

# Forcibly outing transgender students violates their state constitutional right to privacy

## Overview

The Chino Valley Unified School District Board of Education recently adopted a policy requiring school officials to notify parents if a student requests to use a different name or pronoun than is on their birth certificate — drawing California into the national battle over transgender rights in education.<sup>[1]</sup> California Attorney General Rob Bonta sued the district, arguing that the policy violates California's constitutional right to privacy.<sup>[2]</sup>

He's right. Transgender students meet the threshold requirements of a California constitutional privacy claim because they hold specific and legally protected privacy interests, a reasonable expectation of privacy in light of "widely accepted community norms," and will suffer an invasion of privacy serious enough to egregiously breach these social norms.<sup>[3]</sup> Policies that require school personnel to out transgender students to their parents violate the students' fundamental autonomy privacy interest in making life-changing and intimate decisions, and the informational interest in keeping information about their identities private. Accordingly, such policies are subject to a compelling public interest test akin to strict scrutiny, which they cannot withstand.

## Argument

**Trans students have a fundamental privacy interest in choosing if, when, and how to come out.**

California's constitution protects two types of privacy interests. One is autonomy interests "in making intimate personal decisions . . . without observation, intrusion, or interference."<sup>[4]</sup> The other concerns informational interests "in precluding the

dissemination or misuse of sensitive and confidential information.”<sup>[5]</sup> Transgender students hold both interests.

Coming out is a life-changing choice protected by the California constitution. It is a speech act that shapes one’s identity and social role.<sup>[6]</sup> The act transforms private thoughts and desires into tangible reality.<sup>[7]</sup> In *In re Marriage Cases* California’s high court found that the right to choose to enter into a same-sex marriage was a fundamental autonomy privacy right.<sup>[8]</sup> A trans student’s coming out is fundamental for the same reasons: this decision can change a person’s name, honorifics, social role, legal rights, and relationships with others. Coming out is likewise fundamental for the same reasons the court found a minor’s right to choose an abortion without parental permission is fundamental: the choice will shape a minor’s life and identity.<sup>[9]</sup>

Transgender students have an informational interest in keeping their inner selves private.<sup>[10]</sup> The state high court has explained that “[i]f there is a quintessential zone of human privacy it is the mind. Our ability to exclude others from our mental processes is intrinsic to the human personality.”<sup>[11]</sup> And there is an interest in keeping one’s transgender status private because being outed can lead to discrimination.<sup>[12]</sup>

These privacy interests cannot be waived by parents. In *American Academy of Pediatrics v. Lungren*, the California Supreme Court held that minors have a fundamental right to choose an abortion even without parental consent.<sup>[13]</sup> The court explained that children “are not simply chattels” and may have different privacy interests than their parents.<sup>[14]</sup> A minor’s youth makes the consequences of being forced to carry a child to term even more severe, rendering their privacy right all the more essential.<sup>[15]</sup> Similarly here, transgender students have a fundamental interest in deciding how they wish to communicate an core element of their inner self, which is independent of the interests held by their parents. Their youth and vulnerability to harm makes the burden of a forced outing all the more harmful.

## **Transgender students have a reasonable expectation of privacy over their identity, and forced outings violate community norms.**

Privacy includes an element of control. The right to privacy is “not so much one of total secrecy as it is of the right to define one’s circle of intimacy — to choose who shall see beneath the quotidian mask. Loss of control over which ‘face’ one puts on may result in literal loss of self-identity . . . .”<sup>[16]</sup> This is why the common practice of coming out in accepting environments while remaining closeted elsewhere does not undermine one’s reasonable expectation of privacy.<sup>[17]</sup> For example, a California court held that a high school student had a reasonable expectation of not having her same-sex relationship with another student revealed to her parents.<sup>[18]</sup> Although she was openly gay at school, the student did not bring her girlfriend home, and her parents would have been unlikely to discover her relationship had school officials not outed her.<sup>[19]</sup>

