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17
18 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**

19 **COUNTY OF SAN BERNARDINO**

20 **THE PEOPLE OF THE STATE OF**
21 **CALIFORNIA, EX REL. ROB BONTA,**
22 **ATTORNEY GENERAL OF THE STATE**
23 **OF CALIFORNIA,**

23 Plaintiff,

24 v.

25 **CHINO VALLEY UNIFIED SCHOOL**
26 **DISTRICT,**

27 Defendant,
28

Case Number: CIV SB 2317301

**PROSPECTIVE INTERVENORS’
REPLY MEMORANDUM IN SUPPORT
OF APPLICATION FOR LEAVE
TO INTERVENE**

Judge: Hon. Michael A. Sachs

Date: October 13, 2023

Time: 8:30 a.m.

Dept.: S28

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NICHOLE VICARIO, an individual,
RICHARD N. WALES Jr., an individual,
MISTY STARTUP, an individual,
DARICE DE GUZMAN, an individual,
KRISTI MARCOS, an individual, and
KRISTAL BARRET, an individual.

Prospective Intervenors

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1 Prospective Intervenors Nichole Vicario, Richard N. Wales Jr., Misty Startup, Darice De
2 Guzman, Kristi Marcos, and Kristal Barret (collectively, “Prospective Intervenors”) hereby file their
3 Reply Memorandum in support of their Application to Intervene (“Application”).

4 **I. INTRODUCTION**

5 The citizens of Chino Valley Unified School District (“District”), through their elected
6 representatives, adopted a policy (“BP 5020.1”) under which parents are to be notified if their children
7 took the major step of undergoing social transition at school.¹ BP 5020.1 safeguards the constitutional
8 rights of District parents by ensuring that parents are notified when a child asks to be treated as a
9 gender different from their natal sex at school. Social transition, a form of psychological treatment,
10 is a serious decision in the life of the child that often sets in motion medical interventions, some of
11 which are irrevocable. Despite arguing that schools have broad latitude to regulate educational
12 policies, the Attorney General filed this action to prevent the District from enforcing BP 5020.1.

13 The Attorney General’s efforts to enjoin the enforcement of BP 5020.1 threatens the
14 constitutional rights of District parents because BP 5020.1 is necessary to ensure that parents are not
15 stripped of their right to direct the upbringing of their children. Halting BP 5020.1 would put parents’
16 constitutional rights in jeopardy. District parents, including Prospective Intervenors, thus have both
17 the protectable interest and the direct and immediate interest in the subject of the litigation required
18 for mandatory and permissive intervention, respectively. Prospective Intervenors further meet the
19 remaining requirements to intervene in the case.

20 The Attorney General’s vehement opposition to Prospective Intervenors’ participation here
21 speaks volumes. Only parents—like Prospective Intervenors—can defend their constitutional rights
22 that are in danger because of the Attorney’s General lawsuit. They should not be denied the
23 opportunity to defend those rights.

24 The Court should therefore grant the Application and join Prospective Intervenors as party-
25 defendants so they can defend their constitutional rights as parents.

26 _____
27 ¹ “Social transitioning” refers, primarily, to referring to a transgender-identifying person by a new
28 name and pronouns associated with their transgender identity. (See Declaration of Dr. Erica E. Anderson (“Anderson Decl.”) ¶ 9, attached as exhibit to District’s Opposition.)

1 **II. PROSPECTIVE INTERVENORS SATISFY THE STANDARD FOR**
2 **MANDATORY INTERVENTION**

3 Prospective Intervenor’s joinder is mandatory because the Attorney General’s lawsuit
4 threatens their constitutional rights as parents, a protectable interest in this action. Prospective
5 Intervenor carried their burden of showing (1) “a protectable interest in the subject of the action,”
6 (2) “that the disposition of this action may impair or impede [their] ability to protect that interest,”
7 and (3) “that [their] interests are not adequately represented by existing parties.” (*Carlsbad Police*
8 *Officers Ass’n v. City of Carlsbad* (2020) 49 Cal.App.5th 135, 148.)

