Tiffany L. Clark, Esq. April 19, 2018

[redacted]

Dear Education Committee Members,

I am a lawyer, and have been a California private homeschool principal and teacher for nearly fourteen years, with the support of my husband and our homeschooling community. Our two sons are *thriving* under our private school laws – as they *currently* exist. Our family, and so many others, would be *devastated* if either AB 2756 or AB 2926 were to become law. ***(PLEASE NOTE:*** *Just prior to printing, signing and emailing this letter, I became aware of the late-breaking rumor that the author of AB 2926 had pulled the bill, although this is not yet reflected at leginfo.ca.gov. In any event, however, my arguments regarding AB 2926 herein are also relevant to AB 2756. Hence, I ask that the entirety of my letter be read and carefully considered, regardless of whether or not AB 2926 was in fact pulled. I believe you will find the legal and policy analysis I offer helpful in making your decision on either or both bills. Thank you.)*

Over the course of my life, I have consistently allied myself with targeted minority groups (e.g., I have been pro Dreamers/DACA recipients; pro sanctuary state status for California; against Muslim registry and bans; against African-American racial profiling and unwarranted police violence; pro transgender bathroom use and military service rights; pro marriage equality; and so on). But I had never known what it felt like to be a *member* of a targeted minority group myself, before the introduction of these two bills. That is, until then, I had never personally felt the dreadful fear of having *my* minority group targeted by the law, as a result of a fundamental misunderstanding, born of either long-standing bias, or, as in this situation, a single, horrific, utterly misleading case in the news – the Turpin case.

From both a rational policy-making perspective *and* from a constitutional one, here's what makes the Turpin case *so* demonstrably and problematically misleading, as rationale for AB 2756's singling out of private *home* schools, under circumstances that demonize all homeschooling families and jeopardizes their privacy, with the evidenced intent of working to impose an even *heavier* regulatory burden upon them in the future, *via* bills like AB 2926.

I'll begin with the problems with these two bills, from a rational policy-making perspective.

Looking at these two bills, one would assume that there must at *least* be a rational basis for concluding that the Turpin case is representative of homeschooling families. That is, looking at these two bills, one would assume that, compared with other private schools, private *home* schools must be singled out, at any cost to family privacy or otherwise, because they are 1) *more* likely to abuse or neglect their children, justifying health and safety inspections *just* for them; and they have 2) *less* positive student academic, developmental, and/or other adult preparedness

outcomes, justifying curriculum standards and teaching credential requirements, again *just* for them. ***Yet nothing could be further from the truth.***

In *fact*, on the first question of whether private home school abuse rates uniquely justify *health and safety inspections*, when we look at *research,* rather than misleading anecdotal cases, we find that homeschooling parents generally are *less* likely to abuse or neglect their children than other parents – regardless of degree of state regulation of home schools (including state regulation requiring *home visits*). Specifically, evidence "shows that homeschooled children are abused at a lower rate than are those in the general public, and no evidence shows that the home educated are at any higher risk of abuse."[1] And "Legally homeschooled students are 40% less likely to die by child abuse or neglect than the average student nationally."[2] *And, importantly, a recent study shows no statistically significant relationship between the degree of state regulation of homeschooling and the frequency of abuse and neglect of homeschooled students.*[3] This study covered all fifty states, plus the District of Columbia, comparing homeschoolers in "high regulation" states, i.e., seven states where home school parents "send to the state notification of homeschooling or achievement test scores and/or evaluation by a professional and, in addition, having other requirements (e.g., *curriculum* approval by the state, *teacher qualifications* of parents, or *home visits* by state officials)"; "medium regulation" states, including California; and "low regulation" states, i.e., fourteen states where homeschool parents give no notice or have any other contact with the state.

And on the *second* question, of whether private *home* school student academic outcomes uniquely justify *state approved curriculum* or *teacher certification* requirements, when we look at *research,* rather than misleading anecdotes, we find that homeschooled students on average enjoy the same or *better* academic outcomes than their institutionally schooled peers – again, regardless of degree of state regulation of homeschools (including state regulation requiring *state approval of curriculum*, *teacher qualifications*, and/or *home visits*) *and* regardless of whether either or both parents possess or ever have possessed a *teaching credential* (indeed students of non-certified parents perform slightly *better* on average).[4] In

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[1] Brian D. Ray, Ph.D., *Child Abuse of Public School, Private School, and Homeschool Students: Evidence, Philosophy, and Reason* (January 23, 2018), https://www.nheri.org/child-abuse-of-public-school-private-school-and-homeschool-students-evidence-philosophy-and-reason/ (last visited April 16, 2018).

