

Docket No. 21-56259

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*In the*  
**United States Court of Appeals**  
*for the*  
**Ninth Circuit**

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**JOHN DOE, et al.,**  
*Plaintiffs-Appellants,*

v.

**SAN DIEGO UNIFIED SCHOOL DISTRICT, et al.**  
*Defendants-Appellees.*

On Appeal from the United States District Court  
for the Southern District of California  
Case No. 21-cv-01809-CAB-LL,  
Hon. Cathy Ann Bencivengo, District Judge

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**DEFENDANTS-APPELLEES'  
MOTION TO DISMISS APPEAL AND REMAND TO  
DISTRICT COURT IN LIGHT OF  
CHANGED CIRCUMSTANCES**

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## TABLE OF CONTENTS

	Page
MOTION TO DISMISS APPEAL AND REMAND.....	5
INTRODUCTION.....	5
FACTUAL AND PROCEDURAL BACKGROUND.....	7
ARGUMENT .....	14
I. Appellees do Not Contend the Entire Case is Moot .....	14
II. This Appeal is Moot Based on Changed Circumstances, and Should be Dismissed and the Remanded to the District Court .....	14
AFFIDAVIT [FRAP 27(A)(2)(B) AND CIRCUIT RULE 27-1(2)], AND CONCLUSION.....	16
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES

	Page(s)
<b>FEDERAL CASES</b>	
<i>Church of Scientology of Cal. v. United States</i> , 506 U.S. 9 (1992).....	15
<i>Doe v. San Diego Unified School District</i> , 19 F.4th 1173 .....	10
<i>Doe v. San Diego Unified School District</i> , 2021 WL 5396136 (S.D. Cal 2021).....	10
<i>Doe v. San Diego Unified School District</i> , 22 F.4th 1099 .....	10
<i>Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.</i> , 528 U.S. 167 (2000).....	14
<i>Genesis Healthcare Corp. v. Symczyk</i> , 569 U.S. 66 (2013).....	15
<i>Mills v. Green</i> , 159 U.S. 561 (1895).....	15
<i>New York State Rifle &amp; Pistol Ass’n, Inc. v. City of New York</i> , 140 S.Ct. 1525 (2020) (per curiam).....	16
<i>Tandon v. Newsom</i> , 141 S.Ct. 1294 (2022).....	14
<i>United States v. Munsingwear, Inc.</i> , 340 U.S. 36 (1950).....	15
<b>OTHER AUTHORITIES</b>	
Circuit Rule 27-1(2) .....	16, 17

FRAP 27(A)(2)(B) .....	16
<a href="https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a217.htm">https://www.supremecourt.gov/search.aspx?filename=/docket / docketfiles/html/public/21a217.htm</a> .....	10
U.S. Constitution First Amendment.....	9

## **MOTION TO DISMISS APPEAL AND REMAND**

Appellees move this Court for an order dismissing the current appeal as moot, and remanding the case to the district court for further proceedings in light of changed circumstances. The basis for Appellees' motion is straightforward: 1) this appeal raises the application of specific facts to clearly-articulated legal principles; and 2) the record before the district court, and Appellants' opening brief based on that record, relate to a set of facts that no longer exist.

### **INTRODUCTION**

This lawsuit challenges the constitutionality of a "Vaccination Roadmap" ("Roadmap"), adopted by the Board of Education ("Board") of Appellee San Diego Unified School District ("District") on September 28, 2021, under which students would be subject to a requirement to be vaccinated against COVID-19 beginning in January, 2022. Implementation of that requirement was delayed, and two additional recent events have prompted Appellees to bring this matter to the Court's attention through this motion. First, on February 18, 2022 the Supreme Court denied Appellants' application for injunctive relief and a writ of certiorari in this case, without addressing the merits, "in light of

changed circumstances” arising from the “delayed implementation of the challenged policy” and because the District “has not settled on the form any policy will now take.” See Dkt. 33.<sup>1</sup> This is a rather strong indication that the high Court considers the factual record before the appellate courts hypothetical and insufficient based on changed circumstances. Second, as of March 8, 2022 the Board has “settled on the form [the] policy will now take,” through specific action taken on that date, and that policy includes factual differences and distinctions from the Roadmap, from the record before the district court, and from Appellants’ Opening Brief, that would render a decision on Appellants’ opening brief an advisory opinion.

