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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 CDE 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 In an unsurprising move, in opposing Plaintiffs Elizabeth Mirabelli and Lori Ann
3 West’s motion for a preliminary injunction, the Escondido Union School District
4 Defendants (“EUSD”) and the California Department of Education Defendants
5 (“CDE”) have chosen to point the finger at each other. In pointing the finger, the
6 CDE has taken the strategic move of declining to defend the merits of EUSD’s
7 Parental Exclusion Policies *at all*. It only raises procedural arguments such as standing
8 and sovereign immunity. As explained below, neither argument has any merit and this
9 Court can and should make clear in its order that a further motion to dismiss from the
10 CDE would not be well taken.

11 With respect to the present motion for a preliminary injunction, according to
12 EUSD, “[t]he guidance from the CDE is the source of the school district’s Policy”
13 and “[t]he California Department of Education specifically prohibits schools from
14 sharing a student’s gender preference with the student’s parents.” (ECF No. 16,
15 EUSD Opp., at pp.7:16-17, 8:2-3.)¹ The CDE, in turn, acknowledges that it published
16 the Frequently Asked Questions page that EUSD relies on (ECF No. 9, CDE Opp.,
17 p.11:13-14), and it never actually takes a position on whether EUSD is bound to follow
18 its guidance. The CDE simply contends that Plaintiffs pleaded that EUSD is *not*
19 bound. (*See* ECF No. 9, CDE Opp., pp.8:24-25, 11:16-17, 12:17-18, 13:13, 15:26-28.) In
20 truth, the complaint is silent as to whether or not *EUSD* must follow the CDE’s
21 guidance documents—it simply states that *this Court* need not give the CDE’s
22 guidance any deference as a formal agency rule. (*See* Compl., p.46, ¶189.)

23 The issue of whether EUSD *must* follow the CDE’s lead is not entirely clear. But,
24 “[p]ublic education is an obligation which the State assumed by the adoption of the
25 [California] Constitution.” *Butt v. State of California*, 4 Cal. 4th 668, 680 (1992). “The

26
27
28 ¹ Unless otherwise noted, all quotations are “cleaned up” by omitting citations,
quotation marks, brackets, ellipses, and emphasis; all emphasis is added. Page
number references are to the ECF-generated page number contained in the header of
each ECF-filed document.

1 system of public schools, although administered through local districts created by the
2 Legislature, is ‘one system applicable to all the common schools’,” in which local school
3 “districts are the State’s agents for local operation of the common school system.” *Id.* at
4 680-81 (quoting *Kennedy v. Miller*, 97 Cal. 429, 432 (1893)) (emphasis in original).

5 Thus, “[m]anagement and control of the public schools is a matter of state, not
6 local, care and supervision,” *id.* at 681 (quoting *Kennedy*, 97 Cal. at 431), “the State’s
7 ultimate responsibility for public education cannot be delegated to any other entity,”
8 *id.*, and the State “is obliged to intervene” when local school districts go awry. *Id.* at
9 692. “Against th[is] background of ‘plenary’ state control,” the Ninth Circuit has held
10 that it “h[as] no difficulty concluding that the State of California is in a theoretical *and*
11 practical position to ‘interfere’ with the employment decisions of local school
12 districts.” *Ass’n of Mexican-Am. Educators v. State of California*, 231 F.3d 572, 582 (9th
13 Cir. 2000) (en banc) (emphasis in original).

14 Because of the interconnectedness of the California education system, and
15 because Plaintiffs sought to strike down the CDE’s own guidance document—as the
16 source of EUSD’s own policies—Plaintiffs joined officials with the CDE to this lawsuit
17 as necessary parties. *See Drobnicki v. Poway Unified Sch. Dist.*, No. 06-cv-1563, 2007
18 WL 9718700 (S.D. Cal. July 13, 2007) (denying CDE’s motion to dismiss because
19 CDE was a necessary party).

20 With the CDE having an “interest” in its own guidance document, and with it
21 failing to state unequivocally whether EUSD is legally bound by its guidance, such that
22 an injunction against EUSD may leave it “subject to ... inconsistent obligations,” Fed.
23 R. Civ. P. 19(a)(1)(B)(ii), this Court can and should issue a preliminary injunction
24 encompassing the CDE Defendants. As stated in Plaintiffs’ motion, that order should
25 enjoin the CDE “from interfering in any way, including by taking action against the
26 EUSD Defendants, with Mrs. Mirabelli’s and Mrs. West’s ability to communicate
27 with the parents of transgender or gender diverse students in accordance with this
28 Court’s order.” (ECF No. 5, Ntc. of Mtn. for Prelim. Inj., at p.3:7-10.)

1 **REPLY ARGUMENT**

2 The CDE argues that Plaintiffs lack standing to sue it (instead of solely EUSD)
3 (CDE Opp., pp.10:15-13:19), and that sovereign immunity bars Plaintiffs’ claims.
4 (CDE Opp., pp.15:20-16:7.) At base, these arguments are all about the closeness of the
5 CDE to the facts of this case, and are “overlapping” “facets” of the same causation
6 argument. *Skyline Wesleyan Church v. California Dep’t of Managed Health Care*, 968
7 F.3d 738, 749 n.8 (9th Cir. 2020); *Mecinas v. Hobbs*, 30 F.4th 890, 903 (9th Cir. 2022).
8 As explained below, this single argument fails.

