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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ELIZABETH MIRABELLI, an individual, and LORI ANN WEST, an individual, Plaintiffs, **v.** **MARK OLSON, in his official capacity as President of the EUSD Board of Education, et al.,** Defendants.	3:23-cv-0768-BEN-VET **GOVERNOR NEWSOM'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS** Date: April 1, 2024 Time: 10:30 a.m. Dept: 5A Judge: The Honorable Roger T. Benitez Action Filed: April 27, 2023

INTRODUCTION

In their opposition to Governor Gavin Newsom's motion to dismiss, Plaintiffs assert that their constitutional injuries flowing from Escondido Union School District's (EUSD) policy restricting disclosure of private student information are "fairly traceable" to the Governor for purposes of Article III standing and Eleventh Amendment immunity. But the Governor has no direct connection to the local policy challenged in this suit and does not exercise direct enforcement authority or the authority to direct other state-level officials alleged to have enforcement authority, such that he may be deemed responsible for the policy decisions of EUSD officials. Plaintiffs cannot establish an exception to the Governor's Eleventh Amendment immunity and have not demonstrated the requisite causation for standing in this Court. Governor Newsom should be dismissed from this case.

ARGUMENT

I. GOVERNOR NEWSOM SHOULD BE DISMISSED AS A DEFENDANT BECAUSE HE ENJOYS ELEVENTH AMENDMENT IMMUNITY FROM SUIT

Plaintiffs contend that Governor Newsom has a "fairly traceable" connection to the alleged constitutional injuries caused by EUSD's disclosure policy. ECF No. 98 at 28. This connection, they submit, is not only sufficient to confer Article III standing (addressed *post*), but also supports an exception to Eleventh Amendment immunity under *Ex parte Young*, 209 U.S. 123, 155-57 (1908). *See* ECF No. 98 at 28-31. They are mistaken. The facts alleged by Plaintiffs fail to demonstrate that the Governor has any connection to the dispute in this case, let alone the type of tangible enforcement ability required for jurisdiction.

With respect to Eleventh Amendment immunity, as explained in the motion to dismiss, Plaintiffs have not sufficiently alleged that the Governor has any power that could arguably render him responsible for EUSD's policy and Plaintiffs' associated allegations of constitutional harm. *See* ECF No. 95 at 12-17. Under *Ex parte Young*, an official's connection to enforcement must be "fairly direct; a

generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). In other words, unless the official has "direct authority and practical ability to enforce the challenged statute," Eleventh Amendment immunity bars suit. *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 846 (9th Cir. 2002). Because Plaintiffs' alleged constitutional injuries flow from EUSD's policy—a policy not required by California law or enforced by the Governor in any appreciable way—the Eleventh Amendment immunizes Governor Newsom from suit.

Plaintiffs disagree, first highlighting a number of California cases that generally stand for the proposition that public education is an obligation assumed and controlled by the State. ECF No. 98 at 25, 28 (citing *Butt v. State of California*, 4 Cal. 4th 668, 680 (1992); *Mendoza v. State of California*, 149 Cal. App. 4th 1034, 1052 (2007); *Bd. of Educ. v. Honig*, 13 Cal. App. 4th 720, 754 (1993)). Plaintiffs further point to public education cases in state court where the Governor was named as a defendant. ECF No. 98 at 28 (citing *Vergara v. State of California*, 246 Cal. App. 4th 619, 629 n.2 (2016); *Campaign for Qual. Educ. v. State of California*, 246 Cal. App. 4th 896 (2016)). Plaintiffs argue that the Governor necessarily has a sufficient connection to the policy for purposes of federal court jurisdiction, solely because the EUSD policy challenged here relates to the broader field of public education. ECF No. 98 at 28. But Plaintiffs' argument is nothing more than a detailed description of the existence of "a generalized duty to enforce state law [and] general supervisory power" that is insufficient to overcome Eleventh Amendment immunity. *Eu*, 979 F.2d at 704.

Although the State has ultimate responsibility under the California Constitution for providing a system of common schools and may be required to intervene affirmatively to prevent the deprivation of the equal educational rights of public school students by local school districts, it does not follow that the

Governor, by mere virtue of the "supreme executive power" vested in him by the state constitution, *see* Cal. Const., Art. V, § 1, is a proper defendant in any federal case touching on public education. To the contrary, as cataloged in the motion to dismiss, binding circuit precedent and a wealth of district court cases conclusively demonstrate that the Governor's generalized duty to ensure that California law is faithfully executed is insufficient under *Ex parte Young*. *See* ECF No. 95 at 14-15 & n.2; *see, e.g.*, *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013) (holding governor was entitled to Eleventh Amendment immunity in suit "because his only connection to [the challenged statute] is his general duty to enforce California law"). Though the California cases cited by Plaintiffs may speak to jurisdiction against the Governor in the state court system in cases involving disputes over K-12 educational governance or the fundamental right to equal educational opportunity protected by the California Constitution, they have no bearing on the Eleventh Amendment analysis in this federal forum for a case in which local school district employees challenge a policy adopted by the school district.