Jurisdictional principles, the interest of judicial efficiency, and correlative interest in decisions (trial court and appellate) being based on actual rather than hypothetical facts, warrant dismissal of the appeal and a remand to the district court for further proceedings in light of the changed circumstances.

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<sup>1</sup> Citations to docket numbers in this appeal are referred to as “Dkt. \_\_\_,” and citations to the docket of District Court Case No. 3:21-cv-01809-LL-MDD are referred to as “DC Dck. \_\_\_.”

## FACTUAL AND PROCEDURAL BACKGROUND

The Roadmap laid out a plan, with specific deadlines and parameters, for implementation of a requirement that District students be vaccinated against COVID-19. DC Dkt. 1, pp. 21-38. The Roadmap provided for and required the following:

1. All District students were subject to the vaccination requirement, once the Food and Drug Administration (“FDA”) gave full approval of a COVID-19 vaccine for the student’s age group. *Id.* at 36.

2. Students age 16 and older as of November 1, 2021 were immediately subject to the vaccination requirement, and these students were required to receive their first vaccination shot by November 29, 2021, and their second vaccination shot by December 20, 2021. *Id.* at 34, 62.

3. Consistent with state law for other required vaccines, the Roadmap provided for a narrow medical exemption for students who, based on objective evidence, could not be safely vaccinated against COVID-19. *Id.* at 36.

4. Consistent with state law for other required vaccines, the Roadmap did not include an exemption for religious or personal beliefs.

*Ibid.*

5. Consistent with state law for other required vaccines, the Roadmap gave newly-enrolling students in certain vulnerable populations (migrant students, homeless students, foster youth, and students from military families) additional time to comply with the requirement that other students were not provided. *Ibid.*

6. The Roadmap did not specify when students who turned 16 after November 1, 2016 would be subject to the vaccination requirement. *Id.* at 33-35.

7. The Roadmap did not specify when newly-enrolling students already FDA-approved for the vaccine would be required to be vaccinated/provide proof of vaccination. *Ibid.*

8. The Roadmap did not specify when students under age 16 would be subject to the vaccination requirement after full FDA approval occurred for their age group. *Ibid.*

9. The Roadmap provided that students with disabilities — students with an Individual Education Program — would be subject to the mandate consistent with the due process rights of the student under state and federal law. *Id.* at 36.

The suit was filed on October 22, 2021, twenty-four (24) days after adoption of the Roadmap. *Id.* at 1-77. Appellants’ prayer for relief sought an “order and judgment declaring that the [Roadmap], facially and as-applied to Plaintiff Jill Doe (“JD”), violates the First Amendment to the U.S. Constitution,” and an “order temporarily, preliminarily, and permanently enjoining and prohibiting Defendants from granting any exemptions to the [Roadmap],” based on the provisions and parameters of the Vaccination Roadmap, unless JD was also exempted. *Id.* at 18.

Ten (10) days after filing the lawsuit, on November 1, 2021, Appellants filed an ex parte application for a temporary restraining order and order to show cause re: preliminary injunction, seeking the following order:

Defendants, their agents, employees, and successors in office, are restrained and enjoined from granting any exemptions to the Vaccination Roadmap for medical reasons, foster youth, homeless youth, migrant youth, students with an IEP, and members of military families, unless they give the exact same or a better exemption to Plaintiff Jill Doe, who cannot get vaccinated for religious reasons.

