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12 UNITED STATES DISTRICT COURT
 13 SOUTHERN DISTRICT OF CALIFORNIA

15 ELIZABETH MIRABELLI, an
 16 individual, and LORI ANN WEST, an
 17 individual,

Plaintiffs,

v.

20 MARK OLSON, in his official capacity as
 21 President of the EUSD Board of
 22 Education, et al.,

Defendants.

Case No.: 3:23-cv-0768-BEN-VET

**Reply in Support of Plaintiffs’
 Motion for a Finding of Civil
 Contempt and Clarification of the
 Preliminary Injunction Order**

Judge: Hon. Roger T. Benitez
 Courtroom: 5A
 Hearing Date: January 10, 2024
 Hearing Time: 10:00 a.m.

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INTRODUCTION

1
2 Plaintiffs Elizabeth Mirabelli and Lori Ann West want to go back to work. That
3 is the gravamen of their motion for a finding of civil contempt. Thus, Plaintiffs stated
4 in their motion that they “hope that no finding of civil contempt will be needed
5 because EUSD will comply before any such hearing.” ECF No. 59, Mot. for
6 Contempt, at p.7:23-24.¹ Since that time—crickets. Even the threat of contempt is not
7 enough to get EUSD to make any progress towards bringing Plaintiffs back to work.

8 Instead, EUSD merely offers excuses. It complains about other employees
9 requesting religious accommodations, about the State threatening legal action, and
10 about fears that protecting Plaintiffs from harassment will violate other employees’
11 free speech rights. *See* ECF No. 65, Opp. to Mot. for Contempt, at pp.2:11-27, 4:7-18,
12 6:10-23. Those are all issues that could and should have been raised by EUSD in its
13 own motion for clarification—*not in response* to Plaintiffs’ motion for contempt. If
14 EUSD found bringing Plaintiffs back to work to be impossible (for reasons never
15 actually explained to Plaintiffs), EUSD’s recourse was to petition this Court for
16 relief—not ignore the Court’s order. To entertain EUSD’s excuses for violating the
17 order now, “would be to invite experimentation with disobedience.” *Inst. of Cetacean*
18 *Rsch. v. Sea Shepherd Conserv. Soc’y*, 774 F.3d 935, 954 (9th Cir. 2014). The Court
19 should find EUSD in contempt of court, award Plaintiffs their attorneys’ fees, and
20 issue a further order requiring EUSD to bring Plaintiffs back to work.

REPLY ARGUMENT

21
22 Plaintiffs’ contempt motion argues that the Court’s preliminary injunction order,
23 firstly and most importantly, required EUSD to bring Plaintiffs back to work. Thus, the
24 fact that Plaintiffs are not currently teaching means that EUSD is violating the order.
25 *See* ECF No. 59, pp.15:24-16:18, § I. Secondly, Plaintiffs’ contempt motion noted
26 that the Court’s order prohibits EUSD from taking “adverse action” against Plaintiffs.

27 ¹ Unless otherwise noted, all quotations are “cleaned up” by omitting citations,
28 quotation marks, brackets, ellipses, and emphasis; all emphasis is added. Page
number references are to the ECF-generated page number.

1 With respect to Mrs. West, Plaintiffs argued that “endless investigations” constitute
2 adverse action. *Id.* at pp.16:19-18:11, § II. And with respect to Mrs. Mirabelli, Plaintiffs
3 argued that EUSD’s refusal to protect her from harassment constitutes adverse action.
4 *Id.* at pp.18:12-19:24, § III. In response, EUSD argues against each of these three points
5 (in summary fashion) (*see* ECF No. 65, pp.3:1-7:4), pleads for forgiveness while
6 explaining the difficulties it has encountered in complying (*see id.* at pp.1:21-2:27), and
7 then argues that qualified immunity precludes awarding attorneys’ fees (*see id.* at 7:5-
8 10:7). The arguments will be addressed in this order.

9 I. AN INABILITY TO TEACH IS IRREPARABLE HARM

10 As stated above, in their contempt motion, Plaintiffs argued that the Court’s
11 preliminary injunction order required EUSD to bring Plaintiffs back to work. As stated
12 in that order: “without an injunction, it is certain that plaintiffs will continue to suffer
13 present and future irreparable constitutional harm due to the existence of the state and
14 EUSD policies and the fact that plaintiffs have involuntarily been placed on
15 administrative leave from their teaching positions.” ECF No. 42 at pp.29-30.

16 EUSD provided no direct response to this argument—apparently conceding
17 that a return to work is envisioned by the preliminary injunction order. *See* S.D. Cal.
18 CivLR 7.1(f)(3)(c). Rather, EUSD focuses its substantive argument on placing the
19 blame for the continued administrative leave, for Mrs. West, on “the nature of the
20 investigation” (ECF No. 65 at p.3:14), and for Mrs. Mirabelli, on her colleagues’
21 “First Amendment rights to oppose the position the Plaintiffs have taken” (*id.* at
22 pp.4:11-12). These will be addressed in the succeeding sections.