This foundational principle of privacy rights aligns with community norms. Forcibly outing LGBTQ+ people has long been widely condemned.<sup>[20]</sup> Such a widespread norm against outing helps to explain the opposition forced outing policies face in California. The Rocklin Unified School District, for example, received 184 emails opposing an outing policy, and only 22 supporting it.<sup>[21]</sup> (The policy was enacted nonetheless.) In several counties, school board members that helped establish outing policies are facing local recall efforts.<sup>[22]</sup> The reason these unpopular policies were enacted in the first place is because a statewide outing bill failed to gain any meaningful support in the California legislature, demonstrating its niche status statewide.<sup>[23]</sup>

## **Forced outing policies impose serious privacy harms.**

Forced outing policies coerce children into remaining closeted at school, putting their health at risk. While only 55% of transgender youth feel that their school is an accepting environment, even fewer (37%) believe that their homes are accepting.<sup>[24]</sup> The majority of families in the United States are *not* supportive of their transgender

children.<sup>[25]</sup> Even when parents are unaccepting, support at school can play an important role in reducing the risk of grave injuries.<sup>[26]</sup> But rejection at home increases these risk factors.<sup>[27]</sup> For children who would be accepted at school but rejected at home, forced outing policies prevent them from finding safety and affirmation at school, while chilling their speech right to come out of the closet. And early research suggests that support at school or in the community is linked to increased family acceptance over time.<sup>[28]</sup> Denying students the safety to come out at school first reduces the odds of gaining future family acceptance.

Coming out is a landmark moment in one's life.<sup>[29]</sup> When done voluntarily, it can be an empowering act of self-acceptance.<sup>[30]</sup> Coming out offers the opportunity to share a foundational part of oneself with others, and to deepen relationships with loved ones. This is why forced outing is a violation of one of the most intimate parts of a person's life. Outing a trans child to their parents can never be undone — a moment that could have been healing will instead always be remembered as traumatic. Even those who were outed to family members who were ultimately accepting still often remember the invasion of their innermost self as a painful experience.<sup>[31]</sup>

Fears of harm from outing trans students “are neither theoretical nor fanciful.”<sup>[32]</sup> Studies show that trans and gender non-conforming youth are significantly more likely to be overrepresented — even among LGBTQ+ community members — in foster care,<sup>[33]</sup> juvenile detention centers,<sup>[34]</sup> and in homeless shelters.<sup>[35]</sup> The high rates of familial rejection are evident in data that show trans and gender non-conforming youth are at increased risk of substance abuse, mental health disorders, and suicide.<sup>[36]</sup> For example, a recent study found that 80% of trans youth have seriously considered suicide, with lack of familial support being one of the primary contributing factors.<sup>[37]</sup>

**Schools that out transgender students fail the compelling interest test because their actions impair the parent-child relationship they purport to foster.**

Proponents of forced outing policies argue that “parents play a critical role in nurturing and supporting children” and transgender youth are “less likely to feel depressed with parental support.”<sup>[38]</sup> For example, the Chino Valley School District contends that the policy would “promote the best outcomes for pupils’ academic and social-emotional success.”<sup>[39]</sup> Promoting students’ academic and social-emotional well-being is indeed a compelling interest. But forced outing policies *contravene* that interest: many trans and gender non-conforming youth encounter abuse when their families learn of their gender identity.<sup>[40]</sup> Although some consequences of coming out can be mitigated by doing so intentionally, policies that non-consensually out trans youth increase the likelihood that these students will experience physical and psychological abuse.

Forced outing policy proponents claim that these policies promote a healthy parent-child relationship by “bringing parent(s)/guardian(s) into the decision-making process . . . to prevent or reduce potential instances of self-harm.”<sup>[41]</sup> Of course the state has a compelling interest in promoting healthy parent-child relationships. But rather than strengthen parent-child relationships, forcibly outing students damages that bond by promoting familial conflict and estrangement. Like the pregnant minors in *Lungren* who felt unsafe discussing abortion or other sex-related matters with their parents, a trans or gender non-conforming youth may feel unsafe revealing their gender identity to their parents, and surprising them with that information does no one any good.

