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MATTHEW J. PLATKIN, Attorney General of New Jersey, and SUNDEEP IYER, Director, New Jersey Division on Civil Rights,

Plaintiffs,

vs.

MARLBORO TOWNSHIP BOARD OF EDUCATION, and MARLBORO TOWNSHIP PUBLIC SCHOOL DISTRICT,

Defendants.

SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION, GENERAL EQUITY – MONMOUTH COUNTY

DOCKET NO. MON-C-000078-23

INTERVENOR-DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR INJUNCTIVE RELIEF RESTRAINING IMPLEMENTATION OR AMENDMENT OF POLICY 5756

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

PRELIMINARY STATEMENT

This case is about parental rights, specifically, about a parent's right to be informed when teachers and school administrators are involved in fundamental decisions a child is making about their identity and gender expression. The Plaintiffs here argue that Marlboro Township Board of Education's Policy 5756 ("Policy")—which requires that parents be informed in such circumstances unless "doing so would pose a danger to the health or safety of the pupil"—violates New Jersey's Law Against Discrimination ("LAD"). But whether it does or does not is of secondary importance. Most important is whether the parental rights at issue in Policy 5756 are protected by the Constitution, and accordingly, whether granting Plaintiffs' injunction would violate the constitutional right of parents to be informed about their children's well-being. The answer to both questions is yes.

Parents have a fundamental right to control and direct the education, upbringing, and healthcare decisions of their children. Both the U.S. and New Jersey Supreme Courts have consistently upheld this fundamental right. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Moriarty v. Bradt*, 177 N.J. 84, 115 (2003) (calling the right to parental autonomy a fundamental right and concluding it is subject to strict scrutiny); *Watkins v. Nelson*, 163 N.J. 235, 245 (2000) (holding that parental rights "is both a natural and legal right" and that "the law should not disturb the parent/child relationship except for the strongest reasons and only upon a clear showing of a parent's gross misconduct or unfitness."). The Policy recognizes and protects the fundamental constitutional right of parents to control and direct the education, upbringing, and healthcare decisions of their children. Conversely, Plaintiffs' request for an injunction in this case is based on an interpretation of the LAD that violates the Constitution because it cuts parents out of decisions that

directly affect the mental health or physical well-being of their own children.

STATEMENT OF FACTS

Angela Tycenski is a parent who sends her two children to schools governed by the Marlboro Township Board of Education (District). The District runs *only* Pre-Kindergarten through 8th grade schools—it does not have a high school, nor does it serve high school students. Recently, the Board adopted a new policy pertaining to transgender students, Policy 5756.

The purpose of this amended policy is to foster increased parental involvement in important decisions involving minors, such as the decision to be known by a different name or pronouns, to use a different bathroom, etc. *See* Defendants' Brief in Opposition to Order to Show Cause (Defs.' Br.) at 4. Most importantly for parents, this newly amended policy requires school officials 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 and safety of the pupil." Policy 5756, Exhibit 1.

The Policy does not require *immediate* parental notification. Instead, the first step it prescribes is for a school counselor to meet with and collaborate with the student. Their conversation will center around how the student's parents/guardians will be notified and will address what concerns the student may have with parental notification. Unless notification would pose a danger to the health or safety of the child, the parent shall then be notified—after which the student, counselor, parents/guardians, and other necessary officials shall come together to develop a plan for the student.

The Policy therefore recognizes that every case is unique and does not prescribe a one-size-fits-all solution, such as immediate parental notification no matter the risk of harm to the student, nor a blanket prohibition on parental notification. Instead, it strikes the appropriate balance between concerns for student health and safety with the constitutional rights of parents. In other words, Policy 5756 centers on

ensuring that parents/guardians are involved in a critically important aspect of a child's development, and prohibits school officials from withholding vital information from parents/guardians. But the Policy also protects students and does not require notification if there's a legitimate fear that such notification would harm the student. The Policy then operates on a case-by-case basis to address the needs of students and their parents.

Nevertheless, Plaintiffs contend that this policy violates the LAD as interpreted by the New Jersey Department of Education because it requires parental/guardian notification barring the exception for child health and safety. The New Jersey Department of Education somehow interprets the LAD as strictly prohibiting such a requirement. *See* Department of Education Transgender Student Guidance for School Districts, attached as Exhibit 2. Plaintiffs therefore filed a Complaint and Order to Show Cause with Temporary Restraints, seeking an injunction against the Policy while an Administrative Complaint process was pending. The District has refrained from implementing the Policy while Plaintiffs' motions are pending.

The Defendant-Intervenor, Angela Tycenski (Parent) is a parent who has two children that attend schools governed by the Policy. If the Policy is enjoined, neither she, nor any other parent, will be notified by the school or school officials if those officials decide to recognize any of their children as transgender, leaving no opportunity for parental involvement and precluding any input by parents/guardians in decision making that could have life-altering consequences for their children. This violates her constitutionally protected right as a parent to direct the upbringing of her children, including on matters that the Plaintiffs themselves argue are critically important to a child's mental, emotional and physical well-being.

LEGAL ARGUMENT

Courts will grant preliminary injunctive relief only in situations where the movant shows "a

reasonable probability of success on the merits; that a balancing of the equities and hardships favors injunctive relief; that the movant has no adequate remedy at law and that the irreparable injury to be suffered in the absence of the injunctive relief is substantial and imminent; and that the public interest will not be harmed." *Brown v. City of Paterson*, 424 N.J. Super. 176, 183 (App. Div. 2012) (marks and citations omitted). Plaintiffs must prove these factors by clear and convincing evidence. *Id.* Plaintiffs have not done that.