23 II. ENDLESS INVESTIGATIONS CONSTITUTE ADVERSE ACTION

24 As stated in Plaintiffs’ contempt motion, “placement on administrative leave
25 can constitute an adverse employment action,” *Dahlia v. Rodriguez*, 735 F.3d 1060,
26 1078 (9th Cir. 2013), when an endlessly “lengthy investigation” “place[s] a cloud over
27 [a] career.” *Velikonja v. Gonzales*, 466 F.3d 122, 124 (D.C. Cir. 2006). Here, Mrs. West
28 remains on leave pending EUSD’s investigation into a student complaint—filed after

1 this Court entered its preliminary injunction order in late September—that she made
2 racist remarks *five years ago*. See ECF No. 59-3 at pp.2-3, West Decl., ¶¶3-8.

3 EUSD responds by arguing: (1) that “Plaintiff West is on paid administrative
4 leave for reasons completely unrelated to the Court’s order;” (2) that there is no
5 “evidence[] that any named Defendants did anything to encourage the student to
6 complain;” (3) that instead of the student having a retaliatory motive, “it is entirely
7 possible that these events triggered a memory in the student that persuaded them to
8 bring forward a valid complaint;” and (4) “[t]he standard procedure is to place the
9 accused person on leave and investigate.” ECF No. 65, Opp. to Contempt, p.5:5-25.

10 To begin, other than stating that it is “standard procedure” or “routine,”
11 EUSD provides no concrete explanation as to why, *in this case*, Mrs. West must remain
12 on administrative leave. See ECF No. 65-1 at 3-4, Rankins-Ibarra Decl., ¶10. Plaintiffs
13 are unaware of any rule requiring that Mrs. West remain on leave, and thus the refusal
14 to allow her teach pending EUSD’s investigation is simply unjustified.

15 Next, EUSD ignores the 60-day investigation timeline contemplated by
16 California regulations—which should have run in late November, Cal. Code Regs., tit.
17 5, § 4631(a), presumably because the complainant can agree to extend this deadline, *see*
18 *id.*, and here “the complaining party has agreed to extend the time for the
19 investigation.” ECF No. 65, Opp. to Contempt, pp.5:14-16. But the shorter 30-day
20 timeline contemplated by EUSD’s own regulations, ECF No. 59-1 at 10, AR 1312.1(2),
21 has no such extension provision, and unadornedly notes that complaints should be
22 resolved “to the satisfaction of the parties involved within 30 days.” *Id.*

23 In any event, the real issue is the *serial* complaints and investigations. EUSD is
24 allowing activist-minded students and parents to “game” the system by filing serial
25 complaints against Mrs. West. See ECF No. 65-1 at 3-4, Rankins-Ibarra Decl., ¶10.
26 This is anything but “routine.” *Contra* ECF No. 65 at p.5:25. Notably, nowhere in its
27 opposition does EUSD provide any information regarding the current status of the
28 investigation or an estimate of when it will conclude—EUSD is a black box.

1 Ultimately, EUSD states that “there is ... no evidence that the length of the
2 investigation was extended as a retaliation in violation of the Court’s Order.” *Id.* at
3 p.6:1-3. But when establishing motive, “[c]ircumstantial evidence is not only sufficient,
4 but in most cases it is the only proof that can be adduced.” *Rea v. Missouri*, 84 U.S.
5 532, 543 (1873). Here, EUSD’s failure to explain why Mrs. West must remain on
6 administrative leave pending its investigation, combined with its complaints about the
7 difficulty of complying with the Court’s order (*see* ECF No. 65, Opp. to Contempt,
8 pp.1:21-2:27), more than explains why Mrs. West is not currently teaching: EUSD just
9 does not want her to be teaching. That is contempt of court.

10 **III. COLLEAGUE HARASSMENT CONSTITUTES ADVERSE ACTION**

11 Plaintiffs’ original motion explains that workplace harassment—whether by
12 students or colleagues—is adverse action. *See Berger-Rothberg v. City of New York*, 803
13 F. Supp. 2d 155, 164-65 (E.D.N.Y. 2011); *Small v. New York City Dep’t of Educ.*, 650 F.
14 Supp. 3d 89, 101-02 (S.D.N.Y. 2023). Thus, since May 1, Mrs. Mirabelli has been
15 requesting that EUSD take specific actions to protect her from harassment and to
16 ensure that she felt physically safe, and for months has been requesting that EUSD
17 explain what happened with the complaints she filed against colleagues. *See* ECF No.
18 59-2 at pp.2-5, Mirabelli Decl., ¶¶2-14.

19 EUSD responds that: (1) Assistant Superintendent McGuire “has told [Mrs.
20 Mirabelli] she can return to work whenever she wants;” (2) “to the extent that the
21 District has issued discipline to a student or teacher for their conduct against the
22 Plaintiffs, that discipline is protected by privacy rights so that Plaintiffs are not entitled
23 to be informed about that discipline;” and (3) “most of the conduct of teachers and
24 students that she found hurtful are outside [EUSD’s] power to control, because those
25 people have First Amendment rights to oppose the position the Plaintiffs have taken.”
26 ECF No. 65. Opp. to Contempt, pp.3:27-28, 4:7-5:3, 6:10-7:4.

