Spare the Hot Air:
Navigating New Developments in Labor and Employment Relations

Summary of Cited Cases

- *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905)

Many of the recent cases challenging COVID-19 vaccine mandates cite both *Jacobson* and *Zucht v. King* (summarized below) in support of upholding the mandates. In *Jacobson,* Massachusetts law empowered the board of health of individual cities and towns to enforce mandatory, free vaccinations for adults over the age of 21 if the municipality determined it was necessary for the public health or safety of the community. Adults who refused were subject to a $5.00 fine. In 1902, faced with an outbreak of smallpox, the Board of Health of the city of Cambridge adopted a regulation ordering the vaccination or revaccination of all its inhabitants. Jacobson refused to get vaccinated and asserted that subjecting him to a fine or imprisonment for neglecting or refusing vaccination was an invasion of his liberty. The Supreme Court held that the mandate did not violate the Fourteenth Amendment because vaccinations are neither arbitrary nor oppressive so long as they do not "go so far beyond what was reasonably required for the safety of the public."

- *Zucht v. King,* 260 U.S. 177 (1922)

San Antonio, Texas excluded students from public and private schools who were not vaccinated for smallpox. Plaintiff Rosalyn Zucht argued the vaccine policy violated her Fourteenth Amendment due process rights. Justice Louis Brandeis wrote in the Court's decision that "long before this suit was instituted, *Jacobson v. Massachusetts*, had settled that it is within the police power of a state to provide for compulsory vaccination."

- *Jason Burcham et al v. City of Los Angeles et al*, No. 2:21-cv-07296[1]

In the Fall of 2021, thirteen LAPD members sued the City for its vaccine mandate on numerous causes of action. Judge Klausner of the Central District Court recently dismissed almost all of the Plaintiffs' causes of action. Plaintiffs asserted that the vaccine mandate was an unreasonable search and seizure in violation of the Fourth Amendment of the U.S. Constitution. On this cause of action, the Court determined that there was no authority indicating that a vaccine injection itself constituted an unreasonable search. Instead, the Court focused on the question of whether requiring unvaccinated employees to submit to COVID-19 testing was a reasonable special needs search. The Court determined that it was. The Plaintiffs also alleged a violation of California Constitution's Right to Privacy on the basis that the mandate forced Plaintiffs to disclose their private medical information and receive unwanted medical treatment. The Court indicated that the invasion of privacy was justified because it safeguarded the public health. The Court also denied the Plaintiffs' due process arguments.

[1] A copy of the court's minute order is attached (Attachment 1).

The Court did allow the Plaintiffs leave to amend their Title VII and FEHA causes of action allowing them to provide evidence of the element that the City threatened the employee with or subjected them to discriminatory treatment.

- *Kheriaty v. The Regents of the University of California et al.,* No. 8:21-CV-01367[2]

A physician at the University of California Irvine challenged the University's COVID-19 vaccine mandate. On September 29, 2021 the court denied Kheriaty's request to issue an injunction to block the mandate. Kheriaty argued that the policy violates his fundamental right to bodily integrity and is an unwanted medical treatment in violation of the Due Process clause of the U.S. Constitution. The court determined that the policy did not implicate a fundamental right. Kheriaty also argued that that the vaccine mandate violated the Equal Protection clause on the basis that the policy disparately treats individuals who have vaccine-induced immunity and individuals who have infection-induced immunity. The court determined that this was not a "suspect class" under the law. The court found the mandate to have a legitimate purpose of maintaining the health and well-being of the campus community and that it promoted that purpose. The employee has appealed this ruling to the Ninth Circuit Court of Appeals.

- *Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020)

Horvath worked as a firefighter for the city. He objected to the city's TDAP vaccine requirement on religious grounds. The city offered two accommodations to the employee. The first was a transfer to a different position with the same pay and the second was requiring the employee to use protective measures, such as wearing a respirator while on duty. The employee refused the accommodations and the city fired him for insubordination. The court ruled in favor of the city finding that a "reasonable" accommodation need not be the employee's preferred accommodation. Additionally, insubordination constituted a non-discriminatory reason for the termination. Finally, the city's offer for him to wear a respirator on duty enabled him to freely exercise his religion in his current position and did not burden his First Amendment rights.

