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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CRUZ
UNLIMITED CIVIL CASE

H.N., a minor, by Justing Nordgreen his guardian,

Plaintiff,

vs.

SCOTTS VALLEY UNIFIED SCHOOL DISTRICT, et al and DOES 1 to 50, inclusive,

Defendants.

Case No.: 22CV01828

PLAINTIFF'S OPPOSITION TO DEFENDANT'S DEMURRER

Date: January 10, 2023
Time: 8:30 a.m.
Dept: 5
Judge: Hon. Timothy Volkmann

Complaint filed: 8/24/22
Trial Date: Not Yet Set

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I. INTRODUCTION

Defendants, in arguing that Plaintiff's causes of action fail, simply show they misunderstand the law. Educators have one job – to create environments where children thrive. Parents entrust their most precious part of their lives to educators daily. It is arguably is the greatest act of trust given to a government employee by a parent. School districts must take care of children in their care and are prohibited by law from harming them while in their care. This case seeks to hold Defendant educators accountable for harming H.N. by treating him like a prisoner to force him to comply with recommendations Scotts Valley Unified School District("SVUSD"), and its employees, erroneously believed was their job to enforce. Accordingly, the demurrer should be overruled and paragraph number 83 be edited on the record. If the Court disagrees, the Plaintiff respectfully requests leave to amend per the Court's directive so these educators, who acted in ways unbecoming an educator, can be held accountable.

II. ARGUMENT IN OPPOSITION TO DEFENDANTS' DEMURRER

A. Defendants are Not Statutorily Immune from Mentally Traumatizing a Child

Defendants appear to argue that their acts of coercively pressuring a 6/7 year old healthy child and isolating him from his peers in a storage classroom, making him run laps, chasing him around the playground and scaring him, sending him to the office and the nurse as if he was in trouble repeatedly, making him eat alone, humiliating him in front of his peers, grabbing signs out of his hands, and refusing to let him speak to his peers – all which traumatized him to the point that he started drawing pictures of his teacher hitting him over the head with a mallet – are acts "of discretion" from which they are immune (Complaint ¶75; Demurrer 5:7-9) and that these acts "fell within the scope of their authority. Demurrer 5:9. Defendants' argument misconstrues the statutes relating to public entity liability and a school district's authority. Plaintiff takes each issue in turn.

B. Defendant's Acts Not Subject to Discretionary Function Exception

Defendants cite Gov Code §820.2 for the proposition that "public entity" immunity is the unquestionable legal standard. Demurrer 4:27-28-5:1-5. Our California Supreme Court has been clear that immunity based on 820.2 is an *exception* that requires "a strong showing…justify "discretionary function" immunity". Gov Code § 820; *Johnson v. State of California*, (1968) 69 Cal. 2d 782, 798. "The liability of a public employee is clear. "…the general rule is that an employee of a public entity is liable for his torts to the same extent as a private person (§ 820, subd. (a)) and the public entity is vicariously liable for any injury which its employee causes (§815.2, subd. (a)) to the same extent as a private employer (§ 815, subd. (b))." (Citations omitted) *C.A. v. William S. Hart Union High School Dist*., 53 Cal. 4th 861, 868; *D.V. v. City of Sunnyvale*, 65 F. Supp. 3d 782, 785. Simply, the legislature has not granted immunity for every act or omission. *Elton v. County of Orange*, (1970) 3 Cal. App. 3d 1053, 1057.

The illustrative *Johnson* analysis has been upheld and applied by our California Supreme Court in later years. "…although a basic policy decision may be discretionary and thus warrant governmental immunity, subsequent operational actions in the *implementation* of that basic decision still must face case-by-case adjudication on the question of negligence. *Barner v. Leeds*, (2000) 24 Cal. 4th 676, 687. It is illustrative as it carefully analyzes the definition of discretion which is helpful in this case. "Generally speaking, a discretionary act is one which requires the exercise of judgment or choice. "Discretion" has also been defined as meaning equitable decision of what is just and proper under the circumstances." (Citation omitted) Finally, "[a] discretionary act is one which requires 'personal deliberation, decision and judgment…'" *Johnson v. State of California,* (1968) 69 Cal. 2d 782, 788. There is nothing "just and proper" about confining a healthy child to a storage classroom for days.

