No. 24-7676

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONCERNED JEWISH PARENTS AND TEACHERS OF LOS ANGELES, et al.
Plaintiffs-Appellants,

v.

LIBERATED ETHNIC STUDIES MODEL CURRICULUM CONSORTIUM, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
FERNANDO M. OLGUIN, DISTRICT JUDGE • CASE NO. 2:22-CV-03243-FMO-E

APPELLANTS' OPENING BRIEF

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APPELLANTS' OPENING BRIEF

INTRODUCTION

This is an appeal from the dismissal of a complaint challenging the current and future use of antisemitic teaching materials in defendant Los Angeles Unified School District's ("LAUSD") classrooms. The complaint also seeks to enforce public disclosure requirements for ethnic studies curriculum materials used by LAUSD teachers. Finally, the appeal challenges the granting of an anti-SLAPP motion when the complaint targets antisemitic materials taught in classrooms, not First Amendment protected speech.

Plaintiffs are Los Angeles-area Jewish parents, teachers, and an organization that represents them who sued LAUSD and its co-conspirators United Teachers of Los Angeles ("UTLA"), Liberated Ethnic Studies Model Curriculum Consortium ("Consortium"), and three related individuals for their ongoing surreptitious introduction of antisemitic ethnic studies curriculum into classrooms.

Plaintiffs seek relief for Jewish teachers, parents, and children from a hostile LAUSD environment where Hamas terrorists are celebrated as liberators and the Jewish state of Israel is portrayed as a white colonial apartheid state that should cease to exist. The district

court wrongly decided on the pleadings that such teachings are not antisemitic and that LAUSD's Jewish children and teachers are not injured by studying and working in a hostile environment.

The district court also wrongly held defendants did not engage in state action. As a government entity, LAUSD engages in state action. So too did defendant Guadalupe Carrasco Cardona, who teaches the antisemitic curriculum in her LAUSD classroom. UTLA engages in state action by appointing half the members of the official LAUSD curriculum committee that creates and distributes the challenged curriculum. Likewise defendant Cecily Myart-Cruz engages in state action through her leadership of UTLA and service on and appointment power over the curriculum committee. So too do defendants Theresa Montaño and Cardona through their curriculum committee service. And the Consortium engages in state action through its conspiracy with the other defendants to develop antisemitic curriculum and instruct sympathetic teachers how to covertly teach it in classrooms.

The court also erred in finding the complaint stated no claims. The current and future use of secretly created and distributed antisemitic curriculum in LAUSD classrooms violates federal and state constitutional and statutory law. An entire generation of Jewish high school students has endured a bigoted environment as this case has languished for two-and-a-half years while the district court dithered over the pleadings. Jewish teachers have endured a hostile workplace. And non-Jewish students and teachers have been taught to be antisemitic. The court never once held a hearing, and plaintiffs still have not had an opportunity to take discovery. The district court's ruling ignores the complaint's allegations and its prayer for relief.

Finally, the court erred in dismissing state law claims under California's anti-SLAPP statute. As framed by the complaint's allegations, the only relief sought is enjoining illegal curriculum taught in public school classrooms. The First Amendment is irrelevant.

Ultimately, the district court simply doesn't understand antisemitism. According to the court, this case is about nothing more than "learning about Israel and Palestine or encountering teaching materials with which one disagrees." (1-ER-15.) It is not. The grievous harm caused to Jewish students and teachers stuck in a hostile

environment that seeks to delegitimize their faith and existence is something no minority group should ever face in a public school. It is time to move this case forward to secure a just school environment free from discrimination and hostility toward Jewish students and teachers.

JURISDICTIONAL STATEMENT

The district court had original jurisdiction over plaintiffs' federal claims under 28 U.S.C. § 1331 and supplemental jurisdiction over their state claims under 28 U.S.C. § 1367(a).

The district court entered judgment on November 30, 2024. (1-ER-51.) Plaintiffs filed a timely notice of appeal on December 17, 2024. (11-ER-2360.) This Court has jurisdiction over plaintiffs' appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

(1) Do plaintiffs have standing?

(2) Are plaintiffs' claims ripe?

(3) Is LAUSD protected by state sovereign immunity?

(4) Does the operative complaint sufficiently allege state action to establish a claim under 42 U.S.C. § 1983?

(5) Does the operative complaint sufficiently state claims for violation of the Free Exercise and Equal Protection Clauses of the federal and state Constitutions, Title VI of the Civil Rights Act of 1964, and the California Education Code?

(6) Should plaintiffs be afforded leave to amend?

(7) Was defendants' anti-SLAPP motion properly granted?

STATEMENT OF THE CASE

A. Antisemitism comes to Los Angeles Unified School District.

Through their official appointment power, defendants UTLA and Myart-Cruz appointed avowed anti-Zionists to LAUSD's government-funded Ethnic Studies Committee and play a significant official role in the committee's work developing antisemitic materials to distribute to

teachers for use in classrooms. (7-ER-1237–39, 1250.)[1] One committee member appointed by UTLA praised the crowd who rampaged through the Jewish neighborhood of Fairfax yelling "F**k the police and kill the Jews!" (7-ER-1240–41.) UTLA also works with the committee to sponsor teacher workshops funded by teacher dues, including plaintiffs' dues, which instruct on introducing the antisemitic ethnic studies materials into LAUSD classrooms. (7-ER-1241, 1364–66.) UTLA's designated "Palestine expert" advising this official effort is a member of the Palestinian Youth Movement which stated after October 7, 2023, that the murder of more than one-thousand Israelis and the taking of hostages was a "battle" in which "the honor of the Arab nation is restored." (7-ER-1244–45.)

Defendant Consortium is a nonprofit corporation and government contractor whose leadership sits on LAUSD's official curriculum committee and conspires with UTLA and the District to prepare antisemitic teaching materials. (7-ER-1242–43; *see* 7-ER-1251.)[2] Defendant Montaño is secretary of the Consortium and a member of LAUSD's Ethnic Studies Committee. (7-ER-1243.) She uses her official

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[1] California law established an ethnic studies teaching requirement for schools. Cal. Educ. Code § 51226.7(a) & (e) (West 2022).

[2] If the full extent of the Consortium's involvement is unclear in the complaint, it can be amended to clarify.

position to ensure that the ethnic studies curriculum taught in LAUSD slanders Jewish Zionists. (7-ER-1243.) Defendant Cardona is Chief Executive Officer of the Consortium, a member of the LAUSD Ethnic Studies Committee, and a LAUSD public school teacher who uses the antisemitic liberated ethnic studies teaching materials drafted by the Consortium. (7-ER-1243–44.)[3]

Defendants' goal for this liberated ethnic studies curriculum in use at some LAUSD schools with plans for expansion is to "always be confronting Zionism." (7-ER-1244.) The curriculum describes Zionism as a "settler colonial ideology that justifies ethnic cleansing" and Israel as a "fascist dictatorship." (7-ER-1244, 1250–54.) Hamas, even after October 7, is celebrated as part of the treasured resistance. (7-ER-1231–32.) Defendants develop and promulgate model curriculum materials in secret and introduce them by stealth in LAUSD classrooms. 7-ER-1252–53, 1287-88; *infra* pp. 9-13.

[3] An amended complaint would update Cardona's current role as a school site coordinator who organizes other teachers to teach the challenged curriculum.

B. Plaintiffs are harmed by the hostile environment created by the antisemitic curriculum drafted and taught by defendants in LAUSD classrooms.

Plaintiff Concerned Jewish Parents and Teachers of Los Angeles ("Concerned Parents") is an association of Zionist Jewish parents with children enrolled in LAUSD and teachers who teach there. (7-ER-1235.) Plaintiffs Lindsey Kohn, Danna Rosenthal, and Daniel Eli are teachers and parents at LAUSD. (7-ER-1235–36.) Their children, along with the children of other Concerned Parents members, are negatively affected by the hostile environment created by the current infiltration of antisemitic curriculum into some LAUSD classrooms even if they or their children are not present in them. (7-ER-1235–37.) They are also at risk of direct exposure to antisemitic curriculum as it is added to more classrooms which they could join. (7-ER-1249, 1252–53, 1257, 1261–66.)[4] Separate from their children, the teacher plaintiffs and other Concerned Parents members feel unsafe in their workplace given the hostility toward Zionist Jews that permeates LAUSD and is

[4] While the operative complaint's allegations could be clearer regarding the current and reasonably likely future harm caused by the challenged curriculum, they are sufficient to survive a motion to dismiss. If necessary plaintiffs could provide greater clarity through amendment.

caused by defendants' actions developing and promoting the challenged curriculum. (7-ER-1235–37.)

For plaintiffs, Zionism is essential to Judaism, as the Torah and other sacred Jewish texts discuss the ancient and longstanding connection of the Jewish people to the land of Israel and its essential part in daily Jewish religious life. (7-ER-1266–73.)

C. Plaintiffs sue in 2022 and amend their complaint to challenge the current and future secret use of antisemitic curriculum.

Plaintiffs filed their original complaint on May 12, 2022. (2-ER-53–107.) A corrected complaint with exhibits was filed on June 27, 2022. (2-ER-114–238.) In August, defendants moved to dismiss and filed an anti-SLAPP motion. (2-ER-239–332.)

On September 16, 2022, after the motions were withdrawn (2-ER-333–34), plaintiffs filed a first amended complaint. (3-ER-336–400.)[5] The prior motions were denied as moot. (3-ER-401.) Defendants then moved to dismiss the new complaint and to strike it under the anti-SLAPP statute. (3-ER-402–546.) The motions were fully briefed on December 16, 2022. (5-ER-763–801.)

[5] The district court considered this the second amended complaint. (3-ER-401.)

