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(Defendants CDE and Tony Thurmond in his Official Capacity as SPI are Governmental Parties Exempt from the Provisions of FRCP 7.1 and L.R. 7-1.1)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHAYA LOFFMAN and JONATHAN LOFFMAN, on their own behalf and on behalf of their minor child M.L.; FEDORA NICK and MORRIS TAXON, on their own behalf and on behalf of their minor child K.T.; SARAH PERETS and ARIEL PERETS, on their own behalf and on behalf of their minor child N.P.; JEAN & JERRY FRIEDMAN SHALHEVET HIGH SCHOOL; and SAMUEL A. FRYER YAVNEH HEBREW ACADEMY,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF EDUCATION; TONY THURMOND, in his official capacity as Superintendent of Public Instruction; LOS ANGELES UNIFIED SCHOOL DISTRICT; and ANTHONY AGUILAR, in his official capacity as Chief of Special Education, Equity, and Access,

Defendants.

Case No. 2:23-cv-01832-JLS-MRW

THE STATE DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Hearing: July 21, 2023
Time: 10:30 a.m.
Courtroom: 8A
Judge: Hon. Josephine L. Staton

Action Filed: March 13, 2023
Trial Date: Not set

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I. INTRODUCTION

Plaintiffs' opposition to the State Defendants' motion to dismiss asserts that the motion relies on defendants' "own set" of "alternative facts," instead of the Complaint's allegations. (Dkt. 37 at 12:12-13.) But nowhere do Plaintiffs try to support that conclusion. The motion relies on the law and the Complaint's allegations, or lack thereof. That is all. And that is all that is needed to determine that Plaintiffs lack standing and that all counts fail to state a claim.

II. PLAINTIFFS DO NOT DISPUTE ANY OF THE POINTS AND AUTHORITIES IN THE STATE DEFENDANTS' PRESENTATION OF THE HIGHLY RELEVANT LEGAL FRAMEWORK

The motion used eleven pages to lay out the legal framework of the IDEA and California's NPS system (Dkt. 31-1, § II), because it is critical to properly assessing this case. While the opposition sporadically mischaracterizes aspects of the framework (as discussed below), it largely ignores the State Defendants' presentation, and it does not attempt to contradict any of its points or authorities. While the Court may revisit § II of the motion for the full discussion, it is worth taking stock of the following undeniable and uncontested key conclusions here:

- Under the IDEA, families have a choice to enroll their child in a private school or to accept their state's free public education; in either case the IDEA provides services. (*See* Dkt. 31-1 [Mot. to Dismiss], § II.A., at 13.)
- The IDEA's provision of services differs based on a family's choice, but Plaintiffs do not challenge that difference, and its constitutionality has been upheld. (*Id*. at 13-14.)
- When a family accepts the state's free public education, the state directs the provision of *its* state-adopted *public* curriculum, even in the rare case where the law's "least restrictive environment" rules permit NPS placement. (*Id*., § II.C., at 14-16.)
- The IDEA's "free appropriate public education" need not account for a family's desire for religious instruction; and ultimately, placement decisions are made by state officials, with courts giving due weight to their expertise. (*Id*., § II.D., at 16-18.)

- When a local educational agency ("LEA") places a child in an NPS, IDEA funds benefit the child whose family has accepted the state's free public education (not the NPS itself) and may not be used for religious instruction. (*Id*., § II.E., at 18.)
- The nonsectarian NPS requirement only comes into play when a family accepts the state's free public education, and only when no appropriate public program is available (and IDEA's least restrictive environment rules allow). (*Id*., § II.F., at 18-19.)
- An NPS assists an LEA in providing California's public education under an IEP – including through required use of state-approved textbooks and curriculum and state-credentialed teachers – pursuant to a contract; however, the child is deemed enrolled in public school and graduates with a diploma from the LEA. (*Id*., § II.G., at 19-21.)
- NPS placement involves extensive and continuing state monitoring, evaluation and direction, with the required shared goal of transitioning a pupil back to less restrictive environments in the LEA. (*Id*., § II.H., at 21-23.)

Plaintiffs' avoidance of each of these critical points should not let any be forgotten. But perhaps the opposition's most telling and damaging omission is its failure to cite or grapple with *M.L. v. Smith*, 867 F.3d 487 (4th Cir. 2017), *cert. denied*, 138 S.Ct. 752 (2018), a case dealing with an Orthodox Jewish family's claim that the IDEA required their child's IEP to account for their child's religious and cultural needs and to call for the provision of religious and cultural instruction. As discussed in the motion (Dkt. 31-1 at 17:28 – 18:13), the court analyzed the IDEA's key provisions and rejected the claim. *M.L.*, 867 F.3d at 496-99. It also recognized that federal regulations prohibit the use of IDEA funds for religious instruction. *Id*. at 496; 34 C.F.R. § 76.532(a)(1).

It is not simply that Plaintiffs failed to cite *M.L.* or the above cited regulation, but still challenged the points they establish and that were argued in the motion. The opposition does not challenge the points *at all*. Thus, even though the Complaint makes clear that Plaintiffs brought this suit desiring the ability to provide/receive a private *religious* education, they have no answer to the fact that, even if the nonsectarian NPS requirement were removed, it would not allow them to obtain what they seek.

When the opposition is not ignoring the legal framework, it is mischaracterizing it. For example, Plaintiffs confuse the issues, and urge a false conclusion, relating to differences under the IDEA when a family chooses between accepting the state's offer of a free appropriate public education, or enrolling in a private school. As noted in the motion, a family can choose private school instead of public school (*i.e.*, a "parentally-placed" private school situation) and receive services under an IDEA "services plan" (which is different from an "IEP" developed for public school children). (Dkt. 31-1 at 13:23 – 14:20.) If a family chooses to enroll in public school but later believes that its LEA has *violated the IDEA* by failing to provide a free appropriate public education to its child, then it can initiate *legal action* against the LEA. (Dkt. 31-1 at 31:26 – 32:5.) In that event, if the family took the risk of enrolling their child in a private school pending the legal dispute (*i.e.*, a "unilaterally-placed" private school situation) then, *as a legal remedy for the LEA's violation of federal law*, the family may be awarded monetary compensation for the cost of that schooling if the family successfully proves that the LEA's FAPE offer did, in fact, violate the IDEA, and that the family's resulting private school placement was reasonable. (*Id.*; 20 U.S.C. § 1412(a)(10)(C)(ii).)