DC Dkt. 7, p. 2. After full briefing, on November 18, 2021 the district court denied Appellants’ application and stated it would not grant an

injunction pending appeal. See DC Dkt. 20; *Doe v. San Diego Unified School District*, 2021 WL 5396136 (S.D. Cal 2021).<sup>2</sup>

Appellants immediately appealed and filed an urgent motion in this Court for an injunction pending appeal, and on December 4, 2021, after expedited briefing, this Court denied Appellants' urgent motion. See Dkt. 5-6, 9, 11, 18; *Doe v. San Diego Unified School District*, 19 F.4th 1173. Six days later, on December 10, 2021 Appellants filed an emergency application in the Supreme Court for writ of injunction or, in the alternative, petition for writ of certiorari and stay pending resolution.<sup>3</sup> A week later, on December 17, 2021, three days prior to the Roadmap's deadline for a second vaccination shot, Appellants filed a motion with this Court for reconsideration en banc, which was denied on January 14, 2022. See Dkt. 22, 28; *Doe v. San Diego Unified School District*, 22 F.4th 1099. While this Court considered Appellants urgent motion and motion for reconsideration en banc, the deadline for

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<sup>2</sup> In addition to concluding that Appellants had failed to establish a likelihood of success on the merits and irreparable harm, the court concluded that Appellants lack standing because the District could comply with an injunction that would place "Jill Doe ... in the same position she is now." *Id.* at \*2.

<sup>3</sup> <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a217.html>

Appellants to file their brief on the merits was extended twice, ultimately to February 17, 2022. See Dkt. 21; Dkt. 29.

Appellants Opening Brief acknowledges some “related developments” since the creation of the record in the district court, see Dkt. 30, pp. 22-23, and points to their February 11, 2022 letter to the Supreme Court (in response to an email to the Court Clerk from Appellees) acknowledging that the Board would be considering further action on February 22, 2022, but presumes that the issue before this Court is and will continue to be the specific provisions of the Roadmap. See Dkt. 30, fns. 1 and 9.

A day after Appellants filed their Opening Brief, on February 18, 2022, the Supreme Court denied Appellants’ application for injunctive relief and a writ of certiorari, stating:

The application for injunctive relief presented to Justice Kagan and by her referred to the Court is denied in light of changed circumstances. Because respondents have delayed implementation of the challenged policy, and because they have not settled on the form any policy will now take, emergency relief is not warranted at this time. Applicants’ alternative request for a writ of certiorari before judgment and a stay pending resolution is denied for the same reason. The Court’s denial is without prejudice to applicants seeking a new injunction if circumstances warrant.

See Dkt. 33. It is thus without dispute that the Roadmap challenged in this lawsuit was not implemented by the District, and accordingly, it is also without dispute that the record in the district court, and therefore the record in this appeal, was directed at and addressed the Roadmap and “the form [that] policy [would] take” upon implementation in January, 2022. The record on appeal and Appellants’ brief are based on the specific facts and parameters of the unimplemented Roadmap, not the “form any policy will now take.”

On February 22, 2022, after Appellants’ brief was filed, the Board took action approving a plan for implementation of student the vaccination requirement after the end of the current school year. Affidavit, *infra*, ¶ 1 and Ex. A. More specifically, for the two issues raised in this lawsuit (participation in in-person instruction and participation in extracurricular activities), no student will be required to initiate the process of being vaccinated against COVID-19 until August 6, 2022 (for extracurricular activities) or September 6, 2022 (for in-person instruction). *Ibid.* Following this general decision and direction, on March 8, 2022 the Board adopted a new plan implementing a vaccination requirement to be implemented for the fall,

2022 semester that is factually and substantively distinct from the Roadmap, not only because certain Roadmap deadlines are long passed but because certain components of the Roadmap are not in the Resolution implementing the new requirement. *Ibid.* For example, there is no longer a mid-semester (November 1, 2021) age cutoff for students already within the FDA-approved age 16 and up category; deadlines coincide with the start of activities/instruction for a season/semester and are specifically tied to vaccine manufacture recommended timelines; there is no longer a vaccination deadline distinction between students in vulnerable populations (migrant students, homeless students, foster youth, and students from military families) and other students; and the Resolution specifies when students (newly-enrolling and continuing) who turn 16 during a semester, or who become FDA-approved for their age group during a semester, will be subject to the vaccination requirement. *Id.* at 21-23. To be sure, there are aspects of the Roadmap that are consistent with the Resolution, but there are substantive differences not in the record before the district court and not addressed in Appellants' Opening Brief, which impact the legal analysis.

