No. 22-55908
Decided via Published Opinion on June 7, 2024
M. Daly Hawkins, R. Nelson, and D. Collins

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HEALTH FREEDOM DEFENSE FUND, ET AL.,
Plaintiffs and Appellants,

v.

MEGAN REILLY, ET AL.,
Defendants and Appellees.

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

PETITION FOR REHEARING *EN BANC*

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I. INTRODUCTION AND RULE 35(B)(1) STATEMENT

En banc review is needed to correct the fatally flawed split decision of the Ninth Circuit panel in this matter, which incorrectly decided that an action for injunctive relief challenging a public school district's COVID-19 vaccine policy could proceed, even though the vaccine mandate Appellants sought to enjoin *no longer exists*. To reach this implausible and erroneous result, the panel misapplied the mootness doctrine and its narrow exceptions, tossed aside 100-year-old United States Supreme Court precedent enforcing vaccine mandates, and ignored rafts of cases from this and other Circuits regarding vaccine mandates that were temporarily put in place to protect public safety during the COVID-19 pandemic.

The Court could not have reached this improper legal destination without embracing the unsupportable pseudo-science-based allegation asserted by Appellants that the COVID-19 vaccine was not a vaccine at all, but rather a medical treatment. In so doing, the panel upends over 100 years of jurisprudence recognizing the rational basis test that applies to vaccines to protect the public at large. This decision must be revisited and corrected to align with Supreme Court, Ninth Circuit, and sister Circuits precedents, and to respect the fundamental doctrine that courts should not adjudicate moot disputes. As currently framed, the opinion creates substantial confusion in areas of critical significance to the general public. *En banc* review is necessary to resolve questions of exceptional importance, and to reaffirm

the rational basis test required to be applied by *Jacobson v. Massachusetts,* 197 U.S. 11 (1905).

First and most importantly, this lawsuit is moot. Judge Hawkins correctly explains in his dissent that there is no longer any policy for this Court to enjoin. As courts have consistently done in actions challenging rescinded pandemic policies, Judge Hawkins affirmed that this action is moot and should be dismissed. The majority circumvented this bedrock principle in holding that the "voluntary cessation exception" to mootness applies, premised on no more than the inference drawn from the fact the Los Angeles Unified School District's ("LAUSD") Board rescinded its COVID-19 vaccine mandate twelve days after oral argument. In doing so, the majority created new law that conflicts with decisions from both the U.S. Supreme Court and other Circuits. (*Payne v. Biden,* 144 S.Ct. 480 (2023) ("[t]he judgment is vacated, and the case is remanded … with instructions to dismiss the case as moot[]")*; accord Biden v. Feds for Medical Freedom,* 144 S.Ct. 480 (2023)*; Kendall v. Doster,* 144 S.Ct. 481 (2023)*; Norris v. Stanley,* 73 F.4th 431 (6th Cir. 2023) 144 S.Ct. 1353 (2024) (certiorari denied); *Sczesny. v. New Jersey Governor Philip Murphy,* 2023 WL 4402426 (3rd Cir. 2023) 144 S.Ct. 395 (2023) (certiorari denied).

Second, the majority erroneously concludes that the district court misapplied the U.S. Supreme Court's longstanding precedent in *Jacobson,* which has been consistently applied in COVID-19 vaccine mandate cases across the county to

require a rational basis review when considering the health benefits vaccines confer upon the public. Instead, the majority accepted Appellants' pseudo-scientific allegation that COVID-19 vaccines do not effectively prevent spread of COVID-19, but only mitigate symptoms, and therefore are not a "traditional" vaccine, but instead a medical treatment. Judge Collins' concurrence used this allegation as a springboard to argue the fundamental right to refuse medical treatment is implicated by the challenged policy, rather than the rationale basis test governing vaccines as a compulsory treatment required for the health benefit of others.

This holding creates a new fundamental right applicable to vaccine policies which should be reviewed *en banc,* as it conflicts with both U.S. Supreme Court and other Circuit decisions and creates substantial confusion for employers, including the United States Armed Forces, which require vaccines as a condition of employment. *Jacobson, 197 U.S. at 25-31* (mandatory vaccination laws are generally constitutional); *Biden v. Missouri,* 142 S.Ct. 647, 653 (2022) (federal government has authority to enforce rule requiring health care workers at facilities participating in Medicare and Medicaid to be fully vaccinated against COVID-19); (*Lukaszczyk v. Cook Cnty.,* 47 F.4th 587 (7th Cir. 2022) (followed U.S. Supreme Court guidance holding that courts should be "hesitant to expand the scope of fundamental rights under substantive due process[]"); *Klassen v. Trustees of Indiana Univ.,* 7 F.4th 592 (7th Cir. 2021) (COVID-19 vaccine mandate survived

constitutional due process scrutiny, *Jacobson* is controlling law); *Norris,* 73 F.4th 431; *Sczesny,* 2023 WL 4402426.

II. SUMMARY OF FACTS RELEVANT TO REHEARING

A. The District Court Correctly Applied A Rational Basis Review To Dismiss This Action.

On September 2, 2022, the District Court entered its Order Granting Defendants' Motion for Judgment on the Pleadings as to Appellants' operative Second Amended Complaint for Violation of Civil Rights and Declaratory and Injunctive Relief. (1-EOR-089-101.) The District Court correctly found Appellants alleged "facts" surrounding the efficacy of the COVID-19 vaccine unpersuasive:

> Defendants argue that there is a rational basis for the Policy: 'a legitimate and constitutionally mandated state interest in promotion and providing the safest environment possible to all employees and students against the COVID-19 virus.' … Plaintiffs argue that the vaccine does not further the Policy's stated purpose of 'provid[ing] the safest possible environment in which to learn and work,' …; they point out various uncertainties about the precise mechanics of the COVID-19 vaccine, including numerous authorities explaining that the COVID-19 vaccine is believed to reduce symptoms in infected vaccine recipients and prevent severe disease and death, rather than prevent transmission or contraction of COVID-19 … However, these features of the vaccine further the purpose of protecting LAUSD students and employees from COVID-19, and the Court finds the Policy survives rational basis review.

(1-EOR-098-099, citations omitted.)

B. It Is Undisputed LAUSD Rescinded Its COVID-19 Vaccine Mandate.

The only evidence in the record with regard to LAUSD's recission of its COVID-19 mandate is attached to its motion to dismiss the appeal. Specifically, LAUSD's Interim Chief of Human Resources attests that the COVID-19 vaccine mandate was rescinded only after careful consideration and consultation with leading medical experts, public health officials, and multiple local labor organizations representing its employees without *any* consideration of oral argument. (Dkt. 49, Francisco Serrato Declaration ("Serrato Decl.") ¶¶3-4.) As the Board of Education Report on the Rescission of the LAUSD Vaccination Requirement ("Report") supports, LAUSD's Board rescinded the COVID-19 mandate only after months of careful consideration and the changing nature of COVID-19 which "has now entered the endemic phase." (Dkt. 50, Scott Street Declaration ("Street Decl.") Ex. B, p. 25.)

Specifically, the Report first details actions of various federal, state, and local public health officials and other governmental agencies which led to the rescission of the COVID-19 mandate. (Dkt. 50, Street Decl., Ex. B, p. 24-25.) The Report then explains that given the changing nature of COVID-19, there is no longer any need for the COVID-19 mandate. (Dkt. 50, Street Decl., Ex. B, p. 25.) The only evidence in the record regarding the decision to rescind the mandate supports only one conclusion - reinstitution of LAUSD's COVID-19 mandate is not reasonably

expected to recur:

> At the time of implementation of the District's COVID-19 vaccination requirement, Los Angeles Unified schools had been closed for full time in-person learning for 17 months due to the rapidly changing, deadly virus. The intent with re-opening schools was to preserve in-person learning in the safest environment possible. At the time, even a modest number of positive cases of COVID-19 could have prompted school and classroom closures. Because COVID-19 vaccination reduced transmission and disease severity, it made sense to have a vaccination requirement-to keep schools open for in-person learning.
>
> As a testament to the incredible power of vaccinations and the advancements of science, COVID-19 has now entered the endemic phase. This means that the virus is here to stay, but is not spreading at a rapid enough pace to overwhelm hospital systems. This also means that while there will continue to be surges of COVID-19, it has entered a state of stability and predictability that comes with other viruses such as RSV and the Flu. In addition, we can use mitigation measures such as encouraging vaccination, masking, testing and educating about good hygiene practices during times when there is a high prevalence of respiratory viruses such as COVID-19. The science has not changed. Vaccines are still safe and effective. We continue to encourage everyone to stay updated on all vaccinations. *However, we no longer need a COVID-19 vaccine requirement to keep schools open for in-person learning.*

(Dkt. 50, Street Decl., Ex. B, p. 25, emphasis added.)