In fact, Plaintiffs seek an injunction that would require the District to violate both the U.S. Constitution and the long-standing presumption of parental fitness recognized by the New Jersey Constitution. Under the U.S. Constitution, parents have a fundamental right to control and direct the education, upbringing, and healthcare decisions of their children. *See Troxel*, 530 U.S. at 65; *see also Parham v. J.R.*, 442 U.S. 584, 602 (1979). The New Jersey Supreme Court has recognized the same right under the state constitution and has specifically held that any law abridging this fundamental right is subject to strict scrutiny. *Moriarty*, 177 N.J. at 114.

This Court should reject Plaintiff's request for injunctive relief because it would violate parents' constitutional rights.

I. The Plaintiffs are not likely to succeed on the merits of their claim, as the constitutional rights of parents preempt the New Jersey Law Against Discrimination.

A. The U.S. Constitution protects the right of parents to control and direct the education, upbringing, and healthcare decisions of their children.

The Supreme Court has consistently recognized that the right of parents to control and direct the education, upbringing, and healthcare of their children is one of the fundamental "liberty interests" protected by the Fourteenth Amendment's Due Process Clause. The Court has called it "perhaps the oldest of the fundamental liberty interests" recognized in constitutional law. *Troxel*, 530 U.S. at 65.

The Court has described parental rights as "fundamental" for over a century. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (finding that this right includes the right "to control the education of [a parent's children]."); *see also Pierce v. Soc'y of Sister*s, 268 U.S. 510, 534–35 (1925) (Holding that "the liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control."). In *Pierce*, the Court further explained that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

Two decades after *Meyer* and *Pierce*, the Court reiterated that parental rights are constitutionally protected, explaining, "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). Since then, the Court has repeatedly upheld parental rights over government attempts to interfere with parental decisions, finding that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

Thus, a parent's right to direct the upbringing of their children is "objectively, deeply rooted in this Nation's history and tradition … and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal marks and citations omitted).

The Policy seeks to protect this fundamental right. It does so by requiring school officials to notify parents of school decisions and actions involving the child's gender identity. Without such notice, parents like Angela Tycenski are unable to participate in or otherwise make critical decisions involving the healthcare and upbringing of their own children. Concealing this information from parents, including

Angela Tycenski, thus hinders their ability to discharge their "high duty" to "prepare" their children for their adult "obligations." *Pierce*, *supra*, 268 U.S. at 535.

Specifically, parents cannot meaningfully decide how to raise their children—how to help them with their psycho-sexual maturation, to guide them with deeply personal intimate decisions, and to counsel them with respect to their interpersonal relationships—if they do not know crucial information about actions that school officials are taking with respect to their children's development and education. Nor can a parent exercise choice regarding *where* to educate their children if they are deprived of basic information necessary to make that choice.

B. New Jersey law provides longstanding protections for parental rights, including a presumption that parents are fit to make decisions for their children.

Under New Jersey law, "there is a presumption supporting a natural parent's 'right to the care, custody, and control of his or her child.'" *W.M. v. D.G.*, 467 N.J. Super. 216, 230 (App. Div. 2021) (citation omitted). That presumption can only "be overcome by 'a showing of gross misconduct, unfitness, neglect, or exceptional circumstances affecting the welfare of the child.'" *Id*. (internal marks and citation omitted); *see also Watkins*, 163 N.J. at 241. In other words, this presumption can *only* be overcome by a showing of parental unfitness in a *specific* circumstance. Such a showing necessitates a neutral proceeding to evaluate the child's welfare if unfitness is suspected. The Policy is directly in line with this legal requirement because it presumes parents are fit to be involved in decisions about how to best accommodate their children, while also allowing that presumption to be overcome if school officials reasonably believe that a child's health or safety would be in danger if their parents/guardians were made aware of the child's transgender status.

In seeking an injunction against the Policy, however, Plaintiffs are rejecting the presumption of parental fitness, calling for a blanket policy that presumes parents are *unfit* to participate in critical

decisions involving their children's gender identity or expression. Their position assumes that all parents are unfit to know about decisions their children are making with regard to gender identity and expression, if the child has not informed the parents. They therefore seek to enjoin the policy in order to prevent the informing of parents *without* showing that any particular parent is unfit or that transparency will somehow threaten children's safety in general. Indeed, this kind of blanket presumption against parental fitness to know is unconstitutional. In *Stanley v. Illinois*, 405 U.S. 645, 656–57 (1972), the Supreme Court made clear that parental rights are to be adjudicated on an individualized, case-by-case basis, *not* based on blanket presumptions. To apply a blanket presumption of unfitness-to-know, as the Plaintiffs' position requires, "disdains present realities in deference to past formalities, [and] needlessly risks running roughshod over the important interests of both parent and child." *Id.* at 657. It therefore deprives parents of their rights without due process of law.

In other words, Plaintiffs not only seek an injunction against a Policy that is *required* by the Constitution in favor of one that violates the Constitution, they also seek to undo longstanding precedent supporting a presumption of parental fitness.

Plaintiffs assert that their interpretation of the LAD protects children's right to privacy. *See* Plaintiffs' Brief in Support of Application for Order to Show Cause (Plfs.' Br.) at 24. But that right is served by confidentiality rules that apply on a case-by-case basis, not by one-size-fits-all policies of actively concealing vital information, without regard to individual circumstances.