9 **Protectable interest.** Prospective Intervenor’s constitutional rights as parents constitute a
10 protectable interest in this litigation. In examining whether there is a protectable interest, the
11 “operative inquiry” is whether there is an “interest [that] is protectable under some law,” and
12 “whether ‘there is a relationship between the legally protected interest and the claims at issue.’” (*Cal.*
13 *Dep’t of Toxic Substances Control v. Jim Dobbas, Inc.* (9th Cir. 2022) 54 F.4th 1078, 1088 (quoting
14 *Wildernes Soc. v. U.S. Forest Serv.* (9th Cir. 2011) 630 F.3d 1173, 1176 (en banc)) (emphasis
15 removed).)² Prospective Intervenor has a protectable interest in this action that is not just
16 “protectable under some law,” but under the supreme law of the land—the United States Constitution.

17 On September 14, 2023, Judge Roger T. Benitez of the Southern District of California issued
18 an order in a case involving a similar issue that removes any shred of doubt as to Prospective
19 Intervenor’s constitutional rights in this action. (*See Mirabelli v. Olson*, No. 323CV00768BENWVG,
20 2023 WL 5976992 (S.D. Cal. Sept. 14, 2023).) In *Mirabelli*, the court enjoined state and local
21 educational officials from enforcing a policy that required teachers to conceal students’ gender
22 identities in discussions with parents, *i.e.*, what the Attorney General maintains District teachers must
23 do here. (*See id.* at *1–2.) While the court’s focus was on teachers’ First Amendment rights, Judge
24 Benitez nonetheless recognized that a school’s decision to either notify or conceal a student’s social
25 transition to a student’s parents implicates parents’ constitutional rights. (*See id.* at *8–10.)

26 _____
27 ² Prospective Intervenor cite Ninth Circuit authority when discussing mandatory intervention
28 because California courts take guidance from federal courts’ construction of Federal Rule of Civil
Procedure 24, after which California’s intervention statute was modeled. (*See Crestwood Behav.*
Health, Inc. v. Lacy (2021) 70 Cal.App.5th 560, 572 (citation omitted).)

1 While *Mirabelli* discussed many of the same cases Prospective Intervenors raised in their
2 Application, Judge Benitez’s synthesis of these authorities makes Prospective Intervenors’
3 protectable interest clear. Judge Benitez explained that the Supreme Court “recognized the parental
4 right to be involved in—and even override their child’s opinion—the need for medical care or
5 treatment.” (*Id.* (citing *Parham v. J.R.* (1979) 442 U.S. 584, 604).) Judge Benitez further cited
6 Supreme Court precedent for the proposition that “it is not a novel proposition to say that parents
7 have a recognized legal interest in the education and upbringing of their child.” (*Id.* at *9 (quoting
8 *Winkelman v. Parma City Sch. Dist.* (2007) 550 U.S. 516, 529).)

9 On October 3, 2023, in *T.F. v. Kettle Moraine School District*, the Circuit Court for Waukesha
10 County Wisconsin issued an order granting summary judgment in favor of parents who sued a school
11 district for “violat[ing] parental rights by adopting a policy to allow, facilitate, and affirm a minor
12 student’s request to transition to a different gender identity at school without parental consent and
13 even over the parents’ objection.” (RJN, Exh. A (“*T.F.*”) at 1). The court’s order was consistent with
14 Judge Benitez’s analysis in *Mirabelli*. The court held that social transitioning at school “is
15 undisputedly a . . . healthcare issue,” and, accordingly, a protected constitutional right that requires
16 that strict scrutiny be satisfied. (*Id.* at 8–10). *T.F.*, like *Mirabelli*, makes explicit what is implicit in
17 decades of Supreme Court jurisprudence: schools must notify parents when their children begin the
18 process of transitioning genders by socially transitioning because of its healthcare implications.