III. QUESTIONS OF EXCEPTIONAL IMPORTANCE SUPPORT *EN BANC* REVIEW

Rehearing *en banc* should be granted when a "proceeding involves a question of exceptional importance." (FRAP 35(a)(2).) This is met here because the

majority's holding as to both the voluntary cessation exception to mootness and whether an employer's vaccine mandate implicates a fundamental constitutional right to refuse medical treatment as opposed to the rational basis review, contradicts both U.S. Supreme Court precedent and recent decisions from other Circuits, causing substantial confusion in the law.

In *Norris v. Stanley,* 73 F.4th 431 (2023), Michigan State University employees challenged the university's COVID-19 vaccine mandate, which required all faculty and staff to be either fully vaccinated or receive at least one of a two-dose series of vaccines, claiming it violated their due process rights. The Sixth Circuit disagreed with the lower court and held, on a motion to dismiss, that the trial court need not accept as true legal conclusions or unwarranted factual inferences; that plaintiffs' substantive due process claim is subject to rational basis scrutiny; and that plaintiffs' substantive due process claim failed because the university's vaccine policy satisfied rational basis scrutiny. *Id.* at 435-438; 144 S.Ct. 1353 (2024) (certiorari denied).

The instant case contradicts this holding of the Sixth Circuit and the similar opinions from the Third, Fifth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits, cited throughout. This Court should grant *en banc* review and hold: (1) the appeal should be dismissed because the voluntary cessation exception to mootness does not apply; (2) the substantive due process claim is subject to rational basis scrutiny; and

(3) the substantive due process claim fails because LAUSD's vaccine policy satisfies rational basis scrutiny.

A. The Critical Question Of When The Voluntary Cessation Exception To Mootness Applies Requires *En Banc* Review.

It is undisputed that LAUSD rescinded its COVID-19 vaccine mandate, which is the *sole* basis of Appellants' action for injunctive relief. Despite this, the majority nevertheless found that the voluntary cessation exception to the mootness doctrine applies to prevent dismissal, based on its determination that "[f]or over two years – until twelve days after argument – [] LAUSD required employees to get the COVID-19 vaccination or lose their jobs." *En banc* review of this flawed holding is necessary as it misinterprets the factual record, contradicts U.S. Supreme Court precedent, and creates a split of authority with other Circuits.

In *Sczesny v. New Jersey Governor Philip Murphy,* 2023 WL 4402426, a case brought by nurses that challenged the Governor's COVID-19 vaccine mandate for health care workers, the Governor rescinded the state's COVID-19 vaccine mandate *after* the Third Circuit heard oral arguments. *Id.* In response, the Third Circuit dismissed the appeal as moot, finding that it "no longer presents a live issue," while expressing no opinion on the case itself. *Id.* The nurses filed a petition for writ of certiorari, which was denied without comment. *Sczesny,* 144 S.Ct. 395.

U.S. Supreme Court guidance also supports a finding of mootness. The U.S. Supreme Court issued summary disposition granting certiorari in three cases

concerning various federal COVID-19 vaccine mandates with instructions on remand to dismiss the action as moot since the administration rescinded the mandates while the cases were pending before it. Specifically, in *Payne v. Biden* the U.S. Supreme Court held "[t]he judgment is vacated, and the case is remanded … with instructions to dismiss the case as moot." 144 S.Ct. 480; *accord Biden v. Feds for Medical Freedom,* "[t]he judgment is vacated, and the case is remanded … with instructions to direct the District Court to vacate as moot its order granting a preliminary injunction[]" (144 S.Ct. 480) and in *Kendall. v. Doster,* "[t]he judgment is vacated, and the case is remanded … with instructions to direct the District Court to vacate as moot its preliminary injunctions[]" (144 S.Ct. 481). Similar to the facts of this case, the U.S. Supreme Court lifted blocks to the Biden administration's COVID-19 vaccine mandate for federal employees and military service members, instructing the lower courts to dismiss the case or vacate preliminary injunctions as moot since the mandates were rescinded.

This Court should grant *en banc* review and do likewise – dismiss the appeal as moot since it no longer presents a live issue. Otherwise, substantial confusion will be created in the application of the voluntary cessation exception to mootness.

1. The Majority's Holding That The Voluntary Cessation Exception To The Mootness Doctrine Applies Creates A Conflict In The Law.

In *Trinity Lutheran Church v. Comer*, 582 U.S. 449 (2017), the U.S. Supreme

Court held that "'voluntary cessation of a challenged practice does not moot a case unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' ..." *Id.* at 457 n. 1. While in *Trinity Lutheran Church* the Supreme Court found the government had not met its burden, "as the basis for this conclusion, the Supreme Court cited to a letter from the respondent which explicitly stated that 'there [was] no clearly effective barrier that would prevent the [respondent] from reinstating [its] policy in the future, relying on evidence of both parties agreeing with its conclusion." *Lewis v Becerra*, 203 WL 3884595, at *11 n. 10. (D.C. 2023) (dismissing lawsuit as moot as the challenged regulation was rescinded).

Here, the majority attempts to rely on similar reasoning, without requisite supporting evidence beyond speculative hyperbole regarding the alleged motivations of Appellees.[1] As this Court and other Circuits have previously held, it is sheer conjecture to assume a pandemic would happen again. *Donovan v. Vance,*

[1] In characterizing Appellees' actions as a "pattern" and effort to "tactically manipulate" the Court, the majority cites to the alleged "withdrawal" by LAUSD of the mandate on two occasions and attributes these so-called "reversals of course" to pending litigation. (Dkt. 54-1, Opinion, pp. 13-16.) However, the only evidence in the record shows that Appellants' initial lawsuit was filed just one day before LAUSD pushed out the effective date of the mandate. (Dkt. 54-1, Opinion, pp. 13-16.) This was not a "withdrawal." The mandate was withdrawn just once, following months of careful consideration. There is no evidence that Appellees' actions occurred in response to any lawsuit. (Dkt. 49, pp. 15-16, Serrato Decl., ¶¶3-4; Dkt. 28, pp. Street Decl., Ex. B, p. 25.) The majority's characterization of LAUSD's motive is thus contrary to the record.

70 F.4th 1167, 1171-72 n. 5 (9th Cir. 2023); *Health Freedom Def. Fund v. President of the United States,* 71 F.4th 888, 892 (11th Cir. 2023); *U.S. Navy SEALs 1-26 v. Biden,* 72 F.4th 666 (5th Cir. 2023); *Robert v. Austin,* 72 F.4th 1160 (10th Cir. 2023); *Roth v. Austin,* 62 F.4th 114, 1119 (8th Cir. 2023). Indeed, Appellant Health Freedom Defense Fund has already failed in its attempt to assert the voluntary cessation exception to the mootness doctrine specific to a COVID-19 vaccine mandate in another case. *Health Freedom Def. Fund,* 71 F.4th at 892. There, the Eleventh Circuit held Appellant's challenge to a non-military vaccine mandate was moot and its "contention that there is a reasonable expectation that the CDC will issue another nationwide mask mandate for all conveyances and transportation hubs to be speculative at best." *Id.* Given this split in authority, this Court should review *en banc* the majority's holding that it is reasonable to assume LAUSD's COVID-19 vaccine mandate will be reinstated in the future and the voluntary cessation exception to the mootness doctrine does not apply.

2. Until This Published Opinion, This Court And Other Circuits Agreed That An Appeal Is Moot When The Vaccine Mandate Is Rescinded.

Until this published opinion, this Ninth Circuit held that challenges to COVID-19 vaccine mandates are moot when those requirements are rescinded. *Donovan,* 70 F.4th at 1171-72 n. 5 ("We reject as meritless Plaintiffs' suggestions that either the 'capable of repetition, yet evading review' or 'voluntary cessation'

exceptions to mootness apply here[]"); *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 836 (9th Cir. 2014) (capable of repetition yet evading review exception applies only to 'classes of cases that, absent an exception, would *always* evade judicial review,' which is not the case here …"); *Brach v. Newsom*, 38 F.4th 6, 9 (9th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 854 (2023) (holding that the "mere possibility that California might again suspend in-person instruction is too remote to save this case" from mootness).

Numerous other federal courts have agreed with this Ninth Circuit's previous holdings, finding challenges to COVID-19 vaccine mandates are moot when those requirements are ended. *Health Freedom Def. Fund,* 71 F.4th at 892-893 (holding challenge to a non-military vaccine mandate was moot because "there [wa]s no longer any Mandate … to set aside or uphold"); *U.S. Navy SEALs 1-26,* 72 F.4th 666 (dismissing as moot an appeal challenging the military's COVID-19 vaccine mandate following its rescission); *Robert,* 72 F.4th 1160; *Roth,* 62 F.4th at 1119; *Navy Seal 1 v. Austin,* 2023 WL 2482927 (D.C. Cir. Mar. 10, 2023), *cert. denied sub nom. Creaghan v. Austin,* 2023 WL 6377949 (U.S. Oct. 2, 2023); *Regalado v. Dir., Ctr. for Disease Control,* 2023 WL 239989 (11th Cir. Jan. 18, 2023) (affirming dismissal of case on mootness grounds where the challenged OSHA's COVID-19 vaccine mandate had been "withdrawn"); *Bazzrea v. Mayorkas,* 2023 WL 3958912, at *4, *7 (S.D. Tex. June 12, 2023) (dismissing as moot case challenging the Coast

Guard's COVID-19 vaccine mandate, because the mandate's rescission "eliminated the actual controversy" and precluded "effectual relief"); *Colonel Fin. Mgmt. Officer v. Austin,* 2023 WL 2764767, at *3 (M.D. Fla. Apr. 3, 2023) (dismissing as moot case challenging the military's COVID-19 vaccination mandate because the "mandate no longer exists").