[2] Roger Williams, *Homeschool Child Fatalities Fewer Than the National Average* (July 28, 2017), http://thehomeschooleffect.com/child-fatalities-regulation.html (last visited April 16, 2018). See also, Dr. Brian Ray and Debi Ketron, *Child Abuse and Neglect Fatalities Not Correlated with Homeschooling* (February 8, 2017), https://iahe.net/blog/child-abuse-neglect-fatalities-not-correlated-homeschooling-201702 (last visited April 16, 2018).

[3] Brian D. Ray, PhD, *The Relationship Between the Degree of State Regulation of Homeschooling and the Abuse of Homeschool Children (Students)* (March 15, 2018), https://www.nheri.org/2018/03/15/degree-of-homeschool-regulation-no-relationship-to-homsechool-child-abuse/ (last visited April 16, 2018).

[4] Brian D. Ray, PhD, *Academic Achievement and Demographic Traits of Homeschool Students: A Nationwide Study, Academic Leadership,* Vol 1, Issue 1, Winter 2010, , https://www.nheri.org/wp-content/uploads/2018/03/Ray-2010-Academic-Achievement-and-Demographic-Traits-of-Homeschool-Students.pdf, which can also be reached through the "view here in an academic, peer-reviewed journal" link on this page, https://www nheri.org/academic-achievement-and-demographic-traits-of-homeschool-students-a-nationwide-study-2010/ (both last visited April 19, 2018)

addition to the same or better academic outcomes, data show home schooled students enjoy better social, emotional and psychological development outcomes, and the same or better levels of general preparation for adulthood as well.[5]

So why – simply as a rational public policy matter – would we pass either of these two bills? That is, why would we spend scarce state, legislative, and department money, time and human resources to further the goal of *singling out* a particular group, with the evidenced intent of uniquely regulating that group, based on one misleading case, *while* the *broad-based* research shows that 1) not only are there are no systemic problems warranting such regulation, but the opposite is true, and that, 2) even if there were, such state regulation makes no statistically significant difference in remedying such problems? ***Especially when, by so doing, we would demonize, burden, and jeopardize the privacy of a group that demonstrably contributes so much to young people, and, in the process, arguably violate our Federal Constitution as well?***

I will get to the constitutional concerns shortly. But, first, again solely from a rational policy-making perspective, what do I mean when I say these bills would "jeopardize the privacy" of private home school families? Here are the privacy concerns, with each bill.

With AB 2756, the state would require home schools to affirmatively "out" themselves with regard to their home life, and to do so effectively to the *public*, notwithstanding the policy of only putting schools with six or more students on the "public list," for two reasons. First, because home schools can in fact have six or more students, as families can have six or more children. And, second, because home and other private school records are not protected by Family Educational Rights and Privacy Act,[6] meaning otherwise legal requests for public information could result in public dissemination of the affirmed "home school" status of schools with five or fewer students as well. And, to be clear, this *would* represent a change to current law, notwithstanding a California Department of Education (CDE) official's claim, made to me, that the CDE already collects "this data" from private home schools. I was told, in effect, that, because the Private School Affidavit already asks for the number of enrolled students, and the CDE *infers* that private schools with less than five enrolled students are *home* schools, requiring home schools to now affirmatively *verify* their status as home schools would represent no effective difference in the law. But, if this were the case, there would be no purpose for passage of AB 2756. Moreover, respectfully, there is a world of difference between an agency *inferring* that particular status and a home school being required to explicitly *confirm* it, and, by so doing, risk effectively revealing that confirmation to legislators who have demonstrated a willingness to target them without a rational basis, and to the public at large.[7] In other words, the affirmative

[5] *Id.* For example, those who were or are home schooled students on average demonstrate at least as much or more involvement in activities that predict *leadership* in adulthood, are doing at least as well on college/university SAT and ACT tests, have comparable or a bit higher levels of college matriculation, are performing at least as well in college, are reporting satisfaction in having been home educated, have at least as much involvement in community service, and are more civically engaged. *Id.*

[6] "FERPA General Guidance for Parents," U.S. Department of Education, https://www2.ed.gov/policy/gen/guid/fpco/ferpa/parents html (last visited April 17, 2018)

[7] *See supra* note 6 and accompanying text.

confirmation of *home* school status, which would be required under AB 2756, would mandate home schools "out" themselves in an environment where evidence suggests they will likely not only then be *further* targeted by legislators, without a rational basis, but also possibly by groups who disagree with homeschooling, or even by child predators.