The Policy protects students' privacy interests by allowing for determinations to be made on a case-by-case basis. For example, if there are concerns that disclosure to parents or guardians would pose a danger to the student's health and safety, then the Policy provides that school officials need not disclose that information. Further, the Policy provides that a school counselor will meet first with the student and

collaborate with the student to determine how best to notify the student's parents. The Policy thus requires that decisions about confidentiality be made on a case-by-case basis.

Plaintiff's request for an injunction, by contrast, rejects this case-by-case approach. Their position calls for a blanket prohibition on school officials notifying parents that a child has requested an accommodation based on the child's transgender status, even in the absence of *any* reason to withhold this information. *See* Plfs.' Br. at 19–20 (explaining that under the LAD there can be "no affirmative duty for any school district personnel to notify a student's parent or guardian of the student's gender identity or expression.")

Thus, the Plaintiffs cannot show a likelihood of success on the merits. A policy of presumptively concealing or withholding information from parents violates the fundamental right of parents to direct the upbringing of their children because a parent cannot make decisions about education, counseling, or emotional, psychological, or physical care of their children if they are kept in the dark.[1] Nothing can be more central to the psychological and physical maturation of children than matters relating to their intimate understanding of their physical bodies and gender identity. To knowingly conceal this information from fit parents deprives them of the ability to make decisions about their children's well-being that they are morally and legally *obligated* to make. If parents have a "high duty" to help their children grow up, *Pierce*, *supra*, 268 U.S. at 535, the state cannot—absent good cause to the contrary—purposely withhold

[1] Obviously, a parent's fundamental rights to direct a child's upbringing does not entitle the parent to dictate internal policies of curricula in a school. *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008). But that principle is based on the fact that a parent remains free to withdraw a student from a public school if it engages in actions the parent believes inappropriate for the child and send her child to private school. *Id.* at 102. Where a public school withholds information from a parent on which the parent can make *that* choice, however, then this choice is rendered meaningless. Absent some individualized finding of good cause to withhold such information, a policy of blanket withholding—as the Plaintiffs here are endorsing—violates the fundamental rights of parents, who are thus effectively deprived of their *Parker* choice.

or conceal the information necessary to discharge that duty. Yet the Plaintiffs, in arguing against the Policy, seek precisely that: to withhold from fit parents information they need to aid their children in growing up. That is unconstitutional.

Marlboro's Policy 5756, by contrast, correctly balances the rights of parents with the needs of children in those circumstances in which there is specific reason to withhold information. The Policy is constitutional, and the Plaintiffs cannot show a likelihood of success on the merits.

II. The Plaintiffs do not face irreparable injury—but the Parents do.

Along with a showing of likelihood of success, the Plaintiffs must also show that it is "necessary to prevent irreparable harm." *Crowe v. DeGioia*, 90 N.J. 126, 132 (1982). But it's parents like Angela Tycenski, not the Plaintiffs, who face the risk of irreparable harm. Here, Plaintiffs suggest that transgender, gender non-conforming, and non-binary students will face immediate harm by the Amended Policy, while the Board will not suffer any harm from a "temporary delay" in its implementation. Plfs.' Br. at 26–27. But the reality is that parents will be irreparably harmed by enjoining the implementation of Policy 5756. Once a parent is kept in the dark about a school's decisions regarding their children's gender identity or expression, a constitutional injury has occurred: specifically, the parent's right to be informed about their child's well-being and their right to decide what is best for their child has been violated. And because the point is to keep parents in the dark, parents may never know their rights had been violated until long after the fact. Nor is there any way to remedy this violation if a parent should learn about it; it is not the kind of financial injury that can be remedied by money damages. An injunction requiring parental notification *in the future* would be little comfort to a parent after the school has taken action, without the parent's consent, with respect to the student's gender identity or gender expression.

Thus, a parent's constitutional rights are violated simply by the status quo because there is no way for parents to know whether school officials have concealed or withheld such information unless the parent learns through other channels that the policy *has been applied* to their child—and by that time, there is nothing school officials could do to remedy their unwarranted intrusion into the parent-child relationship. In simpler terms, parents cannot know if their rights are being violated unless and until their rights have already been violated. And given that the violation consists of withholding

information that parents need to meaningfully exercise their right to decide what's best for their children, no forward-looking relief can remedy the harm done *after* the parent discovers the injury.

Further, the status quo that Plaintiffs allege the injunction will preserve is one rife with constitutional inadequacies. Plfs.' Br. at 26. As demonstrated above, the status quo that the Plaintiffs seek to preserve *requires* school officials to violate both the federal Constitution and the New Jersey Constitution and upend a longstanding presumption of parental fitness.

III. The balance of harms weighs firmly against the granting of preliminary relief.

Finally, to obtain an injunction, Plaintiffs must also show that the relative hardship to the parties with respect to the granting or withholding of relief tips in their favor. *Crowe*, 90 N.J. at 134. But the balance of harms always tips in favor of the Constitution—and in this case, that means parents like Angela Tycenski, and not the Plaintiffs.

"'[T]here can be no irreparable harm to a [government] when it is prevented from enforcing an unconstitutional statute because "it is always in the public interest"' to protect constitutional liberties." *Garden State Equal. v. Dow*, 433 N.J. Super. 347, 352–53 (Law. Div. 2013) (citations omitted). That means the balance tips in favor of the parents and against the Plaintiffs.

If the Plaintiffs are denied an injunction, school officials will still be free to withhold information from parents in the event that there is an actual risk of harm to a student, shown on a case-by-case basis. But if the injunction is granted, schools will be barred from notifying *fit* parents of information crucial to their making decisions involving the health and welfare of their children—a right that is fundamental under both the state and federal constitutions. *Troxel*, 530 U.S. at 65; *Moriarty*, 177 N.J. at 115.

