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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,

18 Plaintiffs,

19 v.

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

22 Defendants.

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

**Reply to the EUSD Defendants in
 Support of Plaintiffs' Motion for a
 Preliminary Injunction**

Judge: Hon. Roger T. Benitez
 Courtroom: 5A
 Hearing Date: June 26, 2023
 Hearing Time: 10:30 a.m.

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INTRODUCTION

1
2 This case concerns fundamental constitutional rights. It concerns Plaintiffs
3 Elizabeth Mirabelli and Lori Ann West’s First Amendment rights to freedom of
4 speech and religion. It also concerns the First and Fourteenth Amendment rights of
5 parents to direct the upbringing of their children. As presented here, these interests are
6 two sides of the same coin. The California Department of Education (“CDE”) and the
7 Escondido Union School District (“EUSD”) seek to impose on impressionable
8 children a novel and quasi-religious view of sex, gender, and personhood.¹

9 In their own right, Plaintiffs object to being required to endorse and advance the
10 new gender ideology. As stated by the California Court of Appeal in a recent analogous
11 case, Plaintiffs absolutely have this right: “[W]here the State’s interest is to
12 disseminate an ideology, no matter how acceptable to some, such interest cannot
13 outweigh an individual’s First Amendment right to avoid becoming the courier for
14 such message.” *Taking Offense v. State*, 66 Cal. App. 5th 696, 711 (2021) *not*
15 *depublished pending grant of review*, 498 P.3d 90 (Cal. 2021) (quoting *Wooley v.*
16 *Maynard*, 430 U.S. 705, 717 (1977)).

17 But perhaps more importantly, Plaintiffs object to being used as the vehicle for
18 coming between parents and their children. Parents absolutely have the primary and
19 most important role in their children’s lives. As stated by the Supreme Court,
20 “[f]amilies entrust public schools with the education of their children, *but condition*
21 *their trust* on the understanding that the classroom will not purposely be used to
22 advance religious [or quasi-religious, ideological] views that may conflict with the
23 private beliefs of the student and his or her family.” *Edwards v. Aguillard*, 482 U.S.
24 578, 584 (1987). As the Supreme Court has made very clear, the government has

25
26 ¹ Unless otherwise noted, all quotations are “cleaned up” by omitting citations,
27 quotation marks, brackets, ellipses, and emphasis; all emphasis is added. Page
28 number references are to the ECF-generated page number contained in the header of
each ECF-filed document. As explained in Plaintiffs’ separate Reply to the CDE
Defendants, the term “CDE” is a perfectly accurate short-hand.

1 absolutely no interest or right to “save” a child from his parents’ religious or
2 ideological views. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

3 Over 100 years ago, California itself was a leader in recognizing parental rights.
4 Citing to both the California Constitution and the U.S. Constitution, the California
5 Supreme Court affirmed the Court of Appeals’ conclusion that a public school district
6 had to grant a parent the right to opt his child out of classes that he found offensive. As
7 stated by the Court:

8 Has the state the right to enact a law or confer upon any public
9 authorities a power the effect of which would be to alienate in a measure
10 the children from parental authority? May the parents thus be eliminated
11 in any measure from consideration in the matter of the discipline and
12 education of their children along lines looking to the building up of the
13 personal character and the advancement of the personal welfare of the
14 latter? ... [T]o answer said questions in the affirmative would be to give
15 sanction to a power over home life that might result in denying to parents
16 their natural as well as their constitutional right to govern or control,
17 within the scope of just parental authority, their own progeny. Indeed, it
18 would be distinctly revolutionary and possibly subversive of that home
19 life so essential to the safety and security of society and the government
20 which regulates it, the very opposite effect of what the public school
21 system is designed to accomplish, to hold that any such overreaching
22 power existed in the state or any of its agencies.

19 *Hardwick v. Bd. of Sch. Trustees of Fruitridge Sch. Dist.*, 54 Cal. App. 696, 714 (1921),
20 *opinion respecting denial of review*, 205 P. 49, 56 (Cal. 1921) (per curiam).