Plaintiffs refer to these two situations and claim that they are proof that California "*already* provides funding to religious schools when children with disabilities are parentally or unilaterally placed in those schools." (Italics in original) (Dkt. 37 at 43:14-23.) And they refer to the "parentally-placed" and the "unilaterally-placed" situations as two IDEA "programs" by which "children in California already can, and do, receive publicly funded services or tuition reimbursement in religious private schools." (*Id.* at 14:18 – 15:23.) Those characterizations are extremely misleading. With respect to the parentally-placed situation, no public money is given to private schools; rather, LEAs themselves spend IDEA funds to provide certain services to the eligible children attending those schools. Significantly, the IDEA contains several provisions requiring that those funds are only used for education that is "secular" and "neutral," and only to benefit the eligible children, as opposed to the private school itself or the private

school's general student population. *See* 20 U.S.C. § 1412(a)(10)(A)(vi) ("Special education and related services provided to parentally place private school children with disabilities, including materials and equipment, shall be secular, neutral, and nonideological."); 34 C.F.R. § 300.141(a) ("An LEA may ***not*** use [IDEA] funds . . . *to finance the existing level of instruction* in a private school ***or to otherwise benefit the private school***." Emphasis added.); 34 C.F.R. § 300.144(b)-(e) (more specific rules relating to facilities, equipment and supplies, intended to prevent benefiting the private school itself). And with respect to the "unilaterally-placed" situation, it is mistaken to view it as an IDEA "program" to fund religious school education; rather, it is a *legal remedy* to the victim when the state *violates* the IDEA. And even when that remedy is awarded, it is to the family (as compensation for the breach), not the private school.

Plaintiffs also misstate the law in stating that "[c]onsistent with IDEA's requirements, California law implementing IDEA guarantees the substantive right to a FAPE for all eligible students. Educ. Code § 56040." (Dkt. 37 at 16:10-12.) The statute Plaintiffs cite does not say that. It says that a "free appropriate public education" (or FAPE) "shall be *available to* individuals with exceptional needs" while recognizing that eligible families that choose private education will still be provided the "special education instruction and related services" they are entitled to in the parentally-placed context (though not with an IEP or FAPE). Educ. Code § 56040 (emphasis added).

Plaintiffs' opposition also asserts, without support, that the IDEA and California law provide "that a FAPE may be provided outside the public-school setting." (Dkt. 37 at 16:12-13). Plaintiffs overreach. They neglect the many IDEA provisions specifying that responsibility for carrying out the IDEA "remains with the public agency" and ensuring that the child is provided an education "that meets the standards that apply to education provided by" the state's public education agencies, through significant compliance monitoring. *See*, *e.g.*, 34 C.F.R. §§ 300.325(c), 300.147. It also neglects the whole essence of California's NPS system that, *inter alia*, requires an NPS to faithfully carry out the IEP developed by the LEA and to promise to work toward the

child's return to the LEA's regular classrooms as soon as practicable, and that specifies that when the student's IEP-prescribed work is completed, the student graduates with a diploma from the LEA. (*See* Dkt. 31-1 at 18-23 for full discussion of the NPS system.)

III. PLAINTIFFS CONCEDE THAT CDE AND THE DAMAGES CLAIMS MUST BE DISMISSED, AND THAT ANY POTENIAL RELIEF MUST BE LIMITED ONLY TO FORWARD-LOOKING INJUNCTIVE RELIEF

The motion explained that both sovereign immunity and the elements of a 42 U.S.C. § 1983 claim required: (1) dismissal of CDE as a party from the action; (2) dismissal of Plaintiffs' prayer for actual and nominal damages (*see* Dkt. 1 at 38:14-15, Prayer, §§f.-g.); and (3) that, if any of Plaintiffs' claims were permitted to proceed and determined to have merit, that judgment would be limited to prospective injunctive relief only. (Dkt. 37-1 at 24:20 – 21:17.) Plaintiffs do not rebut any of that, and their opposition concedes the points. (Dkt. 37 at 23, n.1.) The Court's ruling on the motion should dismiss CDE and the damages claims and specify that any potential relief against the SPI in his official capacity would be limited to forward-looking injunctive relief.

IV. PLAINTIFFS HAVE NOT CLEARLY ALLEGED, AND CANNOT ALLEGE, STANDING TO BRING AND MAINTAIN THIS ACTION

The motion argued that, based on the Complaint and the law, each of the Plaintiffs did not, and could not, establish standing. (Dkt. 31-1 at 25:18 – 34:6.)

Plaintiffs' opposition does not dispute that the Complaint demonstrates that Plaintiffs brought this action so that they could provide/receive a private Orthodox Jewish religious education. The opposition confirms it. (Dkt. 37 at 40, noting Plaintiffs' religiously motivated desire to provide/receive a private "religious education".) Nor does the opposition dispute any of the legal framework aspects that, *inter alia*: **(1)** make it impossible for any of the Families' children to be placed in ***any*** NPS (sectarian or otherwise) unless their IEP team and LAUSD concludes that LAUSD (the nation's second largest public school) is unable to provide an appropriate non-NPS placement, where appropriateness need not account for religious/cultural needs, and with the law

strongly favoring and requiring instruction in the least restrictive environment possible; and **(2)** requires an NPS to employ state-credentialed teachers, perform state assessments, follow state curriculum, use state-adopted instructional materials, promise to work toward a return to the LEA's lesser restrictive settings, comply with numerous other requirements, and subject themselves to extensive monitoring and auditing.

The opposition also does not rebut the motion's points that: **(1)** the Complaint's affirmative allegations about the children's disabilities and the special education services that they have been receiving in LAUSD public schools for years, strongly suggests that no NPS placement is possible or likely at *any* time, let alone imminently; and **(2)** the Complaint's allegations reflect that the Schools would not and could not agree to serve as an NPS, and the Complaint is silent on and reflects an ignorance of the non-challenged NPS requirements, thereby rendering the School's conclusory allegation "on information and belief" that they could and would serve as an NPS inherently suspect and implausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2005). Indeed, on the latter point, the opposition shows that while the Schools would like "to explore" what it means to serve as an NPS in the future, they have not even begun to do so. (Dkt. 21:27 – 22:1.)