As this Court has held, "[w]e cannot provide relief from" a vaccine mandate because it "no longer exist[s]," and therefore "we hold that this appeal is moot and dismiss." *Donovan,* 70 F.4th at 1171-72. To avoid confusion in the law and a split of authority with other Circuits, this Court should grant *en banc* review and find that since LAUSD's COVID-19 vaccine mandate has been rescinded, this action is moot and dismiss it.

B. The Critical Question Of Whether An Employer's Vaccine Mandate Implicates A Fundamental Right Or Whether A Rational Basis Review Applies Requires *En Banc* Review.

The majority disregards U.S. Supreme Court precedent and splits with other Circuit decisions to hold that the District Court "misapplies" *Jacobson* and vaccine mandates implicate a fundamental right instead of being subject to a rational basis review. In so doing, the majority argues as follows:

> *Jacobson* held that mandatory vaccinations were rationally related to 'preventing the spread' of smallpox … *Jacobson,* however, did not involve a claim in which the compelled vaccine was 'designed to reduce symptoms in the infected vaccine recipient rather than to prevent transmission and infection.' … The district court thus

> erred in holding that *Jacobson* extends beyond its public health rationale-government's power to mandate prophylactic measures aimed at preventing the recipient from spreading disease to others-to also govern 'forced medical treatment' for the recipient's benefit …

(Dkt. 54-1, Opinion, p. 18, citations omitted.)

The majority's application of *Jacobson* should be reviewed *en banc* to avoid substantial confusion in the law. In *Jacobson,* the U.S. Supreme Court upheld a far more sweeping vaccine mandate than that at issue here. There, a regulation was enacted which required all residents of the city to be vaccinated or revaccinated against smallpox. *Jacobson,* 197 U.S. 11. The U.S. Supreme Court held the regulation did not violate any constitutional rights because the government had the authority to enforce the vaccine mandate for the "protection of the public health and the public safety." *Id.* at 31, 39. The U.S. Supreme Court "distinctly recognized the authority of a state to enact quarantine laws and 'health laws of every description'" and declared "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Id.* at 25, 29. In so doing, the U.S. Supreme Court emphasized that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members," (*Id.* at 27) and that judicial intervention would be appropriate only if the challenged mandate was "arbitrary" or "[had] no real or substantial relation to the

protection of the public health." *Id.* at 28, 31.

Recent Circuit decisions specific to COVID-19 supplement *Jacobson.* In *Klaassen,* students brought a lawsuit against Indiana University challenging the school's COVID-19 vaccine policy. *Kaassen,* 7 F.4th at 592. That policy required all students be vaccinated against COVID-19 unless they were exempt for religious or medical reasons. *Id.* The students sought a preliminary injunction, claiming the policy violated their due process rights. *Id.* Citing *Jacobson,* the Seventh Circuit applied a rational basis review. *Id.* at 593. In so doing, the Seventh Circuit noted that the university's vaccine policy made for an easier case than *Jacobson* because it had religious and medical exceptions, and it required only university attendees to vaccinate, rather than all the citizens of a state. *Id.*

Similarly, in *Lukaszczyk* the Seventh Circuit rejected the argument made by public employees and healthcare workers challenging state and local mandates requiring them to be vaccinated against COVID-19 or be subject to disciplinary action and termination, claiming the policies violated their substantive due process. 47 F.4th 587. In so doing, the Seventh Circuit held that courts should be reluctant to expand the concept of substantive due process. *Id.* at 601-02. Instead, just like in *Klaassen,* the Seventh Circuit rejected strict scrutiny and applied rational basis review to the vaccine mandate claims. *Id.*

Despite this, the majority holds the District Court misapplies *Jacobson,*

limiting its scope in conflict with other Circuits that have considered the issue. *Klaassen,* 7 F.4th at 593, *Lukaszczyk,* 47 F.4th at 602; see also *Roman Catholic Diocese v. Cuomo,* 141 S.Ct. 63, 70 (2020) (Gorsuch, concurring) ("Although *Jacobson* pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review"). *Jacobson* has also continued to be relied upon in other cases. Chief Justice Roberts recently cited it favorably and numerous Circuits have relied on *Jacobson* when addressing issues similar to that before this Court. *S. Bay United Pentecostal Church v. Newsom,* 140 S.Ct. 1613, 1613 (2020) (Roberts concurring in denial of application for injunctive relief); *Chrysafis v. Marks,* 141 S.Ct. 2482 (2021); *Cuomo,* 141 S.Ct. at 70; *FDA v. Am. Coll. Of Obstetricians & Gynecologists,* 141 S.Ct. 10 (2020); *Calvary Chapel Dayton Valley v. Sisolak,* 140 S.Ct. 2603 (2020); *Ill. Republican Party v. Pritzker,* 973 F.3d 760 (7th Cir. 2020) cert. denied 141 S.Ct. 1754 (2021) ("The district court appropriately looked to *Jacobson* for guidance, and so do we"); *We The Patriots USA, Inc. v. Hochul,* 17 F.4th 266, 293-94 n. 35 (2d Cir. 2021) opinion clarified 17 F.4th 368 (2d Cir. 2021) ("*Jacobson* is still binding precedent."); *Big Tyme Invs., L.L.C. v. Edwards,* 985 F.3d 456 (5th Cir. 2021); *Robinson v. Att'y Gen.,* 957 F.3d 1171, 1179 (11th Cir. 2020).

Moreover, the majority's attempt to distinguish *Jacobson* by arguing that the COVID-19 vaccine is different from the smallpox vaccine because it is designed to reduce symptoms rather than to prevent transmission and infection is a distinction

without a meaningful difference. As the District Court aptly explained, "in Jacobson, the Supreme Court articulated the more general finding that the plaintiff had not demonstrated that 'the means prescribed by the state' to 'stamp out the disease of smallpox' had 'no real or substantial relation to the protection of the public health and the public safety.'" (1-EOR-097.) "Jacobson does not require that a vaccine have a specific purpose of *preventing* disease." (1-EOR-097, emphasis in original.)

As the U.S. Supreme Court recognized in *Jacobson,* the "liberty secured by the Constitution … does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Jacobson,* 197 U.S. at 26. Communities have "the right to protect [themselves] against an epidemic of disease which threatens the safety of [their] members." *Id.* at 27. It is not the judiciary's role to determine the most effective method of protecting the public from disease; that responsibility rests on other branches of government. *Id.* at 30. Here, *en banc* review is necessary to correct the majority's overstep in its consideration of the purported efficacy of the COVID-19 vaccine as opposed to the ability to implement those policies to protect the community against the exigencies of the COVID-19 pandemic.

IV. CONCLUSION

Defendants and Appellees respectfully request their Petition for Rehearing *En Banc* be granted.

Dated: June 21, 2024

LITTLER MENDELSON, P.C.

/s/*Connie L. Michaels*
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CERTIFICATE OF COMPLIANCE FOR PETITIONS FOR REHEARING

I certify that pursuant to Ninth Circuit Rules 35-1 and 40-1, the attached Petition for Rehearing *En Banc* is prepared in a format, typeface, and type style that complies with Federal Rule of Appellate Procedure 32(a)(4)-(6) and contains the following number of words: 4,175 (Petitions and responses must not exceed 4,200 words).

Dated: June 21, 2024

LITTLER MENDELSON, P.C.

/s/*Connie L. Michaels*
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CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 633 W. Fifth Street, 63rd Floor, Los Angeles, CA 90071.

PETITION FOR REHEARING EN BANC

I certify that on June 21, 2024, I electronically filed the foregoing document using the appellate CM/ECF system which will send notification of such filing to:

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 21, 2024 at Los Angeles, California.

Denise Trotta

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HEALTH FREEDOM DEFENSE FUND, INC., a Wyoming Not-for-Profit Corporation; JEFFREY FUENTES; SANDRA GARCIA; HOVHANNES SAPONGHIAN; NORMA BRAMBILA; CALIFORNIA EDUCATORS FOR MEDICAL FREEDOM, *Plaintiffs-Appellants*, v. ALBERTO CARVALHO, in his official capacity as Superintendent of the Los Angeles United School District; ILEANA DAVALOS, in her official capacity as Chief Human Resources Officer for the Los Angeles School District; GEORGE MCKENNA; MONICA GARCIA; SCOTT SCHMERELSON; NICK MELVOIN; JACKIE GOLDBERG; KELLY GONEZ; TANYA ORTIZ FRANKLIN, in their official capacities as members of the Los Angeles Unified School District governing board, *Defendants-Appellees*.	No.22-55908 D.C. No. 2:21-cv-08688-DSF-PVC OPINION

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted September 14, 2023
Seattle, Washington

Filed June 7, 2024

Before: Michael Daly Hawkins, Ryan D. Nelson, and Daniel P. Collins, Circuit Judges.