9 **I. SUMMARY OF ALLEGATIONS AGAINST THE CDE**

10 The Complaint pleads that Plaintiffs Elizabeth Mirabelli and Lori Ann West
11 separately met with officials from the Escondido Union School District (“EUSD”) on
12 November 15, 2022 to begin the process of negotiating a Title VII and California Fair
13 Employment and Housing Act religious accommodation. (Compl., pp.46-52, 250-75,
14 ¶¶186-212 & Exs.27-28.) During that meeting, EUSD personnel “suggested that
15 EUSD’s gender identity policies may be required by California or federal law.”
16 (Compl., p.46, ¶187.) However, “EUSD could identify only one document in support
17 of its suggestion that *any* of its gender identity policies may be necessary. That
18 document was a Frequently Asked Questions (FAQ) page from the website of the
19 California Department of Education.” (Compl., p.46, ¶189.) Substantively, all of
20 EUSD’s policies relating to gender identity could be found in that FAQ page, which
21 was apparently their origin. (*See* Compl., pp.238-49, Ex.26.)

22 The California Department of Education (“CDE”) is tasked with preparing
23 model programs and guidelines for use by local educational entities. *See* Compl., p.10,
24 ¶¶33-35; Cal. Educ. Code §§ 33316-33319.5; Cal. Const., art. IX, § 7.5. The CDE is
25 “administered through” the eleven-member State Board of Education, which is the
26 “governing and policy determining body of the department.” Cal. Educ. Code
27 § 33301(a); *see* Cal. Educ. Code §§ 33000-33000.5. In addition, the CDE is
28 administered by the California Superintendent of Public Instruction, “in whom all

1 executive and administrative functions of the department are vested and who is the
2 executive officer of the State Board of Education” as well as the State Board’s
3 secretary. Cal. Educ. Code § 33301(b); *see* Cal. Educ. Code §§ 33004, 33303.²

4 The State Board can only act through majority vote. Cal. Educ. Code § 33010.
5 The State Superintendent, in turn, “shall execute, under direction of the State Board
6 of Education, the policies which have been decided upon by the board and shall direct,
7 under general rules and regulations adopted by the State Board of Education, the work
8 of all appointees and employees of the board.” Cal. Educ. Code § 33111.

9 In memoranda summarizing the November 15, 2022 religious accommodation
10 meetings, “EUSD checked the box to conclude that accommodating Mrs. Mirabelli and
11 Mrs. West would create an undue hardship because of its unfounded fear that state or
12 federal law required its gender identity policies: ‘The nature of [Mrs. Mirabelli’s and
13 Mrs. West’s] request for exemptions also generate the potential for discrimination and
14 lack of compliance under the various laws described earlier in this IPM Summary.’”
15 (Compl., p.49, ¶201 (quoting Compl., pp.254, 266, Ex.27 at p.4, Ex. 28, p.4).)

16 EUSD based its conclusion in significant part on the CDE’s guidance. As
17 stated towards the conclusion of the memorandum: “It was again noted that the
18 California Department of Education has the authority to interpret and define
19 implications for public education. ‘Frequently Asked Questions’ (FAQs) have been
20 developed to guide local Districts and their school board in implementing policy.”
21 (Compl., p.254, Ex.27 at p.4.) This was reiterated in EUSD’s subsequent letter, dated
22 February 8, 2023. (*See* Compl., pp.49-50, 102-03, ¶¶202-03 & Ex.7.) As stated therein:

23 The EUSD is further guided on this issue by the California Department
24 of Education (CDE) and the California School Boards Association
25 (CSBA).... Regarding the “Privacy” policy, because a student’s gender
26 identity is a very personal, private issue, the CDE states: “Schools must
27 consult with a transgender student to determine who can or will be
informed of the student’s transgender status, if anyone, including the

28 ² In light of these clear statutes, the CDE’s argument that Plaintiffs are improperly
conflating the State Board, the State Superintendent, and the CDE is absurd.

1 student’s family. With rare exceptions, schools are required to respect
2 the limitations that a student places on the disclosure of their transgender
3 status, including not sharing that information with the student’s
4 parents.” [citation to CDE’s FAQ page]

4 (Compl., pp.102-03, Ex.7 at pp.1-2.)

5 In light of this, Plaintiffs included in their complaint a claim for declaratory
6 relief. (Compl., pp.63-64, ¶¶281-86.) Plaintiffs sought a declaration that the CDE’s
7 Frequently Asked Questions page either incorrectly summarizes California or federal
8 statutory law, or is superseded by federal constitutional law. (*Id.*) Plaintiffs further
9 pleaded that an actual controversy exists because “EUSD contends it is bound by the
10 Department of Education’s conclusions.” (Compl., p.63, ¶283.)

11 Because Plaintiffs were seeking declaratory relief regarding the CDE’s guidance
12 document—the FAQ page—Plaintiffs also named in their complaint the State
13 Superintendent and each of the eleven members of the State Board of Education.
14 (Compl., pp.10-12, ¶¶33-46.) These CDE Defendants were named in all four claims
15 for relief—not just the claim for declaratory relief. (*See* Compl., pp.53-64, ¶¶217-86.)
16 Plaintiffs named them as defendants “solely under Fed. R. Civ. P. 19(a)(1)(B), to the
17 extent that they claim an interest relating to the subject matter of the action for which
18 their joinder is practically important.” (Compl., p.10, ¶¶33, 35.)

19 The Complaint makes *no* allegation regarding whether local school districts, like
20 EUSD, are legally bound to follow the CDE’s guidance documents. (*Contra* ECF No.
21 9, CDE Opp., pp.8:24-25, 11:16-17, 12:17-18, 13:13, 15:26-28 (erroneously contending
22 the opposite).) However, the Complaint notes that the FAQ page is not a formal
23 agency interpretation of California or federal law to which judicial deference could
24 apply. (Compl., p.46, ¶189.)

