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December 20, 2023

Via eCourts
Joseph H. Orlando, Appellate Division Clerk
Appellate Division Clerk's Office
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625

Re: MATTHEW J. PLATKIN, ATTORNEY GENERAL OF NEW JERSEY, *et al.* v. MARLBORO TOWNSHIP BOARD OF EDUCATION, *et al.*
Docket No. A-000118-23

Dear Mr. Orlando:

This firm represents the Marlboro Township Board of Education ("Board") in the above-referenced matter. Please accept this letter-brief and appendix in support of the Board's appeal of the trial court's Order, dated August 18, 2023, pursuant to R. 2:6-2(b).

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ORDER BEING APPEALED

Procedural History and Statement of Facts[1]

The Marlboro Township School District ("District") is a Pre-Kindergarten through 8th grade district which serves students ranging in age from three (3)-years-old to fourteen (14)-years-old (Da099). The Marlboro Township Board of Education ("Board") has a policy which pertains specifically to transgender students, Policy 5756, entitled, "Transgender Students," which it first adopted in 2015 (Ibid.). The Board voted to approve a revised version of the policy at the June 20, 2023 public Board meeting, which became effective as of that date (Da043).

The revised policy includes several amendments which facilitate the Board's family-centered approach to accommodating students who wish to

[1] The statement of facts and procedural history are closely related and combined for the Court's convenience.

change their gender identity or expression (Ibid.). While the policy formerly stated that "parental consent is not required (Da054)," the revised policy now requires the District to "notify a student's parent/guardian of the student's change in gender identity or expression except where there is reason to believe that doing so would pose a danger to the health or safety of the pupil" (Da045). The policy also includes several safeguards for students who have concerns with their parents learning of their change in gender identity, stating, in relevant part:

> [I]n the spirit of transparency and parental involvement, the district will notify a student's parent/guardian of the student's change in gender or expression except where there is reason to believe that doing so would pose a danger to the health or safety of the pupil. A school counselor will notify and collaborate with the student first before discussing a student's gender nonconformity or transgender status with the student's parent/guardian. That discussion will address any concerns the student has about such parental notification and discuss the process by which such notification shall occur, including, but not limited to, whether the student wishes to be given the opportunity to notify the parent/guardian first. Where there are concerns about disclosure to a parent/guardian posing a danger to the health or safety of the pupil, the administration in consultation with the school counselor, school psychologist, and other district professionals shall determine the appropriate course of action.
> (Ibid.)

Additionally, the policy requires the principal or designee to "have a discussion with the student and parent/guardian to ascertain the student's preference on matters such as chosen name and chosen pronoun (Ibid.)." The

policy further provides that "[w]here there is disagreement between the student and the family, the Administration shall consult with the student and parent/guardian and develop a plan for how the student will be referred to at school (Ibid.)." In such situations, the policy requires the school to "provide resource information regarding family counseling and support services outside of the school district (Da046)."

The policy specifically directs that the District "shall not discriminate against any student based upon gender identity and/or the pupil's transgender status and shall not require any documentation or evidence in any form, including diagnosis, treatment, or legal name change (Da047)." Similarly, the policy acknowledges that "[a] school's obligation to ensure nondiscrimination on the basis of gender identity requires schools to provide transgender students equal access to educational programs and activities, even in circumstances in which other students, parents/guardians, or community members raise objections or concerns (Ibid.)."

Elsewhere, the revised policy recognizes that every situation is unique, and that some students and parents/guardians may want the District to keep a student's transgender status confidential, while others may prefer that the District openly acknowledge same (Ibid.). It states, in relevant part, that

"[s]chool staff members may not disclose information that may reveal a student's transgender status except as allowed by law and in accordance with the wishes of the parent/guardian and the student" and that "[t]he school district may keep confidential a current, new, or prospective student's transgender status in accordance with the wishes of the parent/guardian and the student (Ibid.)."

The policy also revises the way in which the District maintains certain student records (Da049). The former version of the policy stated that "[i]f a student has expressed a preference to be called by a name other than their birth name, permanent student records containing the student's birth name should be kept in a separate, confidential file (Da056)." The current policy revises this protocol to require the Administration to maintain student records "[i]n accordance with the plan developed in consultation with the student and the student's parent/guardian (Da049)."

The policy concludes by noting that "[t]he Board will continually review and update this policy to conform with current developments in the law (Da051)."

On or about June 21, 2023, Plaintiffs filed an Administrative Action with the New Jersey Department of Law and Public Safety, Division on Civil Rights

("DCR"), wherein they alleged that the Board violated the New Jersey Law Against Discrimination ("NJLAD") by approving the policy (Da030). On or about June 22, 2023, Plaintiffs filed a Verified Complaint and Order to Show Cause with Temporary Restraints in Essex County Superior Court, Chancery Division, seeking to restrain and enjoin the Board from implementing or modifying the policy "until such time as the litigation before DCR arising from the Administrative Complaint is resolved (Da001)." The Board filed a Motion to Transfer Venue to Monmouth County the following day on June 23, 2023 (Da098). The Honorable Sheila Venable, A.J.S.C. ordered the matter to be "transferred to the Superior Court of New Jersey, Chancery Division, Monmouth County" on June 27, 2023 (Da094). The Board agreed to refrain from implementing the Policy pending the Court's determination on Plaintiffs' Order to Show Cause (Da098).

The matter was assigned to the Honorable David F. Bauman, J.S.C., who held a hearing on August 15, 2023, during which time both parties were heard (Da097). Judge Bauman issued an Order on August 18, 2023, which "preliminary enjoined and restrained [the Board] from enforcing, implementing, or otherwise giving effect to Amended Policy 5755 – Transgender Students (adopted June 20, 2023) until such time as the litigation before the New Jersey

Division on Civil Rights arising from a separate administrative complaint filed on June 21, 2023 is resolved (Da095)." The Order also directed that the Board was "hereby preliminarily enjoined and restrained from amending, modifying, or superseding any portion of Policy 5756 (adopted 17, 2019); and are further directed to preserve the status quo ante prior to the adoption of Amended Policy 5756, until such time as the litigation before the New Jersey Division on Civil Rights arising from a separate administrative complaint filed on June 21, 2023 is resolved (Ibid.)." Judge Bauman certified the Order as final via a Consent Order dated September 5, 2023 (Da117). The Board filed the underlying Notice of Appeal on September 14, 2023 (Da119).

LEGAL ARGUMENT

STANDARD OF REVIEW (Da095)

The New Jersey Superior Court, Appellate Division ("Appellate Division") has held that "[a]n appellate court applies an abuse of discretion standard in reviewing a trial court's decision to grant or deny a preliminary injunction." Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 395 (App. Div. 2006) (internal citations omitted). The New Jersey Supreme Court has found that "an abuse of discretion has occurred when a decision was 'made without a rational explanation, inexplicably departed from established policies, or rested

on an impermissible basis.'" Waste Mgmt. of N.J., Inc. v. Morris Cty. Mun. Util. Auth., 433 N.J. Super. 445, 455 (App. Div. 2013) (internal citations omitted).

However, while "decisions relating to injunctive relief are normally reviewed for abuse of discretion, [the Appellate Division's] review is *de novo* where the disputed issue is a question of law. Stoney v. Maple Shade Tp., 426 N.J. Super. 297, 307 (App. Div. 2012) (internal citations omitted). In such situations, the Appellate Division "consider[s] the factual record in the light most favorable to the non-moving party and accord[s] no special deference to the trial court's resolution of purely legal questions." N. Bergen Mun. Util. Auth. v. I.B.T.C.W.H.A. Local 125, 474 N.J. Super. 583, 590 (App. Div. 2023). Here de novo review is appropriate under the circumstances given the issues at bar involve questions of law.

POINT I

THE TRIAL COURT INCORRECTLY APPLIED THE LAW REGARDING "A WELL-SETTLED RIGHT" FOR PLAINTIFFS TO PROCEED ON THEIR CLAIMS (Da103).

The trial court ("Court") correctly identified that "[a] party seeking preliminary injunctive relief must establish: 1) a well-settled right to proceed on its claims; 2) a reasonable probability of success on the merits of those claims;

3) irreparable harm if restrains are not imposed; and 4) that a balancing of the equities and hardships favors injunctive relief, and that the public interest will not be harmed (Da102)" (citing Crowe v. DeGioia, 90 N.J. 126, 132-135 (1982); Waste Mgmt. of N.J., Inc. v. Union Cnty. Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008)). However, the Court incorrectly applied the Crowe prong regarding whether Plaintiffs have "a well-settled right to proceed on its claims (Da103)."

The Court cites to N.J.S.A. 10:5-14.1 for the proposition that the Attorney General's "well-settled right" to proceed on his claim "is both settled and beyond serious dispute (Da103)" and that he has a "well-settled right, if not obligation, to proceed in a summary manner to enforce a remedial statute protecting members of a statutorily protected class in New Jersey from discrimination (Da104)." The statute states:

> At any time after the filing of any complaint, or whenever it shall appear to the Attorney General or the director that a person has engaged in, is engaging in, or is about to engage in any practice declared to be unlawful by this act, the Attorney General or the director may proceed against any person in a summary manner in the Superior Court of New Jersey to obtain an injunction prohibiting such person from continuing such practices or engaging therein or doing any acts in furtherance thereof, to compel compliance with any of the provisions of this act, or to prevent violations or attempts to violate any such provisions, or attempts to interfere with or

> impede the enforcement of any such provisions or the exercise or performance of any power or duty thereunder. (emphasis supplied).

The Court misinterprets the statute to mean that any time the Attorney General requests injunctive relief on a matter pertaining to the New Jersey Law Against Discrimination, that the Attorney General automatically satisfies, as of right, this prong of the well-established Crowe test. The Court's interpretation, however, leads to an absurd result because it renders the necessary "well-settled right" test utterly meaningless in these circumstances. See Applied Underwriters Captive Risk Assurance Co., Inc. v. N.J. Dep't. of Banking & Ins., 472 N.J. Super. 26, 45 (App. Div. 2022) ("Courts are to interpret statutes in a fashion that avoids absurd readings.").

The Court titled its subheading on this analysis as: "The Attorney General's Right **to Proceed Summarily** under the Law Against Discrimination is Well-Settled [emphasis added] (Da103)." However, this misconstrues the requirement of the Crowe test and what the Court is being asked to consider regarding same. It is not disputed that the Attorney General has a well-settled legal right to "proceed in a summary manner in the Superior Court of New Jersey to obtain an injunction," pursuant to N.J.S.A. 10:5-14.1. Indeed, the Board does not dispute Plaintiffs' legal right to file the underlying Order to

Show Cause and to request injunctive relief, which the statute clearly authorizes. However, the statute *does not* state or contemplate that every time Plaintiffs request a temporary injunction in a matter pertaining to the NJLAD, that the applicable law underlying Plaintiffs' claim is to automatically be considered settled in their favor.

Rather, "a plain reading of the statute…simply allows [Plaintiffs] the option to file the summary action or not file the summary action." Sashihara v. Nobel Learning Cmtys., Inc., 461 N.J. Super. 195, 207 (App. Div. 2019). In other words, the Court was not asked to analyze whether Plaintiffs had a well-settled right to request an injunction, but rather, whether the legal right underlying their claims is well-settled; not, as the Court states, Plaintiffs' legal rights to simply file an action in the first place.

The New Jersey Supreme Court in Crowe stated that "temporary relief should not be withheld **when the legal right underlying plaintiff's claim** is unsettled [emphasis added]." Crowe, *supra*, at 133 (internal citation omitted). Accordingly, the Court was required to conduct an analysis regarding the specific facts claimed by Plaintiffs, rather than to mechanically find that they have satisfied this requirement simply because of a law which permits the State to request injunctive relief. See B & S Ltd., Inc. v. Elephant & Castle Intern.,

Inc., 388 N.J. Super. 160, 168 (Super. Ct. 2006) (stating that to determine whether "the movant assert[ed] a settled legal right supporting its claim…require[d] the court to engage in an extensive discussion…"). Indeed, neither Plaintiffs, nor the Court, have cited any legislative or judicial authority regarding a well-settled right to find that a parental notification policy such as the one at issue here could be found violative of the NJLAD. See Plotnick v. DeLuccia, 434 N.J. Super. 597, 618 (Super. Ct. 2013) ("Plaintiff has not shown that the underlying legal right he seeks to establish through his application is 'settled.' […] Indeed, plaintiff has cited no legislative or judicial authority to support his conclusion that such a right exists (citing Crowe, *supra*).").

The Court's holding, which rested on simply citing to N.J.S.A. 10:5-14.1 without any analysis of the actual claims or facts, rested on an impermissible basis (Da103). Indeed, as the Court correctly identified, "[a] party seeking preliminary injunctive relief **must establish** a well-settled right to proceed on its claims" by clear and convincing evidence [emphasis added] (Da102). Because Plaintiffs have failed to do so, they are unable to satisfy **all** of the requirements set forth in Crowe, and therefore, the Order respectfully should be reversed and Plaintiffs' request denied as a matter of law. Alternatively, the

matter should be remanded to the Chancery Division for an analysis regarding whether the applicable law pertaining to Plaintiffs' claim is well-settled.

POINT II

THE TRIAL COURT IMPROPERLY RELIED ON ONLINE SURVEYS TO DETERMINE WHETHER PLAINTIFFS HAD A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS (Da107).

The Court cited to two (2) online surveys provided by Plaintiffs in support of its determination that Plaintiffs' "proffered evidence is sufficiently clear and convincing to demonstrate the Amended Policies' disparate impact on a protected class under the NJLAD (Da108)." However, New Jersey Rules of Evidence define "relevant evidence" as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. Moreover, "[e]xcept as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of: (a) [u]ndue prejudice, confusing the issues, or misleading the jury; or (b) [u]ndue delay, wasting time, or needlessly presenting cumulative evidence." N.J.R.E. 403. As applied here, it was improper for the Court to rely on these two surveys in rendering its determination pertaining to Plaintiffs' reasonable probability of success on the merits (Da108). The primary survey cited to by the Court, "Exhibit F," is, according to Plaintiffs,

"an excerpted true and correct copy of" a presumably more comprehensive 2022 survey (Ibid.; Da027; Da066).

The Court notes that the Board did not "refute [Plaintiffs'] data or present alternate evidence sufficient to negate or call into question that data or the methodology by which the data was compiled (Da108)." However, it would have been virtually impossible for the Board to do so. The "excerpt" cited by Plaintiffs and relied upon by the Court does not identify any methodology whatsoever which the surveyors used in creating this excerpted survey answer (Da027; Da066). Plaintiffs have not provided information such as the number of individuals who participated in the survey, the manner in which it was distributed (mail, in-person, etc.), the number of responses, the layout of the survey, etc. (Ibid.). Moreover, while Plaintiff includes a website link to a page purporting to contain "[a] full, unexcerpted copy" of the survey, the link leads to a webpage which "doesn't exist (Da027)." Additionally, the parties never engaged in discovery or took depositions, and thus, the Board never had an opportunity to question Plaintiffs regarding the survey. It was simply impossible for the Court to make a valid determination regarding the admissibility of this survey based on the limited information provided by Plaintiffs, and the survey should not have been credited as having "a tendency

in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401.

The second survey cited to by the Court, "Exhibit G," does not contain any information relevant to the parental notification issue which is central to this matter, but rather, is relied upon by the Court for information regarding familial relations between individuals who identify as transgender and their "immediate families" (Da108; Da027; Da069). Thus, any probative value presented therein is "substantially outweighed by the risk of undue prejudice [or] confusing the issues." N.J.R.E. 403.

In sum, the Court's determination regarding Plaintiffs' reasonable probability of success on the merits rested on an impermissible basis, and the Order should be reversed.

POINT III

THE TRIAL COURT'S ORDER COMPELS THE BOARD TO VIOLATE STATE AND FEDERAL LAW (Da114).

The Court, in examining the relative hardships to the parties and harm to the public interest, found that the Board's "arguments that imposing restraints will compel them to violate federal and state law are not persuasive," and that "[t]he federal and state law cited by defendants pertain to access to information

in written student records… (Da114)." However, this is simply not correct. Moreover, the relevant policy changes do pertain to written student records.

As the Board explained in its opposition papers, New Jersey State law provides that "[t]he State Board of Education shall provide by regulation for the creation, maintenance, and retention of pupil records and for the security thereof and access thereto, to provide general protection for the right of the pupil to be supplied with necessary information about herself or himself, **the right of the parent or guardian and the adult pupil to be supplied with full information about the pupil**, except as may be inconsistent with reasonable protection of the persons involved, the right of both pupil and parent or guardian to reasonable privacy as against other persons and the opportunity for the public schools to have the data necessary to provide a thorough and efficient educational system for all pupils [emphasis added]." N.J.S.A. 18A:36-19.

The Court commented that N.J.S.A. 18A:36-19 contains a "qualifier that such information be provided 'except as may be inconsistent with the reasonable protection of the person involved. (Da114).'" However, such "qualifier" requires a fact-sensitive analysis regarding whether a student requires "reasonable protection" from their parents under the circumstances, which such protection the Board's amended policy contains (Da045). It does

not authorize Plaintiffs to place a blanket exemption on all parents' rights "to be supplied with full information about the pupil" by contending that all such students, as a general proposition, require "protection" from their parents.

The New Jersey Administrative Code defines a "student record," in relevant part, as "information related to an individual student gathered within or outside the school district and maintained within the school district, regardless of the physical form in which it is maintained." N.J.A.C. 6A:32-2.1. The regulations further provide that "[n]onadult students may assert rights of access only through their parent(s)" and "[t]he parent or adult student shall have access to the student's records." N.J.A.C. 6A:32-7.1(e) and (f). N.J.A.C. 6A:32-7.1(g)(1) also states that "[e]ach district board of education shall establish written policies and procedures for student records that: "[g]uarantee access to persons authorized under this subchapter within 10 days of a request, but prior to any review or hearing conducted in accordance with N.J.A.C. 6A." N.J.A.C. 6A:32-7.5(e) also defines "the parent of a student under the age of 18, regardless of whether the child resides with the parent [except where there are certain custody issues]" as a "person authorized to access student records, including student health records."

Thus, New Jersey law provides parents with the rights to access accurate records and information concerning their minor children. Accordingly, the Board sought to revise language contained in the previous version of the policy, which the Order compels the Board to reinstate, which stated that "[i]f a student has expressed a preference to be called by a name other than their birth name, permanent student records containing the student's birth name should be kept in a separate, confidential file (Da056)." The revised policy would have required the Administration to maintain student records "[i]n accordance with the plan developed in consultation with the student and the student's parent/guardian (Da049)." In other words, the previous policy, which the Order requires the Board to reinstate, mandates that the Board violate State and Federal Law by keeping secret, confidential files from parents.

Additionally, the Court does not address the federal requirements under the Family Educational Rights and Privacy Act ("FERPA") that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution…the right to inspect and review the education records of their children." 20 U.S.C.S. § 1232g(a)(1)(A). Moreover, "a parent

or eligible student must be given the opportunity to inspect and review the student's education records." 34 C.F.R. § 99.10. At least one federal court has interpreted FERPA as prohibiting school boards from maintaining policies which prevent teachers from referring to students by the student's preferred names and pronouns in communications with parents. See Ricard v. USD 475 Geary Cty., No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742 at 15 (D. Kan. 2022) ("FERPA is a law that specifically empowers parents to receive information about their minor students; it mandates the District to make education records available to parents upon request—whether the child wants their parents to have the records or not. See 34 C.F.R. § 99.10(a) ("Except as limited under § 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records" (emphasis added)). And FERPA does not exempt from its disclosure obligation education records that deal with preferred names and pronouns.").

The Board cannot legally be required to keep matters pertaining to minor students' gender identity or expression confidential from their parents as contained in their pupil records. Therefore, the Court erred as a matter of law in reaching a contrary determination by requiring the Board to reinstate its previous policy which requires it to do so.

CONCLUSION

The Appellate Division respectfully should reverse the Court's Order and dismiss Plaintiffs' request for injunctive relief.

Respectfully submitted,
SCHENCK, PRICE, SMITH & KING, LLP

MARC H. ZITOMER

MHZ/afm
cc: All parties via eCourts

NEW JERSEY SUPERIOR COURT
APPELLATE DIVISION

MATTHEW J. PLATKIN, AG, NJ AND SUNDEEP IYER, DIRECTOR, NJ DIVISION OF CIVIL RIGHTS, Plaintiffs-Appellees, v. **MARLBORO TOWNSHIP BOARD OF EDUCATION AND MARLBORO TOWNSHIP PUBLIC SCHOOL DISTRICT,** Defendants-Appellants.	**Docket No. A-000118-23** **Civil Action** **On appeal from the Superior Court of New Jersey, Monmouth County, Chancery Division – General Equity** **Sat below: Hon. David F. Bauman, J.S.C.**

AMENDED BRIEF OF PROPOSED AMICUS CURIAE THE CENTER FOR AMERICAN LIBERTY IN SUPPORT OF APPELLANTS

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PRELIMINARY STATEMENT

Parents have a fundamental right under the United States Constitution to direct the upbringing of their children. Pursuant to that right, public schools are required to notify parents and obtain their consent before socially transitioning their children at school. "Social transitioning" refers, primarily, to calling a transgender-identifying person by a new name and pronouns associated with their transgender identity. *See* ACa14, Certification of Dr. Erica E. Anderson ("Anderson Cert.") ¶ 9, attached to ACa1, Certification of Josiah Contarino, as Exhibit 1. Social transitioning is a form of psychological treatment, with dramatic and potentially life-long consequences, and the State may not perform this treatment on children without informing their parents. Minor children are not capable of determining by themselves whether social transitioning is appropriate for them, and the healthcare consensus is that schools should not socially transition students without involving their parents in the process.