- *Gregg Crawford v. Trader Joes Company,* No. 5:21-cv-01519

This case is pending in the Central District of California. Crawford asserted that his Christian beliefs prevented him from being vaccinated, as required by Trader Joes' vaccination mandate and Trader Joes granted him an accommodation. However, Trader Joes decided that only vaccinated employees could attend an upcoming "Leaders Meeting" and that Crawford's non-attendance would negatively affect his performance review. Trader Joes terminated Crawford and Crawford asserts that he was terminated for exercising his religion.

[2] A copy of the Court's order is attached (Attachment 2)

- *Let them Choose v. San Diego Unified School Dist.,* No. 37-2021-43172[3]

This lawsuit challenged the School District's issuance of a COVID-19 mandate for all students over the age of 16. This case determined that school vaccination requirements are under the jurisdiction of the state. The School District's COVID-19 vaccine requirement did not allow for a personal belief exemptions that State law requires for new vaccines outside of the legislated childhood list of vaccines. The court, therefore, determined that the vaccine mandate directly conflicted with state law. The school board recently voted to appeal the decision.

- *Regents of the University of California* (2021) PERB Decision No. 2783-H

The University required that all employees receive the influenza vaccine. The employees demanded that the University bargain over the policy, but the University refused to bargain asserting that the policy "was not a mandatory subject of bargaining but would bargain over the effects of the policy." PERB concluded "the University's decision to adopt a mandatory influenza vaccination policy was outside HEERA's scope of representation." However, the University was required to negotiate over the effects of the decision to implement the policy, which the University failed to do.

- *National Federation of Independent Business et al., v. Department of Labor, Occupational Safety and Health Administration,* 595 U. S. ____ (2022) (citation pending)

Under a rule promulgated by the Occupational Safety and Health Administration (OSHA), businesses with 100 or more employees had to ensure their employees were fully vaccinated, or submitted a negative COVID-19 test weekly to enter the workplace. It would have covered some 80 million private-sector employees. The Supreme Court determined that OHSA acted outside of its authority. The Court stated that it expects "Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." In this case, the Occupational Safety and Health Act authorizes OSHA to set workplace safety standards, not broad public health measures. On the other hand, the Court upheld the Centers for Medicare & Medicaid Services (CMS) vaccine mandate for certain health care workers, finding it within CMS's statutory authority over regulated health care providers.

[3] A copy of the Court's order is attached (Attachment 3).

Attachment 1

***Jason Burcham et al v. City of Los Angeles et al*, No. 2:21-cv-07296**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:21-cv-07296-RGK-JPR	Date	January 7, 2022
Title	***Jason Burcham, et al. v. City of Los Angeles, et al.***		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiff:	Attorneys Present for Defendant:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS) Order Re: Defendants' Motion to Dismiss and Plaintiffs' Motion for Preliminary Injunction [DEs 42 and 43]**

I. INTRODUCTION

On September 26, 2021, thirteen Los Angeles Police Department employees ("Plaintiffs") filed a First Amended Complaint ("FAC") against the City of Los Angeles (the "City"), Los Angeles Mayor Eric Garcetti ("Mayor Garcetti"), Chief of Los Angeles Police Department Michael Moore, and Los Angeles City Administrative Officer Matthew Szabo (collectively, "Defendants"). (*See* ECF No. 16.) Plaintiffs allege constitutional and statutory violations based on the City's COVID-19 vaccine mandate for City employees. (*Id.*) On November 9, 2021, Defendants filed a Motion to Dismiss. (*See* ECF No. 42.) On November 11, 2021, Plaintiffs filed a Motion for Preliminary Injunction. (*See* ECF No. 43.)

For the reasons below, the Court **GRANTS** Defendants' Motion to Dismiss and **DENIES** ***as moot*** Plaintiffs' Motion for Preliminary Injunction.

