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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

MAE M., through her guardian ad litem Anthony M.; SUSAN C., through her guardian ad litem Sabrina; C.; GWEN S., through their guardian ad litem Ramona S.; CARSON L., through his guardian ad litem Nancy L.; DAVID P., through his guardian ad litem RACHEL P.; VIOLET B., through her guardian ad litem INEZ B.; STELLA B., through her guardian ad litem INEZ B.; TEMECULA VALLEY EDUCATORS ASSOCIATION, AMY EYTCHISON, KATRINA MILES, JENNIFER SCHARF, and DAWN SIBBY,

Plaintiff(s)

v.

JOSEPH KOMROSKY, JENNIFER WIERSMA, DANNY GONZALEZ, ALLISON BARCLAY, and STEVEN SCHWARTZ, in their official capacities as members of TEMECULA VALLEY UNIFIED SCHOOL DISTRICT BOARD OF TRUSTEES, TEMECULA VALLEY UNIFIED SCHOOL DISTRICT, and DOES 1 - 20,

Defendant(s)

Case No.: CVSW2306224

DEFENDANTS' NOTICE OF DEMURRER AND DEMURRER TO THE FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: January 16, 2024
Time: 8:30 a.m.
Dept.: 5

RESERVATION ID 484306646479

TO EACH PARTY AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 16, 2024, or as soon as the matter may be heard in Department 5, located 4011 Main Street, Riverside, California 92501, Defendants will move for an order sustaining their demurrer for failure to state a cause of action, without leave to amend, to Counts I through X. (*See* Cal. Civ. Proc. Code § 430.10(e).)

This Demurrer is made pursuant to California Code of Civil Procedure section 430.10 and is based upon the Notice of Demurrer and Demurrer, the Memorandum of Points and Authorities in Support Thereof, the Declaration of Mariah Gondeiro, the pleadings, and other papers on file in this action, and upon such other matters as may be relevant.

DEMURRER

Defendants demurrer to Plaintiffs' First Amended Complaint ("FAC") on the following grounds:

DEMURRER TO FIRST CAUSE OF ACTION

The first cause of action does not state facts upon which relief could be granted. (Code Civ. Proc., § 430.10, subd. (e).)

DEMURRER TO SECOND CAUSE OF ACTION

The second cause of action does not state facts upon which relief could be granted. (Code Civ. Proc., § 430.10, subd. (e).)

DEMURRER TO THIRD CAUSE OF ACTION

The third cause of action does not state facts upon which relief could be granted. (Code Civ. Proc., § 430.10, subd. (e).)

DEMURRER TO FOURTH CAUSE OF ACTION

The fourth cause of action does not state facts upon which relief could be granted. (Code Civ. Proc., § 430.10, subd. (e).)

DEMURRER TO FIFTH CAUSE OF ACTION

The fifth cause of action does not state facts upon which relief could be granted. (Code Civ. Proc., § 430.10, subd. (e).)

DEMURRER TO SIXTH CAUSE OF ACTION

The sixth cause of action does not state facts upon which relief could be granted. (Code Civ. Proc., § 430.10, subd. (e).)

DEMURRER TO SEVENTH CAUSE OF ACTION

The seventh cause of action does not state facts upon which relief could be granted. (Code Civ. Proc., § 430.10, subd. (e).)

DEMURRER TO EIGHTH CAUSE OF ACTION

The eighth cause of action does not state facts upon which relief could be granted. (Code Civ. Proc., § 430.10, subd. (e).)

DEMURRER TO NINTH CAUSE OF ACTION

The ninth cause of action does not state facts upon which relief could be granted. (Code Civ. Proc., § 430.10, subd. (e).)

DEMURRER TO TENTH CAUSE OF ACTION

The tenth cause of action does not state facts upon which relief could be granted. (Code Civ. Proc., § 430.10, subd. (e).)

DATED: November 18, 2023

ADVOCATES FOR FAITH & FREEDOM

Mariah Gondeiro

By: _____
Mariah R. Gondeiro, Esq.
Attorneys for Defendants

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In 2022, three new board members were elected to represent Temecula Valley Unified School District, including Defendants Jennifer Weirsma, Danny Gonzales, and Joseph Komrosky. (First Amended Complaint ["FAC"] ¶¶ 15-16, on file.) These newly elected board members immediately adopted Resolution No. 2022/23/21 ("Resolution"), which banned certain discriminatory doctrines under Critical Race Theory ("CRT"). (*Id.*, ¶¶ 15-17; Ex. 1.) They later adopted Board Policy 5020.01 ("Policy 5020.01"), requiring the district to notify parents of important information regarding their children, including any changes to their pronouns or gender identity. (*Id.*, ¶ 25; Ex. 2.) These board members' beliefs regarding CRT and parental rights were known by the public before they were elected. (*Id.*, ¶¶ 15-17.) Indeed, they garnered a majority of votes because the voters agreed with their stance on these issues. (*Id*.)

The board members acted within the authority given to them by law. Local school boards have broad discretion in the management of school affairs, including controlling their school's curriculum. (*Board of Education v. Pico* (1982) 457 U.S. 853, 864 ["Pico"].) Instead of focusing their efforts on voting the board members out of office, Plaintiffs brought this lawsuit and threw the kitchen sink at Defendants[1], hoping one of their claims would stick. They fling baseless accusations against Defendants, claiming they discriminated against them because of their race and/or sexual orientation and gender identity. They ask this Court to find discrimination simply because they disagree with the Board's policies. That is a dangerous precedent. It would essentially allow any student, parent, or teacher to file a lawsuit against their school simply because they disagree with the school's curriculum or fear that they may be discriminated against because of propaganda perpetuated in the media.

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[1] Defendants include Joseph Komrosky, Jennifer Wiersma, Danny Gonzales, Allison Barclay, Steven Schwartz, in their official capacity as members of Temecula Valley Unified School District Board of Trustees, and Temecula Valley Unified School District, (collectively, "Board" or "TVUSD").