19 BP 5020.1 safeguards the same rights Judge Benitez recognized in *Mirabelli*. BP 5020.1
20 ensures that parents, like Prospective Intervenors, will be notified if their child socially transitions at
21 school. Social transition carries inherent and significant psychological impacts for a child. School
22 employees will call transitioning children by names unknown to their parents; place such children on
23 sports teams and in locker rooms with children of the opposite natal sex; and intervene in children’s
24 social interactions to ensure that other children honor the social transitioning process. These actions
25 have psychological impacts on the child and constitute healthcare treatment. The Attorney General’s
26 own expert, Dr. Christine Brady, opined: “By itself, social transition is psychologically beneficial
27 and is a *medically recognized treatment for gender dysphoria.*” Decl. of Christine Brady in Supp. of
28

1 App. for TRO and OSC RE: Prelim. Inj., ¶8 (emphasis added).³ There is a relationship between
2 legally protected rights (Prospective Intervenors’ constitutional right to direct their children’s
3 upbringing) and the claims at issue in the case (the legal viability of BP 5020.1, which protects those
4 rights).

5 The Attorney General admits that parents have a right to “direct[] the education of their
6 children,” but argues that this right “must yield to state interests in certain circumstances.” Opp’n at
7 4. Implicit in the Attorney General’s argument is the concession that Prospective Intervenors do
8 indeed have a protectable interest here, as the above authority confirms. The Court should not weigh
9 Prospective Intervenors’ interest against the Attorney General’s purported interest in deciding
10 whether Prospective Intervenors can intervene—that determination should occur only when the Court
11 decides the merits of the case.

12 **Impair or impede.** In *Mirabelli*, Judge Benitez explained that “it would seem” that school
13 officials’ policy of withholding information about social transitions would violate “the federal
14 constitutional rights of parents of school district students,” but did not decide the issue because
15 parents were not parties to the case. (*Mirabelli, supra*, 2023 WL 5976992, at *11.) Prospective
16 Intervenors are seeking to intervene in this case because the enjoinder of BP 5020.1—the remedy
17 sought by the Attorney General—would impair Prospective Intervenors’ constitutional rights as
18 parents. Without BP 5020.1, District employees would be mandated to withhold critical healthcare-
19 related information about students from Prospective Intervenors, *see* Compl. ¶37, which is exactly
20 what Judge Benitez suggested would “seem to” violate parents’ constitutional rights. Accordingly,
21 Prospective Intervenors have satisfied their burden of showing that “the injunctive relief sought by
22 the plaintiffs will have direct, immediate, and harmful effects upon a third party’s legally protectable
23 interests.” (*Sw. Ctr. For Biological Diversity v. Berg* (9th Cir. 2001) 268 F.3d 810, 818 (quoting
24

25 ³ The Attorney General’s concession that social transitioning is a medical process (one administered
26 largely by laypersons and not medical professionals) makes this case readily distinguishable from
27 *Regino v. Staley* (E.D. Cal. Jul. 11, 2023) 2023 WL 4464845, a case upon which the Attorney General
28 relies. (*Regino*, 2023 WL 4464845, at *3.) The *Regino* court (incorrectly) disregarded the plaintiff’s
allegation that social transitioning is a medical process as conclusory, and that case is on appeal.
Here, Dr. Brady’s declaration makes clear that social transitioning by itself is form of psychological
intervention with healthcare implications.

1 *Forest Conservation Council v. U.S. Forest Serv.* (9th Cir. 1995) 66 F.3d 1489, 1495, *abrogated on*
2 *other grounds by Wilderness Soc. v. U.S. Forest Serv.* (9th Cir. 2011) 630 F.3d 1173.)