Instead of rebutting these points, Plaintiffs' only argument that the Complaint clearly alleges all elements of standing is to assert that the mere "identification of a discriminatory barrier in a benefits scheme suffices to demonstrate standing[.]" (Dkt. 37 at 25:4-5.) That is not the law. Plaintiffs cite cases for the proposition that when there is an allegedly discriminatory barrier to some competitive or discretion-based process for obtaining some arrangement, the plaintiff is not required to plead and prove that they would have prevailed in the competition or that the defendant would have exercised its discretion to allow the plaintiff to perform the arrangement. However, Plaintiffs' approach fails. As an initial matter, of course, a holding that a plaintiff need not prove one thing says nothing about what is required. More fundamentally, however, that entire section of Plaintiffs' opposition is a straw man argument. The State Defendants did not argue that Plaintiffs must plead that the SPI would have exercised his discretion to

certify the Schools as NPSs (and/or that an LEA would decide to contract with them). Rather, their argument was based on the Schools' lack of ability and/or desire to actually fulfill the arrangement and perform as an NPS. The cases Plaintiffs cite are not inconsistent with that argument; in fact, as discussed below, they strongly support it.

When Plaintiffs finally do acknowledge the most recent Supreme Court precedent on what is required for federal jurisdiction in an analogous case (*Carney v. Adams*, 141 S.Ct. 493 (2020)), they misconstrue the relevant standard so as to render it meaningless. Essentially, they assert that it suffices for the Schools to say that, while they understand that there are a bunch of unchallenged NPS requirements, and that they "intend to explore" those things later on, they currently have a "belief" based only on unspecified "information," that they could, at some unspecified time in the future, meet the non-challenged requirements and obligations. (Dkt. 37 at 28:16-22.) That does not suffice.

Plaintiffs rely heavily on *Northeastern Fla. Chapter of the Associated General Contractors of America* ("*AGC*"), 508 U.S. 656 (1993). However, while *AGC* stands for the proposition that a plaintiff need not actually plead and prove that it would have been successful in some competitive bidding/selection process, it *is* required to "demonstrate that it is able ***and*** ready" to meet the required non-challenged obligations and that it is the challenged discriminatory policy that is "prevent[ing] it from doing so on an equal basis." *AGC*, 508 U.S. at 666 (emphasis added).

Plaintiffs assert that *AGC* held that the mere general allegation of a discriminatory barrier in an application process suffices for standing at the pleading stage. (Dkt. 37 at 28:1-3, citing *AGC*, 508 U.S. at 659). However, nothing in that opinion (at the cited page or elsewhere) could be construed as supporting that assertion. Indeed, at the cited page, the court noted that the petitioner in that case (challenging discriminatory preferences in competitive bidding for city construction contracts) was "an association of individuals and firms in the construction industry" and "alleged that many of its members '*regularly bid on and perform construction work for the City* of Jacksonville,' [citation], and that they '***would have bid*** on … designated set aside contracts ***but for*** the

restrictions imposed' by the ordinance[.]" *AGC*, 508 U.S. at 659 (emphasis added). Thus, in *AGC*, the complaint showed that there was a plaintiff that well-understood the non-challenged obligations and requirements that it would be required to meet if it obtained a city construction contract from the defendant, with an established history of bidding on and successfully obtaining such contracts from the defendant and actually performing such contracts for the defendant. And later in the opinion, the court emphasized that such allegations ensured "an 'injury … of sufficient immediacy … to warrant judicial intervention.'" *Id*. at 668-69 (ellipses in original).

The Supreme Court's decision in *Gratz v. Bollinger*, 539 U.S. 244 (2003) is equally unhelpful to Plaintiffs' position. There, the court reaffirmed the "able and ready" requirement for standing in a discriminatory college admissions case. *Gratz*, 539 at 262. The court rejected an argument that because one of the plaintiffs, a current undergraduate college student, did not actually apply *to* ***transfer*** to the defendant-college, he lacked standing to challenge the college's undergraduate admission policy. *Id*. at 260-262. In doing so, the court noted that the college student *had* applied to the college's undergraduate program, and was rejected, and that the district court had otherwise concluded that the record demonstrated that the plaintiff had *an actual present intent* "to transfer" (not just "apply" to transfer) to the defendant-college if its allegedly illegal policy were struck down and the transfer application were granted. *Id*. *Gratz's* recognition that a plaintiff's actual intent to accept and perform obligations but for the challenged law is particularly unhelpful to Plaintiffs in this case. Although their Complaint is impermissibly vague and conclusory about whether Plaintiffs could or would meet the non-challenged requirements and obligations of an NPS, it is abundantly clear that Plaintiffs' desire is to provide their own private religious education to Orthodox Jewish students. Plaintiffs' opposition does not dispute that the Schools' certification as an NPS would not allow them to do that.

Nor does the Ninth Circuit's decision in *Bras v. Calif. Pub. Utilities Com'n*, 59 F.3d 869 (9th Cir. 1995) support their position. In *Bras*, another case involving a

competitive bidding process with an allegedly discriminatory policy, the Ninth Circuit recognized *AGC's* able and ready requirement and held that the plaintiff could meet it in that case because: (a) he had performed work for the defendant in the past; (b) the defendant had expressed in writing that it had been pleased with the plaintiff's past work and that it would consider working with him in the future; and (c) the plaintiff had testified under oath: "I *earnestly desire* to reinstate my long term business relationship with Pacific Bell . . . in the future *and stand ready, willing and able* to provide such services should I be given an opportunity to do so." (Italics and ellipses in original.) *Bras*, 59 F.3d at 874. That sworn testimony of an earnest desire and readiness to provide "such services" underscores an important point: the constitutional requirement of standing cannot be met merely by an ability and readiness to *apply* if there is no ability, readiness or intent to *perform* if selected.

Plaintiffs' opposition ignores case law applying the *AGC* "able and ready" standard and demonstrating that it is not easily met, and that it certainly is *not* met merely by an asserted "interest" in applying. Indeed, in applying that standard in the case of a non-native Hawaiian challenging state law restricting business loan benefits to native Hawaiians, the Ninth Circuit found that the plaintiff lacked standing even though that plaintiff ***did***, in fact, apply for the business loan benefit. *Carroll v. Nakatani*, 342 F.3d 934, 938, 941-43 (9th Cir. 2003). The plaintiff in that case sought a loan to start a copy shop business, had spoken with "a sales clerk at Office Depot" about his desire to do so, and had submitted a loan application to the defendant-agency overseeing such benefit stating his contact information, the requested loan amount of $10,000, and the fact that he was "0% Hawaiian." *Id*. at 941. Nonetheless, the Court concluded:

> Even assuming [the plaintiff] had a legitimate intention *to apply* for a loan, he has done essentially nothing to demonstrate that he is in a position to compete equally with other OHA loan applicants. His application is materially deficient. Unlike the contractor cases cited above [*i.e.*, the *Bras* and *AGC* cases cited by Plaintiffs and discussed above], he has no work history with small business copy shops or any other entrepreneurial endeavors that might bolster his bona fides…

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> . . . [The plaintiff's] declaration of "interest" in starting a copy shop, and submission of a meritless application falls short of being "able and ready" to compete.