## ARGUMENT

### I. APPELLEES DO NOT CONTEND THE ENTIRE CASE IS MOOT

Initially, and for clarity, Appellees note that this is a motion to dismiss the *appeal* as moot and to remand for further consideration in light of the changed circumstances, and it is not a motion to dismiss the *case* as moot. In *Tandon v. Newsom*, 141 S.Ct. 1294 (2022), the Supreme Court stated that “even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not *necessarily* moot the *case*.” *Id.* at 1297 (emphasis added). Appellees do not contend here that this “case is well and truly over” and subject to dismissal as moot. *High Plains Harvest Church, supra*, 141 S.Ct. at 257 (J. Kagan, dissenting), citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000). Appellees’ contention is that the *appeal* is moot based on the changed circumstances in this case recognized by the Supreme Court. This appeal is based on a set of facts that are no longer applicable.

### II. THIS APPEAL IS MOOT BASED ON CHANGED CIRCUMSTANCES, AND SHOULD BE DISMISSED AND THE REMANDED TO THE DISTRICT COURT

“It has long been settled that a federal court has no authority ‘to

give opinions upon moot questions.” *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992), quoting *Mills v. Green*, 159 U.S. 561, 653 (1895). The doctrine “ensures that the Federal Judiciary confines itself to the constitutionally limited role of adjudicating actual and concrete disputes.” *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013). The Roadmap challenged in this appeal is no longer in effect, based on a variety of factors, and while the District presumes a dispute remains in this case, it cannot be disputed that the dispute is no longer about the Roadmap. The District, through its Board, has taken subsequent action to modify the Roadmap challenged below and replace it with a policy, based on the same interests and rationales, that contains relevant factual differences.

While the typical appellate court practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss, see e.g. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950), when a government appellee moots an appeal by amending a challenged policy and the appellant maintains that the amended policy continues to violate its rights, the court usually will remand for further proceedings in which the parties may, if necessary,

amend their pleadings or develop the record more fully. *New York State Rifle & Pistol Ass’n, Inc. v. City of New York*, 140 S.Ct. 1525, 1526-1527 (2020) (per curiam).

This is what Appellees seek here. Unlike in *New York State Rifle & Pistol Ass’n*, here there is no final judgment below that must be vacated, and it is clear that the change in policy does not provide “the precise relief [Appellants] requested in the prayer for relief in their complaint.” *Id.* at 1526.<sup>4</sup> Accordingly, Appellees contend the appeal should be dismissed and the matter remanded to the district court for further proceedings in light of the changed circumstances.

**AFFIDAVIT [FRAP 27(A)(2)(B) AND CIRCUIT RULE 27-1(2)], AND**

**CONCLUSION**

1. Attached hereto as **Exhibit A** is a true and correct copy of a RESOLUTION IN THE MATTER OF IMPLEMENTATION OF STUDENT VACCINATION REQUIREMENT BEGINNING WITH THE 2022-2023 SCHOOL/FISCAL YEAR, which was adopted by the Board of Education of the San Diego Unified School District on March 8, 2022.

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<sup>4</sup> Similarly, the two prior decisions of this Court in this case were not decisions on the merits of the district court decision on appeal, but on whether the Court should issue a stay pending its decision on the merits of the district court decision.