The acts of isolation, pressure and humiliation in violation of H.N.'s constitutional and statutory rights engaged in by the Defendants engaged in were at best negligent, at worst tragically cruel, and cannot reasonably be characterized as a "sensitive decision implicating fundamental policy concerns warranting judicial abstention." *Id.* Notably, the *Johnson* Court concluded the discretionary acts and omissions of public employees for which §820.2 provides immunity from liability are only those which involve basic policy decisions. *Elton v. County of Orange,* 3 Cal. App. 3d 1053, 1058. This exception does not apply here.

Defendants failed to analyze their acts applying these standards. In a case involving the failure of those responsible for the care of children to prevent physical and mental trauma it was held that 'to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision." *Elton v. County of Orange*, (1970) 3 Cal. App. 3d 1053, 1058.

Here, the Defendants' decision to put a 6/7 year old, who was perfectly healthy, in a storage classroom, away from his peers, make him exercise and eat alone, and humiliate and scold him for no wrong doing to the point he drew drawings of being hit on the head with a mallet cannot be argued to be a "considered decision" "requiring judicial abstention." Complaint Ex. 4. While the acts may be based on decisions made out of factually baseless fear, the trauma it caused H.N. is real, and this actionable conduct surely must go before a jury so they can decide how to hold these so called educators accountable.

C. School Districts Have No Authority to Harm Children

Defendants also argue that their conduct outlined in Plaintiff's complaint were "within the scope of their authority." Demurrer 5:9. Defendants cite *Hardy v. Vial*, (1957) 48 Cal. 2d 577, 583 in

support. *Hardy* is notably prior to *Johnson* and factually distinguishable as the act at issue for which immunity was found in *Hardy* was a conspiracy "to accomplish the dismissal of plaintiff from his employment." The other cite offered by Defendants for the proposition that §820.2 provides absolute immunity is *DiLoreto v. Board of Education*, (1999) 74 Cal. App. 4th 267, 282 which is likewise factually distinguishable. The *Diloreto* Court merely held that the school employees did make a reasoned decision when they refused to post a religious ad on a public high school baseball field fence. Accordingly, neither case cited by Defendants supports or addresses the claimed authority of a school district to mandate an experimental mask. Complaint ¶¶56-57.

Instead, the state of the law is that school districts do not have the authority to act as health officers and certainly cannot mentally traumatize children based on the mistaken belief they can do so. The Constitution, and more precisely the Legislature itself, have ceded some discretionary control to local school districts relating to education *not health*. Since 1973 the Constitution has provided that the Legislature may authorize the governing boards of all school districts to 'initiate and carry on any programs, activities, or to otherwise act in any manner ***which is not in conflict*** with the laws and ***purposes*** for which school districts are established.*'* (Cal. Const., art. IX, § 14.) Education Code §35160 mimics the Constitution which notably qualifies the authority of a school district based on the *purpose* of a school district:

> '[T]he governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner *which is not in conflict with or inconsistent* with, or preempted by, *any law* and *which is not in conflict with the* **purposes** *for which school districts are established*.' *Emphasis added.*

It is undisputable that a school district's main job is to *educate* children. Nothing in the grant of authority from the legislature to school districts allows a school district to make or even enforce health orders or mandate experimental masks on healthy children to respond to a pandemic.

> "The Legislature hereby recognizes that, because of the common needs and interests of the citizens of this state and the nation, there is a need to establish a common state curriculum for

> the public schools, but that, because of economic, geographic, physical, political and social diversity, there is a need for the **development of educational programs at the local level, with the guidance of competent and experienced educators and citizens.** Therefore, it is the intent of the Legislature to set broad minimum standards and guidelines for **educational programs**, and to encourage local districts to **develop programs** that will best fit the needs and interests of the pupils, pursuant to stated philosophy, goals, and objectives." *Burton v. Board of Education*, 71 Cal. App. 3d 52, 58. **Emphasis added.**

Health officers, in contrast, do have police power to issue and enforce health orders. The legislature has also been very clear in its delegation of duties to state and local health officers. Under Chapter 3 of the California Health and Safety Code, it is the job of the local health officer…

> "knowing or having reason to believe that any case of the diseases made reportable by regulation of the department, or any other contagious, infectious … disease exists, or has recently existed, within the territory under his or her jurisdiction, shall take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases." Health & Saf Code § 120175; § 120195.