The facts alleged in the FAC demonstrate that Defendants did not act with racial animus or a discriminatory purpose. In fact, the Resolution was passed to protect diversity and to uplift and unite students. (FAC, Ex. 1.) The Board adopted Policy 5020.1 because they support the fundamental rights of parents, including the right to be informed and involved in their child's well-being and education. (*Id.*, Ex. 2.) It is not discriminatory to seek to involve parents in important decisions regarding their child's gender identity.

For the reasons stated below, this Court should dismiss Counts I through X with prejudice because Plaintiffs do not state facts upon which relief could be granted. (Code Civ. Proc., § 430.10, subd. (e).)

II. STATEMENT OF FACTS

On December 13, 2022, the Board enacted the Resolution. (FAC, Ex. 1.) Plaintiffs primarily challenge the Resolution because it prohibits the teaching of CRT. (*Id.*, ¶¶ 2, 11-12, 108-09; Ex. 1.) California does not require that CRT be taught in public schools. (*Id.*, Ex. 1, p. 2.) The Board prohibited CRT because it "is a divisive ideology that assigns moral fault to individuals solely on the basis of an individual's race" and "violates the fundamental principle of equal protection under the law…." (*Id.*)

The Board "values all students, respects diversity, celebrates the contributions of all, and encourages culturally relevant and inclusive teaching practices. The [Board] further believes that the diversity that exists among the District's community of students, staff, parents, guardians, and community members is an asset to be honored and valued…." (*Id.*)

The Resolution states that TVUSD will not use CRT or "other similar frameworks" as a source to guide how topics related to race will be taught. (*Id.*) The Resolution explains what "other similar frameworks" encompass by prohibiting a list of specific doctrines derived from CRT. (*Id.*, p. 3.) The Resolution further states that "social science courses can include instruction on CRT, "provided that such instruction plays only a subordinate role in the overall course and provided that such instruction focuses on the flaws in [CRT]." (*Id.*)

On August 22, 2023, TVUSD enacted Policy 5020.01, otherwise known as the parental notification policy. (*Id.*, ¶ 3, Ex. 2.) The Board adopted Policy 5020.01 because it "strives to foster

trust between the District and parent(s)/guardian(s) of its students." (*Id.*, p. 1.) TVUSD supports "the fundamental rights of parent(s)/guardian(s) to direct the care and upbringing of their children, including the right to be informed of and involved in all aspects of their child's education to promote the best outcomes." (*Id.*)

The policy requires district staff to notify parents(s)/guardian(s) anytime a student requests to be identified or treated differently than the gender listed on the student's birth certificate or official records. (*Id.*) "This includes any request by the student to use a name that differs from their legal name…or to use pronouns that do not align with the student's biological sex or gender listed on the student's birth certificate or other official records." (*Id.*) The policy also requires the principal/designee or staff to notify parent(s)/guardian(s) if a student "has experienced any significant physical injury while on school property or participating in a school sponsored activity." (*Id.*, p. 2.)

Plaintiffs Mae M., Susan C., Gwen S., Carson L., David P., Violet B., and Stella B. (collectively, "Student Plaintiffs") sue under Article I, Section 2(a) of the California Constitution for infringement of the right to receive information (Count II), under Article I, Section 7 and Article IV, Section 16(a) of the California Constitution for infringement of the fundamental right to education (Count III) and intentional discrimination on the basis of race (Count IV), and under California Government Code section 11135 for discrimination on the basis of protected characteristics (Count VI). (*Id.*, ¶¶ 157-84.) Plaintiff Gwen S. is an LGBTQ student and sues under Article I, Section 7 and Article IV, Section 16(a) for intentional discrimination on the basis of sexual orientation, gender identity, and sex regarding the Resolution (Count V) and Policy 5020.1 (Count VIII), and under Article 1, Section 1 regarding the right to privacy (Count IX). (*Id.*, ¶¶ 173-74, 191-95.)

Plaintiffs Temecula Valley Education Association ("TVEA"), Amy Eytchison, Katrina Miles, Jennifer Scharf, and Dawn Sibby (collectively "Teacher Plaintiffs") also bring Counts I through III and Count VI. (*Id.*, ¶¶ 151-65, 175-85.) They also sue for a violation of California Code of Civil Procedure Section 526(a) (Count VII), a violation of Article I, Section 7 of the California Constitution regarding Policy 5020.1 (Count VIII), and a violation of Article I, Section 1 regarding

the right to privacy (Count IX). (*Id.*, ¶¶ 185-98.) Plaintiff Katrina Miles is a minority teacher and sues under Article I, Section 7 and Article IV, Section 16(a) for intentional discrimination on the basis of race (Count IV), and California Government Code section 11135 ("Section 11135") for discrimination on the basis of protected characteristics (Count VI). (*Id.*, ¶¶ 166-72, 175-84.)

Plaintiffs Rachel P. and Inez B. (collectively, "Parent Plaintiffs") are parents of David P. and Violet B, respectively, and also bring Counts II, III, VI, and VII. (*Id.*, ¶¶ 157-72, 185-90.) Plaintiff Inez B. also brings Count IV. (*Id.*, ¶¶ 166-72.)

Plaintiff TVEA is an affiliate of the California Teachers Association and represents teachers in the District, as well as nurses, counselors, social workers, psychologists, and speech pathologists. (*Id.*, ¶ 24.) TVEA brings Counts IV and V. (*Id.*, ¶¶ 66-74.) TVEA's members include individual teacherr Plaintiffs Amy Eytchison, Katrina Miles, Jennifer Scharf, and Dawn Sibby. (*Id.*, ¶ 33.)