The Ninth Circuit's decision in *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 714 F.2d 946 (9th Cir. 1983) is particularly instructive. In that case, the NAACP sought injunctive relief against various state agencies and officials, including the Governor, on allegations that the State had unconstitutionally created and maintained segregated schools in Los Angeles. *NAACP*, 714 F.2d at 947-48. In analyzing whether the plaintiff had demonstrated a sufficient connection between the defendants and the alleged injuries for purposes of *Ex parte Young*, the Court described how state-level decisions and policies in the education sphere were alleged to have fostered the *de jure* segregation. *Id.* at 952. And yet, despite finding a sufficient connection for some state-level actors, the Court flatly rejected the notion that the Governor's generalized duty to faithfully

execute the law, including education law, was sufficient to support an exception to immunity under *Ex parte Young*. *Id.* at 953.

Plaintiffs acknowledge that *NAACP* is "directly on point," but attempt to minimize its relevance by arguing that the plaintiff there did not seek to enjoin the Governor from enforcing allegedly unconstitutional state laws. ECF No. 98 at 30. They further argue that the plaintiff (and Court) mistakenly understood the Governor's powers in the sphere of public education as "'limited to making general policy and budget recommendations.'" *Id.* (quoting *NAACP*, 714 F.2d at 953). But nothing in Plaintiffs' opposition identifies any basis for this Court to part with the Ninth Circuit's binding (and correct) conclusions about the limits on the Governor's direct enforcement power.

Moreover, contrary to Plaintiffs' arguments, the specific injunctive relief sought in *NAACP* has no tendency undermine the controlling nature of the Court's immunity holding in this case. What was important for the Ninth Circuit, and what Plaintiffs try to side-step, was that "[t]he Governor's connection with the unconstitutional acts alleged . . . [was] much more tenuous" than other state agencies and officials. *NAACP*, 714 F.2d at 953. And that holding matters all the more here, where Governor Newsom is even further removed from enforcement of the EUSD policy at the heart of this case. If the Governor's generalized executive powers with respect to California education law was insufficient in *NAACP*—a case alleging constitutional harm based on *state-level policy decisions*—it necessarily follows that the Governor is also immune where identical allegations of generalized enforcement power are made with respect to a *local policy*. Indeed, state law expressly grants local school districts authority to "initiate and carry on any program, activity, or … otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law," Cal. Educ. Code § 35160, and EUSD relied on this authority in adopting the policy, underscoring that the Governor had no connection to the challenged action.

In attempting to bolster their invocation of *Ex parte Young*, Plaintiffs further highlight several press releases issued by Governor Newsom on other education-related topics (not EUSD's policy), describing such statements as "enforcing California education policy." ECF No. 98 at 28. But simply calling statements "enforcement" does not make it so. Though the highlighted press releases undoubtedly evidence the Governor's awareness of and concerns for public education issues in California, nothing in these statements satisfies Plaintiffs' burden to demonstrate that Governor Newsom has any direct enforcement power to dictate that EUSD or any other school district adopt a policy akin to the one challenged in this lawsuit. To the contrary, the cited press releases involving Temecula Valley Unified School District demonstrate that he criticized the district's actions, proposed legislation in response, and procured textbooks, but he did not purport to override the local school district's decision, *even though that decision would lead to violations of state law*.

Plaintiffs further contend the Governor is a proper party "in light of the extreme finger-pointing" by other state officials named as defendants in this case. ECF No. 98 at 29. This point, however, has no legal significance to the present jurisdictional inquiry. That other state-level defendants in a case deflect responsibility for a plaintiff's alleged injuries (or accurately assert that they are not responsible) does not give license to the plaintiff to simply haul the Governor into federal court as a surrogate for the State based on his role as the State's chief executive. *NAACP*, 714 F.2d at 953. Plaintiffs' assertion that "the buck stops with Governor Newsom" does not suffice to bypass Eleventh Amendment immunity.

Plaintiffs list gubernatorial powers and specific conduct they claim plausibly connects Governor Newsom to the asserted constitutional injuries. *See* ECF No. 98 at 29-30. For instance, Plaintiffs allege that the Governor purportedly has the "direct ability to veto litigation by the Attorney General." *Id.* at 29 (citing *People ex rel. Deukmejian v. Brown*, 29 Cal. 3d 150, 157 (1981)). To the extent this is a

reference to the Attorney General's recent litigation against Chino Valley Unified School District for its categorically different forced-disclosure policy, as explained in the Attorney General's motion to dismiss, that litigation does not logically support a conclusion that EUSD's restriction on disclosure is required under penalty of Attorney General enforcement. *See* ECF No. 96 at 16-17.

