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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

YVETTE FELARCA, LORI NIXON, LARRY STEFL,

Plaintiffs/Petitioners,

v.

BERKELEY UNIFIED SCHOOL DISTRICT, DONALD EVANS, JANET LEVENSON,

Defendants/Respondents.

JUDICIAL WATCH,

Real Party In Interest.

CASE NO.: 17-cv-06282-VC

JUDICIAL WATCH'S REPLY TO PLAINTIFFS' OPPOSITION TO JUDICIAL WATCH'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Date: October 4, 2018
Time: 10:00 a.m.
Location: Courtroom 4
Judge: Hon. Vince Chhabria

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I. INTRODUCTION

It is now abundantly clear that Plaintiffs filed their lawsuit without considering any of the complex jurisdictional, procedural, and substantive issues raised by their claims. Plaintiffs largely ignore the only claim they offer as the basis for the Court's jurisdiction – their federal civil rights claim under title 42, section 1983 of the U.S. Code. They also ignore the incontrovertible fact that they cannot pursue a CPRA claim in federal or state court. The CPRA does not allow it. The only CPRA-related claim potentially available to them is a petition for writ of mandate under section 1085 of the Code of Civil Procedure. Not only is a section 1085 petition a limited procedural mechanism that allows challenges to nondiscretionary government actions, but federal courts have regularly declared they have no authority to apply this California procedural rule and routinely decline to exercise supplemental jurisdiction over such petitions. Plaintiffs provide no reason why the Court should deviate from these federal precedents and consider the merits of a section 1085 petition in this case. Name-calling and attack words like troll, fascist, alt-right, and witch-hunt are not substitutes for evidence and legal analysis. Nor are uninformed attempts to impute viewpoints or characteristics to a litigation adversary. Summary judgment should be entered against Plaintiffs on all their claims.

II. ARGUMENT

A. Municipal Liability Does Not Apply.

In its opening brief, Judicial Watch demonstrated that, as state agencies, California school districts enjoy Eleventh Amendment immunity from suits in law or equity filed in federal court. *See e.g.*, *Balenger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir. 1992). Judicial Watch also demonstrated that, even if BUSD were not immune from suit, it is not a "person" for purposes of a section 1983 claim. *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1988); *Maldonado v. Harris*, 370 F.3d 945, 951 (9th Cir. 2004); *Kirchmann v. Lake Elsinore Unified Sch. Dist.*, 83 Cal. App. 4th 1098, 1104-05 (Cal. Ct. App. 4th Dist. 2000). It is irrelevant that Plaintiffs do not seek monetary damages from Defendants. As an arm of the state, BUSD cannot be sued in federal court for monetary damages or injunctive relief. Defendants Evans and Levenson can only be sued in federal court, in their official

capacities, for injunctive relief. Even then, official capacity lawsuits against Defendants Evan and Levenson are limited to alleged violations of federal law.

Plaintiffs ignore these clear, incontrovertible legal conclusions, abandon their pleadings, and invoke the doctrine of municipal liability. Plaintiffs' newly-minted argument fails for multiple reasons. First, BUSD is a not a municipality. *Balenger*, 963 F.2d at 254. Second, Plaintiffs never brought a municipal liability claim and never alleged BUSD was acting pursuant to an official policy. *Rodriquez v. Cnty. of Los Angeles*, 891 F.3d 776, 803 (9th Cir. 2018). Plaintiffs also present no evidence that BUSD was acting pursuant to an official policy. It was not. BUSD was fulfilling its obligations under state law.