25 **II. PLAINTIFFS HAVE STANDING TO SUE THE CDE**

26 “To satisfy the ‘irreducible constitutional minimum’ for standing, a plaintiff
27 must establish ‘three elements’: (1) injury in fact (2) that is fairly traceable to the
28 challenged conduct of the defendant and (3) that is likely to be redressed by a favorable

1 decision.” *Skyline Wesleyan Church v. California Dep’t of Managed Health Care*, 968
 2 F.3d 738, 746 (9th Cir. 2020) (“*Skyline*”). Here, the CDE contends: (2) that there is
 3 inadequate traceability “between the injury and any challenged state action” (CDE
 4 Opp., pp.11:10-12:10), and (3) that “Plaintiffs’ alleged injury [will not] be redressed by
 5 the remedy that they seek.” (CDE Opp., pp.12:11-13:19.) The CDE’s two arguments
 6 are really two sides of the same coin. “[A]lthough traceability and redressability are
 7 separate inquiries, they were initially articulated as ‘two facets of a single causation
 8 requirement.’” *Skyline*, 968 F.3d at 749 n.8 (quoting *Allen v. Wright*, 468 U.S. 737, 753
 9 n.19 (1984)). For similar reasons, both arguments fail.

10 **A. There is a Fairly Traceable Connection Between the CDE’s**
 11 **Frequently Asked Questions Page and Plaintiffs’ Harm**

12 With respect to the second element of the standing analysis, “[a] plaintiff must
 13 show that its ‘injury is fairly traceable to the challenged action of the defendant, and
 14 not the result of the independent action of some third party not before the court.’”
 15 *Skyline*, 968 F.3d at 748 (quoting *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir.
 16 2014)). “Purely ‘self-inflicted injuries’ are insufficient,” *id.* (quoting *Clapper v.*
 17 *Amnesty Int’l USA*, 568 U.S. 398, 415-18 (2013)), but “[w]e do not ... ‘require the
 18 defendant’s action to be the sole source of injury.’” *Id.* (quoting *Wash. Envtl. Council*
 19 *v. Bellon*, 732 F.3d 1131, 1142 (9th Cir. 2013)).

20 In *Skyline*, a California agency issued a regulation requiring all health care
 21 insurance plans to cover elective abortion. *Id.* at 743-44. It then sent a letter to the seven
 22 health insurance companies that offered plans without elective abortion, and they added
 23 such coverage to their plans. *Id.* at 744. When Skyline Wesleyan Church discovered that
 24 its health insurance plan now covered elective abortion, and could find no plan that
 25 excluded such coverage, it sued the California agency. *Id.* at 744-45. On traceability, the
 26 Ninth Circuit held that “there is a direct chain of causation from [California’s] directive
 27 requiring seven insurers to change their coverage, to Skyline’s insurer’s doing so, to
 28 Skyline’s losing access to the type of coverage it wanted.” *Id.* at 748.

1 Here, the CDE argues that “[t]he Complaint contains no factual allegations as
2 to any interaction of any kind between any State-level Defendant and either Plaintiffs
3 or EUSD,” “[t]he Complaint contains no allegations that the State-level Defendants
4 employed the Plaintiffs,” “[t]he Complaint does not allege that the State-level
5 Defendants imposed any requirements on Plaintiffs,” and “[t]he Complaint does not
6 allege that the State-level Defendants denied Plaintiffs any requested religious
7 accommodation.” (CDE Opp., pp.11:19-21, 12:2-6.) But just like in *Skyline*, the
8 Complaint pleads that the origin of EUSD’s policies relating to gender identity was the
9 CDE’s FAQ page (Compl., pp.238-49, Ex.26), and EUSD denied Plaintiffs an
10 exemption from its Parental Exclusion Policies because it believed it was bound by the
11 CDE’s guidance. (Compl., p.49, ¶201; Compl., pp.254, 266, Ex.27 at p.4, Ex. 28,
12 p.4.) Under *Skyline*, these are adequate allegations of traceability.

13 **B. Enjoining the CDE is Likely to Redress the Harms that Plaintiffs**
14 **Have Suffered**

15 “To establish redressability, a plaintiff must show that ‘it is likely, as opposed to
16 merely speculative, that its injury will be redressed by a favorable decision.’” *Skyline*,
17 968 F.3d at 749 (quoting *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*,
18 528 U.S. 167, 181 (2000)). “It is not necessary to show ‘a guarantee that the plaintiff’s
19 injuries will be redressed.’” *Id.* (quoting *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir.
20 2012)). “[R]edressability is lacking ‘if the injury complained of is ‘the result of the
21 independent action of some third party not before the court.’” *Id.* (quoting *Bennett v.*
22 *Spear*, 520 U.S. 154, 167 (1997)). “But a plaintiff does have standing when the
23 defendant’s actions produce injury through their ‘determinative or coercive effect
24 upon the action of someone else.’” *Id.* (quoting *Bennett*, 520 U.S. at 167).

25 Again, the facts of *Skyline* are dispositive. There, California argued that “a
26 favorable decision would be unlikely to redress Skyline’s injury because Skyline
27 cannot show that an insurer would likely agree to offer coverage consistent with
28 Skyline’s beliefs.” *Id.* The Ninth Circuit disagreed. It held that “we need not be

1 *certain* how insurers would respond,” and found that “the predictable effect of an
 2 order granting the relief Skyline seeks is that at least one insurer would be willing to
 3 sell it a plan that accords with its religious beliefs.” *Id.* at 750 (emphasis in original).

4 Here, the CDE argues that “Plaintiffs fail to meet their burden that it is likely,
 5 as opposed to merely speculative, that the requested declaration as to the CDE’s
 6 FAQs would result in EUSD either amending its policies in the manner sought by
 7 Plaintiffs or granting Plaintiffs a further religious accommodation from such
 8 policies.” (CDE Opp., pp.12:22-13:3.) But, as stated above, Plaintiffs pleaded that
 9 EUSD specifically cited the CDE’s FAQ page as the basis for its policies and why no
 10 exemption could be available to Plaintiffs. (Compl., p.49, ¶201; Compl., pp.254, 266,
 11 Ex.27 at p.4, Ex. 28, p.4.) The reasonable inference of an instruction to EUSD that it
 12 need not comply with the CDE’s FAQ page (either because the court declares the
 13 guidance document legally incorrect, or enjoins the CDE from enforcing it) is that
 14 EUSD would then extend an exemption to Plaintiffs. Under *Skyline*, this is adequate.