By the plain meaning of the language in the relevant health and safety codes, it is clearly the duty of the health officer to issue and enforce health orders related to public health *not a school district.* Cal Health & Saf Code § 101030. The bottom line is only health officers have the power to enforce orders that are necessary based on verifiable factual conditions. If young H.N. was even sick, and masks worked, it would be within the purview of the health officials to enforce them not educators. At best, the only authority a school district has in this situation is to send a sick child home. Ed code §49451

D. Plaintiff's Second Cause of Action for False Imprisonment is Sufficiently Pled

Defendants then weakly argue that Plaintiff has failed to state a cause of action for false imprisonment because Plaintiff "fails to distinguish Plaintiff's experience from any other child attending school." Demurrer 6:3-4. Seeming to incredulously imply that all children suffer as H.N. did simply by going to school to a classroom every day, Defendants argue that "…if the Court finds false imprisonment in this instance, it must also find false imprisonment in every other case of a

minor child attending school." Demurrer 6:6-7. If putting healthy school children in storage classrooms away from their peers all day *without consent,* and causing them mental trauma as already stated, is not on its face distinguishable from normal school experience of all other children, then we all need to pull our kids out of public school stat! Accordingly, Defendants' arguments fail in their attack on this cause of action by asking this court to make a factual finding and interpret facts.

A demurrer is not the appropriate procedure for determining the truth of disputed facts or what inferences should be drawn when competing inferences are possible. *Ball v. GTE Mobilnet of California* (2000) 81 Cal. App. 4th 529, 534–535 (general demurrer challenges only legal sufficiency of complaint, not truth or accuracy of its factual allegations or plaintiff's ability to prove those allegations). At the pleading stage, all Plaintiff has to do is allege the facts in support of a cause of action. The elements of a false imprisonment cause of action are: (1) the nonconsensual, intentional confinement of a person; (2) without lawful privilege; (3) for an appreciable length of time. *Hagberg v. California Fed. Bank,* 32 Cal. 4th 350, 372-373 (2004) superseded by statute on other grounds. False imprisonment "is the unlawful violation of the personal liberty of another." *City of Newport Beach v. Sasse*, 9 Cal. App. 3d 803, 810. *City of Newport* cites to the restatement of torts which even more clearly lays out the elements:

> (1) An actor is subject to liability to another for false imprisonment if:
> (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and
> (b) his act directly or indirectly results in such a confinement of the other, and
> (c) the other is conscious of the confinement or is harmed by it.
> Restat 2d of Torts, § 35

As facts in support of each of these elements are laid out in paragraphs 55-63 of Plaintiff's Complaint, and most tellingly, the damage that isolating H.N. in a storage classroom for three days alone without his consent is exemplified in the drawing attached to the complaint as Exhibit "4", this cause of action should be allowed to proceed to trial.

E. Plaintiff's Third Cause of Action for IIED is Sufficiently Pled

Defendants argue that an Intentional Infliction of Emotional Distress ("IIED") cause of action is not viable against a school district because "common law claims are unavailable against a public entity as a matter of law." Demurrer 6:19-27. It appears that Defendants cherry picked citations out of some treatise without actually reading the cases. As stated above, the proposition that immunity of a public entity is absolute is not the correct statement of the law. A public entity is vicariously liable for any injury which its employee causes (§815.2, subd. (a)) to the same extent as a private employer (§ 815, subd. (b). Because Defendants failed to make the strong showing that the acts complained of by Plaintiff are subject to the discretionary function required for §820.2 immunity, the demurrer should be overruled.