III. LEGAL STANDARD

When reviewing a demurrer, the court's task is to determine whether the complaint states a cause of action. (*People ex rel. Lungren v. Superior Ct.* (1996) 14 Cal. 4th 294, 300.) While the allegations of the complaint must be treated as having been admitted, this applies only to well-pleaded allegations. (*Consumer Cause, Inc. v. Weider Nutrition International, Inc.* (2001) 92 Cal.App.4th 363, 366.) A court need not accept as true a plaintiff's contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.)

To confer standing in California courts, a plaintiff must suffer an injury – i.e., an "'invasion of [his or her] legally protected interests'" and whether it is "'sufficient to afford them an interest in pursuing their action vigorously.'" (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175.) The latter consideration is met where the injury is """(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."""" (*Associated Builders and Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 362 ["Associated Builders"]; *City of Palm Springs v. Luna Crest* (2016) 245 Cal.App.4th 879, 883.)

IV. ARGUMENT

A. This Court Should Dismiss Count I Because Teacher Plaintiffs Fail To Plead Facts Sufficient To Constitute A Violation Of Article I, Section 7(a) (Count One)

The void-for-vagueness doctrine prevents the government "from enforcing a provision that 'forbids or requires the doing of an act in terms so vague' that people of 'common intelligence must necessarily guess at its meaning and differ as to its application.'" (*People v. Hall* (2017) 2 Cal.5th 494, 500 [quoting *Connally v. General Construction Co.* (1926) 269 U.S. 385, 391].) "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." (*Robinson v. Shell Oil Co.* (1997) 519 U.S. 337, 341; *see also Boys Markets, Inc. v. Retail Clerks Union, Loc.* 770 (1970) 398 U.S. 235, 250 ["Statutory interpretation requires more than concentration upon isolated words"].)

Teacher Plaintiffs claim they do not know what "other similar frameworks" in the Resolution means, nor do they know what classroom discussions of racism or gender discrimination are permissible. (FAC, ¶ 155.) Viewed in the context of the entire Resolution, it is clear what "other similar frameworks" refer to. The Resolution lists five specific elements of CRT and eight specific doctrines of CRT that are prohibited. (*Id.*, Ex. 1, pp. 2-3.) Teacher Plaintiffs do not explain how any of the challenged elements or doctrines are ambiguous. Thus, this Court should dismiss Count I because the Resolution is not vague when viewed in its entirety.

This Court should also dismiss Count I because Teacher Plaintiffs do not allege enough facts to confer standing. They do not allege facts demonstrating how they are unable to ascertain what topics are disallowed by the Resolution. (*Id.*, ¶¶ 33-56.) Indeed, they allege facts demonstrating that they are aware. For instance, Plaintiff Miles claims the Board's actions have already impacted the information available to her students, suggesting she is aware of what she can and cannot teach. (*Id.*, ¶ 43.) Plaintiff Sibby claims she is unable to discuss many topics in World History. (*Id.*, ¶¶ 50-51.) These specific factual allegations bely any claim of vagueness. Thus, this Court should dismiss Count I.

B. This Court Should Dismiss Count II Because Student Plaintiffs, Teacher Plaintiffs, And Plaintiffs Rachel P. And Inez B. Fail To Plead Facts Sufficient To Constitute A Violation Of Article I, Section 2(a)

Plaintiffs erroneously allege that the Resolution violates the Free Speech Clause because "it restricts students' access to ideas and viewpoints on a partisan, sectarian, and discriminatory basis." (FAC, ¶ 160.) For Student Plaintiffs, there is no First Amendment right to receive instruction on any given subject. (*See Seyfried v. Walton* (3d Cir. 1981) 668 F.2d 214, 216.) A school board's decision to restrict classroom materials as part of a curriculum implicates the balance between a student's First Amendment rights and a state's authority in education matters. (*Hazelwood Sch. Dist. v. Kuhlmeier* (1988) 484 U.S. 260, 266 ["Kuhlmeier"].) School boards have broad discretion in the management of school affairs. (*Pico, supra,* 457 U.S. at p. 864.) "[L]ocal school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values.…'" (*Id*.) The Board's conduct does not offend the First Amendment so long as it is "reasonably related to legitimate pedagogical concerns." (*Kuhlmeier, supra*, 484 U.S. at p. 571.) Courts examine the true motives of the school board members. (*McCarthy v. Fletcher* (Ct. App. 1989) 207 Cal.App.3d 130, 147.) Moreover, the "makeup of the curriculum…is by definition a legitimate pedagogical concern." (*Boring v. Buncombe Cty. Bd. of Educ.* (4th Cir. 1998) 136 F.3d 364, 370.)

Plaintiffs cannot point to any evidence in the FAC that suggests the Board members intended to restrict students' access to viewpoints on a discriminatory basis. The Resolution explicitly states that it "encourages culturally relevant and inclusive teaching practices." (FAC, Ex. 1, p. 1.) It further states that "the diversity that exists among the District's community of students, staff, parents, guardians, and community members is an asset to be honored and valued…." (*Id.*)

Moreover, the Resolution is reasonably related to legitimate pedagogical concerns because it prohibits doctrines that teach that "[a]n individual is inherently morally or otherwise superior to another individual because of race or sex." (*Id.*, p. 3.) The state has a legitimate interest in ensuring that students are not taught that one race is inherently superior to another race. (*Id.*) Accordingly, this Court should dismiss Count II on behalf of Student Plaintiffs for failure to state a claim.

This Court should also dismiss Count II because Student Plaintiffs do not demonstrate how the Resolution injures them. Student Plaintiffs assert broad, unsupported hypotheticals as their claims. For example, Plaintiff Mae M. claims she "knows that her ability to learn" about certain topics will be compromised, but she does not explain how or why. (*Id.*, ¶ 58.) Plaintiff Susan C. alleges that she "rejects the claim that the District's history teachers are attempting to indoctrinate their students." (*Id.*, ¶ 65.) She also claims that she believes the current Board will not approve a course in A.P. U.S. History, but she does not explain how or why. (*Id.*, ¶ 66.) Plaintiff Gwen S. claims the Resolution stymies questions related to "why colonization happened, how colonizers attempted to justify it, and what impacts it had on people subject to colonial rule." (*Id.*, ¶ 77.) Despite making this broad accusation, Plaintiff Gwen S. does not explain how the Resolution stymies these questions.

