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12 UNITED STATES DISTRICT COURT
 13 SOUTHERN DISTRICT OF CALIFORNIA

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

17 Plaintiffs,

18 v.

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

21 Defendants.

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

**Plaintiffs': (1) Response to CDE
 Defendants' Objections, and (2)
 Objections to CDE Defendants'
 Reply, in support of Plaintiffs'
 Opposition to CDE Defendants'
 Motion to Dismiss**

[Fed. R. Civ. P. 12(b)(1)]

[Fed. R. Civ. P. 12(b)(6)]

Judge: Hon. Roger T. Benitez

Courtroom: 5A

Hearing Date: August 23, 2023

Hearing Time: 2:00 p.m.

1 I. RESPONSE TO CDE'S PROCEDURAL OBJECTION

2 The CDE Defendants' opposition to Plaintiffs' motion for a preliminary
3 injunction (ECF No. 9), and the CDE Defendants' motion to dismiss (ECF No. 25-
4 1), are the same briefing cut-and-pasted. Thus, when Plaintiffs filed their opposition
5 to the CDE's motion to dismiss, Plaintiffs included a 2-page summary of their prior
6 preliminary injunction reply, and incorporated that 10-page reply brief by reference.
7 (*See* ECF No. 28 at 9:7-5:3; citing ECF No. 18-1.)¹

8 With the CDE's reply in support of its motion to dismiss, it then objected to
9 that summary and incorporation by reference, stating that nothing in the Federal
10 Rules permits incorporation by reference. (*See* ECF No. 30 at 2:16-3:4; citing
11 *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 345 (9th Cir. 1996).) While nothing in the
12 Federal Rules expressly *allows* incorporation by reference (*see Swanson*, 87 F.3d at
13 343-45 ("district court did not abuse its discretion" in "grant[ing] the government's
14 motion to strike those portions of the revised ISC brief that incorporated by reference
15 69 additional pages of argument")), nothing expressly *prohibits* incorporation by
16 reference either. *See Doe v. Kamehameha Sch./Bernice Pauahi Bishop Est.*, 596 F.3d
17 1036, 1042 n.4 (9th Cir. 2010) (noting that local rules permitted incorporation by
18 reference in briefing).

19 Thus, courts most frequently reject incorporation by reference when it is
20 abused to circumvent page limits (*see Swanson*, 87 F.3d at 345), and allow it when it
21 promotes efficiency. *See, e.g., Gifford v. Calco, Inc.*, No. A03-19 CV (RRB), 2005 WL
22 283524, at *7 n.2 (D. Alaska Jan. 25, 2005) ("Notably, CALCO's reply incorporates
23 by reference its opposition to APUIT's motion for summary judgment at docket No.
24 50. The summary judgment motions presently before the court are intertwined and,
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.

1 most efficiently, a good deal of incorporation by reference has occurred between
2 them.”); *Lion Raisins, Inc. v. U.S. Dep’t of Agric.*, No. 1:08-CV-358-OWW-SMS,
3 2009 WL 160283, at *3 (E.D. Cal. Jan. 21, 2009) (on summary judgment, “[i]n the
4 interest of efficiency, the parties may incorporate by reference any affidavits or
5 briefing submitted in connection with Lion’s motion for discovery.”).

6 Here, Plaintiffs believed that their summary and incorporation by reference
7 was the most efficient manner of presenting certain arguments to the Court, so the
8 Court did not have to hunt for truffles between cut-and-pasted, *but slightly modified*,
9 briefing. *See* S.D. Cal. CivLR 1.1(c) (rules “must be construed so as to ... promote
10 the just, efficient and economical determination of every action”). However, if the
11 Court would prefer that Plaintiffs cut-and-paste their prior briefing—because there is
12 room to do so in their opposition to the motion to dismiss, which only contains 14
13 pages of new briefing (*see* ECF No. 28)—Plaintiffs can re-submit such a corrected
14 brief. Otherwise, Plaintiffs request that the Court overrule the CDE’s objection.

15 **II. PLAINTIFFS’ OBJECTION TO NEW REPLY ARGUMENT**

16 In the CDE Defendants’ motion to dismiss, the CDE stated unequivocally that
17 their standing arguments were based solely on “the face of the Complaint.” (ECF
18 No. 23-1 at 10:9.) Nevertheless, on reply, the CDE argues that the Court should treat
19 a footnote in Plaintiffs’ opposition to the *EUSD* Defendants’ motion to dismiss as a
20 binding “concession.” (*See* ECF No. 30 at 4:12-16; citing *Cordova v. Imperial Cnty.*
21 *Narcotics Task Force*, No. 3:21-cv-445, 2022 WL 84409, at *4 (S.D. Cal. Jan. 7, 2022)
22 (Benitez, J.); *but see also* ECF No. 30 at 2 n.1 (admitting the location of the
23 “concession” was not clearly cited in the motion to put Plaintiffs on notice).

24 The rule which this Court cited in *Cordova*, however, concerns “concessions”
25 made in opposition to the *moving party’s* motion to dismiss—not *another party’s*
26 motion to dismiss. *See Cordova*, 2022 WL 84409, at *2 n.5 (citing *Camara de*
27 *Mercadeo, Industria y Distribucion de Alimentos, Inc. v. Emanuelli-Hernandez*, No. CV
28 21-1156, 2021 WL 5605098, at *2 (D.P.R. Nov. 30, 2021), *aff’d*, 72 F.4th 361 (1st Cir.

1 2023); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012)).
 2 Thus, the *actual* rule is inapplicable on its face. In reality, the *new rule* which the CDE
 3 proposes—that any statement made by the plaintiff in any brief should trump the
 4 allegations of the complaint—is directly contrary to the rule that this Court
 5 discussed. *See Cordova*, 2022 WL 84409, at *2 n.5 (explaining that the court is
 6 limited to the four corners of the complaint except in unique circumstances, present
 7 there, but not present here). Under the logic of the CDE’s rule, the Court would
 8 equally have to read into Plaintiffs’ Complaint *EUSD’s* “concession” in its brief that
 9 the CDE’s FAQ page is binding on it. (ECF No. 16 at 7:16-17, 8:2-3.) How to resolve
 10 such competing concessions is anybody’s guess.

11 Moreover, in reality, the CDE does and did not purport to create new
 12 substantive protections in its Legal Advisory on gender identity and corresponding
 13 FAQ page. (*See* ECF No. 28-1 at 5-20.) It merely purported to summarize the current
 14 state of California law (*see id.*), and it is indisputable that the CDE expects local
 15 school districts to comply with California law. Whether the FAQ page *itself* is binding
 16 or not is misdirection. The dispositive issue here is that—despite ample briefing—
 17 the CDE has refused to “disavow” that EUSD must follow California law or that the
 18 Legal Advisory/FAQ page accurately reflects California law. In the context of a
 19 refusal to “disavow,” the U.S. Supreme Court has made clear that a pre-
 20 enforcement challenge is appropriate. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298,
 21 2310 (2023).

22 Respectfully submitted,
 23 LiMANDRI & JONNA LLP

24 Dated: August 17, 2023

25 By:



26 Charles S. LiMandri
 27 Paul M. Jonna
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 Jeffrey M. Trissell
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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):

- **Plaintiffs’: (1) Response to CDE Defendants’ Objections, and (2) Objections to CDE Defendants’ Reply, in support of Plaintiffs’ Opposition to CDE 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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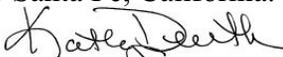
 X **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Rancho Santa Fe, California in the ordinary course of 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 August 17, 2023, at Rancho Santa Fe, California.



 Kathy Denworth