Opinion by Judge R. Nelson;
Concurrence by Judge R. Nelson;
Concurrence by Judge Collins;
Dissent by Judge Hawkins

SUMMARY*

COVID-19/Mootness

The panel vacated the district court's order dismissing plaintiffs' action alleging that the COVID-19 vaccination policy of the Los Angeles Unified School District ("LAUSD")—which, until twelve days after oral argument, required employees to get the COVID-19 vaccination or lose their jobs—interfered with their fundamental right to refuse medical treatment.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the voluntary cessation exception to mootness applied. LAUSD's pattern of withdrawing and then reinstating its vaccination policies was enough to keep this case alive. The record supported a strong inference that LAUSD waited to see how the oral argument in this court proceeded before determining whether to maintain the Policy or to go forward with a pre-prepared repeal option. LAUSD expressly reserved the option to again consider imposing a vaccine mandate. Accordingly, LAUSD has not carried its heavy burden to show that there is no reasonable possibility that it will again revert to imposing a similar policy.

Addressing the merits, the panel held that the district court misapplied the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), in concluding that the Policy survived rational basis review. *Jacobson* held that mandatory vaccinations were rationally related to preventing the spread of smallpox. Here, however, plaintiffs allege that the vaccine does not effectively prevent spread but only mitigates symptoms for the recipient and therefore is akin to a medical treatment, not a "traditional" vaccine. Taking plaintiffs' allegations as true at this stage of litigation, plaintiffs plausibly alleged that the COVID-19 vaccine does not effectively "prevent the spread" of COVID-19. Thus, *Jacobson* does not apply.

Concurring, Judge R. Nelson wrote separately to point out that this Circuit's intervening case *Kohn v. State Bar of California*, 87 F.4th 1021 (9th Cir. 2023) (en banc), raises the question of whether the district court's holding that the Los Angeles Unified School District is entitled to sovereign immunity should be revisited on remand.

Concurring, Judge Collins wrote separately to address a crucial point that the district court overlooked. Pursuant to more recent Supreme Court authority, compulsory treatment for the health benefit of the person treated—as opposed to compulsory treatment for the health benefit of others—implicates the fundamental right to refuse medical treatment. Plaintiffs' allegations here are sufficient to invoke that fundamental right. Defendants note that the vaccination mandate was imposed merely as a "condition of employment," but that does not suffice to justify the district court's application of rational-basis scrutiny.

Dissenting, Judge Hawkins wrote that because there is no longer any policy for this court to enjoin, he would, as this court has done consistently in actions challenging rescinded early pandemic policies, hold that this action is moot, vacate the district court's decision, and remand with instructions to dismiss the action without prejudice.

COUNSEL

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Connie L. Michaels (argued), Littler Mendelson PC, Los Angeles, California; Carrie A. Stringham, Littler Mendelson PC, San Diego, California; for Defendants-Appellees.

OPINION

R. NELSON, Circuit Judge:

For over two years—until twelve days after argument—Los Angeles Unified School District (LAUSD) required employees to get the COVID-19 vaccination or lose their jobs. LAUSD has not carried its "formidable burden" to show that it did not abandon this policy because of litigation, and thus that "no reasonable expectation remains that it will return to its old ways." *Cf. FBI v. Fikre*, 601 U.S. 234, 241 (2024) (cleaned up). So this case is not moot. *See id.* On the merits, the district court misapplied the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), stretching it beyond its public health rationale. We vacate the district court's order dismissing this claim and remand for further proceedings under the correct legal standard.

I

This case is about LAUSD's COVID-19 vaccination policy. LAUSD has reversed course several times. Because of its importance to the mootness issue, we recount that history in detail.[1]

LAUSD issued its first policy on March 4, 2021. That policy was challenged two weeks later in a lawsuit filed by Plaintiff California Educators for Medical Freedom (CEMF) and several individual plaintiffs. According to CEMF's complaint, LAUSD's policy required employees to get the

[1] We may properly take judicial notice that various statements were made in filings in related litigation. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). But we do not take those statements themselves as true. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018).

COVID-19 vaccine, no exceptions. The March 4 memorandum announcing this policy was attached to the complaint. This memorandum stated that employees would "be notified to make an appointment through the District's vaccination program when it is their turn to get vaccinated." *See CEMF v. LAUSD*, No. 21-cv-02388, 2021 WL 1034618, Dkt. 1, Ex. F at 1 (C.D. Cal. Mar. 17, 2021). It added that "District employees may either participate in the District's COVID-19 vaccination program or provide vaccination documentation in the form of an official Vaccination Record certified by a medical professional." *Id.* For those who chose the latter option, the memorandum provided instructions on how to "submit proof of vaccination from an external medical provider through the LAUSD Daily Pass" website. *Id.* It specified that "[c]urrent District employees will submit documentation of COVID-19 vaccination through the Daily Pass web portal at http://DailyPass.lausd.net as indicated in their vaccination notification." *Id.* at 2. The memorandum said nothing about an option to submit to COVID testing rather than submitting vaccine verification.

The very next day after CEMF filed suit, LAUSD reversed course and issued a "clarifying memorandum" that gave employees an option to test for COVID-19 if they did not want to get the vaccine. Relying on this clarifying memorandum, which LAUSD claimed did not impose "mandatory vaccinations," LAUSD moved to dismiss CEMF's suit because, among other things, it was "moot and/or premature." LAUSD disputed whether CEMF had adequately pleaded that exemptions would not be allowed.

But LAUSD did not dispute CEMF's contention that the March 4 memorandum was properly construed "as requiring District employees to be vaccinated." Instead, LAUSD

argued that, considering the March 18 "clarifying memorandum" allowing a testing alternative—issued after the lawsuit was filed—the case was moot or unripe. CEMF argued that the complaint properly alleged that a mandatory policy was in place when the suit was filed, and that the post-filing clarifying memorandum could not establish mootness under the voluntary cessation doctrine. CEMF's position was bolstered by its citation in the complaint to a letter from the LAUSD employees' union, which stated that "[a]ll District employees will be required to be vaccinated," and "[n]o exceptions have been made." *See CEMF*, No. 21-cv-2388, 2021 WL 1034618, Dkt. 1, Ex. G at 2. In its reply brief LAUSD shifted its position and explicitly denied that the March 4 memorandum "reflects a mandatory vaccination policy." LAUSD argued that the March 18 memorandum was "merely a clarification" of the "original March 4, 2021 memorandum."

On July 27, 2021, the district court dismissed the complaint, holding that CEMF's claims were not ripe. Noting that CEMF's amended complaint had cited the March 18 memorandum, the district court held that, considering the then-existing testing option, "there is no threat of future injury because LAUSD explicitly stated it is not requiring vaccines." The court held that it was "completely speculative" whether "LAUSD will begin to require vaccination of all employees at some point in the future and will not offer exemptions" for the plaintiffs. The court acknowledged CEMF's allegations about the March 4 policy memorandum. Still, the court held that, because that policy was changed before it was ever enforced, the dispute remained unripe. "That Defendants were contemplating requiring the vaccine, and then later reversed course and

explicitly said they would not be, does not create a ripe case or controversy."

Having obtained dismissal of CEMF's suit on these grounds, LAUSD reversed course again two weeks later. Its new policy (the Policy), adopted on August 13, 2021, expressly eliminated the testing option on which the district court's July 27 dismissal had been based. The Policy required that all LAUSD employees be fully vaccinated against COVID-19 by October 15, 2021. Like the earlier March 4 memorandum, the Policy required those who are vaccinated outside of LAUSD's own program to submit proof of vaccination through the "Daily Pass" web portal. The Policy ostensibly provided for religious and medical exemptions. But each of the individual plaintiffs here were allegedly denied accommodations, thus rendering any exemptions "illusory."

CEMF sued again, this time joined by Health Freedom Defense Fund, Inc. and new individual plaintiffs (collectively, Plaintiffs). They named as defendants LAUSD employees and Board members in their official capacities. Plaintiffs challenged the Policy as violating the Fourteenth Amendment, among other claims. Only the substantive due process and equal protection claims brought under 42 U.S.C. § 1983 are on appeal. Plaintiffs ask for future relief, including declaring the Policy unconstitutional and enjoining LAUSD from requiring it.

Plaintiffs claim that the Policy interferes with their fundamental right to refuse medical treatment. Their complaint's crux is that the COVID-19 "vaccine" is not a vaccine. "Traditional" vaccines, Plaintiffs claim, should prevent transmission or provide immunity to those who get them. But the COVID-19 vaccine does neither. At best,

Plaintiffs suggest, it mitigates symptoms for someone who has gotten it and then gets COVID-19. But this makes it a medical *treatment*, not a vaccine.