Plaintiff Carson L. claims "[h]e worries that the Resolution will prevent teachers from fully explaining issues and answering questions out of fear of being reported by ideologically motivated students." (*Id.*, ¶ 84.) Similarly, Plaintiff Rachel P., the mother of Plaintiff David P., is concerned that the Resolution will prevent teachers "from introducing concepts such as the freedom to express one's own opinions", and that the Resolution will "result in unrealistic depictions of important events in David P's history, like the Holocaust." (*Id.*, ¶¶ 89-91.) Plaintiff Inez B., the mother of Violet B. and Stella B., also fears the Resolution will prevent her children from learning about their cultural heritage and historical figures such as Frederick Douglass and Harriet Tubman. (*Id.*, ¶¶ 93, 99.)

These allegations are woefully inadequate to confer standing. Indeed, if this Court were to hold these allegations were adequate, it would allow essentially any student to bring a lawsuit simply because they disagree with their teacher or fear some hypothetical harm. "[H]ypothetical" harm is not the standard. (*Associated Builders, supra*, 21 Cal.4th at p. 362.) Further, districts have the right to control their curriculum. (*Pico, supra,* 457 U.S. at p. 864.) This Court should therefore dismiss Count II because Student Plaintiffs and Plaintiffs Rachel P. and Inez B. do not have standing.

This Court should also dismiss Count II on behalf of Teacher Plaintiffs. Even though Teacher Plaintiffs also allege a violation of Article I, Section 2(a), they do not allege how their rights were

restricted. Count II only focuses on a students' right to receive information. (FAC, ¶¶ 158-61.) Thus, this Court should also dismiss Count II on behalf of Teacher Plaintiffs because they do not allege facts to confer standing.

C. This Court Should Dismiss Count III Because Student Plaintiffs, Teacher Plaintiffs, And Plaintiffs Rachel P. And Inez B. Fail To Plead Facts Sufficient To Constitute A Violation Of The Fundamental Right To An Education

Article IX, Section 1 of the California Constitution recognizes that "[a] general diffusion of knowledge and intelligence [is] … essential to the preservation of the rights and liberties of the people…." Because of this principle, "California has assumed specific responsibility for a statewide public education system open on equal terms to all." (*Butt v. State of California* (1992) 4 Cal.4th 668, 680.) "A finding of constitutional disparity depends on the individual facts. Unless the actual quality of the district's program, viewed as a whole, falls fundamentally below prevailing statewide standards, no constitutional violation occurs." (*Id.* at pp. 686-87.) Moreover, to claim an equal protection violation, group members must have some pertinent common characteristic other than the fact that they are allegedly harmed by the challenged act or law. (*Altadena Library Dist. v. Bloodgood* (Cal. Ct. App. 1987) 192 Cal.App.3d 585, 590-91.)

For instance, in *Vergara v. State of California* (2016) 246 Cal.App.4th 619, 629, the plaintiffs alleged that a group of students were disadvantaged because they were assigned to grossly ineffective teachers. The court found these facts insufficient because whether students are assigned to grossly ineffective teachers is the result of a random assortment, not a defining characteristic. (*Id.* at p. 648.)

Similarly, here, the FAC defines the class of students solely by reference to their alleged shared harm. Specifically, the FAC alleges that, "[b]y restricting the teaching and learning of content and disciplinary skills mandated under California's academic standards, the Board has denied, and continues to deny, Temecula students 'an education basically equivalent' to what students elsewhere in the State are receiving." (FAC, ¶ 165.) The FAC does not provide sufficient substantive group characteristics. The "proposed categories are too lose, too shifting to be useful to courts." (*Corey Airport Servs., Inc. v. Clear Channel Outdoor, Inc.* (11th Cir. 2012) 682 F.3d 1293, 1298.) This

Court should therefore dismiss Count III for failure to state a claim on behalf of Student Plaintiffs, Plaintiffs Rachel P. and Inez B., and Teacher Plaintiffs.

Plaintiffs do not allege enough facts to confer standing either. Student Plaintiffs do not explain how they are denied the ability to learn "content and disciplinary skills mandated under California's academic standards…." (FAC, ¶ 165.) California does not require the teaching of CRT, and the Resolution specifically states that "[n]othing in this resolution shall require any staff member to violate local, state, or federal law…." (*Id.*, Ex. 1, p. 1.) As explained above, Student Plaintiffs do not demonstrate how the Resolution injures them. They only allege speculative harm. (*Id.*, ¶¶ 58, 65-66, 77, 84, 89-91, 93, 99.) Similarly, Teacher Plaintiffs do not explain how the Resolution prevents them from teaching content required under California's academic standards. (*Id.*, ¶¶ 33-56.) This Court should therefore dismiss Count III because Student Plaintiffs, Plaintiff Rachel P., Plaintiff Inez B, and Teacher Plaintiffs do not have standing.

D. This Court Should Dismiss Count IV Because Plaintiffs Mae M., Susan C., Gwen S., Carson L., Violet B., Stella B., Inez B., Miles, And TVEA Fail To Allege Sufficient Facts To Demonstrate Intentional Discrimination On The Basis Of Race

Under the Equal Protection Clause, a law is not "unconstitutional solely because it has a racially disproportionate impact." (*Washington v. Davis* (1976) 426 U.S. 229, 239.) The Supreme Court has held that proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. (*Vill. of Arlington Heights v. Metro. Housing Dev. Corp.* (1977) 429 U.S. 252, 265.) Discriminatory purpose "implies that the decisionmaker…selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." (*Pers. Adm'r of Massachusetts v. Feeney* (1979) 442 U.S. 256, 279 [cleaned up].) "The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." (*Id.*) Courts also look at the specific sequence of events leading up to the act, as well as the legislative or administrative history. (*Id.* at pp. 267-68.)