3 The Attorney General’s argument that Prospective Intervenors’ “primary concern is not with
4 the adoption of BP 5020.1, but rather, how prior policies . . . were presumably inadequate to address
5 their rights” misses the mark. Opp’n at 4. As explained above, it is sufficient that the relief sought by
6 the plaintiff threaten the intervening party’s interest. If the Attorney General succeeds in enjoining
7 BP 5020.1, the District would be forced to return to a prior secrecy policy would *require* that school
8 officials violate parents’ rights. In *T.F.*, even the *absence* of a policy was unconstitutional where it
9 allowed individual employees to do what the Attorney General argues school employees must do.
10 (*See T.F.* at 18 (“By failing to act, the District has implemented a policy, by the actions of their
11 employee, which implicates the rights of [parents] in the decision-making authority of their children.
12 . . . [T]he School District has already shown by their actions that their policy is a willingness to go
13 against parental wishes when handling the medical treatment of gender dysphoria in minors through
14 affirming them by social transition.”).) And Prospective Intervenors would be without recourse to
15 argue that the Court should order the District to revert back to a parental notification policy because,
16 in this scenario, this Court will already have decided that BP 5020.1 is unenforceable.

17 In *Berg*, the Ninth Circuit explained that intervention was mandatory “because the City’s
18 status as an EPA permittee could be affected when the relief sought would require the EPA to make
19 the City’s permits more restrictive.” (*Berg, supra*, 268 F.3d at 819 (citation omitted).) This case is
20 analogous as it is the Attorney General’s requested remedy (invalidating BP 5020.1 which safeguards
21 Proposed Intervenors’ rights) that would impair Prospective Intervenors’ rights.

22 Finally, the Attorney General argues that “preexisting policies already protect parent-child
23 relationships by involving parents where possible, while still protecting the privacy of vulnerable
24 children.” Opp’n at 4. Once again, the Attorney General is putting the cart before the horse by
25 weighing Prospective Intervenors’ constitutional interest against the state law interests the Attorney
26 General asserts on behalf of District students. The Court should adjudicate this question when it
27 evaluates the merits of BP 5020.1—not at the intervention stage.

28

1 **Not adequately represented by existing parties.** Prospective Intervenors satisfy the final
2 requirement for mandatory intervention because they are the only parties properly situated to
3 represent the constitutional rights of District parents. The Ninth Circuit “considers three factors in
4 determining the adequacy of representation: (1) whether the interest of a present party is such that it
5 will undoubtedly make all of a proposed intervenor’s arguments; (2) whether the present party is
6 capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any
7 necessary elements to the proceeding that other parties would neglect. (*Arakaki v. Cayetano* (9th Cir.
8 2003) 324 F.3d 1078, 1086, *as amended* (May 13, 2003) (citing *California v. Tahoe Reg’l Plan.*
9 *Agency* (9th Cir. 1986) 792 F.2d 775, 778).)

10 Proposed Intervenors satisfy all three factors. The District’s opposition to the Attorney
11 General’s application for a temporary restraining order makes no mention of parents’ constitutional
12 rights. (*See generally*, District’s Opp’n to App. for Temp. Rest. Order.) And while the District’s
13 opposition to the Attorney General’s application for a preliminary injunction references parents’
14 constitutional rights in passing, the District’s focus is on its own authority to enact BP 5020.1 and its
15 interest in enforcing it (understandably so). (*See* District’s Opp’n to App. for Prelim. Inj. at 11, 19.)
16 Thus, it cannot be the case that the District will undoubtedly make the arguments Prospective
17 Intervenors are making, or even that they are capable and willing to make such arguments.
18 Prospective Intervenors therefore offer a separate and critical component to the case, that is, the threat
19 to parents’ constitutional rights that reversion to the prior secrecy policy poses. The District, which
20 is led by an elected body, represents and is beholden to all stakeholders in the District: parents,
21 students, educators, and the community more generally. Thus, the District cannot advocate solely on
22 behalf of parents, which are but one constituent group of stakeholders. Their voices should be heard.

23 Once again, *Mirabelli* is instructive. Judge Benitez explained that parents had a clear
24 constitutional interest, but the court granted relief based only on teachers’ First Amendment rights
25 because no parents were parties. (*Mirabelli, supra*, 2023 WL 5976992, at *11.) Without Prospective
26 Intervenors’ participation, the court would therefore be all but certain to issue a ruling that affects
27 parents’ rights without parents present to litigate their constitutional interest in the case.

