., Investigation Report, Case Matter No. 2024-0065 (July 16, 2024), *available at* https://www.tvusd.k12.ca.us/cms/lib/CA02208611/Centricity/Domain/9886/TVUSD%20CDE%20Investigation%20Report.pdf (the Policy's forced disclosure provisions *"on their face* single out and are directed exclusively toward one group of students *based on* that group's legally protected characteristics of identifying with or expressing a gender other than that identified at birth").

C. The Policy fails strict scrutiny.

Because the court below erroneously concluded that the Policy is facially neutral, it applied rational basis review rather than the strict scrutiny required for laws that discriminate on the basis of sex and gender. Opening Br. 32–34. Even the Board concedes that strict scrutiny applies to "disparate treatment based on an identifiable classification." Board Br. 55. But it claims that the Policy survives strict scrutiny because, in its view: (i) the Policy is intended to further the Board's "compelling interest in protecting and promoting a student's

[15] The Board's attempt to liken forced outing to notifications related to bullying or suicide risk, Board Br. 54, fails for the straightforward reason that those provisions do not target a protected class.

well-being"; and (ii) the Policy is narrowly tailored. *Id.* at 56. Neither is true.

First, even if the purpose of the Policy were in fact to protect and promote student well-being—and as a matter of record, it is not—the Policy's express targeting of transgender and gender nonconforming students for forced disclosure plainly does not further that interest. As Plaintiffs' experts attest, the Board's coercive outing Policy harms these students by, *inter alia*:

- Pressuring them "to hide their identities or be forcibly outed, lose their autonomy, and experience worse outcomes," 4 CT 1133 ¶ 24;
- "[E]liminating support systems that can improve their mental health outcomes, namely supportive adults at school[,]" resulting in greater likelihood of educational disengagement, 4 CT 1134 ¶ 26;
- "[E]xposing them to discrimination, harassment, or bullying at school" by "creat[ing] an official record of their gender identity or expression," 4 CT 1131 ¶ 17;
- "[I]ncreasing stress and trauma for students already facing high rates of discrimination," *id.*;
- Denying them "the opportunity to socially transition at a developmentally appropriate pace[,]" which in turn "support[s] positive mental health outcomes," 4 CT 1134 ¶ 27; and
- Placing them at risk of "parental abuse, homelessness, and lasting trauma," 4 CT 1135 ¶ 28.

Bafflingly, the Board nevertheless asserts that "there is no record evidence to suggest that this Policy places students in harm." Board Br. 56. And the court below did not even mention—much less examine—*any* of Plaintiffs' uncontroverted evidence on this point. *See* PI Op. 7–9, 6 CT 1674–76.

Second, the Board's invocation of pernicious stereotypes—both in the

Policy itself and in the discussions preceding its enactment—belies any purported aim to protect and promote student well-being.[16] The Policy falsely equates transgender identity with mental illness,[17] relying on an "outdated social stereotype[]" to justify forced disclosure. *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 18, (1971); *see also, e.g.*, *Grimm*, 972 F.3d at 594 (transgender identity is "not a psychiatric condition," and the American Psychiatric Association and World Health Organization do not classify transgender identity as a mental illness); *cf. SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 484–85 (9th Cir. 2014) ("gays and lesbians were [once] . . . made inadmissible under . . . immigration laws . . . [as] individuals 'afflicted with psychopathic personality'"). During the Board's consideration of the Policy, Defendant Komrosky described transgender people as lifelong "medical patient[s]" due to "[a]ll the drugs and surgeries." 3 CT 707. Likewise, the Policy's supporters disparaged transgender and gender nonconforming individuals as "gender-confused," suffering from a "mental medical disorder," and the product of a "destructive agenda." 3 CT 608, 612, 617. The court below echoed these stereotypes. PI Op. 8, 6 CT 1675 (quoting Chino Valley Unified School District amicus brief to assert that social transitioning "raises important issues about [children's] health" and implicates "medical decisions being made about" children).

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[16] As described in the opening brief, the Board's stated intent is also undermined by its censorship of State-mandated curricular information on the LGBTQ rights movement, baseless attempts to link LGBTQ people to pedophilia, and banning of the Pride flag. Opening Br. 15, 36–37. Nor is the Policy specific to Temecula; rather, it is taken word-for-word from an identical coercive outing policy enacted (and now enjoined) in Chino Valley. *Id.* 14–15.

[17] Specifically, the Policy states that being transgender is a "mental health" issue that requires parental intervention "at the earliest possible time" because it could give rise to "instances of self-harm." 1 CT 240.