Here, the Marlboro Township Board of Education and Marlboro Township Public School District (the "District") adopted a policy that at least partially acknowledges parental rights by requiring schools to notify parents when the schools socially transition their children (the "Parental Notification Policy"). Under the Parental Notification Policy, schools must accept a student's asserted gender identity as decisive and socially transition the student if the student asks for it. Upon socially

transitioning the student, the school must notify the child's parents, unless there is reason to believe that doing so would create a risk of harm to the child.

The Parental Notification Policy amended a prior policy under which schools were permitted to socially transition children in secret from their parents if the child asked that their parents not be informed (the "Parental Secrecy Policy"). The Parental Secrecy Policy was based on a guidance document issued by the New Jersey Department of Education, called *Transgender Student Guidance for School Districts*, which provided that schools may socially transition children in secret from their parents if the child asks that their parents not be informed.

The court below entered an order preliminarily enjoining the Parental Notification Policy and requiring the District to reinstate the Parental Secrecy Policy. This was erroneous. An injunction may not violate constitutional rights, and the Parental Secrecy Policy violates the rights of parents whose children attend schools in the District. What is more, the Parental Secrecy Policy harms children. It keeps children who may be experiencing psychological distress from seeing a competent mental health practitioner. It results in children receiving a "one size fits all" form of psychological treatment in a situation that demands individualized evaluation. It results in children persisting in a transgender identity when they might otherwise desist. And it cuts parents out of their children's lives, isolating children from their

main source of support and driving a wedge into the heart of the parent-child relationship just when children need it most.

This Court can remedy the violation of parents' constitutional rights and prevent this harm to children. It should reverse.

BACKGROUND ON SOCIAL TRANSITIONING[1]

I. Youth should receive a careful professional assessment before socially transitioning.

Transgender persons experience a "mismatch between [their] natal sex and [their] felt, perceived, or desired gender identity." ACa15 ¶ 10. Having a transgender identity is not, standing alone, a psychological condition. ACa15 ¶ 10. Nevertheless, transgender-identifying persons can experience gender dysphoria, which refers to "clinically significant distress . . . related to gender incongruence." ACa15 ¶ 10. Not everyone who has a transgender identity suffers from gender dysphoria, but a young person's desire to undergo a social transition is a sign that may indicate the presence of gender dysphoria or related mental-health conditions. ACa11-ACa12 ¶ 8.b.

[1] This background discussion is based on the certification of Dr. Erica Anderson. ACa7-ACa57. Dr. Anderson, a transgender woman, is an expert in the field of the treatment of youth dealing with gender-identity related issues. ACa10-ACa11, Anderson Cert. ¶¶ 3–6. Dr. Anderson's certification starts on page ACa6 of the attached appendix.

Minors who want to undergo a social transition should thus receive a "careful evaluation by an appropriately trained mental health professional" to determine whether gender dysphoria or other related conditions exist. ACa37-ACa38 ¶ 57.

II. Social transition is a significant psychotherapeutic intervention.

The primary purpose of social transitioning is to relieve the psychological distress associated with having a mismatch between one's natal sex and gender identity. ACa14 ¶ 9. Social transitioning is an "impactful psychotherapeutic intervention" in the life of a child. ACa12 ¶ 8.e. Indeed, "a social transition represents one of the most difficult psychological changes a person can experience." ACa31 ¶ 42. Like other forms of healthcare treatment, however, social transitioning is not without risks.

First, social transitioning may cause a minor's transgender identity to persist. Absent social transitioning, for the vast majority of children, "gender incongruence does not persist" into adulthood. ACa13 ¶ 20. But once a child is socially transitioned and lives as their aspired-to gender, the likelihood that the child's transgender identity will persist into adulthood "dramatic[ally]" increases. ACa25 ¶ 30. In this way, social transitioning itself can change "gender identity outcomes" in the lives of children. ACa25-ACa30 at IV.a.

Second, in most cases, social transitioning is the first step down the road to graduated "affirmative" care for the child in the form of puberty blockers and cross-

sex hormones, which can "have permanent, long-term effects," including but not limited to sterility. ACa35 ¶ 53; *see also* United Kingdom National Health Service Website (noting that "long term cross-sex hormone treatment may cause . . . permanent infertility"), ACa88–92. The risks associated with this graduated care must be considered when deciding whether to socially transition a minor. ACa22-ACa23 ¶¶ 24–25.

Third, the recent surge of youth reporting a transgender identity suggests that "cultural and/or social factors may contribute—even substantially—to a young person's experience of gender variance." ACa19 ¶ 19. Caution is thus warranted to ensure that a social transition is appropriate. ACa19 ¶ 19.

Based on these concerns, social transitioning youth must be carefully undertaken with the assistance of a mental health practitioner and the minor's parents. ACa25-ACa31 ¶¶ 29–43. And in some cases, based on a weighing of the relevant considerations, "it can be appropriate for parents to say 'no' to a social transition" of their children. ACa39 ¶ 60.

III. Parental involvement is essential at every stage in the social transition process.

As a practical matter, parents must be involved for their children to even see a mental health professional. ACa40-ACa41 ¶¶ 61–64. Parental involvement is also critical in "the diagnostic process to [allow the mental health professional to] evaluate how long the [minor] has been experiencing gender incongruence, whether

there might be any external cause of those feelings, and a prediction of how likely those feelings are to persist." ACa35 ¶ 66. And given the "complicated risk-benefit calculus . . . and the limited knowledge about long-term effects and outcomes," parents "should . . . be involved to make important decisions about next steps." ACa44 ¶ 72. Moreover, excluding parents from decisions about a social transition "drive[s] a wedge between the parent and child" and "undermines [minors'] main support structure"—their families. ACa45, ACa46 ¶¶ 77, 80.

Parental involvement is also necessary to obtain informed consent. Minors generally may not be seen "without informed consent from the parent(s)/legal guardian(s), both as a matter of state laws and as a matter of medical ethics." ACa40 ¶ 61. And because minors "lack the skills for future thinking, planning, . . . and self-reflection," parents are "integral to the informed consent process." ACa40 ¶ 62.

IV. Schools should not socially transition students in secret from their parents.

Based on these considerations, schools should not socially transition minors "without consultation with parents and appropriate professionals." ACa31 ¶ 42. Indeed, no professional body "has endorsed school-facilitated social transition of minors without parental [involvement]." ACa36-ACa47 ¶ 81. School policies "excluding parental involvement [in the decision whether to socially transition their child are] contrary to widely accepted mental health principles and practice" and are "likely to lead to student harm." ACa47, ACa49 ¶¶ 82, 86.

ARGUMENT

The State has not satisfied its burden of demonstrating the preliminary injunction factors by "clear and convincing[]" evidence. *Waste Mgmt. of New Jersey, Inc. v. Union Cnty. Util. Auth.*, 399 N.J. Super. 508, 519–20 (App. Div. 2008) (setting forth preliminary injunction factors).

I. THE STATE IS NOT LIKELY TO SUCCEED ON THE MERITS

Below, the court concluded that the Parental Notification Policy violated New Jersey law, and it enjoined that Policy and required the District to reinstate the Parental Secrecy Policy. This was error. Under the Supremacy Clause of the United States Constitution, parents' federal constitutional rights trump any other state-law rights that might be at issue. *Montgomery v. Louisiana*, 577 U.S. 190, 205 (2016), *as revised* (Jan. 27, 2016). Moreover, it is black-letter law that a state-court injunction may not violate federal constitutional rights. *Horizon Health Center v. Felicissimo*, 135 N.J. 126, 148–49 (1994) (modifying injunction that "impermissibly exceeds [federal constitutional] standards"); *see also N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 916 n.51 (1982) (noting that in a "civil lawsuit between private parties," the "application of state rules of law by . . . state courts in a manner alleged to restrict [constitutional] freedoms constitutes 'state action' under the Fourteenth Amendment" (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964))).

Here, for the reasons set forth below, the lower court's injunction, which requires the District to reinstate the Parental Secrecy Policy, violates the federal constitutional rights of parents in the District. Thus, this Court should reverse.

A. Parents have a fundamental right to direct the upbringing of their children.

Parents have a fundamental right under the United States Constitution to direct the "care, custody, and control" of their minor children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.); *see also Gruenke v. Seip*, 225 F.3d 290, 304 (3d Cir. 2000) (same). This right rests on the constitutionally mandated common-law presumptions of parental fitness and affection—*i.e.*, that (1) "parents possess what a child lacks in maturity, experience, and capacity for judgment" and (2) the "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

The Parental Secrecy Policy—which the lower court ordered the District to reinstate—infringes the rights of parents in the District in four ways.

1. Right to Consent to Psychological Treatment

First, the Parental Secrecy Policy violates parents' right to consent when the State performs psychological treatment on their children. *Parham*, 442 U.S. at 602; *see also Parents United For Better Sch., Inc. v. Sch. Dist. of Phila. Bd. of Educ.,* 148 F.3d 260, 275 (3d Cir. 1998) (recognizing that "parental consent must be secured before medical treatment is obtained" by children); *Kanuszewski v. Michigan Dep't*

of Health & Hum. Servs., 927 F.3d 396, 418 (6th Cir. 2019) (noting parents have the "right to direct their children's medical care"); *Mann v. Cnty. of San Diego*, 907 F.3d 1154, 1160–61 (9th Cir. 2018) (holding state violates parental right by performing healthcare treatment on children "without notifying the parents . . . and without obtaining either the parent's consent or judicial authorization"). As Dr. Anderson explains, social transitioning is a form of psychological treatment. ACa12, ACa25-ACa31 ¶¶ 8.e, 29–43. Indeed, the very purpose of social transitioning is to alleviate the mental suffering that persons with a transgender identity can experience. ACa14 ¶ 9. Because social transitioning constitutes psychological treatment, parents have the right to consent when the State is performing that treatment on their children. *See T.F. v. Kettle Moraine School Dist.*, No. 2021CV1650, 2023 WL 6544917, at *5 (Wis. Cir. Oct. 03, 2023) (holding that socially transitioning child against parents' wishes "directly implicates an infringement against the parental . . . right to direct the care for their child").

The characterization of social transitioning as a form of psychological treatment is not controversial. Courts across the country have recognized this fact. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 770 (9th Cir. 2019) (noting that "[t]reatment options for individuals with gender dysphoria" include "changes in gender expression and role (which may involve living . . . in another gender role, consistent with one's gender identity)"); *Lamb v. Norwood*, 899 F.3d 1159, 1161 (10th Cir.

2018) (noting that "[t]reatment forms [for gender dysphoria] currently include . . . [c]hanges in gender expression and role (which may involve living . . . in another gender role, consistent with one's gender identity)"); *Koe v. Noggle*, No. 1:23-CV-2904-SEG, 2023 WL 5339281, at *6 (N.D. Ga. Aug. 20, 2023) (noting that "gender dysphoria treatment plans include therapy, support, and assistance with elements of a social transition"); *Doe v. Horne*, No. CV-23-00185-TUC-JGZ, 2023 WL 4661831, at *3 (D. Ariz. July 20, 2023) ("Undergoing treatment to alleviate gender dysphoria is commonly referred to as 'transition' and includes . . . social transition . . . ."); *Monroe v. Meeks*, 584 F. Supp. 3d 643, 678 (S.D. Ill. 2022) (holding that "[s]ocial transition . . . is a medically necessary component of treatment for some . . . with gender dysphoria"); *Pinson v. Hadaway*, No. 18-CV-3420-NEB-KMM, 2020 WL 6121357, at *1 (D. Minn. July 13, 2020) (noting that "[g]ender dysphoria treatment can involve . . . social transition"); *Porter v. Allbaugh*, No. 18-CV-0472-JED-FHM, 2019 WL 2167415, at *2 n.3 (N.D. Okla. May 17, 2019) (noting that "[c]urrent treatments for gender dysphoria include . . . social transition").

Leading medical associations also consider social transitioning to be psychological treatment. For example, the American Academy of Pediatrics, the American Association of Child & Adolescent Psychiatry, the American College of Physicians, and the American Medical Association, among others, hold the views that "[t]he recommended treatment for transgender people with gender dysphoria

includes . . . social transition" and that "[s]ocial transition . . . is often a critically important part of treatment" for gender dysphoria. Brief of Amici Curiae Medical, Nursing, Mental Health, and other Health Care Organizations in support of Plaintiff in *Adams v. The School Board of St. Johns County*, Case No. 18-13592 (11th Cir. 2019) at 12–13, ACa93–134. In addition, in its recently released *Standards of Care* Version 8, the World Professional Association of Transgender Health ("WPATH")—an advocacy organization committed to the health of transgender-identifying individuals—considers social transitioning to be psychological treatment. E. Coleman, et al., *Standards of Care for the Health of Transgender and Gender Diverse People*, Version 8, Int'l J. of Transgender Health (Sept. 15, 2022) ("WPATH SOC8") at S77 (noting that the "potential benefits" of social transitioning include "reducing gender dysphoria and enhancing psychosocial adjustment and well-being"), ACa135–39.

And other leading experts in the field—like Dr. Anderson—consider social transitioning to be psychological treatment. Ken Zucker, the former head of the Centre for Addiction and Mental Health in Toronto, has opined that social transition is a form of "psychosocial treatment that will increase the odds of long-term persistence." Zucker, K.J., *The myth of persistence: Response to "A Critical Commentary on Follow-Up Studies and Desistance Theories about Transgender and Gender Non-Conforming Children" by Temple Newhook et al.*, International Journal

of Transgenderism, 19, 231–245 (2018), ACa140–56. Hillary Cass, the former President of the Royal College of Paediatrics and Child Health in the United Kingdom, has similarly opined in her recent *Interim Report* that childhood social transition is an "active intervention [that] may have significant effects on the child." Cass, H., *Independent review of gender identity services for children and young people: Interim Report* (February 2022), ACa157–59.

The State undoubtedly has the authority to render medical treatment to children without parental consent in certain situations, *see, e.g.*, *D.C.M.M. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, No. 87207, 2023 WL 5837974, at *2 (Nev. Sept. 8, 2023) (authorizing treatment without parental consent where child needed immediate medical attention for serious medical condition and parents could not be located), but this is not one of them. Socially transitioning every child who asks for it is not recommended by any healthcare association. ACa46 ¶ 81; *see also* WPATH SOC8 at S77–78 (recommending that "health care professionals discuss the potential benefits and risks of a social transition with families who are *considering* it"), ACa138–39. Instead, a child's request to be socially transitioned should merely *begin* a "careful evaluative process" of the child. ACa21 ¶ 22; *see also* WPATH SOC8 at S77–78, ACa138–39. Socially transitioning every child who asks for it ignores the facts that (1) most children who experience a transgender identity will desist, (2) social transitioning reduces the likelihood of desistance, (3) most children

who are socially transitioned will go on to receive puberty blockers and cross-sex hormones, which can have irreversible consequences, (4) the surge in transgender identifying youth may be impacted by peer pressure, and (5) there is a growing awareness of adult "detransitioners"—*i.e.*, persons who transitioned to a transgender identity as youth who decide as adults to revert to the gender associated with their natal sex. ACa20, ACa18-ACa29, ACa34, ACa36 ¶¶ 20, 29–38, 50, 54–55; *see also* James M. Cantor, *Transgender and Gender Diverse Children and Adolescents: Fact-Checking of AAP Policy*, J. Sex & Marital Therapy 307, 313 (2019) (noting that "[o]ver puberty, the majority of [gender dysphoric] children cease to want to transition"), ACa160–68; *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 48 (D.D.C. 2020) (citing scholarship establishing that "childhood social transitions [are] important predictors of persistence"); Kristina R. Olson, *Gender Identity 5 Years After Social Transition*, Pediatrics 150(2):e2021056082 (Aug. 2022) (study in which majority of children who socially transitioned were receiving puberty blockers and / or cross-sex hormones within 5 years), ACa169–76; Carmichael, P., Butler, G., Masic, U., Cole, T. J., De Stavola, B. L., Davidson, S., Skageberg, E. M., Khadr, S., & Viner, R. M., *Short-term outcomes of pubertal suppression in a selected cohort of 12- to 15-year-old young people with persistent gender dysphoria in the UK*, PLOS ONE 16(2) (2021) (study in which 98% of children who received puberty blockers went on to receive cross-

sex hormones), ACa177–203; WPATH SOC8 at S58 (noting that the uptick in transgender-identifying adolescent girls may be driven in part by "excessive peer and social media influence"), ACa137; Irwig, M.S., *Detransition Among Transgender and Gender-Diverse People—An Increasing and Increasingly Complex Phenomenon*, J. Clin. Endocrinology & Metab., e4251–e4262 (June 9, 2022) (noting new scholarship focusing on detransitioners), ACa204–206. It is not permissible for school personnel to make such a critical healthcare decision in the life of the child without involving their parents. ACa47-ACa49 ¶¶ 82–86; *see also* WPATH SOC8 at S77–78 (recommending that "health care professionals discuss the potential benefits and risks of a social transition with *families* who are considering it" and noting that such communications "facilitate the *parents/caregivers'* success in making informed decisions about the advisability and/or parameters of a social transition for their child" (emphases added)), ACa138–39. These facts counsel for caution, not schools rushing headlong to socially transition every student who asks for it without parental involvement.

Moreover, there are no exigent circumstances in the social transitioning context that would justify schools' failure to obtain parents' consent. While it might be permissible to render life-saving emergency treatment to a child whose parents cannot be located, *see D.C.M.M.*, 2023 WL 5837974, at *2, social transitioning is a slow, deliberative process in which parental involvement is always feasible.

It does not matter that it is students—and not the school—who are initiating the request to be socially transitioned. As a matter of law, minors lack the "maturity, experience, and capacity for judgment" needed to "make sound judgments concerning many decisions, *including their [own] need for medical care*." *Parham*, 442 U.S. at 603 (emphasis added); *see also Roper v. Simmons*, 543 U.S. 551, 569 (2005) (noting that children are "vulnerable . . . to negative influences and outside pressures, including peer pressure" and often make "impetuous and ill-considered . . . decisions"). Parents—not the State, and not the child—have the "primary role" in raising their children. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). This rule, which contemplates parental participation in children's healthcare decisions, protects children from their own imprudent decisions. *See Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000). If the rule were otherwise, it would be permissible for a school to employ doctors to distribute Adderall to students before class to help them focus without obtaining parental consent, so long as the students voluntarily sought the medication. That is not the law. *See, e.g.*, *Mario V. v. Armenta*, No. 18-CV-00041-BLF, 2021 WL 1907790 (N.D. Cal. May 12, 2021) (holding parents' rights violated when school secretly conducted blood-sugar tests on willing students).[2]

[2] It is important to note that the United States Constitution protects parents' rights to *consent* to the social transitioning of their children, not just the right to parental *notice* that schools are taking this step in treating their children. While the Parental

2. Right to Make Important Decisions

Second, the Parental Secrecy Policy violates parents' right to make the "important decisions" in their children's lives. *H.L. v. Matheson*, 450 U.S. 398, 410 (1981); *see also C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005) (discussing parents' right to make those decisions in their children's lives that go to the "heart of parental decision-making"). "It is not educators, but parents who have primary rights in the upbringing of children," *Gruenke*, 225 F.3d at 307, and parents cannot play this crucial role if their children's school is actively concealing its actions from them, *Hodgson v. Minnesota*, 497 U.S. 417, 483 (1990) (noting that, under the common law, parents had the right, "not merely to be notified of their children's actions, but to speak and act on their behalf") (Kennedy, J., concurring in part and dissenting in part).

Regardless of whether social transitioning is considered psychological treatment, the decision of whether a school socially transitions a child is indisputably an "important decision" in the child's life. *See Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 522CV04015HLTGEB, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022) (observing that parents must "have a say in what [their] minor child[ren are] called" by their school); *Mirabelli v. Olson*, No. 323CV00768BENWVG, 2023 WL

Notification Policy appropriately requires parental notice before a school socially transitions students, to comply with the Constitution, it must go further and require parental consent as well.

5976992, at *9 (S.D. Cal. Sept. 14, 2023) (concluding that school district's "policy of elevating a child's gender-related choices to that of paramount importance, while excluding a parent from knowing of, or participating in, that kind of choice, is . . . foreign to federal constitutional . . . law"). Social transitioning impacts the very core of the child's self-definition as a boy or girl. And, as discussed, it substantially reduces the odds of desistence, is likely to lead to a life of medicalization, and—when done by schools behind parents' backs—results in the child suffering without parental support.

Moreover, socially transitioning students in secret from their parents does not fall within the scope of schools' implied authority under the doctrine of *in loco parentis*. Schools have "inferred parental consent" that gives them "a degree of authority . . . commensurate with the task that the parents ask the school to perform"—namely, to educate their children. *Mahanoy Area Sch. Dist. v. B.L*, 141 S. Ct. 2038, 2052 (2021) (Alito, J., concurring). Consistent with that authority, schools must have the ability "to control curriculum and the . . . educational environment," *C.N.*, 430 F.3d at 182, including things like "the hours of the school day," "the timing and content of examinations," or "the extracurricular activities offered at the school," *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005) ("*Fields I*"), *opinion amended on denial of reh'g sub nom. Fields v. Palmdale Sch. Dist. (PSD)*, 447 F.3d 1187 (9th Cir. 2006) ("*Fields II*"). But socially

transitioning students without parental consent is not within the scope of that inferred delegation—parents do not hand children off so schools may render psychological treatment and secretly facilitate changing their gender identity. *See Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2052; *see also Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 265–66 (N.Y. App. Div. 1993) (holding in-school condom distribution program violated parental rights because it lacked parental notification and opt-out provision).