Plaintiffs also never alleged nor presented any evidence that BUSD failed to "train employees in a manner that amounts to 'deliberate indifference' to a constitutional right[.]" *Rodriquez*, 891 F.3d at 802. Nor did they plead or present any evidence demonstrating that "the individual who committed the constitutional tort was an official with final policy-making authority" or "ratified a subordinate's unconstitutional decision or action and the basis for it." *Id.* (internal quotation marks and citation omitted). In fact, Plaintiffs never pled nor presented evidence demonstrating that anyone committed a constitutional tort. It is irrelevant that Superintendent Evans may have told King Middle School teachers in October 2017 that BUSD would comply with Judicial Watch's CPRA request. At that point, BUSD had not even begun to search for records responsive to the request, and no decision had been made about releasing any particular records. The decision to release particular records was not made until the Spring of 2018 (Sticht. Decl. at paras. 14-15); there is no evidence in the record about who decided to release any particular record or ratified a decision to release any particular record. There simply is no municipal liability.

B. Section 1085 Petitions Have No Place in Federal Court.

Plaintiffs argue that context matters in bringing section 1085 petitions in federal court, but fail to show why, legally, in this particular context, the Court should consider Plaintiffs' section 1085 petition here. They offer no reason why the Court should deviate from a long line of cases holding that section 1085 does not apply in federal court and declining to exercise supplemental jurisdiction over section 1085 petitions. *Wilridge v. Kernan*, 2018 U.S. Dis. LEXIS 92088, *8 (N.D. Cal. May 30, 2018) *citing*

Hill v. County of Sacramento, 466 F. App'x 577, 579 (9th Cir. 2012) (section 1085 does not apply in federal court); *In re Ke*, 2017 U.S. Dist. LEXIS 197381, **3-4 (N.C. Cal. Nov. 30, 2017) (section 1085 does not apply in federal court); *San Francisco Apt. Ass'n v. City & Cnty. of San Francisco*, 142 F. Supp.3d 910, 917 n. 2 (N.D. Cal. 2015) (section 1085 does not apply in federal court); *Fresno Unified Sch. Dist. v. K.U.*, 980 F. Supp.2d 1160, 1184 (E.D. Cal. 2013) (declining supplemental jurisdiction over section 1085 petition); *Mory v. City of Chula Vista*, 2011 U.S. Dist. LEXIS 19874 (S.D. Cal. Mar. 1, 2011) (declining supplemental jurisdiction over section 1085 petition); *City Limits of N. Nev., Inc. v. Cnty. of Sacramento*, 2006 U.S. Dist. LEXIS 75414, *10 (E.D. Cal. Oct. 6, 2006) (declining supplemental jurisdiction over section 1085 petition); *Pac. Bell Tel. Co. v. City of Walnut Creek*, 428 F. Supp. 2d 1037, 1055 (N.D. Cal. 2006) (declining supplemental jurisdiction over section 1085 petition); *Shaheen v. Cal. Supreme Court*, 2002 U.S. Dist. LEXIS 24969 at *1 (N.D. Cal. Dec. 27. 2002) (section 1085 does not apply in federal court). Plaintiffs fail to cite a single case holding otherwise.

Plaintiffs could have filed a section 1085 petition in state court once BUSD decided which records it intended to disclose to Judicial Watch;[1] they chose to ignore BUSD's extant right to make claims of exemption under the CPRA in the first instance and filed an unprecedented federal lawsuit instead. While it is correct that Judicial Watch makes record requests under the CPRA and has filed section 1085 petitions for writs of mandate to enforce the CPRA's provisions, it has done so only in state court, and only then as a companion claim to a complaint for injunctive or declaratory relief. *See* Cal. Gov't Code § 6258. In its twenty-four years history of submitting thousands of public records requests and litigating hundreds of public records lawsuits in state and federal courts across the country, Judicial Watch has never had a third-party file suit to stop a government agency from responding to one of its requests. It also has never been required to litigate a state public records act lawsuit in a federal

[1] In *Marken*, the leading case upon which Plaintiffs rely, the Second District Court of Appeal described the procedure:

> If the public agency elects to disclose records in response to a CPRA request, absent an independent action for declaratory relief or traditional mandamus, no judicial forum will exist in which a party adversely affected by the disclosure can challenge the lawfulness of the agency's action. . . [I]n the case of a third party seeking to challenge an agency's decision to disclose documents, the Legislature has not specified any special procedures to resolve the issue. A petition for writ of mandate is the appropriate procedure.