27 **First**, the discussion with Mr. McGuire occurred on November 2, 2023. *See*
28 ECF No. 59-1 at pp.6, 74, 78. As Mr. McGuire testified, that meeting ended with the

1 understanding that Mrs. Mirabelli would be submitting follow-up questions. Thus, on
2 November 9, 2023, counsel emailed a list of eight items she wanted confirmed by
3 EUSD to protect her safety and to protect her from harassment and retaliation. *See id.*
4 at pp.93-94. Mr. McGuire’s statement that he “offered a plan that [he] believed
5 provided her with the security she wanted,” is false. *See* ECF No. 65-2 at 2:4. A
6 “plan” was never offered. Reply Jonna Decl., ¶¶2-4; Reply Coughlin Decl., ¶¶2-11;
7 Reply Mirabelli Decl., ¶¶2-3.

8 On November 15, 2023, Mr. Shinoff sent a letter asking when those items would
9 be sent over. *See* ECF No. 59-1 at p.97. That same day, and the next day, Plaintiffs’
10 counsel sent emails stating that it was already sent on November 9. *See id.* at pp.99-101.
11 When Mr. Shinoff stated that it was never received, on November 17, Plaintiffs re-sent
12 it. *See id.* at p.105. As stated above, that was the last communication between the
13 parties about Mrs. Mirabelli’s return to work. And although that list has been filed with
14 the Court, it has apparently still not been provided by Mr. Shinoff to Mr. McGuire. At
15 best, Mr. McGuire’s declaration merely makes the point that perhaps EUSD’s counsel
16 should be held in contempt. *See Seymour v. Wilshire Credit Corp. Home Loans Direct,*
17 No. 2:19-CV-564, 2023 WL 2167112, at *4 (E.D. Cal. Feb. 22, 2023).²

18 ***Second***, with respect to “privacy,” the one cited case is inapposite, *see In re*
19 *Crawford*, 194 F.3d 954, 959 (9th Cir. 1999), and is belied by California regulations. Cal.
20 Code Regs., tit. 5, § 4631(e) (“The LEA Investigation Report shall be in writing and
21 sent to the complainant within 60 days from receipt of the complaint by the LEA”). In
22 any event, Plaintiffs do not want to know what “discipline” was meted out—they want
23 confirmation that some action was taken so that Mrs. Mirabelli will not be targeted

24 _____
25 ² Indeed, the November 2 meeting only occurred after Plaintiffs’ counsel sent letters or
26 emails, with specific proposals to ensure Mrs. Mirabelli’s safety, dated September 18
27 (ECF No. 59-1 at pp.35-37), September 26 (*id.* at pp.39-40), October 5 (*id.* at pp.54-
28 55), October 12 (*id.* at p.57), and October 13 (*id.* at p.69-71). In the last of these emails,
Plaintiffs explained that they would seek “contempt sanctions” if EUSD did not come
to the table (*id.* at p.69)—but Plaintiffs then shelved their contempt motion pending
the forthcoming November 2, 2023 meeting. *See id.* at p.78.

1 again. What EUSD’s “privacy” objection really means is simply that it did not take
2 Mrs. Mirabelli’s complaints seriously, but does not want to tell her that.

3 *Third*, with respect to other teachers’ First Amendment rights, those rights are
4 not even potentially implicated by a large number of Mrs. Mirabelli’s requests, such as
5 providing a specific contact person with whom Mrs. Mirabelli should communicate,
6 notifying the local school police to pay particular attention to issues concerning her,
7 and the parties drafting a joint letter to school staff about the preliminary injunction
8 order. *See* ECF No. 59-1 at pp.36-37, 69, 93-94.

9 As for the rights of students and teachers to “picket[] and protest[],” or to make
10 “comments and posters,” about Mrs. Mirabelli and this lawsuit, ECF No. 65 at
11 pp.3:23, 5:1, First Amendment rights are limited in the school context when they cause
12 “substantial disruption.” *Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 715 (9th Cir.
13 2022) (students); *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 781–82 (9th Cir.
14 2022) (teachers). Under this analysis, “the court should weigh the level of disruption
15 against the value of the free speech.” *Keyser v. Sacramento City Unified Sch. Dist.*, 265
16 F.3d 741, 749 n.2 (9th Cir. 2001). And, importantly, courts uniformly distinguish
17 between speech expressing an opinion that “is merely offensive to some listener,” and
18 “harassing speech” directed toward a particular individual. *C.R. v. Eugene Sch. Dist.*
19 *4J*, 835 F.3d 1142, 1152 (9th Cir. 2016) (sexual harassment); *Chen*, 56 F.4th at 722
20 (memes of classmates with racist comments). The latter has little First Amendment
21 “value,” and thus may be prohibited for even a little “disruption.”