Defendants cite *Grosz v. Lassen* (2008) 573 F.Supp.2d 1199 for the proposition that because IIED is a "common law claim" unsupported by constitutional requirement or statute, this cause of action may not be alleged against Defendants. As an initial matter, *Grosz* is not found in Lexis. It appears to be a federal 12(b)(6) motion case regarding employment termination that discusses a §1983 claim barred by the eleventh amendment which is not applicable here. On the page cite proffered by Defendants, *Grosz* essentially cites to another case that merely recites the general proposition of governmental immunity without any supporting analysis. Thus, *Grosz* and its citations fail to analyze the discretionary function requisite argued herein. Further, "when interpreting state law, a federal court is bound by the decision of the highest state court." *Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir. 1991). As such, *Johnson v. State of California's* analysis, discussed above, controls here and *Grosz* fails to support Defendants contentions.

Amylou R. v. County of Riverside, 28 Cal. App. 4th 1205, cited by Defendants shepardizes as questionable precedent and does not help Defendant's contentions either. In *Amylou* the county was

found to have immunity because the facts met the three elements of the immunity provided by § 821.6 of the Government Code – a completely irrelevant statute. This immunity is limited to conduct of instituting or prosecuting any judicial or administrative proceeding within the scope of one's employment. Further, the Ninth Circuit reversed the district court's finding of immunity for the county in this case by finding that §821.6 only applies to *malicious prosecution* claims. *Garmon v. County of L.A.,* 828 F.3d 837, 847.

In contrast, *Banks v. Modesto City Schs. Dist*., 2005 U.S. Dist. LEXIS 44295, *34, 2005 WL 2233213 is a case where the Eastern District of California allowed an IIED claim to proceed against individual defendants because the child was handcuffed and pepper sprayed and a teacher *taunted* the child about it. Accordingly, the argument that IIED is foreclosed against fails based *Banks* and §815.2.

Defendants go on to incredulously try to justify the Defendants conduct which mentally harmed H.N. by arguing that socially isolating a 6/7 year old in a storage classroom, which is akin to solitary confinement for a prisoner, for three days against his wishes away from his friends, making him eat alone, run laps and then taunting, humiliating and pressuring him regularly about wearing a mask because his parents chose not to enter him into a medical trial[1] - which *traumatized* him See Complaint Exhibit 4 - is not sufficient facts to support an IIED claim. Demurrer 8:9-17. Notably, Defendants *do not cite any cases* in which IIED has or has not been sufficiently stated to contrast with Plaintiff's allegations. From the standard of a reasonable person of a 6/7 year old, this conduct, whether termed as social isolation or isolation akin to solitary confinement, is without a doubt

[1] A child cannot be entered into a clinical trial without express consent from their parents, and only if there is a benefit and a minimal risk to the child. 45 CFR 46.404,45 CFR 46.408. Further, if there is a greater than minimal risk to the child, there must first be a "direct benefit" to that specific child, and any risk must be "as favorable as" those presented by alternative approaches. 45 CFR 46.405 Per the FDA, an investigational drug can also be called an "experimental drug" and when an experimental drug is administered, it is the equivalent of entering the recipient into a clinical trial. https://www.fda.gov/media/150386/download

absolutely outrageous as it is proven to cause mental damage to young children.[2] Being in a storage closet classroom with someone you hardly know is scary for a 6/7 year old. Accordingly, educators who damage children mentally like H.N. has been damaged should be held accountable. As the *Banks* court found such conduct sufficient, so can this Court find here and overrule this demurrer as to this cause of action.

In the event the Court disagrees with Plaintiff's argument, Plaintiff requests leave to amend to change the status of the Defendants from acting in their capacity as employees to individual status and clarify as to which Defendants this cause of action applies.

As a last, but not least point, the outrageously biased and irrelevant statements made by Defendants cannot be left unaddressed. Defendants claim that equating a prisoner left alone in a cell to isolating a 6/7 year old from his peers is "misleading and false" and that this is a "fate to be expected." Demurrer 8:12-14. Again, such arguments against inferences are not properly made on demurrer but at trial. Defendants continue the inappropriate arguments by contending that somehow the Complaint must "successfully articulate" how the SVUSD was made to enforce policies based on various mandates during a pandemic with "crippling" consequences "exceeded the bounds of decency." Demurrer 8:14-17. While it is not Plaintiff's job to meet Defendant's burden to excuse the trauma they caused to a young 6/7 year old, the complaint does in fact so explain. Paragraph 51 states that the CDPH K 12 guidance never was a mandate as it did not go through the Administrative Procedures Act ("APA") rulemaking process. The federal case that removed masks on airplanes for not following the federal APA is illustrative on this legal point. *Health Freedom Defense Fund, Inc.*