In short, as the Third Circuit has held, parents' rights do not stop at "the threshold of the schoolhouse door." *C.N.*, 430 F.3d at 185 n.26. Schools must obtain parents' consent before socially transitioning their children.

3. Right to Family Integrity

Third, the Parental Secrecy Policy violates parents' right to maintain the integrity of their family. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (noting that "freedom of personal choice in matters of . . . family life" is constitutionally protected) (plurality op.); *see also Gruenke*, 225 F.3d at 303 (discussing right to "familial integrity"). This right protects parents' relationships with their children from "undue state interference." *Gruenke*, 225 F.3d at 303, 306 (holding school personnel's secret interference with parents' "management of [their daughter's] teenage pregnancy" violated right to family integrity). *See also Pierce*

v. Society of Sisters, 268 U.S. 510, 535 (1925) (noting that students are not "mere creatures of the State").

The Parental Secrecy Policy constitutes an "undue state interference" in parents' relationship with their children. From the clothing and toys parents give their children, to the friends parents allow their children to have, to the sports parents allow their children to play, the parent-child relationship is deeply shaped by whether the child is a boy or a girl. By requiring schools to socially transition children without informing parents, the Parental Secrecy Policy allows schools to fundamentally alter the nature of parents' "emotional bond[s]" with their children. *Ovando v. City of Los Angeles*, 92 F. Supp. 2d 1011, 1021 (C.D. Cal. 2000); *see also Doe v. Dickenson*, 615 F. Supp. 2d 1002, 1014 (D. Ariz. 2009) (holding state may not fundamentally alter the nature of the parent-child relationship). Moreover, the Parental Secrecy Policy treats parents as the enemy, impermissibly driving a wedge into the parent-child relationship that lies at the heart of the family, thus usurping the parental role. *Patel v. Searles*, 305 F.3d 130, 134, 137 (2d Cir. 2002) (holding the state violated the right to family integrity when it created "mistrust among the members of [plaintiff's] family"). In short, a school that socially transitions children behind parents' backs unduly interferes with the parents' right to family integrity.

4. Presumptions of Fitness and Affection

Fourth, the Parental Secrecy Policy impermissibly reverses the constitutionally mandated presumptions of parental fitness and affection in violation of both substantive and procedural due process. *Parham,* 442 U.S. at 602; *see also Troxel*, 530 U.S. at 68 (reversing visitation decision that failed to presume parental fitness and affection) (plurality op.); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (invalidating statute that presumed unmarried fathers were unfit parents); *Doe v. Heck*, 327 F.3d 492, 521 (7th Cir. 2003) (holding parents' rights violated where state actors "not only failed to presume that . . . parents would act in the best interest of their children, they assumed the exact opposite"); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (noting that the "fundamental requirement of [procedural] due process" is notice and an opportunity to be heard). According to the State, parental secrecy is required in *all* cases because *some* parents might harm their transgender-identifying children. State's Br. at ACa81–82.[3] But the "statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect [their] children is repugnant to American tradition." *Parham*, 442 U.S. at 603 (emphasis in original). Thus, the State's justification for the Parental Secrecy Policy renders it constitutionally impermissible.

[3] All citations to the State's Brief herein are citations to State's brief in the trial court.

To be sure, the State may overcome the presumptions of fitness and affection if an appropriate factfinder makes *specific findings* that *specific parents* are either unfit or will not act in the child's best interests. But the Parental Secrecy Policy does not require such findings. Instead, its secrecy requirement is predicated on the presumption that all parents are unfit and / or will not act in the best interests of the children simply because their children do not want them to know they are being socially transitioned at school. ACa81. This impermissibly reverses the presumptions of fitness and affection in violation of the parental right.

* * *

To be clear, the United States Constitution does not require schools to inform parents if they merely have a suspicion—or even direct knowledge—that their children are asserting a transgender identity (or, for that matter, any identity or orientation). Thus, this case is not, as the State argued below, about "outing" LGBTQ+ children. ACa60. Instead, this case is about whether schools must involve parents before *schools take the affirmative step* of socially transitioning their children. Under the United States Constitution, they must.

B. The Parental Secrecy Policy does not satisfy strict scrutiny.

Because parental rights are "fundamental," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), the Parental Secrecy Policy is subject to strict scrutiny, *Reno v. Flores*, 507 U.S. 292, 302 (1993). To satisfy strict scrutiny, the State must show

that the Parental Secrecy Policy is "narrowly tailored to serve a compelling state interest." *Id.* The State has not made—and cannot make—that showing.

1. Children do not have a privacy right to keep the fact their school is socially transitioning them secret from their parents.

The State argued below that children have a privacy right to keep their school's social transitioning of them secret from their parents. ACa83. The State did not specifically invoke the United States Constitution as the source of students' alleged privacy rights (presumably to avoid creating federal jurisdiction), but even if it had, children have no federal constitutional right to privacy to keep secret from their parents the fact they are being socially transitioned by their school. Thus, student privacy is not a legitimate interest, much less a compelling one.[4]

To find new extra-textual rights in the United States Constitution, the Court must conclude that the right, as "careful[ly] descri[bed]" by the litigant advancing it, is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 720–21. The argument that children have a privacy right to keep secret from their parents the fact that their school is socially transitioning them does not come close to satisfying this standard. Indeed, the argument is devoid of any historical support whatsoever. *See* Blackstone,

[4] As for the State's state-law privacy arguments, as discussed, parents' federal parental rights trump any state-law privacy rights their children may have. *Montgomery*, 577 U.S. at 205.

1 *Commentaries on the Laws of England* at 440–41 (recognizing the obligation of children to parental "subjection and obedience"); Kent, 2 *Commentaries* on *American Law* at 207 (providing that children's duties to their parents include "obedience"); *Hodgson*, 497 U.S. at 483 (noting that, under the common law, parents had the right, "not merely to be notified of their children's actions, but to speak and act on their behalf") (Kennedy, J., concurring in part and dissenting in part).

Below, the State cited *Sterling v. Borough of Minersville* in support of its position, State's Br. at ACa76, but *Sterling* did not involve a minor. Instead, *Sterling* involved an *eighteen-year-old*. 232 F.3d 190, 192 (3d Cir. 2000).[5] Even if *adults* had a privacy right to keep the state's social transitioning of them secret (and the United States Supreme Court has never held that they do), that holding would not extend to *minors*. As the United States Supreme Court has held, "the constitutional rights of children cannot be equated with those of adults." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (noting that "unemancipated minors lack some of the most fundamental rights of self-determination"). Adults have the constitutional right to marry, *Loving v.*

[5] In its briefing below, the State attempted to obscure this fact, describing the case as involving a "teenager." ACa75. While that description is not incorrect, it also ignores the categorial distinction between minors and adults in connection with parental rights.

Virginia, 388 U.S. 1 (1967), to engage in consensual sexual relations, *Lawrence v. Texas*, 539 U.S. 558 (2003), and to and to view indecent material, *Pope v. Illinois*, 481 U.S. 497 (1987), for example, yet almost every state in the union, including New Jersey, has laws prohibiting minors from engaging in these activities, *see, e.g.*, N.J.S.A. 37:1–6 (prohibiting minors from marrying); N.J.S.A. 2C:14–3 (restricting sexual activity with minors); N.J.S.A. 2C:34–3 (prohibiting distribution of indecent material to minors).

More importantly, the proposed right at issue is not some abstract privacy right. Rather, it is a proposed privacy right in children *against their parents*. But minor children generally "lack . . . rights vis-à-vis [their] parents." *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944–45 (9th Cir. 1997). Indeed, considering "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing," the Court should be highly skeptical of arguments that seek to interpose the United States Constitution between parents and their children. *Bellotti*, 443 U.S. at 634; *see also Parham*, 442 U.S. at 603 ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions . . . ."). This conclusion is especially true considering the significant long-term "medical, emotional, and psychological consequences" associated with social transitioning, which leave

children particularly vulnerable to their own immature choices. *H.L.*, 450 U.S. at 411.

The alleged privacy right at issue also does not arise from the logic of those cases requiring a judicial bypass of a parental consent requirement in the abortion context. *See, e.g.*, *Bellotti*, 443 U.S. 622. For one thing, those cases were predicated on a federal constitutional right to an abortion, which no longer exists. *Dobbs*, 597 U.S. 215. For another thing, the Supreme Court has only ever required a judicial bypass to a parental consent requirement in the unique context of abortion, where the (former) right must be exercised within the short window of human gestation or lost forever. *Bellotti*, 443 U.S. at 642 ("A pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy."). The same is not true with social transitioning, which—like most life decisions—minor children can choose for themselves when they reach the age of majority. *Id.* (observing that no judicial bypass is required for laws prohibiting minors from marrying because "[a] minor not permitted to marry before the age of majority is required simply to postpone her decision").

Furthermore, a right to privacy exists only where the individual has a "reasonable expectation[] of confidentiality." *Fraternal Ord. of Police, Lodge No. 5 v. City of Phila.*, 812 F.2d 105, 112 (3d Cir. 1987). Children have no expectation of confidentiality in the fact that their school is socially transitioning them. Social

transitioning is open and notorious; indeed, the transition is a "social" one. By definition, students have no reasonable expectation of confidentiality in this information. *Mirabelli*, 2023 WL 5976992, at *10 ("A student who announces the desire to be publicly known in school by a new name, gender, or pronoun and is referred to by teachers and students and others by said new name, gender, or pronoun, can hardly be said to have a reasonable expectation of privacy or expect non-disclosure.").

Finally, even if minor children had a federally protected privacy right against their parents to conceal their social transitioning at school (and they do not), it is settled that privacy rights must yield where "the government interest in disclosure outweighs the individual's privacy interest." *Fraternal Ord. of Police*, 812 F.2d at 110. Here, due to the importance of parental involvement in the lives of their children, which the United States Supreme Court has recognized for over a century, parents' constitutional right to direct the upbringing of their children outweigh any putative privacy right their children might have.

In sum, children have no federal constitutional right to privacy to keep secret from their parents the fact they are being socially transitioned by their school. Thus, student privacy cannot be a compelling governmental interest sufficient to support the Parental Secrecy Policy's infringement of parental rights.

2. The Parental Secrecy Policy is not narrowly tailored to prevent harm.

a. The Parental Secrecy Policy is not narrowly tailored to prevent parents from abusing their children.

The State argued below that the Parental Secrecy Policy also prevents parents from harming their transgender-identifying children. ACa81–82. The prevention of harm to children is assuredly a compelling government interest in the abstract. But it violates both the substantive and procedural components of the Due Process Clause to presume that parents will harm their children without making specific factual findings in each individual case.

As discussed, the United States Constitution's protection of parental rights rests on the common-law presumptions of parental fitness and affection. *Parham*, 442 U.S. at 602. The State must adhere to these presumptions unless and until it makes specific findings that rebut them in each individual case. *Id.*; *see also Troxel*, 530 U.S. at 68 (plurality op.); *Stanley*, 405 U.S. at 652. As the Third Circuit Court of Appeals has held, "a state has no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Croft v. Westmoreland Cnty. Child. & Youth Servs.*, 103 F.3d 1123, 1126 (3d Cir. 1997). Because the Parental Secrecy Policy presumes that parents will harm their children if told the child is asking to be socially transitioned at school, it is not narrowly

tailored to the prevention of child abuse. *Id.*; *see also Ricard*, 2022 WL 1471372, at *8 (holding parental secrecy overbroad "because it prohibits the disclosure of preferred name and pronoun information to parents without any assessment of whether disclosure would actually post a risk" of harm to the child); *T.F.*, 2023 WL 6544917, at *8 (holding school's actions in socially transitioning child without parental consent was "not narrowly tailored because there [were] not the necessary procedural protections in place that are necessary to override a parent's choice of how to . . . treat their child").

b. The Parental Secrecy Policy is not narrowly tailored to prevent discrimination against transgender-identifying students at school.

The State also argued below that the Parental Secrecy Policy is necessary to prevent discrimination against—and create a "safe space[]" for—transgender-identifying students at school. ACa83. As with the prevention of child abuse, the prevention of discrimination is certainly a compelling governmental interest in the abstract. But the Parental Secrecy Policy is not narrowly tailored to serve that goal.

Under both the Parental Notification Policy and the Parental Secrecy Policy, schools are required to socially transition students upon their request. The only substantive difference is that under the Parental Notification Policy, schools must inform parents of their actions, while under the Parental Secrecy Policy, schools are not required to inform parents. Because social transitioning is required under both

policies, to justify the Parental Secrecy Policy, it is not enough for the State to demonstrate that *socially transitioning* students prevents discrimination. Instead, the State must demonstrate that the Parental Secrecy Policy's *non-disclosure provisions* prevent discrimination. *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1881 (2021) (holding that government does not satisfy its burden of satisfying strict scrutiny by proffering government interest at a "high level of generality" but must link the interest to the provision being challenged). Here, the State has utterly failed to demonstrate how the failure to notify parents that their children are being socially transitioned prevents discrimination against transgender-identifying students.

To the extent the State's argument is predicated on the assumption that some parents would not allow their children to be socially transitioned if given the opportunity to consent, it fails. First, this argument assumes that every child who asks to be socially transitioned should be, which is demonstrably untrue. ACa25-ACa31, ACa39 ¶¶ 29–43, 60; *see also* WPATH SOC8 at S77–78, ACa138–39. Rather, as discussed, a child's request to be socially transitioned merely *begins* the evaluation process between a mental health professional and parents regarding whether social transitioning is appropriate for that child, a process that can appropriately lead to the child not being socially transitioned. Second, the argument that bypassing parental consent prevents discrimination assumes that children play the primary role in their own upbringing. But parents have the right to play this role,

and if parents do not consent to their children's social transitioning at school, then—absent a finding of parental unfitness—that decision controls, and the District lacks any anti-discriminatory interest with respect to those children. Accordingly, like the prevention of child abuse, the State's alleged anti-discrimination purpose is not narrowly tailored.

II. THE OTHER PRELIMINARY INJUNCTION FACTORS TIP DECIDEDLY IN FAVOR OF REVERSAL

Far from *preventing* irreparable harm, the Parental Secrecy Policy *causes* harm, both to parents and to their children.

The Parental Secrecy Policy irreparably harms parents. It violates parents' fundamental rights under the United States Constitution, which cannot be remedied by money damages. *See Garden State Equal. v. Dow*, 216 N.J. 314, 328 (2013) (holding that loss of constitutional rights that cannot be remedied by money damages constitutes irreparable injury); *see also Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 949–50 (S.D. Miss. 2014) (holding that deprivation of parental rights gives rise to irreparable harm), *aff'd*, 791 F.3d 625 (5th Cir. 2015); *Jenkins v. Jenkins*, No. 03-08-CV-037, 2008 WL 483312, at *1 (S.D. Ohio Feb. 19, 2008) (same). Moreover, the harm is immediate—the Parental Secrecy Policy is in effect now, and every day it is in place parents face the substantial risk that their children might seek to be socially transitioned in secret at school.

The Parental Secrecy Policy also irreparably harms children.

First, the Parental Secrecy Policy keeps children who are experiencing a transgender identity even from being evaluated by a competent mental health practitioner. Gender dysphoria can be a serious condition, yet the Parental Secrecy Policy leaves children who are struggling with it (or sub-threshold psychological distress) to fend for themselves, without parental support and without the involvement of a mental health professional. "[K]eeping parents uninformed . . . of significant events that beg for medical and psychological experts to evaluate a child . . . is . . . likely to cause . . . harm [to the child]." *Mirabelli*, 2023 WL 5976992, at *14.

Second, the Parental Secrecy Policy's "one size fits all" approach fails to account for the unique facts in each child's situation and results in the unnecessary and ill-advised social transitioning of at least some children. This is significant because once social transitioning is introduced, the odds of desistence plummet. And the persistence of a transgender identity can result in the child experiencing psychological distress and is highly likely to lead to the introduction of puberty blockers and cross-sex hormones, which can cause irreversible changes to children's bodies. Even one child who unnecessarily suffers these life-long impacts is one too many.

Third, the Parental Secrecy Policy creates a paradigm where students are socially transitioned at school but remain the gender associated with their natal sex

at home. This facilitation of a secret "double life" cuts children off from their primary support structure and is psychologically harmful. ACa38-ACa39 ¶¶ 77–80. The State acknowledges that transgender-identifying children are uniquely susceptible to mental-health challenges, ACa81, yet—remarkably—it concludes that this is reason to *exclude* parents from their lives. The State has it exactly backwards—the fact that these children face unique challenges is a reason for parental disclosure, not secrecy.

Finally, the State has not demonstrated that transgender-identifying students will suffer harm due to the Parental Notification Policy. The State argues that notifying parents can result in parents harming their children, ACa81–82, but, again, presuming that parents will harm their children based on nothing more than the child's request to be socially transitioned in secret is constitutionally prohibited. In any event, the Parental Notification Policy has an exception for the situation where parents are likely to harm their children, so the Parental Notification Policy adequately accounts for that concern. The State also argues that the Parental Notification Policy compromises students' "safe spaces" at school, State's Br. at ACa83, but as pointed out, the District is free to continue to socially transition students under the Parental Notification Policy just as it has done in the past. The only difference is that, under the Parental Notification Policy parents will be notified, and the State has not remotely demonstrated that the notification requirement will

cause transgender-identifying students to be discriminated against at school. Unlike the Parental Secrecy Policy's "one size fits all" approach, the Parental Notification Policy's case-by-case evaluation of the risk of parental harm interposes the State between parents and their children only when such interference is truly needed.

For these reasons, the balance of the equities tips dramatically in parents' favor, and lifting the injunction is strongly in the interest of parents, their children, and the public.

CONCLUSION

For the foregoing reasons, the Court should reverse.

January 3, 2024

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MATTHEW J. PLATKIN Attorney General of New Jersey, & SUNDEEP IYER, Director of the New Jersey Division on Civil Rights, Plaintiffs-Respondents, v. MARLBORO TOWNSHIP BOARD OF EDUCATION & MARLBORO TOWNSHIP PUBLIC SCHOOL DISTRICT Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION CIVIL ACTION DOCKET NO. A-000118-23 On Appeal From an Order Entered in the Superior Court, Chancery Division, Granting a Preliminary Injunction Sat Below: Hon. David F. Bauman, J.S.C. Docket No.: MON-C-78-23

BRIEF ON BEHALF OF PLAINTIFFS-RESPONDENTS

Date Submitted: February 20, 2024

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PRELIMINARY STATEMENT

New Jersey's Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50, is designed to eradicate discrimination in all forms. Among its protections, the LAD prohibits discrimination on the basis of "gender identity or expression" in "any place of public accommodation," N.J.S.A. 10:5-12(f)(1), including "any kindergarten, primary and secondary school, … [or] high school," N.J.S.A. 10:5-5(l). In other words, a school that adopts a policy discriminating against students based on gender identity has violated the LAD's bedrock protections. And as the New Jersey Supreme Court recognized decades ago, this prohibition extends to both disparate-treatment and disparate-impact claims.

This case arose when Appellants, the Marlboro Board of Education and Marlboro Public School District, violated the LAD's requirements. For years, Appellants had maintained a policy—consistent with guidance the New Jersey Department of Education issued in 2018—to ensure a nondiscriminatory, safe, and supportive environment for all students, including all transgender students. But on June 20, 2023, they changed course. They adopted, for the first time, a blanket policy that required school personnel to affirmatively inform the parents of transgender, gender non-conforming, or non-binary students about the child's gender identity. Because the policy discriminated on the basis of gender identity or expression, the Attorney General and Director of the Division on Civil Rights

("DCR") (together, "the State"), filed an administrative complaint before DCR the very next day alleging multiple LAD violations. And they sought relief in the Superior Court to preliminarily enjoin enforcement of the policy—and thus maintain the status quo—pending resolution of that administrative action.

Judge Bauman did not abuse his discretion in maintaining the status quo while DCR resolves the administrative proceeding. The trial court rightly held that the State demonstrated a reasonable probability of success on the merits on its claim that this new policy subjected transgender, gender non-conforming, or non-binary students to disparate treatment and to a disparate impact under the LAD. The trial court properly found that failure to enjoin these policies would irreparably harm these students—students who already face distressingly high risks of mental health challenges and suicide. And the court accurately reasoned that Appellants would not be harmed by an order maintaining the prior policy, which had been in place for four years without identified problems, while DCR's administrative proceeding plays out. Appellants do not directly challenge these findings, which are amply sufficient to justify the preliminary injunction.

The arguments Appellants do present on appeal cannot overcome the trial court's meticulous findings on each Crowe factor. Appellants claim the State's right to relief was insufficiently settled and that their new policy is compelled by state and federal recordkeeping laws. But the State's right to relief could

scarcely be clearer: the court found (and Appellants' opening brief does not dispute) that the policy likely violates the LAD, and N.J.S.A. 10:5-14.1 provides the Attorney General and Director the express right to seek an injunction in this situation. Second, the injunction has nothing to do with recordkeeping; this case concerns whether schools may adopt policies requiring affirmative disclosure of students' gender identities on a discriminatory basis, not when such schools can withhold records from requesting parents.