***As for AB 2926*,** there is a very serious privacy concern indeed, given the direct evidenced intent to ultimately require health and safety inspections of *private* homes – *private* homes for which there is zero evidence of greater risk for child abuse, fire, or any other kind of health and safety problem, as compared with any other private home.

But how could a "mere data collection" bill, like AB 2756, or "mere advisory committee" bill, like AB 2926, possibly violate our Federal Constitution? For reasons described below, AB 2756 and AB 2926 are arguably unconstitutional now *and* would likely lead to additional unconstitutional legislation in the future. Here's why.

***First*, related to AB 2756 specifically, data collection laws by themselves can violate the fundamental constitutional right to privacy – no physical invasion is required, so long as there is a reasonable expectation of privacy, which is impacted by the law.**[8] And there is no more reasonable expectation of privacy than the expectation of privacy related to the goings on within the four walls of a family's *home.*[9] Given AB 2756's impact upon on a right that the Supreme Court considers "fundamental," i.e., the right to privacy, it would be subject to "strict scrutiny,"[10] a test most statutes fail to pass. Strict scrutiny requires *more* than evidence of a "rational basis," which is the standard constitutional test in many contexts, at least when no fundamental right is infringed upon. The rational basis test requires states show the state action in question is "rationally related to a legitimate government interest."[11] But strict scrutiny requires not *only* a rational basis for the government's action, but that it be *necessary* to further a compelling government interest.[12] Of course, the state possesses legitimate and even compelling interests in education and prevention of child abuse – as I will elaborate upon shortly. However, as explained earlier, there is not even so much as a rational basis for concluding *either* of these bills would further *either* interest, let alone be *necessary* enough to justify infringement of either the fundamental constitutional right to privacy, or another fundamental constitutional right *also* impacted by these bills, which I will discuss next.

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[8] U.S. v. Maynard, 615 F. 3d 544, 563-565 (D.C. Cir. 2010) (finding reasonable expectation of privacy violated by GPS data collection)

[9] Kyllo v. United States, 533 US 27, 31 ("The Fourth Amendment provides that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[, and no Warrants shall issue, but upon probable cause].' 'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' Silverman v. United States, 365 U. S. 505, 511 (1961). With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. See Illinois v. Rodriguez, 497 U. S. 177, 181 (1990); Payton v. New York, 445 U. S. 573, 586 (1980)."); the Fourth Amendment is applicable to state action *via* the Fourteenth Amendment. Ker v. California, 374 U.S. 23, 30 (1963).

[10] Roe v. Wade, 410 U.S. 113, 155-156 (1973)

[11] See, e.g., U.S. Department of Agriculture v. Moreno, 413 U.S. 528, 533 (1973).

[12] *Id.*

***Second*, these are not *merely* data collection and advisory committee bills – they unconstitutionally *discriminate,* in ways that impact not only the fundamental constitutional right to privacy, but also the recently affirmed *fundamental constitutional right of parents to direct the upbringing and education of their children*,[13] as well as the important constitutional right to free exercise of religion.[14]** That is, in addition to requiring home school families to "out" themselves effectively publically,[15] in a way that *uniquely* infringes upon their fundamental constitutional right to privacy, there is evidence of an intent to *use* that data to legislate *further* "disparate treatment" or "discrimination" under law, by ultimately subjecting private *home* schools to a heavier regulatory burden than *other* private schools, in a way that infringes upon the recently affirmed fundamental constitutional right of parents to direct the upbringing and education of their children.[16] (The Supreme Court has found *discriminatory intent* using sources which include statutory language, legislative history, and "contemporary statements by members of the decision-making body."[17] In this case, all three point to a discriminatory intent with *each* of these bills. Both bills explicitly single out private *home* schools as distinct from other private schools. And both bills come with an evidenced intent to ultimately place a heavier regulatory burden on private *home* schools than other private schools. AB 2926 does the latter explicitly in the statute, by mandating that the result of its study "shall" be recommendations for regulation targeted uniquely at it. AB 2756 does this implicitly, as amply evidenced by legislative history and public statements alike.[18]) The trouble is, our Constitution does not allow the government to legislate with the evidenced intent of "discriminating" against or giving *any* group "disparate treatment" under law, without *at least* a "rational basis"[19] – which is absent here, as explained earlier. Moreover, when evidence shows

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[13] In Troxel v. Granville, 530 U.S. 57 (2000), the Supreme Court clarified and confirmed the existence of this fundamental parental right, and implicitly (explicitly in Kennedy's dissent, p. 95) that it exists *independently* of any free exercise of religion claim, given Employment Division v. Smith, 494 U.S. 872, 881 (1990), taken in the context of decades of other Court cases, outlined in Christopher J. Klicka, Esq., *Decisions of the United States Supreme Court Upholding Parental Rights as "Fundamental"* (October 27, 2003), https://hslda.org/docs/nche/000000/00000075.asp#10 (last visited April 16, 2018). See also, this excellent summary of the impact of *Troxel*, with key quotes included, *U.S. Supreme Court: Parents' Rights Are Fundamental* (August 17, 2001), https://hslda.org/content/docs/nche/000010/20011210.asp (last visited April 19, 2018)

[14] *Id.*

[15] *See supra* note 6 and accompanying text.