In short, granting the injunction will result in a non-disclosure regime that interferes with parents' fundamental constitutional rights—whereas denying the injunction would allow for the implementation

of a Policy that presumes parental fitness for involvement in decisions being made about their children's intimate choices and overall well-being, while nonetheless allowing school officials to withhold information only in the event that disclosure poses a risk to student health and safety.

CONCLUSION

For the foregoing reasons, Plaintiffs have failed to establish a likelihood of success on the merits, and are therefore not entitled to injunctive relief. The motion should be *denied*.

RESPECTFULLY SUBMITTED this 14th day of August, 2023 by:

/s/ Justin Meyers
Justin A. Meyers (041522006)

LAW OFFICES OF G. MARTIN MEYERS, PC

CERTIFICATE OF SERVICE

JUSTIN A. MEYERS, ESQ., certifies and declares as follows:

1. I am an attorney of law of the State of New Jersey. I am counsel for the plaintiff in the above-captioned matter, and as such I have full knowledge of the facts set forth herein.

2. On August 14, 2023, I served a true and correct copy of Intervenor-Defendant's Brief in Opposition to Plaintiffs' Application for Injunctive Relief Restraining Implementation or Amendment of Policy 5756 in connection with the above-mentioned matter to the following via JEDS and email:

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August 14, 2023

VIA JEDS
Hon. David F. Bauman, Ch. J.
Superior Court, Chancery Division
71 Monument Street, Floor 2
Freehold, New Jersey 07728

Re: Matthew J. Platkin, Attorney General of the State of New Jersey, et al., v. Marlboro Township Board of Education, et al.
Docket No. MON-C-0078-23

Dear Judge:

Please accept for filing the enclosed Motion to Intervene in the above referenced matter, along with the Intervenor's accompanying motions for admission *pro hac vice*.

The proposed Intervenor respectfully requests an opportunity to be heard at tomorrow's hearing, if such opportunity presents itself.

Respectfully submitted,

/s/ Justin Meyers
Justin A. Meyers (041522006)

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MATTHEW J. PLATKIN, Attorney General of New Jersey, and SUNDEEP IYER, Director, New Jersey Division on Civil Rights,

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SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION, GENERAL EQUITY – MONMOUTH COUNTY

DOCKET NO. MON-C-000078-23

INTERVENOR-DEFENDANT'S ANSWER AND COUNTERCLAIMS

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Intervenor-Defendant Angela Tycenski—a parent of two children in the Marlboro school system—by way of her Answer and Counterclaims, alleges as follows:

1. Intervenor-Defendant denies the allegations in Paragraph 1 of the Verified Complaint.

2. Intervenor-Defendant admits that the Board passed Policy 5756 on June 20, 2023, and she denies the remaining allegations in Paragraph 2.

3. Intervenor-Defendant denies the allegations in Paragraph 3.

4. Intervenor-Defendant admits the allegations in Paragraph 4.

5. Intervenor-Defendant denies the allegations in Paragraph 5.

6. Responding to Paragraph 6, Intervenor-Defendant admits that Plaintiffs seek injunctive relief in this action. With regard to the balance of the allegations in paragraph 6 of plaintiffs' complaint, Intervenor-Defendant leaves Plaintiffs to their proofs. To the extent a responsive pleading is required, Intervenor-Defendant denies the balance of the allegations in paragraph 6 of plaintiff's Complaint.

7. Responding to Paragraph 7, Intervenor-Defendant admits that Plaintiffs seek injunctive relief in this action. With regard to the balance of the allegations in paragraph 6 of plaintiffs' complaint, Intervenor-Defendant leaves Plaintiffs to their proofs. To the extent a responsive pleading is required, Intervenor-Defendant denies the balance of the allegations in paragraph 6 of plaintiff's Complaint.

8. Intervenor-Defendant makes no response to the allegations contained in Paragraph 8 as these allegations are not directed to Intervenor-Defendant but insofar as said allegations may be deemed to apply, the same are denied.

9. Intervenor-Defendant makes no response to the allegations contained in Paragraph 9 as these allegations are not directed to Intervenor-Defendant but insofar as said allegations may be deemed to apply, the same are denied.

10. Intervenor-Defendant admits the allegations in Paragraph 10.

11. Intervenor-Defendant admits the allegations in Paragraph 11.

12. Responding to Paragraph 12, Intervenor-Defendant admits that venue is proper in this action and that Plaintiffs seek injunctive relief in this action. With regard to the balance of the allegations in Paragraph 12, Intervenor-Defendant leaves Plaintiffs to their proofs. To the extent a responsive pleading is required, Intervenor-Defendant denies the balance of the allegations in Paragraph 12.

13. Responding to Paragraph 13, Intervenor-Defendant responds that the LAD speaks for itself and denies Plaintiffs' characterization thereof.

14. Responding to Paragraph 14, Intervenor-Defendant responds that the LAD speaks for itself and denies Plaintiffs' characterization thereof.

15. Responding to Paragraph 15, Intervenor-Defendant responds that the LAD speaks for itself and denies Plaintiffs' characterization thereof.

16. Responding to Paragraph 16, Intervenor-Defendant responds that the LAD speaks for itself and denies Plaintiffs' characterization thereof.

17. Responding to Paragraph 17, Intervenor-Defendant responds that N.J.S.A. 18A:36-41 speaks for itself and denies Plaintiffs' characterization thereof.