Carroll, 342 F.3d at 942-43. *Carroll* drives home the point that the readiness and ability standard cannot be met by a readiness and willingness to apply for an arrangement that the applicant has no readiness or willingness to fulfill. *Id*. at 942 ("Submission of a symbolic, incomplete application demonstrates neither readiness nor ability to compete for an OHA small business loan. Additionally, [the plaintiff] did not seek alternative sources of financing (*as required by OHA for Hawaiians*), he failed to formulate even a basic business plan, . . . has not researched necessary business expenses such as rent or equipment, and has only a vague sense about the cost of paper." Italics added.)

The Third Circuit's decision in *Ellison v. American Bd. of Orthopaedic Surgery*, 11 F.4th 200 (3rd Cir. 2021) is also instructive. In that case, a California surgeon who wanted to move to New Jersey and practice at certain New Jersey hospitals sued a professional certification board alleging that the board engaged in illegal behavior in restricting individuals from completing its certification process unless they first obtained staff privileges at a local hospital, which the plaintiff alleged ordinarily do not grant such privileges to surgeons not certified by the board. *Ellison*, 11 F.4th at 203. Even though the plaintiff alleged that applying for staff privileges at New Jersey hospitals would be futile, the court held that the California plaintiff lacked standing because he did not attempt to apply for medical staff privileges at the New Jersey hospitals and did not take "any concrete steps to practice in New Jersey." *Id*. The court considered the "able and ready" standard in light of the Supreme Court's relatively recent decision in *Carney v. Adams*, 141 S.Ct. 493 (2021) and recognized that "[a] plaintiff who alleges that he has been denied a benefit or opportunity for which he did not actually apply must generally plead enough facts to show that "he is 'able and ready' to apply" and that "even a statement of intent to take future action must reflect a concrete intent to do so imminently, rather than indefinite 'some day' intentions." (Emphasis added.) *Ellison*, 11 F.4th at 206-07. The court also recognized that "in most cases, a plaintiff will need to

plead that he or she took some actual steps that demonstrate a real interest in seeking the alleged benefit." *Id*. at 207. Underscoring that the "ready and able" standard must encompass a readiness and ability to actually perform the arrangement sought, the court rejected the argument that taking concrete steps was "futile" at the present time, stating:

> Ellison is not able and ready to apply for staff privileges merely because it might be futile to actually do so. It would be futile for a student who has yet to enter medical school to apply for staff privileges, but we could not reasonably conclude that the student was thus able and ready to apply for those privileges. Ellison must therefore plead something more to indicate that he was positioned to practice at the hospitals he specified in the near future. But the SAC does not allege that Ellison took any steps to that effect. Indeed, it alleges virtually no acts by Ellison apart from taking the first part of the ABOS's certification exam. That is not enough to establish a concrete and imminent injury here[.]

Id. at 208.

See also Beztak Land Co. v. City of Detroit, 298 F.3d 559, 566-68 (6th Cir. 2002) (after considering the *AGC* decision, holding in a plaintiff-developer's challenge to a city ordinance's allegedly discriminatory casino development process that "[a]n applicant's intent *to develop and operate* a casino was and is a necessary predicate for establishing standing to challenge the developer-selection process." Emphasis added.)

V. THE FREE EXERCISE-BASED CLAIMS ALL FAIL

A. Plaintiffs' Attempt to Erase the Threshold Burden Element of a Free Exercise Claim is Unsupported and Must Be Rejected.

The opposition repeatedly suggests that any state action that can be described as not "neutral and generally applicable" with respect to religion is automatically subject to strict scrutiny, regardless of whether the action can be said to actually cause a burden on the exercise of religion. (Dkt. 37 at 34:19-25, 38:17-19.) That is not the law. Plaintiffs primarily rely on a partial quote from a decision later reversed by the Supreme Court (*id*. at 34:19-21), but the partial quote is misleading. The full sentence from that decision is: "Regardless of the magnitude of the burden imposed, 'if the object of a law is to infringe upon or restrict practices *because* of their religious motivation, the law is not neutral' and 'is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.'" *Fazagada v. F.B.I.*, 965 F.3d 1015, 1058 (9th Cir. 2020),

reversed by 142 S. Ct. 1051 (2022) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)) (italics in original, underline emphasis added). Significantly, the sentence assumes that it is dealing with a law or regulation that "infringes upon or restricts practices." The sentence then restricts application of the "non-neutral" descriptor to laws that intentionally *infringe upon or restrict religious practices* because they are religiously motivated. And the oft-cited 1993 decision cited after the sentence dealt with a city ordinance that *criminalized* ***conduct*** (*i.e.*, the killing of animals under certain circumstances, subject to fines and/or imprisonment), in circumstances reflecting that the prohibition was intended only to apply to religious sacrifices by Santerians. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* ("*Lukumi*"), 508 U.S. 520, 527-28, 534 (1993). Clearly, these cases did not do away with the threshold element of an actual burden on the plaintiff's exercise of religion.

Multiple Ninth Circuit decisions after *Fazagada* make clear that an actual and legally sufficient burden on the plaintiff's exercise of religion is a necessary element of a Free Exercise claim. *Sabra v. Maricopa County Community College District*, 44 F.4th 867, 890 (9th Cir. 2022) ("To state a claim under the Free Exercise Clause, a plaintiff must show that a government practice 'substantially burdens a religious practice[.]"); *California Parents for the Equalization of Educational Materials v. Torlakson* ("*CAPEEM*"), 973 F.3d 1010, 1019-20 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2583 (2021). And the Ninth Circuit has rejected the notion that the *Lukumi* decision should be construed as eliminating the threshold substantial burden requirement. *Am. Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1123-24 (9th Cir. 2002).