Marken v. Santa Monica-Malibu Unified School Dist., 202 Cal. App. 4th 1250, 1267 (2012).

court. If context matters as Plaintiffs argue, Plaintiffs fail to show why the context here warrants a different outcome.

C. Plaintiffs Misperceive or Misconstrue the Nature of a Section 1085 Petition.

Plaintiffs also err in their response to Judicial Watch's argument about the limited nature of a section 1085 petition in a reverse-CPRA lawsuit. Judicial Watch does not argue that determining what is in the public interest is solely the prerogative of the government. Such a claim is nonsensical. Rather, Judicial Watch correctly demonstrated – and Plaintiffs failed to rebut – that third parties bringing section 1085 petitions to challenge decisions to disclose records under the CPRA are limited in the arguments they can make. Because section 1085 is a mandamus provision, petitioners must plead and prove a "clear, present, ministerial duty upon the part of the respondent and a correlative clear, present, and beneficial right in the petitioner to the performance of that duty." *Marken v. Santa Monica-Malibu Unified Sch. Dist.*, 202 Cal. App. 4th 1250, 1266 (Cal. Ct. App. 2012). "Mandamus will not lie to control an exercise of discretion, i.e. to compel an official to exercise discretion in a particular manner." *Id.* "Mandate will not issue to compel action unless it is shown the duty to do the thing asked for is plain and unmixed with discretionary power or the exercise of judgment." *Unnamed Physicians v. Board of Trustees*, 93 Cal. App. 4th 607, 618 (Cal. App. Ct. 2001).

As Judicial Watch understands Plaintiffs' section 1085 petition, Plaintiffs argue BUSD erred in deciding to disclose the "Disputed Documents." According to Plaintiffs, BUSD should withhold these records from Judicial Watch under section 6255(a) of the CPRA. Section 6255(a) is a discretionary withholding provision, however. It authorizes a government agency to withhold a requested record if the agency finds, in the exercise of its discretion, that "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Cal. Gov't Code § 6255(a). The provision "permits the government agency to withhold a record." *CBS, Inc. v. Block*, 42 Cal.3d 646, 652 (1986). It does not mandate withholding any record. Because section 6255(a) is discretionary, not mandatory, and "mandamus will not lie to control an exercise of discretion," Plaintiffs' section 1085 petition must fail. Plaintiffs may not second-guess a government agency's exercise of discretion to disclose a public record. This is not to say that a *requestor* filing a complaint for declaratory or injunctive relief under section 6258 may not challenge a

government agency's exercise of discretion under section 6255(a). Nor does it mean only the government gets to decide what is in the public interest, which is a gross oversimplification on Plaintiffs' part. It only means a decision to disclose or not to disclose under section 6255(a) cannot be challenged by a section 1085 petition for writ of mandate. Plaintiffs cannot succeed on a section 1085 petition that only second guesses BUSD's disclosure decisions under section 6255(a).[2]

D. Plaintiffs' Section 1983 Claim Also Fails on the Merits.

Judicial Watch's opening brief showed Plaintiffs' section 1983 claim to be confused and implausible and not consistent with any recognized First Amendment legal theory. If anything, Plaintiffs reply/opposition makes their claim even more ambiguous and confused. Plaintiffs cite *Doe v. Reed*, 561 U.S. 186 (2010), but ignore the fact that *Doe* concerned a facial challenge to the constitutionality of the State of Washington's public records law. Plaintiffs do not allege that the CPRA is unconstitutional on its face. Plaintiffs also cite *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010). They disregard the fact that *Perry* was a discovery dispute between parties to a lawsuit challenging whether a ballot measure violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, not a section 1983 claim. Unlike Plaintiffs' section 1983 claim, the First Amendment issue was collateral to the underlying dispute in *Perry*.