After nearly a year with no hearing or decision, the court accepted the parties' stipulation to file the operative second amended complaint on October 16, 2023. (7-ER-1213–1472.)[6] The first paragraph of the operative complaint makes clear what this case is about: "This case is brought to compel public disclosure of, and to enjoin, the use by the Los Angeles public schools of Defendants' overtly racist and antisemitic teaching material" which "discriminates against a segment of California residents on the basis of their religious beliefs and their national origin." (7-ER-1224 (¶ 1).)

The complaint alleges five basic facts.[7] First, the complaint alleges that LAUSD, in concert with its coconspirators UTLA and the

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[6] In granting permission to file this amended complaint, the court deemed it the second amended complaint. (7-ER-1211–12.) But the later order dismissing the complaint called it the third amended complaint. (1-ER-4 n.5.)

[7] The district court complained about the difficulty of parsing "plaintiffs' wide-ranging, imprecise, and at times, baffling 258-paragraph SAC into coherent theories." (1-ER-8 n.8.) While the complaint could be streamlined, the basic allegations are clear. The court also complained that plaintiffs' opposition to the motion to dismiss devoted "a third" of its space "to explain exactly what they contend their SAC alleges—and at times, attempting to walk back certain allegations or add new ones." (1-ER-4.) If the court was confused, a hearing could have led to better understanding of the complaint and how to amend it. Clarifying a complaint in an opposition brief is also an appropriate way to show how the complaint could be amended. That the complaint has

Consortium, intentionally hides the current and future ethnic studies curriculum from public scrutiny, contrary to law. (7-ER-1228 (¶14), 1229 (¶ 15(c)), 1230 (¶ 15(f)), 1235–37 (¶¶ 26–32), 1246–47 (¶ 63), 1252–53 (¶ 85), 1261 (¶¶ 114–16), 1262 (¶¶ 118–19), 1265 (¶ 128).)[8]

Second, the antisemitic curriculum prepared by defendants through the official LAUSD Ethnic Studies Committee is taught surreptitiously in LAUSD schools today. (7-ER-1241 (¶ 44), 1243–44 (¶ 53).)[9]

Third, there is a reasonable probability that additional classrooms will include this antisemitic curriculum over time. (*See, e.g.*, 7-ER-1225–26 (¶¶ 6–8), 1228–1230 (¶¶ 12, 15), 1237–38 (¶ 33), 1249 (¶¶ 71–72), 1252–53 (¶ 85), 1257 (¶ 100), 1261–66 (¶¶ 116–29).)

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been amended (1-ER-4) is less salient given that the order on appeal is the first time the court addressed the merits of the case and what required fixing in the over two years it was pending.

[8] The court found fault with the complaint's discussion of the liberated ethnic studies model curriculum. (1-ER-4–8.) The curriculum is discussed because it is taught now and will expand to more classrooms. (7-ER-1241, 1243–44.)

[9] The court appeared to think the complaint is inconsistent in alleging defendants conspire to hide introduction of the model curriculum and that it is being used in LAUSD classrooms. (1-ER-8.) There is no inconsistency. Without the conspiracy, there would likely be more evidence of current use because there would be more transparency about the curriculum being taught.

Fourth, the current and future use of antisemitic curriculum in LAUSD schools harms Jewish students and teachers by creating a hostile environment throughout the district. (*See, e.g.*, 7-ER-1232–33 (¶ 19), 1237 (¶¶ 31–32).)

Fifth, the non-District defendants are sued for their engagement in a conspiracy involving state action given their official positions on the LAUSD curriculum committee, appointment power for that committee, active role in developing and spreading the challenged curriculum, and role as teachers. (*See, e.g.*, 7-ER-1237–38 (¶ 33), 1238–39 (¶¶ 34–37), 1240 (¶ 40), 1241 (¶ 45), 1242 (¶ 50), 1243–44 (¶¶ 52–53).)

The prayer for relief seeks: (1) declaratory relief that the current and future use of elements of the liberated ethnic studies curriculum violates the federal and state laws invoked in the complaint; (2) declaratory and injunctive relief requiring LAUSD to publicly disclose all ethnic studies teaching materials currently in use by teachers and to require future compliance with the public hearings requirement for approving such curriculum; and (3) declaratory and injunctive relief prohibiting the use of specific antisemitic materials in any classroom. (7-ER-1293–94.)

D. The district court dismisses the amended complaint with prejudice without a hearing.

Defendants again moved to dismiss and filed anti-SLAPP motions on November 13, 2023. (8-ER-1474–1598.) The motions were fully briefed on November 30, 2023. (8-ER-1646–73.)

After another year of delay, and still no hearing, on November 30, 2024, the court granted the motions to dismiss and anti-SLAPP motions, dismissing the complaint with prejudice and without leave to amend. (1-ER-48–50.)

The court ruled the claims were not ripe, plaintiffs lacked standing, and LAUSD had state sovereign immunity. (1-ER-12–26.) The court determined that none of plaintiffs' causes of action stated a claim. (1 ER 26–42.) The court also dismissed the state claims against the non-LAUSD defendants under California's anti-SLAPP statute. (1-ER-42–48.)

Judgment was entered on November 30, 2024. (1-ER-51.)

SUMMARY OF THE ARGUMENT

Plaintiffs' claims are ripe because defendants are using the antisemitic ethnic studies curriculum in LAUSD classrooms now and are threatening to imminently expand that use.

Plaintiffs have standing because they are injured by (1) defendants' use of the curriculum to create a hostile educational environment, (2) defendants' concealment of those materials from public view and comment, and (3) the future expansion of the curriculum. All of these injuries will be redressed by the relief plaintiffs seek.

Eleventh Amendment state sovereign immunity does not protect LAUSD from suit because Congress abrogated such immunity from Title VI claims and, as to plaintiffs' remaining claims, because LAUSD is no longer an arm of the state under this Court's new test. Plaintiffs' claims against defendant Cardona can proceed under the *Ex parte Young* exception to Eleventh Amendment immunity.

The district court erred in dismissing each of plaintiffs' claims. The complaint alleges that (1) defendants engaged in a conspiracy to hide an antisemitic ethnic studies curriculum from the public, which amounts to state action; (2) some teachers are already using this curriculum in LAUSD classrooms; and (3) absent action from the court, more teachers will use the curriculum. These allegations support each of plaintiffs' claims (including the state action requirement) and justify the relief sought: (1) to require compliance with the public hearing requirement, (2) to identify existing ethnic studies teaching materials

currently being used in classrooms, and (3) to enjoin the use of any antisemitic ethnic studies curriculum.

At minimum, plaintiffs should be afforded leave to amend their complaint.

Finally, California's anti-SLAPP statute does not apply because plaintiffs' claims fall within the statute's public interest exception and are not based on any protected petitioning activity. Forthcoming changes in the law will also likely end the applicability of state anti-SLAPP laws in federal court.

ARGUMENT

I. Dismissal under Federal Rules of Civil Procedure 12(b)(1)&(6) is reviewed de novo, all allegations are accepted as true, and leave to amend is liberally granted.

An order granting a motion to dismiss is reviewed de novo, accepting all "'allegations as true, and construe[ing] all inferences in the plaintiff's favor.' Jurisdictional questions, including issues of standing, also are reviewed de novo. We review a district court's denial of leave to amend for abuse of discretion. 'Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.'" *Bolden-Hardge v. Off. of Cal. State Controller*, 63 F.4th 1215, 1220 (9th Cir. 2023) (alteration in

original) (citations omitted); *see United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011) ("The standard for granting leave to amend is generous."); *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1137 (9th Cir. 2001) ("Where counsel is able to posit possible amendments that would be consistent with the operative complaint and could also possibly state a claim for relief, the complaint should not be dismissed on its face with prejudice.").[10]

"Rule 12(b)(6) dismissals 'are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development.'" *McGary v. City of Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004).

"A plaintiff is the master of his complaint and responsible for articulating cognizable claims." *Newtok Vill. v. Patrick*, 21 F.4th 608,

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[10] The district court properly applied these rules in other cases. *See, e.g.*, *Ent. Studios Network, Inc. v. McDonald's USA, LLC*, No. 21-4972, 2022 WL 17078647, at *5 (C.D. Cal. Sept. 16, 2022) (denying motion to dismiss because factual questions cannot be resolved at motion to dismiss stage); *Sec. & Exch. Comm'n v. Church-Koegel*, No. 20-8480, 2021 WL 6104157, at *1 (C.D. Cal. Sept. 29, 2021) (denying motion to dismiss a prayer for injunctive relief "since determining the likelihood of future violations is almost always a fact-specific inquiry"); *Rodriguez v. County of Los Angeles*, No. CV-10671, 2021 WL 4434973, at *1 (C.D. Cal. May 24, 2021) (denying motion to dismiss a *Monell* claim because "[i]t is a rare plaintiff who will have access to the precise contours of a policy or custom prior" to discovery (alteration in original)).

616 (9th Cir. 2021). In particular, "we turn to the prayers for relief for indications of the pleader's intent." *Ring v. Spina*, 166 F.2d 546, 549 (2d Cir. 1948); *see Ferguson v. City of Phoenix*, 157 F.3d 668, 675 (9th Cir. 1998) (noting "[t]he principal purpose of this litigation as evidenced by the prayers for relief").

Pierro v. Spiegel Development, Inc., 461 F.App'x 593 (9th Cir. 2011) is instructive. This Court reversed the grant of a motion to dismiss because the complaint's prayer for relief satisfied an element of a claim the district court said was not properly stated. *Id.* at 594. Looking to the prayer for relief was necessary to give plaintiff's complaint the benefit of "all reasonable inferences." *Id.*

As detailed below, the basic allegations in the complaint, including the stated limitations on the relief sought, support each of plaintiffs' claims. At worst, as framed in this brief, the complaint could be amended to state each of its claims.

II. The district court erred in dismissing plaintiffs' claims on justiciability grounds.

A. Plaintiffs' claims are ripe because they are harmed by antisemitic curriculum.

The district court ruled plaintiffs' claims were not ripe because the challenged curriculum has not been adopted by LAUSD and their

children do not attend classrooms in which it is taught. (1-ER-12.) The court erred by ignoring the nature of the alleged harm.