Schools adopting forced outing policies claim to further a compelling interest in protecting parental rights. But there is no compelling interest in protecting a right above and beyond its actual constitutional scope.<sup>[42]</sup> As several recent decisions explained, there is no parental right to compel a school to out transgender students.<sup>[43]</sup> This is because constitutional parental rights are a liberty interest protected by substantive due process.<sup>[44]</sup> Such rights are negative, not positive.<sup>[45]</sup> Thus, parental rights are a shield against state interference, not a sword to compel the state to help a parent raise their child in their preferred manner.<sup>[46]</sup> This protects against a state telling a parent, “‘You can’t teach your child German or send him to a

parochial school;” it does not apply when a parent says to the state, “You can’t teach my child subjects that are morally offensive to me.”<sup>[47]</sup> This is why the Eleventh Circuit recognized that these schools have no affirmative duty to inform parents when about a student’s pregnancy considerations.<sup>[48]</sup> Similarly, there is no positive parental right obligating schools to inform parents that their child has chosen to go by a different name or pronoun.<sup>[49]</sup>

Imposing an affirmative duty on schools to inform parents of their child’s transgender identity would require courts to significantly expand the contours of parental rights — in the face of the U.S. Supreme Court’s reluctance to broaden substantive due process.<sup>[50]</sup> This explains why the majority of courts considering the issue found that parents have no right to compel the state to help them steer their children away from gender diverse expression.

Only two courts have held that fundamental parental rights require schools to out transgender children.<sup>[51]</sup> Both held that accepting transgender students at school constitutes a medical intervention to treat the “mental illness” of gender dysphoria, implicating a parent’s right to direct the medical treatment of their child.<sup>[52]</sup> These poorly reasoned decisions are in the minority. Being transgender is not a mental illness.<sup>[53]</sup> The majority approach is correct: respecting gender diversity is not a medical intervention.<sup>[54]</sup>

**The state constitutional privacy right requires schools to further their interests in protecting children and the parent-child relationship through less intrusive means.**

Privacy intrusions can only be sustained if the intruder can demonstrate that their compelling interests cannot be advanced by “alternative means less intrusive on fundamental rights.”<sup>[55]</sup> Even if forced outing policies indeed advance compelling interests, those interests (promoting trans youth welfare and promoting a healthy parent-child relationship) can be accomplished with less-intrusive alternatives.<sup>[56]</sup>

Not outing trans youth is the best way to promote their welfare. Instead of nonconsensual outings, school districts seeking to promote trans students' welfare should strive to create gender affirming school environments. Social acceptance has been shown to be crucial in protecting trans youth, as shown by a recent study finding that trans youth who were accepted by an adult or peer were about 34% less likely to attempt suicide.<sup>[57]</sup>

Proponents of forced outing policies could also support legislation seeking to make schools a safer environment.<sup>[58]</sup> One example of such legislation was Assembly Bill 5, which Governor Gavin Newsom signed into law last year.<sup>[59]</sup> Among other things, this new law will better train school personnel to identify and provide resources to trans students who lack familial acceptance. Proponents of forced outing could also take steps to better support parents and make it safer for trans students will to come out to their parents. Thus, the logical step for those seeking to promote a healthy parent-child relationship would be to provide parents the tools they need to understand and support their children.<sup>[60]</sup> School districts could achieve this through various means, including providing workshops or connecting parents with professionals who can provide them the guidance they need. Achieving the objectives of protecting trans youth and promoting a healthy parent-child relationship can be done through noninvasive tactics.

## **Conclusion**

Forced outing policies violate trans youth's privacy interests. Rather than promoting the wellbeing of trans youth, school districts adopting these policies are putting trans lives at risk. California courts should invalidate these policies and allow trans youth to come out on their own terms.

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1. We use "transgender" as an umbrella term to describe anyone "whose

gender identity or expression differs from what is associated with the gender they were thought to be at birth.” See Herman et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (2015) at 40. ↑

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3. *Hill v. National Collegiate Athletic Ass’n* (1994) 7 Cal.4th 1, 35–37. ↑
4. *Hill*, 7 Cal.4th at 35. ↑
5. *Id.* ↑
6. See Miriam Lind, *How to do gender with names: The name changes of trans individuals as performative speech acts* (2023) 12 J. of Language & Sexuality 1, 1–12; see also Kenji Yoshino, *Covering* (2002) 111 Yale L.J. 769, 833–34. ↑
7. Deborah A. Chirrey, *‘I hereby come out’: What sort of speech act is coming out?* (2003) 24 J. of Sociolinguistics 24, 26–27. ↑
8. *In re Marriage cases* (2008) 43 Cal.4th 757, 810–19. ↑
9. *Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 334–38. ↑
10. *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 440–41. ↑
11. *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 944. ↑
12. *Powell v. Schriver* (2d Cir. 1999) 175 F.3d 107, 111–12. ↑
13. *Lungren*, 16 Cal.4th at 313–14. ↑
14. *Id.* at 336–37. ↑
15. *Id.* ↑

