No. 22-55908

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Health Freedom Defense Fund *et al.*,

Plaintiffs-Appellants,

v.

Megan K. Reilly *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:21-cv-08688-DSF-PV
Hon. Dale S. Fischer

APPELLANTS' SUPPLEMENTAL BRIEF PENDING EN BANC REVIEW

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SUPPLEMENTAL BRIEF

The Court has requested supplemental briefing about whether, in light of *Kohn v. State Bar of California*, 87 F.4th 1021 (9th Cir. 2023) (en banc), it should explicitly overrule the school district sovereign immunity decisions rendered in *Sato v. Orange County Department of Education*, 861 F.3d 923 (9th Cir. 2017), and *Belanger v. Madera Unified School District*, 963 F.2d 248 (9th Cir. 1992). We can keep this brief short.

First, the Court has already overruled the reasoning in *Sato* and *Belanger* because they were based on a legal standard—the "*Mitchell* factors"—that the Court jettisoned in *Kohn*. *See Kohn*, 87 F.4th at 1030-31 (endorsing D.C. Circuit's test, as it "better encapsulates the current state of the law than the *Mitchell* factors and avoids their problems"). To avoid any confusion, the Court should clarify that *Sato* and *Belanger* are no longer good law.

Deciding whether California school districts should be entitled to Eleventh Amendment immunity is still a complicated and fact-intensive matter, though, even under the new test. For example, the new test requires an analysis of "how members of the governing body of the entity are appointed and removed, as well as whether the state can directly supervise and control the entity's ongoing operations." *Id.* at 1030 (cleaned up). The third factor, meanwhile, considers "the

entity's overall effects on the state treasury." *Id.* (quotations omitted). And that factor is especially important, as "whether the state legally or practically pays a money damages judgment against the entity is central to the sovereign immunity analysis." *Id.* at 1041 (Mendoza, J., concurring in part); *see also id.* at 1053 (Budahay, J., and Sung, J., concurring in part and dissenting in part) ("While the Eleventh Amendment may have twin reasons for being, the State's solvency was the impetus for the Eleventh Amendment." (cleaned up) (quotations and citations omitted)).

Those factors cannot be evaluated properly in the abstract. Indeed, that was one of the problems with the panel's decision in *Sato*. It considered whether the education reforms enacted in 2013 changed the sovereign immunity analysis for school districts in California. On its face, the new law (AB 97) did. After all, it was "a massive reform package designed to streamline public education financing and decentralize education governance." *Sato*, 861 F.3d at 926.

The plaintiffs in *Sato* argued that the funding changes made by AB 97 moved California from the "maximum per-pupil funding" system discussed in *Belanger* to the "minimum per-pupil funding" system discussed in cases where this Court held that a school district was not entitled to Eleventh Amendment immunity. *See Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1184 (9th Cir. 2003) (Alaska); *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1044 (9th

Cir. 2003) (Arizona); *Eason v. Clark County Sch. Dist.*, 303 F.3d 1137, 1143 (9th Cir. 2002) (Nevada). The panel disagreed in *Sato*, but it did so based on abstract references to principles like the California Constitution's guarantee of "equalization of per-pupil spending in California …." *Sato*, 861 F.3d at 923. It discounted Sato's argument about the importance of the new law "allow[ing] districts and [county offices of education] to raise local property tax revenues [or other funds] above and beyond the state's minimum 'base' support." *Id.* at 931. And it continued to rely on generalizations about the "equalization of per-pupil spending and centralized control over local education budgets." *Id.* at 932.

Real-world evidence undermines those findings. For example, LAUSD has paid massive settlements and jury verdicts during the past decade, including $88 million to settle sexual abuse cases that arose at two elementary schools and more than $170 million to the families and victims of an elementary school teacher convicted of sex crimes. Richard Winton & Howard Blume, *L.A. school district reaches $88-million settlement in sex misconduct cases at two campuses*, Los Angeles Times (May 16, 2016); *LAUSD approves another $3.55M to settle sexual abuse claims at Miramonte school*, City News Service (Jan. 23, 2024).[1] There is no evidence that the State paid those settlements, or that it was legally responsible for

[1] These articles can be found at https://www.latimes.com/local/lanow/la-me-ln-l.a.-school-abuse-settlements-20160516-snap-story.html (last visited Feb. 18, 2025), and https://abc7.com/miramonte-school-sexual-abuse-lausd-lawsuit-settlement/14353968/ (last visited Feb. 18, 2025).

paying them. Similarly, last fall, a plaintiff obtained a $7.4 million judgment against LAUSD after a six-week jury trial. *PARRIS Law Firm Obtains $7.1 Million Verdict Against Los Angeles Unified School District*, PR Newswire (Nov. 25, 2024). There is no evidence that the State had to pay that verdict.

Moreover, although LAUSD is self-insured for most activities, it has excess general liability coverage above $5 million.[2]

That real-world evidence weighs against granting California school districts Eleventh Amendment immunity. That is the norm. Several other circuits have held that school districts do *not* enjoy Eleventh Amendment immunity, even though they receive nearly all their funding from the state. *Springboards to Educ., Inc. v. McAllen Indep. Sch. Dist.*, 62 F.4th 174, 180-83 (5th Cir. 2023); *Lightfoot v. Henry County School Dist.*, 771 F.3d 764, 769-78 (11th Cir. 2014); *Woods v. Rondout Valley Central School Dist. Bd of Educ.*, 466 F.3d 232, 243-51 (2d Cir. 2006); *Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 228 (3d Cir. 2006); *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 226-27 (4th Cir. 2001); *Duke v. Grady Mun. Schools*, 127 F.3d 972, 979-82 (10th Cir. 1997).[3] That would be

[2] https://www.lausd.org/cms/lib08/CA01000043/Centricity/Domain/220/EvidenceOfSelfInsurance.pdf (last visited Feb. 18, 2025).