To be ripe under Article III, a lawsuit must present "concrete legal issues, presented in actual cases, not abstractions." *Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky. v. Labrador*, 122 F.4th 825, 839 (9th Cir. 2024). "Ripeness, like standing, is evaluated 'less stringently in the context of First Amendment claims.'" *Id.* at 839.

The complaint details how the model curriculum discriminates against Jews and Israelis. (*See* 7-ER-1225, 1227–32, 1248, 1254, 1297–1314, 1316–26.) Plaintiffs' complaint alleges the curriculum is already being taught at LAUSD, whether or not formally adopted. (7-ER-1241, 1243–44.)[11] It also alleges LAUSD's Ethnic Studies Committee is

[11] The district court hinged its analysis on the supposed concession that LAUSD has not adopted the challenged curriculum. (1-ER-12.) That ignores the complaint's allegations: curriculum committee members promote the challenged curriculum to be taught in secret to escape public review. (7-ER-1260–63.) That the curriculum committee is advisory (1-ER-28) also does not assist defendants. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) is instructive. The Supreme Court "look[ed] through forms to the substance and recognize[d] that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." *Id.* at 67. Here, too, the committee, even acting informally, can materially impact the rights of Jewish students and teachers.

working in secret to expand use of the curriculum to more classrooms without required public oversight. (7-ER-1261–63.)

These allegations show the dispute is ripe for adjudication.

B. Plaintiffs have standing because their civil rights are violated by implementation of the model curriculum.

1. Plaintiffs allege injury in fact from the hostile environment created by antisemitic curriculum.

The district court ruled plaintiffs lack standing because they alleged no injury in fact as no plaintiff's child has yet encountered the curriculum in class. (1-ER-13–17.) The court erred by framing the injury this narrowly and by disregarding the alleged harm to the teacher plaintiffs.

To establish standing, plaintiffs must show: (1) an "injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Injuries take many forms, both tangible and intangible. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021); *see, e.g.*, *Trump v. Hawaii*, 585 U.S. 667, 698 (2018) (separation from relatives abroad); *Soule v. Conn. Ass'n of Schs., Inc.*, 90 F.4th 34, 46 (2d Cir. 2023) (denial of equal athletic opportunities). As the district court recognized, "an injury to one's

constitutional rights" is a cognizable injury in fact. (1-ER-13 (quoting *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024).)

Plaintiffs' injuries go beyond a "general legal, moral, ideological, or policy objection." *Hippocratic Med.*, 602 U.S. at 381. Plaintiffs and their children *are* Zionist Jews and Israelis whose civil rights are violated by the current hostile environment based on ongoing use of antisemitic materials in classrooms, and their rights will be further violated by its expansion. 7-ER-1243–44, 1261–63, 1279; *see Louis D. Brandeis Ctr. for Hum. Rts. Under Law v. Pres. & Fellows of Harvard Coll.*, No. 24-11354, 2024 WL 4681802, at *4 (D. Mass. Nov. 5, 2024) (holding that plaintiffs had standing because their "[c]omplaint paints a picture of a[n] environment . . . filled with antisemitic and anti-Israeli rhetoric that [defendant] refuses to sanction or even address").

For plaintiffs, "Zionism is an essential part of Jewish belief as well as of Jewish culture and ethnic identity." 7-ER-1228–30; *see* 7-ER-1235–37, 1270–73; *see also* Alyza Lewin, *Recognizing Anti-Zionism as an Attack on Jewish Identity*, 68 Cath. U. L. Rev. 643, 643–45 (2019). These teaching materials make plaintiffs the target of antisemitism, a form of discrimination based on religion, shared ancestry, race, and ethnicity.

That none of plaintiffs' children have been directly exposed in class to the challenged curriculum is irrelevant (1-ER-14) because the gravamen of their injury is being forced to attend school in a hostile educational environment where such ideas are endorsed. (7-ER-1237.) *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 718–19 (2007) is instructive. Parents challenged a plan that considered race when assigning students to schools. *Id.* at 718. The school district argued the alleged injury was too speculative for standing, since "members [would] only be affected if their children [sought] to enroll in a [district] high school and [chose] an oversubscribed school." *Id.* The Supreme Court rejected this argument: "The fact that it is *possible* that children . . . will *not* be denied admission to a school based on their race . . . does not eliminate the injury claimed." *Id.* at 719 (emphasis added). Here, plaintiffs are similarly injured now by the hostile environment that permeates all LAUSD schools because this antisemitic curriculum is tolerated in some classrooms already, and they are at risk of future placement in classes directly teaching the harmful materials.

Harris v. Board of Supervisors, 366 F.3d 754, 756–67 (9th Cir. 2004) is also instructive. In *Harris*, after the Board of Supervisors

proposed cutting certain county health services, chronically ill indigent patients sued. *Id.* The county challenged the plaintiffs' future injury as "too tenuously connected" to the proposed cutbacks. *Id.* This Court disagreed because "the only true uncertainty [was] *when* plaintiffs will next require medical treatment." *Id.* Here, as the challenged curriculum expands to more classrooms, it is likely one or more of plaintiffs' children or the children represented by Concerned Parents will directly face it in class.

The district court described the issue here as "whether instruction that may be critical of Zionism or Israel is antisemitic." (1-ER-21.) That reflects a misunderstanding of antisemitism.[12] The complaint does not seek to enjoin mere criticism of Zionism or Israel. Rather, the complaint seeks relief for Jewish teachers who are harmed by working in a school environment "in which [their] religious or ethnic identity is

[12] *See* Dara Horn, *October 7 Created A Permission Structure for Antisemitism*, The Atlantic (Oct. 7, 2024), https://tinyurl.com/horn-october-7; Andrea Martin, *Balancing Freedom of Expression & Equality on College Campuses in the Wake of Intensified Antisemitism*, 90 Brook. L. Rev. 67, 76 (2024) (describing disparagement of Zionism as a "tactic[] designed to isolate, intimidate, and demonize Jewish students and to force them to hide an integral part of their Jewish identities"); David Hirsh, *How the Word "Zionist" Functions in Antisemitic Vocabulary*, 4(2) J. of Contemp. Antisemitism (2022).

being officially denounced by publicly-funded propaganda in the public school workplace on public school time." (7-ER-1237 (¶ 32).)

Students are similarly harmed. Indeed, a hostile educational environment can develop even where the antisemitic conduct is not directed at the complainant. *See* Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11449–50 (Mar. 10, 1994). When state actors denigrate plaintiffs' religious belief and national origin, the government unlawfully treats them differently than similarly situated LAUSD teachers, parents and students who are not Jewish or Israeli Zionists. As long as LAUSD tolerates antisemitism taught in any class, all Jewish teachers and parents are injured. And there is a real risk of future expansion to more classrooms.[13]

Fiss v. California College of the Arts, No. 24-cv-03415, 2025 WL 91181 (N.D. Cal. Jan. 14, 2025) is instructive. A Jewish professor

[13] The court said it is not enough to complain about lack of public disclosure about curriculum because it is just asking the government to follow the law. (1-ER-15 n.12.) *Hippocratic Med.*, 602 U.S. 367, 381 is inapposite because plaintiffs there did not allege injury to them tied to the government's violation of the law because plaintiffs never would participate in any abortions. Here, the lack of public disclosure makes it easier for antisemitic curriculum to spread into more classrooms injuring plaintiffs.

alleged she suffered adverse employment actions and a hostile work environment after she complained that an Instagram post by the college's Ethnic Studies Department was antisemitic. *Id.* at *6. The court declined to decide whether the post was antisemitic on the pleadings, even though it was a "close call," because the claim was "most appropriately resolved after further factual development, with the benefit of an actual record as opposed to allegations." *Id.*

The court notes that only two teachers are alleged to be using the curriculum now. (1-ER-8, 12.) This number reflects the lack of discovery and the conspiracy to keep use of the curriculum hidden. Discovery will show far more than two teachers using the curriculum.

The district court claimed plaintiffs do not explain how being in an antisemitic school environment harms them. (1-ER-14.) It is no different than how a Black teacher or student would be injured working or studying in a school district tolerating teachers instructing that slavery was good or segregation was moral. *See, e.g.*, *Monteiro v. Temple Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998) ("It does not take an educational psychologist to conclude that . . . being shamed and humiliated on the basis of one's race, and having the school authorities ignore or reject one's complaints would adversely affect a

Black child's ability to obtain the same benefit from schooling as her white counterparts.").

LAUSD and its curriculum development partners promote and implement a curriculum that designates a Jewish practice as "morally wrong" (8-ER-1558–59; *see* 7-ER-1225, 1228–30), thereby singling out plaintiffs and their children for discriminatory treatment on the basis of religion. The complaint sufficiently alleges the infusion of antisemitic curriculum into LAUSD forces plaintiffs to choose between sending their children to, and working in, a hostile environment that denigrates their religious beliefs or upholding their religious values by leaving LAUSD. (7-ER-1237.) The court's contrary conclusion (1-ER-14) is wrong.[14]

The district court questioned the relevance of the allegations that defendants barred plaintiff Amy Leserman from attending a conference that disclosed the content of the model curriculum for use in LAUSD

[14] *See* Shannon B. Wanless, *The Role of Psychological Safety in Human Development*, 13(1) Rsch. Hum. Dev. 1, 2 (2016); Schlosser et al., *Religion, Ethnicity, Culture, Way of Life: Jews, Muslims, and Multicultural Counseling*, 54 Am. Counseling Ass'n 48, 55–56 (2009) ("Left unchecked, internalized antisemitism may lead to (a) feelings of shame, inferiority, and depression; (b) feeling embarrassed by or hateful toward one's Jewish identity; (c) denial of and/or distancing from one's Jewish heritage.").

classrooms. (1-ER-14 n.11.) As the court acknowledged, this supports plaintiffs' conspiracy allegations that the curriculum rollout is happening in secret. (1-ER-14 n.11.) Leserman, an LAUSD teacher and UTLA member, was excluded from the conference because she is Jewish. Her exclusion confirms the existence and use of the challenged curriculum as well as the hostile environment at LAUSD created by the work of the official Ethnic Studies Committee.