18. Responding to Paragraph 18, Intervenor-Defendant responds that the State Guidance and the LAD speak for themselves and deny Plaintiffs' characterizations thereof.

19. Responding to Paragraph 19, Intervenor-Defendant responds that the State Guidance speaks for itself and denies Plaintiffs' characterizations thereof.

20. Responding to Paragraph 20, Intervenor-Defendant responds that the State Guidance speaks for itself and denies Plaintiffs' characterizations thereof.

21. Responding to Paragraph 21, Intervenor-Defendant responds that the State Guidance speaks for itself and denies Plaintiffs' characterizations thereof.

22. Responding to Paragraph 22, Intervenor-Defendant admits that the Marlboro Township Board of Education adopted Policy 5756. With regard to the balance of the allegations in Paragraph 22, Intervenor-Defendant responds that Policy 5756 speaks for itself and denies Plaintiffs' characterizations thereof.

23. Responding to Paragraph 23, Intervenor-Defendant responds that Policy 5756 speaks for itself and denies Plaintiffs' characterizations thereof.

24. Responding to Paragraph 24, Intervenor-Defendant admits that the Marlboro Township Board of Education adopted Amended Policy 5756. With regard to the balance of the allegations in Paragraph 22, Intervenor-Defendant responds that Amended Policy 5756 speaks for itself and denies Plaintiffs' characterizations thereof.

25. Responding to Paragraph 25, Intervenor-Defendant responds that Amended Policy 5756 speaks for itself and denies Plaintiffs' characterizations thereof.

26. Responding to Paragraph 26, Intervenor-Defendant responds that Policy 5756 and Amended Policy 5756 speak for themselves and denies Plaintiffs' characterizations thereof.

27. Responding to Paragraph 27, Intervenor-Defendant responds that Amended Policy 5756 speaks for itself and denies Plaintiffs' characterizations thereof.

28. Responding to Paragraph 28, Intervenor-Defendant responds that Amended Policy 5756 speaks for itself and denies Plaintiffs' characterizations thereof.

29. Responding to Paragraph 29, Intervenor-Defendant responds that Amended Policy 5756 speaks for itself and denies Plaintiffs' characterizations thereof.

30. Responding to Paragraph 30, Intervenor-Defendant responds that Amended Policy 5756 speaks

for itself and denies Plaintiffs' characterizations thereof.

31. The allegations set forth in Paragraph 31 of Plaintiffs' Complaint call for a legal conclusion to which no response is required, and therefore Intervenor-Defendant denies same and leaves Plaintiffs to their proofs.

32. Intervenor-Defendant denies the allegations contained in Paragraph 32.

33. Intervenor-Defendant denies the allegations contained in Paragraph 33.

34. Intervenor-Defendant denies the allegations contained in Paragraph 34.

35. Responding to Paragraph 35, Intervenor-Defendant responds that the scientific literature speaks for itself and denies Plaintiffs' characterization thereof.

36. Responding to Paragraph 36, Intervenor-Defendant responds that the scientific literature speaks for itself and denies Plaintiffs' characterization thereof.

37. Responding to Paragraph 37, Intervenor-Defendant responds that Amended Policy 5756 speaks for itself and denies Plaintiffs' characterizations thereof.

38. Responding to Paragraph 38, Intervenor-Defendant responds that Amended Policy 5756 speaks for itself and denies Plaintiffs' characterizations thereof.

39. Responding to Paragraph 39, Intervenor-Defendant responds that Amended Policy 5756 speaks for itself and denies Plaintiffs' characterizations thereof.

40. Responding to Paragraph 40, Intervenor-Defendant admits that Plaintiffs filed an administrative complaint with the Division on Civil Rights. With regard to the balance of the allegations in Paragraph 40, Intervenor-Defendant leaves Plaintiffs to their proofs. To the extent a response is required, Intervenor-Defendant denies the balance of the allegations in Paragraph 40.

41. Responding to Paragraph 41, Intervenor-Defendant admits that Plaintiffs brought this lawsuit and

are seeking injunctive relief. With regard to the balance of the allegations in Paragraph 40, Intervenor-Defendant leaves Plaintiffs to their proofs. To the extent a response is required, Intervenor-Defendant denies the balance of the allegations in Paragraph 41.

42. Intervenor-Defendant responds that whatever academic literature Plaintiffs are referencing in Paragraph 42 speaks for itself, and Intervenor-Defendant denies Plaintiffs' characterizations thereof. Intervenor-Defendant denies the balance of the allegations contained in Paragraph 42.

COUNT ONE

43. Responding to Paragraph 43, Intervenor-Defendant incorporates her allegations of all foregoing paragraphs and fully incorporates them herein.

44. Intervenor-Defendant responds to Paragraph 44 that N.J.S.A. 10:5-12(f) speaks for itself and denies Plaintiffs' characterizations thereof.

45. Intervenor-Defendant denies the allegations contained in Paragraph 45.

46. Intervenor-Defendant denies the allegations contained in Paragraph 46.

47. Intervenor-Defendant denies the allegations contained in Paragraph 47.

48. Intervenor-Defendant denies the allegations contained in Paragraph 48.

49. The allegations in Paragraph 49 call for a legal conclusion to which no response is required and therefore Intervenor-Defendant denies the same and leaves Plaintiffs to their proofs.

Wherefore, Intervenor-Defendant respectfully requests that the Court dismiss Count One of Plaintiffs' Complaint and award Intervenor-Defendant her costs, counsel fees, and such other relief as the Court may deem just and proper.