More importantly, Plaintiffs mischaracterize the holding of *Deukmejian*, a case that involved a lawsuit filed by the Attorney General *against* the Governor, the Controller, and two state boards seeking to enjoin implementation of a duly enacted statute. *See* 29 Cal. 3d at 154. The California Supreme Court held that the Attorney General could not maintain the action because, having previously represented the Governor and other defendants in the same matter, he was ethically prohibited from taking a position adverse to a former client, *see Deukmejian*, 29 Cal. 3d at 153-54, 157-58, and lacked authority to challenge the legality of a state statute or sue the Governor, *id.* at 158-59. The Court did not, as Plaintiffs suggest, hold that the Governor has veto power over, or can otherwise control, litigation decisions by the Attorney General in enforcement actions brought on behalf of the People or is in any way vicariously responsible for the Attorney General's conduct.

As for Plaintiffs' argument that the State Board of Education (SBE) is "'responsible to [the Governor],'" ECF No. 98 at 29 (quoting *Honig*, 13 Cal. App. 4th at 732), even if it is assumed that SBE has some direct enforcement power that could essentially render EUSD's policy mandatory and attributable to SBE, "general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit," *Eu*, 979 F.2d at 704.

Finally, the allegation that Governor Newsom "just killed a legislative response" concerning transgender student rights, ECF No. 98 at 29-30, is likewise faulty. Even if this allegation could be substantiated, absolute legislative immunity attaches to all actions taken by the Governor in the sphere of legislative activity.

Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998).[1] Still, to the extent the Governor's alleged legislative conduct is intended to show awareness and interest in issues concerning transgender student rights, such evidence, like the Governor's press-release statements, has no tendency to establish the type of direct enforcement connection to EUSD's policy that is required under *Ex parte Young*.

II. PLAINTIFFS HAVE NOT IDENTIFIED ANY INJURY TRACEABLE TO GOVERNOR NEWSOM AND THUS CANNOT ESTABLISH STANDING REQUIRED TO SUE THE GOVERNOR

For the same reasons discussed above, Plaintiffs cannot establish that their alleged constitutional injuries are fairly traceable to Governor Newsom for the purposes of Article III standing. As explained in the motion, to satisfy the causality element of standing, Plaintiffs must demonstrate a "line of causation between the [Governor's] action and [their] harm [that is] more than attenuated." ECF No. 95 at 18; *Wash. Env't Council v. Bellon*, 732 F.3d 1131, 1142 (9th Cir. 2013). Where the chain of causation involves multiple third parties whose independent decisions significantly affect the plaintiff's injuries, the causal chain becomes too weak to support standing. *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011).

As detailed above, Plaintiffs have not alleged that the Governor has any actual enforcement authority that could arguably link him as a cause of the purportedly injurious EUSD policy. Rather, Plaintiffs' theory of causation unpacks as follows: EUSD enacted and enforces a policy that causes Plaintiffs' constitutional harm; some state-level officials and/or agencies have enforcement power that, in effect, causes EUSD to maintain its policy; and the Governor, as chief executive and enforcer of California's law, is responsible for directing and overseeing the power

[1] The exhibit Plaintiffs submit to substantiate this claim, a newspaper article, does not indicate that Governor Newsom did anything to halt any piece of legislation. *See* Declaration of Paul Jonna in support of Plaintiffs' Opposition, Ex. 5. In any case, to the extent Plaintiffs request that this Court take judicial notice of this newspaper article, the Governor objects because the facts contained within this article are not "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

of these state-level actors, thus rendering the Governor a fairly traceable cause of Plaintiffs' injuries. *See* ECF No. 98 at 28-31.

At each level of this theoretical chain of causation, however, "independent decisions" of the state and local officials below the Governor vitiate his connection to Plaintiffs' alleged injuries. *Maya*, 658 F.3d at 1070. Indeed, Plaintiffs have not alleged and cannot show that the Governor directly controls the actions of any of the state-level defendants in this matter, let alone the local officials at EUSD who originally enacted and maintain the injury-causing policy. As to the Attorney General, for instance, even if it is assumed that the Attorney General's separate litigation against another school districts on unrelated issues could demonstrate that the Attorney General was a cause of allegedly injurious EUSD policy (it cannot), state law affirmatively establishes the Attorney General's independent authority to bring such litigation. *See* Cal. Const. Art. V, §§ 1, 6, 13; Cal. Govt. Code §§ 12010-12019 (powers of the Governor), 12510-12534 (powers of the Attorney General). In that sense, even under Plaintiffs' theory of causation, the fact that the Attorney General exercises independent litigation authority and decision-making severs any asserted traceability to the Governor.