The court minimized plaintiffs' injuries by characterizing the issue as nothing more than "learning about Israel and Palestine or encountering teaching materials with which one disagrees." (1-ER-15.) This betrays a fundamental lack of understanding of the grievous harm plaintiffs have suffered by being forced to attend school or work in an environment that tolerates antisemitism.

Finally, the court maintained that plaintiffs' injuries are neither actual nor imminent. (1-ER-15–16.) This ignores the present harm caused by the existing use of the antisemitic materials in LAUSD creating a hostile environment for Jewish students and teachers. It ignores the violation of state law requiring public notice and comment regarding such materials. It also ignores the risk of further use of such materials, particularly given defendants' expressed intention to hide the

infiltration of LAUSD by antisemitic teaching materials from any public scrutiny.

Clapper v. Amnesty International USA, 568 U.S. 398, 409 (2013) does not support the court's order. (1-ER-16.) Plaintiffs challenged a provision of the Foreign Intelligence Surveillance Act because later they might communicate with foreign nationals who might be under surveillance. *Clapper*, 568 U.S. at 407. That alleged harm was too speculative given the lack of allegations that the government was presently targeting plaintiffs' communications. *Id.* at 411. And even if targeted, it was speculative that the challenged provision of FISA would be invoked by the government. *Id.* at 412–13. By contrast, plaintiffs here have alleged the challenged curriculum is used now in LAUSD classrooms and there are efforts to expand it to more.

Similarly, *T.K. v. Adobe Systems Inc.*, No. 17-CV-04595, 2018 WL 4003313 (N.D. Cal. Aug. 22, 2018) does not support the district court. (1-ER-16.) There, the court found too speculative the allegation that a future hypothetical teacher might require plaintiff to secure an Adobe license for that class. *T.K.*, 2018 WL 4003313, at *5. The risk here is more immediate given the curriculum's current use, defendants' efforts

to expand it to more classrooms, and defendants' concealment of the materials from the public.

2. Plaintiffs' injuries are caused by defendants' antisemitic conduct.

The district court next concluded plaintiffs' injuries were not caused by defendants. (1-ER-17–18.) The court again erred. Plaintiffs must present a causal relationship between the injury and the challenged conduct, which means that the injury "'fairly can be traced to the challenged action of the defendant,' and will not result 'from the independent action of some third party not before the court.'" *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976).

The complaint alleges that defendants, working through the LAUSD official Ethnic Studies Committee, are developing antisemitic ethnic studies curriculum, secretly presenting it to sympathetic teachers within LAUSD for current use, violating the public disclosure requirements for such curriculum, and working to expand the use of the challenged curriculum to more teachers. (7-ER-1261–63.) The result of this is a hostile environment at LAUSD for Jewish students and teachers that will continue to get worse as more teachers start using the curriculum and curricular approval remains hidden from public

scrutiny. (*See* 7-ER-1236–37.) This is more than enough to allege causation.

3. Plaintiffs' injuries are redressable.

"[R]edressability requires a court to determine whether it possesses the ability to remedy the harm that a petitioner asserts." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 975–76 (9th Cir. 2003); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

The district court ruled the relief plaintiffs seek would be an unconstitutional prior restraint. (1-ER-19–20.) Not so. Plaintiffs merely seek to prohibit the use of antisemitic curriculum in LAUSD classrooms, not any protected public advocacy. 7-ER-1293–95; *infra* pp. 9–13. Since teacher speech in elementary and secondary school classrooms that creates a racist or otherwise discriminatory learning environment is not protected by the First Amendment, an injunction against such practices cannot be unconstitutional. *Garcetti v. Ceballos*, 547 U.S. 410, 422–23 (2006); *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 970 (9th Cir. 2011).

The court's reliance on *Vance v. Universal Amusement Co.* (1-ER-19) is inapposite because *Vance* dealt with a state law mandating

censorship of movies shown at public theaters, an actual prior restraint of a purely private actor in violation of the First Amendment. 445 U.S. 308, 309 (1980). This is materially different from enjoining the use of a discriminatory curriculum paid for by the government in public school classrooms, which is not protected by the First Amendment at all.

Because plaintiffs' complaint seeks only redress from defendants for the particularized harms they are suffering (i.e., antisemitic curriculum developed in secret creating a hostile environment), it does not present a generalized grievance. (1-ER-21.) Plaintiffs seek to stop LAUSD and its coconspirators from teaching that holding a core Jewish belief makes Jewish teachers and students like plaintiffs morally suspect. (8-ER-1558–59.) Defendants work together to design, adopt, and implement the ethnic studies curriculum in LAUSD. (7 ER 1237–44.) If defendants are enjoined from creating ethnic studies curriculum in secret and including antisemitic content as plaintiffs request (7-ER-1293–95), plaintiffs will not be subjected to antisemitic discrimination by defendants, thereby redressing their injuries.

4. All of plaintiffs' claims are brought on behalf of themselves and their children.

Under Federal Rule of Civil Procedure 17, "a guardian" may sue on behalf of a minor. *See Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 841 n.44 (1977). Some district courts held parents lacked standing to bring claims under Title VI, although the Ninth Circuit "has not squarely addressed statutory standing under" the statute. *Groveman v. Regents of Univ. of Cal.*, No. 24-cv-01421, 2025 WL 391312, at *3 (E.D. Cal. Feb. 4, 2025). Here, the district court wrongly concluded that plaintiffs improperly brought their Title VI claims on behalf of themselves rather than their children (1-ER-36), though it seemed to consider all the other claims as brought on behalf of plaintiffs *and* their children (1-ER-6).

The district court dismissed plaintiffs' claims under California Education Code section 220 because parents are not the intended beneficiaries of the statute, and because the statute applies only to educational institutions. (1-ER-36–37 & n.25.) The section 220 claims should be understood as brought on behalf of plaintiffs' children given the allegation that defendants' tolerance for antisemitic materials in certain classrooms creates a hostile environment that harms Jewish students throughout LAUSD. (7-ER-1235–37.)

In any event, parents *do* have standing to bring section 220 claims because any member of the public can enforce state-protected anti-discrimination rights protecting students under California's so-called public interest exception. *Hector F. v. El Centro Elem. Sch. Dist.*, 227 Cal.App.4th 331, 334, 341 (2014); *see Doe v. Albany Unified Sch. Dist.*, 190 Cal.App.4th 668, 685 (2010).

C. The district court erred in concluding Concerned Jewish Parents and Teachers of Los Angeles lacked standing.

The district court held Concerned Parents lacks organizational standing to sue in its own right (1-ER-17), but it did not address associational standing. "Even in the absence of injury to itself, an association may have standing solely as the representative of its members." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). "An association has standing to sue on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members [of the association] in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

The complaint alleges the individual members of Concerned Parents are Jewish, Zionist teachers, and parents of children in the LAUSD. (7-ER-1235–36). They each have standing to sue in their own right for violations of their civil rights on the basis of their religious beliefs, national identity, and shared ancestry. Plaintiffs' and their children's right to be free from antisemitic discrimination at school relates to the organization's purpose to protect their members' civil rights. 7-ER-1235; *see Laidlaw*, 528 U.S. at 181.

When an association "seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth*, 422 U.S. at 515. As noted above, plaintiffs seek only prospective relief. All of the requirements for associational standing are met.

D. The district court erred in concluding it lacked subject matter jurisdiction over claims against LAUSD and Guadalupe Carrasco Cardona on the basis of state sovereign immunity.

1. LAUSD is subject to suit.

The district court held that LAUSD has Eleventh Amendment state sovereign immunity and does not qualify as a nominal defendant. (1 ER 22–26.) Yet again, the court went astray.

The Eleventh Amendment generally protects states and "arms" of the state from being sued in federal court. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *see Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1040 (9th Cir. 2003). Some exceptions exist, such as when Congress abrogates state sovereign immunity. *Kohn v. State Bar of Cal.*, 87 F.4th 1021, 1026–27 (9th Cir. 2023), *cert. denied*, 144 S.Ct. 1465 (2024).

"When Congress both expresses unequivocal intent to abrogate immunity and also acts pursuant to its [Fourteenth Amendment] § 5 powers, a state's immunity is waived." *Dare v. California*, 191 F.3d 1167, 1174 (9th Cir. 1999). The Supreme Court has held that Congress abrogated sovereign immunity under Title VI. 42 U.S.C. § 2000d-

7(a)(1) & (2); *Alexander v. Sandoval*, 532 U.S. 275, 278–81 (2001). Accordingly, LAUSD has no immunity from plaintiffs' Title VI claims.

As for plaintiffs' state-law claims, considering the California Legislature's explicit instruction to interpret Education Code section 220 consistently with Title VI, Cal. Educ. Code § 201(g), sovereign immunity should be considered waived as to the section 220 claim.

Whether LAUSD is a true nominal defendant will require discovery because it is unclear if it is an active participant in developing the antisemitic curriculum or a passive bystander to the process but necessary to enforce any judgment after wrongdoing is established. *See S.E.C. v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998). Either way, it is properly sued here for its role in promulgating antisemitic curriculum in secret.

LAUSD also lacks Eleventh Amendment immunity as to the remaining claims. Until recently, this circuit relied on the five factors enumerated in *Mitchell v. Los Angeles Community College District*, 861 F.2d 198 (9th Cir. 1988) to determine whether an entity was an arm of the state. This Court should consider whether LAUSD is an arm of the state under *Kohn*, which replaced the *Mitchell* factors with a three-factor approach.