COUNT TWO

50. Responding to Paragraph 50, Intervenor-Defendant incorporates her allegations of all foregoing paragraphs and fully incorporates them herein.

51. Responding to Paragraph 51, Intervenor-Defendant states that N.J.S.A. 10:5-12(e) speaks for itself, and denies Plaintiffs' characterizations thereof.

52. Intervenor-Defendant denies the allegations contained in Paragraph 52.

53. Intervenor-Defendant denies the allegations contained in Paragraph 53.

54. The allegations in Paragraph 54 call for a legal conclusion to which no response is required and therefore Intervenor-Defendant denies the same and leaves Plaintiffs to their proofs.

Wherefore, Intervenor-Defendant respectfully requests that the Court dismiss Count Two of Plaintiffs' Complaint and award Intervenor-Defendant her costs, counsel fees, and such other relief as the Court may deem just and proper.

SEPARATE DEFENSES

1. The Complaint fails to state a claim upon which relief may be granted.

2. Intervenor-Defendant reserves the right to raise additional defenses as continuing investigation and discovery may reveal.

COUNTERCLAIM ONE
Violation of the Fourteenth Amendment to the United States Constitution

1. Intervenor-Defendant incorporates all preceding paragraphs as though fully set forth herein.

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that a state shall not "deprive any person of life, liberty, or property, without due process of law."

3. This clause protects, among other rights, parents' fundamental right to control and direct the upbringing, education, and healthcare of their children.

4. These parental rights are both "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 703, 720–21 (1997) (internal marks and citations omitted). Indeed, they are "perhaps the oldest of the fundamental liberty interests" protected by the United States Constitution. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000).

5. Parents' rights include at a minimum the right to be informed of a public school's actions and decisions regarding their children's gender identity and/or gender expression.

6. The right to be informed of such actions and decisions necessarily flows from the right to direct the upbringing, education, and healthcare of one's children, because a parent cannot meaningfully exercise the right to make decisions regarding a child's upbringing, education, and healthcare if a public school denies the parent basic information regarding the child's upbringing, education, and healthcare.

7. The New Jersey Department of Education Transgender Student Guidance for School Districts ("Guidance") violates Parents' parental rights and is thus unconstitutional under the Fourteenth Amendment because it directs schools and school officials to deny Parents information regarding their children's gender identity and/or gender expression.

8. Intervenor-Defendant is entitled to preliminary injunctive and declaratory relief to protect their fundamental rights under the United States Constitution.

Wherefore, Intervenor-Defendant respectfully requests that this Court declare that the Guidance violates the United States Constitution and enjoin the State from any enforcement of the Guidance or any other action taken pursuant to, or under the authority of, the Guidance.

COUNTERCLAIM TWO
Violation of the New Jersey Constitution's

9. Intervenor-Defendant incorporates all preceding paragraphs as if fully set forth herein.

10. New Jersey's state constitution recognizes and protects parental rights at least as extensively as the Fourteenth Amendment to the United States Constitution. *New Jersey Div. Of Youth & Family Servs. v. G.L.*, 191 N.J. 596, 605 (2007).

11. The Guidance violates Parents' rights under the New Jersey Constitution to direct the upbringing, education, and healthcare of their children because it directs schools and school officials to deny Parents information regarding their children's gender identity and/or gender expression.

12. Intervenor-Defendant is entitled to preliminary injunctive and declaratory relief to protect their fundamental rights under the New Jersey Constitution.

13. Wherefore, Intervenor-Defendant respectfully requests that this Court declare that the Guidance violates the New Jersey Constitution and enjoin the State from any enforcement of the Guidance or any other action taken pursuant to, or under the authority of, the Guidance.

TRIAL ATTORNEY DESIGNATION

Pursuant to the provisions of R. 4:25-4, Adam Shelton, Esq. is hereby designated as trial counsel.

R. 4:5-1 CERTIFICATION

Intervenor-Defendant hereby certifies that the matter in controversy is not the subject of any other action pending in any court and is likewise not the subject of any pending arbitration proceeding except for the administrative complaint filed with the Division on Civil Rights. Intervenor-Defendant further certifies that she has no knowledge of any contemplated action or arbitration proceeding regarding the subject matter of this action. Intervenor-Defendant further certifies that she is not aware of any other parties who should be joined in this action.

R. 4:5-1 (b)(3) CERTIFICATION

Undersigned counsel certifies that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

RESPECTFULLY SUBMITTED this 14th day of August, 2023 by:

/s/ Justin Meyers
Justin A. Meyers (041522006)

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MATTHEW J. PLATKIN, Attorney General of New Jersey, and SUNDEEP IYER, Director, New Jersey Division on Civil Rights,

Plaintiffs,

vs.

MARLBORO TOWNSHIP BOARD OF EDUCATION and MARLBORO TOWNSHIP PUBLIC SCHOOL DISTRICT,

Defendants.

SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION, GENERAL EQUITY – MONMOUTH COUNTY

DOCKET NO. MON-C-000078-23

CERTIFICATION OF SERVICE

On the Brief:

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Jonathan Riches, Esq. (Pro hac vice application pending)
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JUSTIN A. MEYERS, ESQ., certifies and declares as follows:

1. I am an attorney of law of the State of New Jersey. I am counsel for the plaintiff in the above-captioned matter, and as such I have full knowledge of the facts set forth herein.

2. On August 14, 2023, I served a true and correct copy of Intervenor-Defendants Answer and Counterclaims in connection with the above-mentioned matter to the following via JEDS and email:

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Defendants.

SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION, GENERAL EQUITY – MONMOUTH COUNTY

DOCKET NO. MON-C-000078-23

MEMORANDUM IN SUPPORT OF INTERVENOR-DEFENDANT ANGELA TYCENSKI'S MOTION TO INTERVENE

On the Brief:

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Pursuant to New Jersey Court Rules 4:10-3 and 4:33-2, Angela Tycenski respectfully moves to intervene in this lawsuit as Defendants for the purpose of protecting her fundamental rights as parents under the United States and New Jersey Constitutions to direct the care and upbringing of their children. Angela Tycenski seeks to intervene as of right, or, in the alternative, permissively to oppose the application for preliminary injunctive relief filed by the Attorney General on June 21, 2023.

BACKGROUND

The New Jersey Department of Education has adopted guidelines establishing how New Jersey public schools should implement the Law Against Discrimination ("LAD") for transgender students. *See* N.J. Stat. 18A:36-41. The guidelines instruct that there is no "affirmative duty for any school district personnel to notify a student's parent or guardian of the student's gender identity or expression," and that school officials should not involve parents in decisions regarding accommodations for transgender students unless a student affirmatively involves the parents or state law specifically requires parental involvement. N.J. Dept. of Educ., Transgender Student Guidance for School Districts attached as Exhibit 1.

The Marlboro School District (the "District), has adopted a policy that requires parental notification "of the student's change in gender identity or expression except where this is reason to believe that doing so would pose a danger to the health or safety of the pupil."

On June 23, the Attorney General filed a lawsuit against the District (along with lawsuits against two other districts with similar policies), alleging the District's policy violates the LAD. The Attorney General also filed an application for preliminary injunctive relief against the

District, which would enjoin the District's policy and forbid school officials in the District from informing parents of developments involving the education, upbringing, and health of their children, including information pertaining to a child's gender identity.

This Court has set a hearing on the Attorney General's motion for preliminary injunctive relief on August 15, 2023. On July 24, 2023, the District filed its opposition to the Attorney General's motion, making a variety of arguments based on (among other things) the LAD, parental rights under the federal Constitution, and the federal Family Educational Rights and Privacy Act.

Angela Tycenski seeks to intervene as Defendant to assert her own rights as parents under both the New Jersey and United States Constitutions – rights that the District has commendably sought to uphold with its policy, but which only parents like Angela Tycenski actually possess and are capable of vindicating.

ARGUMENT

I. Angela Tycenski is entitled to intervene as of right.

To intervene as of right, a third party must:

> (1) claim "an interest relating to the property or transaction which is the subject of the [proceedings]," (2) show that the movant is "so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest," (3) demonstrate that the "movant's interest" is not "adequately represented by existing parties," and (4) make a "timely" application to intervene.

ACLU of N.J., Inc. v. Cnty. of Hudson, 352 N.J. Super. 44, 67 (App. Div. 2002) (citation omitted). "The substance of the rule permitting intervention as of right is also ordinarily construed quite liberally." *Id.* Angela Tycenski satisfies all four criteria and should therefore be

allowed to intervene as of right.

A. Angela Tycenski has claimed an interest in the subject of the litigation.

The first factor "simply requires the applicant to claim 'an interest' relating to the property or transaction which is the subject of the action." *Atl. Emp'rs Ins. Co. v. Tots & Toddlers Pre-School Day Care Ctr., Inc.*, 239 N.J. Super. 276, 280 (App. Div. 1990). At this stage, the applicant need not *prove* that interest on the merits; it only needs to *claim* an interest. Angela Tycenski satisfies this requirement: As she explains in detail in the attached Opposition, her fundamental rights to direct the upbringing of her children are at stake in this litigation. New Jersey courts have recognized in a variety of contexts that these fundamental rights are *implicated* when the government sets policies that infringe on parents' ability to direct their children's upbringing. *See Moriarty v. Bradt*, 177 N.J. 84, 115 (2003); *Betancourt v. Town of W. New York*, 338 N.J. Super. 415, 421 (App. Div. 2001). This is enough to satisfy the first requirement for intervention.

B. Disposition of this action will impair Angela Tycenski's ability to protect her interests.

The District's policy directly implicates Angela Tycenski's asserted right to be informed of major occurrences in their children's lives. If the Court grants the relief the Attorney General is requesting and enjoins the policy, Angela Tycenski —or any other parents—will have no notice of critical events in their children's lives, and thus will be deprived of their constitutional rights to direct the upbringing of their children. This would "as a practical matter substantially impair the ability of those not now parties to protect their interests," and therefore, the second

requirement for intervention as of right is satisfied. *Cold Indian Springs Corp. v. Ocean Twp.*, 154 N.J. Super. 75, 90 (Law Div. 1977).

C. Angela Tycenski's interests are not adequately represented by existing parties.

New Jersey courts and their federal counterparts have made clear that a prospective intervenor need only make a minimal showing that existing parties *may* not adequately represent an intervenor's interests. *See, e.g.*, *In re Will of Gardner*, 215 N.J. Super. 578, 585 (1987) (explaining the best practice is to permit intervention where "potential conflict of interest" is apparent, even if "no absolute necessity for intervention"); *see also Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) ("The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal.").

Angela Tycenski has satisfied that requirement, as no existing party is in a position to adequately assert the constitutional right of *parents* in this lawsuit. The Attorney General obviously cannot do so, as his stance is that the law requires schools *not* to notify parents of major decisions involving their children, which is directly adverse to Angela Tycenski's interests.

Moreover, while Defendants and Angela Tycenski are (as a very general matter) currently in agreement that this lawsuit implicates Angela Tycenski's constitutional rights, Defendants also cannot adequately represent her interests.