[16] *See supra* note 13.

[17] Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-268 (1977)

[18] Assembly Member Medina introduced AB 2756 on February 16, 2018, in explicit response to the Turpin case, i.e., "[t]he horrific child abuse case in Perris, California," citing the need for "oversight" and the "tighten[ing] up of existing law" to "ensure that each child is in a safe learning environment." "Assemblymember Medina Introduces Bill to Protect Health and Safety of Students" (February 16, 2018), https://a61.asmdc.org/press-releases/assemblymember-medina-introduces-bill-protect-health-and-safety-students (last visited April 16, 2018). Moreover, AB 2756 originally contained language amending the Health and Safety code to effectively mandate annual fire inspections of private home schools. AB 2756. Assemb. Reg. Sess. 2017-2018 (2018). Although this fire inspection language was ultimately removed, it's reasonable to suppose that this language was removed in response to public outcry, knowing that AB 2926 could still provide a path to private home school inspections, given AB 2926's (or, if AB 2926 is pulled or doesn't pass, some potential future bill's) mandate for recommendations *re* imposing additional "[health] and safety inspections" on private home schools. AB 2926. Assemb. Reg. Sess. 2017-2018 (2018).

[19] U.S. Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (ruling against the government, because the rational basis test not satisfied, because the only plausible legitimate interests based on "unsubstantiated

that the state's discrimination would prevent the targeted group from fully exercising one or more *fundamental constitutional rights*, as is the case here, the statute must survive strict scrutiny, requiring evidence of not just a rational basis for the discrimination, but a *necessity* for it.[20]

To summarize – without so much as a rational basis, let alone a basis sufficient to survive strict scrutiny – there is an evidenced intent with these bills to discriminate in a way that would infringe upon a *number* of fundamental rights related to a family making its own, personal, privately versus publically funded,[21] educational/religious decisions, involving its own children, within its own home, which rights take precedence, whether or not those choices are exactly what the state would make *for* the family if the parents were in disagreement in divorce proceedings, or deemed "unfit."[22]

Of course, the state has a constitutionally legitimate and even compelling interest in the education of children within its borders. *However*, that interest is *more* than satisfied by the broad-based research showing *better* academic, developmental, and adult preparedness outcomes for homeschoolers compared to students in institutional learning environments. I say "*more* than satisfied," because these outcomes are *more* than what a state can demand, under our Constitution. For "the child is not the mere creature of the state," as the Supreme Court reminded us, when it ruled in favor of the homes schooled, Old Order Amish over the state, in *Wisconsin v. Yoder* (citing *Pierce v. Society of Sisters*). As described in *Yoder,* the Old Order Amish rejected formal education of *any* kind after the eighth grade, requiring their children instead to stay at home and focus on manual labor, i.e., *vocational* training, fit to prepare the Amish adolescents ultimately for roles as simple Amish farmers and housewives. The Court found even this level of academic achievement and preparation for adult life sufficient to satisfy the state's interest in education of children within in its borders, when held up against the right of parents to direct the upbringing and education of their children (in *Yoder*, the Court emphasized the Amish's religious motivations; however, since *Smith,* then *Troxel,* and numerous other Supreme Court cases, the Court has evolved to conclude that the simple paramount right of parents to direct the upbringing and education of their children is sufficient, regardless of whether religion plays a role in the parents decision-making or not).[23] So, while a state has *wide* discretion in imposing requirements of all kinds when it is *publically* funding education, it has a very *limited* discretion to impose such requirements on families opting for *privately* funded

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assumptions" regarding the specially regulated group, and the regulation not rationally related to serving that interest because members of the group could readily escape regulation). Interestingly, the ability to escape regulation would be even easier in the case before us. A family like the Turpin's could have easily and without detection failed to file the Private School Affidavit, and it would thereby not be subject to the regulation envisioned by these two bills.

[20] San Antonio Independent School District v. Rodriguez, 411 US 1, 16 (1973)

[21] Pierce v. Society of Sisters, 268 U.S. 510 (1925)

[22] *See* Troxel v. Granville, 530 U.S. 57 (2000).