2. To initiate the process of ascertaining Appellants' position on this motion pursuant to Circuit Rule 27-1(2) and Adv. Comment 5, the morning of March 14, 2022 the undersigned counsel for Appellees contacted lead counsel for Appellants regarding Appellants' position. This inquiry led to a series of messages, which are attached hereto as **Exhibit B**. Based on this interaction, Appellees assume Appellants will oppose this motion.

The undersigned attorney, Mark R. Bresee, declares under penalty of perjury that the foregoing paragraphs 1 and 2 are true and correct to the best of his knowledge.

WHEREFORE, and for the reasons described above, Appellees respectfully request that the appeal be dismissed, and the matter be remanded to the district court for further proceedings in light of the changed circumstances.

Date: March 16, 2022

Atkinson, Andelson, Loya, Ruud & Romo

/s/Mark R. Bresee  
Mark R. Bresee  
*Attorneys for Defendants-Appellees*

# **EXHIBIT A**

**BOARD OF EDUCATION  
SAN DIEGO UNIFIED SCHOOL DISTRICT**

IN THE MATTER OF  
IMPLEMENTATION OF STUDENT  
VACCINATION REQUIREMENT  
BEGINNING WITH THE 2022-2023  
SCHOOL/FISCAL YEAR

**RESOLUTION**

**WHEREAS**, the San Diego Unified School District is a local educational agency and an agency of the state for purposes of implementing educational policy and operation of public schools to safeguard the educational, health and safety needs of the District’s students and staff, and the community as a whole; and

**WHEREAS**, the District is charged by law with providing an appropriate public education for all students residing within its boundaries, is obligated to comply with state and federal law regarding each student’s right to a free and appropriate public education, and is obligated by law to ensure the health and safety of all students within its schools and facilities; and

**WHEREAS**, since the start of the COVID-19 pandemic the District has relied on the advice of numerous experts on student and public health regarding steps to be taken to provide an appropriate public education, comply with state and federal law, and ensure the health and safety of all students and staff within its schools and facilities, including: 1) Susan Barndollar, the Executive Director, Nursing & Wellness, a California licensed Registered Nurse; 2) District Medical Consultant Dr. Howard Taras, a San Diego-based pediatrician licensed by the state and certified by the American Board of Pediatrics and faculty member at the University of California, San Diego (“UCSD”) School of Medicine, Department of Pediatrics, Division of Child and Community Health; and 3) a group of local pediatricians, epidemiologists, and infectious disease experts from the UCSD (“UCSD Expert Panel”); and

**WHEREAS**, based on the work of staff, Dr. Taras, and the UCSD Expert Panel, since the start of the COVID-19 pandemic the District has implemented multiple safety measures including COVID-19 testing, masking, ventilation, screening, high quality sanitation measures, and requirement for all employees to be vaccinated, to mitigate the spread of COVID-19 in District schools and in the community; and

**WHEREAS**, these safety measures are effective at mitigating the spread of COVID-19, but vaccination of all eligible students who can be safely vaccinated provides the strongest protection to the health and safety of all students and staff in our schools and community; and

**WHEREAS**, several vaccines against COVID-19 have been developed that have been demonstrated to be effective in reducing the spread of COVID-19 as well as the severity of COVID-19 for breakthrough cases, and recent Center for Disease Control (“CDC”) studies

indicate that infection and hospitalization rates among unvaccinated persons were 4.9 and 29.2 times higher, respectively, than those in fully vaccinated persons; and

**WHEREAS**, in light of the effectiveness and safety of the COVID-19 vaccines, the CDC, State and County public health agencies, District Health & Wellness staff, the District's medical consultant, and the UCSD Expert Panel unanimously recommend that all persons be safely vaccinated against COVID-19; and

**WHEREAS**, throughout the COVID-19 pandemic and into the future the District has been and will continue to be guided by the following interests and priorities, consistent with the above-described obligations, actions, and recommendations: 1) Promoting and protecting the health and safety of students; 2) Promoting a safer overall educational environment and community by increasing and maximizing vaccination rates; and 3) Promoting academic progress through educationally-sound and logical implementation dates of the vaccination requirement; and 4) Complying with legal obligations including federal and state law and collective bargaining agreements; and