21 As explained in Plaintiffs’ moving papers, the motion to dismiss briefing, and
22 below, EUSD’s and the CDE’s Parental Exclusion Policies are unconstitutional and
23 are likely to cause real harm to real students. Plaintiffs object to advancing EUSD’s
24 gender ideology and object to interfering with parents’ rights to direct the upbringing
25 of their children by lying to them about their child’s gender identity. This Court should
26 grant Plaintiffs’ motion for a preliminary injunction against both the EUSD and the
27 CDE in time for the 2023-2024 school year.²

28 ² Both EUSD and the CDE filed opposition to Plaintiffs’ motion for a preliminary

1 **REPLY ARGUMENT**

2 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS**

3 **A. Plaintiffs Incorporate the Motion to Dismiss Briefing by Reference**

4 With respect to the merits, EUSD takes the odd approach of copying and
5 pasting, nearly verbatim, the text from its Rule 12(b)(6) motion to dismiss. (*Compare*
6 ECF Nos. 7 & 17, Mtn. to Dismiss, pp.7:22-9:4 (facts), 9:26-23:14 (argument); *with*
7 ECF Nos. 12 & 16, Opp. to Mtn. Prelim. Inj., pp.2:25-4:6 (facts), 5:4-18:3 (argument).)
8 Thus, Plaintiffs expressly incorporate by reference their opposition to the EUSD’s
9 motion to dismiss. (*See* ECF No. 10, Opp. to Mtn. Dismiss, pp.14:16-33:7.)

10 In sum, as explained in Plaintiffs’ motion for a preliminary injunction and
11 opposition to EUSD’s motion to dismiss, EUSD’s Parental Exclusion Policies violate
12 Plaintiffs’ free speech and free exercise of religion rights—and violate the rights of
13 Escondido parents. Similar policies are being struck down across the nation. *See, e.g.,*
14 *Ricard v. USD 475 Geary County, KS Sch. Bd.*, No. 5:22-cv-4015, 2022 WL 1471372 (D.
15 Kan. May 9, 2022); *Doe 1 v. Madison Metro. Sch. Dist.*, 976 N.W.2d 584, 589-90 (Wis.
16 2022); *Tatel v. Mt. Lebanon Sch. Dist.*, No. CV 22-837, 2022 WL 15523185 (W.D. Pa.
17 Oct. 27, 2022), *recons. den.*, 2023 WL 3740822 (W.D. Pa. May 31, 2023).

18 For freedom of speech, because EUSD is a government employer, the Court
19 must answer a series of questions that ultimately boil down to balancing EUSD’s
20 administrative interests in accomplishing its legitimate objective (of teaching children)
21 against Plaintiffs’ right to freedom of speech. Illegitimate objectives—such as violating
22 parental rights or enforcing ideological conformity among its staff—may not be
23 considered, and political speech is entitled to special protection. Courts that have
24 engaged in this analysis have acknowledged that there is a constitutional problem when
25 injunction. EUSD’s opposition defends its Parental Exclusion Policies on the merits.
26 In contrast, the CDE’s opposition is a quasi-motion to dismiss and argues that an
27 injunction should be denied because Plaintiffs lack standing and because the CDE is
28 protected by sovereign immunity. Thus, this Reply to EUSD focuses on the merits of
the motion for a preliminary injunction, and Plaintiffs’ separate Reply to the CDE
focuses on the standing and immunity issues.

1 the government makes adherence to the new gender orthodoxy a condition of
 2 governmental employment. *See, e.g., Riley’s Am. Heritage Farms v. Elsasser*, 32 F.4th
 3 707, 721-27 (9th Cir. 2022) (government contractor); *Meriwether v. Hartop*, 992 F.3d
 4 492, 508-09 (6th Cir. 2021) (professor); *cited approvingly in Green v. Miss United States*
 5 *of Am., LLC*, 52 F.4th 773, 784 n.12 (9th Cir. 2022); *cf. also Citizens for a Responsible*
 6 *Curriculum v. Montgomery Cnty. Pub. Sch.*, No. Civ.A. AW-05-1194, 2005 WL 1075634,
 7 at *11-12 (D. Md. May 5, 2005).

8 For free exercise of religion, EUSD must show that its refusal to exempt
 9 Plaintiffs from the Parental Exclusion Policies survives strict scrutiny because (1) they
 10 have already categorically exempted thousands of staff, in a manner that undermines
 11 the policy similarly to how an exemption for Plaintiffs would, and (2) because EUSD
 12 officials have discretion to exempt any staff so long as the exemption satisfies a
 13 nebulous “legitimate” reasons standard. *See Fulton v. City of Philadelphia*, 141 S. Ct.
 14 1868, 1877-79 (2021). Yet the only justification that EUSD or the CDE can muster in
 15 support of its Parental Exclusion Policies is an argument that the California
 16 Constitution’s privacy protections include access to certain medical care (abortion and
 17 gender transition) that might be frustrated if parents were kept in the loop. Cal. Const.,
 18 art. I, § 1; *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 359 (1997) (plurality).
 19 Unsurprisingly, they cannot cite a single case in support of this alarming argument that
 20 actually supports the application of the California privacy right in this context, as a
 21 justification for coming between 12-year old children and their parents.