Am. Family Ass'n, Inc. is instructive. In response to an advertising campaign carried out by religious groups to espouse their belief that homosexuality was a sin, the City of San Francisco adopted two resolutions: one that "call[ed] for the Religious Right to take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians," and another specifically directed at the "anti-gay" advertisements. *Id*. at 1119-20. The latter resolution, which listed one of the plaintiffs by name, referred to such

advertisements as "defamatory and erroneous" and urged "local television stations not to broadcast advertising campaigns aimed at 'converting' homosexuals." *Id*. at 1120. The plaintiffs brought a Free Exercise claim, and the district court dismissed it. In affirming the dismissal, the Ninth Circuit rejected the plaintiffs' argument that under *Lukumi*, the court should dispense with considering whether the City's action substantially burdened a religious practice, and skip to strict scrutiny because the City's actions were not "neutral." *Id*. at 1123-24. Because the City's actions did not prohibit, restrict or otherwise infringe upon religious practices, the plaintiffs' claim failed.

Plaintiffs also cite a 2002 Third Circuit opinion to support their view that there is no threshold burden element. (Dkt. 37 at 34:21-22.) However, *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3rd Cir. 2002) is unhelpful to Plaintiffs' position. *Tenafly*, like *Lukumi* (but unlike this case), dealt with the government enforcing a *private conduct-prohibiting* ordinance (in a non-religiously-neutral way) to prohibit specific "religiously motivated acts" by members of a religion. 309 F.3d at 151. In addition, the *Tenafly* court treated the "neutral" and "generally applicable" inquiries *as encompassing* a threshold "burden on religious conduct" requirement. *See id*. at 165 ("On the other hand, if the law is not neutral (*i.e.*, if it discriminates against *religiously motivated* ***conduct***) or is not generally applicable (*i.e.*, if it ***proscribes particular conduct*** only or primarily when religiously motivated), strict scrutiny applies ***and the burden on religious conduct*** violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest." Emphasis added.)

But the best indication that the Third Circuit has not dispensed with a "substantial burden" element is the existence of more recent authority expressly requiring it. In *Anspach v. City of Philadelphia*, the Third Circuit could not have been clearer:

> The First Amendment prohibits the government from burdening the free exercise of religion. However, the First Amendment is only implicated if the governmental burden on religion is 'substantial.' In order to establish a substantial burden, Plaintiffs must once again allege state action that is either compulsory or coercive in nature. (Citations omitted)

503 F.3d 256, 272 (3rd Cir. 2007).

The other Circuits are in accord. *See, e.g., Parker v. Hurley,* 514 F.3d 87, 99 (1st Cir. 2008) (recognizing that Supreme Court precedent had not altered "the standard constitutional threshold question" of "whether the plaintiff's free exercise is interfered with at all."); *Carter v. Fleming*, 879 F.3d 132, 139 (4th Cir. 2018); *U.S. v. Grant*, 117 F.3d 788, 792-93 (5th Cir. 1997); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 689-90 (7th Cir. 1994); *Mbonyunkiza v. Beasley*, 956 F.3d 1048, 1053-54 (8th Cir. 2020); *Bauchman v. West High Sch.*, 132 F.3d 542, 557-58 (10th Cir. 1997); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1256-58, n.25-26 (11th Cir. 2012) (rejecting plaintiffs' argument that *Lukumi* obviated the need to allege that a challenged state action causes a legally sufficient burden on religious exercise, and noting that its "sister circuits are in accord with our position").

B. Plaintiffs' Second and Third Counts Fail Like the Rest.

With the above-discussed principles in mind, it is easy to see how Plaintiffs' Count II and Count III fail. As noted in the motion, those "counts" both argue that aspects of statutory waiver processes are not "generally applicable." (Dkt. 31-1 at 34:12-19.) However, even if those counts' arguments were accepted (*i.e.*, that aspects of the waiver processes could be said to be not "generally applicable"), the counts do not state a claim for a violation of the free exercise clause. Not every state action that can be described as not "generally applicable" is subject to strict scrutiny. As discussed in the motion and above, a necessary and threshold element of a free exercise claim is that the challenged government action actually constitutes a meaningful infringement of the plaintiff's exercise of their religion. Plaintiffs make no argument (let alone a plausible or judicially recognized one) that the aspects of the waiver processes they note operate as a government caused burden on their religious exercise (at least not in a way that is separate from any alleged offense stemming from the nonsectarian NPS requirement itself). In response to the motion to dismiss, the waiver processes are a red herring.

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C. Plaintiffs Cannot Avoid the Clear Purpose of the NPS System.

Because the nonsectarian NPS requirement does not require or restrict private conduct, Plaintiffs have invoked a line of cases that have recognized a legally sufficient coercive burden on religious exercise in certain cases where the government has disqualified people, based on their religion, from public benefits or rights that the government has decided to make otherwise generally available to the public. However, a complete understanding of the relevant legal framework in this case makes a fundamental truth undeniably clear: California's provision for contracting with NPSs is not a program to subsidize private education or to provide an alternative to the state's public education; but rather, is legislation that provides a mechanism (in very limited circumstances and as a consequence of extraordinary disabilities) for the state to meet its obligation to provide its own public and secular education (at all times under federally-mandated public direction and supervision) to students whose families have enrolled in the state's public schools, instead of choosing to enroll in private school. This fundamental truth easily distinguishes this case from the decisions that Plaintiffs rely on.

Plaintiffs advance only a few arguments to avoid that truth, but all of them collapse under scrutiny. First, Plaintiffs argue that the proposition that NPS certification is "a means by which California provides children with disabilities a public education" "is belied by the very name 'nonpublic, nonsectarian,' which is defined as "a *private*, nonsectarian school that enrolls individuals with exceptional needs pursuant to an individualized education program and is certified by the department." (Italics by Plaintiffs.) (Dkt. 37 at 37:12-15, quoting Educ. Code § 56034.) However, "nonpublic, nonsectarian school" is a statutory term, whose definition incorporates other statutory terms, within the context of a larger federal statutory system. The phrase "pursuant to an individualized education program" in the definition quoted by Plaintiffs underscores that the very purpose of the statutorily created "NPS" creature is to enroll students *pursuant to an IEP under the IDEA*. As discussed in §II.B. of the motion, a state's *public* agencies oversee the development of IEPs *for students that enroll in the state's public*