In its opposition, the Board cites "studies demonstrating that transgender and nonconforming students raise mental and social-emotional issues that their cisgender peers do not" to claim that coerced outing is necessary for parents "to take steps to mitigate such serious harms." Board Br. 57–58. But as Plaintiffs' uncontroverted evidence makes clear, that gets the causality backwards. Dr. Sabra Katz-Wise and Dr. Sari Reisner, professors at Harvard Medical School and the Harvard T.H. Chan School of Public Health, state unequivocally that "[b]eing transgender or nonbinary is not a mental disorder." 4 CT 1131 ¶ 16. Katz-Wise and Reisner explain that "[t]ransgender and nonbinary individuals experience higher rates of certain mental health conditions than their cisgender peers, *but these experiences are not the result of their gender identity*." 4 CT 1132 ¶ 19 (emphasis added). Instead, they result from "distinct stressors associated with the stigmatization of [these youths'] gender identity and gender expression, including increased rates of victimization, bullying, and the lack of a supportive environment at home, at school, and elsewhere." *Id.*

Thus, the "[P]olicy erroneously attributes poor mental health outcomes to gender identity, blaming individual students for socially caused mental health disparities"—which are exacerbated, not mitigated, by discriminatory enactments like the Board's. 4 CT 1131 ¶ 18; 4 CT 1085–86 ¶ 9 ("Contrary to the view that sexual minority identity itself causes these disparities, significant research demonstrates that minority stress is the primary driver of disparate behavioral health outcomes for [sexual and gender minority] youth."). As Dr. Mary Helen Immordino-Yang, professor of Education, Psychology, and Neuroscience at the University of Southern California, testifies: "At every turn, TVUSD officials have actively created new sources of stress for students, teachers, and families, instead of working to foster student wellbeing. . . . These policies exacerbate students' identity-based stress, stymying their educational

potential and hindering their social and emotional health." 3 CT 819–20 ¶¶ 16, 18.

Third, even if the Board's claimed interest were not pretextual (and it is), and even if the Board had adduced evidence showing that forcibly outing transgender and gender nonconforming students promotes their well-being (and it hasn't), the Policy would still fail strict scrutiny because it is neither necessary nor narrowly tailored to advancing that interest. *See Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 33 (2001) ("Because suspect classifications are pernicious and are so rarely relevant to a legitimate governmental purpose, they are subjected to strict judicial scrutiny" and "may be upheld only if they are shown to be necessary for furtherance of a compelling state interest and they address that interest through the least restrictive means available.").[18]

Far from being necessary to support student well-being, the Policy in fact inflicts irreparable harms on the students it targets. *Supra* 35–37; *infra* 43. And as described in the opening brief, the Policy is not narrowly tailored because, *inter alia*, it does not except students for whom forced disclosure poses a serious risk of emotional, psychological, or physical harm, nor does it allow

[18] The Board's attempt to liken this case to *Mirabelli* fails because *preventing* disclosure and *mandating* disclosure are fundamentally different policies. *See Mirabelli v. Olson*, 691 F. Supp. 3d 1197, 1203, 1222 (S.D. Cal. 2023) (granting preliminary injunction on the grounds that a policy prohibiting disclosure would "forc[e] plaintiffs to conceal information"); Board Br. 46, 59–60. In fact, *Mirabelli* condemns the policy challenged therein for the same shortcomings that doom the Policy here: the district's articulation of "at best[,] . . . an overly broad state interest"; its "blanket prohibition" on disclosure, which is not "narrowly tailored"; and its failure to "offer[] any showing that it has genuinely considered less restrictive measures than" the policy it chose to implement. *Id.* at 1218.

parents who do not wish to have their children's gender identity officially documented in school records—potentially subjecting them to school-based discrimination and harassment—to opt out of disclosure. Opening Br. 37–38; *see* 4 CT 1089 ¶ 16 (it is "standard practice" to include a waiver provision where "disclosing certain information to parents has the potential to cause harm").[19]

The Board retorts that Plaintiffs' concern about abuse resulting from forced disclosure "would be a basis for prohibiting a school from sharing any facts about a child such as the child's grades . . . or sport's [sic] team result." Board Br. 58–59. This glib equation of a student's being forcibly outed to unsupportive parents with that student bringing home a "B" report card or losing

[19] The Board's suggestion that the Policy accords with State law because certain provisions of the Education Code generally "encourage[] parental involvement" is belied by recently-enacted Assembly Bill 1955 ("AB 1955"), which prohibits precisely the type of discriminatory policy that Plaintiffs challenge here. Board Br. 60; *see* AB 1955 § 5, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB1955 (2024) (prohibiting school district from "enact[ing] or enforc[ing] any policy, rule, or administrative regulation that requires an employee or a contractor to disclose any information related to a pupil's sexual orientation, gender identity, or gender expression to any person without the pupil's consent unless otherwise required by state or federal law").