Appellants misunderstand what this case is about. The State has always embraced the central role that parents play in decisions regarding their children. And, consistent with the LAD, schools may disclose a student's gender identity in a number of circumstances, including where the school has a compelling and non-discriminatory basis to do so. But they may not enforce a policy requiring personnel to discriminate based on a protected characteristic—let alone while the State's administrative action plays out. This court should affirm.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. Statutory Background.

The New Jersey Legislature enacted the LAD in 1945, making it one of the oldest civil rights laws in the Nation. C.V. v. Waterford Twp. Bd. of Educ., 255 N.J. 289, 306 (2023). Its purpose, our Supreme Court has held, "is nothing less than the eradication of the cancer of discrimination." Id. at 306-07; see also L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ., 189 N.J. 381, 400 (2007) (agreeing that the LAD must be "liberally construed" to effectuate "the Legislature's broad remedial objectives" to eradicate discrimination); Rodriguez v. Raymours Furniture Co., 225 N.J. 343, 354 (2016) ("The LAD occupies a privileged place among statutory enactments in New Jersey."). The LAD has prohibited unlawful discrimination in all places of public accommodation since 1949, Pub. L. 1949, c. 11—a prohibition that covers unlawful discrimination in "any kindergarten, primary and secondary school ... [or] high school," N.J.S.A. 10:5-5(1); see also, e.g., C.V., 255 N.J. at 307. And since 2006, the LAD has expressly barred discrimination on the basis of "gender identity or expression." N.J.S.A. 10:5-12(f); Pub. L. 2006, ch. 100; see also, e.g., Holmes v. Jersey City Police Dep't, 449 N.J. Super. 600, 601 (App. Div. 2017). This prohibition on

[1] Because the procedural history and statement of facts are closely related, they have been combined for efficiency and for the Court's convenience.

unlawful discrimination extends to disparate treatment and disparate impact alike. See N.J.S.A. 10:5-12(f) (prohibiting any place of public accommodation from engaging in discrimination "directly or indirectly"); Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 81-82 (1978).

The LAD also adopts a number of remedies to enforce these bedrock protections. Almost eight decades ago, the Legislature established what is now the Division on Civil Rights in the Department of Law and Public Safety, which today enjoys "general jurisdiction and authority" to "prevent and eliminate" all "discrimination" the LAD prohibits. N.J.S.A. 10:5-6. New Jersey law likewise vests in the Attorney General the broad authority to "[e]xercise all powers of the division." N.J.S.A. 10:5-8(a), (g). The statute allows the Attorney General and Director to proceed in an administrative forum or in the Superior Court against any party they believe is violating the LAD. N.J.S.A. 10:5-8.2, -13. And even where the Attorney General and Director proceed administratively, New Jersey law empowers them to proceed "in a summary manner in the Superior Court of New Jersey to obtain an injunction prohibiting such person from continuing such practices or engaging therein or doing any acts in furtherance thereof" while the administrative action proceeds. N.J.S.A. 10:5-14.1; see also, e.g., Pfaus v. Palermo, 97 N.J. Super. 4, 8 (App. Div. 1967).

B. The Instant Case.

On September 17, 2019, the Marlboro Township Board of Education adopted Policy 5756—Transgender Students ("Original Policy"), to govern the Marlboro Township Public School District. (Da57).[2] The Original Policy broadly followed the state Department of Education's Transgender Guidance for School Districts ("State Guidance") (Da54-65), which DOE had issued in 2018 pursuant to the Legislature's direction to "assist schools in establishing policies and procedures that ensure a supportive and nondiscriminatory environment for transgender students." N.J.S.A. 18A:36-41. The Original Policy thus generally required the school district to "keep confidential a current, new, or prospective student's transgender status." (Da55). The Original Policy also stated that there was "no affirmative duty" on school personnel to notify parents regarding a student's gender identity or expression, (Da54), and recognized that students might wish to keep this information private. But the Original Policy and State Guidance acknowledge that even when a student requests privacy, there will be times when "the school district may be obligated to disclose a student's status" because it has "a specific and compelling need" to do so, "such as the health and safety of a student or an incident of bias-related crime." (Da55).

[2] "Ra" refers to Respondents' appendix to this brief. "Da" refers to appellants' appendix and "Db" refers to appellants' brief. "1T" refers to the August 15, 2023 transcript of the Order to Show Cause hearing.

On June 20, 2023, Appellants amended the Policy 5756—Transgender Students ("Amended Policy"). (Da52). The Amended Policy imposed a new obligation on the school district to affirmatively notify all parents when a student "requests a public social transition accommodation[]" related to their gender, including any "public name/identity/pronoun change." (Da45). The terms of the Amended Policy provide:

> [T]he district will notify a student's parent/guardian of the student's change in gender identity or expression except where there is reason to believe that doing so would pose a danger to the health or safety of the pupil. A school counselor will notify and collaborate with the student first before discussing a student's gender nonconformity or transgender status with the student's parent/guardian. That discussion will address any concerns the student has about such parental notification and discuss the process by which such notification shall occur including, but not limited to whether the student wishes to be given the opportunity to notify the parent/guardian first. Where there are concerns about disclosure to a parent/guardian posing a danger to the health or safety of the pupil, the administration in consultation with the school counselor, school psychologist and other district professionals shall determine the appropriate course of action. Those measures may include facilitation of counseling and other resources for the student and the student's family to facility the family's support of the student's transgender status. Confidentiality related to each student's unique situation should be addressed on a case-by-case basis, which shall include an open line of communication with the student, parent/guardian and school personnel, subject to the conditions set forth above….

[(Da45) (emphasis added).]

The Amended Policy adds that a parent or guardian should also be notified when "ascertain[ing] the student's preference on matters such as chosen name and pronoun" and that they "shall" be consulted "[w]here there is a disagreement between the student and the family" to "develop a plan for how the student will be referred to at school, including the pupil's name and/or choice of pronouns." (Da45-46). The Amended Policy eliminates the Original Policy's requirement that school staff "shall keep confidential a current, new, or prospective student's transgender status," and instead permits that school personnel "may" disclose any student's transgender status "in accordance with the wishes of the parent/guardian and the student." Compare (Da55), with (Da48).

The Amended Policy also eliminates other rights afforded to transgender, gender non-conforming, or non-binary students. It removes the requirement in the Original Policy that the school "should continue to refer to the student in accordance with the student's chosen name and pronoun," (Da55), and replaces it with a vague and amorphous statement that "the school district is to develop a plan for how the student will be referred to at school, including the pupil's name and/or choice of pronouns," (Da45-46). Moreover, the Amended Policy eliminates the Original Policy's requirement that "[a]ll students are entitled to have access to restrooms, locker rooms, and changing facilities in accordance

with their gender identity," (Da56), and instead mandates consultation with "the student's parent/guardian to develop a plan for the student's use of facilities," including their "access to restrooms, locker rooms, and changing facilities in accordance with their gender identity." (Da50-51).

On June 21, 2023, the State filed an administrative complaint with the DCR alleging that the Amended Policy violates the LAD. (Da30-41). The same day, the State filed the instant suit in the Superior Court, Chancery Division, under N.J.S.A. 10:5-14.1, which authorizes the Attorney General or the Director to "proceed against any person in a summary manner in the Superior Court of New Jersey to obtain an injunction" at any time after filing an administrative complaint or whenever it appears that a person is engaging in any practice that violates the LAD. Proceeding by Verified Complaint and Order to Show Cause, the State sought temporary restraints and a preliminary injunction to preserve the status quo prior to Appellants' adoption of the Amended Policy only for so long as the administrative complaint is pending. (Da5-24).

The trial court heard argument on August 15, 2023, and granted the State's request on August 18, 2023. (Da95-116). The preliminary injunction directed Appellants "to preserve the status quo ante prior to the adoption of Amended Policy 5756, until such time as the litigation before [DCR] arising from a separate administrative complaint filed on June 21, 2023 is resolved." (Da95-

96). The trial court went no further than maintaining the status quo: the court emphasized that it was "not rendering any final judgments or determinations as to the merits of either the State or the School Boards' claims," which would "be left to the sound determination of the Office of Administrative Law after a full development of the factual and legal record in that matter." (Da115).

The court's opinion considered the prongs set forth in Crowe v. DeGioia, 90 N.J. 126, 132-35 (1982), and found that the State had carried its burden on each one. (Da102; 115). Initially, the court rejected Appellants' claim that the State had no "well-settled right" to obtain relief. (Da103-04). Just the opposite: the court explained that the LAD's plain text both allows the Attorney General and the Director to "proceed in a summary manner in the Superior Court of New Jersey to obtain an injunction" prohibiting any violation of the LAD and makes clear that schools may not discriminate on the basis of gender identity or expression. Ibid. (citing N.J.S.A. 10:5-14.1). That supplied ample legal basis for the State to seek, and for the court to award, an order maintaining the status quo while the DCR administrative action proceeds. Ibid.

The trial court also found the State had a reasonable probability of success on the merits of its LAD claims. The court found the State was likely to prevail in arguing that the Amended Policy violated the LAD's prohibition on disparate treatment: the new policy, by its terms, adopted a different notification policy

for transgender, gender non-conforming, and non-binary students than for their cisgender peers. (Da104-05). Although Appellants had claimed that this policy would also apply to cisgender students who request the same change, the court aptly noted: "who but transgender, gender non-conforming, and non-binary students would request public and social accommodations or express a change in gender identity and expression?" Ibid. For similar reasons, the court found that the Amended Policy would likely have a disparate impact: transgender, gender non-conforming, and non-binary students would experience "far greater incidence of parental disclosure of their gender identity or expression, and, with it, a far greater risk of harm from this involuntary disclosure." (Da107).

Finally, the trial court found that remaining equitable factors also weighed in the State's favor. (Da112-15). The court found both that transgender youth already face a heightened risk of mental health challenges, suicide, illicit drug dependency, and infliction of physical or emotional harm by immediate family members—and that mandatory disclosure of their gender identity or expression under the Amended Policy risked exacerbating those harms. (Da113). Such harms, especially while the State's challenge to the Amended Policy was pending in the administrative forum, would be irreparable. Ibid. And on the other side of the ledger, the trial court found that Appellants had not made "any compelling argument that adherence to the [Original Policy] governing

transgender students while the administrative action is pending will result in any claim, liability or hardship," especially given that the Original Policy had been in place "uneventfully" since 2019. (Da115). This absence of hardship, when weighed against "the statistical possibility that even one transgender student affected by the [Amended Policy] should run away from home, or attempt or commit suicide," was "sufficient to tip the balance of equities in favor of the State." Ibid.

This appeal followed.

ARGUMENT

Preliminary relief is appropriate when the moving party establishes "(1) a likelihood of success on the merits; (2) irreparable harm; (3) a showing that on balance the harm to the moving party is greater than the harm to the party to be restrained; and (4) the public interest will not be harmed." In re City of Newark, 469 N.J. Super 366, 387 (App. Div. 2021) (citing Crowe, 90 N.J. at 133); see also Waste Mgmt. of N.J., Inc. v. Union Cnty. Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008) (confirming that while "all the Crowe factors must weigh in favor of injunctive relief, a court may take a less rigid view than it would after a final hearing when the interlocutory injunction is merely designed to preserve the status quo"). This court also refuses to take "a grudging or narrow approach"

to such relief if the State is seeking merely to maintain the status quo pending resolution of a DCR administrative action. Pfaus, 97 N.J. Super. at 8.

The trial court did not abuse its discretion in preliminarily maintaining the status quo in the Marlboro school district while DCR's administrative action proceeds. See Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 395 (App. Div. 2006) (reviewing trial court's decision to grant or deny preliminary relief only for abuse of discretion); Horizon Health Ctr. v. Felicissimo, 135 N.J. 126, 137 (1994) ("The authority to issue injunctive relief falls well within the discretion of a court of equity."); Interactive Brokers, LLC v. Barry, 457 N.J. Super. 357, 362 (App. Div. 2018) (emphasizing a preliminary-relief order should be upheld "unless it was 'made without a rational explication, inexplicably departed from established practices, or rested on an impermissible basis" (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002))). First, the court correctly held that the State is likely to succeed on the merits. Second, the court correctly held the remaining equitable factors—irreparable harm, balance of the equities, and public interest—all squarely support maintaining the status quo.

POINT I

THE COURT CORRECTLY FOUND THAT THE STATE IS LIKELY TO SUCCEED ON THE MERITS.

The trial court correctly found, and Appellants do not seriously dispute on appeal, that the State had demonstrated a sufficient likelihood of success on its claim that the Amended Policy violates the LAD. Appellants' responses—that the State lacks a settled right to relief and that the Amended Policy finds support in federal and state recordkeeping laws—both fall short.

A. The Trial Court Correctly Found That The Amended Policy Likely Violates The LAD.

The trial court correctly found that the Amended Policy likely violates the LAD because it expressly mandates disparate treatment of transgender, gender non-conforming, and non-binary students or, alternatively, because it will have a disparate impact on those same students. (Da107-08).

i. Disparate Treatment.

The trial court correctly found that the State is likely to succeed in proving that Appellants have engaged in disparate treatment barred by the LAD because, under Appellants' Amended Policy, "only students who identify as transgender are singled out for mandatory parental notification." (Da107).

The plain terms of the Amended Policy impose disparate treatment on the basis of gender identity or expression. The new policy specifically singles out

transgender, gender non-conforming, and non-binary students for differential treatment, as it requires school staff to notify parents only about those students who request a "change in gender identity or expression," which specifically includes such a student's preference on matters such as a name and pronoun change, and bathroom, locker room, and changing facilities accommodation. (Da45, Da50-51). In other words, the Amended Policy categorically and facially treats transgender students (subject to blanket notification) differently than it treats cisgender students (subject to no parental notification). Although Appellants below argued that the Amended Policy could apply to cisgender students who requested a social transition, as the court noted, "who but transgender, gender non-conforming, and non-binary students would request public and social accommodations or express a change in gender identity or expression?" (Da106-107). Indeed, Appellants no longer seriously argue that the Amended Policy applies equally to cisgender students.

Nor does the Amended Policy guarantee that a student's requested accommodation be respected if the student's parents object. It does not guarantee that a student's preference of name and pronoun will be respected, instead leaving providing an amorphous instruction that parents be consulted "[w]here there is a disagreement between the student and the family" in order to "develop a plan for how the student will be referred to at school, including the

pupil's name and/or choice of pronouns." (Da45-46). Nor does the Amended Policy guarantee a student the ability to access and use restrooms, locker rooms, and changing facilities in accordance with their gender identity, mandating instead that the school consult with "the student's parent/guardian to develop a plan for the student's use of facilities." (Da50-51). These provisions also treat transgender students (not guaranteed to be treated in accordance with their gender identity) differently than they treat cisgender students (guaranteed to be treated in accordance with their gender identity).

Other evidence of differential treatment abounds. The Amended Policy's title—"Transgender Students"—underscores that it does not apply to cisgender students, and the remainder of its language eliminates any doubt. (Da43). The Amended Policy specifically refers to facilitating communication with the parents to discuss "a student's gender nonconformity or transgender status." (Da45). The Amended Policy also provides that when "transgender students" require emotional support services, the school must provide a "full, complete, and accurate" explanation of that "counseling and/or referrals for mental health crisis"—without similarly requiring "parental notification/consent" for other school counseling services. (Da46-47). Even Appellants' brief characterizes their policy as requiring parental notification if a "transgender student[]" takes certain covered actions. (Db2).

Appellants get no further by claiming that they did not violate the LAD because they were just seeking to comply with state and federal laws governing access to student records. (Db15-20). As explained in detail below, Appellants misunderstand both recordkeeping laws. See infra at 28-30. But fundamentally, it does not matter whether Appellants were intending to comply with other laws: the LAD "is not a fault- or intent-based statute." C.V., 255 N.J. at 314 (explaining discrimination has harmful effects whether intentional or otherwise, and so "the perpetrator's intent is simply not an element of the [LAD] cause of action"). Whether the challenged conduct "involves disparate treatment through explicit facial discrimination does not depend on why the [entity] discriminates but rather on the explicit terms of the discrimination." A.D.P. v. ExxonMobil Research & Eng'g Co., 428 N.J. Super. 518, 537 (App. Div. 2012) (emphasis added). And here, the Amended Policy explicitly singles out transgender, gender non-conforming, and non-binary students and treats them differently than their cisgender peers. This disparate treatment is precisely what the LAD is intended to prohibit, and the Amended Policy thus presents a textbook violation of the LAD. See Peper, 77 N.J. at 81; (Da107).

ii. Disparate Impact.

The trial court also rightly found that, in the alternative, the State is likely to succeed on its claim that the Amended Policy violates the LAD because it has

a disparate impact on these transgender, gender non-conforming, and non-binary students. An unlawful disparate impact exists where "practices that are facially neutral in their treatment of different groups ... in fact fall more harshly on one group than another." Peper, 77 N.J. at 81; see also, e.g., Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 399 (2005) (agreeing that an otherwise "facially neutral policy" still violates the LAD when the plaintiff shows that it "'resulted in a significantly disproportionate or adverse impact on members of the affected class.'" (quoting United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1, 47 (App. Div. 2001))).

The Amended Policy's disparate impact is clear. Even assuming that this policy were somehow facially neutral, it is beyond dispute—and Appellant does not dispute on appeal—that the Amended Policy will disproportionately impact transgender, gender non-conforming, and non-binary students. The Amended Policy specifically requires school officials to proactively disclose to parents a student's "change in gender identity or expression" when they request to change their gender identity and/or expression at school. (Da45). As the trial court correctly found, transgender, gender non-conforming, and non-binary students are the students who will make such requests, and therefore these students will necessarily be the ones that face "a far greater incidence of parental disclosure of their gender identity or expression." (Da107).

Moreover, these are the students who will also face "a far greater risk of harm from this involuntary disclosure." (Da107) (emphasis added). After all, whereas cisgender students typically consistently express their gender identity or expression at home and at school, transgender, gender non-conforming, and non-binary students are far more likely to express a different gender identity or expression at home than they do at school—often because they fear reprisal or harm. See, e.g., (Da71) (detailing significant percentages of transgender survey respondents who report having unsupportive families, families who kicked them out of the home, and/or family members who engaged in violence against them); (Da79) (study showing that 61% of transgender individuals facing high levels of familial rejection reported having attempted suicide—making them over 300% more likely to attempt suicide than those who experienced low or no family rejection); John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 622 F. Supp. 3d 118, 139 (D. Md. 2022) (finding transgender students "could hardly feel safe in an environment where expressing their gender identity resulted in the automatic disclosure to their parents, regardless of their own wishes"), vacated for lack of standing, 78 F.4th 622 (4th Cir. 2023); Cf. Sterling v. Borough of Minersville, 232 F.3d 190 (3d Cir. 2000) (finding police violated teenager's rights when they threatened to tell his family he was gay, after which he died by suicide). That evidence suffices at this stage to show that the

Amended Policy would likely "unlawfully subject these students to a disparate impact in violation of the LAD." (Da107). And as before, it is striking that Appellants' opening brief does not deny the Amended Policy would have a disparate impact on transgender students.

Appellants argue that the trial court erred in its disparate impact analysis by citing surveys the State introduced into the record, (Db13-15),[3] but that response fails for two reasons. First, the court's ultimate conclusion on disparate impact did not actually depend on these studies and surveys. The decision below mentioned not only surveys, but undisputed facts, common sense, and a wealth of cases reaching the same conclusion. See, e.g., (Da111) (discussing Sterling, 232 F.3d 190). It hardly requires scientific evidence to find that, as compared to cisgender students, "some transgender students may feel more comfortable disclosing their gender identification or expression at school rather than at home." (Da109). In other words, while studies and surveys corroborate the court's conclusions, its holding does not depend on them. (Da109-11).[4]

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[3] Appellants note that the Certification of Deputy Attorney General James R. Michael dated June 21, 2023 mistakenly includes a broken hyperlink for Exhibit F to the declaration, The Trevor Project, Issues Impacting LGBTQ Youth: Polling Analysis 12 (2022). The State apologizes for this error. A full copy of the survey is available at: https://www.thetrevorproject.org/wp-content/uploads/2022/01/TrevorProjectPublic1.pdf (last visited Feb. 19, 2024).

[4] In any event, the trial court's separate finding that the Amended Policy mandates disparate treatment did not reference the studies and surveys. (Da105-

Second, the court's consideration of studies and surveys at the preliminary stage was wholly appropriate. Appellants overlook the established principle that preliminary relief is "customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981). Indeed, New Jersey courts have repeatedly taken a flexible approach to consider probative information presented in a preliminary posture, especially when acting on an expedited timeline. See Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 640 n.10 (2000) (taking judicial notice of a report for the purpose of determining a preliminary injunction); Matter of T.I.C.-C., 470 N.J. Super. 596, 604 (App. Div. 2022) (citing New Jersey Transgender Equality Task Force Report to highlight "the significant amounts of violence, harassment, and discrimination experienced by transgender people in various areas of their lives"). The court appropriately exercised its discretion in the context of a preliminary injunction to take notice of the probative information the State introduced—information that, as laid out above, substantiates the Amended Policy's likely disparate impact.