Plaintiffs' complaint supports these assertions with data and statements from the Centers for Disease Control and Prevention (CDC). For example, Plaintiffs claim that the CDC changed the definition of "vaccine" in September 2021, striking the word "immunity." Thus, they argue, the CDC conceded that the COVID-19 vaccine is not a "traditional vaccine." They also cite CDC statements that say the vaccine does not prevent transmission, and that natural immunity is superior to the vaccine.

LAUSD moved for judgment on the pleadings, requesting judicial notice of the attached CDC information. This included information about the COVID-19 death count and number of cases, as well as the vaccine's safety and effectiveness. For example, the CDC says that "COVID-19 vaccines are **safe and effective**."

The district court granted LAUSD's motion. *Health Freedom Def. Fund v. Reilly*, No. CV-21-8688, 2022 WL 5442479, at *7 (C.D. Cal. 2022). The district court took judicial notice of LAUSD's attached documents. *Id.* at *2–3. Then, applying a rational basis review, the district court held that the Policy does not implicate any fundamental right, *id.* at *5, and that LAUSD had a legitimate government purpose in requiring the COVID-19 vaccination, *id.* at *6. The district court held that the COVID-19 vaccine's reduction in symptoms and prevention of severe disease and death in recipients survived rational basis review, even if it did not prevent transmission or contraction. *Id.*

The district court largely relied on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), in concluding that the

Policy survived rational basis review. *Reilly*, 2022 WL 5442479, at *5–6. Plaintiffs argued that the COVID-19 vaccine is a "medical treatment" and not a traditional vaccine. *Id.* at *5. The district court disagreed, holding that "*Jacobson* does not require that a vaccine have the specific purpose of *preventing* disease." *Id.* (emphasis in original).

Plaintiffs appealed the district court's order. In April 2023, LAUSD filed its answering brief. It vigorously defended its vaccine mandate and did not raise any suggestion that it might be revoked. We held oral argument on the morning of September 14, 2023. The case was calendared together with two similar appeals involving the rejection of challenges to vaccine mandates that had been imposed on state employees by Oregon and Washington. But Oregon and Washington revoked their mandates before the answering briefs were filed in those cases. They therefore sought dismissal of the claims for prospective relief in those cases as moot.

LAUSD's counsel was asked at oral argument about the contrast with those cases and whether LAUSD could maintain the Policy indefinitely. LAUSD's counsel responded that the Policy was properly still in place because "there are Covid spikes right now." Counsel stated that LAUSD was "very concerned about maintaining the health of [its] staff" and believed that COVID vaccines should continue to be required "until it is absolutely established that the vaccines have no effect." When again pressed about the contrast with the two other argued cases about vaccine mandates, counsel stated that "with respect to what the district is going to do now, what they're considering doing now, there is only so much I can tell you, because it's not in the record." Counsel then reaffirmed LAUSD's view that "with respect to the vaccination requirement, they have felt

that until it is established that the vaccine is not of use in any way that it is important to go ahead and maintain it." LAUSD's counsel also repeatedly defended the constitutionality of its vaccine mandate.

According to a declaration submitted by Plaintiffs' counsel, LAUSD's attorney turned to him as they were leaving the courtroom and said, "What are you going to do when we rescind the mandate?" That same day, LAUSD's Superintendent (the Superintendent) submitted to the LAUSD Board (the Board) of Education a proposal to repeal the mandate.[2] Twelve days later, (the Board) voted to rescind the Policy by a six to one vote, with one abstention. This lawsuit was mentioned by members of the public at the meeting of the Board. Indeed, one commenter played excerpts from the publicly available audio recording of the oral argument in this court.[3] The Superintendent submitted materials in support of repeal that stated that, because the virus was no longer "spreading at a rapid enough pace to overwhelm hospital systems," LAUSD "no longer need[ed] a COVID-19 vaccine requirement to keep schools open for

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[2] Plaintiffs' Motion for Judicial Notice is **GRANTED** in part and **DENIED** in part. We take judicial notice that LAUSD voted to withdraw the Policy on September 26, 2023, and that various documents were submitted, and statements made, in connection with that repeal. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689–90 (9th Cir. 2001). But we do not take judicial notice of the truth of the claims made in such written or oral statements. *Id.*; *see also Owino v. Holder*, 771 F.3d 527, 534 n.4 (9th Cir. 2014) (denying request for judicial notice of article where "[t]he government does not concede that the facts [included] are beyond dispute.").

[3] LAUSD, *September 26th, 2023 – 1pm Regular Board Meeting*, YOUTUBE (Sept. 26, 2023), https://www.youtube.com/watch?v=qQf_y77unZw (25:37–28:00) (*Meeting*).

in-person learning." They explained that "[t]he science [on vaccines] has not changed" and they are still "safe and effective." And they also cautioned that LAUSD would continue to monitor COVID-19, and if "health conditions necessitate a revisiting of the COVID-19 vaccine requirement," LAUSD would reconsider the Policy.

Comments made by LAUSD officials and Board members at the meeting generally followed these statements. The one Board member who voted against the repeal, Dr. McKenna, said he was "not afraid of litigation" or the "zealousness that will come out with lawsuits" brought by employees who lost their jobs. *Meeting* (59:20 – 1:00:48). Likewise, Board President Goldberg said that she had a "foot in [the] camp with Dr. McKenna." *Id.* (1:13:12 – 1:15:12). While she acknowledged that the virus was now "endemic," she also said she did not regret imposing the mandate for "one moment, not 30 seconds, not one tiny bit." *Id.* (1:13:15–22). When the vote on the repeal was called, she voted, "Reluctantly, yes." *Id.* (1:18:23–26).

LAUSD then asked us to dismiss the appeal, claiming that the case is now moot. Plaintiffs objected, arguing that LAUSD withdrew the Policy because they feared an adverse ruling.

II

"Judgments on the pleadings are reviewed de novo." *George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1229 (9th Cir. 1996). We review under the same standards as a motion to dismiss. *Gregg v. Haw., Dep't of Pub. Safety*, 870 F.3d 883, 887 (9th Cir. 2017). So we must accept the plaintiffs' alleged facts as true, whether "actual proof" of them is "improbable." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). If the parties provide competing but

plausible explanations, the plaintiffs' complaint survives. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Thus, we can affirm for the moving party only if there are no material and unresolved facts, and the plaintiffs' claims fail as a matter of law. *George*, 91 F.3d at 1229.

III

We begin by analyzing whether this appeal is now moot because of LAUSD's recent policy reversal. Because LAUSD acted after this litigation was filed, we must decide whether the voluntary cessation exception to mootness applies. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 457 n.1 (2017).

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). But generally, a party's decision to stop the challenged conduct does not take away our "power to hear and determine the case." *Id.* (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

Sometimes, however, voluntary cessation can moot a case. First, it must be reasonably clear that the challenged practice will not happen again. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Second, any effects of the alleged violation must be permanently reversed. *Davis*, 440 U.S. at 631. This is a "formidable burden" and "holds for governmental defendants no less than for private ones." *Fikre*, 601 U.S. at 241.

LAUSD's pattern of withdrawing and then reinstating its vaccination policies is enough to keep this case alive. *See*

Fikre v. FBI, 904 F.3d 1033, 1039 (9th Cir. 2018) ("[A] claim is not moot if the government remains practically and legally free to return to [its] old ways despite abandoning them in the ongoing litigation." (citing *W.T. Grant*, 345 U.S. at 632) (internal quotation marks omitted)). Twice LAUSD has withdrawn its policy only after facing some litigation risk. LAUSD immediately rescinded its prior policy after some plaintiffs first sued, and LAUSD then asked the district court to dismiss for mootness or ripeness. But then just two weeks after securing a dismissal on those grounds, LAUSD implemented the Policy, which has remained in effect for over two years.

We held oral argument on the morning of September 14, 2023, where LAUSD's counsel was vigorously questioned. That same day LAUSD submitted a report recommending rescission of the Policy. Twelve days later, LAUSD withdrew the Policy.

Litigants who have already demonstrated their willingness to tactically manipulate the federal courts in this way should *not* be given any benefit of the doubt. LAUSD's about-face occurred only after vigorous questioning at argument in this court, which suggests that it was motivated, at least in part, by litigation tactics. *See R.W. v. Columbia Basin Coll.*, 77 F.4th 1214, 1226 (9th Cir. 2023). For example, in *Columbia Basin College*, we upheld a finding that the voluntary-cessation-mootness burden had not been met. *Id.* We were persuaded by the district court, which noted the defendants' strategic timing of sending a letter purporting to moot the case more than three years after litigation but only one month before moving on mootness. *Id.* Here too, LAUSD's timing is suspect.