15 **III. SOVEREIGN IMMUNITY IS IRRELEVANT TO PLAINTIFFS’ MOTION** 16 **FOR PROSPECTIVE PRELIMINARY INJUNCTIVE RELIEF**

17 **A. Legal Background on Sovereign Immunity**

18 A sovereign entity is immune from suit absent its consent. As stated by the
 19 Supreme Court, “[t]he immunity of a truly independent sovereign from suit in its own
 20 courts has been enjoyed as a matter of absolute right for centuries. Only the
 21 sovereign’s own consent could qualify the absolute character of that immunity.” *Alden*
 22 *v. Maine*, 527 U.S. 706, 715 (1999) (quoting *Nevada v. Hall*, 440 U.S. 410, 414 (1979)).³

23
 24 ³ The Supreme Court has explained that, on its face, the text of the Eleventh
 25 Amendment does not create an immunity to suits by citizens of a state *against their*
 26 *own state* (as here). But, states have always retained their common law sovereign
 27 immunity. Thus, although a misnomer, courts and litigants often use the term
 28 “Eleventh Amendment immunity” to refer to both the constitutional amendment
 and common law sovereign immunity, which Plaintiffs assume is what the CDE has
 done here. *See Alden*, 527 U.S. at 713 (“The phrase is convenient shorthand but
 something of a misnomer...”).

1 “Thus, implementation of state policy or custom may be reached in federal court
 2 only because ... *actions for prospective relief* are not treated as actions against the State.”
 3 *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) (emphasis added). But, under
 4 sovereign immunity, neither a state nor a state agency may “*be sued directly in its own*
 5 *name* regardless of the relief sought.” *Id.* (emphasis added); *see Vartanian v. State Bar of*
 6 *California*, 794 F. App’x 597, 600 (9th Cir. 2019). Thus the need to sue responsible
 7 government officials in their “official capacity.” *Kentucky*, 473 U.S. at 167 n.14. When a
 8 government official is sued in his “personal-capacity,” the lawsuit seeks “to impose
 9 personal liability upon [him] for actions he takes under color of state law.” *Id.* at 165. In
 10 contrast, when an official is sued in his “official-capacity,” the lawsuit is, “in all
 11 respects other than name, to be treated as a suit against the entity.” *Id.* at 166. “It is *not*
 12 a suit against the official personally, for the real party in interest is the entity.” *Id.*⁴

13 **B. The State Board Officials Have the Requisite Connection to the CDE**

14 Here, the CDE engages in a lengthy discussion of Eleventh Amendment
 15 immunity in an effort to confuse the issues. (CDE Opp., pp.13:20-16:7.) The simple
 16 answer is that Eleventh Amendment immunity is irrelevant because government
 17 officials can be sued under *Ex parte Young* for prospective injunctive relief. *See, e.g.,*
 18 *Doe v. Lawrence Livermore Nat’l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997) (citing *Ex*
 19 *parte Young*, 209 U.S. 123 (1908).)

20 Undeterred, the CDE argues that Plaintiffs’ complaint is barred by Eleventh
 21 Amendment immunity because Plaintiffs have not alleged that the CDE officials have
 22 “a sufficient connection with the law [being challenged] and direct responsibility for
 23 enforcing it.” (CDE Opp., p.15:14-15.) According to the CDE, “[t]he Complaint does

24 _____
 25 ⁴ Sovereign immunity is “quasi-jurisdictional” and so may be raised by either a Rule
 26 12(b)(1) motion (lack of jurisdiction) or a Rule 12(b)(6) motion (failure to state a
 27 claim). *Sato v. Orange Cnty. Dep’t of Educ.*, 861 F.3d 923, 927 n.2 (9th Cir. 2017). Being
 28 quasi-jurisdictional, “Eleventh Amendment immunity does not implicate a federal
 court’s subject matter jurisdiction in any ordinary sense” and “should be treated as an
 affirmative defense.” *Tritchler v. Cnty. of Lake*, 358 F.3d 1150, 1153-54 (9th Cir. 2004)
 (quoting *ITSI TV Prods., Inc. v. Agric. Ass’ns*, 3 F.3d 1289, 1291 (9th Cir.1993)).

1 not allege that the [CDE] Defendants had or have any hand in developing, adopting,
2 implementing, enforcing or considering religious accommodations in relation to
3 EUSD’s challenged policies that are at issue here.” (CDE Opp., p.14:23-26.)

4 Like above, “[t]he question of whether there is the requisite ‘connection’
5 between the sued official and the challenged law implicates an analysis that is ‘closely
6 related—indeed overlapping’—with the traceability and redressability inquiry already
7 discussed.” *Mecinas v. Hobbs*, 30 F.4th 890, 903 (9th Cir. 2022). Thus, it is generally
8 dispositive that the Complaint pleads that the origin of EUSD’s policies relating to
9 gender identity was the CDE’s FAQ page (Compl., pp.238-49, Ex.26), and that
10 EUSD denied Plaintiffs an exemption from its Parental Exclusion Policies because it
11 believed it was bound by the CDE’s guidance. (Compl., p.49, ¶201; Compl., pp.254,
12 266, Ex.27 at p.4, Ex. 28, p.4.)

13 But specifically here, the CDE makes the absurd argument that the California
14 Department of Education is “a legally distinct entity” from the State Board of
15 Education or State Superintendent. (CDE Opp., p.12:14-17.) Thus, the CDE stresses,
16 “[t]here are no factual allegations made against the members of the [State Board]”
17 (CDE Opp., p.8:22-23), and “[w]hile Plaintiffs seemingly conflate [the State Board]
18 and CDE by styling the State-level Defendants as ‘CDE Defendants’, the [State
19 Board] and CDE are distinct entities. (See footnote 4 below).” (CDE Opp., p.10:1-6.)