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[2] https://www.aclu.org/files/assets/us1012webwcover.pdf "Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States," Page 20. See also SOCIAL ISOLATION AND POST-COVID NEUROPSYCHOLOGICAL DAMAGE Page 3. "Play behavior profoundly changes the social brain. Play mimics adult behavior and helps establish social rules. The brains of animals that grow up with adults only are different than those exposed to many playmates. Peer relationships are critical." http://tru.uni-sz.bg/tsj/Volume%2020,%202022,%20Number%201,%20Series%20Biomedical%20Sciences/10_E.Encheva.pdf

v. Joseph R. Biden, Jr., Case No: 8:21-cv-1693-KKM-AEP. And, as stated above, school districts do not have any authority to force mask children. See section II(C) herein. Finally, educators certainly do not have authority to traumatize healthy children under the color of law. Ed Code §201; 42 USC §1983.

F. Plaintiff's Fourth Cause of Action Under the Bane Act Is Sufficiently Pled

Defendants make a myriad of arguments contending that the cause of action based on Civil Code §52.1 is insufficient. Defendants argue that a) paragraph 73 should be paragraph 81, b) the cause of action fails to allege a threat of violence, c) the use of the description solitary confinement is improper, and d) speech alone is insufficient to support a Bane Act Claim. Demurrer 9:13-27. Plaintiff takes each issue raised in turn.

First, paragraph 83 in Plaintiff's complaint can easily be amended for the record to refer to paragraph 81 and 86 instead of 73 without having to fully amend the entire complaint. Plaintiff so requests.

Second, Defendants, by arguing *without citing to any legal authority* that an actual threat of violence must be alleged, fail to understand that the showing required at the pleading stage for a Bane Act claim is conduct that amounts to *coercion or intimidation* that interferes, or *attempts to interfere*, with a *constitutional or statutory right*. Cal Civ Code § 52.1(c). In fact, Civil Code Section 52.1 doesn't even use the word violence. Thus, an actual threat of violence is not needed. *D.V. v. City of Sunnyvale*, 65 F. Supp. 3d 782, 789("Section 52.1 does not require threats, coercion, or intimidation independent from the threats, coercion, or intimidation inherent in the alleged constitutional or statutory violation.") "Section 52.1 permits an individual to bring a civil action for interference with his rights under the United States or California Constitutions by threats, intimidation, or coercion." (Citations omitted) "Section 52.1 does not provide any substantive protections; instead, it enables

individuals to sue for damages as a result of constitutional violations." (Citations omitted) "When a § 52.1 claim is premised on the violation of a constitutional right, the court must look to the elements of the constitutional claim to determine whether the § 52.1 claim is meritorious." (Citations omitted) *Stanley v. Cty. of San Diego*, 2018 U.S. Dist. LEXIS 10936.

Here, H.N. alleges he was isolated and confined to a storage classroom away from his peers which is conduct intended to coerce and intimidate him, or attempt to coerce and intimidate him, into putting on a mask. Complaint ¶26, 81-89. He was humiliated for not being vaccinated. Complaint ¶23, 25, 27. The rights violated and the facts to support it are clearly listed in the complaint. Complaint ¶81, 85-86. Yet Defendants are trying to persuade this Court that humiliation of a 6/7 year old into compliance is "to be expected." Demurrer 8:12-14. Notwithstanding the fact that an actual threat of violence is not a requisite, Defendants completely ignore the drawing attached as Exhibit "4" to the Complaint that evinces, very clearly, that H.N. *felt threatened* that violence would happen – namely that he would be hit over the head with a mallet by his teacher for not wearing a mask. Accordingly, Defendants' attack on this cause of action fails.