schools – in contrast to the LEA's development of "service plans" for services that an LEA will make available to parentally-placed private school students. (Dkt. 31-1 at 13:25 – 14:13.) A key element of an IEP for public school enrollees is the analysis and description of what will be provided to enable the child to make progress in the LEA's "general education curriculum (*i.e.*, the same curriculum as for nondisabled children)." 34 C.F.R. § 300.320(a)(1)(i). Moreover, an "IEP" is the cornerstone of the state's public agencies' provision of "free appropriate public education." *See* 20 U.S.C. § 1401(9)(D) and 34 C.F.R. § 300.17(d). Under the IDEA, the definition of "free appropriate public education" is special education and related services that are "provided at public expense, *under public supervision and direction*, and without charge," that *meets the state's educational agency's standards*, and that are provided pursuant to an IEP. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. And when the IDEA allows for involvement of a private entity to assist in the state's provision of its "free appropriate *public* education," it requires significant participation and oversight, and ultimate responsibility, by the state's public educational agencies. 34 C.F.R. §§ 300.147, 300.325(c), 300.600. Furthermore, the NPS definition's reference to the NPS needing to be "certified by the department" underscores that the state's master contract, certification, and audit compliance requirements for serving as an NPS – including the requirements to use state curriculum and instructional materials, employ state-credentialed teachers and conduct state assessments (Dkt. 31-1 at 19:20 – 23:17) – cannot be artificially divorced from the "NPS" concept. Thus, a more accurate statutory term for an "NPS" would have been: "Entity agreeing to serve as emergency adjunct to the state's public educational system by assisting the state in providing the state's public and secular education under public direction and supervision to families that have chosen to enroll in the state's public schools." But the Legislature may have reasonably thought that that term is rather long, and that "nonpublic, nonsectarian school" would do, given the clear context and purpose.

Second, Plaintiffs argue that California's alleged "repackaging" of its NPS system as a way to provide the state's public education is a "gambit" that was rejected by the

Supreme Court in *Carson v. Makin*, 142 S. Ct. 1987 (2022). However, Plaintiffs' reliance on *Carson* is misplaced. *Carson* involved "a program of tuition assistance for parents" which directed funds to pay tuition at the private or public school of the parents' choice. 142 S. Ct. at 1993-94. "Under the program, parents designate the secondary school they would like their child to attend – public or private – and the school district transmits payments to that school to help defray the costs of tuition." *Id*. at 1993. While Maine advanced the lower courts' attempt "to distinguish" the Supreme Court's "precedent by recharacterizing the nature of Maine's tuition assistance program" as "the 'rough equivalent of [a Maine] public school education,'" the Supreme Court rejected that argument – but it did so because it simply was not true as a factual matter in *that* case that the purpose of the law was to provide the state's "free public education." *Id*. at 1998-1999. After noting that "the curriculum taught at participating private schools need not even resemble that taught in the Main public schools" and that those private schools "need not administer state assessments" and "need not hire state-certified teachers[,]" the Court characterized the state's program as a public benefit program where "[t]he benefit is tuition at a public or private school, selected by the parent, with no suggestion that the 'private school' must somehow provide a 'public' education." *Id*. at 1998-99. In this case, however, the undeniable purpose of the NPS system *is* to provide the state's "free appropriate public education" to children whose families have decided to enroll in the state's public schools, and NPSs ***are*** required to teach state standards-aligned curriculum, use state-adopted textbooks, hire state-certified teachers, and administer state assessments. (Dkt. 31-1, § II.) Moreover, in *Carson*, the state decided "to offer tuition assistance that parents may direct to the public or private schools of *their* choice" (*id*. at 2000, *italics in original*), which caused government aid to flow to religious schools "wholly as a result of their own genuine and independent private choice" thereby avoiding Establishment Clause issues (*id*. at 1994, quoting *Zelman, v. Simmons-Harris*, 536 U.S. 639, 652 (2002)). In contrast, in this case, the state decides to certify an NPS, the state's LEAs decide to contract with them, and no

money is able to flow to a certified NPS contractor unless one of the state's LEAs decides that such placement is both legally permitted and educationally appropriate.

D. *Fulton* Does Not Save Plaintiffs' Claims.

To support their argument that the nonsectarian NPS requirement is a disqualification from a "public benefit" program constituting an unconstitutional burden on their religious exercise, Plaintiffs cite *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). However, *Fulton* is distinguishable from this case in fundamental ways, and it does not support the conclusion that there is an unconstitutional burden here. In *Fulton*, the City had long contracted with both sectarian and secular private agencies to place foster children in foster homes. 141 S. Ct. at 1875 (noting that "[f]or over 50 years," the plaintiff, Catholic Social Services, "successfully contracted with the City to provide foster care services while holding to these beliefs.") In that case, the threshold burden on religious exercise was *not* a disqualification from a public benefit program, but the City's enforcement of a conduct-requiring contract rule that could have been waived, and that required the contractor-plaintiff to act in a way that infringed on the exercise of its religious beliefs. *Id*. at 1881-82 ("The contractual non-discrimination requirement imposes a burden on CSS's religious exercise[.]").

Because *Fulton* involved state enforcement of a rule requiring its contractors to affirmatively act and was not analyzed by the Supreme Court as a "disqualification from a public benefit" type of case, it cannot be viewed as holding that a disqualification from the ability to contract with the state, regardless of the nature of the contract or underlying purpose, constitutes a legally sufficient burden on a private person's practice of religion.

Also, in *Fulton*, the very purpose of the City's program and contracts – the finding of homes to care for foster children – was itself also the Catholic Social Services' religiously motivated "mission." *Id*. at 1874-75 (recognizing that CSS continued the Catholic Church's two centuries' long mission of serving foster children in the city). Here, the NPS system's purpose is to ensure the provision of the state-adopted, secular "free appropriate *public* education" to children with disabilities who have enrolled in

public schools. The Complaint makes clear that Plaintiffs seek to provide/receive a private Orthodox Jewish religious education, due to their religious belief that Orthodox Jewish parents are required to transmit Orthodox Jewish religious teachings to their children. Thus, unlike in *Fulton*, the state contract's underlying purpose and the plaintiffs' religiously motivated mission are not aligned. Plaintiffs cannot plausibly claim that their ability to provide/receive Orthodox Jewish religious teachings is impeded by an inability to provide/receive the state's public and secular education pursuant to federal law that precludes use of the contract funds for religious teachings.

Finally, unlike the conduct-regulating contract provision that the City affirmatively enforced against its contractor in *Fulton*, California has no ability to waive any of the federal statutes and regulations that define the contours of the state's program and that prohibit use of funds for religious education.