Here, the Resolution does not explicitly discriminate between separate or distinct classifications of people. It applies to all students. (FAC, Ex. 1.) Plaintiffs have made no preliminary

showing that the Resolution disproportionately impacts a protected class either. Plaintiffs cannot explain how the Resolution treats African American students differently than their peers.

Moreover, Plaintiffs cannot demonstrate intent to discriminate, which is "the condition that offends the Constitution." (*Swann v. Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1, 16.) Plaintiffs allege Defendants engaged in intentional discrimination because "the Resolution expressly singles out for censorship the teaching of concepts related to race and racism" and "its enactment was characterized by procedural and substantive irregularities and overt expressions of racial animus…." (FAC, ¶ 172.) However, the text of the Resolution belies any intent to discriminate.

For instance, the Resolution affirms that people should not be judged by the color of their skin. (*Id.*, Ex. 2, p. 1.) The Board values and respects diversity and condones racism. (*Id.*) The Board opposes CRT because it believes it is an ideology based on false assumptions about the United States and improperly assigns moral fault to individuals solely on the basis of their race. (*Id.*, pp. 1-2.) The Board members' opinions on CRT do not reveal racial animus. (*Id.*, ¶ 139.)

Plaintiffs' opposition to the Resolution does not give rise to an equal protection violation. It simply represents a policy disagreement. TVUSD, in its discretion, has the authority to prohibit or select the scope of its curriculum. (*See Pico, supra*, 457 U.S. at p. 864.) To make any allegation that the Resolution causes a disparate impact on Plaintiffs when the content proscribed in the Resolution is not required by law conflicts with the law giving school districts broad discretion to choose their curriculum. Thus, this Court should dismiss with prejudice Count IV on behalf of Plaintiffs Mae M., Susan C., Gwen S., Carson L., Violet B., Stella B., Inez B., Miles, and TVEA for failure to state a claim.

For the reasons stated above, Plaintiffs Mae M., Susan C., Gwen S., Carson L., Violet B., Stella B., and Inez B. also fail to allege standing because they cannot demonstrate that Defendants have discriminated against them on the basis of race. They allege speculative harm, which does not amount to a cognizable injury. (FAC, ¶¶ 58, 65-66, 77, 84, 89-91, 93, 99.) Plaintiff Miles alleges she fears she will face retaliation for using terms like "white", but this, too, is speculative harm and does not amount to an injury. (*Id.*, ¶ 43.) Finally, TVEA alleges that "[b]y censoring ideas and modes

of inquiry disfavored by certain Board members, the Resolution has made it impossible for TVEA educators at every grade level to meet their professional obligations to their students and teach the concepts mandated under State law and District policy." (*Id.*, ¶ 28.) TVEA fails to allege an injury because it do not allege how Defendants have discriminated against any of its members on the basis of race.

E. This Court Should Dismiss Count V Because Plaintiffs Gwen S. And TVEA Fail To Allege Sufficient Facts To Demonstrate Intentional Discrimination On The Basis Of Sexual Orientation, Gender Identity, And Sex Regarding The Resolution

For related reasons, Plaintiffs Gwen S. and TVEA do not state a claim for relief under Article 1, Section 7 and Article IV, Section 16(a) of the California Constitution. Plaintiffs Gwen S. and TVEA allege discrimination on the basis of sexual orientation, gender identity, and sex because the Resolution censors "concepts related to sex (and, as indicated by Board members' comments, sexual orientation and gender identity)." (FAC, ¶ 174.) Plaintiffs suggest that the Board's removal of specific books that contain LGBTQ material supports a finding of discrimination. (*Id.*, ¶ 139.) The removal of certain books does not show an intent to discriminate, specifically when the Board members emphasize that their decisions are not due to animus towards a specific group of people but a desire to protect parental rights. Indeed, Defendant Komrosky stressed that he desires "more parental involvement." (*Id.*)

Defendant Komrosky's disagreement about the content of certain books or Harvey Milk is not evidence of discrimination either. (*Id.*) Plaintiffs ask this Court to set a dangerous precedent. Essentially, Plaintiffs claim that anytime a school official disagrees about the legitimacy or benefits of a certain curriculum or book, that is tantamount to discrimination. This Court should dismiss Count V because Plaintiffs Gwen S. and TVEA do not allege enough facts to support a claim for discrimination on the basis of sexual orientation, gender identity, or sex.

Similarly, this Court should dismiss this claim because Plaintiffs Gwen S. and TVEA cannot demonstrate a cognizable injury. (FAC, ¶¶ 26-32.) Plaintiff Gwen S. alleges speculative and generalized facts such as how LGBTQ students are frequently the targets of anti-LGBTQ slurs, but she does not explain how the Resolution has discriminated against her. (*Id.*, ¶¶ 72-81.) TVEA does

not allege that any of its members were discriminated against on the basis of sexual orientation, gender identity, or sex. (*Id.*, ¶ 28.)

F. This Court Should Dismiss Count VI Because Individual Plaintiffs Fail To Plead Sufficient Facts To Constitute A Violation Of California Government Code Section 11135

This Court should dismiss Count VI of the FAC because it is moot, and Individual Plaintiffs have not met their burden in establishing disparate impact.