20 This attempt to create distance between the State Board, the State
21 Superintendent, and the California Department of Education is completely false. As
22 stated above, the CDE is run by the State Board through the State Superintendent.
23 Cal. Educ. Code § 33301. The entity with the power to order the FAQ page corrected
24 or taken down is the State Board of Education. *Id.* None of the citations in the CDE’s
25 “footnote 4” state otherwise. (See CDP Opp., p.14 n.4.)

26 **CONCLUSION**

27 For the foregoing reasons, Plaintiffs respectfully request that this Court grant
28 their motion for a preliminary injunction in full and dispense with a bond requirement.

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Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: June 16, 2023

By:



Charles S. LiMandri

Paul M. Jonna

Jeffrey M. Trissell

Milan L. Brandon II

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 *Application forthcoming

Attorneys for Plaintiffs

10
 11
 12 UNITED STATES DISTRICT COURT
 13 SOUTHERN DISTRICT OF CALIFORNIA

14 ELIZABETH MIRABELLI, an individual,
 15 and LORI ANN WEST, an individual,

16 Plaintiffs,

17 v.

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

21 Defendants.

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

**Rebuttal Declaration of Plaintiff
 Elizabeth Mirabelli in Support of
 Motion for a Preliminary Injunction**

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

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 25 years, with the most recent 17 at Rincon Middle School. The
5 matters discussed below are based on my own personal knowledge. I could and would
6 testify to them if called upon to do so in court. This declaration is submitted to
7 supplement and not supersede my prior declaration, dated May 11, 2023, with
8 supplemental and rebuttal testimony.

9 **THE JANUARY 2018 TRAINING MEETING**

10 2. I have reviewed the declaration of Tracy Schmidt, EUSD’s Director of
11 Integrated Student Services, dated June 12, 2023 and filed in this action. In her
12 declaration, Director Schmidt says that the YMCA’s Our Safe Place Team provided
13 training on gender identity to certificated staff (teachers and some administrators)
14 during professional development days in January 2018. She also states that the same
15 training was provided by the YMCA to classified staff (other administrative staff and
16 custodians) in June 2018.

17 3. In light of this January 2018 training, Director Schmidt states that
18 EUSD’s provision of gender identity training to staff was “broader and deeper” than
19 the complaint asserts. However, Director Schmidt fails to specifically clarify what is
20 meant by “broader and deeper,” and in paragraph 3 of her declaration, she uses many
21 vague terms such as: “focused interactions,” “complex questions and issues,” and
22 “individual circumstances.” Director Schmidt does not clearly define what those
23 terms mean in context, or explain their implications.

24 4. Also of concern, Director Schmidt’s declaration fails to address the fact
25 that many classified staff have not implemented EUSD’s gender identity policies. As
26 stated in the Complaint at paragraph 139, I have collected documentation of a variety
27 of ways in which classified staff have continued to use legal names and biological
28 pronouns years after the January 2018 training. Director Schmidt gives no explanation

1 for why classified staff are not following EUSD’s gender identity policies and are not
2 being held accountable for violating them, while teachers are being formally disciplined
3 and threatened with termination under the same policy. I am attaching true and correct
4 redacted copies of that document as **Exhibit 45**. Unredacted copies will be submitted
5 to the Court under seal. The students listed on the office passes or certificates, or
6 circled in the lists of students, have all requested preferred transgender names.

7 5. Indeed, in paragraph 6 of her declaration, and on page 2 of EUSD’s
8 opposition brief, she says that it is entirely “hypothetical” that a student may ask a
9 teacher to deceive her parents. As explained at length in the complaint, this is not
10 “hypothetical” but a real situation I dealt with during the 2022-2023 school year.

11 6. I do remember training that occurred on January 7, 2018, where EUSD
12 Deputy Superintendent Liela Sackfield (now retired) led a presentation to teaching
13 staff about gender identity nondiscrimination. That training was provided at Rincon
14 Middle School, but not solely to Rincon staff. Rather, EUSD district leaders also
15 arranged for teaching staff from Rincon’s “feeder” elementary schools to also attend
16 the meeting. The training involved a slideshow presentation.

17 7. At the training, a group of at least five presenters spoke. The training
18 was not specifically about gender identity, but about LGBT rights more generally.
19 Each presenter represented a different LGBT identity: lesbian, gay (male), bisexual,
20 transgender, and nonbinary. Each presenter shared a definition of their specific
21 LGBT identity.

22 8. The presenters then facilitated participation activities for all of the
23 teachers. This included statements such as: “Stand up, if you identify as
24 heteronormative” (as in, not a member of the LGBT community), or “Stand up if
25 you are an ally of someone who is non-conforming.” Then the presenters invited all
26 of the teachers to circle up with a group and share our gender identity.

27 9. At the time, this training created a minor uproar among the staff.
28 Teachers were not notified in advance about the content of the meeting and were not

1 allowed to decline to attend. However, some staff members did refuse to participate
2 and left the meeting. The EUSD district leaders in attendance stood along the side
3 and back of the room. They discouraged people from leaving the meeting, but did not
4 stop them or threaten any retaliation for leaving. I remember discussing with some
5 colleagues how they felt caught off-guard and very uncomfortable.

6 10. This January 2018 training displayed complete disregard for the
7 conscientious objection of many teachers to a highly-charged political issue. It failed
8 to provide accommodations for all stakeholders. It ran roughshod over teachers'
9 sincere objections to various policies and allowed no input.