**WHEREAS**, on September 28, 2021, consistent with above-described obligations and interests, the Board of Education ("Board") accepted the recommendation of its staff, medical consultant, State Senator and pediatrician Richard Pan, and the UCSD Expert Panel, and adopted a Vaccination Roadmap to implement a student vaccination requirement for the Spring, 2022 semester; and

**WHEREAS**, the Vaccination Roadmap adopted on September 28, 2021, required students to be vaccinated only after full-approval for their age group by the Food and Drug Administration ("FDA"), and accordingly required students age 16 and older on or before November 1, 2021 to obtain their first vaccination shot by November 29, 2021, and their second vaccination shot by December 20, 2021; and

**WHEREAS**, the Vaccination Roadmap included a narrow medical exemption, modeled on state law regarding other mandated vaccines, to protect students who cannot be safely vaccinated, and prior to the previous vaccination shot deadlines the District received six (6) medical exemption requests, and two (2) of these were approved; and

**WHEREAS**, after the Board's adoption of the Vaccination Roadmap, operational concerns and considerations delayed feasible implementation of the Vaccination Roadmap on the schedule adopted by the Board; and

**WHEREAS**, consideration of the implementation of a student vaccination requirement was further delayed by a decision on December 20, 2022 by the San Diego Superior Court, ordering the rescission of the September 28, 2021 Vaccination Roadmap, its deadlines, and its implementation, while at the same time concluding the vaccination requirement was necessary and rational, and the District's "desire to protect its students from COVID-19 is commendable;" and

**WHEREAS**, on February 1, 2022, a unanimous panel of the Court of Appeal in San Diego issued an order granting the District's petition for a writ staying the implementation of the Superior Court order regarding the Vaccination Roadmap, thereby authorizing the District to proceed with a student vaccination requirement during the appeal of the Superior Court ruling; and

**WHEREAS**, on February 8, 2022, the Board took action to confirm that a student vaccine requirement for regular school year in-person instruction will not be implemented at any time prior to the beginning of the fall, 2022 semester, directed District staff to develop a revised plan for implementation, and directed staff to place a public discussion and potential action item on a future Board meeting agenda regarding a potential earlier implementation of the vaccine requirement for extracurricular activities; and

**WHEREAS**, on February 22, 2022, the first regular Board meeting after the February 8, 2022 Board meeting, the Board preliminarily approved a student vaccination requirement plan that includes the following timeline:

1. Students 16 years and older who want to participate in optional summer school/summer enrichment activities will be required to receive their first vaccination shot on or before June 28, 2022, and their second shot on or before July 26, 2022; and
2. Students 16 years and older who want to participate in fall, 2022 extracurricular activities will be required to receive their first vaccination shot on or before August 6, 2022, and their second shot on or before September 3, 2022; and
3. Students 16 years and older who want to participate in in-person instruction in the fall, 2022 semester will be required to receive their first vaccination shot on or before September 6, 2022, and their second shot on or before October 4, 2022; and

**WHEREAS**, the student vaccination requirement plan approved by the Board is attached to this Resolution as **Exhibit A**, and it included direction for an update and more specific Board action at the March 8, 2022 meeting; and

**WHEREAS**, based upon the foregoing, the Superintendent brings forward this Resolution for Board action to adopt a requirement that all District students be vaccinated against COVID-19, with the sole exception of students who seek and obtain a medical exemption based on the inability to be vaccinated safely, beginning with optional summer school/summer enrichment activities in the summer of 2022, on the timelines and within the parameters described at the February 22, 2022 meeting and described below.