22 Importantly, the Supreme Court has recently re-focused the constitutional
 23 inquiry towards a history and tradition analysis. *See, e.g., Nat’l Inst. of Fam. & Life*
 24 *Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (Free Speech Clause);³ *Kennedy v.*
 25 *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (Establishment Clause); *New York*

26 _____
 27 ³ *Tingley v. Ferguson*, 57 F.4th 1072, 1078-83 (9th Cir. 2023) (Statement of O’Scannlain,
 28 J., respecting denial of rehearing en banc) (noting that Ninth Circuit panel had rightly
 engaged in a tradition and history analysis In a Free Speech case, but arguing that
 analysis was flawed).

1 *State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126-34 (2022) (Right to Bear
2 Arms). In the Free Exercise context, the government must show that its compelling
3 state interest is supported by history and tradition. *See, e.g., Espinoza v. Montana Dep’t*
4 *of Revenue*, 140 S. Ct. 2246, 2258-59 (2020) (examining but rejecting “tradition against
5 state support for religious schools”); *Wisconsin v. Yoder*, 406 U.S. 205, 227 (1972)
6 (examining “historical origin” of “compulsory education” in exempting the Amish).
7 Here, EUSD and the CDE absolutely cannot show a tradition of excluding parents
8 from decision-making regarding their children. The tradition is the exact opposite. *See*
9 *Yoder*, 406 U.S. at 232 (“Th[e] primary role of the parents in the upbringing of their
10 children is now established beyond debate as an enduring American tradition”).

11 Finally, as explained below, EUSD’s sole attempt to dispute Plaintiffs’
12 characterization of the facts—meticulously and comprehensively documented in a
13 288-page verified complaint, along with a lengthy 31-page expert declaration—is a
14 vague, two page declaration which should be given no weight. In contrast, Plaintiffs
15 submitted the expert testimony of a renowned expert in child gender dysphoria who
16 summarized EUSD’s policies as follows: “Rather than ensuring student safety and
17 overall mental-health well-being, EUSD’s policies are discordant with the practices of
18 all mental health professional associations and are more likely to lead to student
19 harm.” (ECF No. 5-2, Declaration of Dr. Anderson, p.34, ¶86.)

20 Thus, this Court should find that Plaintiffs have established that they are likely
21 to succeed on the merits and grant their requested preliminary injunction.

22 **B. The Court Should Give No Weight to Director Schmidt’s Declaration**

23 The only substantive difference between EUSD’s motion to dismiss and
24 opposition to the present motion for a preliminary injunction is that, in contending
25 that EUSD’s policies do not compel Plaintiffs to lie, EUSD included a citation to the
26 declaration of Defendant Tracy Schmidt, EUSD’s Director of Integrated Student
27 Services. (ECF No. 16, EUSD Opp., p.11:8-13 (citing ECF No. 16-1, Schmidt Decl.,
28 p.2, ¶¶5-6).) EUSD sprinkled citations to Director Schmidt’s declaration throughout

1 its opposition, but generally all for the same proposition: that there’s no direct
2 requirement for Plaintiffs to lie, only to “avoid the question.” (ECF No. 16, EUSD
3 Opp., pp.2:16-24, 3:15-16, 4:8-9, 11:8-13.)

4 As in their motion to dismiss, this argument might draw a chuckle if its
5 implications were not so grim. By narrowly defining lying as “to state any fact that is
6 false” (ECF No. 16, EUSD Opp., p.11:9), EUSD appears to think it has found some
7 kind of loophole that allows it to sidestep candor and get away with deception. *See* Cal.
8 Bus. & Prof. Code § 6068(d). Telling partial truths with the intent to deceive and
9 mislead is not lying, in EUSD’s book. As long as no one says something that is literally
10 false, there has been no lie. Nor is using artful language, omitting key facts, deliberately
11 giving the wrong impression and concealing the truth—all are allowed.