10 11. After the presentation, Deputy Superintendent Sackfield announced
11 that gender fluidity was the official position of EUSD, and that this was to be
12 accepted by all teachers. I still do not really know what she meant by “gender
13 fluidity” being the official position. Teachers were also told that we should “come
14 out” with preferred pronouns on our form email signatures. Importantly, the training
15 I attended in January 2018 *did not address the role of parents at all*.

16 **OTHER “INDIVIDUALIZED TRAINING”**

17 12. On page 2 (paragraphs 3-6) of her declaration, Director Schmidt then
18 transitions to “more individualized training with selected staff.” (¶3) Director
19 Schmidt downplays the importance of my objection to misleading parents by stating
20 that this “individualized training” focused on helping a child feel comfortable
21 revealing her gender confusion to her parents. (¶5) Director Schmidt states that
22 EUSD staff are supposed to try to convince a child to speak with her parents about
23 her gender identity, and advises educators to avoid informing parents if the child
24 expresses concerns about a parent’s reaction. (¶5) Finally, Director Schmidt explains
25 that these policies are about “respect[ing] the student’s right to privacy.” (¶6)

26 13. This description of EUSD’s training and policies is very misleading and is
27 not how they are being enacted in practice. In practice, students’ so-called “right to
28 privacy” is not about keeping anything private, but taking concrete, public actions—

1 such as changing official school records—without the knowledge or consent of parents.

2 14. This so-called “right to privacy” keeps parents in the dark about life-
3 altering decisions made *for* their child (not really *by* their child). But a child’s “right
4 to privacy” cannot supersede a parent’s right to oversee the upbringing of their
5 children; minor children do not have the right to act independently from their
6 parents. In practice, this “right to privacy” is and has been completely unworkable—
7 because EUSD’s policies have always been opaque, without a uniform procedure for
8 implementation.

9 **CONCLUDING THOUGHTS**

10 15. In practice, this case is the logical conclusion of the California
11 Department of Education encouraging educators more and more over the years to
12 usurp parents’ rights. It has been doing so upon consultation from special interest
13 groups who wish to advance a social agenda. These special interest groups do not
14 care that they are acting outside the constitutional guarantees of a parent’s right to
15 direct their minor child’s education.

16 16. Nor do these special interest groups care that, in reality, coming
17 between children and their parents is detrimental to the welfare of children and
18 families. EUSD’s policies, as I’ve experienced them, overlook the inevitable
19 consequences of violating the childhood sexual latency period for young children and
20 exacerbate the confusion for children during the unpredictable years of adolescence.

21 17. Do gender diverse students have a right to receive an education free
22 from discrimination? Yes. Gender diverse students have a right to be protected from
23 unjust discrimination. They deserve access to educational opportunities. This case is
24 not about discriminating against transgender or gender diverse students or about
25 making them feel unwelcome.

26 18. But may gender diverse students claim false discrimination and strip
27 others of rights? No. EUSD’s gender identity policies—specifically its Parental
28 Exclusion Policies—have unjustly discriminated against parents and teachers under

1 the guise of supposedly protecting gender diverse students. Educational leaders have
2 not only excluded parents from the educational life of their children, but they are
3 actively promoting sexual identity on school campuses.

4 19. Far from creating an “equitable and safe” environment, EUSD has
5 established an overtly hostile environment for every member of the community that
6 holds different views on gender and sexuality than EUSD. While EUSD should be
7 providing a place where employees and students can teach academics in an
8 accommodating environment, they are intentionally hostile towards people who hold
9 religious views. This includes Muslim, Jewish, Mormon, Hindu, and Christian
10 families—or anyone who holds traditional views on gender or sexuality, or believes in
11 the primary role of parents in forming their children.

12 20. Administrators at EUSD actively encourage displays in offices and
13 classrooms campus-wide about sexual behavior that directly discriminates against
14 students of faith. Rather than keeping the educational environment supportive of
15 everyone in the community, EUSD admin openly engages in hotly contested political
16 views against approved EUSD Board policy.

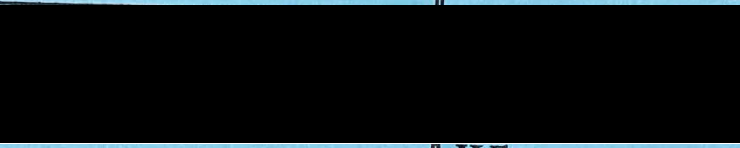
17 21. Enough is enough. It is bad enough that EUSD wants me to advance the
18 brand new gender ideology to my seventh grade students (generally 12 years old). But
19 it was beyond the pale when EUSD ordered me to lie to parents so that they can have
20 no family discussion or voice in their child’s gender transition. That places me in an
21 untenable situation. This is why injunctive relief is absolutely necessary.

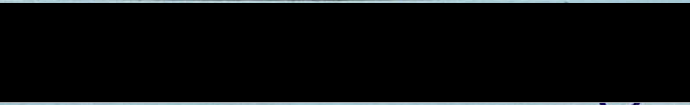


22 I declare under penalty of perjury under the laws of the United States and the
23 State of California that the foregoing is true and correct.

24 Executed on June 16, 2023, in Escondido, California.

25 
26 Elizabeth Mirabelli
27
28

EXHIBIT 45

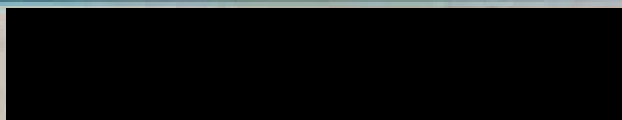
OFFICE PASS		Room <u>51</u>
		Period <u>1</u>
Name(s): 		
To: <input type="checkbox"/> Office <input type="checkbox"/> Asst. Principal's Office <input type="checkbox"/> Health Office <input type="checkbox"/> Library <input type="checkbox"/> Counselor <input checked="" type="checkbox"/> Room # <u>27</u> <input type="checkbox"/> Other:		When: <input checked="" type="checkbox"/> NOW please <input type="checkbox"/> Before end of period at your convenience. <input type="checkbox"/> At the END of this period. <input type="checkbox"/> Other: _____ <input type="checkbox"/> Note: Student will not be returning to your class.
Date: <u>11/9/2022</u>		Staff: <u>VH → MS. WARD</u>
Time returned to class: <u>923</u>		Staff: <u>SPURD</u>