II. FACTUAL BACKGROUND

Unless otherwise noted, the following facts are alleged in the FAC:

Plaintiffs are employees of the Los Angeles Police Department (and therefore the City). On August 20, 2021, Mayor Garcetti signed and approved Ordinance No. 187134 (the "Ordinance"), which implemented a policy requiring City department heads to track whether employees had been vaccinated against COVID-19. Under the Ordinance, employees are required to establish that they are fully vaccinated, subject to certain exemptions. The Ordinance set a deadline of October 20, 2021 for employees to report that they were fully vaccinated or had applied for either of the following exemptions: (1) a reasonable accommodation for a medical condition; or (2) a reasonable accommodation for sincerely held religious beliefs.

Employees granted an exemption must still report their vaccination status, and exempted employees that are required to work in-person are subject to weekly COVID-19 testing requirements. These employees must also wear masks, physically distance from others, and receive COVID-19 vaccine training. The Ordinance also has conflicting language on whether exempt, unvaccinated employees will be given promotions, transfers, or appointments.[1]

On September 22, 2021, Defendants distributed a document titled "COVID-19 Vaccination Requirement Exemption Request Procedures." If an employee requests a religious exemption, he or she must submit two forms. The first, the "Religious Exemption Form," asks several questions to determine the employee's sincerity of belief, as well as how that belief conflicts with receiving the COVID-19 vaccine. The second, the "Religious Accommodation Certification Form," requires that a third-party explains, under penalty of perjury, the substance of the applicant's religious beliefs and why the belief forbids COVID-19 vaccination. Plaintiffs allege that they submitted medical or religious exemption requests and that the City has yet to process these requests.

III. JUDICIAL STANDARD

A. 12(b)(6): Dismissal for Failure to State a Claim Upon Which Relief Can be Granted

Under Federal Rule of Civil Procedure ("Rule") 12(b)(6), a party may move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible if the plaintiff alleges enough facts to draw a reasonable inference that the defendant is liable. *Iqbal*, 556 U.S. at 678. A plaintiff need not provide detailed factual allegations, but must provide more than mere legal conclusions. *Twombly*, 550 U.S. at 555. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

When ruling on a Rule 12(b)(6) motion, the Court must accept well-pled factual allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *See Autotel v. Nev. Bell. Tel. Co.*, 697 F.3d 846, 850 (9th Cir. 2012). Dismissal "is appropriate only where the

[1] Section 4.704 of the Ordinance states: "All candidates and applicants seeking . . . promotions or transfers . . . must meet the minimum qualification of being fully vaccinated or receive an exemption and report their vaccination status prior to the appointment, promotion, or transfer." By contrast, Section 4.704(a)(2) states: "[A]ll employees whose vaccination status is unvaccinated, partially vaccinated, or unreported shall be ineligible to promote or transfer until the employee has reported to the appointing authority that they have been fully vaccinated." (FAC Ex. 1, at 9, ECF No. 16-1.)

complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

B. Preliminary Injunction

The purpose of a preliminary injunction is generally to preserve the status quo pending a judgment on the merits. *Regents of Univ. of California v. Am. Broad. Companies, Inc.*, 747 F.2d 511, 514 (9th Cir. 1984). To obtain a preliminary injunction, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that the balance of equities tips in favor of the moving party; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The court may also apply a sliding scale test, whereby the elements of the *Winter* test are balanced "so that a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). The moving party has the burden of persuasion. *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

IV. JUDICIAL NOTICE

Defendants request (and Plaintiffs do not oppose) that the Court take judicial notice of the following documents:

- Exhibit A, Declaration of Erika Johnson-Brooks, with State Public Health Officer Order attached;
- Exhibit B, Declaration of Leticia Ortiz;
- Exhibit C, Memorandum of Understanding No. 24 By and Between The City of Los Angeles and The Los Angeles Police Protective League;
- Exhibit D, "Variant Proportions," Centers for Disease Control and Prevention;
- Exhibit E, "Morbidity and Mortality Weekly Report: Laboratory-Confirmed COVID-19 Among Adults Hospitalized with COVID-19-Like Illness with Infection-Induced or mRNA Vaccine-Induced SARS-CoV-2 Immunity – Nine States, January-September 2021," Centers for Disease Control and Prevention;
- Exhibit F: "Safety of COVID-19 Vaccines," Centers for Disease Control and Prevention;
- Exhibit G: "Delta Variant," Centers for Disease Control and Prevention;
- Exhibit H: "New CDC Study: Vaccination Offers Higher Protection than Previous COVID-19 Infection," Centers for Disease Control and Prevention;
- Exhibit I: "Antibody Testing is Not Currently Recommended to Assess Immunity After COVID-19 Vaccination: FDA Safety Communication," U.S. Food and Drug Administration;