[3] The Third Circuit reached a different result in *Denkins v. State Operated School District of City of Camden*, 715 F. App'x 121, 124 (3d Cir. 2017), a case involving New Jersey schools, but it did so because of "factual changes since *Febres*—specifically, the full state takeover and the relocation of responsibilities from the Board to the state-appointed Superintendent …." AB 97 arguably did the opposite in California.

consistent with the Supreme Court's Eleventh Amendment jurisprudence, which has "consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a slice of State power." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979) (quotations omitted).

But a full analysis is premature. Appellants have not asserted a claim for damages yet and, although LAUSD raised the issue briefly below, the district court did not do an Eleventh Amendment analysis. ER-095. Moreover, the parties did not gather any evidence to guide the Eleventh Amendment analysis. LAUSD simply moved for judgment on the pleadings based on *Sato*.

Thus, the Court should state that *Belanger* and *Sato* are no longer good law, and it should remand the case to the district court with instructions to deny LAUSD's motion to dismiss, as the panel held. It should also grant Appellants leave to amend to assert a claim for damages and allow them to conduct limited discovery to guide the Eleventh Amendment analysis. That way the parties can create a factual record to which the district court (and future panels in this Court) can apply the Court's new sovereign immunity standard. *See Greenwood v. Ross*, 778 F.2d 448, 454 (8th Cir. 1985) (doing just that); *see also STC.UNM v. Quest Diagnostics Inc.*, No. CV 17-1123 MV/KBM, 2018 WL 3539820, at *2-4 (D.N.M.

July 23, 2018) (explaining when limited discovery is appropriate to guide Eleventh Amendment analysis).

If the Court does that, oral argument is not necessary. Adding a damages claim will moot LAUSD's mootness argument, one of the two issues on which it petitioned for rehearing. *See Desert Outdoor Advert., Inc. v. City of Oakland*, 506 F.3d 798, 808 n.10 (9th Cir. 2007) (noting that "a claim for damages already incurred from application of the original version of the ordinance might not be moot," although plaintiff did not plead one or seek leave to do so on remand).

And the other issue on which LAUSD sought rehearing involves a pleading matter on which the panel's decision is consistent with circuit and Supreme Court law, including this Court's holding that "substantive due process protects an individual's fundamental rights to liberty and bodily autonomy." *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1154 (9th Cir. 2016); *see also Compassion in Dying v. State of Wash.*, 79 F.3d 790, 799 (9th Cir. 1996) (en banc), as amended (May 28, 1996), result rev'd in *Wash. v. Glucksberg*, 521 U.S. 702 (1997) (noting that "in cases like the one before us, the courts must apply a balancing test under which we weigh the individual's liberty interests against the relevant state interests in order to determine whether the state's actions are constitutionally permissible"). Other circuits have agreed with that framework, including the Sixth Circuit, as well as the Supreme Court, which described *Jacobson v. Massachusetts*, 197 U.S. 11 (1905),

as a case in which "the Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease." *Cruzan by Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278 (1990); *see also Guertin v. State*, 912 F.3d 907, 920-27 (6th Cir. 2019) (refusing to dismiss substantive due process claim asserted against officials in Flint, Michigan, related to water safety issues, in part because of "guidance not to resolve such [factual] issues at the motion-to-dismiss stage").

We can speculate about how the balancing analysis will turn out here. But it has not been done yet. And that distinguishes this case from other constitutional cases that the Court has reheard *en banc* in recent years, most notably *Project Veritas v. Schmidt*, 125 F.4th 929 (9th Cir. 2025) (en banc), where there were no factual disputes and the Court had to decide whether Oregon's ban on secret audio recordings violated the First Amendment (an analysis often done on the pleadings).

Put simply, that merits analysis has not been done yet in this case. Doing it *en banc*, in the first instance, before the parties have created a factual record, would be a mistake. The parties need to create that record and have a hearing. Then the district court can reach a decision about whether LAUSD's actions violated the Constitution. That is what the parties did in *Compassion in Dying* and *Cruzan*, the latter of which was decided "at trial …." 497 U.S. at 285.

CONCLUSION

Remanding this case for further proceedings is consistent with those decisions and is the best way to develop a record on which to litigate the novel constitutional questions this case presents, including the Court's new test for Eleventh Amendment immunity.

Respectfully submitted,

Date: February 26, 2025

JW HOWARD/ATTORNEYS, LTD.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 22-55908

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CERTIFICATE OF SERVICE

Health Freedom Defense, et al. v. Megan K. Reilly, et al.
U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT
Case No. 22-55908

At the time of service, I was over 18 years of age and not a party to this action. I am employed by JW Howard/Attorneys, LTD. in the County of San Diego, State of California. My business address is 600 West Broadway, Suite 1400, San Diego, California 92101.

On February 26, 2025, I caused the **APPELLANTS' SUPPLEMENTAL BRIEF PENDING EN BANC REVIEW** to be filed and served via the Court's Electronic Service upon the parties listed on the Court's service list for this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 26, 2025, at San Diego, California.

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