E. The Challenged Rule Passes Strict Scrutiny Under the Law.

Two days before the State Defendants filed their motion, the Plaintiffs argued in their motion for preliminary injunction that defendants would not be able to show that sectarian NPSs "would violate the Establishment Clause" because the Supreme Court has held that the Establishment Clause is not violated when government aid flows to religious schools due to the "independent" choices of private actors. (Dkt. 28-1 at 26:21 – 27:5.) However, after having been presented with a complete analysis of the legal framework in the State Defendants' motion, which unquestionably shows that government aid would *not* reach sectarian NPSs only due to independent choices of private actors (*see* Dkt. 31-1 at 44:10-24), the Plaintiffs have now backtracked, suggesting that there is no reason to think that the Establishment Clause is violated by significant government involvement in directing public money to religious sects. (Dkt. 37 at 42:6-24.) Notably, Plaintiffs cite no authority permitting such involvement.

Plaintiffs also try to read the "wholly" due to "genuinely" independent private choice aspects out of the applicable standard by citing to *one* part of the *Carson* decision where those two words did not appear in a restatement of the rule, and by suggesting that

Carson must have intentionally and significantly narrowed the standard without saying so. (Dkt. 37 at 42:6-12.) However, just a couple of pages before that, when the Supreme Court was purporting to state the complete rule, it clearly said that "a benefit program under which private citizens 'direct government aid to religious schools ***wholly*** *as a result of* their ***own genuine and independent*** private choice' does not offend the Establishment Clause." (Italics added.) *Carson*, 142 S. Ct. at 1994.

Plaintiffs also suggest that the State Defendants have not shown that the compelling interests identified in their motion comport with "historical practices and understandings." (Dkt. 37 at 42:24-27.) But Plaintiffs fail to acknowledge the many authorities cited in the motion that state and that reflect the fact that the principle that government must be neutral toward and among religious, and "may not aid, foster, or promote" religion, is "rooted in the foundation soil of our Nation" and "fundamental to freedom." *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968). Indeed, as the above-referenced discussion in *Carson* reflects, the state of Maine imposed the nonsectarian rule in that case in 1981 based on the state's Attorney General's opinion that it was required by the Establishment Clause, and the *Carson* court described *Zelman's* 2002 announcement of the "wholly as a result of" "genuine independent private choice" rule as the thing which should have caused Maine to reconsider its requirement. As discussed in the motion, the cases that developed that "wholly as a result of" "genuine independent private choice" rule described it as the thing that ensured that the deeply rooted neutrality principle would not be violated. Allowing sectarian NPSs here would violate that deeply rooted principle, and thus, the Establishment Clause. That is clear as a matter of law, and therefore, it is a proper basis to dismiss all of Plaintiffs' claims at the pleading stage. *See Gaspee v. Mederos*, 13 F.4th 79, 82, 88, 90 (1st Cir. 2021) (affirming 12(b)(6) dismissal of political speech regulation requiring "exacting" strict scrutiny, on ground that regulation was narrowly tailored to serve compelling interests).

Plaintiffs have no response to the motion's discussion of *Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, which struck down New York's creation of a school district

because it departed from the "constitutional command" of neutrality toward religion "by delegating the State's discretionary authority of public schools to a group defined by its character as a religious community," in a context that gave "no assurance that governmental power has been or will be exercised neutrally." 512 U.S. 687, 696 (1994).

Plaintiffs also attempt to downplay the compelling interest in avoiding the monitoring and auditing of religious schools by asserting that entanglement is no longer a problem, because the "Lemon test" has been surpassed. (Dkt. 37 at 41.) However, abandoning a specific "test" from a case "and a host of its progeny" over the decades (*see id*.) does not mean that any *holdings* have been disavowed; and Plaintiffs neglect that *Carson* reaffirmed the principle that "scrutinizing whether and how a religious school pursues its educational mission" would "raise serious concerns about state entanglement with religion and denominational favoritism." *Carson*, 142 S. Ct. at 2001.

Plaintiffs also downplay the concern with indoctrination and coercion of K-12 students by noting that parents may not object to their school district's decision about the most appropriate place for their disabled child to be educated. (Dkt. 37 at 43:1-7.) But Plaintiffs do not dispute that it is the LEA that makes the offer of where and how it will provide its free appropriate public education. And Plaintiffs neglect that parents (or legally appointed decisionmakers in some cases) may, as courts do, give due weight to the presumed expertise of school officials in educating children with disabilities.

Plaintiffs' claim that the nonsectarian requirement is not narrowly tailored fails to recognize that the deeply rooted neutrality principle is violated *as soon as* government officials have *any* significant ability to direct government aid to sectarian NPSs. Plaintiffs claim that "the complete exclusion of *all* 'sectarian' schools" is not narrowly tailored" (Dkt. 37 at 44, italics in original); however, if the government were to choose which religious sects should be excluded, then there would be an even more obvious violation of the Establishment Clause. Plaintiffs offer no specific adjustment that would resolve all compelling interests. There are none. Plaintiffs' case should be dismissed.

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F. The "Right to Religious Education" Claim is Meritless.

Regarding their "Free Exercise Clause Right to Religious Education" claim (Count VI, Dkt. 1 at 36:9), the opposition cites a few cases that were also cited in their Complaint. The motion explained how none of those decisions supported Plaintiffs' novel theory. It also cited Ninth Circuit precedent that limits the scope of the right to the ability to choose a private education (which may cost money) instead of the state's free public education, and that explains that if the state's free public education is chosen, the family has no right "to expect the state to modify its curriculum to accommodate the[ir] personal, moral or religious concerns[.] (Dkt. 31-1 at 41-42, quoting *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206-07 (9th Cir. 2005).) The only other case that Plaintiffs cite in their opposition in support of Count VI is *Washington v. Glucksberg*, 521 U.S. 702 (1997), a case which held that a state did not violate the 14th Amendment's due process clause by banning assisted suicide. The words and phrases "religion," "First Amendment" and "Free Exercise" do not appear in that decision. The Court merely cites to the substantive due process "*Meyer-Pierce*" right "to direct the education and upbringing of one's children" stemming from those two 1923 and 1925 decisions, in cataloguing past due process decisions. *Glucksberg*, 521 U.S. at 720. However, those decisions are among the ones considered by the Ninth Circuit decisions discussed in the motion. *Fields*, 427 F.3d at 1203-04; *Parents for Privacy v. Barr*, 949 F.3d 1210, 1229, n.14 (9th Cir. 2020). *Glucksberg* hurts Plaintiffs' position by emphasizing that courts must be "reluctant to expand the concept of substantive due process" and "exercise the utmost care whenever [they] are asked to break new ground in this field[.]" *Id.*

Plaintiffs close with the remarkable proposition that when the dispute concerns "the scope of the substantive right," it is improper to dismiss the claim at the pleading stage; however, Plaintiffs cite no authority for that claim. Notably, in *all* three of the Ninth Circuit cases cited in the motion regarding Count VI, the court affirmed the district court's Rule 12(b)(6) dismissal of the plaintiff's claim. *Parents for Privacy*, 949 F.3d at 1233 (affirming dismissal with prejudice because amendment would be futile);

Fields, 427 F.3d at 1200; *CAPEEM*, 973 F.3d at 1016-17, 1020.