Although *Kohn* posited that the new "framework [was] unlikely to lead to different results in cases that previously . . . held an entity entitled to immunity," 87 F.4th at 1031, that remains to be seen. *See K.J. by and through Johnson v. Jackson*, 127 F.4th 1239, 1251 n.8 (9th Cir. 2025). While some district courts have continued to treat school districts as arms of the state, *see, e.g.*, *All. of Schs. for Coop. Ins. Programs v. Munich Reinsurance Am., Inc.*, No. 24-cv-06664, 2024 WL 4836466, at *3 (C.D. Cal. Nov. 20, 2024), the *Kohn* factors now weigh against this classification.

Under *Kohn*'s entity-based approach, courts consider: "(1) the State's intent as to the status of the entity, including the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury." 87 F.4th at 1038 (Mendoza, J., concurring) (citation omitted).

In *Belanger v. Madera Unified School District*, 963 F.2d 248, 251 (9th Cir. 1992), this Court found a school district was an arm of the state because a judgment against it "would be satisfied out of state funds" (the first *Mitchell* factor), and because "under California law, the school district is a state agency that performs [the] central government function" of public schooling (the second *Mitchell* factor). *See Sato v.*

Orange Cnty. Dep't of Educ., 861 F.3d 923, 933 (9th Cir. 2017) (applying the second *Mitchell* factor, that the state still had "primary responsibility for providing public education", and concluding the district performed "a central government function," and should be treated as an arm of the state). But California school districts "enjoy wide discretion and considerable autonomy." *Belanger*, 963 F.2d at 253. Under *Kohn*'s second factor, this would now weigh against an arm-of-the-state designation, since it indicates the state lacks control over the entity. *Health Freedom Def. Fund, Inc. v. Carvalho*, 104 F.4th 715, 726–27 (9th Cir. 2024) (Nelson, J., concurring), *reh'g en banc granted*, 127 F.4th 750 (9th Cir. 2025) (noting that *Kohn* might call into question *Belanger* and *Sato*). Applying *Kohn*'s new test requires overruling *Belanger* and *Sato* and recognizing that LAUSD is not an arm of the state, which the Court should do here.[15]

2. Cardona is subject to suit under *Ex parte Young*.

The district court held that defendant Cardona cannot be sued under the *Ex parte Young* exception to Eleventh Amendment immunity

[15] We think the court can apply *Kohn* and find no immunity for LAUSD, but we acknowledge this issue might require an en banc call.

because plaintiffs did not adequately allege her connection to any unconstitutional act. (1-ER 23–24.) The court got it wrong again.

Under *Ex parte Young*, 209 U.S. 123 (1908), "suits seeking *prospective* relief under federal law may ordinarily proceed against state officials sued in their official capacities." *Planned Parenthood*, 122 F.4th at 842 (emphasis added) (citations omitted). The state official "must have 'some connection with the enforcement'" of the unconstitutional action. *Id.* The connection requirement is "modest" and requires only that the official's role "goes beyond 'a generalized duty to enforce state laws or general supervisory power over the persons responsible for enforcing the challenged provision.'" *Id.*

Cardona is an LAUSD ethnic studies teacher serving on the Ethnic Studies Committee, sued "in her individual and official capacity." (7-ER-1240, 1243–44.) The district court ruled the complaint contained "no allegations" she had "decision-making authority" sufficient to show a "connection to the enforcement" of "the development and implementation of the challenged curriculum." (1-ER-24.) The court ignored the complaint's allegations that Cardona is (1) the cofounder, CEO, and CFO of the Consortium (7-ER-1243–44), which developed and promotes the antisemitic curriculum (7-ER-1254–56,

1357–59); (2) a member of the LAUSD Ethnic Studies Committee tasked with developing and promoting new curriculum (7-ER-1240); (3) now teaching the antisemitic curriculum in LAUSD classrooms; and (4) going to keep teaching it (7-ER-1244). On these facts, plaintiffs have alleged more than a modest connection between Cardona and the unlawful conduct. Plaintiffs' claims can proceed against Cardona under *Ex parte Young*.

II. The district court erred in concluding plaintiffs failed to state any claims at the pleading stage.

A. The district court erred in ruling that the complaint violates the First Amendment rights of teachers.

The district court found plaintiffs' complaint violates defendants' First Amendment rights to petition for curricular changes and to discuss ideas in classrooms. (1-ER-37–42.) The court ignored allegations in the complaint that plaintiffs seek relief only against state-funded speech in the classroom that is part of LAUSD teachers' job duties, which is not speech protected by the First Amendment. (7-ER-1250, 1284–85.) The complaint, which plaintiffs control, does not seek to enjoin any non-government-funded speech or speech outside the classroom. (7-ER-1250, 1284–85.) The opposition to the motion to dismiss amply clarified this point. (*E.g.*, 8-ER-1607–08, 1617–20.)

Defendants' antisemitic public statements (7-ER-1240, 1244–45) are included as circumstantial evidence supporting the narrow relief sought, not as something to enjoin (7-ER-1285–1286 (¶ 225(a))). As the complaint alleges, these statements reflect defendants' antisemitic intent. (7-ER-1286 (¶225(b)).) After discovery, these public statements might be excised from the complaint given direct evidence, and as always, defendants can spread antisemitic ideas on their own time and without the use of public funds. (*See* 7-ER-1285–1286 (¶ 225(a)).)

Teachers have no First Amendment right to teach antisemitic curriculum in their classrooms. *See Garcetti*, 547 U.S. at 422–23 (government employers have right to control employees' speech during work); *Johnson*, 658 F.3d at 970 ("Because the speech at issue owes its existence to Johnson's position as a teacher, [the district] acted well within constitutional limits in ordering Johnson not to speak in a manner it did not desire."); *Downs v. L.A. Sch. Dist.*, 228 F.3d 1003, 1009 (9th Cir. 2000) (when public school is the speaker, teachers have lesser First Amendment rights to speak during work).

The district court's reliance on *Monteiro* (*e.g.*, 1-ER-37) was misplaced. *Monteiro* affirmed the dismissal of a lawsuit seeking to ban books containing racial slurs. 158 F.3d at 1028. This Court noted the

complaint did *not* "contend that the curriculum itself was racist or that the manner in which [the books] were taught caused injury to African-American students." *Id.* at 1031. But it noted that "[w]e do not, of course, suggest that racist actions on the part of teachers implementing a curriculum could not comprise discriminatory conduct for the purposes of . . . the Fourteenth Amendment." *Id.* at 1032. This is the complaint *Monteiro* did not foreclose. *Id.* at 1035 (Boochever, J., concurring) ("A complaint alleging that the adoption of such texts violated Title VI may well present different issues which we need not consider in this case.").

B. Plaintiffs stated claims under 42 U.S.C. § 1983.

1. The complaint alleged state action by LAUSD.

Section 1983 redresses civil rights violations occurring "under color of any statute, ordinance, regulation, custom, or usage" of a state. 42 U.S.C. § 1983. "A § 1983 claim requires two essential elements: (1) the conduct that harms the plaintiff must be committed under color of state law (i.e., state action), and (2) the conduct must deprive the plaintiff of a constitutional right." *Ketchum v. Alameda Cnty.*, 811 F.2d 1243, 1245 (9th Cir. 1987); *see Baker v. McCollan*, 443 U.S. 137, 146 (1979). The most obvious state action occurs when state actors

"officially adopt[]," "implement[] or execute[] a policy statement, ordinance, regulation, or decision," but unofficial action may also suffice. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

Local government bodies, like school districts, are "persons" within the meaning of § 1983. *Id.* at 690. "Education is perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see Serrano v. Priest*, 5 Cal.3d 584, 610 (1971); *see* 8-ER-1632. LAUSD controls and operates public schools and is funded largely by the state. *See McAllister v. L.A. Unified Sch. Dist.*, 216 Cal.App.4th 1198, 1202 (2013); Cal. Const., art. IX, § 5; LAUSD, *How California Schools Are Funded*, LAUSD UNIFIED, https://tinyurl.com/LAUSDfunding (last visited Apr. 30, 2025).

The district court held plaintiffs pled no theory of municipal liability. (See 1-ER-23.) Again, it was mistaken. As the court acknowledged, plaintiffs asserted many claims and sought injunctive relief against LAUSD. (1-ER-25.) LAUSD established the Ethnic Studies Committee charged with "'provid[ing] input' on" (1) "the implementation" of ethnic studies courses, (2) "the definition of Ethnic Studies," (3) "the selection . . . of models or providers of professional development," and (4) "the development or selection of curriculum and

teaching materials to be purchased for Ethnic Studies." 7 ER 1237–39; LAUSD-UTLA Collective Bargaining Agreement p. 262 https://tinyurl.com/CBA-2022-2025 (last visited Apr. 30, 2025) [hereinafter CBA].[16]

Five members of the 10-member committee are appointed by UTLA and five by LAUSD. 7-ER-1238; CBA at 262. The complaint alleges that LAUSD through this committee enshrines the antisemitic curriculum throughout the district and violates state laws requiring a public process for curriculum approval. (7-ER-1238–39.) At this stage, that is enough to state a prima facie case of state action and allow plaintiffs' § 1983 claims against LAUSD to proceed.

2. The complaint alleges the non-District defendants engaged in state action.

The complaint alleges UTLA and the Consortium engage in state action through their official role on the Ethnic Studies Committee and by conspiring with LAUSD to introduce antisemitic curriculum into LAUSD classrooms and conceal this from the public. (7-ER-1286–88.)

[16] The complaint includes a link to the LAUSD/UTLA Collective Bargaining Agreement granting UTLA official power over the ethnic studies curriculum. (7-ER-1238; *see* 1-ER-7 n.7.) The district court judicially noticed it. (1-ER-7 n.7.)

The district court held that the complaint does not sufficiently allege the non-District defendants are engaging in state action because UTLA's appointment of teachers to the advisory curriculum committee was not the exercise of a state-created right. (1-ER-27–32.)[17] The court got it wrong once again.