12 In practice, no one take such nonsensical ideas seriously. Advertisers who rely
13 on literally true statements can still be liable for false advertising. *Southland Sod Farms*
14 *v. Stover Seed Co.*, 108 F.3d 1134, 1137 (9th Cir. 1997). And in the legal context, there
15 are good reasons “candor” and not merely “avoiding stating a fact that is false” is the
16 standard of conduct. The fact that EUSD sees fit to define a “lie” so narrowly only
17 speaks to the type of moral bankruptcy that Plaintiffs refuse to participate in.

18 This casual relationship with the truth is evident not only in EUSD’s policies,
19 but in its reasoning. In its motion to dismiss, EUSD stated: “The instruction to say a
20 subject is outside of the scope of the discussion is not an instruction to lie.... *It is an*
21 *instruction to avoid the question.*” (ECF No. 17, p.16:21-22.) But in opposition to
22 Plaintiffs’ motion for a preliminary injunction, EUSD changed tacks: “Contrary to the
23 Plaintiffs[’] position, the School District’s training did not instruct a person to lie, *or*
24 *even avoid the truth.*” (ECF No. 16, p.4:8-9.) EUSD’s claim to have a finely-tuned
25 sense of what it means to speak the truth is perhaps not as finely-tuned as it may think.

26 With respect to the declaration of Defendant Schmidt, therein, she explains that
27 she was responsible for “the training” on compliance with Board Policy 5145.3 and
28 Administrative Regulation 5145.3, which was “much broader and deeper than the

1 Plaintiffs’ Complaint and motion make it sound” than Plaintiffs’ Complaint says.
2 (ECF No. 12-1, Schmidt Decl., p.1, ¶¶1-2.)⁴ In her declaration, however, Defendant
3 Schmidt moves between describing different “trainings” without clearly explaining to
4 which training she is referring. As written, the declaration creates the misleading
5 impression that all of the training provided to all staff has been the same. In this
6 respect, her declaration is more likely to confuse the issues than provide probative
7 value. *See* Fed. R. Evid. 403.

8 Most plainly, Defendant Schmidt states that certain training on gender identity
9 was provided to certificated/teaching staff in January 2018 and administrative/classified
10 staff in June 2018. (Schmidt Decl., pp.1-2, ¶2.) Oddly, Defendant Schmidt fails to note
11 that this training was provided more than two years before AR 5145.3 was adopted.
12 Thus, it could not be training on compliance with AR 5145.3 itself. (*See* Compl., p.77.)
13 But, in any event, the role of parents was not discussed at that training at all. (Rebuttal
14 Mirabelli Decl., ¶¶2-11; Rebuttal West Decl., ¶2.) This discussion is necessarily
15 irrelevant to EUSD’s *current* Parental Exclusion Policies. *See* Fed. R. Evid. 401.

16 Defendant Schmidt’s declaration also avoids ever stating whether the 2018
17 training was performed pursuant to training manuals or via a slideshow presentation—
18 presumably to avoid triggering the Best Evidence Rule. Plaintiff Mirabelli, however,
19 does remember this training and its slideshow presentation (Rebuttal Mirabelli Decl.,
20 ¶6), making the testimony inadmissible. *See* Fed. R. Evid. 1002. And Defendant
21 Schmidt never addresses the evidence that classified staff are apparently unaware of
22 EUSD’s gender identity policies. (Compl., ¶193; Rebuttal Mirabelli Decl., ¶4 & Ex.45.)

23 Defendant Schmidt then describes “more individualized training with select
24 staff” and how it was similar or dissimilar to the Parental Exclusion Policies at issue in

25 ⁴ As stated in the Complaint, BP 5145.3 is a generic nondiscrimination policy from
26 2003 that includes gender identity as a protected characteristic. (Compl., pp.27-28, 70-
27 75, ¶¶112-14 & Ex.2.) In contrast, AR 5145.3 is a new regulation adopted in August
28 2020 that explains that gender identity discrimination includes violating a child’s
“privacy right” to preclude his parents from learning that he has socially transitioned
to a new gender at school. (Compl., p.28, 76-82, ¶¶115-16 & Ex.3.)

1 this case. (Schmidt Decl., p.2, ¶¶5-6.) That description downplays the requirement that
2 teachers deceive parents, but is not how the Parental Exclusion Policies are being
3 implemented in practice. (Rebuttal Mirabelli Decl., ¶¶12-21.)

4 In light of the above, especially the disconnect between the January 2018
5 training and the August 2020 regulation, and because EUSD chose not to provide the
6 actual training—but merely a short and sparse declaration characterizing it—Plaintiffs
7 object to Defendant Schmidt’s entire declaration as irrelevant, more prejudicial than
8 probative, hearsay, a legal conclusion, and a violation of the Best Evidence Rule.⁵

9 **II. THE OTHER INJUNCTION FACTORS FAVOR PLAINTIFFS**

10 The remaining preliminary injunction factors are irreparable harm, balance of
11 harms, and the public interest. All three factors tilt strongly in Plaintiffs’ favor.