The Board tries to dismiss AB 1955 with a cursory assertion that it "has no bearing on the merits of the claims currently before this Court." Board Br. 46 n.5. While AB 1955 does not render Plaintiffs' claims moot—it is not yet effective, nor does it obviate the need for a ruling on the Policy's unconstitutionality—it expressly articulates the Legislature's finding that forced outing policies are an unlawful assault on "the rights, safety, and dignity" of LGBTQ students, adversely impacting their "health and well-being." AB 1955 § 2(i).

a lacrosse match betrays the Board's fundamental indifference to the risks it imposes on the transgender and gender nonconforming students it singles out.[20] As Plaintiffs' expert Dr. Jeremy Goldbach—co-author of the first ever comprehensive measure of adolescent minority stress, *i.e.*, stress resulting from hostility toward LGBTQ people because of their identity—testifies: "Transgender and gender diverse students face significant risks at home, including threats of violence and the potential of becoming unhoused. In fact, the majority of all unhoused youth either were kicked out of or fled their homes due to their sexual orientation or gender identity." 4 CT 1083, 1088 ¶¶ 4, 13. Drs. Katz-Wise and Reisner cite multiple reports demonstrating the same. 4 CT 1135 ¶ 29.

Here, the Board did not even consider gender-neutral alternatives to promote student well-being, such as training students and staff to prevent and address bullying and harassment; updating, publicizing, and/or enforcing existing anti-bullying policies; hiring additional counselors or social workers; or ensuring the representation of all students in inclusive curricula. *See* 4 CT 1089 ¶ 15 ("best alternative is for schools to create safe environments"); 4 CT 1133 ¶ 23 (supportive school environments "improve[] transgender and nonbinary students' mental health" and "lead[] to increased feelings of self-efficacy, advocacy, and empowerment"); *cf.* 3 CT 820 ¶ 18 (the Policy "renders school an immensely stressful, even dangerous environment for transgender and gender

[20] Nor are these risks mitigated by the mandated reporter provisions cited by the Board, Board Br. 62, which require reporting suspected or known child abuse or neglect, not refraining from the disclosure of information likely to precipitate such abuse. *E.g.*, Penal Code § 11166 (requiring report where mandated reporter has "knowledge of or observes a child whom the mandated reporter knows or reasonably suspects *has been the victim of child abuse* or neglect" (emphasis added)); Board Policy 5141.4 (same).

nonconforming students"). As the State described, "many other school districts" have adopted such alternatives, including "providing resources, support, and counseling for students and families to facilitate conversations." 5 CT 1329. Both the "availability of [gender-neutral] alternatives" and the Board's failure to consider them are independently "fatal" to the Policy. *Woods v. Horton*, 167 Cal. App. 4th 658, 675 (2008) (quoting *Connerly*, 92 Cal. App. 4th at 37).

The Policy cannot withstand strict scrutiny.

V. Because it erroneously concluded that the Resolution and Policy are constitutional, the court below failed to balance the harms.

The court below conflated its balance-of-harms analysis with its likelihood-of-success analysis, premising the former entirely on its incorrect legal conclusion that the Resolution and Policy are constitutional:

> As discussed above, it is this Court's finding that neither the Resolution nor Policy 5020.01 violate Plaintiffs' constitutional rights. Defense cites to *Maryland v. King* (212) 133 S. Ct. 1, 3 which holds that "[a]ny time a [government] is enjoined by a court from effectuating statutes enacted by the people, it suffers a form of irreparable injury." Accordingly, the balance of harms weighs in favor of denying the request for a preliminary injunction as to both the Policy and the Resolution.

PI Op. 9–10, 6 CT 1676–77. Where, as here, the court below "rested its denial of the request for preliminary injunction solely upon its analysis that plaintiff would not likely prevail on the merits," *de novo* review applies. *Miller v. City of Hermosa Beach*, 13 Cal. App. 4th 1118, 1138 (1993); *Dep't of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*, 8 Cal. App. 4th 1554, 1561 (1992) (applying *de novo* review where lower court premised denial of preliminary injunction on its conclusion "that the [appellant] could not prevail on the merits").

