

# Split 9th Circ. Revives LA Schools Vaccine Policy Row

By **Hailey Konnath**

Law360 (June 7, 2024, 10:29 PM EDT) -- A split Ninth Circuit panel on Friday reversed a California federal court's dismissal of a proposed class action challenging a recently rescinded Los Angeles Unified School District policy requiring employees to get the COVID-19 vaccine to keep their jobs, ruling that the district still has the potential to reinstate it.

The panel majority said the district has a pattern of withdrawing and reinstating its strict vaccination policy, most recently pulling the plug on it just 12 days after the Ninth Circuit held oral arguments in the workers' case. LAUSD hasn't shown that it didn't recently abandon the policy because of litigation, U.S. Circuit Judge Ryan D. Nelson wrote on behalf of the majority.

"Twice LAUSD has withdrawn its policy only after facing some litigation risk," Judge Nelson wrote. "LAUSD immediately rescinded its prior policy after some plaintiffs first sued, and LAUSD then asked the district court to dismiss for mootness or ripeness. But then just two weeks after securing a dismissal on those grounds, LAUSD implemented the policy, which has remained in effect for over two years."

Then, immediately following oral arguments, the district rescinded the policy again, according to the opinion.

Judge Nelson, who was joined by U.S. District Judge Daniel P. Collins, said there was a "strong inference" that LAUSD waited to see how oral arguments would shake out before deciding whether or not to keep the vaccination policy in place.

"So this case is not moot," he said.

Meanwhile, U.S. Circuit Judge Michael Daly Hawkins said in a dissent that LAUSD's recent undoing of the policy means there's nothing left for a court to block.

"This case is over," Judge Hawkins said. "We cannot grant the sole relief sought by the plaintiffs, an injunction against enforcement of the school district's now rescinded COVID-19 vaccination policy."

The workers allege that the district's policy interferes with their right to refuse medical treatment. Specifically, they contend that the COVID-19 vaccine isn't actually a vaccine. According to them, traditional vaccines prevent transmission or provide immunity, but the COVID-19 vaccine doesn't do either. Rather, it mitigates symptoms, making it a treatment, not a vaccine, the workers argued.

The school district argued that it was within its rights to enforce safety policies with a legitimate purpose and that courts routinely reject constitutional challenges to vaccination mandates.

In 2022, the California federal court sided with LAUSD, granting it judgment on the pleadings. In particular, the lower court held that the vaccination policy doesn't implicate any fundamental right, and the district had a legitimate government purpose for implementing it.

On appeal, the **workers argued** that the lower court incorrectly followed the U.S. Supreme

Court's 1905 ruling in [Jacobson v. Massachusetts](#) , which upheld a city's smallpox vaccine policy, without properly considering that case's context.

Oral argument was held in September, during which LAUSD repeatedly defended its mandate, according to the Ninth Circuit majority's opinion. However, counsel for the workers said in a declaration that as everyone was leaving the courtroom, LAUSD's attorney said to him, "What are you going to do when we rescind the mandate?" And that same day, LAUSD's superintendent proposed repealing the mandate, per the majority. Twelve days later, the school board voted to rescind the policy. And LAUSD then asked the Ninth Circuit to nix the appeal and find the case moot.

The Ninth Circuit majority said the key question is whether the voluntary cessation exception to mootness applies to this case. To overcome that exception, it must be "reasonably clear that the challenged practice will not happen again," the majority said.

Consequently, LAUSD's pattern of withdrawing and then reinstating the policy is "enough to keep this case alive," it said.

"Litigants who have already demonstrated their willingness to tactically manipulate the federal courts in this way should not be given any benefit of the doubt," the majority said. "LAUSD's about-face occurred only after vigorous questioning at argument in this court, which suggests that it was motivated, at least in part, by litigation tactics."

As for the merits of the case, the majority agreed with the workers that the lower court's finding that LAUSD's policy served a "legitimate government purpose" diverges from the Supreme Court's finding in *Jacobson*. *Jacobson* didn't involve a claim in which the "compelled vaccine" was designed to reduce symptoms rather than to prevent transmission, according to the opinion.

"The district court thus erred in holding that *Jacobson* extends beyond its public health rationale — government's power to mandate prophylactic measures aimed at preventing the recipient from spreading disease to others — to also govern 'forced medical treatment' for the recipient's benefit," the majority said.

The majority acknowledged the "preliminary nature of our holding" and said a more developed factual record is needed to prove the workers' contentions true. But at this stage in the litigation, the panel must accept the allegations as true, it said.

In his dissent, Judge Hawkins disagreed that the district would reimpose the policy. The majority has ignored the "practical realities surrounding LAUSD's adoption and rescission of the policy, which demonstrate there is no reasonable expectation LAUSD will reimpose the policy in the future," the judge said.

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

Scott J. Street, one of the workers' lawyers, told Law360 on Friday that all his clients "have ever asked for is a chance to gather evidence and have their day in court."

"The Ninth Circuit has a long record of allowing that, especially when it comes to bodily autonomy and medical freedom, and we hope this opinion serves as a reminder of that," Street said.

An LAUSD spokesperson said the district is "reviewing the Ninth Circuit ruling and assessing the district's options."

U.S. Circuit Judges Michael Daly Hawkins, Ryan D. Nelson and Daniel P. Collins sat on the panel for the Ninth Circuit.

The workers are represented by John W. Howard and Scott J. Street of JW Howard Attorneys Ltd.

The LAUSD officials are represented by Connie L. Michaels and Carrie A. Stringham of Littler Mendelson PC.

The case is Health Freedom Defense Fund Inc. et al. v. Alberto Carvalho et al., case number 22-55908, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Max Kutner. Editing by Jay Jackson Jr.