G. Fifth Cause of Action for Violation of Rights is Not a §1983 Claim Subject to Eleventh Amendment Immunity. Assuming *Arguendo* This Court Disagrees, Immunity Does Not Apply in This Case

Defendants confusingly seem to argue another form of sovereign immunity based on the fact that Plaintiff cited 42 USC §1983 in the header of his cause of action for violation of civil rights. There are several problems with this argument. Most notably is the fact that Plaintiff has not alleged a §1983 claim – he alleged a cause of action for violation of free speech rights under state and federal law – which renders the Eleventh Amendment inapplicable.

Plaintiff's cause of action is generally for violation of civil rights including state and federal rights to free speech. Complaint ¶92-97. The cause of action is plain – a California tort cause of

action for violation of free speech which our California Supreme Court recognized was possible. *Degrassi v. Cook*, 29 Cal. 4th 333, 344. ("This does not mean that the free speech clause, in general, never will support an action for money damages.") The violation of civil rights cause of action simply relies on §1983 for its remedies.

Defendants mainly cite *Sato v. Orange Cty. Dep't of Educ*., 861 F.3d 923, 928 for the proposition that the §1983 claim is barred. However, assuming *arguendo* that qualified immunity somehow applies, Defendants failed to apply the five *Mitchell* factors. Under the Ninth Circuit's current analysis, SVUSD and its officials are protected by the Eleventh Amendment only if, by adopting the subject mask guidance as a mandatory policy and discriminating against Plaintiff, the district acted as an instrumentality of the State of California. To determine whether a government entity is an arm of the state, an examination of the five factors set forth in *Mitchell v. Los Angeles Community College District*, 861 F.2d 198 (9th Cir. 1988) must occur namely:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central government functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

As explained by the Ninth Circuit in *Belanger*, "the first factor is predominant[.]" 963 F.2d at 251. Indeed, the "*most crucial question* is whether the named defendant has such independent status *that a judgment against the defendant would not impact the state treasury*." *Id.* In analyzing this factor, "the relevant inquiry is whether the state will be legally required to satisfy any monetary judgment obtained against the district, not whether state funds will actually be used." *Sato*, 861 F.3d at 929 (citing *Eason v. Clark Cty Sch. Dist.*, 303 F.3d 1137, 1142 (9th Cir. 1995)

Here, unlike in *Belanger* and *Sato*, SVUSD's budget is not predominantly comprised of funds received from the state's general fund pursuant to calculated formula because a significant portion of its current (and recent) revenues are comprised of federal grants. In fact, SVUSD has received nearly

$2.7 million in federal funds since 2020.[3] For the 2022/2023 school year, its projected revenues comprised $2,796,429 is federal funds[4]—representing approximately 20% of its total revenues for that period. Here, unlike in *Sato* and *Belanger*, an award against SDUSD would not necessarily be paid for by the state treasury. Because an award against SVUSD in the present case would not necessarily impact the state treasury, the first *Mitchel* factor weighs against granting SDUSD immunity as an arm of the state.

The second *Mitchell* factor also weighs against granting SVUSD sovereign immunity. Although Plaintiff concedes that SVUSD generally performs central government functions with respect to its role in "educating" children, SVUSD's wrongful actions in this case far exceeded the scope of any duties charged to it by the State of California. Stated simply, adopting, and enforcing an indoor mask mandate to promote "health and safety" is not something "required" of SVUSD. In fact, during all relevant times to the case at hand, there was no legal mandate as argued herein and protection of health and safety belongs to health officers. Defendants can cite no basis in law for compelling SVUSD to mandate masks. Because SVUSD violated Plaintiff's civil rights, and because it did so by acting outside of its role as an arm of the state (*i.e.*, mandating masks has no bearing on SVUSD's role as an educational institution unlike personnel decisions) and because the district had no justification for discriminating against Plaintiff in such a manner, the second *Mitchel* factor weighs against granting SVUSD Eleventh Amendment immunity. Accordingly, deference on this factor should be granted to the injured party. As the court reasoned in *Sato*, the third (capacity to sue and be sued) and fourth (capacity to hold and convey property in its own name) *Mitchel* factors weigh against granting SVUSD Eleventh Amendment Immunity whereas the fifth factor (the corporate

[3] https://edsource.org/2021/california-districts-and-charter-schools-get-covid-relief-funding-under-american-rescue-plan-act/650922
[4] https://go.boarddocs.com/ca/sandi/Board.nsf/files/CFPQKM69B3BC/$file/2022_Local_Control_and_Accountability_Plan_San_Diego_Unified_School_District_20220624%20(1).pdf

status of SVUSD as a political subdivision of the State) arguably weighs in favor of granting the district immunity. Considering the *Mitchel* factors together, the great weight of analysis (four out of five prongs, including the predominant first) support the conclusion that Defendants should not be entitled to sovereign immunity.

