NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SAN JOAQUIN COMMUNITY HOSPITAL, DBA Adventist Health Bakersfield, a California nonprofit religious corporation; et al., Plaintiffs-Appellants, v. WILL LIGHTBOURNE, in his official capacity as the Director of the California Department of Health Care Services; et al., Defendants-Appellees, and RICHARD FIGUEROA, Defendant.	No. 21-16294 D.C. No. 3:20-cv-01301-SK MEMORANDUM*
DIGNITY HEALTH, a California non-profit corporation; DIGNITY COMMUNITY CARE, a Colorado non-profit corporation, Plaintiffs-Appellants,	No. 21-16295 D.C. No. 3:20-cv-00212-SK

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

and

SAN JOAQUIN COMMUNITY HOSPITAL; et al.,

Plaintiffs,

v.

WILL LIGHTBOURNE, in his official capacity as the Director of the California Department of Health Care Services; et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Sallie Kim, Magistrate Judge, Presiding

Argued and Submitted November 14, 2022
San Francisco, California

Before: S.R. THOMAS and BENNETT, Circuit Judges, and MOSKOWITZ,[**] District Judge.

A group of California health care entities ("Hospitals") appeal the district court's grant of judgment on the pleadings in their consolidated action brought under 42 U.S.C. § 1983 and other statutes. The Hospitals challenge the process and results of audits performed by the California Department of Health Care

[**] The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

Services ("Department") that determined the Hospitals had been overpaid through a federally-funded incentive program. This appeal presents issues we review de novo. *Tijerino v. Stetson Desert Project, LLC*, 934 F.3d 968, 971 (9th Cir. 2019); *Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part, reverse in part, and vacate and remand in part. Because the parties are familiar with the history of this case, we need not recount it here.

I

In seeking declaratory and mandamus relief, the Hospitals alleged injuries fairly traceable to the Department. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (describing standard). Therefore, they had Article III standing to pursue their claims.

II

On the record before us, we hold the Hospitals' claims are barred by sovereign immunity in part.

A

The district court correctly concluded that to the extent the Hospitals are seeking monetary damages, restitution, or recoupment from the Department, their claims are barred by the doctrine of sovereign immunity, which generally

precludes suits against states without their consent. *See Alden v. Maine*, 527 U.S. 706, 727 (1999). The protection of sovereign immunity extends to state agencies and officers acting in their official capacity, such as the Defendants-Appellees here. *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015).

Sovereign immunity bars these claims even though the program at issue involves exclusively federal funds. The state's legal liability, not the ultimate source of the funds, is the relevant concern. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997) (rejecting the argument that the Eleventh Amendment "does not apply to this litigation because any award of damages would be paid by the Department of Energy, and therefore have no impact upon the treasury of the State of California"). *Taylor v. Westly* is not to the contrary, as that case involved the return of property that had not yet formally escheated to the state and therefore was not state property. 402 F.3d 924, 932 (9th Cir. 2005).

Sovereigns can waive immunity by actively litigating a case before asserting immunity, but the Department has not done so here. *Hill v. Blind Indus. & Servs.*, 179 F.3d 754, 756 (9th Cir. 1999) *amended by* 201 F.3d 1186 (denial of reh'g en banc). To waive immunity in this manner, the litigation conduct must "unequivocally evidence the state's intention to subject itself to the jurisdiction of the federal court," such as by initially defending on the merits and only belatedly

raising immunity as a defense. *Id.* at 758–59. Here, the Department reserved sovereign immunity as a defense in the removal notice, raised the defense in answers, and sought to dismiss on sovereign immunity in its motion for judgment on the pleadings, which was filed only ten days after the cases were consolidated and before the magistrate judge had addressed the merits of the case. Therefore, the *Hill* sovereign immunity waiver does not apply.[1]

Thus, to the extent the Hospitals seek recovery of money from the state, their claims are barred by sovereign immunity.

B

To the extent that the Hospitals are seeking non-monetary prospective relief against Department officials in their official capacities, sovereign immunity does not apply, and the claims may proceed. Under the *Ex Parte Young* doctrine, sovereign immunity does not bar suits seeking prospective equitable relief against a state official engaged in "a present violation of federal law" in their official capacity. *Papasan v. Allain*, 478 U.S. 265, 277–78 (1986).

[1] We decline to consider the Hospitals' argument, raised for the first time on appeal, that the Department waived sovereign immunity by removal. *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004). Nothing in our decision should be construed as foreclosing the Hospitals from raising such argument on remand.

Here, the Hospitals assert prospective claims against the Department pertaining to future disbursements and potential future audits and recoupments. It is not clear from the record whether the Department officials' alleged illegal actions related to the incentive program are continuing. To the extent that the Hospitals are seeking non-monetary prospective relief under *Ex Parte Young* against Department officials in their official capacities, sovereign immunity does not apply, and the claims may proceed. Therefore, we must vacate the district court's judgment to the extent it foreclosed prospective relief under *Ex Parte Young*. Whether those claims are viable or not, or whether the relief sought is truly within the purview of *Ex Parte Young*, are matters to be decided by the district court in the first instance.

III

The Hospitals also challenge the district court's various remand decisions. Because those decisions were informed by the district court's subject matter jurisdiction decision, we remand those decisions for reconsideration by the district court.[2]

AFFIRMED IN PART; REVERSED IN PART; VACATED AND REMANDED IN PART.

[2] The parties shall bear their own costs.