This applies even more so with the local EUSD officials in Plaintiffs' chain of causation, who are twice removed from any action of the Governor. Under Plaintiffs' theory of standing, EUSD believes (mistakenly) that it may be subjected to state-level enforcement if it does not maintain its policy. But the decision by district officials to keep and enforce its policy against Plaintiffs is, itself, an independent decision that breaks the chain of causation with respect to the Governor. As previously noted, Plaintiffs, the Governor, the Attorney General, and the State Education Defendants all agree that EUSD's policy is not required by any California law—much less a law that is enforced directly by the Governor. *See* FAC ¶¶ 219 ("As stated above, it is clear that EUSD's Parental Exclusion Policy, as documented in AR 5145.3, is not required by any provision in California law"),

247, 283. California law reinforces that EUSD has authority, as a local entity established under state law, to adopt or not adopt the policy, *see* Cal. Educ. Code section 35160, and EUSD used that authority to adopt this policy. Thus, under Plaintiffs' own theory of causation, EUSD's conduct in enforcing its policy based on a mistaken perceived threat of state-level enforcement is doubly attenuated from any possible action taken by the Governor.

III. LAW OF THE CASE DOCTRINE DOES NOT APPLY HERE AND SANCTIONS ARE UNWARRANTED

In their opposition, Plaintiffs reference the "law of the case" doctrine in an apparent effort to paint the arguments in the Governor's motion to dismiss as seeking reconsideration of issues already decided. ECF No. 98 at 20 (citing *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997)). Because they believe the Governor's asserted grounds for dismissal are "duplicative" and "frivolous," Plaintiffs ask for sanctions pursuant to 28 U.S.C. § 1927 and this Court's inherent authority to impose sanctions under Local Rule 83.1. ECF No. 98 at 20-21, 31-34.

Law-of-the-case doctrine ordinarily precludes a court from reexamining an issue previously decided by the same court or a higher court, in the same case. *United States v. Jingles*, 702 F.3d 494, 499-500 (9th Cir. 2012). The doctrine is discretionary, not mandatory, and is in no way a limit on the Court's power. *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001). For the doctrine to apply, the issue in question must have been "decided explicitly or by necessary implication in [the] previous disposition." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000).

Here, the issue of Eleventh Amendment immunity and standing as to the Governor was not decided in the Court's earlier order. To the contrary, in denying the State Education Defendants' motion to dismiss, the Court placed explicit evidentiary and party caveats on its ruling, finding, "*[w]ith no evidence to the contrary at this point*, it must be concluded that *the State* is the driving force behind

EUSD's alleged violations of plaintiffs' constitutional rights." ECF No. 42 at 32 (emphasis added). To that point, in later ordering Plaintiffs to add the Attorney General and the State, it is apparent that the Court sought inclusion of all parties who could *possibly* be responsible for Plaintiffs' injuries. *See* ECF No. 75 at 55.

Moreover, Plaintiffs cite no authority for the proposition that law-of-the-case doctrine applies to bar a defendant newly added to a civil lawsuit from raising a challenge to the court's jurisdiction to hear a case against them. Indeed, as Plaintiffs purport to apply the doctrine here, law-of-the-case would permanently deprive the Governor and Attorney General from pressing specific arguments based on their individualized circumstances and connection to the Plaintiffs' claimed injuries. But the mere fact that one of these parties—the Attorney General—was referenced in the Court's prior decision rejecting standing and immunity claims by the State Education Defendants cannot extinguish the Attorney General's (or the Governor's) ability to make their own challenges to the Court's jurisdiction. *See, e.g.*, *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119-20 (S.D. Cal. 2007) (the right of a defendant to bring a motion to dismiss was not foreclosed by prior finding, during *sua sponte* civil action screening, that prisoner has stated a claim, because the right to file a motion to dismiss as a responsive pleading is a "basic procedural right" afforded to all defendants).

Here, the Governor has raised individualized jurisdictional arguments based on his unique characteristics, responsibilities, and conduct as it relates (or, more accurately, does not relate) to Plaintiffs' alleged constitutional injuries. The Governor's exercise of his "basic procedural right" to file a motion to dismiss was, by definition, and on these facts, neither unreasonable nor in bad faith. Law-of-the-case doctrine does not apply and sanctions under any mechanism are unwarranted.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed as to Governor Newsom in its entirety without leave to amend.

Dated: March 22, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: **Mirabelli et al. v. Olson, et al.** No. **3:23-cv-0768-BEN-VET**

I hereby certify that on March 22, 2024, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

GOVERNOR NEWSOM'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on March 22, 2024, at Sacramento, California.

Kevin L. Quade	*/s/ Kevin L. Quade*
Declarant	Signature