22 But here, of course, the hateful posters by students calling her “Mrs. Miraflaty”
23 (ECF No. 5-3 at p.11), telling her to get psychological help (*id.* at p.16), and calling her
24 “sexist[] & racist[]” (*id.* at p.17); the organizing of protests *by teachers*—both before
25 the Court’s preliminary injunction order (*id.* at p.32), and after (ECF No. 59-1 at p.64);
26 and the accusations by teachers that the lawsuit is a “money grab” (*id.* at p.69), have
27 caused more than a little disruption. Altogether, the hostile environment has severely
28 impacted Mrs. Mirabelli’s health and disrupted the learning environment for

1 students—by robbing them of their teacher who was forced to miss the end of the
2 school year. *See* ECF No. 59-2 at pp.4-5, Mirabelli Decl., ¶¶8-14. EUSD’s
3 characterization of what Mrs. Mirabelli has suffered as “not sufficiently severe,” or
4 merely “teachers and students said things,” is irresponsible, callous, and demeaning.
5 *See* ECF No. 65 at pp.3:19, 6:22. The EUSD Defendants *can* take actions to protect
6 Mrs. Mirabelli so that she can return to work. Their refusal to do so, thereby forcing
7 her to remain on administrative leave is, again, contempt of court.

8 **IV. EUSD’S DIFFICULTIES DO NOT EXCUSE NONCOMPLIANCE**

9 In the beginning of their opposition, the EUSD Defendants state that
10 “Clarification of the Court’s Order Would be Helpful,” ECF No. 65 at p.1:21, and
11 explain that California has threatened to sue EUSD if it applies the reasoning of this
12 Court’s order more broadly—beyond the two named Plaintiffs—either to protect
13 other religious objectors, or to conform its actions to the Court’s explanation of
14 parental rights. *Id.* at p.2:11-27. This, apparently, has partly motivated EUSD’s refusal
15 to bring Plaintiffs back to work because EUSD is loath to have an “inconsistent policy
16 position” within its practical workings. *Id.*

17 This explanation does not excuse noncompliance with the Court’s order. “[I]f
18 there were extenuating circumstances or if the decree was too burdensome in
19 operation, there was a method of relief.... Respondents could have petitioned the
20 District Court for a modification, clarification or construction of the order.” *McComb*
21 *v. Jacksonville Paper Co.*, 336 U.S. 187, 192-93 (1949). By waiting until now, the
22 Defendants “acted at their peril.” *Id.* Regardless of whether it clarifies its order, the
23 Court should find EUSD in contempt.

24 On the issue of clarification, however, Plaintiffs note that “an injunction is not
25 necessarily made over-broad by extending benefit or protection to persons other than
26 prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is*
27 *necessary to give prevailing parties the relief to which they are entitled.*” *Bresgal v. Brock*, 843
28 F.2d 1163, 1170–71 (9th Cir. 1987) (emphasis in original); *see also E. Bay Sanctuary*

1 *Covenant v. Biden*, 993 F.3d 640, 680 (9th Cir. 2021). Thus, if the Court credits
2 EUSD’s complaint that it is stuck between a rock (the Court’s order) and a hard place
3 (the State’s threatened litigation), the Court should merely clarify that the State is
4 enjoined from acting against EUSD for applying this Court’s order across-the-board.
5 *See NBA v. Minnesota Pro. Basketball, Ltd. P’ship*, 56 F.3d 866, 871 (8th Cir. 1995)
6 (injunction against state court suit that threatened to frustrate federal court orders).

7 **V. THE COURT SHOULD FIND DEFENDANTS IN CONTEMPT IN**
8 **THEIR “OFFICIAL CAPACITY”**

9 Lastly, EUSD makes the novel argument that “qualified immunity” bars an
10 award of attorneys’ fees for a contempt violation. ECF No. 65, Opp. to Contempt,
11 pp.7:5-10:7. As explained below, this is a red herring because Plaintiffs only seek to
12 hold the EUSD Defendants in contempt in their “official capacity.”

13 **A. Background on the “Official Capacity” v. “Personal**
14 **Capacity” Distinction**

15 A defendant—whether an individual or an entity—is only subject to a § 1983
16 claim if he/it was acting “under color of state law.” *Garnier v. O’Connor-Ratcliff*, 41
17 F.4th 1158, 1169 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 1779 (2023); *Monell v. Dep’t of*
18 *Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978). A government employee acts
19 “under color of state law” where he “exercised power possessed by virtue of state
20 law” in an illegal manner. *Garnier*, 41 F.4th at 1169. An entity itself acts “under color
21 of state law” where “the action that is alleged to be unconstitutional implements or
22 executes a policy statement, ordinance, regulation, or decision officially adopted and
23 promulgated by that body’s officers.” *Monell*, 436 U.S. at 690.

24 In a suit challenging the conduct of the entity itself, “local government units
25 [such as counties and cities] can be sued directly for damages and injunctive or
26 declaratory relief.” *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). “[H]owever, a
27 State [or arm of the state] cannot be sued directly in its own name regardless of the
28 relief sought.” *Id.* This includes state agencies. *Vartanian v. State Bar of California*, 794

1 F. App'x 597, 600 (9th Cir. 2019). In California, all school districts are arms of the
 2 state, *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992), and thus the
 3 only way to sue the “Escondido Union School District” under § 1983 is to sue its
 4 responsible governmental officials in their “official capacity.”