1. Count VI is moot

Count VI is moot under the current statutory framework of California Government Code section 11135 ["Section 11135"]. (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 905 ["Collins"] [holding that 'educational equity claims' brought under Section 11135 are mooted by the statutory scheme of Article 9.5 of the California Government Code].) "[I]t is apparent that the Legislature intended to remove ['educational equity claims] from the scope of Section 11135." (*Id.*)

In *Collins*, the plaintiffs brought a claim under Section 11135, alleging that the state defendants failed to remedy "'racial and ethnic disparities in suspension, expulsion, involuntary transfer and educational opportunity . . . [and] took no action to ensure" that they were in compliance with state anti-discrimination provisions. (*Id.* at p. 903.) The Court dismissed the plaintiffs' claim, explaining that any relief under Section 11135 "would come in the form of enforcement of the provisions of Government Code Sections 11136 and 11137," which would require a complaint to be submitted to the California Department of Fair Employment and Housing ("DFEH"). Yet, under the current statutory scheme, DFEH would be without statutory authority to investigate the complaint and make a determination relating to an "educational equity claim." (*Id.* at p. 904; *see also* Gov. Code, § 12930 [DFEH has the power and duty "[t]o receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful pursuant to Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1, *except for complaints relating to educational equity* . . . ."].) The court, therefore, affirmed the trial court's dismissal. (*Id.* at p. 905.)

Individual Plaintiffs also attempt to bring an "educational equity claim" under Section 11135. (FAC, ¶¶ 175-84.) However, any relief under Section 11135 would come from the

enforcement of Sections 11136 and 11137, which require investigations by DFEH. (*Collins, supra*, 41 Cal.App.5th at p. 904.) Because DFEH is statutorily barred from investigating Individual Plaintiffs' Section 11135 claim, they cannot receive any relief under Section 11135. As a result, Count VI is moot.

2. Even if Count VI is not moot, Individual Plaintiffs still fail to state a claim for relief

This Court should dismiss Count VI because Individual Plaintiffs have not met their burden required under Section 11135. California courts follow a burden-shifting framework when analyzing claims under Section 11135. (*Darensburg v. Metro. Transp. Comm'n* (9th Cir. 2011) 636 F.3d 511, 519 ["Darensburg"].) Under this framework, the plaintiff must establish that the defendant's "facially neutral practice caused a disproportionate adverse impact on a protected class." (*Id.*) The burden then shifts to the defendant to "justify the challenged practice." (*Id.*)

First, Individual Plaintiffs fail to allege facts demonstrating that the Resolution has a disparate impact. Disparate treatment is the "intentional discrimination against one or more persons on prohibited grounds." (*Rosenfeld v. Abraham Joshua Heschel Day Sch., Inc.* (2014) 226 Cal.App.4th 886, 893, [citing *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20].) The "basis for a successful disparate impact claim involves a comparison between . . . those affected and those unaffected" by the policy. (*Darensburg, supra*, 636 F.3d at pp. 519-20.) "[T]he appropriate inquiry is into the impact on the total group to which a policy or decision applies." (*Cnty. Inmate Tel. Serv. Cases* (2020) 48 Cal.App.5th 354, 368 [quoting *Hallmark Developers, Inc. v. Fulton County* (11th Cir. 2006) 466 F.3d 1276, 1286].) "[T]he mere fact that each person affected by a practice or policy is also a member of a protected group does not establish a disparate impact." (*Villafana v. Cnty. of San Diego* (2020) 57 Cal. App. 5th 1012, 1017 ["Villafana"].)

To support their claim of disparate impact, Individual Plaintiffs rely on research that shows that "students of color, female students, and LGBTQ students" benefit from "curriculum that reflects their identities, experiences, and histories." (FAC, ¶ 123.) They further assert that "students without access to inclusive curricula . . . are more likely to be disaffected with or alienated by their studies." (*Id.*, ¶ 124.) Individual Plaintiffs make a broad-sweeping, conclusory allegation that the Resolution

subjects them to discrimination, but they do not show *how* they are disparately impacted by the Resolution. Simply belonging to a protected class is not sufficient to demonstrate disparate impact. (*Villafana, supra,* 57 Cal.App.5th at p. 1017.) The reference to various research data regarding the benefits of "inclusive" curriculum is not sufficient to demonstrate the disparate impact of the Resolution. (*Darensburg, supra*, 636 F.3d at p. 519 ["A district court may not find the existence of a disparate impact 'on the sole basis of a [statistic] unless it reasonably [finds] that [the statistic] would be a reliable indicator of a disparate impact.'"])

Individual Plaintiffs do not allege or identify any facts that demonstrate disparate impact. They rely on a broad assertion that students benefit from education that is reflective of their "identities, experiences, and histories." (FAC, ¶ 123.) Yet, they do not demonstrate how Defendants' actions prohibit access to an education that is reflective of these attributes. The Resolution disproves any allegations of disparate impact or discrimination. For instance, the Resolution prohibits tenets of CRT that seek to elevate one race or sex, and instead promotes diversity "and encourages culturally relevant and inclusive teaching practices." (*Id.*, Ex. 1, p. 1.) Because Individual Plaintiffs fail to show disparate impact or intentional discrimination, they fail to meet their burden under Section 11135. Thus, on this basis alone, this Court should dismiss Count VI.

Second, even if Individual Plaintiffs can show disparate impact, TVUSD can justify the adoption and implementation of the Resolution. (*See Darensburg, supra*, 636 F.3d at p. 519 [holding that the burden shifts to defendant to show discriminatory actions were justified].) TVUSD has an obligation to ensure that its students and faculty are not subjected to discrimination on the basis of race: "[T]he California Supreme Court long ago recognized that cases 'authoritatively establish that in this state school boards do bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin.'" (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 896 ["Collins"]; *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1026–27 (9th Cir. 1998) ["[The Court considers] the awareness that words can hurt, particularly in the case of children, and that words of a racist nature can hurt especially severely."]) The Department of Education defines a "racially hostile environment" as one in which racial harassment is "severe, pervasive or persistent so as to interfere with or limit the ability of an

individual to participate in or benefit from the services, activities or privileges provided by the recipient." (*See* U.S. Dep't of Education, Office for Civil Rights, Racial Incidents and Harassment Against Students at Educational Institutions, 59 Fed. Reg. 11,448, 11,449 (Mar. 10, 1994); Request for Judicial Notice, Ex. 1.)