The Amended Policy's exemption does not resolve these disproportionate harms. Its language requires affirmative parental notification any time a student

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06). In other words, that holding—which is already sufficient to find a reasonable probability of success—is unaffected by this argument. Appellants do not argue otherwise.

requests a "change in gender identity or expression[.]" (Da45). The sole exception to Appellants' blanket rule applies where there is "reason to believe" that notifying a student's parents "would pose a danger to the health or safety of the pupil." Ibid. As an initial matter, the very inclusion of this exception is a "tacit acknowledgment" that disproportionate harms could manifest for these students. (Da110). But unfortunately, the exception does not ameliorate the problem: the Amended Policy provides no explanation of what could give rise to a "reason to believe," how a school would come to this conclusion, or when such a belief would be sufficient to show that notification "would pose a danger" to the student's "health or safety." Ibid. And even if there is such "reason to believe," the Amended Policy still does not expressly preclude disclosure.

B. Appellants' Responses Are Unavailing.

Unable to meaningfully contest the State's proofs it will likely succeed in demonstrating that the Amended Policy violates the LAD, Appellants raise two separate arguments instead: that (i) the State has no settled right to relief, and (ii) the Amended Policy finds support in federal and state recordkeeping laws.[5]

[5] Appellants argued before the trial court that the preliminary injunction would violate fundamental substantive due process rights protected by the Fourteenth Amendment, but have raised no such argument before this court. Accordingly, Appellants have waived this issue. Green Knight Capital, LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021) ("An issue not briefed on appeal is deemed waived[.]" (quoting Woodlands Cmty. Ass'n v. Mitchell, 450 N.J. Super. 310, 319 (App. Div. 2017))).

These arguments misunderstand the legal questions in this case, and do not support overturning this narrow injunction.

i. Settled Right To Relief.

Appellants' first response—that even if the State is likely to prevail on the merits, it lacks a "well-settled right" (Db8-13)—fails for multiple reasons.

As an initial matter, although some early cases described the "well-settled legal right" and "reasonable probability of success" analyses as two independent prongs under Crowe, courts have long since merged the settled-right inquiry into the reasonable-probability-of-success test. See e.g., Newark, 469 N.J. Super at 387 (defining the prongs for preliminary relief as "(1) a likelihood of success on the merits; (2) irreparable harm; (3) a showing that on balance the harm to the moving party is greater than the harm to the party to be restrained; and (4) the public interest will not be harmed"); Waste Mgmt., 399 N.J. Super. at 519-20 (same); McKenzie v. Corzine, 396 N.J. Super. 405, 413 (App. Div. 2007) (same). That makes sense: if there is a reasonable probability of success, there is logically an underlying well-settled right on which that reasonable probability is based. See Waste Mgmt., 399 N.J. Super. at 528 (explaining that the "time-honored approach in ascertaining whether a party has demonstrated a reasonable likelihood of success" includes consideration of whether "the law upon which

plaintiff's claim is based is well-settled"). And as explained above, Appellants do not challenge on appeal the State's arguments regarding the LAD itself.

In any event, the trial court properly found that the State's claims do rest on well-settled rights. As to substance, "the legal right underlying" the State's action, Crowe, 90 N.J. at 133, is explicit, well-recognized, and longstanding: the LAD itself. The LAD expressly prohibits unlawful discrimination in places of public accommodation; expressly extends this prohibition to schools; expressly includes discrimination based upon gender identity or expression; and expressly extends to disparate-treatment and disparate-impact theories alike. See supra at 4-5; N.J.S.A. 10:5-5(1); N.J.S.A. 10:5-12(f). The LAD also expressly grants the State authority to seek relief enjoining ongoing or future statutory violations, as it did here. See supra at 5; (Da125-26) (decision below confirming this well-established right to relief); N.J.S.A. 10:5-14.1 (authorizing State to "proceed in a summary manner in the Superior Court of New Jersey to obtain an injunction" against any defendant violating the LAD after filing an administrative complaint against them before DCR); Pfaus, 97 N.J. Super. at 8 (same); Poff v. Caro, 228 N.J. Super. 370, 374-75 (Law Div. 1987) (preliminarily enjoining actions while LAD administrative litigation remained pending). Settled law thus recognizes both the kind of claim alleged and the type of remedy sought.

Appellants misconstrue the "well-settled right" inquiry. Appellants seem to believe that a right is only well settled where there is binding legal authority on the precise legal issue applied to the precise set of facts. See (Db12) (arguing the State lacks a well-settled right because it did not identify a specific precedent holding "that a parental notification policy such as the one at issue here" violates the LAD). But case law has long made clear that the inquiry is whether the underlying body of law is settled, not whether the specific outcome of a specific lawsuit is already settled by precedent. See Crowe, 90 N.J. at 133 (noting "the underlying legal claim … was settled as a matter of law" and observing that "mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo"); Waste Mgmt., 399 N.J. Super. at 528 (same).

Indeed, were the rule otherwise, under the "well-settled right" inquiry, the movant would have already had to establish that its exact claims had already been decided with certainty under binding precedent, rendering the "reasonable probability of success" inquiry superfluous. Moreover, if Appellants' approach were the law, no claim applying established legal rights to new facts could ever meet the preliminary injunction standard—no matter how troubling the new statutory violation, and no matter how compelling the need to maintain the status quo. And Appellant's approach would create perverse incentives: a policy that is so clearly unlawful that no other school district has previously adopted it (or

an argument made in defense so clearly incorrect that no other defendant had raised it) could avoid preliminary relief merely because no court had previously needed to address its validity. That has never been the law.

Appellants' reference to Plotnick v. DeLuccia, 434 N.J. Super. 597 (Ch. Div. 2013), only underscores that the right here is well-settled. (Db11-12). In Plotnick, the putative father of an unborn child sought a temporary injunction requesting that he be notified when the mother entered labor and be allowed in the delivery room during the child's birth over the mother's objection. Id. at 601. The trial court found that plaintiff had not shown the legal right he sought to establish was "settled" because he offered "no legislative or judicial authority to support his conclusion" that his right to be notified of labor or to be present in the delivery room existed at all. Id. at 618-19. In short, because plaintiff's asserted legal right did not exist in the first place, he had no well-settled right to proceed . Ibid. The opposite is true here. The State's right to seek injunctive relief against a policy that mandates disparate treatment and subjects students to disparate impact on the basis of gender identity or expression in schools, which are places of public accommodation, has been well-settled for at least 45 years. See N.J.S.A. 10:5-14.1; N.J.S.A. 10:5-12(f)(1); Peper, 77 N.J. at 81-82. And those are the rights on which the State relies here and in its administrative action. Appellants fail to disprove the well-settled LAD rights.

ii. Recordkeeping Requirements.

Appellants contend that their Amended Policy is necessary to comply with federal and state recordkeeping laws, and that the injunction threatens to put them in noncompliance. See (Db16-19). Initially, it is undisputed that their Original Policy was in place "uneventfully" for four years before the Appellants amended it. (Da115). During that time, Appellants never expressed any concern that they had been actively violating these laws. In any event, Appellants cannot show that the court's injunction, and the policy that it reinstates, are inconsistent with—or even remotely implicate—the recordkeeping laws they now cite.

Contrary to Appellants' misunderstanding, the federal Family Education Rights Privacy Act ("FERPA") and New Jersey Pupil Records Act ("NJPRA") have little to do with this case. Among other things, these federal and state laws govern how schools must respond to parental requests to access certain official student records. FERPA requires that no State school or educational institution shall have a policy which "den[ies], or which effectively prevents, the parents of students ... the right to inspect and review the education records of their children." 20 U.S.C. § 1232g(a)(1)(A). NJPRA, for its part, similarly requires the State Board of Education to promulgate regulations governing "the creation, maintenance and retention of pupil records … to provide general protection for … the right of the parent or guardian … to be supplied with full information

about the pupil, except as may be inconsistent with reasonable protection of the persons involved[.]" N.J.S.A. 18A:36-19. However, as the trial court explained, the plain language of FERPA and NJPRA "pertain to access to information in written student records, not to affirmative requirements of parental notification of a student's transgender orientation or expression." (Da114).

That distinction is dispositive. The question this case presents is not how a school district must handle specific parental requests for officials records—or what information must go in that record. Instead, the issue before the trial court, and now on appeal, is whether the Amended Policy's decision to require blanket affirmative notification to parents regarding their transgender children's gender identity is likely consistent with the LAD. On that score, FERPA and NJPRA are silent: neither statute requires schools to affirmatively notify parents of their children's gender identity or expression in the absence of records request. See (Da115) (finding that enjoining schools from affirmatively "notifying parents of a child's transgender identification or expression" on a blanket basis in no way "would prevent parents from 'inspect[ing] and review[ing] the education records of their children.'" (quoting 20 U.S.C. § 1232g(a)(1)(A))). Nor do they provide a justification for promulgating a blanket rule that discriminates on the basis of gender identity or expression. As a result, the trial court correctly determined,

"[Appellants'] arguments that imposing restraints will compel them to violate state and federal law are not persuasive." (Da114).

Appellants' claim that the preliminary injunction would somehow require them to violate the terms of FERPA and NJPRA is particularly weak given that it simply restores the status quo ante—the Original Policy that has been in place since 2019. (Da99). Appellants have not pointed to any instance where the Original Policy exposed them to any liability or claim under FERPA or NJPRA. (Da115). The State confirmed at oral argument that under the State's requested relief, Appellants would still be required to supply school records to a parent making a valid request under state or federal law, just as they had presumably been doing prior to the pre-2023 amendment. (Da105; 1T12:18-14:5; 1T58:23-60:1). In other words, the preliminary injunction does not preclude Appellants from complying with federal and state recordkeeping laws, but rather requires compliance with the LAD. Appellants can and must do both.

POINT II

THE TRIAL COURT CORRECTLY FOUND THE EQUITABLE FACTORS WEIGH IN FAVOR OF MAINTAINING THE STATUS QUO.

The trial court also correctly found that the remaining Crowe factors cut in favor of maintaining the status quo that predated the Amended Policy.

The trial court concluded—and Appellants do not contest on appeal—that a preliminary injunction was necessary to avoid irreparable harm.[6] There are at least two relevant irreparable harms here. For one, as the trial court recognized,

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[6] Although the State below argued that it did not have to establish an irreparable harm when seeking preliminary injunctive relief under N.J.S.A. 10:5-14.1, the court found no need to evaluate that question because the State had amply shown irreparable harm. See (Da113). Since Appellants do not directly challenge that finding of irreparable harm on appeal, that issue is not squarely before this court. That said, the State need not establish irreparable harm. The Legislature authorized the Attorney General and the Director to "obtain an injunction" after filing an administrative complaint—an indication the Legislature believes it sufficient for the State to establish a defendant "has engaged in, is engaging in, or is about to engage in" a violation of the LAD. N.J.S.A. 10:5-14.1; see also, e.g., United States v. Nutri-cology, 982 F.2d 394, 498 (9th Cir. 1992) (holding that where the government has brought a "statutory enforcement case[]" and has shown a sufficient probability on the merits, "further inquiry into irreparable injury is unnecessary"; "the passage of the statute is itself an implied finding by Congress that violations will harm the public"); N.J. Dep't of Env't Prot. v. Boro Auto Wrecking Co., No. A-4920-04T3, 2006 WL 3007394, at *5 (App. Div. Oct. 24, 2006) (Ra1-5) (same); Hoffman v. Garden State Farms, Inc., 76 N.J. Super. 189, 201 (N.J. Ch. 1962) (same). That approach is not only textual but logical: this rule would "undeniably serve to underscore the remedial purpose of the LAD," (Da113), especially in cases where the Attorney General and the Director have found an urgent need for emergency relief. Pursuant to R. 1:36-3, copies of all unpublished opinions cited within this brief are submitted as part of the State's Appendix (Ra1-5).

the mandatory, involuntary disclosure of transgender, gender non-conforming, or non-binary students' gender identity or expression will cause significant and irreparable harm to students. As the court reasoned, "there is no protected group more vulnerable, or more susceptible to physical or psychological harm, than transgender, gender non-conforming, and non-binary youth." (Da113); see also, e.g., Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 528-29 (3d Cir. 2018) (discussing these students' "extraordinary social, psychological, and medical risks"); John & Jane Parents 1, 622 F.Supp.3d at 139; T.I.C.-C., 470 N.J. Super. at 609; N.J. Pub. L. 2018, c.60 § 1(a), 1(g). Those harms are exacerbated by any "[m]istreatment," including discriminatory treatment: if "transgender, gender non-conforming, and non-binary students face discrimination in schools, the risk to their wellbeing cannot be overstated—indeed, it can be life threatening." T.I.C.-C., 470 N.J. Super. at 609 (quoting Boyertown, 897 F.3d at 522)).

Without this injunction, Appellants' transgender, gender non-conforming, and non-binary students would suffer under an Amended Policy that specifically targets them for mandatory disclosure, and that uniquely infringes their privacy interests. See id. at 611 (emphasizing their interest in privacy to protect against "violence, harassment, and discrimination because of their gender identity"). If a student is involuntarily outed, or if a student now declines to candidly express their gender identity at school for fear of mandatory reporting, the harm will be

tremendous—and that bell can never be un-rung. See (Da135) (concluding that the Amended Policy will threaten serious injuries on transgender, gender non-conforming, and non-binary students, including "mental health issues, suicide, illicit drug dependency, and infliction of emotional harm by immediate family members," which "constitute[] irreparable injury which may result if restraints are not imposed preliminarily"); John & Jane Parents 1, 622 F.Supp.3d at 139 (explaining that a transgender student "could hardly feel safe in an environment where expressing their gender identity resulted in the automatic disclosure to their parents, regardless of their own wishes"). The trial court did not abuse its discretion in concluding that these overwhelming harms supported a preliminary injunction to temporarily protect the preexisting status quo.[7]

For another, the State would also experience an irreparable harm without this relief. See David v. Vesta Co., 45 N.J. 301, 327 (1965) (finding "prevention of unlawful discrimination" vindicates a "vital interest of the State" because the act of discrimination is "a public wrong and not merely the basis of a private grievance"); N.J.S.A. 10:5-3 (Legislature finding "the State suffers a grievous

[7] Appellants do not dispute any of these points; Appellants simply protest the trial court's decision to cite certain evidence. But as the State explained above, Appellants' quibble with these references to published studies and surveys fails on this posture. See supra at 22-23. Moreover, the court's mention of studies in assessing the equities was passing at best, (Da112), and simply bolstered the conclusions this court and a range of other jurists have already reached.

harm" from discrimination). Indeed, the Legislature gave the Attorney General and the Director the authority to "prevent and eliminate" all the "discrimination" the LAD prohibits. N.J.S.A. 10:5-6. And it gave them the authority to file an administrative complaint against entities that violate the LAD. N.J.S.A. 10:5-14.1. But absent preliminary relief to prevent the ongoing or future violations of the LAD, the State cannot stop this discrimination until the proceeding ends. That such discrimination could continue in the meantime, and may not be fully remediable after the fact, undermines "any adjudication [DCR] may make in this matter in vindication of [students'] rights." Pfaus, 97 N.J. Super. at 8 (adding "adequate enforcement" of the LAD ranks "high indeed in our public policy"). The court's order was further justified "to aid in the preservation of the subject matter of a proceeding pending before an administrative agency." Ibid.; see also ibid. (emphasizing that courts "cannot adopt a grudging or narrow approach" in this circumstance, because otherwise, administrative adjudication of LAD rights could become "a vain and useless act"); Poff, 228 N.J. Super. at 379 (enjoining landlord from renting apartment while an administrative proceeding under LAD was pending concerning refusal to rent apartment to gay men).

Last, the trial court correctly found that the balance of hardships and the public interest weighed in favor of preliminary injunctive relief to maintain the status quo. As explained above, Appellants did not and have not demonstrated

any meaningful harm they would suffer from a temporary delay in implementing the Amended Policy—a delay only so long as is necessary to resolve the pending administrative action. See Pfaus, 97 N.J. Super. at 8. Strikingly, Appellants do not contest the court's factual finding that the Original Policy had been in effect "uneventfully since at least 2019," (Da115), nor do Appellants show that they were subject to liability during those four-plus years under any of the statutory provisions on which they now rely. To the contrary, as a long line of cases instructs, Appellants' vague assertions of "abstract harms" and inconvenience are insufficient. See Garden State Equality v. Dow, 216 N.J 314, 327-28 (2013); N.J. State Policeman's Benevolent Ass'n v. Murphy, 470 N.J. Super. 568, 594 (App. Div. 2022). By contrast, the State and the public have a significant and tangible interest in ensuring that school districts across the State fulfill their obligations to "[p]romote equal educational opportunity" and foster "a learning environment free from all forms of prejudice, discrimination, and harassment." N.J.A.C. 6A:7-14. The trial court's time-limited injunction promotes that public interest and causes no harm to Appellants as a result.

CONCLUSION

This Court should affirm the preliminary injunction.

Respectfully submitted,

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MATTHEW J. PLATKIN, ATTORNEY GENERAL OF NEW JERSEY, and SUNDEEP IYER, DIRECTOR OF THE NEW JERSEY DIVISION ON CIVIL RIGHTS, Plaintiffs-Respondents, v. MARLBORO TOWNSHIP BOARD OF EDUCATION and MARLBORO TOWNSHIP PUBLIC SCHOOL DISTRICT, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET No. A-000118-23 Civil Action On appeal from: Superior Court of New Jersey Chancery Division, Monmouth County Sat Below: Honorable David F. Bauman, J.S.C. Docket No. MON-C-78-23

BRIEF AND APPENDIX OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AND GARDEN STATE EQUALITY

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Abbreviation	**Source**
Manalapan/Middletown Db	Manalapan/Middletown Brief
Da	Manalapan/Middletown Appendix
Marlboro Db	Marlboro Brief
D2a	Marlboro Appendix
Manalapan Pb	State's Brief in Manalapan Appeal
Manalapan Ra	State's Appendix in Manalapan Appeal
Marlboro Pb	State's Brief in Marlboro Appeal
Marlboro Ra	State's Appendix in Marlboro Appeal
Middletown Pb	State's Brief in Middletown Appeal
Middletown Ra	State's Appendix in Middletown Appeal
CAL Br.	Amicus Center for American Liberty Brief
Aa	Amici ACLU and GSE Appendix

STATEMENT OF INTEREST OF AMICI CURIAE[1]

For more than 60 years, the **American Civil Liberties Union of New Jersey** ("**ACLU-NJ**") has defended liberty and justice guided by the vision of a fair and equitable New Jersey for all. The ACLU-NJ's mission is to preserve, advance, and extend the individual rights and liberties guaranteed to every New Jerseyan by the State and Federal Constitutions in courts, legislative bodies, and communities. Founded in 1960 and based in Newark, the ACLU-NJ is a nonpartisan organization that operates on several fronts—legal, political, cultural—to bring about systemic change and build a more equitable society. In all these arenas, the ACLU-NJ advocates for the rights of LGBTQ+ individuals, including children, on equal terms with all others. The ACLU-NJ is the state affiliate of the American Civil Liberties Union and has 30,000 members in New Jersey and hundreds of thousands of additional supporters. ACLU-NJ members and supporters include transgender and gender-nonconforming students and their parents and guardians.

Garden State Equality Education Fund ("GSE") was founded in 2004 and is the largest LGBTQ+ advocacy organization in New Jersey, with more than 150,000 members. Its mission is to provide quality, innovative community

[1] Amici file identical briefs in the Middletown, Manalapan, and Marlboro appeals.

programs, educate and train service providers, and pass pro-equality policies to protect and meet the needs of LGBTQ+ New Jerseyans.

In the arena of education, GSE engages in advocacy, policy work, and trainings to ensure that New Jersey schools are safe and affirming environments for transgender and nonbinary students. GSE engages with stakeholders in New Jersey schools at all levels, including by:

- Providing training and guidance to school administrators and staff,
- Advocating for students at state and local board of education meetings,
- Presenting at student assemblies,
- Supporting parents of transgender students, and
- Providing direct support to and programming for transgender and nonbinary students.

PRELIMINARY STATEMENT

The Constitution does not compel schools to notify parents, over the objection of their children, when their children express nonconforming gender identities at school. While the substantive component of the Due Process Clause protects the rights of parents to direct the upbringing of their children, nothing in the Constitution demands that governmental actors assist parents in exercising that right by outing students against their will. Whether or not they receive notice from their children's schools, parents remain free to talk to their children about gender identity and offer whatever direction they like about how their children explore and express their gender, in school and elsewhere. Likewise, students remain free to talk to their parents about these issues and even to seek their schools' help in broaching the subject at home. The school districts' original policies of presumptive nondisclosure, absent student consent, neither coerced parents to act nor prevented them from acting. The Constitution imposes no duty on the districts to alter their original policies, and certainly not to mandate parental notification over the student's objection.

The districts cannot rescue this unavailing constitutional defense by relying on the argument first raised by their amicus that social transition constitutes medical treatment requiring parental consent. Students who have been diagnosed with gender dysphoria may have health care providers who

recommend social transition to relieve the symptoms of this condition, which can be exacerbated by living in a way that does not match their gender identity. But that does not transform social transition into medical care. A student who changes their clothing and hairstyle, who asks to be called by a new name and pronouns, or who asks to use a different bathroom or join a different club is not seeking health care, and schools that honor these requests are not offering health care. Instead, the schools are showing courtesy and maintaining an inclusive and egalitarian environment where all students feel safe and affirmed in their gender identity, whether they are cisgender or transgender.

Even if a policy of presumptive nondisclosure conflicted with the rights of parents, however, the State has shown compelling interests in both enforcing nondiscrimination law and avoiding harm to students. These interests overcome the asserted parental right to affirmative notification of gender nonconformity, and the injunction the State seeks is narrowly tailored to achieve its objective of protecting students.