5 But this is a legal fiction. An “official-capacity suit is, in all respects other than
 6 name, to be treated as a suit against the entity.” *Kentucky*, 473 U.S. at 166. “[A]
 7 judgment against a public servant in his official capacity imposes liability on the entity
 8 that he represents.” *Buffin v. California*, 23 F.4th 951, 961-62 (9th Cir. 2022). In
 9 contrast, as stated above, a “personal capacity” suit is against the individual, and his
 10 personal illegal conduct in performance of his governmental duties. *Garnier*, 41 F.4th
 11 at 1169. “Qualified immunity ... is a defense available ... to government officials sued
 12 in their individual capacities. It is *not* available to those sued only in their official
 13 capacities.” *Cnty. House, Inc. v. City of Boise*, 623 F.3d 945, 965 (9th Cir. 2010)
 14 (emphasis in original). Further, “[q]ualified immunity is an affirmative defense to
 15 damage liability; it does not bar actions for declaratory or injunctive relief.” *The*
 16 *Presbyterian Church v. United States*, 870 F.2d 518, 527 (9th Cir. 1989).

17 **B. This Case Has “Official Capacity” and “Personal Capacity”**
 18 **Defendants, but this Motion Only Applies to the Former**

19 In light of the above, for all practical purposes, this lawsuit has *six* defendants. In
 20 their official capacity only, the Complaint names as defendants six EUSD officials (the
 21 five-member board and the superintendent), and twelve CDE officials (the eleven-
 22 member board and the state superintendent). See ECF No. 1 at pp.7-12, Compl., ¶¶21-
 23 46. In this respect, the “suit is, in all respects other than name, to be treated as a suit
 24 against” (1) EUSD and (2) the CDE. *Kentucky*, 473 U.S. at 166.

25 Separately, this lawsuit names as defendants, in both their “official capacity”
 26 and “personal capacity,”³ (3) Assistant Superintendent John Albert, (4) Director

27 _____
 28 ³ If it is unclear in which capacity an employee was acting, the capacities can be pleaded
 alternatively. *Ashker v. California Dep't of Corr.*, 112 F.3d 392, 395 (9th Cir. 1997).

1 Trent Smith, (5) Director Tracy Shmidt, and (6) Rincon Principal Steve White. *See*
2 ECF No. 1 at p.9, Compl., ¶¶29-32. This is because the Complaint has detailed
3 allegations regarding the specific activities of each of these four individuals, and it was
4 unclear whether EUSD would endorse or repudiate their conduct. *See, e.g., id.* at
5 pp.29-32, 36-37, 83-96, 99-100, ¶¶118-29, 131, 148 & Exs.4, 6 (Ms. Schmidt).

6 EUSD argues that “qualified immunity” should bar an award of attorneys’ fees
7 as contempt sanctions. ECF No. 65 at pp.7:5-10:7. On its face, this argument would
8 only apply to the four “personal capacity” defendants—not the “official capacity”
9 defendants. Moreover, EUSD’s cases inappositely concern a § 1988 attorneys’ fees
10 award to the prevailing party at the end of the case, not sanctions. *Id.*

11 The easiest method of resolving this objection is solely hold the EUSD
12 Defendants in contempt in their “official capacities.” In that context, courts have not
13 hesitated to hold the named defendant in contempt of court when the agency fails to
14 comply with a court order. *See, e.g., Norman Bridge Drug Co. v. Banner*, 529 F.2d 822,
15 827-29 (5th Cir. 1976); *Nelson v. Steiner*, 279 F.2d 944, 947-48 (7th Cir. 1960); *Hinton*
16 *v. Sullivan*, 737 F. Supp. 232, 241-42 (S.D.N.Y. 1990). Indeed, because “official
17 capacity” suits are (in all but name) suits against the agency, an official can be held in
18 civil contempt of court for his predecessor’s failure to comply with a court order. *See,*
19 *e.g., Alberti v. Klevenhagen*, 610 F. Supp. 138, 141-42 (S.D. Tex. 1985); *Cobell v. Norton*,
20 226 F. Supp. 2d 1, 131 (D.D.C. 2002), *vacated*, 334 F.3d 1128 (D.C. Cir. 2003)
21 (reversing because reasoning only applies to civil contempt, not criminal contempt).⁴

22 CONCLUSION

23 The Court should grant Plaintiffs’ motion for contempt and attorneys’ fees.

24
25 ⁴ Plaintiffs do not concede that a “personal capacity” defendant who successfully
26 raises a “qualified immunity” affirmative defense will not be ultimately liable for
27 § 1988 attorneys’ fees if an injunction is entered against him. *See, e.g., Lefemine v.*
28 *Wideman*, 758 F.3d 551, 556-57 (4th Cir. 2014) (reversing denial of fees); *Williams v.*
Vidmar, 367 F. Supp. 2d 1265, 1277 (N.D. Cal. 2005) (“§ 1988 which provides that
one who prevails in a § 1983 action is entitled to recover attorneys’ fees as costs, not
as damages.”); *Helbrans v. Coombe*, 890 F. Supp. 227, 231-32 (S.D.N.Y. 1995).