Defendants cite the vastly criticized case *Monell* for the proposition that causation is required which literally makes no sense. The Ninth Circuit notes that "California, however, has rejected the *Monell* rule and imposes liability on counties under the doctrine of respondeat superior for acts of county employees; it grants immunity to counties "only where the public employee would also be immune." (Citation omitted) "Thus, should [plaintiff] prevail on her excessive force claim, liability could extend to the County." (Citation omitted) *Stanley v. Cty. of San Diego*, 2018 U.S. Dist. LEXIS 10936, *24. The United States Supreme Court has held that *cities, counties, and local officers* sued in their official capacity are themselves "persons" for purposes of section 1983 and, although they cannot be held vicariously liable under section 1983 for their subordinate officers' unlawful acts, they may be held directly liable for constitutional violations carried out under their own regulations, policies, customs, or usages by persons having "final policymaking authority" over the actions at issue. *Venegas v. County of Los Angeles*, 32 Cal. 4th 820, 829.

Assuming *arguendo* the Court finds that somehow Plaintiff's claim is actually a §1983 claim or somehow the qualified immunity applies, Plaintiff seeks leave to amend to name the Defendants in their personal capacity. "Personal-capacity suits . . . seek to impose individual liability upon a government officer for actions taken under color of state law. While the plaintiff in a personal-capacity suit need not establish a connection to governmental "policy or custom," officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law." *Pena v. Gardner,* 976 F.2d 469,

473. The eleventh amendment "bar is not automatically applicable to a suit brought against a state official in his individual capacity alleging the commission by him of a common law tort in the course of his employment"), *aff'd sub nom. Kush v. Rutledge,* 460 U.S. 719. Otherwise, Plaintiff can amend to move the civil rights violations to be under the Bane Act claim as the free speech violations would properly be "conduct that amounts to *coercion or intimidation* that interferes, or *attempts to interfere*, with a *constitutional or statutory right*." Civil Code 52.1.

CONCLUSION

For all the reasons stated herein, Defendant's demurrer should be overruled. In the event the Court disagrees, Plaintiff requests leave to amend as stated herein.

Dated: December 26, 2022

Respectfully submitted,

Tracy L. Henderson, Esq.

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PROOF OF SERVICE

The undersigned declares as follows:

I am a citizen of the United States and employed in the County of Monterey, State of California. I am over the age of 18 and not a party to the within action; my business address is:

PO BOX 221562, Carmel CA 93923

On this date, I served the foregoing documents described as on the interested party(ies) listed below in this action as follows:

PLAINTIFF'S OPPOSITION TO DEFENDANT'S DEMURRER

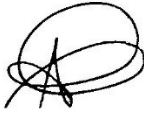
MARK E. DAVIS
Davis, Bengston and Young APLC
1960 The Alameda STE 210
San Jose, CA 95126

__X__ **BY MAIL**: By placing a copy(ies) thereof in a sealed envelope(s) addressed to the above-listed person(s) and place(s) of business and deposited with the U.S. Postal Service on the same day, with postage fully prepaid, at Monterey, California, in the ordinary course of business. I am aware that, on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing affidavit.

_____ **BY FACSIMILE:** The above-referenced document(s) was faxed to the above-listed person(s) and/or place(s) of business at the above-listed fax number(s). the facsimile machine used complies with California Rules of Court, Rule 2003(3), and no error was reported by the machine.

__X__ **BY ELECTRONIC MAIL PER EMERGENCY RULE 12**: By electronically serving the document(s) to the electronic mail address set forth above on this date

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 26, 2022 at Carmel, California.



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Tracy L. Henderson