Moreover, the Court should defer to the State's straightforward interpretation of the Law Against Discrimination ("LAD") to prohibit a parental notification mandate that is triggered only when nonconforming students express their gender identities at school and not when cisgender students put their masculinity or femininity on display. Mandatory notification policies that

target gender-nonconforming students offend the New Jersey Constitution's independent and broad protection for equal rights. To avoid a constitutional problem, the Court should accept the State's reading of the LAD and affirm the preliminary injunction entered by the trial court.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici adopt the Procedural Histories and Statements of Facts in the briefs of the Attorney General and Director of the Division on Civil Rights. Middletown Pb4–12; Manalapan Pb4–12; Marlboro Pb4–12.

Each school district's Amended Policy 5756, entitled "Transgender Students" ("Mandatory Notification Policies"), requires the school to notify a gender-nonconforming student's parent or legal guardian about the student's gender identity as expressed in school, regardless of the student's consent, unless doing so would harm the student. Under Marlboro's policy, notification is triggered by a "student's change in gender identity or expression," and under the Manalapan and Middletown policies, notification is triggered when a student requests "a public social transition accommodation." Marlboro Amend. Pol'y (D2a45); Middletown Amend. Pol'y (Da152); Manalapan Amend. Pol'y

(Da169–70).[2] Notification is required even when the student objects unless the harm exception applies.[3]

The school districts' pre-amended (2019) versions of the policies ("Original Policies") are currently in place under the trial court's orders of August 18, 2023, preliminarily enjoining the Mandatory Notification Policies pending resolution of this matter. The Original Policies contain the following identical provision: "There is no affirmative duty for any school district staff member to notify a student's parent of the student's gender identity or expression." Marlboro Orig. Pol'y 5657 (D2a54); Middletown Orig. Pol'y 5657 (Middletown Ra8); Manalapan Orig. Pol'y 5657 (Manalapan Ra8). While imposing no blanket requirement of parental notification, the Original Policies

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[2] See Table of Abbreviations of Briefs and Appendices, supra p. x.

[3] Manalapan and Middletown assert that their policies do not require parental notification when a student asks to use a different name or pronouns in classrooms or extracurricular activities, but only when a student seeks to change their official school records. Manalapan/Middletown Brs. at 18. The districts make this assertion based on draft regulations that the superintendents of each district attest they "intend to enact." Alfone Cert. ¶ 14 (Da160); Middletown draft regs ¶ A.1.-2. (Da162); Santora Cert. ¶ 10 (Da235); Manalapan draft regs ¶ A.1.-2. (Da262). Because the proposed regulations do not appear to have been promulgated, Amici treat the language of the policies as the operative mandate. Even if parental notification were not triggered by a student's request to use a different name or pronouns while at school, however, the policies still mandate parental notification over the student's objection if the student asks for other accommodations, such as to use a different restroom, play on a different sports team, or sing in a different chorus.

permit disclosure to parents in an array of circumstances, including "as allowed by law," and "[d]ue to a specific and compelling need, such as the health and safety of a student or an incident of bias-related crime." Marlboro Orig. Pol'y (D2a55); Middletown Orig. Pol'y 5657 (Middletown Ra9); Manalapan Orig. Pol'y 5657 (Manalapan Ra8–9). In the trial court, the State clarified further that it seeks to prohibit parental notification only when the student objects and that schools are obligated to answer truthfully if parents inquire about their children's gender expression at school.[4] The Original Policies also include instruction for school personnel on how to manage potential disagreements between students and their parents about how the schools accommodate the students' gender identity. Marlboro Orig. Pol'y (D2a54–55); Middletown Orig. Pol'y 5657 (Middletown Ra8–9); Manalapan Orig. Pol'y 5657 (Manalapan Ra8–9).

ARGUMENT

I. Substantive Due Process Does Not Require School Districts to Provide Affirmative Notice to Parents About Their Children's Gender Identity.

The school districts argue that enjoining the Mandatory Notification Policies interferes with parents' fundamental rights because it "deprives parents

[4] Platkin v. Marlboro/Manalapan/Middletown Twp. Bds. of Educ., Nos. MON-C-78-23, MON-C-79-23, MON-C-80-23, slip op. at 9 n.2 (N.J. Super. Ct. Aug. 18, 2023) ("Tr. Ct. Op.") (Da127).

. . . of LGBTQ+ students of information critical to the parents' ability to actively guide and foster their children's moral and psycho-social development." Manalapan/Middletown Db29. This argument fails because, although parents have a fundamental right under the Due Process Clause of the Fourteenth Amendment "to make decisions concerning the care, custody, and control of their children," Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion), that right does not extend to being notified of their children's gender identity as expressed in school over their children's objections. The Constitution prohibits governmental actors from interfering with parental decision-making on matters of great importance, but it does not require governmental actors (here, the school districts) to assist parents in exercising their parental authority. Nor does the constitution prevent school districts from continuing to implement a policy of presumptive nondisclosure.

The districts' amicus, Center for American Liberty ("CAL"), advances an even more extreme parental rights claim: CAL argues that a student's social transition is medical care requiring parental consent in all cases. But this is wrong. A teacher who calls a student by their requested name or allows them to use the bathroom consistent with their gender identity is practicing decency, not medicine.

Moreover, even if fundamental parental rights were at stake—which they are not—such parental rights are not absolute or beyond regulation. Here, the State has demonstrated an overriding interest in creating a safe, inclusive learning environment, which precludes outing students to their parents over the students' objections.

A. Because the Original Policies neither compel nor constrain any conduct by students or their parents, there is no violation of parental rights and no constitutional duty to mandate affirmative notice to parents of their children's gender identity over the students' objection.

While federal and New Jersey courts have repeatedly recognized that parents have a liberty interest in the care, custody, and nurture of their children, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Troxel, 530 U.S. at 65–66; Moriarty v. Bradt, 177 N.J. 84, 101–02 (2003), courts have set a high standard for demonstrating unconstitutional interference with the parent-child relationship.

In J.S. ex rel. Snyder v. Blue Mountain School District, the Third Circuit held that "[a] conflict with the parents' liberty interest will not be lightly found, and, indeed, only occurs when there is some 'manipulative, coercive, or restraining conduct by the State.'" 650 F.3d 915, 933–34 (3d Cir. 2011) (quoting Anspach ex rel. Anspach v. City of Phila., Dep't of Pub. Health, 503 F.3d 256, 261 (3d Cir. 2007)). The court further explained that "parents' liberty

interest will only be implicated if the state's action 'deprived them of their right to make decisions concerning their child,' and not when the action merely 'complicated the making and implementation of those decisions.'" Id. at 934 (quoting C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 184 (3d Cir. 2005)). Applying these factors, the court held that a school's decision to suspend a student did not violate her parents' fundamental rights because it did not interfere with their "ability to make decisions concerning their daughter's upbringing." Ibid. The school's actions "in no way forced or prevented J.S.'s parents from reaching their own disciplinary decision, nor did its actions force her parents to approve or disapprove her conduct." Ibid.

Similarly, in Anspach, the court held that a public health center did not violate the plaintiff-parents' liberty interests by providing emergency contraception to a minor without first notifying her parents or encouraging her to consult them, because "the conduct complained of was devoid of any form of constraint or compulsion." 503 F.3d at 264. "[N]o one prevented [the minor] from calling her parents before she took the pills she had requested" or tried to dissuade her from speaking to her parents, and she was "only given the pills

because she asked for them." Id. at 264–65. Under such circumstances, there was no "coercion" and no constitutional violation. Id. at 265.[5]

The Anspach court explained further that the "real problem alleged by [the] [plaintiff-parents] is not that the state actors interfered with [them] as parents; rather, it is that the state actors did not assist [them] as parents or affirmatively foster the parent/child relationship." Id. at 266. But there is no "constitutional obligation on state actors to contact parents of a minor or to encourage minors to contact their parents." Id. at 262; accord Parents United for Better Schs., Inc. v. Sch. Dist. of Phila. Bd. of Educ., 148 F.3d 260, 275 (3d Cir. 1998) (condom distribution program in high schools did not "intrude" on the "strong parental interest in deciding what is proper for the preservation of their childrens' [sic] health" because "[p]articipation in the program is voluntary"); Doe v. Irwin, 615 F.2d 1162, 1168 (6th Cir. 1980) ("We can find no deprivation of the liberty interest of parents in the practice of not notifying them of their children's voluntary decisions to participate in the activities of [a

[5] Cf. Gruenke v. Seip, 225 F.3d 290, 303–07 (3d Cir. 2000) (finding student was coerced into a course of action she objected to and that her mother's parental liberty interest was violated when a school swim coach, without the student's invitation and against her wishes, spoke with her regarding his suspicion that she was pregnant, asked other school officials to speak with her to confirm the pregnancy, paid for a pregnancy test, and discussed the pregnancy with other school officials and parents of other students, but never with the student's mother).

publicly funded family planning clinic]."); C.N., 430 F.3d at 185 (fundamental parental right not violated by student participation in survey seeking information about drug and alcohol use, sexual activity, physical violence, and suicide attempts).

In cases involving school policies relating to the treatment of transgender and gender nonconforming students, courts have similarly refused to find a violation of parents' due process rights when there is no coercive conduct.[6] Indeed, just last month, the District of New Jersey declined to issue a temporary restraining order against a school board policy that is substantively identical to the Original Policies here. Doe v. Del. Valley Reg'l High Sch. Bd. of Educ., No. 24-cv-00107 (GC) (JBD), 2024 WL 706797, at *2, 13 (D.N.J. Feb. 21, 2024) (Aa17). Relying on the precedents reviewed above, the court held that "Board Policy 5756 does not impose the kind of 'constraint or compulsion' that the Supreme Court and the Third Circuit have found violative of parental rights."

[6] Amicus CAL wrongly relies on Ricard v. USD 475 Geary Cnty., Kan. Sch. Bd., No. 5:22-cv-04015-HLT-GEB, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022), voluntarily dismissed per settlement, ECF. No. 37 (Aa27), and Mirabelli v. Olson, No. 3:23-cv-00768-BEN-WVG, 2023 WL 5976992, at *9 (S.D. Cal. Sept. 14, 2023) (Aa44-45), to argue that courts have recognized a parental substantive due process claim in this context. CAL Br. at 17–18. Those cases involved plaintiff teachers who alleged that withholding a student's transgender status from their parents violated the teachers' free speech and religious free exercise rights under the First Amendment; the substantive due process rights of parents were not directly at issue in those cases.

Id. at *7 (Aa10). "[T]he Board Defendants only began referring to Jane by her preferred gender identity at Jane's request, did not coerce Jane into making the request, and did not prevent or discourage Jane from discussing the transition with Plaintiff [her father]." Id. at *9 (Aa11–12). In the absence of "proactive, coercive interference with the parent-child relationship," id. at *8 (Aa10), the court found no likelihood that the plaintiff could show a constitutional violation, id. at *13 (Aa17).

Other jurisdictions have reached the same conclusion. In Doe v. Manchester School District, No. 216-2022-cv-00117, at *7 (N.H. Super. Ct. Sept. 5, 2022), argued, No. 2022-0537 (N.H. Apr. 27, 2023) (Aa66), the court held that a policy prohibiting school personnel from disclosing information that may reveal a student's transgender status or gender-nonconforming presentation without the student's consent did not infringe on parents' fundamental rights:

> [T]he policy does not encourage or prevent students from sharing information with their parents. Moreover, the Policy does not prevent parents from observing their children's behavior, moods, and activities; talking to their children; providing religious or other education to their children; choosing where their children live and go to school; obtaining medical care and counseling for their children; monitoring their children's communications on social media; choosing with whom their children may socialize; and deciding what their children may do in their free time. In short, the Policy places no limits on the plaintiff's ability to parent her child as she sees fit.

See also Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., No. 2:23-cv-01595, 2023 WL 4848509, at *18–19 (S.D. Ohio July 28, 2023) (no due process violation where "[t]here is nothing in the Policies that suggests that they prohibit parents from discussing gender identity issues with their children, or reach in some other way into the privacy of families' homes"), appeal docketed, No. 23-3630 (6th Cir. July 31, 2023) (Aa99–101); John and Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 622 F. Supp. 3d 118, 134 (D. Md. 2022) (no "coercive interference with the parent-child relationship" in school guidelines that prohibit disclosure of student's gender identity over student's objection), vacated and remanded for lack of standing, 78 F.4th 622 (4th Cir. 2023), petition for cert. docketed, No. 23-601 (U.S. Dec. 5, 2023); Regino v. Staley, No. 2:23-cv-00032-JAM-DMC, 2023 WL 4464845, at *3 (E.D. Cal. July 11, 2023) (declining to expand parental substantive due process rights to require affirmative notice of child's transgender identity and parental consent to use child's requested name and pronouns), appeal docketed, No. 23-16031 (9th Cir. July 25, 2023) (Middletown Ra65–66).[7]

[7] The decisions the districts rely on are not to the contrary. In Tatel v. Mt. Lebanon School District, 37 F. Supp. 3d 295, 326–27 (W.D. Pa. 2022), clarified on denial of reconsideration, No. 22-837, 2023 WL 3740822 (W.D. Pa. May 31, 2023) (Aa103-131), the district court held that parents raised a plausible substantive due process claim where the allegations included conduct by a first-grade teacher that could be construed as coercive interference with the parent-child relationship.

As in these cases, parental rights are not implicated here because there is no coercive conduct and no right to affirmative notice of a child's expressed gender identity. Del. Valley Reg'l High Sch., 2024 WL 706797, at *7–9 (Aa9–Aa12). Like the minor in Anspach who voluntarily went to the health center asking for emergency contraception and was not prevented or dissuaded from contacting her parents, the districts' students are not compelled to come forward to discuss their gender identities with school officials, and, far from discouraging students to talk to their parents, the Original Policies instruct the districts to be "mindful of disputes between minor students and parents concerning the student's gender identity or expression" and to refer families to an array of "support resources." Marlboro Orig. Pol'y (D2a55); Middletown Orig. Pol'y 5657 (Middletown Ra8); Manalapan Orig. Pol'y 5657 (Manalapan

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In Willey v. Sweetwater County School District No. 1 Board of Trustees, No. 23-CV-069, 2023 WL 4297186, at *13-14 (D. Wyo. June 30, 2023) (Middletown Ra37), the court held that parents were unlikely to be able to establish that the school had a constitutional obligation to affirmatively disclose their child's gender identity, but fundamental parental rights were burdened "[t]o the extent the Student Privacy Policy prohibits a teacher or school employee, upon inquiry by a parent or legal guardian, from responding or providing accurate and complete information concerning their minor child (and absent a threat to the wellbeing of the student)." Here, the Attorney General has acknowledged that "schools would be obligated to respond truthfully to a parent or a guardian who contacted the school to request confirmation that their child had made such a request [to use a chosen name or pronouns] or statement [expressing another gender]." Tr. Ct. Op. at 9 n.2 (Da127); see also Del. Valley Reg'l High Sch., 2024 WL 706797, at *11 (distinguishing Willey and Regino from Tatel) (Aa14-15).

Ra8). Moreover, there is nothing in the Original Policies preventing parents from "mak[ing] decisions concerning their [child's] upbringing," J.S., 650 F.3d at 934, or "discussing gender identity issues with their children," Parents Defending Educ., 2023 WL 4848509, at *18 (Aa99–101). The policies do not mandate what parents teach their children about gender identity or in any way alter how parents address their children's gender identity at home, including what names or pronouns parents use for their children. In other words, "[t]here is no requirement [by the school districts] that the children . . . avail themselves of the services offered . . . and no prohibition against the [parents] participating in decisions of their minor [children] . . . . The [parents] remain free to exercise their traditional care, custody and control over their unemancipated children." Doe v. Irwin, 615 F. 2d at 1168.

Unable to point to coercive conduct, the school districts cannot prevail in defending the Mandatory Notification Policies as constitutionally compelled.

B. Respecting a student's request to use a certain name or pronouns does not implicate the rights of parents to direct their children's medical treatment.

Although not raised below or on appeal by the school districts, Amicus CAL argues that the Original Policies violated the Due Process Clause by infringing on parents' rights to consent to their children's medical treatment because "social transitioning constitutes psychological treatment." CAL Br. at

9. Indeed, CAL argues further that even the revised Mandatory Notification Policies are unconstitutional for failure to require parental consent before using a student's preferred name and pronoun. CAL Br. at 16 n.2. These arguments fail because they are based on the faulty premise that the districts are providing medical treatment to students by using their requested name and pronouns or allowing them to use a different restroom or join a different team or club.

This Court should reject CAL's attempt to redefine an ordinary part of the school day as medical treatment. Addressing someone in a way that honors their identity—by using their correct name, pronouncing it correctly, or using their chosen pronouns—is an act of decency and courtesy, not the practice of medicine. Likewise, granting a student's request to use a different restroom or to play on a different sports team is not medicine, but rather a recognition and affirmation of their expressed gender identity.

Social transition—which includes non-medical steps to align one's gender expression with one's gender identity (e.g., different clothing, hairstyle, name, or pronouns)—may be part of a medical provider's package of recommendations for alleviating the symptoms of gender dysphoria in youth with this diagnosis. Notably, all the cases CAL cites in support of the proposition that courts have recognized social transition as a form of psychological treatment involve individuals with gender dysphoria. See CAL Br. at 9–10. These cases recognize

that social transition may be medically indicated for some transgender youth diagnosed with gender dysphoria. But that does not transform the school districts' policies, or individual instances of honoring students' requested accommodations, into a form of medical treatment. Similarly, CAL's repeated references to puberty blockers and hormone replacement therapy, CAL Br. at 4–5, 13, 32—medical treatments that do require parental consent—have no bearing on whether schools notify parents of their children's requests to use a different bathroom or a different name and pronouns.

Having conversations about using a different name, restroom, or clothing requires no medical skill or training, treatment plan, or diagnosis. See Foote v. Town of Ludlow, No. 22-30041-MGM, 2022 WL 18356421, at *5 (D. Mass. Dec. 14, 2022), appeal docketed, No. 23-1069 (1st Cir. Jan. 17, 2023) (Aa138–39). The teachers and counselors having these conversations are not medical professionals, and the students are not their patients. See Parents United for Betters Schs., 148 F.3d at 269 (quoting with approval trial court holding that, while condom distribution is a "health service," "[i]mpact upon health . . . does not transform a health service into a medical treatment"). Indeed, under CAL's reasoning, using a student's chosen name and pronouns would have the absurd result of subjecting teachers, counselors, and others to criminal penalties. See

N.J.S.A. 2C:21-20 (imposing criminal penalties on unauthorized practice of medicine).

For these and other reasons, the District of New Jersey recently concluded that "recognition of [a student's] preferred gender identity" does not violate a parent's right to "direct [the student's] medical treatment." Del. Valley Reg'l High Sch., 2024 WL 706797, at *11 (Aa14–15). Where "the school merely addressed the Student by the Student's requested preferred name and pronoun," and did not pressure the student to make such a request, there is no interference with a parent's right to make medical decisions for the student. Ibid.

The cases CAL relies on to show a purported right to parental consent all involve invasive actions taken by medical professionals that are undoubtedly medical treatment—a far cry from the school districts' conduct here. See Mann v. Cnty. Of San Diego, 907 F.3d 1154, 1158–62 (9th Cir. 2018) (concluding that parents' rights were violated by unconsented physical examination of their minor children involving "a gynecological and rectal exam," "visual and tactile inspection of the children," and blood and urine tests); Wallis v. Spencer, 202 F.3d 1126, 1141–42 (9th Cir. 2000) (similar); Mario V. v. Armenta, No. 18-cv-00041-BLF, 2021 WL 1907790, at *1–2, 5 (N.D. Cal. May 12, 2021) (teacher performing finger-prick blood sugar tests of students without parental consent violated parents' and students' rights) (Aa160–63, 166–67). Moreover, CAL's

reliance on T.F. v. Kettle Moraine School District, No. 202-cv-1650, 2023 WL 6544917 (Wis. Cir. Oct. 3, 2023) (Aa146–59), is likewise misplaced: in T.F., the student received treatment at a mental health center related to gender identity, and the school consulted with the student's therapist to determine that it would use the student's requested name and pronouns over the parents' objection. Id. at *1–2 (Aa146–49).

In sum, recognizing students for who they are and using the pronouns they request (whether corresponding with sex assigned at birth or not) is part of the basic level of respect necessary for a safe and supportive learning environment. That the use of gendered names and pronouns and other accommodations may be medically indicated for some students does not mean that respecting every student's identity is a form of medical treatment.

C. The State's overriding interest in protecting the rights of transgender and gender-nonconforming students satisfies any constitutional standard.

New Jersey has a compelling interest in prohibiting discrimination on the basis of gender identity and expression in public schools. Any countervailing parental rights are "not without limits, and the State may '[a]ct[] to guard the general interest in [a] youth's well being.'" Doe ex rel. Doe v. Governor of N.J., 783 F.3d 150, 156 (3d Cir. 2015) (quoting Prince, 321 U.S. at 166) (alteration in original); see also V.C. v. M.J.B., 163 N.J. 200, 218 (2000) ("The right of

parents to the care and custody of their children is not absolute."). Public schools in particular retain significant discretion in shaping students' educational experience. Thus, "in certain circumstances the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment." C.N., 430 F.3d at 182.