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Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: January 3, 2024

By:



Charles S. LiMandri

Paul M. Jonna

Mark D. Myers

Jeffrey M. Trissell

Milan L. Brandon II

Attorneys for Plaintiffs

Elizabeth Mirabelli & Lori Ann West

CERTIFICATE OF SERVICE

Elizabeth Mirabelli v. Mark Olson, President of the EUSD Board of Education, et al.

USDC Court Case No.: 3:23-cv-00768-BEN-WVG

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; my business address is P.O. Box 9120, Rancho Santa Fe, California 92067, and that I served the following document(s):

- **Reply in Support of Plaintiffs’ Motion for a Finding of Civil Contempt and Clarification of the Preliminary Injunction Order;**
- **Reply Declaration of Paul M. Jonna, Esq., in Support of Plaintiffs’ Motion for Civil Contempt and Clarification of the Preliminary Injunction Order;**
- **Reply Declaration of Elizabeth Mirabelli in Support of Plaintiffs’ Motion for Civil Contempt and Clarification of the Preliminary Injunction Order; and**
- **Reply Declaration of Frank J. Coughlin, Esq., in Support of Plaintiffs’ Motion for Civil Contempt and Clarification of the Preliminary Injunction Order..**

on the interested parties in this action by placing a true copy in a sealed envelope, addressed as follows:

Thomas Prouty, Deputy General Counsel
 Len Garfinkel
 California Department of Education
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Attorneys for EUSD Defendants

 (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Rancho Santa Fe, California in the ordinary course of business. The envelope was sealed and placed for collection and mailing on this date following our ordinary practices. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

 X **(BY ELECTRONIC MAIL)** I served a true copy, electronically on designated recipients via electronic transmission of said documents.

 X **(BY ELECTRONIC FILING/SERVICE)** I caused such document(s) to be Electronically Filed and/or Service using the ECF/CM System for filing and transmittal of the above documents to the above-referenced ECF/CM registrants.

I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct.

Executed on January 3, 2024, at Rancho Santa Fe, California.



 Kathy Denworth

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 *Application forthcoming

Attorneys for Plaintiffs

12 UNITED STATES DISTRICT COURT
 13 SOUTHERN DISTRICT OF CALIFORNIA

15 ELIZABETH MIRABELLI, an
 16 individual, and LORI ANN WEST, an
 17 individual,

18 Plaintiffs,

19 v.

20 MARK OLSON, in his official capacity as
 21 President of the EUSD Board of
 22 Education, et al.,

23 Defendants.

Case No.: 3:23-cv-0768-BEN-VET

**Reply Declaration of Paul M. Jonna,
 Esq., in Support of Plaintiffs' Motion
 for Civil Contempt and Clarification
 of the Preliminary Injunction Order**

Judge: Hon. Roger T. Benitez
 Courtroom: 5A

1 I, Paul M. Jonna, Esq., declare and state as follows:

2 1. I am an attorney at law duly licensed to practice in the State of California
3 and in the Southern District of California. I am a Partner with LiMandri & Jonna
4 LLP, and am counsel of record for Plaintiffs Elizabeth Mirabelli and Lori Ann West.
5 The matters discussed below are based on my own personal knowledge. I could and
6 would testify to them if called upon to do so in court.

7 **REBUTTAL TESTIMONY**

8 2. On November 2, 2023, I participated in a Zoom videoconference
9 meeting with EUSD Assistant Superintendent Andrew McGuire regarding Plaintiff
10 Elizabeth Mirabelli’s needed assurances for her to return to work. This meeting was
11 very important because Mrs. Mirabelli has continued to suffer physical symptoms—
12 neuropathy and accompanying jolting nerve pain—from the stress of returning to a
13 hostile work environment. Mrs. Mirabelli wants to teach, but doing so at EUSD will
14 be impossible without EUSD providing her with a safe working environment.

15 3. Present at the meeting were myself, Mrs. Mirabelli, Attorney Frank
16 Coughlin (an employment specialist representing Mrs. Mirabelli), Attorney Daniel
17 Shinoff (counsel for EUSD), and Assistant Superintendent McGuire. During the
18 meeting, Mrs. Mirabelli expressed her concerns about feeling threatened by students
19 and harassed by colleagues. In response, Mr. McGuire expressed his concerns over
20 practical limitations on what EUSD could do.

21 4. Contrary to his declaration (ECF No. 65-2), at no time during the
22 meeting, or after, did Mr. McGuire “offer[] a plan” to provide Mrs. Mirabelli “with
23 the security she wanted.” The meeting ended with the understanding that we would
24 be submitting follow-up points to EUSD. Thus, on November 9, 2023, my office
25 emailed to Attorney Shinoff a list of eight items that Mrs. Mirabelli wanted
26 confirmed by EUSD to protect her safety and to protect her from harassment and
27 retaliation. Indeed, if there were such a plan, presumably Mr. McGuire would have
28 recounted it in his declaration in order to explain how reasonable EUSD has been.

