Docket No. 23-3694

In the
United States Court of Appeals
For the
Ninth Circuit

CITY OF HUNTINGTON BEACH, et al.,
Plaintiffs and Appellants,
v.
GAVIN NEWSOM, et al.,
Defendants and Appellees,

On Appeal from the District Court for the Central District of California
No. 8:23-cv-00421
Hon. Fred W. Slaughter

AMICUS CURIAE BRIEF OF CALIFORNIA POLICY CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

California Policy Center, Inc. is a 501(c)(3) nonprofit organization organized under the laws of the State of California. It has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

No counsel for a party authored any part of this brief. No one other than amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

Date: November 19, 2024

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INTEREST OF AMICUS CURIAE[1]

California Policy Center, Inc. ("California Policy Center") is a non-profit 501c(3) organization that educates and advises local elected officials and members of the public on constitutional governance issues and engages in strategic litigation to accomplish its mission.

The underlying case involves a challenge by a city and its officials against the State of California. The Court determined plaintiffs lack standing to sue under *South Lake Tahoe's* prohibition against political subdivisions suing the state in federal court. *See City of South Lake Tahoe v. California Tahoe* (9th Cir. 1980) 625 F.2d 231.

State directives to local governments sometimes conflict with federal laws and state and federal constitutions. The *South Lake Tahoe* rule means these conflicts cannot be litigated; for example, the State issued guidance and passed Assembly Bill 1955 ("AB 1955"), establishing confidentiality between students and school districts and prohibiting districts from providing records to parents—in violation of the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.

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[1] Counsel for California Policy Center received consent from all parties to file this brief pursuant to Circuit Rule 29-3.
No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Code § 1232g. FERPA requires school districts to provide educational records to parents, but does not include a private right of action to parents to enforce the law. School districts challenging AB 1955 under the Supremacy Clause are denied relief due to lack of standing under the *South Lake Tahoe* rule. (*See Mirabelli v. Olson,* 3:23-cv-00768 (S.D. Cal.) Order on Plaintiffs' Motion To Amend, Document # 130, filed August 8, 2024) and *Chino Valley Unified School District v. Newsom,* 2:24-cv-01941 (E.D. Cal.) (Defendants' motion to dismiss pending).

The ability to seek relief against state actors failing to uphold their constitutional obligations is critical to California Policy Center's mission. *Amicus curiae* is invested in the revision or overturning of the *South Lake Tahoe* rule.

SUMMARY OF THE ARGUMENT

The underlying case involves a challenge by a charter city and its officials against the State of California. The Court determined plaintiffs lacked standing under the *South Lake Tahoe* rule prohibiting an arm of the state from suing the state in federal court. *See* Appellants' Petition for Rehearing, pp. 32-34.

Deemed "indefensible on its merits" by Judge Reinhardt, the *South Lake Tahoe* rule was "implicitly but unequivocally overturned by *Seattle School District* as necessarily recognized by the subsequent Ninth Circuit decision in *Board of Natural Resources*." *Indian Oasis–Baboquivari Unified v. Kirk* (9th Cir. 1996) 91 F.3d 1240, 1246, 1250 (Reinhardt, J., dissenting) (citing *Washington v.*

Seattle School District, No. 1 (1982) 458 U.S. 457; *Board of Natural Resources v. Brown* (9th Cir. 1993) 992 F.2d 937). A *per se* bar on standing cannot be "reconciled with *Lujan* or literally dozens of other modern standing cases." *Indian Oasis*, 91 F.3d at 1250 (Reinhardt, J., dissenting) vacated on reh'g en banc, 109 F.3d 634 (citing *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555).