- Exhibit J: U.S. Food and Drug Administration's Pfizer vaccine approval letter

(*See* Request for Judicial Notice ("RJN"), Exs. A–J.)

While the scope of a court's review of a 12(b)(6) motion is typically limited to the contents of the complaint, a court may consider exhibits attached to or incorporated by reference in the complaint. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). Courts may also "take judicial notice of matters of public record outside the pleadings." *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988). A fact is judicially noticeable if it "is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). However, when a court takes judicial notice of a public record when analyzing a motion to dismiss, it "cannot take judicial notice of *disputed facts* contained in such public records." *Khoja v. Orexigen Therapeutics*, 899 F.3d 988, 998–1003 (9th Cir. 2018) (emphasis added).

Exhibits A, G, H, I, and J all consist of publicly available guidelines, studies, or mandates authored by government agencies. Accordingly, the Court takes judicial notice of these documents, but only for the fact that these governmental guidelines exist and not for the truth of the scientific facts contained within (which Plaintiffs dispute).

Exhibit C is the Memorandum of Understanding that governs the conditions of Plaintiffs' employment. The document is publicly available and neither party disputes its contents. Accordingly, the Court also takes judicial notice of Exhibit C.

The Court need not consider the remaining documents contained within Defendants' Request for Judicial Notice to decide the Motions at issue. Therefore, the Court **GRANTS *in part*** the Request for Judicial Notice as to Exhibits A, C, G, H, I, and J, and **DENIES *as moot*** as to all other Exhibits.

V. DISCUSSION

A. Motion to Dismiss

Plaintiffs assert the following claims against Defendants: (1) violation of the Fourth Amendment (as incorporated against the states by the Fourteenth Amendment); (2) violation of the California Constitution's right to privacy provision; (3) violation of the right to substantive due process guaranteed by the Fourteenth Amendment; (4) a due process violation for failure to obtained informed consent to administer medical products under the Emergency Use Authorization ("EUA") statute; (5) violations of Title VII of the Civil Rights Act of 1964 ("Title VII"); and (6) violations of California's Fair Employment and Housing Act ("FEHA"). The Court considers each claim in turn.

1. *Claim 1: Violation of the Fourth Amendment*

Plaintiffs allege that both the vaccine requirement and the testing requirement for exempted employees violate the Fourth Amendment. For the reasons below, the Court disagrees.

The Fourth Amendment protects against unreasonable searches and seizures. *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Though searches conducted without suspicion are typically prohibited, the Supreme Court has created exceptions for circumstances where the government has "special needs, beyond the normal need for law enforcement." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). Accordingly, alleged Fourth Amendment violations that are not related to law enforcement purposes are analyzed under the judicially-crafted special-needs rubric, not under the traditional search-and-seizure analysis. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) Such a search is constitutional when special, non-law-enforcement needs make obtaining a warrant or determining the existence of probable cause "impracticable." *Id.*

As a threshold matter, Plaintiffs do not assert, and the Court cannot find, any controlling case indicating that a vaccine-injection requirement is a "search" under the Fourth Amendment. Although Plaintiffs included allegations related to the vaccine mandate in their Fourth Amendment claim, their Opposition seems to concede the point, as it argues only that the weekly testing requirement is unreasonable. Accordingly, the Court addresses only whether the weekly testing requirement constitutes a reasonable special-needs search.