Here, the court below erred as a matter of law in concluding that Plaintiffs are unlikely to prevail on the merits, *supra*, and therefore failed to assess the balance of harms. *See* PI Op. 9–10, 6 CT 1676–77. The Board, moreover, was "given a full opportunity in the trial court to present evidence on and brief [the balance-of-harms issue]," yet "failed to identify any significant harm which would result from the issuance of a preliminary injunction." *Miller*, 13 Cal. App. 4th at 1143. The only harm it claimed was being enjoined from effectuating the Resolution and Policy, which are unconstitutional as described herein. Board PI Opp'n 13, 6 CT 1511; *see Tahoe Keys Prop. Owners' Ass'n v. State Water Res. Control Bd.*, 23 Cal. App. 4th 1459, 1471 (1994) (court may enjoin public officials' unconstitutional or void acts); *NetChoice, LLC v. Bonta*, No. 22-CV-08861-BLF, 2023 WL 6135551, at *22 (N.D. Cal. Sept. 18, 2023), vacated in part on other grounds, 2024 WL 3838423 (9th Cir. Aug. 16, 2024) (no irreparable injury from enjoining statute where government has not shown "that the challenged statute passes constitutional muster"). Nor did the Board adduce any evidence to rebut the extensive record of irreparable injury resulting from the Resolution and Policy. *See* Board PI Opp'n 13, 6 CT 1511. This Court should therefore reverse and order the injunction to issue. *Dep't of Fish & Game*, 8 Cal. App. 4th at 1561, 1569 (reversing and remanding with instructions to enter preliminary injunction where denial was "not supported by the [lower] court's reliance on its erroneous determination that [appellant] could not prevail on the merits" and there was no factual dispute as to the evidence of harm).

Even if the court below had not denied the preliminary injunction based on its erroneous determination that Plaintiffs were unlikely to succeed on the merits (and it did), such that its denial were reviewed for abuse of discretion, the court below abused its discretion by ignoring the evidence of harm presented by one side *in its entirety*. *Cont'l Baking Co. v. Katz*, 68 Cal. 2d 512, 527

(1968) (court abuses its discretion where it "exceed[s] the bounds of reason or contravene[s] the uncontradicted evidence"). Not once did the court below mention—much less weigh—the uncontroverted evidence of significant and ongoing injuries detailed in 11 Plaintiff declarations; 12 expert declarations from the nation's foremost authorities on education, child development, and gender; and the *amici curiae* briefs filed by the State of California and by the ACLU Foundation of Southern California (on behalf of 25 legal and research organizations), respectively. Those injuries, described at length in the opening brief, include significant and continuing harms to all Temecula students, whose education is now subpar to that elsewhere in the State; to Temecula teachers, who are struggling to teach State content standards without triggering career-ending penalties; and to LGBTQ students, who are suffering the devastating impacts of the Board's animus on their education and health. Opening Br. 15–17, 39–40.

Because (i) the court below's denial of Plaintiffs' request for a preliminary injunction fails *de novo* review (and, in the alternative, review for abuse of discretion), and (ii) the facts underlying the balance-of-harms analysis are uncontroverted, this Court should "undertake[] the required balancing on the record before [it] and conclude that an injunction should issue." *Miller*, 13 Cal. App. 4th at 1143.

CONCLUSION

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

September 18, 2024

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CERTIFICATE OF COMPLIANCE

The foregoing **REPLY BRIEF OF PLAINTIFFS-APPELLANTS** complies with the type-volume limitation of Local Rule 8.204(c) because it contains 10,932 words and was prepared in 14-point Garamond, a proportionally spaced typeface, using Microsoft Word. The electronic brief was subject to a virus scan and no virus was detected prior to its submission.

September 18, 2024

Amanda Mangaser Savage

PROOF OF SERVICE

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

On September 18, 2024, I served a copy of **REPLY BRIEF OF PLAINTIFFS-APPELLANTS** on the interested parties in this action as follows:

BY FIRST-CLASS UNITED STATES MAIL: Pursuant to CRC R.8.212(c)(1), a true and correct copy of the foregoing was mailed to the Superior Court of Riverside County clerk for delivery to the trial judge, addressed as follows: Superior Court of California, County of Riverside, Attn: Dept. 6, Honorable Eric A. Keen, 4050 Main Street, Riverside, CA 92501.

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

- Julianne Fleischer, jfleischer@faith-freedom.com
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

September 18, 2024

Amanda Mangaser Savage