Courts apply a two-part test to determine whether private parties are engaged in state action and can thus be held liable under § 1983. "Under [the *Lugar*] framework, we first ask whether the alleged constitutional violation was caused by the 'exercise of some right or privilege created by the State . . . .' If the answer is yes, we then ask whether 'the party charged with the deprivation [is] a person who may fairly be said to be a state actor.'" *O'Handley v. Weber*, 62 F.4th 1145, 1156 (9th Cir. 2023) (second alteration in original) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

"Private persons, jointly engaged with state officials in . . . prohibited action, are acting 'under color' of law for purposes of [§ 1983]." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970);

[17] The court said it is unclear whether defendant Cardona is sued in her official capacity as a member of the Ethnic Studies Committee. (1-ER-3 n.4.) She is. If unclear, the complaint can be amended.

O'Handley, 62 F.4th at 1157. To demonstrate joint action, a plaintiff must either "prov[e] the existence of a conspiracy or . . . show[] that the private party was a willful participant in joint action with the State or its agents." *O'Handley*, 62 F.4th at 1159. Joint action of this kind is state action, "whether or not" it was "officially authorized, or lawful." *Adickes*, 398 U.S. at 152; *see Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 757 (9th Cir. 2020) (holding "nominally private actors" are "state actors" when "the State . . . has 'undertaken a complex and deeply intertwined process [with private actors]'" such that "the state has so deeply insinuated itself into this process").

To show state action, the Supreme Court identified two key tests, the public function test and a joint action test. *Lugar*, 457 U.S. at 939; *Ohno v. Yasuma*, 723 F.3d 894, 995 n.13 (9th Cir. 2013). *Adickes* is instructive. A white teacher was refused service at a Mississippi restaurant while seated with a group of her Black students and then arrested for loitering. *Adickes*, 398 U.S. at 149. She sued the restaurant under § 1983 for an equal protection violation based on a "conspiracy between [the restaurant] and [the city's] police." *Id.* at 147–48. The Supreme Court held that plaintiff would "be entitled to relief under § 1983" against the private party if she could prove that the

server and the police "somehow reached an understanding to deny [her] service . . . or to cause her subsequent arrest because she was a white person in the company of" Black people. *Id.* at 151.

The facts here are similar to *Adickes*. LAUSD is the ultimate state actor with final authority over curriculum. Its designated curriculum committee drafts new ethnic studies curriculum and instructs select teachers on how to implement this curriculum in classrooms without any public oversight. (*See* 7-ER-1238–39.) The UTLA, the Consortium's founder, and the individual defendants have official roles on that committee. They violate state public disclosure laws and draft and push the antisemitic curriculum into classrooms. (7-ER-1237–40.) The non-District defendants are state actors because they possess significant influence over the curriculum decision-making process. (7-ER-1237–40.)

In any event, as the district court conceded, Cardona engages in state action as a teacher using the challenged curriculum in her class. (1-ER-27 n.21.) She speaks as a "government employee[] paid in part to speak on the government's behalf and convey its intended messages." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 509 (2022); *see Johnson*, 658 F.3d at 964. Likewise, when the other non-District defendants

advise teachers in a professional development session as members of LAUSD's Ethnic Studies Committee, they too engage in state action. Thus, the district court erred in concluding defendants are sued simply for "advocating for changes to public programs." (1-ER-29.)

3. The complaint alleges enough to show a conspiracy among LAUSD and the non-District defendants.

The district court concluded that no conspiracy exists because the non-District defendants are concealing their use of antisemitic teaching materials from LAUSD and LAUSD controls the committee, so no meeting of the minds could have occurred. (1-ER-31.)

An allegation of conspiracy must be based on more than mere "suspicions" or "association." *Contreras v. Dowling*, 4 Cal.App.5th 394, 417 (2016). A plaintiff must provide "some evidence" of "knowledge and intent," which can be "inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances." *Id.*; *see Belgau v. Inslee*, 975 F.3d 940, 947 (9th Cir. 2020) ("A joint action between a state and a private party may be found in two scenarios: the government either (1) 'affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party,' or (2) 'otherwise has so far

insinuated itself into a position of interdependence with the non-governmental party,' that it is 'recognized as a joint participant in the challenged activity.'").

Plaintiffs sufficiently alleged a conspiracy. LAUSD created the official curriculum committee with UTLA during contract negotiations, and approved the participation of the UTLA and the Consortium's founder in the official work of the committee. *See* CBA at 262. Defendants' instructions to teach the material in secret posted to the Consortium's website, UTLA's continued promotion of the antisemitic curriculum, and the influence UTLA exercises over the Ethnic Studies Committee all confirm the conspiracy with LAUSD. (7-ER-1240–44.) As long as LAUSD is not officially notified, it can maintain plausible deniability, and the non-District defendants can disseminate the material throughout LAUSD. The "meeting of the minds" between all the defendants occurs when they tacitly agree the non-District defendants will promote antisemitism in the classroom and LAUSD will ignore it.

4. Plaintiffs adequately alleged an equal protection violation.

a. Plaintiffs state a federal equal protection claim.

"The Equal Protection Clause requires the State to treat all similarly situated people equally." *Shakur v. Schriro*, 514 F.3d 878, 891 (9th Cir. 2008); see *Lugar*, 457 U.S. at 923–24. "Section 1983 claims based on Equal Protection violations must plead intentional unlawful discrimination or allege facts that are at least susceptible of an inference of discriminatory intent." *Monteiro*, 158 F.3d at 1026.

The district court, relying on *Monteiro*, determined there were insufficient allegations of an equal protection violation because there is supposedly no underlying racist policy, and the complaint merely attacks possible curricula. (1-ER-32–33.) Wrong. The ethnic studies curriculum promoted by defendants purposely treats plaintiffs and Jewish parents, students, and teachers like them as an inferior class on the basis of their ethnic and religious backgrounds—a textbook violation of the Equal Protection Clause. (7-ER-1273–79, 1297–1302; 8-ER-1558–59.)

As discussed above, *Monteiro* is inapposite, and this case falls into the exception *Monteiro* envisaged. *See supra* p. 41. The district court

also relied on *California Parents for the Equalization of Educational Materials v. Torlakson*, 973 F.3d 1010, 1015 (9th Cir. 2020), a case brought by Hindu parents alleging that the state's curriculum discriminated against Hinduism, which required plaintiffs to allege "an underlying racist policy." *Torlakson* does not apply because plaintiffs here allege an underlying racist policy—defendants' use of antizionism as a pillar of the curriculum. (*See* 7-ER-1244, 1273–74.) Moreover, unlike *Torlakson*, the materials here violate state law because they are antisemitic and not properly subjected to public approval. 7-ER-1361–62, 1368–77; Cal. Educ. Code § 51225.3(a)(1)(G)(ii)(IV) (West 2018).

b. Plaintiffs' state equal protection claim is broader than their federal claim.

In some ways, the equal protection analyses under federal and California law are "substantially similar." *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1154 (9th Cir. 2004) (citation omitted); *see* Cal. Const., art. I, § 7. But under California law, equal protection claims which "touch[] on fundamental interests" warrant strict scrutiny, and unlike under federal law, education is a fundamental interest. *Serrano*, 5 Cal.3d at 604–10. Thus, state equal protection provides an even stronger claim for relief here because students' fundamental right to an

education is compromised by forcing them to learn in a hostile environment. (7-ER-1237.)

Moreover, as the district court acknowledged, there is no express state action requirement for state equal protection claims. (1-ER-32 n.22.) Indeed, the California Supreme Court has broadly applied equal protection claims to state-protected private utility monopolies. *See Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 24 Cal.3d 458, 469 (1979), *superseded by Cal. Gov. Code § 12940, as recognized in In re Marriage Cases*, 43 Cal.4th 757, 835 n.56 (2008). Like the private utility there, UTLA and the Consortium have preferred status to exercise state power through the LAUSD curriculum committee for state equal protection purposes. Thus, even if they do not engage in state action under federal law, the non-District defendants can still be held liable for violating the state equal protection clause.

5. Plaintiffs adequately alleged a free exercise claim.

The district court held plaintiffs failed to state a free exercise claim because it found there is no burden on religion from the challenged curriculum but only allegations that the curriculum offends plaintiffs. (1-ER-33–35.) The court missed the mark.

State actors have a First Amendment "duty . . . not to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n.*, 584 U.S. 617, 638 (2018). The state cannot regulate or punish "the expression of religious doctrines it believes to be false" "or lend its power to one or the other side in controversies over religious authority or dogma." *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). "To state a free exercise claim . . . [p]laintiffs must plausibly allege 'that a government entity has burdened [their] sincere religious practice pursuant to a policy that is not neutral or generally applicable.'" *Loffman v. Cal. Dept. of Educ.*, 119 F.4th 1147, 1165 (9th Cir. 2024) (alterations in original).

Government conduct burdens religious exercise if it "tends to coerce the [plaintiffs] to forego [their] sincerely held religious beliefs or to engage in conduct that violates those beliefs." *Jones v. Williams*, 791 F.3d 1023, 1031–33 (9th Cir. 2015). An adherent's claim "that his belief is an essential part of a religious faith must be given great weight." *United States v. Seeger*, 380 U.S. 163, 184 (1965); *see Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

The non-District defendants contend that because some Jews do not view Zionism as central to their identity, Zionism cannot be central to plaintiffs' Jewish identity. (8-ER-1562–63.) Plaintiffs' right to religious free exercise "is not limited to beliefs which are shared by" all Jews. *Thomas*, 450 U.S. at 715–16.

