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11 EILEEN ROBINSON, in her official capacity; and MATT TENNIS,
12 in his official capacity

11 IN THE UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF CALIFORNIA

13 AURORA REGINO,

14 Plaintiff,

15 vs.

16 SUPERINTENDENT KELLY STALEY, in
17 her official capacity; CAITLIN DALBY, in her
18 official capacity; REBECCA KONKIN, in her
19 official capacity; TOM LANDO, in his official
20 capacity; EILEEN ROBINSON, in her official
21 capacity; and MATT TENNIS, in his official
22 capacity,

23 Defendants.

Case No.: 2:23-cv-00032-JAM-DMC

**DEFENDANTS’ OBJECTIONS TO
REPLY EVIDENCE SUBMITTED BY
PLAINTIFF IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION
(Local Rule 230(m)(1))**

Complaint Filed: January 6, 2023
Trial Date: Not Yet Set

24 Defendants KELLY STALEY, CAITLIN DALBY, REBECCA KONKIN, TOM
25 LANDO, EILEEN ROBINSON, and MATT TENNIS (collectively, “Defendants”) hereby object
26 to the Declaration of Plaintiff Aurora Regino (ECF 27-2; “Regino Declaration”) submitted by
27 Plaintiff AURORA REGINO (“Plaintiff”) as part of her reply briefing in support of her pending
28 motion for a preliminary injunction. In short, the Regino Declaration seeks to introduce material,

1 new evidence concerning Plaintiff’s delay in filing the underlying motion for a preliminary
2 injunction. This testimony should have been proffered with Plaintiff’s moving papers so that
3 Defendants could have had an opportunity to address that testimony, and proffer
4 counterevidence, as part of their opposition to the motion. In addition, the declaration is rife with
5 inadmissible testimony.

6 Accordingly, pursuant to Rule 230(m)(1) of the Local Rules of the United States District
7 Court for the Eastern District of California (“Local Rule 230(m)(1)”), Defendants request that
8 the Court strike the Regino Declaration in its entirety and refuse any consideration of the
9 proffered testimony in its determination on the pending preliminary injunction request.

10 **I. THE COURT SHOULD STRIKE THE REGINO DECLARATION AS**
11 **IMPROPERLY-PROFFERED REPLY EVIDENCE**

12 Local Rule 32(m)(1) provides that “[i]f new evidence has been submitted with the reply
13 brief [to a civil motion], the opposing party may file and serve, no later than seven (7) days after
14 the reply is filed, an Objection to Reply Evidence stating its objections to the new evidence. ...”
15 Here, currently pending before the Court, Plaintiff has filed a motion for preliminary injunction.
16 See ECF 18. In her moving papers, Plaintiff recognized that one of the factors this Court must
17 consider when determining whether to grant that motion is whether “she will be irreparably
18 harmed absent the injunction....” See ECF 18.2 (“Memorandum in Support of Motion for
19 Preliminary Injunction”), at 9:2-6 (citing *Winter v. Nat. Res. Def. Council, Inc.* 555 U.S. 7, 20
20 (2008)). Plaintiff did not proffer any declarations in support of this motion. See ECF 18 et seq.
21 Rather, she relied upon the allegations raised in her verified complaint. See ECF 1 (“Complaint;”
22 verified at 27-28); ECF 18 (preliminary injunction moving papers repeatedly citing to
23 Complaint).

24 On February 14, 2023, Defendants filed an opposition to the preliminary injunction
25 motion. See ECF 21 (“Opposition”). In that briefing, Defendants raised, in pertinent part, the
26 following argument, citing nearly 30-year-old precedent by the United States Court of Appeals
27 for the Ninth Circuit (“Ninth Circuit”) in *Lydo Enters. v. Las Vegas*, 745 F.2d 1211 (9th Cir.
28 1984): “A preliminary injunction is sought upon the theory that there is an urgent need for

1 speedy action to protect the plaintiff's rights. By sleeping on its rights a plaintiff demonstrates
2 the lack of need for speedy action. ... Given that Plaintiff admits [in her own pleading] that she
3 waited nine months to bring this motion, and given that during that interim period her child has
4 admittedly [in the pleading] returned to identifying as a girl despite the continued application of
5 the regulation in question, and given that Plaintiff has not proffered any evidence to meet her
6 burden that a new harm is imminent and a compelling reason is apparent, Plaintiff cannot
7 establish the necessary irreparable harm to warrant preliminary injunctive relief." Opposition, at
8 20:11-13, 21:11-16 (internal grammatical marks and citation omitted).