28

1 That Prospective Intervenors and the District both seek to keep BP 5020.1 in place is of no
2 consequence. California’s intervention statute expressly contemplates that a nonparty can intervene
3 by “[u]niting with a defendant in resisting the claims of a plaintiff.” (Cal. Code Civ. Proc. §387(b)(2).)
4 Prospective Intervenors are doing just that by joining the District in opposing the relief the Attorney
5 General seeks based on rights Prospective Intervenors are uniquely positioned to defend.

6 **III. PROSPECTIVE INTERVENORS SATISFY THE STANDARD FOR**
7 **PERMISSIVE INTERVENTION**

8 Prospective Intervenors are further entitled to permissive intervention here because
9 intervention will allow them to protect their “direct and immediate” interest in the litigation—their
10 constitutional right to direct their children’s education and medical decisions—without enlarging the
11 issues before the Court.

12 **Proper procedures.** The Attorney General’s only argument as to the proper procedures
13 requirement is that Prospective Intervenors should not have sought intervention through an *ex parte*
14 application. Yet the Attorney General ignores the fact that the Code of Civil Procedure expressly
15 authorizes *ex parte* applications to intervene. (*See* Cal. Code Civ. Proc. §387(c) (“A nonparty shall
16 petition the court for leave to intervene by notice motion or *ex parte* application.”).) When Prospective
17 Intervenors filed the Application *ex parte*, the Court was scheduled to hear the Attorney General’s
18 application for a preliminary injunction within weeks; an *ex parte* application thus ensured that
19 Prospective Intervenors would be heard before the Court decided an application that goes to the merits
20 of the case. In any event, the Court converted the Application into a noticed motion, and the parties
21 filed a stipulation under which the Attorney General was given a surreply brief, thereby obviating
22 any possible prejudice resulting from the *ex parte* filing.

23 **Direct and immediate interest.** Prospective Intervenors have a direct and immediate interest
24 in this action because the injunction the Attorney General seeks would impair their constitutional
25 rights as parents. Permissive intervention requires an interest that is “direct rather than consequential,
26 and it must be an interest that is capable of determination in the action.” (*City & Cnty. of San*
27 *Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1037 (citations omitted).) This
28 requirement is satisfied when “the judgment in the action *of itself* adds to or detracts from [the

1 proposed intervenor’s] legal rights without reference to rights and duties not involved in the
2 litigation.” (Id. (quoting *Continental Vinyl Prods. Corp. v. Mead Corp.* (1972) 27 Cal.App.3d 543,
3 549).) As explained above, an injunction prohibiting enforcement of BP 5020.1 would threaten
4 Prospective Intervenors’ legally protected interests because it would enjoin a policy that safeguards
5 their constitutional rights as parents. Such an injunction would also give District employees legal
6 cover to violate Prospective Intervenors’ constitutional rights by hiding from them crucial healthcare-
7 related information about their children.

8 The Attorney General’s Opposition does nothing to undermine Prospective Intervenors’
9 assertion of a direct and immediate interest in this action. While conceding that parents do indeed
10 have constitutional rights as parents, the Attorney General makes two inapposite arguments.

11 First, the Attorney General argues that, because courts have imposed limits to parents’
12 constitutional rights in other cases, so too should Prospective Intervenors’ rights be limited. Opp’n at
13 6–7. The cases the Attorney General relies on in which courts have limited the boundaries of parents’
14 constitutional rights in contexts that do not concern students’ healthcare decisions at school. These
15 cases provide no basis for narrowing parents’ constitutional rights here. Judge Benitez explained that
16 he was “unaware of state appellate court decisions recognizing a child’s right to quasi-privacy about
17 their gender identity expressions, and none placing such a right above a parent’s right to know[.]”
18 (*Mirabelli, supra*, 2023 WL 5976992, at *10.) Thus, the Attorney General’s argument that parents
19 have no constitutional interest in learning of their children’s efforts to change their gender identity at
20 school has no support in law.