The district court neglected its "narrow function" of determining whether plaintiffs' religious objections to the curriculum are "honest conviction[s]," *Thomas*, 450 U.S. at 716, sidestepping this threshold inquiry after determining plaintiffs lacked standing. (*See* 1-ER-21.) Relying on *Grove v. Mead School District No. 354*, 753 F.2d 1528, 1543 (9th Cir. 1985) (Canby, J., concurring), the court characterized defendants' conduct as that which "merely require[s] or result[s] in exposure to attitudes and outlooks at odds with perspectives prompted by religion." (1-ER-34.) Plaintiffs do not claim injury will occur from simple exposure to anti-Israel points of view. (*See* 8-ER-1617–22.) Rather, plaintiffs allege a "campaign [by defendants] to indoctrinate Los Angeles public school students in [their] enmity" to Zionism and Israel. (7-ER-1230–31, 1297–1326, 1368–77.)

Jewish students will learn these views not as opinions held by some, but as truth from a teacher vested with state authority they must

accept. 8-ER-1558–59, 1629; *see Kennedy*, 597 U.S. at 527, 530 (holding teachers in the classroom speak as "government employees paid in part to speak on the government's behalf and convey its intended messages"; teachers also "often serve as vital role models"); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007) ("Children who attend school because they must ought not be subject to teachers' idiosyncratic perspectives.").[18]

Defendants' conduct burdens plaintiffs' religious free exercise. By equating Zionism with racism, "white settler" colonialism, and land theft (*see* 7-ER-1233, 1274, 1299–1302, 1384), defendants "pass[] judgment upon" and "presuppose[] the illegitimacy of religious beliefs," *Masterpiece*, 584 U.S. at 638. Defendants also discourage Jews from the practice of yearning for Israel, from identifying as Zionists, and from believing Israel has a right to exist. By teaching that "Zionism is distinct from Judaism" (7-ER-1301), the Consortium "punish[es] the expression of [a] religious doctrine[] it believes to be false," in violation of the First Amendment. *Smith*, 494 U.S. at 877. LAUSD and UTLA,

[18] *See* Einat Wilf, *The BDS Pound of Flesh*, Tablet Mag. (May 10, 2022), https://tinyurl.com/wilf-BDS (describing the impact of antizionist bullying on young Jews).

by partnering with curriculum developers who praise violence against Israelis on October 7th as righteous "resistance" (7 ER 1231, 1241), "lend [the state's] power to one . . . side in controversies over religious authority or dogma," *Smith*, 494 U.S. at 877. A public school district has no business doing any of these things, either on its own or in conspiracy with others.

C. Plaintiffs properly stated a claim for violation of Title VI.

The complaint alleges defendants engage in intentional discrimination through the introduction of antisemitic curriculum. (7-ER-1289–90.) As a recipient of federal money, LAUSD is required to ensure that its contractors comply with Title VI. (7-ER-1290.) The non-District defendants are engaged in a conspiracy with LAUSD to introduce antisemitic materials into LAUSD classrooms. (7-ER-1290.)

Title VI prohibits programs that receive federal funding from discriminating against a person "on the ground of race, color, or national origin." 42 U.S.C. § 2000d; *see Sandoval*, 532 U.S. at 280. Given the "notorious[]" ambiguity of Title VI, this Court gives deference to the Department of Education's interpretations and guidance. *Monteiro*, 158 F.3d at 1033.

To state a Title VI claim, "a plaintiff [need only] allege that (1) the entity involved is engaging in [prohibited] discrimination; and (2) the entity involved is receiving federal financial assistance." *Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439, 1447 (9th Cir. 1994), *overruled in part by Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1132 (9th Cir. 2001).

The district court held that Title VI does not apply because the individual defendants are not entities and the non-District defendants do not receive federal funding. (1-ER-35–37.) The court further concluded plaintiffs are not the intended beneficiaries of Title VI. (1-ER-36.) This was error.

The district court acknowledged that *Fobbs* held plaintiffs need not plead they are intended beneficiaries. (1-ER-36 n.24.) But the court considered this part of *Fobbs* overruled by the requirement to plead plausible claims. (1-ER-36 n.24.) Quoting one of its own prior orders, *Smith v. Cal. Bd. of Educ.*, No. 13-5395, 2014 WL 5846990, at *4 (C.D. Cal. Nov. 10, 2014), the district court ruled plaintiffs' claim failed because it was supposedly "premised on the implausible, in fact, impossible, theory that parents of public school children are intended beneficiaries of public schooling." (1-ER-36 n.24.)

The district court was wrong then and now. Contrary to *Posey v. San Francisco Unified School District*, No. 23-cv-02626, 2023 WL 8420895, at *2 (N.D. Cal. Dec. 4, 2023), parents can bring Title VI claims on behalf of their children through counsel. 1-ER-36; *Smith*, 2014 WL 5846990, at *4 n.3; *Rossley v. Drake Univ.*, 336 F. Supp.3d 959, 965–66 (S.D. Iowa 2018), *aff'd*, 958 F.3d 679 (8th Cir. 2020); *Lopez v. Regents of Univ. of Cal.*, 5 F.Supp.3d 1106, 1114 (N.D. Cal. 2013). The parent plaintiffs allege they "and [their] children" are injured by the challenged curriculum. (7-ER-1235–36.) The district court seems to have considered the other parent claims to be on behalf of themselves and their children (8-ER-1634–35), and it should have done the same here or granted leave to amend.

The teacher plaintiffs can also bring Title VI claims. *See* U.S. Dep't of Educ., *Frequently Asked Questions: Race, Color, and National Origin Discrimination*, https://tinyurl.com/FAQ-RaceColorNational-Origin (last visited Apr. 30, 2025) ("Q: Does Title VI protect only students? A: No. Title VI protects all persons from discrimination, including parents and guardians, students, and to a limited degree, employees."). While most employees bring discrimination claims under Title VII, when "a 'primary objective' of . . . federal financial assistance

is to provide employment," the recipient of that funding must abide by Title VI in its employment practices. U.S. Dep't of Justice, Civ. Rts. Div., Title VI Legal Manual § 10, p. 1 (2016); 42 U.S.C. § 2000d-3. The district court erred by failing to consider claims by individual teachers as well as Concerned Parents' claims on behalf of teachers.

Title VI applies to all "academic . . . and extracurricular programs of the institution." Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11432, 11448 (Mar. 10, 1994). A "program" encompasses the "operations" of a wide variety of entities, including a "special purpose district, or other instrumentality of a State or of a local government", a "local educational agency", and a "private organization . . . principally engaged in the business of providing education," when "any part of [the entity] is extended Federal financial assistance." 42 U.S.C. § 2000d-4(a). The same definition applies to an "entity which is established" *by* two or more covered entities, for example, a school district and a private organization. *Id.*

Plaintiffs' Title VI claims against UTLA and the Consortium are valid because those entities receive federal financial assistance, directly or indirectly. *See* 42 U.S.C. § 2000d; *Grove City Coll. v. Bell*, 465 U.S.

555, 564–68 (1984) (concluding, in Title IX context, that "[t]here is no basis . . . for the view that only institutions that themselves apply for federal aid or receive checks directly from the federal government are subject to regulation"), *superseded by statute*, Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat. 28 (1988).[19]

LAUSD is covered by Title VI as a "local educational agency" ("LEA"). 20 U.S.C. § 7801-30. Similarly, the activities of the Ethnic Studies Committee are "program[s] and activit[ies]" for Title VI purposes. 42 U.S.C. § 2000d-4(a); *see* 7 ER 1237–38 (alleging the LAUSD-UTLA joint committee is a "government-funded and operated committee which exercises public power"). This is sufficient to get past the pleadings stage.

In any event, LAUSD, which does receive federal funds, is liable for discriminatory conduct *by* the Consortium or UTLA when it occurs as part of an "activit[y] that the [district] sponsors" (e.g., academic instruction or professional development), "whether the individuals

[19] If the public funding point is unclear, the complaint can be amended. Plaintiffs also did not waive that Title VI applies to the non-District defendants. In their opposition brief, plaintiffs argued that defendants acknowledge the claimed injuries to the students' constitutional rights, making it illogical to say that the Title VI claims omit students. (8-ER-1634–35.) At worst, leave to amend should be granted.

involved in [the] activity are students, faculty, employees, or other participants or outsiders." Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11433, 11448 (Mar. 10, 1994).

"[A]ntisemitism can amount to racial discrimination, and thus form the basis for a Title VI claim." *Nahavandi v. Bd. of Trustees of Cal. State Univ.*, No. 24-cv-03791, 2024 WL 4403886, at *3 (C.D. Cal. Sept. 5, 2024) (citing *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987)); *see* Letter from Thomas E. Perez, Assistant Att'y Gen., Dep't of Just., to Russlyn H. Ali, Assistant Sec'y of Educ., Off. for Civ. Rts., U.S. Dep't of Educ. (Sept. 8, 2010), https://tinyurl.com/PerezLetter (indicating discrimination against members of a religious group also violates Title VI when it is based on (1) "the group's actual or perceived shared ancestry or ethnic characteristics, rather than its members' religious practice" or (2) "actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity").

The complaint properly states a Title VI claim.

D. Plaintiffs stated valid state-law claims.

1. Plaintiffs stated claims against LAUSD and the non-District defendants under California's educational equity laws.

The complaint alleges that defendants violate state law through teaching antisemitic curriculum and conspiring to introduce such curriculum into LAUSD classrooms and conceal it from the public. (7-ER-1291–93.) Since the state laws plaintiffs invoked are modeled on Title IX, and Title IX is in turn modeled on Title VI, the district court wrongly dismissed the state-law claims for the same reason it erred in dismissing the Title VI claims. (*See* 1-ER-36–37.)

California's educational equity laws, Cal. Educ. Code § 200 et seq. (West 2021), prohibit discrimination "on the basis of . . . nationality, race or ethnicity, [or] religion . . . in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance, or enrolls pupils who receive state student financial aid." *Id.* § 220. The California Legislature indicated its intent that these laws, including section 220, should be interpreted consistent with Title VI. *Id.* § 201(g).