9 Now, as part of her reply briefing, Plaintiff for the first time submits a declaration in
10 support of the motion. See ECF 27-2. In the substantive reply briefing, Plaintiff cites to this new
11 testimony as evidence of (1) excusable delay in bringing the underlying preliminary injunction
12 motion, see ECF 27 ("Reply"), at 8:6-9:2; and (2) that Plaintiff is currently incurring harm as a
13 result of the purported wrongful conduct, see Reply, at 9:4-19.

14 However, a moving party may not proffer new evidence in its reply papers. *Provenz v.*
15 *Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996). Where new evidence is submitted in reply papers
16 without an explanation as to why it was not timely proffered in the moving papers, the court
17 should decline to consider it. *Lujan v. National Wildlife Federation* (1990) 497 U.S. 871, 894-
18 895; *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007); *Clark v. State of California*, 739 F.
19 Supp. 2d 1168, 1223 n.14 (N.D. Cal. 2010). Here, Plaintiff makes no attempt to justify the
20 submission of her untimely testimony. Rather, she simply proffers that "I have been made aware
21 that the District is contending I have not been irreparably harmed by the District's actions. The
22 purpose of this Declaration is to respond to that contention." ECF 27-2, at ¶ 2. This proffer fails
23 for multiple reasons.¹

24 First, for the purposes of this objection, the material issue is not that the District is
25 contending that Plaintiff has not been irreparably harmed. Rather, the material issue is that
26

27 ¹ It is also important to remember that both the underlying complaint and motion for preliminary
28 injunction only concern Plaintiff, the mother; not her child, A.S., who is not a party to this
litigation.

1 *Plaintiff bears the burden of establishing that she will suffer irreparable harm in light of the fact*
2 *that her own pleading establishes that (1) she waited nine months before filing the underlying*
3 *preliminary injunction motion; and (2) her daughter has returned to identifying herself as a*
4 *female despite the continued enforcement of the policy in question.* Complaint, ¶¶ 35-36, 41-43,
5 50-52; *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (movant bears burden of persuasion in
6 motion for preliminary injunction). Plaintiff chose not to address that deficiency *apparent on the*
7 *face of her own pleading* in her moving papers despite *her burden of persuasion* and despite the
8 fact that Ninth Circuit case law had established *for nearly 30 years* that unwarranted delay is
9 fatal to a motion for preliminary injunction. Instead, Plaintiff chose to wait until her reply papers
10 to address that fundamental issue.

11 Second, if simply responding to arguments raised in an opposition was sufficient to
12 justify the proffering of new evidence in reply papers, then the submission of reply evidence
13 would *always* be permissible as a matter of course since the opposing party will always raise
14 some argument in its opposition. Rather, arguments raised in an opposition justify the proffer of
15 reply evidence only where the arguments “reasonably were unforeseen at the time of the opening
16 brief.” William W. Schwarzer, A. Wallace Tashima, and James M. Wagstaffe, FEDERAL
17 CIVIL PROCEDURE BEFORE TRIAL, § 12:107.1 (The Rutter Group 2022). Here, where the
18 deficiencies were readily apparent on the face of her own pleading, rather than established by the
19 proffer of declarations and other new evidence by Defendants, and where the relevant case law
20 had been established for nearly 30 years, Plaintiff cannot satisfy the “reasonably unforeseen”
21 standard.

22 For these reasons, the Court should strike the Regino Declaration in total, and refuse to
23 consider said testimony in determining the underlying motion for a preliminary injunction.

24 **II. MUCH OF THE TESTIMONY PROFFERED BY PLAINTIFF IS**
25 **INADMISSIBLE**

26 Even if this Court believes that Plaintiff has submitted the Regino Declaration in a
27 procedurally proper manner, much of the proposed testimony is inadmissible.

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1 A. Paragraphs 3 and 4

2 With regard to Paragraphs 3 and 4 of the Regino Declaration, the proffered testimony is
3 inadmissible lay opinion and/or improper expert testimony by a lay witness. A lay person may
4 not provide opinion testimony concerning “scientific, technical, or other specialized knowledge
5 within the scope of [Federal Rule of Evidence] 702.” Fed. R. Evid. 701(c). In turn, Federal Rule
6 of Evidence 702 provides that such opinion testimony can be proffered only by “[a] witness who
7 is qualified as an expert by knowledge, skill, experience, training or education” in the field. Fed.
8 R. Evid. 702.

