

1 Charles S. LiMandri, SBN 110841
 2 cslimandri@limandri.com
 3 Paul M. Jonna, SBN 265389
 4 pjonna@limandri.com
 5 Mark D. Myers, SBN 235719
 6 mmyers@limandri.com
 7 Jeffrey M. Trissell, SBN 292480
 8 jtrissell@limandri.com
 9 Milan L. Brandon II, SBN 326953
 10 mbrandon@limandri.com
 11 LiMANDRI & JONNA LLP
 12 P.O. Box 9120
 13 Rancho Santa Fe, CA 92067
 14 Telephone: (858) 759-9930
 15 Facsimile: (858) 759-9938

Thomas Brejcha, *pro hac vice**
 tbrejcha@thomasmoresociety.org
 Peter Breen, *pro hac vice**
 pbreen@thomasmorsociety.org
 THOMAS MORE SOCIETY
 309 W. Washington St., Ste. 1250
 Chicago, IL 60606
 Tel: (312) 782-1680
 *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,

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-WVG

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

Judge: Hon. Roger T. Benitez
 Courtroom: 5A
 Hearing Date: August 30, 2023
 Hearing Time: 10:00 a.m.

1 **FOURTH NOTICE OF SUPPLEMENTAL AUTHORITY**

2 Plaintiffs Elizabeth Mirabelli and Lori Ann West bring to this Court’s attention
3 supplemental authority in support of their motion for a preliminary injunction (ECF
4 No. 5) and their opposition to the motions to dismiss (ECF Nos. 17 & 25).

5 **I. *Fellowship of Christian Athletes v. San Jose Unified School***
6 ***District*, ___ F.4th ___ (9th Cir. Sep. 13, 2023) (en banc)**

7 On September 13, 2023, the Ninth Circuit issued its en banc opinion in
8 *Fellowship of Christian Athletes v. San Jose Unified School District* (“*FCA*”).
9 Procedurally, the district court had denied a preliminary injunction, and a Ninth
10 Circuit panel had reversed. *See* 46 F.4th 1075. The school district petitioned for
11 rehearing en banc, which the Ninth Circuit granted. *See* 59 F.4th 997. After oral
12 argument, the en banc panel granted an injunction pending appeal. *See* 64 F.4th 1024.
13 The Ninth Circuit has now issued its en banc opinion reversing the district court. *See*
14 2023 WL 5946036.

15 Broadly, *FCA* is relevant because it addresses First Amendment rights (both
16 Free Speech and Free Exercise) in the context of alleged sexual orientation
17 discrimination in the school environment. Thus, as stated in the introduction and
18 conclusion:

19 While it cannot be overstated that anti-discrimination policies certainly
20 serve worthy causes—particularly within the context of a school setting
21 where students are often finding themselves—those policies may not
22 themselves be utilized in a manner that transgresses or supersedes the
23 government’s constitutional commitment to be steadfastly neutral to
24 religion.... Anti-discrimination laws and policies serve undeniably
admirable goals, but when those goals collide with the protections of the
Constitution, they must yield—no matter how well-intentioned.

25 *FCA* at *3, 23. More specifically, *FCA*’s analysis of Standing, Preliminary Injunction
26 standards, and the Free Exercise clause is directly relevant here. (It’s Free Speech
27 analysis is limited to a footnote, and not fulsome. *See FCA* at *15 n.8.)

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1 **First**, in *FCA*, the Ninth Circuit addressed standing. *FCA* at *10-12, § III.A.
2 Accepting that an organization can have standing in a representative capacity, the
3 analysis focused on the represented students. In so doing, the Ninth Circuit
4 reiterated broad legal standards that support Plaintiffs here. *Compare FCA* at *10-11,
5 § III; *with* ECF No. 28, Pls.’ Opp. to CDE Mot. to Dismiss.

6 **Second**, the Ninth Circuit addressed whether a preliminary injunction is
7 properly characterized as prohibitory or mandatory. *FCA* at *13-14, § IV. The Ninth
8 Circuit held that the district court erred in characterizing the requested injunction as
9 mandatory. Even though a policy had been in place for a long time, the status quo was
10 non-enforcement of that policy; thus, the requested injunction was prohibitory. *Id.* at
11 *14. Here, similarly, Plaintiffs’ requested injunction is prohibitory because Mrs.
12 Mirabelli and Mrs. West were practically accommodated for 50 years of collective
13 teaching, and are only in court now due to recent changes.

14 **Third**, the Ninth Circuit addressed a system of Discretionary Exemptions
15 under the Free Exercise clause. *Compare FCA* at *16-17, § V.A; *with* ECF No. 5-1,
16 Pls’ Mot. for Prelim. Inj., § I.B.2. In so doing, the Court rejected the idea that only
17 “unfettered” discretion triggers strict scrutiny, thereby abrogating *Stormans, Inc. v.*
18 *Wiesman*, 794 F.3d 1064, 1082. (9th Cir. 2015). *Compare FCA* at *17; *with* ECF No.
19 16, EUSD Opp. to Prelim. Inj., at 16 (citing *Stormans*). The Court also affirmed the
20 panel’s holding that an informal practice of granting ad hoc exemptions similarly
21 triggers strict scrutiny, *FCA* at *17, a holding which the dissents view as a significant
22 expansion of the law. *See id.* at *38, § I (Forrest, J., concurring in part and dissenting
23 in part); *id.* at *50, § III.A.1 (Murguia, C.J., dissenting).

24 **Fourth**, the Ninth Circuit addressed whether certain exemptions to a generally
25 applicable policy were *comparable*, thus triggering strict scrutiny as Categorical
26 Exemptions. *Compare FCA* at *17-18, § V.B; *with* ECF No. 5-1, Pls’ Mot. for Prelim.
27 Inj., § I.B.1. The Ninth Circuit’s explication of the relevant law supports Plaintiffs.

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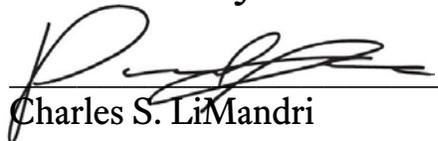
1 ***Fifth***, the Ninth Circuit held that the School District failed strict scrutiny
2 because it “failed to offer any showing that it has even considered less restrictive
3 measures than those implemented here.” *FCA* at *22. Similarly, here, EUSD failed
4 to identify any less restrictive measures that it considered but rejected. *See* ECF No.
5 16, EUSD Opp. to Prelim. Inj., at 17.

6 ***Sixth***, the Ninth Circuit lastly addressed the remaining preliminary injunction
7 factors in a case raising First Amendment rights and brought against a school district.
8 Those broad legal principles support Plaintiffs. *Compare FCA* at *23, § VII; *with* ECF
9 No. 5-1, Pls’ Mot. for Prelim. Inj., § II.

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Dated: September 13, 2023

By:

Respectfully submitted,
LiMANDRI & JONNA LLP

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):

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

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
 1430 “N” Street, Suite 5319
 Sacramento, CA 95814
 Tel: 916-319-0860; Fax: 916-322-2549
 E-Mail: tprouty@cde.ca.gov
 E-Mail: lgarfinkel@cde.ca.gov
Attorneys for CDE Defendants

Daniel R. Shinoff, Esq.
 Artiano Shinoff
 3636 Fourth Avenue, Suite 200
 San Diego, CA 92103
 Tel: 619-232-3122
 E-Mail: Dshinoff@as7law.com
 E-Mail: nlay@as7law.com
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 September 13, 2023, at Rancho Santa Fe, California.



 Kathy Denworth