OFFICE PASS	Room <u>51</u>
	Period <u>1</u>
Name(s): 	
To: <input type="checkbox"/> Office <input type="checkbox"/> Asst. Principal's Office <input type="checkbox"/> Health Office <input type="checkbox"/> Library <input type="checkbox"/> Counselor <input type="checkbox"/> Room # <u>27</u> <input type="checkbox"/> Other:	When: <input checked="" type="checkbox"/> NOW please <input type="checkbox"/> Before end of period at your convenience. <input type="checkbox"/> At the END of this period. <input type="checkbox"/> Other: _____ <input type="checkbox"/> Note: Student will not be returning to your class.
Date: <u>02/08/2023</u>	Staff: 
Time returned to class: <u>8:52am</u>	Staff: 

CERTIFICATE of ACHIEVEMENT



This certificate is awarded to:



for achieving

*at or Above 7th Grade Level
on Our Mid-Year iReady Diagnostic*



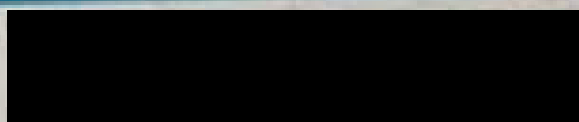

Ms. Mirabel, Teacher

January 2023

CERTIFICATE of ACHIEVEMENT



This certificate is awarded to:



for achieving the

*Annual Stretch Growth Goal
On Our Mid-Year iReady Diagnostic*




Ms. Mirabelli, Teacher

January 2023

Information - Read/Language Arts 7 Period 6

Rincon MS 22-23 Trimester 1

Student In

Information

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Student's last name to go to your screen.

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Read/Language Arts 7
6(A)

Diagnostic Growth



Subject: Reading
 Class/Report Group: All Reading Students
 Comparison Diagnostic: Diagnostic 2

Student	Annual Typical Growth		Annual Stretch Growth®		Baseline Placement & Scale Score	Current Placement & Scale Score
	Percent Progress	Scale Score Progress	Percent Progress	Scale Score Progress		
[REDACTED]	0%	0/4	0%	0/14	Late 7 (658)	Mid 7 (640)
[REDACTED]	0%	0/6	0%	0/23	Early 7 (612)	Grade 6 (588)
[REDACTED]	0%	0/6	0%	0/23	Early 7 (618)	Grade 6 (590)
[REDACTED]	0%	0/12	0%	0/37	Grade 5 (576)	Grade 4 (555)
[REDACTED]	0%	0/10	0%	0/25	Grade 6 (600)	Grade 6 (595)
[REDACTED]	0%	0/17	0%	0/50	Grade 2 (477)	Grade 1 (456)
[REDACTED]	0%	0/10	0%	0/25	Grade 6 (599)	Grade 6 (584)
[REDACTED]	0%	0/10	0%	0/25	Grade 6 (602)	Grade 5 (579)
[REDACTED]	0%	0/10	0%	0/25	Grade 6 (589)	Grade 5 (580)
[REDACTED]	0%	0/6	0%	0/23	Early 7 (625)	Early 7 (619)
[REDACTED]	0%	0/17	0%	0/50	Grade 3 (540)	Grade 3 (515)
[REDACTED]	0%	0/12	0%	0/37	Grade 5 (574)	Grade 5 (566)
[REDACTED]	0%	0/4	0%	0/14	Late 7 (659)	Mid 7 (647)
[REDACTED]	0%	0/17	0%	0/50	Grade 4 (551)	Grade 3 (516)
[REDACTED]	-	-/17	-	-/50	Grade 3 (501)	-

Sign Up for Library

Overdue Report:

This is a list from Destiny of all overdue books in your classroom. Please share with your students. IF there is a Musical Instrument listed, please ignore it. I will be off campus Wednesday at a Workshop, but Thursday & Friday are good days for them to return the books. They can come during class or the Library is open before school, afterschool, during Nutrition and Lunch.

Thank you for your help,

DeeAnne

Overdue Materials, Assigned Resources, Unpaid Fines.

Circulation Types: All. Patron Types: Student - 6th Grade, Student - 7th Grade, Student - 8th Grade.

Rincon School Library

Homeroom: Mirabelli,Elizabeth-4(A)

Call Num.	Barcode	Title	Amount Due
[Fic]LOP	T 513358	Ask my mood ring how I feel	\$20.00
	P 752201		
[Fic] GAR	T 521770	Caraval <i>bring Monday</i>	\$20.00
	P 741543		
[Fic] POB	T000001210	No way out <i>Absent</i>	\$20.00
	P 742658		
[Fic] LIT	T 521541	Anything but okay <i>Yes/returned</i>	\$20.00
	P 746249		
[Fic]POB	T000001266	No way out <i>Absent</i>	\$15.00
	P 810639		
[Fic] HUN	T 521904	Shouting at the rain <i>Yes/returned</i>	\$20.00
	P 746582		
[Fic] GAR	T 521769	Caraval <i>Yes/returned</i>	\$20.00
	P 812090		
FIC O'CO	T 509572	How to steal a dog : a novel <i>Absent</i>	\$20.00
	P 810406		
940.54 BAS	T000001244	Sabotage : the mission to destroy Hitler's atomic bomb <i>bring Monday</i>	\$20.00
	P 813838		
[Fic]LOP	T 513359	Ask my mood ring how I feel <i>(PROPE)</i>	\$20.00
	P 811702		
PAP KOR	T 511464	Pop <i>Yes/returned</i>	\$10.00
	P 746123		
[Fic] MCM	T 521283	One of us is lying <i>Yes/returned</i>	\$20.00

Report generated on 1/24/2023 9:22 AM

JAN 24, 2023 *

Overdue Materials, Assigned Resources, Unpaid Fines.