Rather than hold LAUSD to its "formidable burden," *see Fikre*, 601 U.S. at 241, the dissent consistently draws highly debatable inferences for LAUSD in evaluating LAUSD's actions in the two vaccine-related lawsuits filed against it. But federal judges "are 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Com. v. New York*, 588 U.S. 752, 139 S. Ct. 2551, 2575 (2019) (citation omitted). Given the detailed procedural history summarized earlier, the record at least supports a strong inference that LAUSD waited to see how the oral argument in this court proceeded before determining whether to maintain the Policy or to go forward with a pre-prepared repeal option. LAUSD appears to have twice sought to manipulate the federal courts to avoid an adverse ruling on this issue. Moreover, the Board expressly reserved the option to again consider imposing a vaccine mandate. This confirms that LAUSD has not carried its heavy burden to show that there is no reasonable possibility that it will again revert to imposing a similar policy.

We must view any strategic moves designed to keep us from reviewing challenged conduct with a "critical eye." *See Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012). Comments made by Board members confirm that its policy rescission aimed to avoid litigation. For example, Dr. McKenna—the sole Board member to vote against withdrawal of the Policy—justified his vote because he was "not afraid of litigation" or the "zealousness that will come out with lawsuits" brought by employees who lost their jobs. Likewise, Board President Goldberg said that she had a "foot in [the] camp" with Dr. McKenna, and so "reluctantly" voted to rescind. These comments show that the Board was aware of, and responding to, the pending

litigation. LAUSD therefore is no longer entitled to any presumption of regularity.

The dissent disagrees, citing distinguishable cases involving challenges to COVID-19 policies. We found in each case that the government entity did not intentionally abandon its policy because of litigation risk but for other intervening reasons. *See, e.g.*, *Brach v. Newsom*, 38 F.4th 6, 12 (9th Cir. 2022) ("The State did not rescind its school closure orders in response to the litigation—the orders 'expired by their own terms' . . ."); *McDonald v. Lawson*, 94 F.4th 864, 869 (9th Cir. 2024) ("[N]othing in the record . . . indicates that [the State's assertion that it would not enforce the challenged rule] was made in bad faith." (citation omitted)); *Seaplane Adventures, LLC v. County of Marin*, 71 F.4th 724, 732 (9th Cir. 2023) (given that California's state of emergency ended, "there is no indication that the County can or will reimpose restrictions similar to those in effect at the very beginning of the pandemic."); *Donovan v. Vance*, 70 F.4th 1167, 1172 (9th Cir. 2023) (explaining that because the vaccine mandate exemption was based on executive orders that no longer exist, no relief is available). Indeed, this panel unanimously reached the same conclusion about the withdrawal of the vaccine mandates imposed by Oregon and Washington. *See Johnson v. Kotek*, 2024 WL 747022, at *1 (9th Cir. 2024) (dismissing the claims for prospective relief as moot); *Pilz v. Inslee*, 2023 WL 8866565, at *1 (9th Cir. 2023) (same). As explained above, LAUSD's actions do not suggest the same intent as existed in these other cases. Here, unlike in *Lawson*, the evidence shows that LAUSD acted at least partially in bad faith to avoid litigation risk in again changing the Policy. And unlike in *Seaplane Adventures*, LAUSD has shown that they "can or will reimpose" similar restrictions.

Thus, the voluntary cessation exception to mootness applies. *See id.*; *see also Pub. Utils. Comm'n of State of Cal. v. FERC*, 100 F.3d 1451, 1460 (9th Cir. 1996) ("in order for [the voluntary cessation] exception to apply, the defendant's [changed action] must have arisen *because of* the litigation." (emphasis in original)). This case is not moot.[4]

IV

We now turn to the merits. The district court held, applying rational basis review under *Jacobson*, that the Policy satisfied a legitimate government purpose. But the district court's analysis diverges from *Jacobson*. We thus vacate the district court's opinion and remand.

The district court relied on *Jacobson* to hold that the Policy was rooted in a legitimate government interest. *Reilly*, 2022 WL 5442479, at *5–6. But *Jacobson* does not directly control based on Plaintiffs' allegations. In *Jacobson*, the Supreme Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease. 197 U.S. at 38. The Court explained that the "principle of vaccination" is "to prevent the spread of smallpox." *Id.* at 31–32. Because of this, the Court concluded that the State's interest superseded Jacobson's liberty interest, and the vaccine requirement was constitutional. *Id.*

Plaintiffs argue that a "traditional vaccine" must provide immunity and prevent transmission, meaning that it must "prevent the spread" of COVID-19. Plaintiffs allege that the vaccine does not effectively prevent spread, but only mitigates symptoms for the recipient. And Plaintiffs claim that something that only does the latter, but not the former,

[4] For these reasons, LAUSD's Motion to Dismiss is **DENIED**.

is like a medical treatment, not a "traditional" vaccine. This interpretation distinguishes *Jacobson*, thus presenting a different government interest.

Putting that aside, the district court held that, even if it is true that the vaccine does not "prevent the spread," *Jacobson* still dictates that the vaccine mandate challenged here is subject to, and survives, the rational basis test. The district court reasoned that "*Jacobson* does not require that a vaccine have the specific purpose of *preventing* disease." *Reilly*, 2022 WL 5442479, at *5 (emphasis in original). It acknowledged Plaintiffs' allegations that the vaccine did not "prevent transmission or contraction of COVID-19." *Id.* at *6. But it declared that "these features of the vaccine further the purpose of protecting LAUSD students and employees from COVID-19," and thus "the Policy survives rational basis review." *Id.*

This misapplies *Jacobson*. *Jacobson* held that mandatory vaccinations were rationally related to "preventing the spread" of smallpox. 197 U.S. at 30; *see also Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 23 (2020) (Gorsuch, J., concurring) ("Although *Jacobson* pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review to Henning Jacobson's challenge . . ."). *Jacobson*, however, did not involve a claim in which the compelled vaccine was "designed to reduce symptoms in the infected vaccine recipient rather than to prevent transmission and infection." *Reilly*, 2022 WL 5442479, at *5. The district court thus erred in holding that *Jacobson* extends beyond its public health rationale—government's power to mandate prophylactic measures aimed at preventing the recipient from spreading disease to others—to also govern "forced medical treatment" for the recipient's benefit. *Id.* at *5.

At this stage, we must accept Plaintiffs' allegations that the vaccine does not prevent the spread of COVID-19 as true. *Twombly*, 550 U.S. at 556. And, because of this, *Jacobson* does not apply. LAUSD cannot get around this standard by stating that Plaintiffs' allegations are wrong. Nor can LAUSD do so by providing facts that do not contradict Plaintiffs' allegations. It is true that we "need not [] accept as true allegations that contradict matters properly subject to judicial notice." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). But even if the materials offered by LAUSD are subject to judicial notice, they do not support rejecting Plaintiffs' allegations. LAUSD only provides a CDC publication that says "COVID-19 vaccines are safe and effective." But "safe and effective" for what? LAUSD implies that it is for preventing transmission of COVID-19 but does not adduce judicially noticeable facts that prove this.

We note the preliminary nature of our holding. We do not prejudge whether, on a more developed factual record, Plaintiffs' allegations will prove true. But "[w]hether an action 'can be dismissed on the pleadings depends on what the pleadings say.'" *Marshall Naify Revocable Tr. v. United States*, 672 F.3d 620, 625 (9th Cir. 2012) (quoting *Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997)). Because we thus must accept them as true, Plaintiffs have plausibly alleged that the COVID-19 vaccine does not effectively "prevent the spread" of COVID-19. Thus, *Jacobson* does not apply, and so we vacate the district court's order of dismissal and remand.

V

This case is not moot. And the district court wrongly applied *Jacobson* to the substantive due process claim. Thus, we vacate the district court's order and remand.

VACATED AND REMANDED.

R. NELSON, J., concurring:

I write separately to address another issue not at issue in this appeal, but perhaps relevant as this case progresses on remand. Our intervening case, *Kohn v. State Bar of California*, 87 F.4th 1021 (9th Cir. 2023) (en banc), raises the question whether the district court's holding below that the Los Angeles Unified School District (LAUSD) is entitled to sovereign immunity should be revisited.

"[A] federal court generally may not hear a suit brought by any person against a nonconsenting State." *Munoz v. Super. Ct. of L.A. Cnty.*, 91 F.4th 977, 980 (9th Cir. 2024) (internal quotation marks omitted). "This prohibition applies when the state or the arm of a state is a defendant." *Id.* (cleaned up). We recently clarified when a government agency is an "arm of the state." *See Kohn*, 87 F.4th at 1026–32. We examined the current test—the *Mitchell* factors—against Supreme Court precedent and overruled it. *Id.* at 1027–30 (reassessing *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201–02 (9th Cir. 1988)). We instead adopted a new, entity-based test. *Id.* at 1030. *Kohn*'s reasoning may impact claims that can be brought against LAUSD.

The Supreme Court has never established a standard test for determining whether an entity is an "arm of the state."