The blanket rule is inconsistent with United States Supreme Court precedent, including *Board of Education v. Allen* (1968) 392 U.S. 236 and *Virginia Office for Protection and Advocacy v. Stewart* (2011) 563 U.S. 247 ("*VOPA*"), and conflicts with decisions issued by the Second, Third, Fifth, and Tenth Circuits, which allow political subdivisions to bring Supremacy Clause claims against their parent states. *See Pioneers Memorial Healthcare District v. Imperial Valley Healthcare District*, No. 24-CV-861, 2024 WL 3858135 (S.D. Cal., Aug. 19, 2024), p. 8 (citing *City of San Juan Capistrano v. California Public Utilities Commission* (9th Cir. 2019) 937 F.3d 1278, 1280 n.2*; see also Tweed-New Haven Airport Auth. v. Tong* (2d Cir. 2019) 930 F.3d 65, 72–73; *Ocean Cnty. Bd. of Comm'rs v. Att'y Gen. of N.J.* (3d Cir. 2021) 8 F.4th 176, 180–81; *Rogers v. Brockette* (5th Cir. 1979) 588 F.2d 1057, 1068–69; *Branson Sch. Dist. RE-82 v. Romer* (10th Cir. 1998) 161 F.3d 619, 628.

The *South Lake Tahoe* standard should be reconsidered *en banc*.

ARGUMENT

1. The *South Lake Tahoe Per Se* Standing Rule is Inconsistent with United States Supreme Court Precedent

South Lake Tahoe offered no independent reasoning for its *per se* rule that political subdivisions lack standing to challenge state law on constitutional grounds in federal court. *San Juan Capistrano*, 937 F.3d at 1280 (citations omitted). Instead, the Ninth Circuit cited United States Supreme Court and Second Circuit decisions that rejected cities' constitutional challenges to state law, characterizing political subdivisions as "creature[s]" and states as their "creators." *San Juan Capistrano,* 937 F. 3d at 1280 (citing *South Lake Tahoe*, 625 F.2d at 233–34; *Williams v. Mayor & City Council of Baltimore* (1933) 289 U.S. 36, 40; *City of Trenton v. New Jersey* (1923) 262 U.S. 182, 188; *City of Newark v. New Jersey* (1923) 262 U.S. 192, 196; *City of New York v. Richardson* (2d Cir. 1973) 473 F.2d 923, 929; *Aguayo v. Richardson* (2d Cir. 1973) 473 F.2d 1090, 1100–01).

The Supreme Court cases cited, however, were decided long before the Court's decision in *Board of Education v. Allen*, where the Court held members of a local school board had standing to challenge in federal court the constitutionality of a state statute. *Allen*, 392 U.S. 236; *see City of South Lake Tahoe v. California Tahoe Regional Planning* (1980) 449 U.S. 1039, 1039 (White, J., dissenting from denial of certiorari). Addressing the constitutional requirement that the parties have a "personal stake in the outcome" of the litigation, the Court found such a "stake" in the school board members' choice between violating their oaths of

office to support the United States Constitution or refusing to comply with state statutory requirements, which was "likely to bring their expulsion from office and also a reduction in state funds for their school districts." *South Lake Tahoe*, 449 U.S. at 1039 (White, J., dissenting from denial of certiorari) (citations omitted).

The *Williams* and *Trenton* cases relied on in *South Lake Tahoe* stand for the limited proposition that a municipality may not bring a constitutional challenge against a state when the constitutional provision supplying the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights. *San Juan Capistrano*, 937 F.3d at 1280, fn 2. The Fifth Circuit held that *Williams* and *Trenton* did not bar a school district from claiming state policy conflicted with a federal school meal program, concluding that under the Supremacy Clause, a federal statute might give a political subdivision a cause of action. *San Juan Capistrano*, 937 F.3d at 1280, fn 2. (citations omitted).

In his dissent from *Indian Oasis*, Judge Reinhardt described *South Lake Tahoe* as indefensible on its merits, implicitly but unequivocally overturned by *Seattle School District*, and irreconcilable with *Lujan* and dozens of other modern standing cases. *Indian Oasis,* 91 F.3d at 1250 (Reinhardt, J., dissenting) vacated on reh'g en banc, 109 F.3d 634 (citations omitted).