The New Jersey Supreme Court applies strict scrutiny when the State seeks "to interfere with family and parental autonomy." Moriarty, 177 N.J. at 103–04. The Third Circuit likewise demands a "compelling interest" to justify governmental intrusion on fundamental parental rights. Gruenke, 225 F.3d at 305 (when a "school's policies might come into conflict with [parents'] fundamental right . . . to raise and nurture their child, . . . the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest").

Because the State's actions in seeking to enjoin the Mandatory Notification Policies did not substantially intrude on constitutionally protected parental rights, they need only to be supported by a rational basis, which they are. See Lawrence v. Texas, 539 U.S. 558, 578 (2003) (O'Connor, J., concurring) (conduct at issue must be "rationally related to a legitimate state interest" when a fundamental right is not implicated). In fact, the State's interest in prohibiting school officials from disclosing a student's gender identity to their

parents over the student's objection is compelling enough to survive strict scrutiny, assuming the applicability of that standard.

As set forth in Section II.B.2.b. infra, disclosure of a student's gender nonconformity to their parents over their objection risks harm to the individual student's physical safety, mental health, and educational outcomes. It also disrupts a school's attempt to foster an educational environment that is inclusive and free of discrimination. In Moriarty, the New Jersey Supreme Court recognized that "avoidance of harm to the child" is a "sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit." 177 N.J. at 115. The "compelling interest in protecting the physical and psychological well-being of minors" extends to "a compelling state interest in not discriminating against transgender students" and "in protecting transgender students from discrimination." Doe ex rel. Doe v. Boyertown Area Sch. Dist., 276 F. Supp. 3d 324, 390 (E.D. Pa. 2017), aff'd, 897 F.3d 518, 528–29 (3d Cir. 2018) (school districts did not violate Title IX, 20 U.S.C. § 1681, by permitting transgender students to use restrooms consistent with their identity).

New Jersey has expressly recognized this compelling state interest by prohibiting discrimination on the basis of gender identity and expression in public schools. New Jersey Law Against Discrimination ("LAD"), N.J.S.A.

10:5-1 to -50. The State's compelling interests are advanced by the trial court's preliminary injunction against the Mandatory Notification Policies and reinstatement of the Original Policies, under which the school districts were "providing a safe, supportive, and inclusive learning environment for all students" and complying with the LAD and Title IX. Marlboro Orig. Pol'y 5657 (D2a54); Middletown Orig. Pol'y 5657 (Middletown Ra7); Manalapan Orig. Pol'y 5657 (Manalapan Ra7).

Notably, the preliminary injunction and the resulting reinstatement of the Original Policies are narrowly tailored to achieve the State's goals. While taking a student-centered approach, the Original Policies recognize that there are circumstances when parents will need to be notified over a student's objection, including "as allowed by law," and "[d]ue to a specific and compelling need, such as the health and safety of a student or an incident of bias-related crime." Marlboro Orig. Pol'y 5657 (D2a55); Middletown Orig. Pol'y 5657 (Middletown Ra9); Manalapan Orig. Pol'y 5657 (Manalapan Ra8–9). They also prepare school personnel to manage disagreements between parents and students on the schools' accommodation of the students' expressed gender identity. Marlboro Orig. Pol'y 5657 (D2a54–55); Middletown Orig. Pol'y 5657 (Middletown Ra8–9); Manalapan Orig. Pol'y 5657 (Manalapan Ra8–9). In doing so, the Original Policies ensure that schools "provide a safe and supportive learning environment

that is free from discrimination and harassment for transgender students, including students going through a gender transition," while being "mindful of disputes between minor students and parents concerning the student's gender identity or expression." Marlboro Orig. Pol'y 5657 (D2a55); Middletown Orig. Pol'y 5657 (Middletown Ra8); Manalapan Orig. Pol'y 5657 (Manalapan Ra8). The preliminary injunction restored the status quo by reinstating these policies while the litigation proceeds—a remedy narrowly tailored to protecting the districts' gender-nonconforming students.

II. Deference to the Agency's Interpretation of the Law Against Discrimination Is Warranted Because Requiring Parental Notification Regarding a Student's Gender Identity Would Raise Serious Constitutional Questions That Should Be Avoided.

The State argues that the Mandatory Notification Policies violate the LAD's proscription of discrimination based on gender identity by mandating parental notification when a student asks to be called by a different name or pronouns, to use a different restroom, to play on a different sports team, or otherwise requests accommodations for gender-nonconformity. Middletown Pb14–22; Manalapan Pb14–22; Marlboro Pb14–22. Because the Division on Civil Rights has broad authority to enforce the LAD, its interpretation is entitled to "great deference, especially when its position is supported by the statutory language and is consistent with the history of the LAD." Lehmann v. Toys R Us, Inc., 132 N.J. 587, 625 (1993); see also Klumb v. Bd. of Educ. of

Manalapan-Englishtown Reg'l High Sch. Dist., 199 N.J. 14, 24 (2009) ("[I]nterpretations of the statute and cognate enactments by agencies empowered to enforce them are given substantial deference in the context of statutory interpretation.").

In this case, the agency's interpretation is entitled to even more than the usual deference because an alternative interpretation of the LAD, allowing the Mandatory Notification Policies to stand, would raise serious constitutional questions. The LAD is clear in banning discrimination "on account of . . . gender identity or expression" in public schools. N.J.S.A. 10:5-12(f), 10:5-5(l). But even if the statute were ambiguous, this Court would be obligated to give it a constitutional construction so long as it was susceptible to such a construction. Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 365–66 (2007); Right to Choose v. Byrne, 91 N.J. 287, 311–12 (1982). The interpretation of the LAD advanced here by the Division on Civil Rights avoids a potential collision between the district policies and Article I, Paragraph 1, of the New Jersey Constitution, which offers independent and expansive protection for equal treatment for gender-nonconforming individuals.

A. Courts must interpret a statute to comport with the State Constitution so long as the statute is reasonably susceptible to such interpretation.

Generally, "[a] court is duty-bound to give to a statute a construction that will support its constitutionality." Whirlpool Props., Inc. v. Dir., Div. of Tax'n, 208 N.J. 141, 151 (2011). "[W]hen a statute is susceptible to two reasonable interpretations, one constitutional and one not," New Jersey courts apply the doctrine of constitutional avoidance. State v. Pomianek, 221 N.J. 66, 90–91 (2015) (citing State v. Johnson, 166 N.J. 523, 534 (2001)). This doctrine rests on the "assum[ption] that the Legislature would want [the court] to construe the statute in a way that conforms to the Constitution." Id. at 91 (citing Johnson, 166 N.J. at 540–41). The court may construe an ambiguous statute narrowly or broadly, depending on which interpretation aligns the statute with the Constitution. Compare State v. Carter, 247 N.J. 488, 520 (2021) (narrowly construing a statute requiring legible license plates), with Mueller v. Kean Univ., 474 N.J. Super. 272, 285–89 (App. Div. 2022) (broadly construing immunity granted by the Emergency Health Powers Act, N.J.S.A. 26:13-1 to -36).

B. The Mandatory Notification Policies raise serious constitutional questions by singling out gender-nonconforming students for disparate treatment.

1. The New Jersey Constitution's guarantee of equal protection is independent and robust.

Recognizing that "the original states, including New Jersey, and their Constitutions preceded the formation of the federal government and its Constitution," the New Jersey Supreme Court has long held that our Constitution affords independent protection to New Jersey residents. Right to Choose, 91 N.J. at 299. Because the New Jersey Constitution stands as an independent charter of rights, it can offer protections above the floor set by the United States Constitution. Id. at 300 ("Thus, in appropriate cases, the individual states may accord greater respect than the federal government to certain fundamental rights."); Sojourner A. v. N.J. Dep't of Hum. Servs., 177 N.J. 318, 325 (2003) ("'[T]here may be circumstances in which the [New Jersey] Constitution provides greater protections' than does the Federal Constitution . . . .") (alteration in original) (citation omitted).

In protecting individual rights to marry, raise children, seek an abortion, terminate life support, or make other kinds of deeply personal decisions, the New Jersey Supreme Court has relied on Article I, Paragraph 1, of the State Constitution. Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 618 (2000) (collecting cases); Lewis v. Harris, 188 N.J. 415, 442 (2006). This

provision guarantees to "[a]ll persons" the "natural and unalienable rights" of "enjoying and defending life and liberty" and "pursuing and obtaining safety and happiness." N.J. Const. art. I, ¶ 1. Although the provision "nowhere expressly states that every person shall be entitled to the equal protection of the laws, we have construed the expansive language of Article I, Paragraph 1 to embrace that fundamental guarantee." Lewis, 188 N.J. at 442; see also Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985) (explaining that Article 1, Paragraph 1 "protect[s] . . . against the unequal treatment of those who should be treated alike."); Sojourner A., 177 N.J. at 332 (same).

Departing from the rigid equal protection tiers that apply in federal analysis, the New Jersey Supreme Court has adopted a more flexible balancing test that "weigh[s] the governmental interest in the statutory classification against the interests of the affected class." Planned Parenthood v. Farmer, 165 N.J. at 630. The Court considers three factors: "the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction." Lewis, 188 N.J. at 443 (citations omitted). The more personal the right, the more the scales tip toward the individual and the greater the burden on the State to justify its action. Ibid. "Unless the public need justifies statutorily limiting the exercise of a claimed

right, the State's action is deemed arbitrary." Id. at 443–44 (citing Robinson v. Cahill, 62 N.J. 473, 491–92 (1973)).

Here, the students have a deeply personal right to express and live in accordance with their gender identity. Mandatory parental notification, without adequate regard for the needs and life circumstances of the individual student, can compromise their safety and impair their education. And the districts' proffered reasons for their policies fail to justify the potential harm to students.

2. The district policies raise serious equal protection issues by treating gender-nonconforming students differently from other students.

Each of the Mandatory Notification Policies requires parental notification or consent (for younger children in Manalapan) when a student seeks an accommodation at school for a gender identity that is inconsistent with their assigned sex at birth. The policies thus apply only to students who are gender nonconforming. As the trial court put it, "who but transgender, gender non-conforming, and non-binary students would request public and social accommodations or express a change in gender identity or expression?" Tr. Ct. Op. at 10 (Da128). Under the policies, cisgender students may decide at any time to lean more or less heavily into expressing their masculinity or femininity, and the school does not call their parents except in the unusual circumstance that a student's particular gender expression raises alarms that demand such an

intervention. For gender-nonconforming students, the presumption is reversed: the schools must notify their parents of their gender expression unless some showing of harm counsels against notification.

a. The nature of the right at stake

When this kind of differential treatment targets a group that is subject to severe and widespread discrimination or inhibits the exercise of defining, personal rights, the New Jersey Supreme Court has not hesitated to prohibit it as a violation of equal protection. Thus, in Right to Choose, the Court held that the State could not deny Medicaid funding for therapeutic abortions while funding "all other medically necessary care," including pregnancy-related care, for qualifying low-income beneficiaries. 91 N.J. at 310. Likewise, in Planned Parenthood of Central New Jersey v. Farmer, the Court struck down a parental notification law for abortion in part because the State had presented no "adequate justification for distinguishing between minors seeking an abortion and minors seeking medical and surgical care related to their pregnancies," for whom parental notice was not required. 165 N.J. at 642. When the Court considered challenges to the denial of marriage licenses to same-sex couples, it continued this focus on equal treatment, holding that "committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples." Lewis v. Harris, 188 N.J. at 457. After a

change in federal law deprived couples joined in civil unions of a host of federal benefits available to married couples, the Court declined to stay a trial court decision ordering the State to allow same-sex couples to marry in New Jersey. Garden State Equality v. Dow, 216 N.J. 314, 322–23, 330 (2013).[8]

The nature of the right at issue here weighs heavily in favor of the students the Division on Civil Rights seeks to protect. Gender-nonconforming students do better academically and face fewer mental health risks when their schools treat them in accordance with their gender identity. In Boyertown, the Third Circuit affirmed the denial of a preliminary injunction against a Pennsylvania school district policy that permitted transgender students to use the restrooms that matched their identity. 897 F.3d at 538. The court recognized, "[W]hen transgender students are addressed with gender appropriate pronouns and permitted to use facilities that conform to their gender identity, those students reflect the same, healthy psychological profile as their peers." Id. at 523

[8] Indeed, even when the rights at stake are of less overriding importance than the right to decide whether to end a pregnancy or to marry one's life-partner, the New Jersey courts have consistently enforced the state constitutional guarantee of equal treatment. E.g., Van Winkle v. N.J. Dep't of Corr., 370 N.J. Super. 40, 47–49 (App. Div. 2004) (prohibiting state prisons from denying work credits to a person serving a concurrent sentence out-of-state while permitting inmates to receive work credits for serving sentences in-state); Forstrom v. Byrne, 341 N.J. Super. 45, 48 (App. Div. 2001) (holding that, although the fundamental right to education was not implicated, school district was required to provide speech therapy to home-schooled student on the same basis as to others similarly situated).

(internal quotation marks and footnote omitted). While harassment at school is correlated with negative mental health outcomes, the "opposite is also true . . . : transgender students have better mental health outcomes when their gender identity is affirmed." Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 597 (4th Cir. 2020) (applying Title IX to invalidate Virginia school district policy that barred transgender students from appropriate restrooms and declined to reflect their gender identity in school records).

The record in this case supports the unsurprising finding that transgender students do better in school when they can be themselves and do worse when they are misgendered or mistreated. The 2019 National School Climate Survey, reflecting the experiences of LGBTQ students, reports that those in schools with higher numbers of supportive staff feel safer, miss fewer days of school, experience a greater sense of belonging, have more ambitious educational aspirations, and achieve higher grade point averages. Joseph G. Kosciw, Ph.D., et al., GLSEN, The 2019 National School Climate Survey (2020), https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf (Da111).[9] Acceptance and support in school thus advance many aspects of students' personal and educational development.

[9] The 2021 survey confirms these findings. Joseph G. Kosciw, Ph.D., et al., GLSEN, The 2021 National School Climate Survey, at 66–69 (2022) ("2021

Gender-nonconforming students also benefit from policies, like the Original Policies, that allow the students to decide when and with whom to discuss their transgender or nonbinary status. Even for students whose families will be supportive—and there are many[10]—coming out is a deeply personal process that should be undertaken on the student's terms. Policies that out students against their will insert school personnel into parent-child conversations before families may be ready to have them on their own terms and make it harder for students who might actively want their school's assistance in broaching these topics with their parents.

Mandatory notification policies not only harm the parent-child relationship in families where parents may ultimately be affirming, but also

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National School Climate Survey"), https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf.

[10] Hum. Rts. Campaign Found., 2023 LGBTQ+ Youth Report, Fig. 6 (Aug. 2023) ("2023 LGBTQ+ Youth Report") (trans and nonbinary youth who share their identities with their parents often find them supportive), https://reports.hrc.org/2023-lgbtq-youth-report#about-the-study; The Trevor Project, Research Brief: Behaviors of Supportive Parents and Caregivers for LGBTQ Youth at 2 (May 2022) (reporting frequency of supportive actions by parents of transgender, nonbinary, and gender-questioning youth), https://www.thetrevorproject.org/wp-content/uploads/2022/05/May-Research-Brief-Supportive-Caregiver-Behavior.pdf; The Trevor Project, U.S. Perspectives on Issues Impacting the LGBTQ+ Community, at 11–12 (June 2023) (reporting that more than half of parents state they would be "totally comfortable" if their children came out as transgender or nonbinary), https://www.thetrevorproject.org/wp-content/uploads/2023/06/2304052-THE-TREVOR-PROJECT_May-Adults-Survey-Presentation-PUBLIC-2.pdf.

create serious risks for students who would face rejection at home for expressing their gender identity. For those vulnerable students, the challenged district policies are harmful and dangerous. Infra Point II.B.2.b.

Gender-nonconforming students' right to be treated consistent with their gender identity has great meaning and lasting consequences for them. The right therefore weighs heavily in the equal protection balance.

b. The harm of the challenged policies

The Mandatory Notification Policies threaten to cause harm on an individual and schoolwide level. If students say they are not ready to disclose this personal information to their parents, but schools disregard this decision, then parental notification may harm the students' (1) physical safety, as this kind of notification exposes them to a high risk of familial rejection, leading to violence and homelessness, among other negative outcomes; (2) mental health, including increased risks of anxiety, depression, suicide, substance abuse, and self-injurious behaviors; and (3) educational outcomes, as discrimination against gender-nonconforming students is inversely correlated with academic success. In addition to harming individual students, the Mandatory Notification Policies will subvert schoolwide goals of creating open, safe, and inclusive environments where gender-nonconforming students, like all other students, are able to live in accordance with their gender identity.

i. Individual harm to students

Physical Safety

Disclosing transgender students' status to a parent without consent can endanger their physical safety. Every day, transgender and gender-nonconforming youth encounter alarmingly high rates of "discrimination, harassment, and violence because of their gender identity," including physical and sexual assault. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017). And whether a child is accepted or rejected by their immediate family is a strong safeguard, or risk, to their physical safety.

The 2023 LGBTQ+ Youth Report, which surveyed 13,000 LGBTQ youth from all fifty states, found that only four in ten (43.9%) transgender and gender-expansive youth are out to all their parents or guardians. 2023 LGBTQ+ Youth Report, Fig. 4a. Additionally, the 2015 U.S. Transgender Survey, with a sample of 27,715 respondents, reported that, among transgender people who were out to their immediate family, 40% had family members who did not support them or were "neutral" to their transgender status. Sandy E. James et al., Nat'l Ctr. for Transgender Equal., 2015 U.S. Transgender Survey, at 65 (Dec. 2016) ("2015 U.S. Transgender Survey"), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf (Da91). One in ten reported that a member of their family had been physically violent toward them because they

were transgender. Ibid. And one half experienced at least one form of rejection from their immediate family because they were transgender. Ibid.

Additionally, family conflict is the primary cause of homelessness for LGBTQ youth. Nat'l Network for Youth, Prevalence of Youth Homelessness and LGBTQ+ Homelessness (2023), https://nn4youth.org/lgbtq-homeless-youth/. Transgender people whose families reject them are nearly twice as likely to have experienced homelessness (40%) as those who were not rejected (22%). 2015 U.S. Transgender Survey, at 65 (Da91). The 2015 U.S. Transgender Survey also reported that 15% of respondents either ran away from home or were kicked out of the house after coming out to their families. Ibid.

The students most in need of a safe and inclusive environment at school, precisely because they may not have that at home, are the students most likely to be harmed by a forced-outing policy.

Mental Health

Transgender students who are subjected to discriminatory policies and practices by their schools are more likely to experience negative mental health outcomes. The Third Circuit has stressed that "[w]hen transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated—indeed, it can be life threatening." Boyertown, 897 F.3d at 529. Transgender and nonbinary youth report feeling disproportionately scared and stressed about

a policy that would require schools to tell their parents if they asked to use a different name or pronoun at school. The Trevor Project, Issues Impacting LGBTQ Youth: Polling Analysis, at 12 (Jan. 2022), https://www.thetrevorproject.org/wp-content/uploads/2022/01/TrevorProject_Public1.pdf (Da88). Another study highlighted that 42.3% of a sample of 5,612 respondents reported a suicide attempt and "26.3% reported misusing drugs or alcohol to cope with transgender discrimination." Augustus Klein & Sarit A. Golub, Family Rejection as a Predictor of Suicide Attempts and Substance Misuse Among Transgender and Gender Nonconforming Adults, 3 LGBT Health 193, 195–96 (2016) (Da99–100).

Misgendering students or otherwise refusing to affirm their gender identity "exacerbate[s] the risk of 'anxiety and depression, low self-esteem, engaging in self-injurious behaviors, suicide, substance use, homelessness, and eating disorders among other adverse outcomes." Boyertown, 897 F.3d at 523; see also Grimm, 972 F.3d at 597. Researchers have found that gender-nonconforming children who have not socially transitioned experience higher rates of anxiety and depression, and lower self-worth, when compared to children who have socially transitioned. Lily Durwood et al., Mental Health and Self Worth in Socially Transitioned Transgender Youth, 56 J. Am. Acad. Child

& Adolescent Psychiatry 116, 116 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5302003/.

These risks are amplified with increased reports of parental rejection. Klein, supra, at 194 (Da98). This is because "familial rejection in itself is a stressor" that impacts mental health, economic security, and resulting health behavior, as well as depriving transgender individuals "of the protective buffering effects that are usually derived from social support from close others." Ibid. Transgender individuals who experience high levels of family rejection are three-and-a-half times more likely to attempt suicide and two-and-a-half times more likely to misuse substances compared to those who experience little or no family rejection. Id. at 195 (Da99). And those who experience moderate levels of family rejection are two times more likely to attempt suicide and one-and-a-half times more likely to misuse substances. Ibid. Further, 65.5% of transgender youth who reported that their families never refer to them with correct pronouns screened positive for depression, and 72.1% screened positive for anxiety. 2023 LGBTQ+ Youth Report, Figs. 5a, 5b. As stated, this risk of familial rejection may be increased in these circumstances. And even in the absence of familial rejection, the district policies are discriminatory and will exacerbate these mental health harms.

Educational Outcomes

Discrimination against gender-nonconforming students in school can also lead to negative educational outcomes. Boyertown, 897 F.3d at 529; Grimm, 972 F.3d at 597. Students who experience victimization and discrimination based on their gender expression perform less well academically (2.76 v. 3.17 average GPA), are twice as likely to report that they do not plan on pursuing post-secondary education, and feel lower levels of belonging to their school community. 2021 National School Climate Survey, at 35–37. Additionally, nearly a third of LGBTQ+ youth reported missing a day of school in the past month because they felt unsafe or uncomfortable. Id. at 12.