See id. at 1026–27. We developed the *Mitchell* factors out of a "grab bag" of Supreme Court and Ninth Circuit precedent. *Id.* at 1027. One of the cases the *Mitchell* factors relied on was the Supreme Court's decision in *Edelman v. Jordan*, 415 U.S. 651 (1974). *Id.* *Edelman* suggested that if the judgment would be paid by the State, the suit is barred. *See id.* at 1027 (citing *Edelman*, 415 U.S. at 663 ("Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.")). Since *Edelman*, however, the Court has held that solvency *and* state dignity are equally important, and what matters is how the state and defendant relate to one another. *See id.* at 1027–28; *see also id.* ("But, since *Edelman* and *Mitchell*, the Supreme Court has clarified that '[t]he Eleventh Amendment does not exist solely in order to preven[t] federal-court judgments that must be paid out of a [s]tate's treasury.'" (quotations omitted) (itself quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996)).

The *Mitchell* test was applied inconsistently, and thus was not predictable. The factors were weighted differently, and while this balancing afforded judicial discretion, "it allows lower courts in our Circuit to 'twist' the arms of the state doctrine depending on the defendant." *Id.* at 1029. For example, "[u]nder *Mitchell*, we [] placed the greatest weight on" who was financially responsible in assessing sovereign immunity. *Id.* at 1027 (citing *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 (9th Cir. 1991)). This made little sense. *See id.* at 1027–30.

The second *Mitchell* factor—"whether the entity performs central government functions"—was also applied inconsistently. *Id.* at 1029. At times, we have evaluated this at the entity-level, and other times at the activity-level. *Id.*

But if the *Mitchell* test were entity-based, an entity either should be immune or not—it should not depend on what the entity is doing. *Id.*

Recognizing this tension, *Kohn* overruled *Mitchell*. *Id.* at 1028 ("The *Mitchell* factors are . . . inconsistent with Supreme Court arm of the state doctrine."). In its place, we adopted an "entity-based" test. *Id.* at 1030. This three-factor test evaluates "(1) the state's intent as to the status, including the functions performed by the entity; (2) the state's control over the entity; and (3) the entity's overall effects on the state treasury." *Id.* (citing *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 873 (D.C. Cir. 2008) (cleaned up)). Under it, "an entity either is or is not an arm of the [s]tate"—it is not context specific. *Id.* at 1031 (citing *P.R. Ports Auth.*, 531 F.3d at 873).

We have held that California school districts have sovereign immunity, relying on *Mitchell*. *See, e.g.*, *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir. 1992); *Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d 923, 934 (9th Cir. 2017). That said, we have held that school districts in other states are not.[1] The reasons for this differing result are now suspect under *Kohn*. Given this, it must be reassessed whether California school districts are an "arm of the state."

We first held that California school districts were an "arm of the state" in *Belanger*. We noted that some factors cut against this but reasoned that "Belanger [could not] prevail on the first and most important factor because a

[1] *See, e.g.*, *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1184 (9th Cir. 2003) (Alaska); *Savage v. Glendale Union High Sch., Dist. No. 205*, 343 F.3d 1036, 1044 (9th Cir. 2003) (Arizona); *Eason v. Clark Cnty. Sch. Dist.*, 303 F.3d 1137, 1143 (9th Cir. 2002) (Nevada).

judgment against the school district would be satisfied out of state funds." *Belanger*, 963 F.2d at 251. We also stated that "under California law, the school district is a state agency that performs central government functions." *Id.* This analysis thus hinged on the first and second, now defunct, *Mitchell* factors. *See id.* *Belanger*'s analysis of the second factor also examined the *activity* that California school districts performed—public schooling—and reasoned that because that was a "central governmental function," they were "arms of the state." *Id.* The *Belanger* court was unconcerned that California school districts "enjoy wide discretion and considerable autonomy" under this second factor. *See id.* This analysis is thus suspect under *Kohn*.

We then doubled down on this holding in *Sato*. Between *Belanger* and *Sato*, California enacted AB 97, which "reformed education funding and governance in California." *Sato*, 861 F.3d at 929. As a result, public education in California became more locally funded and educational achievement more locally controlled—thus reducing the State's involvement in both. *See id.* That said, we still held that because state and local education funds were "still 'hopelessly intertwined,'" the first, now disfavored, *Mitchell* factor still favored immunity. *Id.* at 932. For the second *Mitchell* factor, while we recognized that "AB 97 granted districts [] some measure of autonomy and discretion in goal-setting," "it did not delegate primary responsibility for providing public education." *Id.* at 933. This determination thus looked at the activity—providing public education—rather than the entity. That reasoning and this conclusion is now suspect under *Kohn*.

Our new entity-based test in *Kohn* seems to conflict with (and likely overrule) our reasoning in *Belanger* and *Sato*. Because of this, the district court's holding that LAUSD is

an "arm of the state" (as well as our prior holdings in *Belanger* and *Sato*) may need to be revisited. *Cf. Reilly*, 2022 WL 5442479, at *3 (relying on *Mitchell* to determine that LAUSD has Eleventh Amendment immunity).[2]

COLLINS, Circuit Judge, concurring:

I agree that this case is not moot and that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), is not controlling under the well-pleaded allegations of Plaintiffs' complaint. I therefore concur in the majority opinion. I write separately to emphasize a crucial point the district court overlooked.

The district court in this case explicitly held that *Jacobson* governs Plaintiffs' substantive due process claim even if one assumes the truthfulness of the complaint's allegations that the Covid vaccines are not very effective at preventing infection and transmission and that their value is primarily in *reducing disease severity* for those recipients of the vaccine who thereafter contract Covid. As the majority explains, *Jacobson* did not involve a comparable claim and is not controlling authority with respect to it.

In my view, the district court further erred by failing to realize that these allegations directly implicate a distinct and more recent line of Supreme Court authority, in which the

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[2] If LAUSD does not have sovereign immunity, Plaintiffs may be able to amend to raise a monetary claim, which would be another reason this case is not moot. *Cf. Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *see also Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 425–26 (9th Cir. 2008) ("[A] 'live claim for [even] nominal damages will prevent dismissal for mootness.'" (quoting *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002))).

Court has stated that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from [the Court's] prior decisions." *Cruzan ex rel. Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278–79 (1990) (citing, not only *Jacobson*, but a series of later "cases support[ing] the recognition of a general liberty interest in refusing medical treatment"). In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court explained that *Cruzan*'s posited "'right of a competent individual to refuse medical treatment'" was "entirely consistent with this Nation's history and constitutional traditions," in light of "the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment." *Id*. at 724–25 (citation omitted). Given these statements in *Glucksberg*, the right described there satisfies the history-based standards that the Court applies for recognizing "fundamental rights that are not mentioned anywhere in the Constitution." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237–38 (2022). The Supreme Court's caselaw thus clarifies that compulsory treatment for the health benefit of *the person treated*—as opposed to compulsory treatment for the health benefit of *others*—implicates the fundamental right to refuse medical treatment.

Plaintiffs' allegations here are sufficient to invoke that fundamental right. Defendants note that the vaccination mandate was imposed merely as a "condition of employment," but that does not suffice to justify the district court's application of rational-basis scrutiny. *See Lane v. Franks*, 573 U.S. 228, 236 (2014) ("[The] Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights.").

With these additional observations, I concur in the majority opinion.

HAWKINS, Circuit Judge, dissenting.

This case is over. We cannot grant the sole relief sought by the Plaintiffs, an injunction against enforcement of the school district's now rescinded COVID-19 vaccination policy (the "Policy"). Despite the absence of any ongoing policy, my friends in the Majority would hold that this action remains justiciable under the voluntary cessation exception to mootness. *See FBI v. Fikre*, 601 U.S. 234, 241 (2024). In doing so, they ignore the practical realities surrounding LAUSD's adoption and rescission of the Policy, which demonstrate that there is no reasonable expectation LAUSD will reimpose the Policy in the future. Because there is no longer any policy for our court to enjoin, I would, as our court has done consistently in actions challenging rescinded early pandemic policies, hold that this action is moot, vacate the district court's decision, and remand with instructions to dismiss the action without prejudice. *See, e.g.*, *Brach v. Newsom*, 38 F.4th 6 (9th Cir. 2022) (en banc).

I begin with a brief overview of the pertinent events to illustrate the context in which LAUSD adopted and then rescinded the Policy. In early March 2020, the World Health Organization declared a global pandemic in response to COVID-19, leading to the issuance of local, state, and federal emergency declarations and orders. "Governor Gavin Newsom declared a state of emergency within California, and issued Executive Order N-33-20, requiring Californians to 'heed the current State public health directives' including the requirement 'to stay home or at their

place of residence.'" *Id.* at 9. Around March 16, 2020, LAUSD closed its facilities for in-person operations and implemented a distance learning and remote work program that lasted through most of the 2020–2021 school year.