**NOW, THEREFORE, BE IT RESOLVED**, that all of the foregoing recitals are true and correct; and

**BE IT FURTHER RESOLVED**, that the student vaccination requirement is implemented as follows:

1. All students ages five (5) and up are subject to the requirement to be vaccinated against COVID-19.
2. Consistent with the interest of promoting and protecting the health and safety of students, individual students will not be subject to the requirement to be vaccinated against COVID-19 until the student is in an age group that has received full FDA approval for vaccination against COVID-19, and students who cannot be safely vaccinated may seek and obtain a medical exemption. The medical exemption process and criteria will be the same as they were following the implementation of the Vaccination Roadmap on September 28, 2021.
3. For attendance in summer school/enrichment programs in the summer of 2022, students who are 16 years of age or older on or before June 21, 2022, must receive their first vaccination shot on or before June 28, 2022, and their second vaccination shot on or before the timeframe for a second shot recommended by the vaccine manufacturer and the FDA.
4. For participation in fall, 2022 extracurricular activities, students who are 16 or older on or before July 30, 2022, must receive their first vaccination shot on or before August 6, 2022, and their second vaccination shot on or before the timeframe for a second shot recommended by the vaccine manufacturer and the FDA.
5. For participation in in-person instruction for the fall semester, 2022, students who are 16 or older on or before August 29, 2022, must receive their first vaccination shot on or before September 6, 2022, and their second vaccination shot on or before the timeframe for a second shot recommended by the vaccine manufacturer and the FDA.
6. For students enrolling in the District for the first time after August 29, 2022, and whose age group has been fully-approved by the FDA at the time of enrollment, the student must receive their first vaccination shot within seven (7) days of enrolling, and their second vaccination shot on or before the timeframe for a second shot recommended by the vaccine manufacturer and the FDA. Students enrolling for the first time who are foster youth, homeless, migrant, or from a military family who state they have been vaccinated but lack immediate access to records due to their circumstances will be afforded the same the timeframe for a first and second shot provided to other students to provide proof of vaccination.
7. For students already enrolled, who become eligible for vaccination and subject to the requirement after August 29, 2022, based on full FDA approval for their age group, and to promote academic progress through educationally-sound and logical implementation dates of the vaccination requirement, the students must receive their first vaccination shot within seven (7) days of the beginning of the semester following becoming eligible, and must receive their second shot within the timeframe for a second shot recommended by the vaccine manufacturer and the FDA.

8. For students with disabilities and subject to an individual education plan (“IEP”), who are protected by state and federal law regarding educational placement/free appropriate public education, and whose age group has been fully-approved by the FDA, the District shall comply with federal law when imposing the vaccination requirement on these students.

**BE IT FURTHER RESOLVED**, that the Superintendent and/or the Superintendent’s designee(s) is given approval by the Board to implement the foregoing vaccination and testing requirements, and is directed to ensure that students and families are aware of the vaccination and testing requirements and timelines, to partner with Alliance San Diego and the Chicano Federation to provide resources and information to those who are hesitant to get the vaccine, to continue to provide access to the vaccine at District schools, and to ensure that student vaccination records and information are maintained securely and confidentially in accordance with all laws governing the privacy of student health information and other student records.

**PASSED AND ADOPTED** by the Board of Education of the San Diego Unified School District this 8th day of March 2022, by the following vote:

AYES: Barrera, Bazzo, Beiser, McQuary, Whitehurst-Payne

NAYS: None

ABSENT: None

ABSTAIN: None

I, Marty Stultz, Board Action Officer, San Diego Unified School District, San Diego County, California, do hereby certify that the foregoing is a full, true, and correct copy of a resolution adopted by said Board at a regularly called and conducted meeting held on said date.