1 Instead, EUSD has offered no details to Mrs. Mirabelli or this Court regarding what
2 it will do to protect her.

3 5. Also surprising in Mr. McGuire’s declaration is the statement that he
4 “never received any response” containing Mrs. Mirabelli’s follow up items, and she
5 “has not requested to return to work after that meeting.” As stated above and in my
6 prior declaration, on November 9, 2023, I sent Mrs. Mirabelli’s response to Attorney
7 Shinoff. I sent this response to Attorney Shinoff both because EUSD is represented
8 by counsel, and because Attorney Shinoff’s email directly requested it. *See* ECF No.
9 59-1 at pp.8:22-25, 93-94, ¶48 & Ex.22.

10 6. In follow-up to this email, I emailed Attorney Shinoff again: (1) on
11 November 9 (ECF No. 59-1 at p.93 (“Daniel, I was informed that you can’t make our
12 call today. Let me know when you would like to reschedule. Thanks.”)); (2) twice on
13 November 13 (*id.* at pp.91-92); (3) on November 14 (*id.* at p.91); (4) on November 15
14 (*id.* at pp.97-99); (5) twice on November 16 (*id.* at pp.101-02); and (6) on November
15 17 (*id.* at pp.105-06). Each of these communications was an effort by Mrs. Mirabelli
16 to request to return to work. Further, it may be the case that Mr. McGuire never
17 received our response, but it is not the case that EUSD never received it.

18 I declare under penalty of perjury under the laws of the United States and the
19 State of California that the foregoing is true and correct.

20 Executed on January 3, 2024, in Rancho Santa Fe, California.

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Attorneys for Plaintiffs

12 UNITED STATES DISTRICT COURT
 13 SOUTHERN DISTRICT OF CALIFORNIA

15 ELIZABETH MIRABELLI, an
 16 individual, and LORI ANN WEST, an
 17 individual,

18 Plaintiffs,

19 v.

20 MARK OLSON, in his official capacity as
 21 President of the EUSD Board of
 22 Education, et al.,

23 Defendants.

Case No.: 3:23-cv-0768-BEN-VET

**Reply Declaration of Elizabeth
 Mirabelli in Support of Plaintiffs’
 Motion for Civil Contempt and
 Clarification of the Preliminary
 Injunction Order**

Judge: Hon. Roger T. Benitez
 Courtroom: 5A

1 I, Elizabeth Mirabelli, declare and state as follows:

2 1. I am a plaintiff in this action. I am a primary school teacher employed by
3 the Escondido Union School District. I have been teaching middle-school English
4 with EUSD for 26 years, with the most recent 18 at Rincon Middle School. I
5 currently teach seventh grade English. The matters discussed below are based on my
6 own personal knowledge. I could and would testify to them if called upon to do so in
7 court.

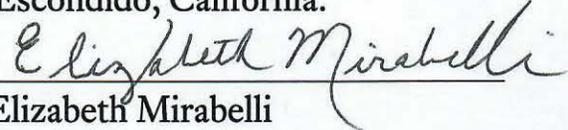
8 **REBUTTAL TESTIMONY**

9 2. On November 2, 2023, I participated in a Zoom videoconference
10 meeting with EUSD Assistant Superintendent Andrew McGuire regarding my
11 needed assurances for my return to work. That meeting ended with the
12 understanding that I would be submitting follow-up points to EUSD through my
13 attorney. Thus, on November 9, 2023, Paul Jonna emailed a list of eight items I
14 wanted confirmed by EUSD to protect my safety and to protect me from harassment
15 and retaliation.

16 3. At no time during the meeting, or after, did Assistant Superintendent
17 McGuire “offer[] a plan” to provide me “with the security [I] wanted.” Indeed, if
18 there were such a plan, presumably Assistant Superintendent McGuire would have
19 recounted it. Instead, the meeting concluded with the understanding that I would
20 provide a list of items I needed addressed so that the parties could continue their
21 discussions.

22 I declare under penalty of perjury under the laws of the United States and the
23 State of California that the foregoing is true and correct.

24 Executed on January 3, 2024, in Escondido, California.

25 
26 Elizabeth Mirabelli

27
28

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 *Application forthcoming

Attorneys for Plaintiffs

12 UNITED STATES DISTRICT COURT
 13 SOUTHERN DISTRICT OF CALIFORNIA

15 ELIZABETH MIRABELLI, an
 16 individual, and LORI ANN WEST, an
 17 individual,

18 Plaintiffs,

19 v.

20 MARK OLSON, in his official capacity as
 21 President of the EUSD Board of
 22 Education, et al.,

23 Defendants.

Case No.: 3:23-cv-0768-BEN-VET

**Reply Declaration of Frank J.
 Coughlin, Esq., in Support of
 Plaintiffs' Motion for Civil Contempt
 and Clarification of the Preliminary
 Injunction Order**

Judge: Hon. Roger T. Benitez
 Courtroom: 5A

1 I, Frank J. Coughlin, Esq., declare and state as follows:

2 1. I am an attorney at law duly licensed to practice in the State of California
3 and in the Southern District of California. I am the principal of Frank J. Coughlin
4 APLC and am Of Counsel with Wallace, Richardson, Sontag & Le LLP. I am advising
5 Plaintiffs Elizabeth Mirabelli and Lori Ann West as employment counsel. The
6 matters discussed below are based on my own personal knowledge. I could and would
7 testify to them if called upon to do so in court.