Plaintiffs also ignore Judicial Watch's demonstration that the two categories of records subject to Plaintiffs' section 1983 claim either are not protected speech or are not Plaintiffs' speech. As a result, the Court need not even reach the question of balancing the government's interest in disclosure against any burden on protected speech. With respect to Plaintiffs' first category of records – internal discussions among King Middle School staff about the storm of controversy caused by Felarca's assault of a protester in Sacramento and subsequent television interviews– Judicial Watch cited *Connick v. Myers*, 461 U.S. 183, (1983) and *Garcetti v. Ceballos*, 547 U.S. 410 (2006) to demonstrate that such discussions were not even protected speech. Plaintiffs make no effort to rebut or refute this showing,

[2] Despite Judicial Watch having raised the issue directly in its opening brief, Plaintiffs still do not invoke section 6254(k) in conjunction with their First Amendment claims. They assert it in their reply/opposition, but only in the context of their newly-found deliberative process privilege claim. Judicial Watch submits that, by failing to invoke section 6254(k) twice now in the context of their First Amendment claims – in their opening brief and in their reply/opposition – Plaintiffs have waived any such argument.

effectively conceding the point. Instead, they argue that the internal discussions are protected from disclosure by the deliberative process privilege or an ambiguous, undefined privacy right.

Plaintiffs also did not and cannot rebut or refute Judicial Watch's showing that what Plaintiffs describe as their fourth category of records – emails and messages from parents and members of the public about Felarca – are not even Felarca's speech. They are the speech of persons who contacted BUSD or King Middle School to express concern about or criticize, sometimes in harsh terms, Felarca's behavior and her calls for the violent suppression of what she deems "fascist" speech by others.[3] Violently attacking someone on the street is not protected speech; and the right to freedom of speech does not include insulating a speaker from public criticism, especially when the speaker seeks out the national spotlight.[4] *See New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (the First Amendment reflects a "profound national commitment to the principal that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks."). Unsurprisingly, Plaintiffs provide no authority for their strikingly dubious claim that the First Amendment privilege they invoke prevents publication of one person's speech commenting on or criticizing the actions or speech of another. Plaintiffs also completely fail to provide any evidence or argument demonstrating that disclosure of this fourth category of records will reveal any private, internal, or otherwise non-public aspect of Felarca's speech. The records at issue are distinctly different from private, internal, and non-public information at issue in *NAACP v. Alabama*, 357 U.S. 449 (1958), *Doe*, *supra*, and *Perry*, *supra*. Because the records at issue are not Felarca's speech and no claim is made that their disclosure will reveal any private, internal, otherwise non-public information about Felarca's speech, there can be no chilling effect, and the Court need not even reach the issue of balancing the government's interest in disclosure against any burden on protected speech.

[3] Felarca characterized the Sacramento event at which she attacked the protester as "the Nazi's recruitment rally" and declared, "To us, there's no free speech for fascists." Sticht Decl., Ex. A at 2:17 and 3:8. She described a fascist as "someone who is organizing a mass movement that's attacking women, immigrants, black people, other minority groups in a movement of genocide." *Id.*, Ex. E at 3:7-9.

[4] In her second declaration, Felarca bemoans the "concerted effort across the country" against her, but says she is "willing to endure it to continue to be a *political leader*." *See* Dkt. Entry No. 82-12 at para. 11 (emphasis added).

E. Plaintiffs' Declarations Do Not Revive Plaintiffs' Fatal Claims.

To try to bolster their plainly deficient claims, Plaintiffs submit 14 "declarations," all but three of which appear to be from October or November 2017.[5] None of the 2017 declarations are probative. They were signed well before BUSD began its search for records responsive to Judicial Watch's request and some six months before BUSD decided which records it would produce in whole or in part. Again, no decision on production was made until the Spring of 2018. Sticht Decl. at paras. 14-15. As a result, the declarations reflect a level of generality that renders them completely speculative about the disclosure of any particular record.