LEGALITY AND FORM APPROVED

Approved in public meeting of the Board of Education of the San Diego Unified School District on March 8, 2022

  
\_\_\_\_\_  
ANDRA M. GREENE, General Counsel  
San Diego Unified School District

  
\_\_\_\_\_

# **EXHIBIT B**

## Mark R. Bresee

---

**From:** Paul Jonna <pjonna@limandri.com>  
**Sent:** Tuesday, March 15, 2022 5:51 PM  
**To:** Mark R. Bresee  
**Cc:** Charles Limandri; Jeffrey Trissell; Mark Rienzi; Eric Rassbach; Daniel Blomberg; Christopher Ferrara  
**Subject:** [EXTERNAL] RE: Doe v. SDUSD [AALRR-Cerritos.005555.00346]

### [EXTERNAL MESSAGE]

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Mark:

Thanks for your message. I don't think the distinction you are making matters. Ultimately if it is your view that the appeal of the preliminary injunction is moot—that is, the court lacks jurisdiction to hear it—then the appeal of the preliminary injunction is moot. Under *Munsingwear*, it would make no sense to say the appeal is moot, but that the earlier rulings that were part of the same moot appeal somehow were not moot and can stay on the books. I agree that would extend to the en banc denial.

**Paul M. Jonna** | Partner  
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**From:** Mark R. Bresee <MBresee@aalrr.com>  
**Sent:** Tuesday, March 15, 2022 10:18 AM  
**To:** Paul Jonna <pjonna@limandri.com>  
**Cc:** Charles Limandri <climandri@limandri.com>; Jeffrey Trissell <jtrissell@limandri.com>; Mark Rienzi <mrienzi@becketlaw.org>; Eric Rassbach <erassbach@becketlaw.org>; Daniel Blomberg <dblomberg@becketlaw.org>; Christopher Ferrara <cferrara@thomasmoresociety.org>  
**Subject:** RE: Doe v. SDUSD [AALRR-Cerritos.005555.00346]

I assume you would include in that list the en banc denial as well, but ultimately I see this as distinct from *NY State Rifle and Pistol Assn.* because that decision involved a judgment not an interim order, it involved a post-judgment change in law giving plaintiffs “the precise relief [they] requested in the prayer for relief in their complaint,” the vacating of the judgment was to allow amendment to assert claims not asserted previously, and there was no reference to vacating appellate orders. Perhaps I am missing something, but I fail to see how that holding is analogous here. Isn’t remanding for further proceedings in light of the changed circumstances sufficient here?

Best,

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**From:** Paul Jonna [<mailto:pjonna@limandri.com>]  
**Sent:** Monday, March 14, 2022 2:42 PM  
**To:** Mark R. Bresee  
**Cc:** Charles Limandri; Jeffrey Trissell; Mark Rienzi; Eric Rassbach; Daniel Blomberg; Christopher Ferrara  
**Subject:** [EXTERNAL] Re: Doe v. SDUSD [AALRR-Cerritos.005555.00346]

**[EXTERNAL MESSAGE]**

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Dear Mark:

We may be willing to agree to have the appeal dismissed as moot, and the case remanded, provided that you also request that the Ninth Circuit vacate under *Munsingwear* the original district court order and the motions panel order as moot. See *New York State Rifle & Pistol Ass’n, Inc. v. City of New York, New York*, 140 S. Ct. 1525, 1526 (2020). Please let me know

Paul Jonna

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**From:** Mark R. Bresee <[MBresee@aalrr.com](mailto:MBresee@aalrr.com)>  
**Sent:** Monday, March 14, 2022 10:52 AM  
**To:** Paul Jonna <[pjonna@limandri.com](mailto:pjonna@limandri.com)>  
**Subject:** Doe v. SDUSD [AALRR-Cerritos.005555.00346]

Good morning.

We intend to file a motion to dismiss the appeal as moot, based on the changed circumstances recognized by the Supreme Court, or in the alternative for full remand. I am writing to inquire regarding plaintiffs' position on the issue pursuant Circuit Rule 27-1(2).

Thanks.

Best,

**Mark R. Bresee** | Partner  
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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for  
Rehearing/Responses

9th Cir. Case Number(s) — 21-56259

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is *(select one)*:

Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words: 2,495**.

OR

In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature /s/ Mark R. Bresee

Date March 16, 2022

## CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2022, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system.

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

Date: March 16, 2022

/s/Mark Bresee

Mark Bresee