California Education Code section 262.3 provides a nonexhaustive list of remedies for enforcement, which "may be combined with

remedies" available under certain federal statutes, including Titles VI and IX. *See M.M. v. San Juan Unified Sch. Dist.*, No. 19-cv-00398, 2020 WL 5702265, at *4 (E.D. Cal. Sept. 24, 2020) ("A claim under [§ 220] is 'governed by the same elements as a federal cause of action under Title IX.'")

For the reasons above, plaintiffs state a claim against each defendant for violation of California Education Code section 220. *See supra* pp. 32, 35.

2. Plaintiffs stated claims under California Education Code sections 51500, 51502, and 51225.3.

Under California law, LAUSD's Board of Education is a "governing board" as defined by the Education Code. Cal. Educ. Code § 51017 (West 2022). Governing boards cannot approve "instructional materials . . . that contain any matter reflecting adversely upon persons on the basis of race or ethnicity, . . . religion, . . . nationality, . . . or because of a characteristic listed in [s]ection 220." *Id.* § 51501(a). School districts cannot sponsor "any activity" that "promotes a discriminatory bias on the basis of race or ethnicity, . . . religion, . . . nationality, . . . or because of a characteristic listed in [s]ection 220,"

and teachers cannot "give instruction" that promotes such a bias. *Id.* § 51500.

The district court erred in dismissing plaintiffs' claims under California Education Code sections 51500 and 51501 on the ground that defendants are private parties who cannot be sued. (1-ER-37.) LAUSD is not a private party. And as explained above, *supra* p. 46, the individual defendants, as teachers and members of the district's official curriculum committee, are governed by section 51500.

Beginning this year, all districts must *offer* "at least a one-semester course in ethnic studies." Cal. Educ. Code § 51225.3(a)(1)(G)(i) (West 2022). For pupils graduating in 2030, one semester of ethnic studies is *required* to graduate. *Id.* Students may satisfy the requirement in a number of ways, including taking "a locally developed ethnic studies course" approved by LAUSD. *Id.* § 51225.3(a)(1)(G)(ii)(IV).

The "locally developed" curriculum must first be proposed "at a public meeting" of the school board, "and shall not be approved until a subsequent public meeting" of the school board "at which the public has had the opportunity to express its views on the proposed course." *Id.*

As pleaded in the complaint, that has not occurred with the local ethnic studies courses taught now in LAUSD, and there is legitimate concern that this procedure is being circumvented for future classes too. *See supra* note 8; Cal. Dep't of Educ., Direct Investigations Off. Investigation Rep., Campbell Union High Sch. Dist., at 12–14 (Apr. 4, 2025) (state report concluding that similar curriculum violated state law because of lack of balance and focus on antisemitic perspectives). Plaintiffs have therefore stated a claim for violation of these state laws.

E. At worst, plaintiffs should receive one chance to amend their complaint after hearing from the court.

The district court denied leave to amend because it concluded none of the claims could be saved. (1-ER-48–50.) This brief sets forth the facts fairly alleged in the complaint. If anything said in this brief is not clearly alleged in the complaint, the complaint can be amended to include those allegations.

Unfortunately, the glacial pace in the district court has allowed the teaching of the antisemitic curriculum to ramp up since the lawsuit was originally filed in 2022 and the operative complaint was filed in 2023. Plaintiffs' amended complaint would include more allegations that plaintiff Leserman, acting on behalf of a frightened colleague,

reported the use of specific antisemitic material directed at a teacher on October 17, 2023, and LAUSD's civil rights office failed to respond to her for fourteen months. An amended complaint would also demonstrate that teachers in at least three—but likely more—schools teach students to demonize Zionists, dismiss concerns about antisemitism, and vilify all Israelis as "European colonists" and "settlers."

The complaint can be amended to include contract-related claims. Private contractors who seek to contract with a state agency for $100,000 or more must "certify, under penalty of perjury . . . [t]hat any policy that they have against any sovereign nation or peoples recognized by the government of the United States, including but not limited to, the nation and people of Israel, is not used to discriminate in violation of the Unruh Civil Rights Act or [FEHA]." Cal. Pub. Cont. Code § 2010 (West 2017). The Consortium is in violation of this requirement, which is another basis for liability that could be pled in an amended complaint.

The district court held that contracting with the government does not alone constitute state action. *See* 1-ER-30; *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). But the complaint alleges more than mere

contracting and could be amended to include more details. *See supra* pp. 10–12.

Finally, the complaint can be amended to add a claim premised on plaintiffs' right to opt their children out of classrooms that teach versions of the challenged curriculum. The Supreme Court will soon decide the contours of parental opt-out rights and plaintiffs should be permitted to amend to add a claim based on the new law. *See* Amy Howe, *Supreme Court likely to rule for parental opt-out on LGBTQ books in schools*, SCOTUSblog (Apr. 22, 2025, 5:45 PM), https://tinyurl.com/SCOTUSblog-parental-opt-out. Given the long lead-time for litigation over a particular assigned teacher in any given academic year, any parental opt-out right would be illusory unless it could be established well before the class placement.

Because the complaint can be amended to state a claim, it was error to dismiss with prejudice.

III. The district court's order granting defendants' anti-SLAPP motion should be reversed because California's anti-SLAPP statute does not apply here.[20]

A. The anti-SLAPP statute does not apply to public interest lawsuits like this one.

California's anti-SLAPP statute "does not apply to any action brought solely in the public interest or on behalf of the general public if" three specified conditions exist. Cal. Civ. Proc. Code § 425.17(b) (West 2016). First, "[t]he plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member." *Id.* Second, "[t]he action, if successful, would enforce an important right affecting the public interest." *Id.* Third, "[p]rivate enforcement is necessary and places a disproportionate financial burden on the plaintiff." *Id.*

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[20] This Court granted initial en banc hearing before argument in *Gopher Media LLC v. Melone*, 129 F.4th 1196 (9th Cir. 2025), issuing a supplemental briefing order directing the parties to brief "whether California's anti-SLAPP statute applies in federal court." The Supreme Court also granted certiorari in *Berk v. Choy*, No. 24-440, 2025 WL 746311 (9th Cir. Mar. 10, 2025) to resolve whether a state procedural statute can be applied in federal court where it conflicts with the Federal Rules of Civil Procedure. One or both cases may curtail or end the ability to file anti-SLAPP motions in federal court. We reserve the right to seek supplemental briefing regarding those opinions.

Plaintiffs' complaint meets all these requirements. Plaintiffs seek no greater relief than could be sought by any Jewish teacher or parent in LAUSD. If plaintiffs prevail, they will have secured an important public right to free LAUSD from antisemitic curriculum which will benefit hundreds of thousands of students and teachers. And private enforcement is necessary, as there has been no government action to enforce the rights plaintiffs seek to vindicate. The anti-SLAPP statute does not apply, and the district court erred in granting the motion.

B. Even if the anti-SLAPP statute applies, the injury-producing conduct challenged by the complaint is not protected petitioning activity.

The district court granted the non-District defendants' anti-SLAPP motion because it held they are being sued for advocating for proposed curriculum changes. (1-ER-46–47.) The court erred because the complaint is not based on protected speech or petitioning, and in any case, plaintiffs could amend the complaint to make that clearer. *See supra* pp. 39–40.

The district court misunderstood how the anti-SLAPP statute operates. "A claim arises from protected activity when that activity underlies or forms the basis for the claim. Critically, 'the defendant's act underlying the plaintiff's cause of action must itself have been an

act in furtherance of the right of petition or free speech.'" *Park v. Bd. of Trs. of Cal. State Univ.*, 2 Cal.5th 1057, 1062–63 (2017) (alteration in original) (citations omitted). Thus, the fact that the non-District defendants engaged in petitioning activity before the lawsuit was filed, or that the complaint references such activity, does not mean plaintiffs' claims are based on that petitioning activity. In fact, the complaint expressly disavows that plaintiffs' claims are based on anything beyond classroom instruction. (7-ER-1284–86.)

"In deciding whether an action is a SLAPP, the trial court should distinguish between (1) speech or petitioning activity that is mere evidence related to liability and (2) liability that is based on speech or petitioning activity." *Park*, 2 Cal.5th at 1065. That the "discriminatory animus might have been evidenced by one or more communications by a defendant" does not make a claim subject to an anti-SLAPP motion. *Id.* Here, the complaint's discussion of defendants' speech outside the classroom is simply circumstantial evidence substantiating the underlying claims, not the basis of those claims itself.

The district court cited out-of-date cases stating that plaintiffs cannot mix allegations of protected and unprotected activity to evade an anti-SLAPP motion. (*See* 1-ER-46–47.) In doing so, the court ignored

the California Supreme Court's substantial reshaping of the mixed cause of action analysis as well as its own obligation under Federal Rule of Civil Procedure 15 to freely grant leave to amend the complaint when justice so requires.

Under current California law, an anti-SLAPP motion must address the "allegations of protected activity that are asserted as grounds for relief. The targeted claim must amount to a 'cause of action' in the sense that it is alleged to justify a remedy. . . . Thus, in cases involving allegations of both protected and unprotected activity, the plaintiff is required to establish a probability of prevailing on any claim for relief based on allegations of protected activity." *Baral v. Schnitt*, 1 Cal.5th 376, 395 (2016). The non-District defendants' motion did not address the limited relief plaintiffs seek, which is the only way to determine which allegations in the complaint are based on protected activity. *See supra* pp. 39–40. Had the district court performed the proper analysis, it would have had to deny the anti-SLAPP motion.

Finally, given that plaintiffs have stated a prima facie case for each claim pled in their complaint, or could do so on remand with leave to amend, they have established a probability of prevailing under the second step of the anti-SLAPP statute.

CONCLUSION

The Court should reverse the judgment with directions to deny defendants' motions to dismiss and anti-SLAPP motions. At minimum, the Court should reverse and remand with directions to grant plaintiffs leave to amend their complaint.

May 5, 2025

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STATEMENT OF RELATED CASES

Appellants know of no cases requiring disclosure under 9th Cir. R. 28-2.6.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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