Poor educational outcomes lead to lower rates of employment, lower household incomes, and higher rates of poverty. Stephanie M. Hernandez et al., Sexual Orientation, Gender Expression and Socioeconomic Status in the National Longitudinal Study of Adolescent to Adult Health, J. Epidem. Cmty. Health, at 7, (Nov. 2023), https://jech.bmj.com/content/jech/early/2023/11/28/jech-2022-220164.full.pdf (finding that gender-nonconforming individuals had lower educational attainment and higher household debt when compared to cisgender individuals). Thus, the discriminatory district policies also threaten to impair transgender students' educational outcomes and livelihoods.

ii. Harm to schools

In addition to causing individual harms, the district policies will also disrupt schools' attempts to foster an inclusive culture, to the detriment of all students. Schools create a safe and inclusive learning environment by accepting and engaging all students, and, in so doing, model respect as the standard for participating in civil society. Conversely, schools that treat some students as unworthy of respect or full acceptance can expect other students to take notice and follow suit, targeting peers whom they come to view as fair game. By singling out gender-nonconforming students under the challenged policies, the districts in effect mark them for further discrimination. Students who seek to avoid these consequences, or who refuse to risk disclosure to their parents, will be unable to participate fully in the school environment and their education, increasing their exposure to the harms described above.

iii. Inadequate safeguards

The safeguards that the Board Defendants point to in their policies cannot realistically prevent these harms. The Board Defendants assert that gender non-conforming students will be safe because the Mandatory Notification Policies preserve confidentiality when "documented" (Middletown) or "credible" (Manalapan) evidence exists, or when "there is reason to believe" (Marlboro), that physical or emotional harm will result from parental notification. Tr. Ct.

Op. at 3–6 (describing policies) (Da121–24); Middletown/Manalapan Db31–32. But these exceptions depend on students to predict accurately when disclosure to their parents might cause harm, to amass some sort of evidence of this risk, and to share such evidence with school personnel. Any break in this fragile chain will defeat the exception and place the student in harm's way.

Additionally, this safeguard comes into play only for students who persevere and ask their school to help them socially transition. These policies will deter some gender-nonconforming students from coming out in the first instance. The exception cannot remedy any harms to these students.

c. The failed justification for the district policies

The school districts offer two justifications for their policies. They argue that parental notification is 1) compelled by the Constitution, and 2) required by state and federal school records law. Neither of these reasons is sufficient to justify the harm the policies pose to gender-nonconforming students.

i. Parental notification over students' objection is not constitutionally compelled.

As explained above, the school districts have no constitutional obligation to affirmatively notify parents about students' gender identity over the students' objections. Supra Section I.

ii. State and federal school records laws do not compel parental notification.

The school districts cannot rely on state and federal school records laws to justify the challenged policies' mandatory parental notification provisions. First, the policies are triggered by conduct that has nothing to do with altering official school records. In Middletown and Manalapan, the triggers include a student's request to join a different sports team or use a different bathroom. Middletown Amend. Pol'y (Da152); Manalapan Amend. Pol'y (Da169–70). In Marlboro, notification is triggered by any behavior that indicates a "change in gender identity or expression," with the latter term defined to include all "external manifestations of gender," such as through "clothing, haircut, behavior, voice, and/or body characteristics." Marlboro Amend. Pol'y (D2a43, 45). Even when a student asks to use a new name or pronouns at school—the conduct that is the focus of the districts' argument about the school records law—the request is rarely directed to the school's official records, which in any case students have no independent right to access or alter. Instead, the student is generally asking teachers, coaches, other school personnel, and fellow students to use their chosen names and pronouns.

Second, the districts mischaracterize the school records laws. Parents are entitled to access and request alterations in such records, N.J.A.C. 6A:32-7.5(e)(1) to (3), 6A:32-7.7(b); 34 C.F.R. § 99.20(a), but nothing requires schools

to affirmatively notify parents about anything contained in the records. Nor do parents possess "the unequivocal right to full, complete and accurate information contained in a student record." See Middletown/Manalapan Db19; Marlboro Db16–17. Instead, parents have the right "to be supplied with full information, about the pupil, except as may be inconsistent with reasonable protection of the persons involved." N.J.S.A. 18A:36-19 (emphasis added).

The school records laws cannot justify the policies because these laws are largely irrelevant to the operation of the policies and pose no conflict with an alternative policy of presumptive nondisclosure. Indeed, the Original Policies restricted disclosure of "a student's transgender status except as allowed by law." Marlboro Orig. Pol'y (D2a55); Middletown Orig. Pol'y 5657 (Middletown Ra9); Manalapan Orig. Pol'y 5657 (Manalapan Ra8). The school records laws thus pose no obstacle to a presumptive nondisclosure policy that avoids conflict with the LAD, an equally binding state law, and raises no issues under the New Jersey Constitution.

* * * * * * * * *

Because implementation of the Mandatory Notification Policies would raise serious issues under the equal protection provision of the New Jersey Constitution, the Court should avoid the constitutional problem by affirming the trial court's decision. The State has established at least a likelihood of success

on the merits of its claim that the Law Against Discrimination prohibits the enforcement of school district policies that single out gender-nonconforming students for mandatory affirmative notice to their parents of how they express their gender identities at school, regardless of the students' objections. The State has also shown that gender-nonconforming students would face irreparable harm under the challenged policies, and the other preliminary injunction factors favor the State as well.

CONCLUSION

For these reasons, Amici respectfully urge this Court to affirm the decision of the trial court preliminarily enjoining enforcement of the Mandatory Notification Policies.

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April 5, 2024

Via eCourts
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Re: MATTHEW J. PLATKIN, ATTORNEY GENERAL OF NEW JERSEY, *et al.* v. MARLBORO TOWNSHIP BOARD OF EDUCATION, *et al.*
Docket No. A-000118-23

Dear Mr. Orlando:

This firm represents the Marlboro Township Board of Education ("Board") in the above-referenced matter. Please accept this letter-brief in reply to the opposition brief filed by Plaintiff-Respondents Matthew J. Platkin, Attorney General of New Jersey ("Attorney General"), and Sundeep Iyer, Director of the New Jersey Division on Civil Rights ("Director") (collectively, "Plaintiffs"), pursuant to R. 2:6-5.

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ORDER BEING APPEALED

Preliminary Statement

Plaintiffs treat their opposition brief as though it is a merits brief by raising nearly every issue addressed by the Board before the trial court on the preliminary injunction, rather than focusing on the key issues on appeal, *i.e.*, whether the trial court misapplied the legal standards for granting preliminary injunctive relief. In addition, Plaintiffs have misrepresented the actual language of the policy which the Board seeks to effectuate. For example, the Board's proposed policy states that "the district will notify a student's parent/guardian of the student's **change in** gender identity or expression **except where there is reason to believe that doing so would pose a danger to the health or safety of the pupil** [emphasis added]"; not, as Plaintiffs allege, "a blanket policy that require[s] school personnel to affirmatively inform the parents of transgender,

gender non-conforming, or non-binary students about the child's gender identity."

Plaintiffs also cite to language purporting to be included in the Board's proposed policy which is nowhere to be found. For example, the Board's proposed policy does not contain language regarding "request[ing] a public social transition accommodation," or "public name/identity/pronoun change," as alleged by Plaintiffs. Presumably, Plaintiffs are carelessly confusing the Board's policy with policies passed by other New Jersey school boards.

Moreover, Plaintiffs assert, without any basis in fact, that the Board no longer "disputes" or "seriously disputes" certain arguments raised below. Indeed, the Board maintains all of the legal arguments that it made before the trial court, which it reserves the right to raise in the pending related DCR matter intended to address the merits of Plaintiffs' allegations. While the Board disagrees with several of the conclusions reached by the trial court in granting Plaintiffs' request for a preliminary injunction, the instant appeal focuses on those portions of the lower court's decision which were explicitly made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.

Specifically, the trial court incorrectly applied the law regarding "a well-settled right" for Plaintiffs to proceed on their claims, improperly relied on

inadmissible evidence, and ordered the Board to violate state and federal law. Importantly, it is Plaintiffs' burden to satisfy each Crowe prong by clear and convincing evidence, which it was unable to do, as detailed *infra* and in the Board's initial brief. Therefore, the trial court's Order respectfully must be reversed.

Procedural History and Statement of Facts[1]

The Board relies on the procedural history and facts set forth in its initial brief (Db2).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT INCORRECTLY APPLIED THE LAW REGARDING "A WELL-SETTLED RIGHT" FOR PLAINTIFFS TO PROCEED ON THEIR CLAIMS (Pb23).

Plaintiffs assert, "[a]s an initial matter," and perhaps as an implicit acknowledgement of the Board's contention that there is no well-settled legal right applicable to the instant matter, that New Jersey courts no longer utilize the well-established and long-standing "independent" "well-settled legal right" prong set forth in Crowe v. De Gioia, 90 N.J. 126 (1982) (Pb23)[2]. This is simply

[1] The statement of facts and procedural history are closely related and combined for the Court's convenience.

[2] Plaintiffs' claim that "the 'well-settled legal right' and 'reasonable probability of success' analyses" no longer constitute "two independent prongs under Crowe" also conflicts with the trial court's decision. See Da104 ("Whether the State has

not true. See, *i.e.*, Petro v. Platkin, 472 N.J. Super. 536, 553 (App. Div. 2022) ("Judge Lougy determined plaintiffs failed to satisfy the Crowe standard for granting injunctive relief because: there was no danger that plaintiffs would suffer irreparable harm if an injunction was denied; **plaintiffs did not establish a settled legal right**; they did not have a reasonable probability of success on the merits; and the balancing of the relative hardships weighed in favor of the public interest" [emphasis added]); Estate of F.W.K. v. M.A-V, 473 N.J. Super. 379, 383 (Law Div. 2021) ("The heart of this dispute on plaintiff's entitlement to the relief sought involves the second Crowe factor – the legal rights underlying plaintiff's claim."); City of Orange Tp. Bd. of Educ. v. City of Orange Tp., 451 N.J. Super. 310, 323 (Ch. Div. 2017) ("A plaintiff seeking injunctive relief must show, in order to avoid having the relief it seeks withheld, that the legal right underlying the claim is settled" (citing Crowe, *supra*)). Indeed, despite Plaintiffs' assertion to the contrary, Plaintiffs are required to satisfy the "well-settled legal right" prong set forth in Crowe, *supra*, in order to obtain the requested injunction. Moreover, they have the burden of satisfying this requirement, as well as the remaining Crowe prongs, "by clear and convincing evidence." Dolan v. De Capua, 16 N.J. 599, 614 (1954).

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shown a reasonable probability of success on the merits of its LAD claims is a separate inquiry…").

Plaintiffs' opposition brief only serves to underscore the Board's contention that the trial court misapplied Crowe's "well-settled legal right" prong (Db8). Plaintiffs state that "case law has long made clear that the inquiry is whether the underlying body of law is settled, not whether the specific outcome of a specific lawsuit is already settled by precedent (Pb25)." Plaintiffs, however, do not cite a single case which stands for the proposition that the "body of law" pertaining to school parental notification policies to the parents of minor children in relation to the New Jersey Law Against Discrimination ("NJLAD") is in any way settled. Rather, Plaintiffs refute the case holding in a case cited by the Board and assert that "the LAD itself" and caselaw which supports Plaintiffs' right to "proceed against any person in a summary manner in the Superior Court of New Jersey to obtain an injunction" is dispositive (Pb24-Pb26).

The New Jersey Supreme Court in Crowe cited to Citizens Coach Co. v. Camden H.R. Co., 29 N.J. Eq. 299, 304 (1878) for its holding that "temporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe, *supra*, at 133. The court in Citizens Coach Co. held that "'[a]n injunction will not issue where the right of the complainant, which it is designed to protect, depends upon a disputed question of law, about which there

may be a doubt, which has not been settled by the courts of law of this state'" (citing Stevens v. Paterson & N.R. Co., 20 N.J. Eq. 126 (1869)).

Contrary to Plaintiffs' assertion to the contrary, the Board does not claim that "a right is only well-settled where there is binding legal authority on the precise legal issue applied to the precise set of facts" (Pb25). Rather, the question is whether "the right on which the plaintiff founds his claim…involve[s] a novel legal problem." Crowe, *supra*, at 139. The issue in the instant matter, whether a school district's parental notification policy regarding notification to a minor student's parents about their own children, can be found to be violative of the NJLAD, does present "a novel legal" issue. Ibid.

Indeed, the United States Supreme Court has "recognized the fundamental rights of parents to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 66 (2000) (internal citations omitted). Moreover, it is well-settled that "in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right…to direct the education and upbringing of one's children." Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citing Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925)). Additionally, "the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for

obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citing Pierce, *supra*). Importantly, the plain language of the NJLAD itself states that "the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed." N.J.S.A. 10:5-5(l).

The Board maintains that the proposed policy is in fact not violative of the NJLAD at all -- an issue upon which the parties clearly disagree. However, this is a determination that will be made pursuant to the pending DCR administrative action, which will address the merits of the Plaintiffs' allegations. It is clear, however, for the purposes of this appeal, that the "body of law" pertaining to whether the NJLAD is violated by public school parental notification policies which require disclosure of information to the parents of their own minor children is entirely unsettled. In fact, the trial court did not even analyze whether there was any responsive "body of law," but instead, simply accepted Plaintiff's position that Plaintiffs satisfy this Crowe prong, as of right, because of the NJLAD's procedural provision which states that Plaintiffs "may proceed against any person in a summary manner in the Superior Court of New Jersey to obtain an injunction…" N.J.S.A. 10:5-14.1 (Da103).

Such an interpretation is an abuse of the trial judge's discretion because it renders the "well-settled right" Crowe prong meaningless, because Plaintiffs

would always satisfy this requirement, as a matter of automatic right, every time they request injunctive relief during the pendency of an administrative action, no matter what their basis for doing so is. Notably, this is not the first time that the Director has attempted to stretch the meaning of N.J.S.A. 10:5-14.1 beyond its intended applicability. See Sashihara v. Nobel Learning Cmtys., Inc., 461 N.J. Super. 195, 207 (App. Div. 2019), where the Appellate Division rejected the Director's contention that the statute provided him with the "authority to proceed with either a plenary action or a summary action:"

> [T]he Director argues that the statute's use of the word "may" gives the Director authority to proceed with either a plenary action or a summary action. However, a plain reading of the statute does not support this interpretation; instead, **it simply allows the Director the option to file the summary action or not file the summary action.** See O'Connell v. State, 171 N.J. 484, 488, 795 A.2d 857 (2002) (holding courts "may neither rewrite a plainly-written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of the plain language").

Indeed, the same statute which the trial court relied on in finding that Plaintiffs satisfied this prong of the Crowe requirements (Da103) simply "allow[ed] the Director the option to file the summary action or not file the summary action," and nothing more. Sashihara, *supra*. The trial court in the instant matter was not authorized to presume that the Legislature intended to extend N.J.S.A. 1-10-14.1 to mean that the "body of law" relevant to any such

filing by Plaintiffs, as a matter of automatic right and in every instance, shall be considered *per se* "settled." Ibid.

The trial court did correctly hold that "[a] party seeking preliminary injunctive relief **must establish** a well-settled right to proceed on its claims" by clear and convincing evidence [emphasis added] (Da102). Plaintiffs are unable to do so, and therefore, the trial court's Order respectfully must be reversed, and Plaintiffs' injunction denied as a matter of law.

POINT II

THE TRIAL COURT'S CONCLUSION ON DISPARATE IMPACT DID DEPEND ON THE SURVEYS AT ISSUE (Pa20).

Plaintiffs contend that "the court's ultimate conclusion on disparate impact did not actually depend on [surveys the State introduced into the record] (Pb20)." This is simply untrue. The introductory paragraph of the trial court's holding on this issue states, in relevant part:

> [N]one of the School Board defendants refutes the State's data or presents alternate evidence sufficient to negate or call into question that data or the methodology by which the data was compiled. On this preliminary record, **the court is constrained to find that the State's studies and reports constitute clear and convincing evidence of a reasonable probability of success on the State's disparate impact claims.**
> [Emphasis added]. (Da107).

As the Board explained in its initial brief, it would have been virtually impossible for the Board to "refute the State's data or present alternate evidence

sufficient to negate or call into question that data or methodology by which the data was compiled" because Plaintiffs did not identify any methodologies or information regarding how the "excerpts" of surveys that they provided, which the trial court relied on to render its determination, were created (Db14). Moreover, the parties did not exchange discovery or conduct depositions which would have permitted the Board to inquire about same (Ibid.).

Plaintiffs do not dispute this in their opposition brief – on the contrary, they concede that the primary survey "excerpt" relied upon by the trial court in rendering its determination (Da108, "Exhibit F to the Michael Certification") "mistakenly include[d] a broken hyperlink" (provided by Plaintiffs to the trial court and the Board) to access the actual survey (Pb20, n.3). However, even the new link now provided by Plaintiffs which purports to contain "[a] full copy of the survey" leads to a webpage which states: "Oops! The page you're looking for doesn't exist."[3] It was impossible for the trial court to make a valid determination regarding the admissibility of an "excerpt" of a survey, and for the Board to "refute the data" contained in the survey "excerpt," where even Plaintiffs do not know where the full survey is located. N.J.R.E. 401 (Da13).

[3] https://www.thetrevorproject.org/wp-content/uploads/2022/01/TrevorProjectPublic1.pdf (last visited April 5, 2024).

The trial court abused its discretion by considering inadmissible evidence, and the preliminary injunction respectfully must therefore be vacated.

POINT III

THE TRIAL COURT'S ORDER *DOES* COMPEL THE BOARD TO VIOLATE STATE AND FEDERAL LAW (Pa27).

The injunction requires the Board to reinstate a policy which requires it to keep pupil records confidential from their parents in contravention of federal and state law (Da095). Apparently realizing that this is problematic, Plaintiffs now ironically argue that "the federal Family Education Rights Privacy Act ('FERPA') and New Jersey Pupil Records Act ('NJPRA') have little to do with this case (Pb27)." However, such a position is completely antithetical to their underlying Order to Show Cause, and the injunction that they requested and were granted. Plaintiffs' Order to Show Cause specifically alleges, in relevant part, that "[b]y creating an affirmative requirement to notify a student's parent/guardian of the student's change in gender identity or expression, and by subjecting students to differential treatment with respect to…**recordkeeping**…the Amended Policy expressly targets students for disparate treatment based on their LAD-protected characteristics…" [emphasis added] (Da016, ¶ 32).

Plaintiffs also alleged that the Board's amended policy was issued "in contravention of state guidance and the LAD" (Da013). The "state guidance"

document, upon which Plaintiffs assert that the Board should model its policy, contains an entire section specifically dedicated to the issue of "school records" (Da064). Thus, access to student records is a key aspect of this case.

Moreover, the injunction reinstates the Board's previous policy, which contains a section pertaining to student records (Da056). That section of the policy requires the Board to maintain a "separate, confidential file" for students who have "expressed a preference to be called by a name other than their birth name" [emphasis added] (Ibid.). Elsewhere, the reinstated policy it states that "[t]he school district shall keep confidential a current, new, or prospective student's transgender status," and that when "obligated to disclose a student's status…[d]ue to a specific and compelling need," the District should take such measures as "the facilitation of counseling for the student and the student's family to facilitate the family's acceptance and support of the student's transgender status" (Da055). Nonetheless, Plaintiffs argue that "[t]he question this case presents" has nothing to do with "what information must go in" student records (Pb28). Indeed, a plain reading of the policy requires the Board to keep any documentation which would reveal a student's transgender status "confidential" from the student's parents, absent a "specific and compelling need." Importantly, a student's name and gender are both mandated student records in New Jersey. N.J.A.C. 6A:32-7.3(b)(1).

Plaintiffs concede in their opposition brief that "FERPA requires that no State school or educational institution shall have a policy which 'den[ies], or which effectively prevents, the parents of students…the right to inspect and review the education records of their children" (citing 20 U.S.C. § 1232g(a)(1)(A)) and that the NJPRA "similarly requires… 'the right of the parent or guardian…to be supplied with full information about the pupil…'" (citing N.J.S.A. 18A:36-19) (Pb27). However, the reinstated policy does just that. It requires the Board to keep student records, which identify a student's change in gender identity or name change, confidential from parents absent "a specific and compelling" need otherwise. This violates these state and federal laws, as detailed by the Board in its initial brief (Da15). Moreover, pursuant to the terms of the injunction, the Board is prohibited from modifying the policy to permit parental access to records (Da095).

Despite Plaintiffs' newfound claim to the contrary, student records have much "to do with this case" (Pa27). While they may argue otherwise now, this is a departure from their Order to Show Cause (Da016, ¶ 32), and the relief that they requested and were granted (Da095). The injunction requires the Board to comply with the terms of the reinstated policy, and pursuant to Plaintiffs' request, the Board has no ability to revise the policy to allow for parental access to true and accurate student records (Ibid.). The trial court erred as a matter of

law in issuing an injunction which requires the Board to reinstate a policy which compels the Board to violate state and federal law, and the Order respectfully must be reversed.

CONCLUSION

For the reasons set forth herein and in the Board's initial brief, the Appellate Division respectfully should reverse the trial court's Order and dismiss Plaintiffs' request for injunctive relief.

Respectfully submitted,
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cc: All parties via eCourts