[23] *See supra* note 13 and accompanying text.

education[24] – especially when in a context like this one, where evidence shows its interests in education for children within its borders is already amply met.

That's why, per our Federal Constitution, families in California *must* continue to have full, equal access to California's *only* legal path for even *close* to full exercise of their fundamental constitutional right to direct the upbringing and education of their children. That path being our private school laws, which barely suffice as they *are* to provide the kind of fulsome respect for the aforementioned right. I say "barely suffice" in part because it's highly questionable that, consistent with the holding in *Yoder,* the Old Order Amish could have been constitutionally required to, for example "offer instruction in the several branches of study required to be taught in the public schools of the state," as required by Education Code Section 51220, given that they specifically objected to instruction in any number of subjects taught in the public schools. And certainly they could not have been required to use state approved curriculum, given their objection to formal education of any kind. Likewise, teaching credentials would have been ruled a wholly unconstitutional burden upon them, given their objection to the higher education that would be required to obtain such credentials.

Also, of course, the state also has a constitutionally legitimate interest in preventing child abuse and neglect. *However,* that interest is similarly more than satisfied by the broad-based evidence showing *lower* rates of abuse, neglect, and fatalities amongst home schooled students compared to their institutionally schooled peers.[25] But what about preventing *isolated* abuse cases? We don't want *any* children to undergo abuse. Of course not. However, we can only use *constitutional* means for preventing anomalous criminal behavior – in *any* context. So, when law enforcement demonstrates probable cause to believe evidence of a specific crime will be found in a specific home, and obtains a warrant, that home can be searched.[26] Or when a parent is given due process and deemed "unfit," a properly authorized home search and even complete displacement of that parent's fundamental constitutional right to direct the upbringing and education of his or her children can occur.[27] But what we *cannot* do, under our Federal Constitution, is sanction home searches across an entire minority group "just in case" we might find evidence of a crime,[28] least of all when that's justified on the basis of the misleading actions of a few, rather than research showing a higher likelihood of crime amongst members of that minority group.

If the idea of targeting a whole minority group based on the misleading actions of a few sounds disconcertingly familiar, it's because over the past year plus we have seen a remarkable amount of similarly problematic *federal* government action, either taken or proposed. That is, often arguably *unconstitutional* federal government action, based on misleading individual cases, when broad-based research shows us no such action is warranted. For example, the proposed "Muslim

[24] *See supra* note 13 and accompanying text, and Pierce v. Society of Sisters, 268 U.S. 510 (1925) (specifically finding there is a constitutional right of parents to *privately* fund and direct their children's education).
[25] *See supra* notes 1-3 and accompanying text.
[26] *See supra* note 10.
[27] *See, e.g.,* Troxel v. Granville, 530 U.S. 57 (2000).
[28] Wolf v. Colorado, 338 U.S. 25 (1949)

registry";[29] the various "Muslim bans";[30] the creation of a "Voter Fraud Commission," on the basis of the false claim of widespread voter fraud;[31] the creation of "The Victims of Immigration Crime Engagement Office," on the basis of misleading, individual immigrant crime cases, when broad-based research showed that immigrants commit less crime than the native born;[32] and so on.

But, until now, we in the great State of California have stood up *against* such discriminatory government action, not *for* it. And we still can here, if *you* stand up and vote "No" on these two bills. I can only hope you will.

Respectfully submitted,

Tiffany L. Clark, Esq.

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[29] David Cole, *Why Trump's Proposed Targeting of Muslims Would Be Unconstitutional* (November 22, 2016), https://www.aclu.org/blog/religious-liberty/free-exercise-religion/why-trumps-proposed-targeting-muslims-would-be (last visited April 19, 2018)

[30] Spencer Amdur, Appeals Court Declares Third Muslim Ban Unconstitutional (February 15, 2018), https://www.aclu.org/blog/immigrants-rights/appeals-court-declares-third-muslim-ban-unconstitutional (last visited April 19, 2018).

[31] Brennan Center for Justice, *Background on Trump's "Voter Fraud" Commission,* https://www.brennancenter.org/everything-you-need-know-about-trumps-voter-fraud-commission (last visited April 19, 2018).

[32] Van Le, *Immigration 101: What is VOICE (Victims of Immigration Crime Engagement)?* (May 2, 2017), https://americasvoice.org/blog/victims-of-immigration-crime-engagement/ (last visited April 19, 2018); Rafael Bernal, *Reports Find That Immigrants Commit Less Crime Than US-Born Citizens* (March 19, 2017), http://thehill.com/latino/324607-reports-find-that-immigrants-commit-less-crime-than-us-born-citizens (last visited April 19, 2018).