TVUSD was justified in adopting the Resolution because of its vested interest in prohibiting racism. The Resolution states that TVUSD "condemns racism and will not tolerate racism and racist conduct." (FAC, Ex. 1, p. 1.) The Resolution prohibits certain doctrines of CRT that teach that "only individuals classified as 'white' people can be racist because only 'white' people control society." (*Id.*) The Resolution prohibits harmful doctrines, including that "[a]n individual is inherently morally or otherwise superior to another individual because of race or sex" or that "[a]n individual should be discriminated against or receive adverse treatment due to the individual's race or sex…." (*Id.*, pp. 2-3.) The Resolution also ensures that no student (or teacher) is subjected to curricula that promotes racism or places moral blame on a specific race, superseding any alleged disparate impact on Individual Plaintiffs.

Finally, for the reasons stated above, Individual Plaintiffs have not alleged enough facts to confer standing. Plaintiffs Mae M., Susan C., Gwen S., Carson L., Violet B., Stella B., Inez B., and Miles cannot demonstrate that Defendants have discriminated against them on the basis of race, as they only allege speculative harm. (FAC, ¶¶ 43, 58, 65-66, 77, 84, 89-91, 93, 99.) Plaintiff Gwen S. alleges speculative and generalized facts such as how LGBTQ students are frequently the targets of anti-LGBTQ slurs, and how Policy 5020.1 is causing her peers to suffer mental strain and fear. (*Id.*, ¶¶ 72-81.) These facts are also speculative and do not give rise to a cognizable injury.

G. This Court Should Dismiss Count VII Because Teacher Plaintiffs, Plaintiff Rachel P., And Plaintiff Inez B. Fail To Plead Facts Sufficient To Constitute A Violation Of California Code Of Civil Procedure Section 526(a)

The FAC asserts that TVUSD's expenditure of "federal, State, county, and/or municipal funds to administer a system of education that contravenes" California law is "unlawful" under California Civil Procedure section 526(a) ["Section 526(a)"] and that they have an interest in

enjoining the unlawful expenditure of tax funds. (FAC, ¶ 188.) Teacher Plaintiffs and Plaintiffs Rachel P. and Inez B.'s claim fails for two reasons.

First, they have not alleged facts demonstrating an "actual or threatened expenditure of public funds" in implementing the Resolution. (*Collins, supra*, 41 Cal.App.5th at p. 910.) Section 526(a) "establishes the right of a taxpayer plaintiff to maintain an action against any officer of a local agency to obtain a judgment restraining or preventing illegal expenditure, waste, or injury of the estate, funds, or property of said agency." (*Schmid v. City & Cnty. of San Francisco* (2021) 60 Cal. App. 5th 470, 495 ["Schmid"]; Code Civ. Proc. § 526(a).) To bring a claim under Section 526(a), a plaintiff "'must cite specific facts and reasons for a belief that some illegal expenditure or injury to the public fisc is occurring or will occur.'" (*Collins, supra*, 41 Cal.App.5th at p. 910 [quoting *County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 130].) Section 526(a) is understood to implicate "a 'useless expenditure of funds.' " (*Collins, supra*, 41 Cal.App.5th at p. 910 [citing *Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1138].)

TVUSD's curriculum is consistent and compliant with all state and federal laws. Again, no state or federal law requires the dissemination of CRT within the classroom. Therefore, to exclude such curriculum has no bearing on the expenditure of state funds. Because the FAC does not cite specific facts and reasons that the adoption of the Regulation results in an illegal expenditure or waste of public funds, Count VII fails.

Second, even if Teacher Plaintiffs and Plaintiffs Rachel P. and Inez B. have stated a cognizable claim, Section 526(a) does not apply to agency discretionary decisions. (*See Schmid, supra*, 60 Cal.App.5th at p. 495 ["A claim under this statute [Cal. Civ. Proc. § 526(a)] does not lie to attack exercises of administrative discretion and may not be employed to interfere with policymaking."]) The Court has noted that "section 526(a) has its limits." (*Humane Society of the United States v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 356.) Specially, "the courts have stressed that the statute should not be applied to principally 'political' issues or issues involving the exercise of the discretion of either the legislative or executive branches of government." (*Id.*; *see also San Bernardino County v. Superior Court* (2015) 239 Cal.App.4th 679, 686 [same].)

TVUSD wielded its discretion in adopting a resolution that reflected "community values" and affirmed TVUSD's condemnation of racism and racist conduct. (FAC, Ex. 1, pp. 1-3.) The Resolution does not violate any state law. (*Id.*, p. 1.) School boards have broad discretion in the management of school affairs. (*Pico, supra,* 457 U.S. at p. 863.) "[L]ocal school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values." (*Id.* at p. 864; *see also McCarthy v. Fletcher* (Ct. App. 1989) 207 Cal.App.3d 130, 139 ["As a result, it is generally permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views."] [quoting *Zykan v. Warsaw Community School Corp.* (7th Cir.1980) 631 F.2d 1300, 1305.].) Defendants acted within their authority to proscribe content that did not reflect the moral views of its community. Plaintiffs cannot use Section 526(a) to attack TVUSD's policymaking and discretion.

Because TVUSD's Resolution is compliant with state law and because TVUSD has the discretion to make its own educational decisions, this Court should dismiss Count VII.