To determine whether a special-needs search is reasonable, a court must balance four factors: (1) the nature of the privacy interest affected; (2) the character of the intrusion; (3) the nature and immediacy of the government concern; and (4) the efficacy of this means of addressing the concern. *See id.* at 654–64. The Court addresses each factor in turn.

a. *Nature of the Privacy Interest Affected*

The "collection and testing of [bodily fluids] intrudes upon expectations of privacy that society has long recognized as reasonable." *Skinner v. Railway Labor Execs.' Ass'n*, 489 U.S. 602, 617 (1989). This expectation applies even if the test "does not include either a blood test or urinalysis." *Yin v. State of Cal.*, 95 F.3d 864, 870 (9th Cir. 1996). Accordingly, Plaintiffs' Fourth Amendment privacy rights are inarguably raised by a requirement that they submit to mandatory COVID-19 tests; either their mucus or saliva must be extracted in order to test for the virus.

The expectation of privacy is reduced for employees in a workplace, however. *See O'Connor v. Ortega*, 480 U.S. 709, 709 (1987). When analyzing the privacy interest, the court must assess the interest "in the context of the employment relation." *Id.* at 717; *see also Vernonia*, 515 U.S. at 654 ("[T]he legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual's legal relationship with the State."); *Hatley v. Dep. of Navy*, 164 F.3d 602, 604 (Fed. Cir. 1998) ("It is generally established that employees responsible for the safety of others may be subjected to . . . testing, even in the absence of suspicion of wrongdoing.")

Plaintiffs here are public employees, and the majority are police officers that have "the safety of others . . . in [their] hands." *Hatley*, 164 F.3d at 604. Further, Plaintiffs have already agreed that, as a condition of employment, they may be subjected to randomized, suspicion-less drug tests—tests which are conducted via urinalysis, which is a far more invasive procedure than a nasal swab or saliva collection. (*See* Defs.' RJN, Ex. C, at 15–16, ECF No. 42-1.) While a contract may not extinguish a party's expectation of privacy, "[i]t is clear that [it] may under appropriate circumstances diminish" that expectation. *Yin*, 95 F.3d at 872. Considering Plaintiffs are entrusted with public safety and have contractually consented to searches that are more invasive than those required by COVID tests, Plaintiffs undoubtedly have a reduced privacy interest here. *See O'Connor*, 480 U.S. at 709.

b. *Character of the Intrusion*

While any intrusion into the body is an intrusion on one's privacy, "[t]he fact that an intrusion is negligible is of central relevance to determining reasonableness." *Maryland v. King*, 569 U.S. 435, 446 (2013). For example, a buccal (cheek) swab "involves but a light touch on the inside of the cheek; and although it can be deemed a search within the body . . . it requires no surgical intrusions beneath the skin." *Maryland v. King*, 569 U.S. 435, 446 (2013). Where an intrusion is brief, painless, and can be done "with a minimum of inconvenience or embarrassment," courts are less likely to find the intrusion unreasonable. *See Skinner*, 489 U.S. at 625. This is particularly so when the test can be performed "outside a hospital environment." *Id.*

Plaintiffs do not allege that either type of COVID-19 test—collection of saliva or a nasal swab—is particularly humiliating or painful. Rather, they state in conclusory fashion that the weekly testing is "intrusive." (*See* FAC ¶ 37.) This Court, like other courts to have considered the issue, finds both tests to be negligible intrusions. *See Streight v. Pritzker*, 2021 WL 4306146, at *6 (N.D. Ill. Sep. 22, 2021) ("The saliva PCR test is one of the most minimally-invasive tests available, as it only requires a small vial of saliva and can be completed in a public setting, unlike blood or urine tests."). While the nasal swab is perhaps slightly more intrusive than the saliva test, it still "is performed in a matter of seconds; is not painful; and does not involve '[a body part or] function traditionally shielded by great privacy." *Aviles v. Blasio*, 2021 WL 796033, at *22 (S.D.N.Y. March 2, 2021.) Both tests hew far more closely to

the buccal swab of *Maryland v. King*—a "negligible" intrusion—than to the random urinalysis that Plaintiffs are already subjected to as a condition to employment. 469 U.S. at 446; *see also Yin*, 95 F.3d at 870 (holding that urinalysis and blood tests are more intrusive than a standard medical exam). Accordingly, this factor weighs towards a finding of reasonableness.