8 **REBUTTAL TESTIMONY**

9 2. On November 2, 2023, I participated in a Zoom videoconference
10 meeting with EUSD Assistant Superintendent Andrew McGuire regarding Plaintiff
11 Elizabeth Mirabelli's needed assurances for her to return to work. Present at the
12 meeting were myself, Mrs. Mirabelli, Attorney Paul Jonna (litigation counsel for Mrs.
13 Mirabelli), Attorney Daniel Shinoff (counsel for EUSD), and Assistant
14 Superintendent McGuire. I took contemporaneous notes at that meeting, which I
15 then reviewed to prepare this declaration.

16 3. The meeting was part of the interactive process to discuss appropriate
17 conditions for Ms. Mirabelli's requested return to work. Mrs. Mirabelli told Mr.
18 Shinoff and Mr. McGuire that she wanted EUSD to address concerns about her
19 safety and to protect her from further harassment. Mr. Shinoff and Mr. McGuire
20 agreed that was critical for her return to work. Accordingly, the parties discussed
21 things like what steps EUSD would take to ensure that Ms. Mirabelli's return to
22 work was safe and free of harassment and what procedures would be put into place if
23 harassment did occur.

24 4. Mr. McGuire said that he and Mr. Shinoff were told by others at EUSD
25 to talk to Ms. Mirabelli and develop a pathway to facilitate her return to work. Mrs.
26 Mirabelli and Paul Jonna told Mr. Shinoff and Mr. McGuire that November 13 and
27 November 27 were suitable dates for Mrs. Mirabelli's return to work. However, Mrs.
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1 Mirabelli said that she believed that November 27, after Thanksgiving, was a more
2 appropriate return date so the process would not have to be rushed.

3 5. Mr. McGuire said that EUSD was not in a rush to have Mrs. Mirabelli
4 return to work. Mr. McGuire emphasized that if she needed more time that would be
5 fine. Mr. McGuire also said that EUSD would have to put in place a “communication
6 procedure that would be non-standard.” He did not explain what “non-standard”
7 meant. However, Mr. Shinoff acknowledged that there had been changes in the HR
8 Department, and he believed that EUSD or its HR Department should designate a
9 qualified representative to address issues that might come up with Mrs. Mirabelli.

10 6. It was made clear that EUSD had not yet developed a non-standard
11 communication path for Mrs. Mirabelli to use, and that EUSD was still sorting out
12 who it would designate to speak with Mrs. Mirabelli if and when issues of harassment
13 arose.

14 7. Further, the parties also discussed the idea of having Mr. McGuire
15 speak to the students before Ms. Mirabelli’s return and how Ms. Mirabelli would
16 respond if she was, in fact, harassed by a student (or other teacher). However, the
17 substance of what Mr. McGuire would say was not developed or agreed to during the
18 Zoom meeting. The details of how Ms. Mirabelli would respond to harassment were
19 also not agreed to or worked out during the Zoom meeting. It was understood by the
20 parties that further discussions would be needed to develop and agree on these ideas.

21 8. Mr. Shinoff and Mr. McGuire complimented Ms. Mirabelli on her
22 suggestions and expressed a willingness to discuss and entertain those suggestions
23 and entertain further suggestions. Mr. Shinoff suggested that the parties meet again
24 to have further discussions as part of the interactive process.

25 9. When the meeting ended, it was agreed that (1) Paul Jonna would email
26 written suggestions and ideas that outlined conditions for Mrs. Mirabelli’s return to
27 work; and (2) that Mr. Shinoff and Mr. McGuire would consider and respond to
28 those suggestions and make time to meet again to conduct further interactive

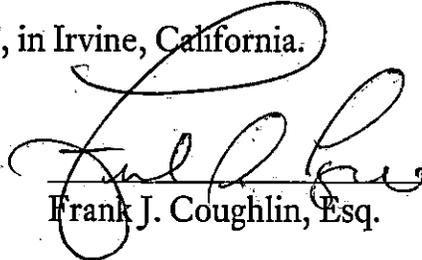
1 discussions to facilitate Mrs. Mirabelli's return to work. Contrary to his declaration
2 (ECF No. 65-2), at no time during or after the meeting did Mr. McGuire "offer[] a
3 plan" to provide Mrs. Mirabelli "with the security she wanted."

4 10. In the days following that meeting, I worked with Attorney Jonna in
5 preparing a list of eight items that Mrs. Mirabelli wanted confirmed by EUSD to
6 protect her safety and to protect her from harassment and retaliation. On November
7 9, 2023, as the parties had agreed, Mr. Jonna sent an email outlining various
8 suggestions and conditions for Mrs. Mirabelli's return to work.

9 11. I am informed that Mr. Shinoff never substantively responded to Mr.
10 Jonna's email, and neither Mr. Shinoff nor Mr. McGuire has asked or agreed to set
11 up a time to meet again for further discussions as part of the interactive process.

12 I declare under penalty of perjury under the laws of the United States and the
13 State of California that the foregoing is true and correct.

14 Executed on January 3, 2024, in Irvine, California.

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16 
17 Frank J. Coughlin, Esq.
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