2. Ninth Circuit Judges Have Called for En Banc Reconsideration of South Lake Tahoe and its Progeny

Ninth Circuit judges have called for *en banc* reconsideration of *South Lake Tahoe* and its progeny to expressly overturn its broad standing rule. *See San Juan Capistrano*, 937 F.3d 1278, 1282 (Nelson, J., concurring) (before *Lujan*, standing was not seen as a preliminary or threshold question); *Indian Oasis*, 91 F.3d at 1246 (Reinhardt, J., dissenting) ("[*South Lake Tahoe*] made no reference to the usual standing criteria, and its reasoning…appears to be addressed to whether the city possessed a cause of action."); *Palomar Pomerado Health Sys. v. Belshe* (9th Cir. 1999) 180 F.3d 1104, 1109 (Hawkins, J., concurring) ("[O]ur *en banc* court should take another look at *South Lake Tahoe* and its progeny."); *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank* (9th Cir. 1998) 136 F.3d 1360, 1364 (Kozinski, J., concurring) ("[T]he fact that three other circuits seem to have recognized an exception to the per se rule ... might be a reason to reconsider the matter *en banc*."); *San Juan Capistrano*, 937 F.3d at 1282 (Nelson, J., concurring) (recommending the Circuit "revisit the court's *per se* rule in light of intervening caselaw from other circuit courts and the Supreme Court").

The Ninth Circuit began to back away from the *South Lake Tahoe* rule one year after its decision, stating "[w]hile there are broad dicta that a political subdivision may never sue its maker on constitutional grounds…we doubt that the rule is so broad." *San Diego Unified Port Dist. v. Gianturco* (9th Cir. 1981) 651 F.2d 1306, 1309 fn 7 (citations omitted).

3. The Ninth Circuit Stands Alone in its Rigid Adherence to the South Lake Tahoe Standing Rule

The Second, Third, Fifth, and Tenth Circuits allow political subdivisions to bring Supremacy Clause claims against their parent states. *See Pioneers Memorial,* 2024 WL 3858135, p. 8 (citations omitted)*; See also Tweed-New Haven Airport Auth.*, 930 F.3d at 72–73; *Ocean Cnty. Bd. of Comm'rs,* 8 F.4th at 180–81; *Rogers*, 588 F.2d at 1068–69; *Branson Sch. Dist. RE-82,* 161 F.3d at 628.

4. Political Subdivisions Can Suffer Concrete and Particularized Injuries Worthy of Article III Attention

The Southern District of California observed, "[i]f a conspicuous link between *South Lake Tahoe's* focus on rights and contemporary Article III standing doctrine (let alone its injury-in-fact requirement) exists, it eludes the court." *Pioneers Memorial*, 2024 WL 3858135, p. 7. Political subdivisions can suffer concrete and particularized injury worthy of Article III attention, and an individual's constitutional rights can be violated by a state's actions against a subdivision. *Id.* (citing *City of Sausalito v. O'Neill* (9th Cir. 2004) 386 F.3d 1186, 1197–98; *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 344–45). If a petitioner can demonstrate a cognizable injury, there is no obvious reason why *Williams's*—and, by extension, *South Lake Tahoe*'s—rights-based reasoning should prevent that petitioner from leaning on the interests of others. *Pioneers Memorial*, 2024 WL 3858135, p. 7.

Some circuits no longer analyze subdivision versus state constitutional claims under Article III. *Id.; See also Kerr v. Polis* (10th Cir. 2021) 20 F.4th 686, 698 ("We believe the 'standing' in 'political subdivision standing' is a misnomer. 'In speaking of "standing," cases [related to *Williams*] meant only that, on the merits, the municipality had no rights under the particular constitutional provisions it invoked.' This is not a jurisdictional inquiry. Rather, ... this inquiry is a way of discerning whether political subdivisions have alleged a cause of action against their parent state in a given case." (citations omitted); *Tweed-New Haven Airport Auth.*, 930 F.3d at 70–73 (concluding political subdivision had Article III standing before separately addressing whether its suit was barred by *Williams* and related cases); *cf. Amato v. Wilentz* (3d Cir. 1991) 952 F.2d 742, 755 ("[W]e agree with the County that these cases may not be standing cases…but instead holdings on the merits."). Similarly, cases applying *South Lake Tahoe* regularly draw concurring and dissenting opinions questioning the political-subdivision rule, some of which take aim directly at the rule's uncertain connection to standing. *See* Section 2, *supra.*

5. The Ex Parte Young Doctrine Allows State Agencies to Sue State Officials for Violating Federal Law

The *Ex parte Young* doctrine, an exception to Eleventh Amendment sovereign immunity, allows federal courts to hear lawsuits for prospective relief

against state officials brought by another agency of the same state. *VOPA*, 563 U.S. 247 (citing *Ex parte Young* (1908) 209 U.S. 123).