Plaintiffs' new declarations also do not remedy the multiple problems Judicial Watch cited in its opening brief. While Plaintiffs Nixon and Steffl now swear they authored some of the handful of email messages included among the alleged internal deliberations that comprise Plaintiffs' first category of records, they do not claim that any of the messages they authored constitute First Amendment-protected advocacy or expression. Nixon Decl. (Dkt. Entry No. 82-18) at para. 4; Stefl Decl. (Dkt. Entry No. 82-19) at 4th bullet point. Rather, it appears more clearly than ever that the messages are administrative communications, not protected advocacy or expression. *Garcetti*, 547 U.S. at 421; *Connick*, 461 U.S. at 149.

F. Plaintiffs Confuse The Public and Governmental Interests in Disclosure With Their Private Interests In Withholding Plainly Public Records.

Plaintiffs are wrong in asserting that Judicial Watch has avoided addressing the public and governmental interest in disclosure. It is not avoidance to point out that Plaintiffs brought claims implicating a host of jurisdictional, procedural, and substantive issues fatal to their lawsuit, but neglected or failed to consider these issues. Such issues are unavoidable.

Plaintiffs also fundamentally misperceive Judicial Watch's argument about what is the public's business and the public and governmental interest in disclosure. Neither have any bearing on Felarca's political views. Her views are largely irrelevant. What is most relevant is that Felarca caused a storm of controversy that significantly burdened her public employer, her fellow teachers and co-workers, and students and parents of students who attend King Middle school. Records demonstrating this burden are

[5] Declaration No. 7 is undated. Mark Airgood's declaration is implausibly dated October 29, 2018. The "declarations" of Joseph C. Hermann and Angela S. Dancheva are unsworn.

plainly the public's business, and the records in this case clearly do so. To claim otherwise is erroneous. When a business receives customer complaints, records of those complaints undoubtedly are the business's records. They are not the customer's records. Likewise, the complaints and comments BUSD received about Felarca, then circulated among BUSD officials and staff to discuss how to respond, are BUSD public records. The public plainly has an interest in the records because, among other interests, the public has an interest in learning how BUSD was burdened by the controversy Felarca created, how BUSD officials, teachers, and staff responded to that controversy, and whether and to what extent the controversy affected BUSD's educational mission. All are significant public issues. Access to such information concerning the public's business is exactly what the California Constitution, art. I, § 3, subd. (b)(1) and the CPRA were intended to secure. [6]

G. Plaintiffs Cannot Rely On The Deliberative Process Privilege.

Plaintiffs double down on their deliberative process privilege claim. Judicial Watch demonstrated in its opening brief that Plaintiffs never invoked the deliberative process privilege in their pleadings. Plaintiffs' reply/opposition does not rebut or refute this assertion. Their deliberative process argument should be rejected for this reason alone.

While Plaintiffs claim the deliberative process privilege is incorporated into the CPRA by section 6254(k), they are mistaken. It arises under section 6255(a). *See*, *e.g.*, *Caldecott v. Superior Court*, 243 Cal. App. 4th 212, 225-26 (Cal. Ct. App. 2015). It is a discretionary withholding, not a mandatory one. *CBS, Inc.*, 42 Cal.3d at 652. It protects not only the "mental processes by which a given decision was reached," but also "conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated." *Caldecott*, 243 Cal. App. 4th at 225. Felarca describes these emails as "messages that

[6] Plaintiffs do not dispute the compelling public interest in BUSD's educational mission; instead they contend that the accomplishment of their educational mission should be "a fundamental privacy right" of the teachers/staff and on that basis the officials/teachers/staff emails in this case should be withheld from the public. Plfs' Reply/Opposition at 5. In Plaintiffs' view, the teachers are "more capable of asserting the public interest of maintaining a quality public education system[.]" *Id*. at 10. As support for this highly unorthodox idea that public education should be carried out in private when teachers are politically controversial, Plaintiffs offer no authority and instead rely on declarations stating the teachers/staff do not want their emails to be subject to public scrutiny. *Id*. at n.6. Even this position is not universally held as plaintiffs suggest since some employees availed themselves of the opportunity for initial turn-over of records before BUSD conducted its search. Def's Brief at 4:10.