9 Here, Paragraphs 3 and 4 of the Regino Declaration proffer the following scientific,
10 technical, or other specialized knowledge testimony:

- 11
- 12 • “A.S. is still in regular counseling, and I believe it is likely that she will again experience
13 a transgender identity based on the facts that (1) the District is prompting students to
14 question their gender identities, (2) she has experienced such an identity in the past, and
15 (3) she is too young to understand what having a transgender identity might mean for her
16 life.” ECF 27-2, at ¶ 3.
 - 17 • “I also believe it is likely that C.S. will begin to experience a transgender identity because
18 (1) the District is prompting students to question their gender identities and (2) her sister
19 has experienced such an identity in the past, and (3) she is too young (eight years old) to
20 understand what having a transgender identity might mean for her life.” ECF 27-2, at ¶ 4.

21 Yet, nowhere in her declaration does Plaintiff proffer any knowledge, skill, experience, training
22 or education regarding the likelihood of persons experiencing a transgender identity in the future.
23 See ECF 27-2. “[T]he proponent [of the proposed expert] has the burden of establishing that the
24 pertinent admissibility requirements are met by a preponderance of the evidence.” Fed. R. Evid.
25 702 advisory committee's note. To that end, the Court has a “gatekeeping role,” “to ensure the
26 reliability and relevancy of expert testimony.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S.
27 137, 152, (1999). “If [proffered expert] evidence lacks either reliability or relevance, it must be
28 excluded.” *Cooper v. Brown*, 510 F.3d 870, 943 (9th Cir. 2007). Given that Plaintiff has not
proffered any evidence to establish her qualifications to provide expert opinion testimony
regarding the likelihood of persons experiencing a transgender identity in the future, said
testimony is barred by Federal Rules of Evidence 701 and 702.

1 B. Paragraph 5

2 Next, with regard to Paragraph 5, “[i]rrelevant evidence is not admissible.” Fed. R. Evid.
3 402. “Evidence is relevant if ... it has any tendency to make a fact more or less probable than it
4 would be without the evidence; and ... the fact is of consequence in determining the action.”
5 Fed. R. Evid. 401.

6 Here, Plaintiff proffers the following irrelevant and speculative testimony in Paragraph 5:

- 7
- 8 • “While I love my daughters and will continue to love and support them if they come to
9 experience a transgender identity in the future, I am concerned that if my daughters do
10 experience such an identity in the future, the District will socially transition them without
11 informing me or obtaining my consent, thus precluding me both from being involved in
12 this important decision in their lives and from seeking the guidance of a mental health
professional. Considering the District has socially transitioned A.S. without my
knowledge or consent in the past, this concern is real, and I am experiencing worry,
concern, anxiety, and emotional distress due to these implications from continued
application of the Parental Secrecy Policy.” ECF 27-2, at ¶ 5.

13 Plaintiff cites to this testimony in her Reply for the proposition that she is currently experiencing
14 harm from the policy in question due to her fears of potential, future governmental action. Reply
15 at 9:4-6. However, fear of future injury of alleged “imminent” government action is insufficient
16 to justify the imposition of injunctive relief upon that public agency. *Fellowship of Christian*
17 *Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 46 F.4th 1075, 1116 (9th Cir. 2022).

18 Accordingly, Plaintiff’s proffered testimony of her fear as to potential, future governmental
19 action is irrelevant, and subject to strike.

20 C. Paragraphs 7 and 13

21 Similarly, with regard to Paragraphs 7 and 13, again, “[i]rrelevant evidence is not
22 admissible.” Here, Plaintiff proffers the following irrelevant testimony in Paragraphs 7 and 13:

- 23
- 24 • “Children in the District, including my daughters, were on summer break from
approximately June 2, 2022 to August 8, 2022.” ECF 27-2, at ¶ 7.
 - 25 • “Children in the District, including my daughters, were on winter break from December
26 23, 2022 until January 6, 2023.” ECF 27-2, at ¶ 13.