12 **A. Plaintiffs Are Suffering Irreparable Harm Due to the Loss of their**
13 **Constitutional Rights and Severe Emotional Stress**

14 With respect to irreparable harm, EUSD argues that “Plaintiffs cannot meet the
15 requirement on no legal remedy, because, if they are being mistreated in the workplace,
16 they have a legal remedy in Title VII employment action or a state action for
17 discrimination.” (ECF No. 16, EUSD Opp., p.4:19-21; *see also id.* at 5:2-3.) The CDE,
18 in turn, simply argues that there is not a “sufficient causal connection” between
19 Plaintiffs’ irreparable injury and the CDE’s Frequently Asked Questions guidance
20

21 ⁵ On a preliminary injunction motion, courts may give even inadmissible evidence
22 some weight. But courts should reject evidence, even on a preliminary injunction
23 motion, if it is insufficiently reliable. *See, e.g., Am. Passage Media Corp. v. Cass*
24 *Commc’ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) (rejecting affidavits because they
25 affidavits were “conclusory and without sufficient support in facts”); *Dr. Seuss*
26 *Enterprises, L.P. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559, 1562 (S.D. Cal. 1996)
27 (court “has discretion to weight the evidence as required to reflect its reliability”). At
28 the very least, the Court can and should view suspiciously EUSD’s decision not to
submit any documentary evidence. *See, e.g., Interstate Cir. v. United States*, 306 U.S.
208, 226 (1939) (“The production of weak evidence when strong is available can lead
only to the conclusion that the strong would have been adverse.”); *Singh v. Gonzales*,
491 F.3d 1019, 1024-25 (9th Cir. 2007).

1 document—the source of EUSD’s Parental Exclusion Policies. (ECF No. 9, CDE
2 Opp., pp.16:8-18:3.)

3 But the existence of monetary damages for violation of Title VII does not
4 adequately remedy the non-monetary harms that Plaintiffs are suffering. For example,
5 Plaintiff Lori Ann West was placed on administrative leave for the rest of the 2022-
6 2023 school year, over her objection, with less than 24 hours’ notice. (ECF No. 8,
7 Supp. West Decl., pp.3-4, ¶¶7-10.) She immediately requested clarification whether
8 this would include the summer school class for special needs children that she was
9 agreed to teach. But EUSD chose not to respond to her inquiry for over two weeks—
10 until the day class was supposed to start. (Rebuttal West Decl., ¶¶3-7.) These harms
11 cannot be remedied via monetary damages.

12 In any event, even in the Title VII context, placing “pressure on Appellants to
13 violate their faith,” through a “Hobson’s choice: lose your faith and keep your job, or
14 keep your faith and lose your job,” is irreparable harm. *Keene v. City & Cnty. of San*
15 *Francisco*, No. 22-16567, 2023 WL 3451687, at *2 (9th Cir. May 15, 2023). And the
16 CDE’s guidance document applies to the whole State. Thus, unless it is enjoined as to
17 Plaintiffs, they will lose “the opportunity to pursue their ‘chosen profession,’ which
18 [the Ninth Circuit has] recognized as irreparable harm.” *Id.* (citing *Chalk v. U.S. Dist.*
19 *Ct. Cent. Dist. of California*, 840 F.2d 701, 710 (9th Cir. 1988); *Enyart v. Nat’l Conf. of*
20 *Bar Exam’rs, Inc.*, 630 F.3d 1153, 1156, 1165-66 (9th Cir. 2011)).

21 Finally, the fact that it is questionable that Plaintiffs could ever seek monetary
22 recovery from the CDE under Title VII weighs in favor of injunctive relief. *See, e.g.*,
23 *Cont’l Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1105 (9th Cir. 1994) (holding
24 “lack of proof of damages, and possible immeasurability or unascertainability of harm,
25 does not mean Continental was not harmed” and “so cuts in favor of equitable
26 relief”); *Dairy Maid Dairy, Inc. v. United States*, 837 F. Supp. 1370, 1381 (E.D. Va.
27 1993) (enjoining government conduct that would cause plaintiff \$4 million in harm,
28 where statute limited damages award against government).

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Respectfully submitted,

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By:



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