teachers and staff sent to each other on the 'King conference' school list serve about the threats and harassment facing the school." Felarca 2nd Decl. at para. 6. Lori Nixon and Larry Stefl describe them in their latest declarations as "discussions . . . about the threats being leveled at school staff and how best to respond to them." Nixon Decl. (Dkt. Entry No. 82-18) at para. 3; Stefl Decl. (Dkt. Entry No. 82-19) at 3rd bullet point. Plaintiffs deny that the persons who participated in these discussions are "policymakers." *See* Supplement to Plfs' Reply (Dkt. Entry No. 83-1) at 2. It is not apparent from these descriptions that the emails ever reached policymakers. BUSD determined, in the exercise of its discretion, to disclose these emails, albeit it with names, email addresses, and contact information redacted. Plaintiffs' unpled claim that BUSD somehow erred by not invoking an inapplicable privilege to withhold these records in their entirety is nothing more than second guessing BUSD's decision. Plaintiffs offer no compelling justification for second guessing BUSD's decision to produce them, albeit with redactions, to Judicial Watch and the public.

In addition, Plaintiffs fail to explain how external communications – emails from parents about whether their children should remain in Felarca's classroom – could be subject to a privilege that protects internal communications about the formulation of government policy. BUSD decided to release these emails with personal names, email addresses, and contact information redacted. The emails in question are not internal deliberations about government policy. *Caldecott*, 243 Cal. App. 4th at 225.

H. Plaintiffs' Alleged "Terrorist Attack" References Are Contradicted By Plaintiffs' Evidence And The Record And Should Be Disregarded As Hyperbole.

Plaintiffs' references to threatened "terrorist attacks" are obvious hyperbole and should be disregarded. The evidence they cite – paragraph 8 of Felarca's second declaration – contains no such factual assertion. Plaintiffs also do not refute Judicial Watch's demonstration that Plaintiffs' own counsel dismissed the alleged threats as "very unserious" in a February 2017 media interview. Sticht Decl. at para. 12.

Other evidence submitted by Plaintiffs with their reply/opposition confirms Plaintiffs' counsels' assessment. In a June 29, 2016 message, BUSD Superintendent Evans and Board President Levya-Cutler stated that an email threat had been received and was forwarded to the FBI: "The FBI has reviewed the email, and by their criteria considered it to be a low level threat." Felarca Second Decl. at

Exhibit C. "However, the Berkeley Police and the District are taking the threat seriously; we have increased police patrols and security, and we have relocated two summer school camps that rent our facilities during the summer." *Id.* "We are grateful to Principal Janet Levenson for dealing immediately and thoughtfully with the situation, and to District staff for finding alternative space for summer camps." *Id.* Plaintiffs' hyperbole aside, nothing in the record warrants this Court issuing a writ of mandate to reverse BUSD's decision to release, albeit with some redactions, what Plaintiffs have identified as their third category of materials. If anything, the exhibit (Felarca Second Decl., Exhibit C) further confirms that disclosure of the requested records is important to help the public better understand both the significant burden Felarca imposed on BUSD and King Middle School officials, staff, parents, and students, and how BUSD and King Middle School officials responded to that burden.

I. Plaintiffs' Privacy Claim Was Waived And Also Has No Merit.

Judicial Watch is at a loss to understand Plaintiffs' "privacy" claim, especially as presented in Plaintiffs' supplement. Judicial Watch understood Plaintiffs had given up their section 1983 privacy claim under the Fourth Amendment. In a filing entitled "Plaintiff's List of Documents That Should be Withheld or Redacted in Order Not to Violate the First Amendment," Plaintiffs disavowed seeking relief under the Fourth Amendment. *See* Dkt. Entry No. 73 at 2 ("Plaintiffs are not arguing to withhold or redact any document based on the Fourth Amendment."). In their supplement, however, Plaintiffs appear to argue that the CPRA requires suppression of certain BUSD records under the Fourth Amendment, comparing it to a "permanent wiretap on public school employees and parents" and citing the landmark Fourth Amendment wiretap case *Katz v. United States*, 389 U.S. 347 (1967). Plaintiffs utterly fail to make the connection, if any, between Fourth Amendment suppression law and the CPRA. Any such claim was never pled in any event and most certainly has been waived.