H. This Court Should Dismiss Count VIII Because Teacher Plaintiffs And Plaintiff Gwen S. Fail To Plead Facts Sufficient To Demonstrate Discrimination On the Basis of Gender Identity, Sexual Orientation, And Sex Regarding Policy 5020.1

Plaintiff Gwen S. and Teacher Plaintiffs allege Policy 5020.1 discriminates against transgender and gender nonconforming students because it requires the school notify parents or guardians of their child's perceived gender identity change. (FAC, ¶¶ 140-44, 192-95.) First, the policy applies equally to all students who wish to transition from their gender listed on their birth certificate. (*Id.*, ¶ 141.)

The FAC do not allege evidence of intent to discriminate either. The Board members' statements about politicians or the Democrat party does not amount to discrimination. (*Id.*, ¶ 142.) These members are entitled to their opinions. The Board implemented Policy 5020.1 to foster open and positive relationships between parents/guardians and students "that promote the best outcomes for pupils' academic and social-emotional success." (*Id.*, Ex. 2, p. 1.) The Board did not act in a discriminatory manner because they seek to involve parents in important medical decisions regarding their children. The policy affirms the constitutional right of parents to "direct the

upbringing and education of children under their control." (*Pierce v. Soc'y of Sisters* (1925) 268 U.S. 510, 535.) This Court should dismiss Count VIII because Teacher Plaintiffs and Gwen S. have not alleged discrimination or enough facts to establish standing. (FAC ¶¶ 72-81)

I. This Court Should Dismiss Count IX Because Plaintiff Gwen S And Teacher Plaintiffs Fail To Plead Facts Sufficient To Constitute A Violation Of Article I, Section 1 Of The California Constitution

Plaintiff Gwen S. and Teacher Plaintiffs claim Policy 5020.1 violates their right to privacy because it "mandates the disclosure of students' gender identity to their parents or guardians without their consent…." (FAC, ¶ 198.) This allegation is not supported by law. In *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1702, the Fifth District of California affirmed the dismissal of an invasion of privacy cause of action because the adult plaintiff's sexual orientation was not confidential, and the court concluded that, "as a matter of law," the plaintiff "cannot state a claim for infringement of a legally protected informational privacy interest." The Fifth Circuit also affirmed that a student has no privacy right under the Fourteenth Amendment that precludes school officials from discussing private sexual matters with parents. (*Wyatt v. Fletcher* (5th Cir. 2013) 718 F.3d 496, 499.)

Policy 5020.1 has an express intent that is consistent with the strong and important public policy regarding school officials; duty to communicate with parents about the children under their charge. (*See, e.g.*, Educ. Code §§ 51101, 48980 [mandating annual notice to parents regarding multiple rights and responsibilities of parents]; § 48911 [communicating to parent after suspension of student].) And the Legislature has specifically carved out circumstances where student confidentiality is required. (*See, e.g.*, § 49602 [communications of a personal nature between students age 12 and older and school counselors are confidential]; § 46010.1 [requiring notification to parents that students in grades 7 to 12 may be excused from school to obtain confidential medical services without parental consent].) Plaintiff Gwen S. and Teacher Plaintiffs' claim fails as a matter of law.

The claim also fails because they fail to establish an injury. Gwen S. did not allege that TVUSD has forced her to disclose sensitive information regarding her gender identity (FAC, ¶¶ 72-

81), nor have Teacher Plaintiffs demonstrated that TVUSD forced them to disclose sensitive information. (*Id.*, ¶¶ 34-56.) Thus, this Court should dismiss Count IX.

J. This Court Should Dismiss Count X Because Individual Plaintiffs Fail To Plead Facts Sufficient To Constitute A Violation Of Education Code Section 200 *et seq*.

Individual Plaintiffs allege Defendants violated California Education Code section 200 ("Section 200") because Policy 5020.1 "unlawfully subjects transgender and nonconforming students in TVUSD to discrimination…." (FAC, ¶ 202.) However, Section 220 only applies to behavior so severe and pervasive that it has a systemic effect of denying the victim equal access to an educational program or activity—a standard specifically meant to limit the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment. (*J.E.L. v. San Francisco Unified School District* (N.D. Cal. 2016) 185 F.Supp.3d 1196, 1201.) To prevail on a claim for harassment/discrimination under Section 220, a plaintiff must prove that: (1) he or she suffered severe, pervasive, and offensive harassment that effectively deprived plaintiff of the right of equal access to educational benefits and opportunities; (2) the school district had actual knowledge of that harassment; and (3) the school district acted with deliberate indifference in the face of such knowledge. (*Videckis v. Pepperdine Univ.* (C.D. Cal. 2015) 100 F.Supp.3d 927, 935.) Individual Plaintiffs do not allege that they suffered from severe and pervasive harassment that effectively deprived them of the right to access educational benefits and opportunities. They do not allege that Defendants were aware of any harassment or acted with deliberate indifference to the harassment. Individual Plaintiffs have therefore failed to satisfy the elements of Section 200, and this Court should dismiss Count X.

V. CONCLUSION

For the foregoing reasons, this Court should dismiss Counts I through X for failure to state facts upon which relief can be granted. (Code Civ. Proc., § 430.10, subd. (e).)

DATED: November 18, 2023

ADVOCATES FOR FAITH & FREEDOM

By: Mariah Gondeiro

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PROOF OF SERVICE

I am an employee in the County of Riverside. I am over the age of 18 years and not a party to the within entitled action; my business address is 25026 Las Brisas Road, Murrieta, California 92562.

On November 18, 2023, I served a copy of the following document(s) described as **DEFENDANTS' NOTICE OF DEMMURER AND DEMMURER TO THE FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

SEE ATTACHED SERVICE LIST

☐ **BY E-MAIL OR ELECTRONIC TRANSMISSION.** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I transmitted copies of the above-referenced document(s) on the interested parties in this action by electronic transmission. Said electronic transmission reported as complete and without error.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am an employee in the office of a member of the bar of this Court who directed this service.

Susan Y. Kenney

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