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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.,

23 Defendants.

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

**Notice of Supplemental Authority in
 Support of Plaintiffs’ Motion for a
 Preliminary Injunction, and in
 Opposition to the EUSD Defendants’
 Motion to Dismiss**

Judge: Hon. Roger T. Benitez
 Courtroom: 5A
 Hearing Date: July 17, 2023
 Hearing Time: 10:30 a.m.

NOTICE OF SUPPLEMENTAL AUTHORITY

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2 Plaintiffs Elizabeth Mirabelli and Lori Ann West bring to this Court’s attention
3 recently issued supplemental authority in support of their motion for a preliminary
4 injunction (ECF Nos. 5, 8, 18) and their opposition to the EUSD Defendants’ motion
5 to dismiss (ECF No. 10). *Cf.* Fed. R. App. P. 28(j).¹

I. 303 Creative LLC v. Elenis, 600 U.S. ___ (2023)

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7 In *303 Creative LLC v. Elenis*, 600 U.S. ___, 2023 WL 4277208 (2023), the High
8 Court held that Colorado could not enforce a statute to compel a graphic designer to
9 create custom wedding websites celebrating same-sex weddings. As explained by the
10 Court, “Colorado seeks to compel this speech in order to ‘excis[e] certain ideas or
11 viewpoints from the public dialogue.’” *Id.* at *9 (slip op., at 10-11). But, under the U.S.
12 Constitution, this is a wholly illegitimate purpose: “Under our precedents, that ‘is
13 enough,’ more than enough, to represent an impermissible abridgment of the First
14 Amendment’s right to speak freely.” *Id.* The Court held that it would be “truly novel
15 [to] allow[] a government to coerce” conformity on “a question of political and
16 religious significance.” *Id.* at *13 (slip op., at 19-20).

17 Here, as explained in the Complaint, there are two distinct lenses through which
18 to regard gender identity. The first is the traditional medical lens. (ECF No. 1 at 12-13,
19 ¶¶49-50.) The new approach, however, is to treat gender identity as a matter of
20 individual “self-determination,” and approaches it from an ideological, “quasi-
21 religious,” and political direction. (ECF No. 1 at 13-14, ¶¶51-55.) In this respect,
22 Plaintiffs have argued that EUSD’s efforts to restrict their speech on gender identity or
23 gender diverse theory should be very carefully scrutinized because political speech is at
24 the core of the First Amendment. (*See* ECF No. 5-1 at 22:19-23:13 & nn.10-11, 31:14-17;
25 ECF No. 18 at 8:18-9:7.) *303 Creative* confirms this.²

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27 ¹ Page number references are to the ECF-generated page number contained in the
header of each ECF-filed document.

28 ² *Counterman v. Colorado*, 600 U.S. ___, 2023 WL 4187751 (2023), also just issued by

1 **II. *Groff v. DeJoy*, 600 U.S. ___ (2023)**

2 The High Court also recently issued its opinion in *Groff v. DeJoy*, 600 U.S. ___,
3 2023 WL 4239256 (2023). In that *unanimous* opinion, the Court revived the plaintiff’s
4 dismissed Title VII religious accommodation claims. In so doing, the Court clarified
5 that “a coworker’s dislike of ‘religious practice and expression in the workplace’ or
6 [dislike of] ‘the mere fact [of] an accommodation’ is not ‘cognizable to factor into the
7 undue hardship inquiry.’” *Id.* at *12 (slip. op., at 20). Neither “employee animosity”
8 nor “adverse customer reaction” is cognizable. *Id.* Notably, Justice Sotomayor
9 concurred separately to reiterate this point. *Id.* at *14 (slip. op., at 3).

10 Here, Plaintiffs discussed how, in weighing Plaintiffs’ and EUSD’s interests in
11 the Free Speech context, EUSD’s asserted interests as an employer must be
12 “legitimate.” (ECF No. 5-1 at 22:5-24:14.) The disruption that could arise when
13 colleagues or students object to Plaintiffs’ religious beliefs may not be considered by
14 EUSD. (*Id.*) *Groff* reaffirms this longstanding principle.

15 **III. *Students for Fair Admissions, Inc. v. President & Fellows of***
16 ***Harvard Coll.*, 600 U.S. ___ (2023)**

17 Finally, in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard*
18 *Coll.*, 600 U.S. ___, 2023 WL 4239254 (2023), the Court reviewed whether Harvard
19 University and the University of North Carolina’s affirmative action policies could
20 continue to survive strict scrutiny. In “apply[ing] genuine strict scrutiny, *id.* at *24
21 (Thomas J., concurring) (slip op., at 2), the Court first criticized the universities’
22 asserted interests as unable to “be subjected to meaningful judicial review.” As the
23 Court explained, a compelling interest must be rejected if it is “standardless” or
24 cannot be “measured.” *Id.* at *15-16 (slip. op., at 23-24). Thus, “diversity” may be
25 compelling, but it fails where the “degree” of needed diversity is unknowable. *Id.*

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27 _____
28 the High Court, similarly reiterates that “dissenting political speech [is] at the First
Amendment’s core.” *Id.* at *7 (slip. op., at 13).

1 Here, EUSD similarly asserts immeasurable and amorphous goals to satisfy
2 strict scrutiny, such as creating “inclusive campuses” to “uphold[] a positive and
3 diverse culture in our district” (ECF No. 10 at 29:20-22), or “eradicating sex and
4 gender identity discrimination. (ECF No. 10 at 30:12-23.) As explained by the Supreme
5 Court, these interests are insufficient in the abstract. The court here must look to
6 EUSD’s more concrete, measurable, goals—such as ending gender identity
7 discrimination *through* presuming that parents are unfit caretakers. And, as explained
8 in Plaintiffs’ brief, at that more concrete level, EUSD’s interests fail. (ECF No. 10 at
9 28:23-32:15.)

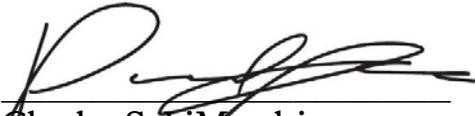
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Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: June 30, 2023

By:



Charles S. LiMandri
Paul M. Jonna
Mark D. Myers
Jeffrey M. Trissell
Milan L. Brandon II
Attorneys for Plaintiffs

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):

- **Notice of Supplemental Authority in Support of Plaintiffs’ Motion for a Preliminary Injunction, and in Opposition to the EUSD Defendants’ Motion to Dismiss.**

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

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 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 30, 2023, at Rancho Santa Fe, California.



 Kathy Denworth