It is, of course, axiomatic that citizens have constitutional rights; governments have

powers (conferred to them by citizens). *See* U.S.C.A. § DECLARATION OF INDEPENDENCE ¶ 2. This intervention involves citizens asserting *their own* constitutional rights. And Angela Tycenski is in the best position to protect her rights in this case. For the moment, Angela Tycenski's rights are being recognized by the District's policy, but there is no guarantee they will continue to be protected, including in this litigation.

What's more, the mere fact that an existing party has raised similar legal issues does not mean that party can adequately represent a differently situated third party. Here, Defendants must think not only of Parents' interests, but of their own, and they could have different motives from Parents regarding whether (and how) to settle this lawsuit, whether to appeal an adverse ruling, and how much to emphasize parental rights vis-à-vis the other issues in this case. *See Meehan v. K.D. Partners, L.P.*, 317 N.J. Super. 563 (App. Div. 1998) (noting board's decision not to appeal adverse decision meant board could not adequately represent interests of intervenors affected by decision). It is also possible that the District may change its Policy as a result of this litigation. This has, in fact, already happened in another case involving a similar school policy subject to litigation from the Attorney General. *See Platkin v. Hanover Twp. Bd. of Educ.*, MRS-C-000042-23 (Morris Cnty. Super. Ct. filed May 17, 2023); *see also* Matt Trapani, *Hanover School Officials Walk Back Policy Regarding Contacting Parents About LGBTQ+ Students*, News 12 N.J. (June 8, 2023).[1] Indeed, in any future situation where Defendants must decide whether to notify parents of a student's change in gender identity or

[1] https://newjersey.news12.com/hanover-school-officials-walk-back-policy-regarding-contacting-parents-about-lgbtq-students.

expression, failure to adequately account for parental rights could make Defendants and Parents directly adverse to each other. Thus, Defendants' and Angela Tycenski's interests are far from being totally aligned, and Parents need a say in this litigation to ensure their own constitutional rights are fully asserted.

D. Intervention is timely.

Angela Tycenski's intervention is timely. Once Angela Tycenski learned that a pending lawsuit threatened her constitutional rights, she worked diligently to intervene as quickly as possible. She moved to intervene less than two months after the lawsuit was filed, and less than two weeks after Defendants filed their Opposition to Order to Show Cause—her first opportunity to assess all the existing parties' positions and legal arguments and determine whether intervention would be necessary. *See, e.g.*, *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) ("Applicants filed their motion to intervene in a timely manner, less than three months after the complaint was filed and less than two weeks after the [defendant] filed its answer to the complaint."). She has also filed her motion before the scheduled hearing on the application for preliminary relief, affording the parties and the Court time to review her arguments and prepare to address them at the hearing.

This easily satisfies the timeliness standards New Jersey courts apply to intervention motions, particularly in an expedited proceeding for preliminary relief such as this one.

II. Angela Tycenski should be allowed to intervene permissively.

Angela Tycenski is also entitled to intervene permissively. Under the "more liberal permissive intervention rule …, intervention is appropriate 'if the movant's claim or defense'

presents 'a question of law or fact in common' with the pending action." *N.J. Dep't of Env't'l Prot. v. Exxon Mobile Corp.*, 453 N.J. Super. 272, 287 (App. Div. 2018) (citation omitted). Additionally, "[p]ermissive intervention pursuant to Rule 4:33-2, requires a trial court to liberally determine 'whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties.'" *N.J. Div. of Youth & Family Servs. v. D.P.*, 422 N.J. Super. 583, 590–91 (App. Div. 2011) (citation omitted); *see also Exxon Mobile Corp.*, 453 N.J. at 265.Both considerations weigh in favor of permissive intervention here.

First, as Angela Tycenski describe at length in her attached Opposition, her defense (i.e., that enjoining the policy would violate her constitutional rights under the state and federal constitutions) is inseparably linked with the key question at this stage of the pending lawsuit: whether the Court should grant the Attorney General's application for injunctive relief.

Second, permissive intervention would not "'unduly delay or prejudice the adjudication of the rights of the original parties,'" *D.P.*, 422 N.J. Super. at 590–91 (citation omitted). Angela Tycenski is not asking for any postponement of existing deadlines or hearings, and their purely legal arguments would not require significant fact discovery. What's more, parental rights are already at issue in this case, so Angela Tycenski's arguments and interests, while unique, would not fundamentally change the scope of the legal issues.

In sum, Angela Tycenski's defenses are inextricably connected to the existing claims and defenses in this case, and allowing her to present those arguments would not prejudice existing parties or delay the proceedings. Therefore, if this Court does not grant intervention as of right, it should grant permissive intervention for the purpose of opposing the Attorney General's

application for injunctive relief.

CONCLUSION

This Court should GRANT Angela Tycenski's Motion to Intervene and allow her to intervene as defendants as of right or, in the alternative, permissively.

RESPECTFULLY SUBMITTED this 14th day of August, 2023 by:

/s/ Justin Meyers
Justin A. Meyers (041522006)

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JUSTIN A. MEYERS, ESQ., certifies and declares as follows:

1. I am an attorney of law of the State of New Jersey. I am counsel for the Proposed Intervenor-Defendant Angela Tycenski in the above-captioned matter, and as such I have full knowledge of the facts set forth herein.

2. On August 14, 2023, I served a true and correct copy of Intervenor-Defendant's Memorandum in Support of Motion to Intervene in connection with the above-mentioned matter to the following via JEDS and email:

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