In advance of the reopening of schools for in-person instruction, California Educators for Medical Freedom—one of the Plaintiffs in this action—and several other individuals filed a complaint on March 17, 2021, seeking to enjoin LAUSD from implementing a policy that required employees, without exception, to be vaccinated against COVID-19. *Cal. Educators for Med. Freedom v. Los Angeles Unified Sch. Dist.*, No. 21-cv-02388, 2021 WL 1034618, Dkt. 1 (C.D. Cal. Mar. 17, 2021) (*CEMF*).[1] The *CEMF* complaint alleged, on information and belief, that LAUSD had adopted such a policy, *id.* ¶ 1, and attached several documents in support, including a March 4, 2021 memorandum to employees. *See id.* Ex. F. The memorandum informed LAUSD employees that they were eligible to receive COVID-19 vaccinations and provided information about registering for vaccinations through the District's vaccination program or submitting documentation of their vaccination if received through an outside program. *Id.* The memorandum did not state explicitly that employees were required to receive vaccinations or that employment consequences would follow if employees were not vaccinated.[2] *Id.* The day after the *CEMF* plaintiffs filed

[1] We may take judicial notice of filings and decisions in related court actions. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006).

[2] CEMF also supported its complaint with a letter from the LAUSD employees' union. *CEMF*, No. 21-cv-02388, 2021 WL 1034618, Dkt.

their complaint, LAUSD sent an updated interoffice memorandum that clarified "vaccinations are not mandatory at this time." The *CEMF* plaintiffs acknowledged in an amended complaint that LAUSD was giving staff the option to test or be vaccinated.

LAUSD moved to dismiss the case on ripeness grounds because it had not yet implemented a vaccination policy, and the district court granted the motion. The district court found that the case did not raise any voluntary cessation concerns because, "according to Plaintiffs' allegations, Defendants never began the objectionable conduct in the first place." The district court dismissed the action without prejudice on July 27, 2021.

The 2021–2022 LAUSD school year was set to begin just a few weeks later on August 16, 2021.[3] The 2021–2022 school year also marked the unrestricted reopening of LAUSD schools for in-person instruction.[4] On August 13, 2021—the first "pupil free day" of the school year[5] and three

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1, Ex. G. The letter indicated that the District's plans to implement a mandatory vaccination policy were in progress; the information regarding those plans "may very well change;" discussions with the District were "nowhere near done;" and no deadlines had been set given a variety of unknown variables, including the availability of vaccinations. *Id.*

[3] LAUSD, Single-Track Instructional School Calendar 2021–2022, https://achieve.lausd.net/cms/lib/CA01000043/Centricity/Domain/4/REV1.4.2022BoardAppvd_2021-2022InstructionalCal.pdf ["LAUSD 2021–2022 Calendar"].

[4] The emergency legislation allowing the California public school system to move online expired on June 30, 2021, and on July 12, 2021, the State of California lifted "all restrictions on school reopening." *Brach*, 38 F.4th at 11, 13.

[5] *See* LAUSD 2021–2022 Calendar.

days before students would be returning to the classrooms—LAUSD circulated a memorandum to staff announcing the Policy and explaining that all non-exempt employees must be vaccinated against COVID-19. The LAUSD Board of Education (the "Board") approved the policy at a subsequent meeting in November 2021.

Plaintiffs filed the underlying complaint and sought an injunction barring enforcement of the Policy. LAUSD eventually moved for judgment on the pleadings. The district court granted the motion and entered judgment in favor of the Defendants. Plaintiffs then appealed.

We held oral argument on September 14, 2023, approximately four weeks after the start of LAUSD's 2023–2024 school year.[6] At oral argument, counsel for Plaintiffs informed the court that, although the Policy remained in effect as of that date, there were rumors LAUSD would be rescinding the Policy. Consistent with those rumors, a detailed report proposing rescission of the Policy was submitted to the Board on the same day as oral argument. The proposal identified the many changes that had occurred since LAUSD adopted the Policy in the fall of 2021 and expressed the view that vaccines were no longer needed to keep schools open for in-person learning. At its next meeting, held on September 26, 2023, the Board heard comments from interested parties and voted to rescind the Policy.

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[6] LAUSD, Instructional School Calendar 2023–2024, https://www.lausd.org/site/default.aspx?PageType=3&ModuleInstanceID=67213&ViewID=C9E0416E-F0E7-4626-AA7B-C14D59F72F85&RenderLoc=0&FlexDataID=112212&PageID=17824&Comments=true.

The Majority characterizes LAUSD's conduct as an intentional manipulation of federal courts. But we generally afford the government a presumption of good faith, *Brach*, 38 F.4th at 13, and when viewed in context, there are obvious, non-litigation-related explanations for LAUSD's actions surrounding the adoption and rescission of the Policy. Far from the "about-face" described by the Majority, the *CEMF* pleadings and attached documents reflect that LAUSD simply had not formalized or implemented a vaccination policy at the time the plaintiffs filed their complaint in that litigation. Although implementation of the Policy came on the heels of the *CEMF* lawsuit's dismissal, it also coincided with the start of the new school year and LAUSD's full return to in-person learning after the unprecedented school closures seventeen months earlier. Thus, I would not be so quick to deem the timing of LAUSD's development and adoption of the Policy as litigation gamesmanship, and I would not rely on it to infer the motive behind LAUSD's rescission of the Policy. Instead, I believe there is sufficient evidence in the record that LAUSD rescinded the Policy in response to developments regarding COVID-19 and "not [as] a temporary move to sidestep litigation." *Brach*, 38 F.3d at 13.

Next, and more importantly, the record shows that LAUSD is not reasonably expected to reenact the Policy. *See Fikre*, 601 U.S. at 241. The burden to show that challenged conduct is not reasonably expected to recur is a "formidable" one indeed. *Id.* And governmental defendants must bear that burden just as any other private party would. *Id.* Here, LAUSD has carried that burden.

Again, context matters. LAUSD adopted the Policy in response to the COVID-19 pandemic and the return to full in-person instruction after the extended school closures

occasioned by the onset of the pandemic. Those are not "routine occurrence[s] that we can assume [are] reasonably likely to reoccur." *McDonald v. Lawson*, 94 F.4th 864, 869 (9th Cir. 2024). It then rescinded the Policy after several key developments in 2023, including the end of local, state, and federal emergency COVID-19 orders; the World Health Organization's determination that COVID-19 no longer constitutes a public health emergency of international concerns; and the determination that COVID-19 had entered an endemic phase. These legal and scientific developments and LAUSD's reliance on them suggest that LAUSD's recission of the Policy is "entrenched" and not "easily abandoned." *Brach*, 38 F.4th at 13. LAUSD also has averred that, absent a very unlikely return to the onset of the COVID-19 pandemic, it will not reinstate the Policy.

As we have said before, "circumstances change, and when circumstances change, it is not reasonable to expect simple repetition of past actions." *Wallingford v. Bonta*, 82 F.4th 797, 804 (9th Cir. 2023). The bottom line, here, is that the circumstances have changed. And neither the speculative possibility of a future pandemic nor LAUSD's power to adopt another vaccination policy save this case.[7] *See Brach*, 38 F.4th at 9.

[7] I also disagree with the approach to avoiding mootness suggested in the concurrence. Although we may consider subsequent events when evaluating mootness, we typically do not allow plaintiffs to change the nature of the remedies sought in their complaint when mootness concerns arise. *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1097–98 (9th Cir. 2001). If our court would not allow the Plaintiffs to save this case with a "late-in-the-day" request for damages, *Bain v. Cal. Teachers Ass'n*, 891 F.3d 1206, 1212 (9th Cir. 2018), the court certainly should refrain from sua sponte suggesting a novel legal theory in support

Unsurprisingly, our court has found that other challenges to early COVID-19 policies became moot upon the rescission or expiration of those policies, and in doing so, we rejected arguments that the voluntary cessation exception to mootness applied, particularly in light of the unique circumstances that gave rise to the policies in the first place. *See, e.g.*, *id.* at 12–14; *McDonald*, 94 F.4th at 869; *Seaplane Adventures, LLC v. County of Marin*, 71 F.4th 724, 732–33 (9th Cir. 2023); *Donovan v. Vance*, 70 F.4th 1167, 1172 & n.5 (9th Cir. 2023).

In a recent trio of cases, the Supreme Court vacated as moot lower court judgments concerning COVID-19 vaccination mandates following the rescission of those mandates. *Payne v. Biden*, 144 S. Ct. 480 (2023); *Biden v. Feds for Ded. Freedom*, 144 S. Ct. 480, 480–81 (2023); *Kendall v. Doster*, 144 S. Ct. 481 (2023). Relying on *Payne*, *Feds for Medical Freedom*, and *Doster*, we determined that a challenge to the executive order mandating COVID-19 vaccinations for federal contractors became moot upon rescission of that executive order; we vacated our court's earlier opinion, dismissed the appeal as moot, and remanded for the district court to vacate portions of its order regarding the moot claims. *Mayes v. Biden*, 89 F.4th 1186, 1188 (9th Cir. 2023). The case before us now warrants the same result.

"Sometimes, events in the world overtake those in the courtroom, and a complaining party manages to secure outside of litigation all the relief he might have won in it." *Fikre*, 601 U.S. at 240. That is the case here. Because there is no longer any policy for the court to enjoin or declare unlawful, I would hold that the case is moot, vacate the

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of a remedy not sought in the complaint as a means to reach the merits of an otherwise moot case.

district court's decision, and remand for the district court to dismiss the case as moot. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). I dissent.