16. *Hill*, 7 Cal.4th at 25. ↑
17. *Chirrey* at 28. ↑
18. *C.N. v. Wolf* (C.D. Cal. 2005) 410 F.Supp.2d 894, 903 (citing *U.S. Dep't of Justice v. Reports Comm. for Freedom of Press* (1989) 489 U.S. 749, 770, for the proposition that “[t]he fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure of dissemination of information.”). ↑
19. *Nguon v. Wolf* (C.D. Cal. 2007) 517 F.Supp.2d 1177, 1191. ↑
20. *Yoshino* at 824. ↑
21. Trudy Ring, *Two More California School Districts OK Forced Outing of Trans Students*, Advocate (Sep. 8, 2023). ↑
22. Ed Sibby & Anthony Saavedra, *Temecula Community Recalls Local School Board President*, California Teachers Association December 8, 2023; Blake Jones, *Conservative Southern California school board members face likely recall over firing of superintendent*, Politico October 16, 2023. ↑
23. Carolyn Jones, *Battle Over Transgender Student Privacy Isn't Over, Bill's Author Says*, EdSource April 21, 2023. ↑
24. The Trevor Project, 2022 National Survey on LGBTQ Youth Mental Health at 20. ↑
25. The Trevor Project at 4. ↑
26. *Ibid.* (describing poor academic outcomes, mental illness, substance abuse, self-harm, and suicide); Toomey et al., *Gender-Affirming Policies Support Transgender and Gender Diverse Youth's Health*, Society for Research in Child Development January 27, 2022; Amy L. Gower et. al., *Supporting Transgender and Gender Diverse Youth: Protection Against Emotional Distress and Substance Use* (2018) 55 Am. J. of Preventative Medicine 787, 788, 792; Jack K. Day. et. al., *Safe Schools? Transgender Youth's School*

*Experiences and Perceptions of School Climate* (2018) 47 J. of Youth & Adolescence 1731, 1731, 1738-39. ↑

27. Elizabeth A. McConnell et. al., *Families Matter: Social Support and Mental Health Trajectories Among Lesbian, Gay, Bisexual, and Transgender Youth* (2016) 59 J. of Adolescent Health 674, 675; Herman et al. at 68-76. ↑
28. McConnell et. al. at 678-79; *see also* Gower et. al. at 790. ↑
29. Chirrey at 34. ↑
30. Yoshino at 819. ↑
31. Sade Collier, *I Was Outed to My Entire Family When I Was 11*, HuffPost October 6, 2018; *What to do if you've been outed before you're ready* Minus18 March 11, 2020; Evan Kinzle, *I Was Outed to My Parents At 15*, Medium.com May 13, 2020. ↑
32. *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.* (D. Md. 2022) 622 F.Supp.3d 118, 137-38. ↑
33. Sandfort, Theo, "Experiences and Well-Being of Sexual and Gender Diverse Youth in Foster Care in New York City," Columbia University, Department of Psychology. ↑
34. "Unjust: LGBTQ Youth Incarcerated in The Juvenile Justice System," Center for American Progress June 2017. ↑
35. "Homelessness and Housing Instability Among LGBTQ Youth." The Trevor Project. November 2021. ↑
36. *Ibid.* ↑
37. Austin et al., *Suicidality Among Transgender Youth: Elucidating the Role of Interpersonal Risk Factors*, National Library of Medicine March 2022. ↑
38. Essayli, Bill, Asm. Bill Essayli Announces AB 1314 to Protect Parents' Rights, California State Assembly 2023. ↑