G. The Unconstitutional Conditions Doctrine Fails.

After the motion showed the two cases cited in the Complaint to support the "unconstitutional conditions doctrine" claim to be unhelpful to Plaintiffs (Dkt. 31-1 at 39-41), the opposition attempted to distinguish them by noting that they involved constitutional rights other than "First Amendment" rights. (Dkt. 37 at 48.) This section of the opposition cites four "First Amendment" cases dealing with the doctrine; however, Plaintiffs omit that none of them involved free exercise rights or religion.

Plaintiffs cite *Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013) – a free speech case – for the proposition that there are no limits to application of the doctrine in the First Amendment context (Dkt. 37 at 48:24-25); however, a review of that case reveals that the Court took pains to explain that there are, and must be, limits to the doctrine. *Agency for Int'l Dev.*, 570 U.S. at 214-215. The court reaffirmed its *repeated* ***rejection*** of "the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State," and held that, in the free speech context at issue there, "conditions that define the limits of the government spending program – those that specify the activities Congress wants to subsidize" are permissible, and it is only when conditions are imposed that "seek*"* to regulate speech in a way that is not fairly tied to "the contours of the program itself" that there is a constitutional issue. *Id*. This tracks with the doctrine's purpose, which is merely to protect against government "abus[ing] its power by attaching strings strategically" and "striking lopsided deals." *U.S. v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006). Here, there is no plausible claim that California enacted the nonsectarian NPS requirement three decades ago to get people to refrain from practicing their religion, and given the legal framework and state interests, it cannot be said that the requirement is not tied to the framework's contours.

The only two "free exercise" cases that Plaintiffs cite in this section of their brief – *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Rev. Bd.*, 450 U.S. 707 (1981) – do not purport to apply some independent and distinct "unconstitutional conditions"

claim. Rather, those are a couple of the few "generally available public benefit" cases where sufficient coercion against religious practice has been found. However, it is important to note just how distinguishable those cases are. *Sherbert* involved a state's law that *allowed* people to refrain from working on *Sundays* for religious reasons, but which disqualified a person from receiving generally available unemployment benefits after losing their job for refusing to work on *Saturday* for religious reasons, because the refusal to work on Saturday was deemed not "good cause." 374 U.S. at 400-01, 404-06. *Thomas* also involved the denial of generally available unemployment benefits, in the case of a person whose religion forbade him from working to produce war materials. *Thomas,* 450 U.S. at 709. In both cases, the court stressed that, for potential denial of generally available unemployment compensation, the pressure put upon a person to forsake their religious beliefs is unmistakable. *Sherbert*, 374 U.S. at 404; *Thomas*, 450 U.S. at 717.

VI. THE EQUAL PROTECTION CLAIM FAILS

It remains clear that the equal protection claim should be dismissed. Plaintiffs do not dispute the argument that if the free exercise-based claims fail, then the rational basis standard applies. (Dkt. 31-1 at 50:4-17.) The law at issue clearly meets that standard.

The opposition also fails to grapple with the motion's argument and citation to supporting Ninth Circuit authority that, to state an equal protection claim, a plaintiff must show that the law classifies and treats *them* differently, which prevents the Families from stating a claim. (Dkt. 31-1 at 48-49.) As the opposition states: "The 'persons' regulated by the statute are NPS applicants." (Dkt. 37 at 46:6-7.) The Families do not allege that they are, or have a desire to be, NPS applicants. They have the same legal rights as all other families. The challenged law does not treat *them* differently.

Plaintiffs also do not dispute the motion's argument that the proper "similarly-situated" inquiry in this case is whether sectarian entities and nonsectarian entities are similarly-situated *for purposes of the NPS system* within the broader IDEA legal framework. (Dkt. 31-1 at 49-50.) Plaintiffs only response is to argue that: "[t]he

'objective' of the NPS statute is to educate children with disabilities in nonpublic schools." (Dkt. 37 at 46:5-6.) That, of course, is not the purpose of California's provision for NPSs. (*See* §V.C. *supra*.) An accurate understanding of that purpose reveals that the two classes are not similarly-situated for purposes of the NPS system.

The opposition continues to misstate and oversimplify things by claiming that California is "discriminating against religion[.]" (Dkt. 37 at 45 and 46.) Again, that is not a fair or accurate description of the law and legal framework. The classification at issue is ***between*** sectarian entities that may seek to do a lot of highly specialized work under a contract with the state that precludes them from using any money for non-secular purposes and that subjects them to significant state oversight, ***and*** nonsectarian entities that may seek to do that. Because of compelling state interests in avoiding serious problems, California enacted the requirement. But no religious sect is prevented from performing any religious activity or operating a religious school, and no religious family is prevented from choosing to enroll in a religious school. Moreover, a fully proportionate share of California's IDEA funds go toward eligible students enrolled in private (including religious) schools. As argued in the motion, the relevant considerations for identifying whether the allegedly discriminated-against class is a "suspect class" does not warrant a determination that sectarian NPSs are a "suspect class." The opposition provides no argument or authority for concluding otherwise.

VII. CONCLUSION

The motion should be granted and the Complaint dismissed.

Dated: July 7, 2023

Respectfully submitted,

By: /s/ Thomas Prouty
THOMAS PROUTY
Attorney for the State Defendants

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for the State Defendants, certifies that this memorandum contains 25 pages (excluding the caption and tables of contents and authorities), which complies with the applicable 25-page limit for memoranda of points and authorities.

Dated: July 7, 2023

Respectfully submitted,

By: /s/ Thomas Prouty
THOMAS PROUTY