In *VOPA*, the United States Supreme Court found that entertaining a state agency's lawsuit in federal court would not infringe the State of Virginia's sovereign interests, nor would it diminish the dignity of a state for a federal court "to adjudicate a dispute between its components." *VOPA,* 563 U.S. at 257. The Court questioned how a State's stature "could be diminished to any greater degree when *its own agency* polices its officers' compliance with their federal obligations, than when *a private person* hales those officers into federal court for that same purpose—something everyone agrees is proper." *Id.* at 257, 258. The Court determined the agency's power to sue state officials was a consequence of Virginia's decision to establish a public protection and advocacy system, and did not find any Eleventh Amendment indignity visited on Virginia when, by operation of its own laws, the agency was admitted to federal court as a plaintiff. *Id.* at 258.

The specific indignity against which sovereign immunity protects is the insult to a state of being haled into court without its consent. *Id.* That occurs "when the object of a suit against a state officer is to reach funds in the state treasury or acquire state lands; **it does not occur just because the suit happens to be brought by another state agency**." *Id.* at 258, 259 (emphasis added).

Finally, shattering *South Lake Tahoe*'s logic, the Supreme Court rejected the contention that applying *Ex parte Young* would divide Virginia against itself, since the opposing parties are both "creatures of the Commonwealth." *Id.* at 259. Even if dividing Virginia against itself was a consequence of allowing the suit in federal court, it would have nothing to do with the concern of sovereign-immunity. *Id.* The division is not a consequence of the federal nature of the forum; the same result would follow if the claim were sued upon in state court. *Id.* If a subdivision were to sue Virginia in state court, "[w]hatever the decision in the litigation, … [t]he Commonwealth will win[, a]nd the Commonwealth will lose." *Id.* Sending the matter to state court would not avoid the prospect that "a federal judge will resolve which part of the Commonwealth will prevail," since the state-court loser could always ask the United States Supreme Court to review the matter by *certiorari*. *Id.* The Court concluded that, if by reason of *Ex parte Young*, there has been no violation of sovereign immunity, the prospect of a federal judge's resolving a subdivision's dispute with the State of Virginia does not make it so. *Id.*

The *South Lake Tahoe* rule forbids political subdivisions from challenging the constitutionality of state statutes in federal court, based on the notion that a creature of the state cannot sue its creator. *San Juan Capistrano,* 937 F. 3d 1278, 1280 (citations omitted). If applied consistently, this rationale means no city or district can sue a state in federal or state court. *See VOPA*, 563 U.S. at 259. State-

created agency "creatures" do sue their "creators," as demonstrated in United States Supreme Court and Circuit Court decisions cited here. The Ninth Circuit should reconsider its rigid *South Lake Tahoe* rule *en banc* to follow United States Supreme Court precedent and align with other circuits. Cases pending at the district court level would benefit from a more thoughtful standard, including *Mirabelli v. Olson,* 3:23-cv-00768 (S.D. Cal.)) and *Chino Valley Unified School District v. Newsom,* 2:24-cv-01941 (E.D. Cal.)—both of which involve school districts seeking relief under the Supremacy Clause against State defendants as a result of State law and policy that conflicts with the districts' obligations under FERPA.

CONCLUSION

For the forgoing reasons, the petition for rehearing *en banc* should be granted.

Date: November 18, 2024

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CERTIFICATE OF COMPLIANCE

(1) This brief complies with Circuit Rule 29(a)(4) because it contains 2,599 words; and

(2) This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman font.

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Date: November 19, 2024