21 Second, the Attorney General argues that parents’ constitutional rights must yield to
22 children’s privacy rights regarding their gender identity. Opp’n at 8. This argument misstates
23 Proposed Intervenors’ burden; Proposed Intervenors need not prove that they will win the case (*i.e.*,
24 that their asserted interest will necessarily predominate those of other parties). Proposed Intervenors
25 must simply prove a direct and immediate interest in the subject of the litigation, which they have
26 done by establishing that their constitutional rights as parents are at issue. In any event, Proposed
27 Intervenors will demonstrate that children lack a privacy right to keep the fact their school is socially
28 transitioning them secret from their parents; that children have no reasonable expectation of privacy

1 in the fact that they are identifying as a different gender at school; and that, even if children had such
2 a privacy right, Proposed Intervenors’ parental rights trump any privacy rights their children might
3 otherwise have. Judge Benitez explained the following in support of his holding that students’ privacy
4 interest was not enough to overcome the First Amendment interests at issue: “a child’s right to privacy
5 and to object to a warrantless search of his room must give way to a parent’s superior right to
6 consent.” (See *Mirabelli, supra*, 2023 WL 5976992, at *11 (citing *In re D.C.*, (2010) 188 Cal.App.4th
7 978).) Likewise, Proposed Intervenors will establish that parents’ constitutional rights to direct their
8 children’s upbringing should predominate.

9 **No enlargement of the issues.** When the Attorney General filed this action, the sole question
10 before the Court was whether the District could enforce BP 5020.1 that its elected leaders adopted.
11 This remains the only question before the Court. Prospective Intervenor’s participation in this case
12 will not cause that to change. The case will still be limited to the question of whether BP 5020.1 can
13 be enforced, but the Court will rule on the issue with the benefit of briefing and evidence offered by
14 Prospective Intervenors, whose rights as parents are directly at issue in the case.

15 The Attorney General’s narrow reading of this element is at odds with the very concept of
16 intervention. The Attorney General argues that intervention will enlarge the issues because it will
17 expand the scope of the case from “students’ rights to equal protection and anti-discrimination . . .
18 and . . . rights to privacy” to include the “rights of parents.” Opp’n at 9. But some degree of
19 enlargement is inevitable whenever a party intervenes in a case. By nature, if a party intervenes, the
20 scope of the lawsuit will increase to include consideration of that party’s rights already affected by
21 the action. That cannot be adequate grounds upon which to deny intervention.

22 The Attorney General’s argument further contradicts his assertion that Prospective
23 Intervenors’ “claim is already before the Court.” Opp’n at 4. If this were true, Prospective
24 Intervenors’ participation could not possibly enlarge the issues in the case.

25 **Prospective Intervenor’s interest outweighs the Attorney General’s.** The balance between
26 Prospective Intervenors’ interest in intervening and the Attorney General’s interest in opposing the
27 Application tips strongly in favor of Prospective Intervenors. Prospective Intervenors’ interest is
28 safeguarding their constitutional rights as parents, which are imperiled by the prospect of enjoining

1 BP 5020.1. The Attorney General, meanwhile, asserts that his interest is a “quick and speedy
2 resolution of the instant case[.]” Opp’n at 10. This is a red herring. The Court set the Application for
3 hearing on October 13, 2023, the same day the Attorney General’s application for a preliminary
4 injunction is scheduled for hearing. Thus, Prospective Intervenors’ participation here will not in any
5 way impede the progress of this case.


6 Prospective Intervenors therefore satisfy all four requirements for permissive intervention,
7 and the Court should grant the Application to ensure that parents are represented when the Court
8 considers the weighty issues before it.

9 **IV. CONCLUSION**

10 Based on the foregoing arguments and authorities, Prospective Intervenors respectfully
11 request that the Court grant the Application and order that Prospective Intervenors be joined as party-
12 defendants to the above-captioned case.

13 Date: October 4, 2023

DHILLON LAW GROUP INC.
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