What is plain is that Plaintiffs do not allege BUSD somehow erred by not invoking the CPRA's express privacy provision, section 6254(c). That provision authorizes the withholding of "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov't Code § 6254(c). They also do not appear to assert a claim under section 6252(k). Plfs' Reply/Opposition at 9, n.5. To the extent Plaintiffs argue their alleged privacy interests provide a

counterweight to the public interest in disclosure for purposes of a section 6255(a) balancing test, there is little, if anything, on Plaintiff's side of the scale.

Plaintiffs have never disputed BUSD's evidentiary showing that their privacy interest in communications sent through BUSD's email system is anything other than minimal. Attached to BUSD Public Information Officer Charles Burress' November 3, 2017 declaration were copies of BUSD's "Employee Acceptable Use Agreement for Electronic Resources & the Internet" and "Employee Use of Technology" policy. *See* Docket Entry No. 21-1 at Exs. A and B. The former states, in pertinent part:

> District staff and contractors are reminded that the District e-mail system, email accounts, computer accounts and all other user accounts are owned by the District. All electronic mail activities utilizing the District server is monitored and logged . . . Communications and information accessible via the network are subject to monitoring and/or review at any time and should not be assumed to be private and can be subpoenaed.

Id. at Ex. A. Burress' declaration states, "The District requires all employees to sign an Employee Acceptable Use Agreement for Electronic Resources and the Internet when they accept employment with the District." *Id.* at para. 2. It continues, "This Agreement is posted on the District's website and restated in its Employee Handbook." *Id.* Similarly, BUSD's "Employee Use of Technology" policy states, in pertinent part:

> Employees shall be notified that computer files and electronic communications, including email and voice mail, are not private. Technological resources shall not be used to transmit confidential information about students, employees, or district operations without authority.
>
> * * *
>
> To ensure proper use, the Superintendent or designee may monitor employee usage of technological resources, including the accessing of email and stored files. Monitoring may occur at any time without advanced notice or consent.

Id. at Ex. B. Notwithstanding BUSD employees' lack of a reasonable expectation of privacy, BUSD was careful to redact names, email addresses, and contact information to protect teachers' and staff's privacy. Any further privacy interest Plaintiffs' might have in the records is outweighed by the public interest in disclosure. Plaintiffs provide no justification for why the Court should second guess BUSD's decision to redact the records and order they be withheld in their entirety instead, especially in light of Plaintiffs' minimal privacy interest in email sent through BUSD's email system. To the extent Plaintiffs claim to be protecting the privacy rights of students or parents, they fail to demonstrate how they have

standing or authorization to assert whatever privacy rights these third-parties might have in the records beyond their names, email addresses, and contact information. Their attempt to second guess BUSD's decision to redact these records instead of withholding them in their entirety fails as well.

III. CONCLUSION

For all of the reasons stated herein and in Judicial Watch's memorandum in support of its motion for summary judgment, this Court should deny Plaintiffs summary judgment and grant summary judgment to Judicial Watch on all of Plaintiffs' claims.

Dated: September 17, 2018

Respectfully submitted,

JUDICIAL WATCH, INC.

By: /s/ Robert Patrick Sticht.
ROBERT PATRICK STICHT

Attorneys for Real Party In Interest,
JUDICIAL WATCH

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2018, I electronically filed the foregoing JUDICIAL WATCH'S REPLY TO PLAINTIFFS' OPPOSITION TO JUDICIAL WATCH'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court for the United States District Court for the Northern District of California by using the district CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the district CM/ECF system.

/s/ Robert Patrick Sticht.
ROBERT PATRICK STICHT