39. Chino Valley Unified School District Board Policy 5020.1 — Parental Notification. ↑
40. Choukas-Bradley et al., *Disparities in Childhood Abuse Between Transgender and Cisgender Adolescents*, American Academy of Pediatrics August 2021. ↑
41. Chino Valley Unified School District Board Policy 5020.1 — Parental Notification. ↑
42. *Carson v. Makin* (2022) 596 U.S. 767, 781; *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017) 582 U.S. 449, 466. ↑
43. *See Regino v. Staley* (E.D. Cal. July 11, 2023) No. 2:23-cv-00032-JAM-DMC, 2023 U.S. Dist. LEXIS 118967; *Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs.* (D. Wy. June 30, 2023) No. 23-CV-069-SWS, 2023 U.S. Dist. LEXIS 113818; *Foote v. Town of Ludlow* (D. Mass. Dec. 14, 2022) No. 22-30041-MGM, U.S. Dist. LEXIS 236102; *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.* (D. Md. 2022) 622 F.Supp.3d 118 [reversed for lack of standing in (4th Cir. 2023) 78 F.4th 622]; *Regino v. Staley* (E.D. Cal. July 11, 2023) No. 2:23-cv-00032-JAM-DMC, 2023 U.S. Dist. LEXIS 118967; *Lee v. Poudre Sch. Dist. R-1* (D. Col. Dec. 19, 2023) No. 23-cv-01117-NYW-STV, 2023 U.S. Dist. LEXIS 226003. ↑
44. *Troxel v. Granville* (2000) 530 U.S. 57, 65. ↑
45. *Deshaney v. Winnebago Cnty. Dep't of Social Services* (1989) 489 U.S. 189, 195-96. ↑
46. *See Runyon v. McCrary* (1976) 427 U.S. 160, 177. ↑
47. *Brown v. Hot, Sexy & Safer Prods.* (1st Cir. 1995) 68 F.3d 525, 534; *see also Swanson by & through Swanson v. Guthrie Indep. Sch. dist. No. I-L* (10th Cir. 1998) 135 F.3d 694, 699 (collecting cases). ↑
48. *Arnold v. Board of Education* (11th Cir. 1989) 880 F.2d 305, 314. ↑
49. *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.* (D. Md. 2022) 622

F.Supp.3d 118. ↑

50. *Willey*, 2023 U.S. Dist. LEXIS 113818 at \*34, citing *Dobbs v. Jackson Women's Health Org.* (2022) 597 U.S. 215; *Wash. v. Glucksberg* (1997) 521 U.S. 702; *Regino v. Staley* (E.D. Cal. 2023) No. 2:23-cv-00032-JAM-DMC, 2023 U.S. Dist. LEXIS 118967 at \*11-12. ↑
51. *Mirabelli v. Olson* (S.D. Cal. Sep. 14, 2023) No. 3:23-cv-00768-BEN-WBG, 2023 U.S. Dist. LEXIS 163880; *T.F. v. Kettle Moraine Sch. Dist.* (Wisc. Cir. Ct. Oct 2, 2023) No. 2021-CV-1650. ↑
52. *Mirabelli*, 2023 U.S. Dist. LEXIS 163880 at \*19-20; *Kettle Moraine*, No. 2021-CV-1650 at 2-3. ↑
53. *Grimm v. Gloucester Cty. Sch. Bd.* (4th Cir. 2020) 972 F.3d 586, 594; *Willey*, 2023 U.S. Dist. LEXIS 113818 at \*27; Dixon et. al., *Let's Talk Gender: Ten Things Transgender and Nonbinary Youth Want All Researchers to Know* (2022) 61 J. of the Am. Academy of Child & Adolescent Psychiatry 960, 961. ↑
54. *Willey*, 2023 U.S. Dist. LEXIS 113818 at \*29-30; *Regino*, 2023 U.S. Dist. LEXIS 118967 at \*12; *Foote*, 2022 U.S. Dist. LEXIS 236102 at \*15-16. ↑
55. *Hill*, 7 Cal. 4th at 32. ↑
56. Toomey et al., *Gender-Affirming Policies Support Transgender and Gender Diverse Youth's Health*, Society for Research in Child Development January 25, 2022. ↑
57. Kinsi Sparks, *Acceptance of Transgender and Nonbinary Youth from Adults and Peers Associated with Significantly Lower Rates of Attempting Suicide*, The Trevor Project 2021. ↑
58. Jennifer K. McGuire et. al., *School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses* (2010) 39 J. Youth Adolescence 1175, 1187. ↑

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60. Gower et. al. at 790. ↑