27 Plaintiff cites to this testimony in her Reply for the proposition that her delay in filing the
28 pending motion for preliminary injunction was justified. Reply at 8:21-22. However, whether the

1 District was on break from June 2, 2022 to August 8, 2022, and then again from December 23,
2 2022 until January 6, 2023, has no tendency to establishing a justification for the delay more or
3 less probable, especially given (1) the underlying litigation and related preliminary injunction
4 motion were to be filed with the Court, not the District; and (2) Plaintiff admits that she had long
5 hired legal counsel to file any such papers on her behalf prior to the aforementioned winter
6 break, see ECF 27-2, at ¶ 10. In short, the fact that the District was closed during certain periods
7 of time is irrelevant to the question of why Plaintiff’s attorneys delayed to file the underlying
8 litigation in this Court.

9 Given that this testimony has no tendency to make establishing a justification for the
10 delay more or less probable, it should be stricken.

11 D. Paragraphs 6 and 8 through 12

12 Finally, with regard to Paragraphs 6 and 8 through 12, again, “[i]rrelevant evidence is not
13 admissible.” Fed. R. Evid. 402. Here, Plaintiff proffers the following irrelevant testimony in
14 Paragraphs 6 and 8 through 12:

- 15 • “In my Verified Complaint, I explained my efforts to persuade the District to change the
16 Policy. Those efforts began soon after April 8, 2022, the day I learned that the District
17 had socially transitioned A.S. without informing me. I started my efforts at the school
18 level. At that time, I was led to believe by District personnel that the Policy applied only
19 at A.S.’s school.” ECF 27-2, at ¶ 6.
- 20 • “Although my efforts were ultimately unsuccessful, based on comments District
21 personnel made to me, there were moments during this time period when I believed I may
22 be able to persuade District officials that the Parental Secrecy Policy was inappropriate. I
23 progressively went higher and higher in the chain of command until I was able to have an
24 in-person meeting with Superintendent Staley on October 10, 2022. It was not until that
25 meeting that I definitively learned the Policy applied throughout the District.” ECF 27-2,
26 at ¶ 8.
- 27 • “During the time period I was communicating with District personnel, I was not
28 represented by counsel.” ECF 27-2, at ¶ 9.
- “Around the same time I last heard from Superintendent Staley on November 2, 2022, I
started reaching out to law firms who I thought might be able to help me. In early
November 2022, I first spoke with Josh Dixon and Eric Sell at the Center for American
Liberty. Over the next several weeks, I had many telephone calls with them regarding the
law, the strengths of my case, and the benefits and burdens of bringing this lawsuit. I
have never been a party to litigation, and I did not know what to expect from it. My

1 daughters were (and are) still in schools operated by the District, and I was (and am)
2 concerned about them (and me) facing scorn in the community and retaliation from the
3 District for suing them. Over the course of November 2022, I discussed these and other
4 issues with Messrs. Dixon and Sell.” ECF 27-2, at ¶ 10.

- 4 • “On or about November 28, 2022, I formally retained the Center for American Liberty. I
5 later retained the Dhillon Law Group.” ECF 27-2, at ¶ 11.
- 6 • “Over the next several weeks, I had many telephone calls and emails with Messrs. Dixon
7 and Sell regarding the details of my case, case strategy, and the legal documents we
8 would be filing.” ECF 27-2, at ¶ 12.

9 Plaintiff cites to this testimony in her Reply for the proposition, again, that her delay in filing the
10 pending motion for preliminary injunction was justified. Reply at 8:6-9:2. However, Plaintiff’s
11 discussions with the District in connection with her parallel political efforts to have the District
12 voluntarily stop enforcing the policy at issue has no tendency to establishing a justification for
13 the delay more or less probable. Indeed, the fact that Plaintiff eschewed the opportunity for
14 immediate legal relief by seeking a preliminary injunction in this Court in favor of seeking slow-
15 moving political relief by campaigning to have the District voluntarily stop enforcing the policy,
16 not only fails to “tend to establish” a need for injunctive preliminary relief, but in fact does just
17 the opposite. In short, the fact that Plaintiff chose to engage in a parallel political effort is
18 irrelevant to the question of why she delayed to seek immediate judicial relief at the same time.

19 Given that this testimony has no tendency to make establishing a justification for the
20 delay in filing a preliminary injunction motion more or less probable, it should be stricken.

21 CONCLUSION

22 For the reasons set forth above, the Court should strike the Regino Declaration in its
23 entirety and refuse any consideration of the proffered testimony in its determination on the
24 pending preliminary injunction request.

25 Dated: February 23, 2023

LEONE ALBERTS & DUUS

/s/ Jimmie E. Johnson

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