Circulation Types: All. Patron Types: Student - 6th Grade, Student - 7th Grade, Student - 8th Grade.

Rincon School Library

Homeroom: Mirabelli, Elizabeth-6(A)

Call Num.	Barcode	Title	Amount Due
P 810985			
398.2 SCH	T 36215	More scary stories to tell in the dark <i>book at home</i>	\$9.07
P 743319			
[Fic] RUS	T000001278	Tales from a not-so-secret crush catastrophe ✓	\$20.00
P 741021			
[Fic] SEG	T 513853	Nightmares! <i>absent</i>	\$12.00
P 762596			
[Fic] PFE	T 521661	Life as we knew it ✓	\$20.00
P 742941			
FIC AVE	T 513988	Cruel Crown / 3 ✓	\$20.00
P 813275			
		<i>absent</i>	\$15.00
P 811932			
567.9 SAT	T 4483	The illustrated dinosaur dictionary <i>book at home</i>	\$20.00
P 727943			
[Fic]LU	T 512602	Legend / : Book 1 <i>at home / Mon</i>	\$10.00
P 761152			
133.5 PAR	T 15835	Parkers' astrology : the essential guide to using astrology in your daily life ✓	\$18.00

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 Tel: (312) 782-1680
 *Application forthcoming

Attorneys for Plaintiffs

10
 11
 12 UNITED STATES DISTRICT COURT
 13 SOUTHERN DISTRICT OF CALIFORNIA

14 ELIZABETH MIRABELLI, an individual,
 15 and LORI ANN WEST, an individual,

16 Plaintiffs,

17 v.

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

21 Defendants.

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

**Rebuttal Declaration of Plaintiff
 Lori Ann West in Support of Motion
 for a Preliminary Injunction**

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

1 I, Lori Ann West, 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 Physical
4 Education at Rincon Middle School in Escondido since 1999. The matters discussed
5 below are based on my own personal knowledge. I could and would testify to them if
6 called upon to do so in court. This declaration is submitted to supplement and not
7 supersede my prior declarations, dated May 15 and May 26, 2023, with supplemental
8 and rebuttal testimony.

9 **THE JANUARY 2018 TRAINING MEETING**

10 2. I have reviewed the declaration of Tracy Schmidt, EUSD's Director of
11 Integrated Student Services, dated June 12, 2023 and filed in this action. Like my co-
12 Plaintiff Elizabeth Mirabelli, I do not remember the role of parents being discussed at
13 the January 2018 training on gender identity discussed in Director Schmidt's
14 declaration.

15 **SUPPLEMENTAL REACTION TO THE LAWSUIT**

16 3. I also want to inform the Court that I was recently notified that my
17 involuntary administrative leave covers summer school. I was scheduled to teach an
18 Adapted Physical Education summer school class for students with special needs
19 from June 14 to July 14, 2023. This was not at Rincon Middle School, so I hoped that
20 I would not be prevented from teaching it. I have taught summer school five times in
21 the past and have greatly enjoyed it.

22 4. As I stated in my last declaration, I received notice on May 18, 2023 that
23 I was being placed on involuntary administrative leave and should not show up for
24 work the next day. A few days later on May 25, 2023, my attorneys sent a letter to
25 EUSD asking them to confirm whether this would apply to my scheduled summer
26 school class. Because that class was not occurring at Rincon Middle School, we said
27 that we would assume that I would be teaching unless informed otherwise.

28 ///

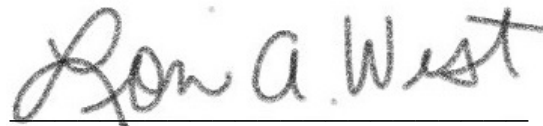
1 5. When we received no response, my attorneys followed up on June 13,
2 2023. I was planning to show up to class the next day. At 5:30 a.m. on June 14, 2023, I
3 was informed that I could not teach the class. I was very surprised. They had offered
4 me the class and I had accepted. It was very distressing to me that I was told to not
5 show up to class on the morning that class was supposed to start. I don't understand
6 that at all. I am afraid that this is just part of EUSD playing games, trying to conjure
7 up a justification to fire me, or convince me to quit.

8 6. But the real victims here are the children. I have more than 30 years of
9 teaching experience. And I greatly love teaching children with special needs. Often,
10 summer school students are some of the most disadvantaged, and so every year I love
11 doing what I can to help them.

12 7. I don't want to be on paid administrative leave. I want to do my job and
13 teach my students. So I need the Court to rule promptly on my motion for a
14 preliminary injunction and strike down EUSD's unconstitutional policies that hurt
15 students and teachers.

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

18 Executed on June 16, 2023, in Escondido, California.

19 

20 _____
21 Lori Ann West

22
23
24
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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 to the EUSD Defendants in Support of Plaintiffs’ Motion for a Preliminary Injunction;**
- **Reply to the CDE Defendants in Support of Plaintiffs’ Motion for a Preliminary Injunction;**
- **Rebuttal Declaration of Plaintiff Elizabeth Mirabelli in Support of Motion for a Preliminary Injunction; and**
- **Rebuttal Declaration of Plaintiff Lori Ann West in Support of Motion for a Preliminary Injunction.**

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

Thomas Prouty, Deputy General Counsel
California Department of Education
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Sacramento, CA 95814
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Attorneys for CDE Defendants

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Attorneys for EUSD Defendants

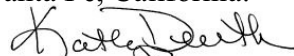
 X **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Rancho Santa Fe, California in the ordinary course of 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 June 16, 2023, at Rancho Santa Fe, California.



Kathy Denworth