c. *Nature and Immediacy of the Government Concern*

Plaintiffs do not attempt to allege that the City's concern here is neither immediate nor great. Indeed, documents cited in the FAC highlight the continued need to contain the spread of COVID-19. For example, Plaintiffs cite a study published by the Centers for Disease Control and Prevention ("CDC") stating that "[v]ariants of SARS-CoV-2 continue to emerge," and recommending that "[j]urisdictions might consider expanding prevention strategies." Catherine M. Brown, DVM, et al, *Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings – Barnstable County, Massachusetts, July 2021*, Centers for Disease Control and Prevention (Aug. 6, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s_cid=mm7031e2_w.[2]

The Court joins other courts in finding that this factor supports the reasonableness of a testing regime. *See, e.g.*, *Streight*, 2021 WL 4306146, at *6 ("The nature and immediacy of the government concern here is great . . . [based in part on] rising numbers of COVID-19 cases and hospitalizations."); *Guilfoyle v. Beutner*, 2021 WL 4594780, at *20 (C.D. Cal. Sep. 14, 2021) (holding that "efforts to keep the District's student body and staff protected from the COVID-19 virus during the ongoing COVID-19 pandemic" justified a testing regime); *Aviles*, 2021 WL 796033 at *23 ("[T]he nature and immediacy of the governmental concern could hardly be more compelling. The random testing program is designed to control the spread of the COVID-19 virus in schools and in the larger community.")

d. *Efficacy and Means of Addressing the Concern*

The FAC also does not allege that COVID-19 testing is an ineffectual means of containing the spread of COVID-19. While much of the FAC is dedicated to challenging the efficacy of the *vaccine* mandate, only the testing regime is at issue in Plaintiffs' Fourth Amendment claim. To that end, Plaintiffs allege several times that a vaccine requirement is not needed *because testing has worked to*

[2] When analyzing a motion to dismiss, courts may consider documents incorporated by reference in the complaint "in situations where the . . . contents of the document are alleged in the complaint, the document's authenticity is not in question and there are no disputed issues as to the document's relevance." *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). Unlike with judicial notice, "a court may assume [an incorporated document's] contents are true for purposes of a motion to dismiss." *Khoja*, 899 F.3d at 1003. Here, Plaintiffs allege the contents of the document in their complaint (*see* FAC ¶ 39), the document's authenticity is not in question (it is published by a governmental authority and publicly available), and Defendants have not disputed its relevance.

contain the spread of the disease. (*See, e.g.*, FAC ¶ 42 ("The City also fails to address quarantine as an effective measure *upon a positive COVID-19 test result*.") (emphasis added); *id.* ¶ 43 ("The City acknowledges in the Ordinance that non pharmaceutical interventions . . . *such as testing* . . . are adequate safety measures to protect the peace, health, and safety of the employee, fellow employees, or the community.") (emphasis added); *id.* ¶50 ("[T]he City relied on weekly testing for unvaccinated people as the primary means of protecting the peace, health, and safety of . . . the community. The City presents no evidence that the peace, health, and safety of City employees or the community in general has been compromised in any way by using non-pharmaceutical interventions.").) Based on Plaintiffs' own allegations, the Court finds that this factor favors a finding of reasonableness.

e. *Conclusion*

Balancing the *Vernonia* special-interest factors and considering the allegations in the FAC in the light most favorable to Plaintiffs, the Court finds that Plaintiffs fail to state a claim that the City's weekly testing requirement violates the Fourth Amendment.

2. *Claim 2: Violation of the California Constitution's Right to Privacy*

Plaintiffs' second claim alleges that the Ordinance violates the California Constitution's right to privacy for two reasons: (1) it forces Plaintiffs to disclose their private medical information; and (2) forces them to receive an unwanted medical treatment. Defendants counter that Plaintiffs cannot plead a *prima facie* right-to-privacy claim, and even if they could, the invasion here is justified by the government's countervailing interest. The Court agrees with Defendants.

Unlike the United States Constitution, the California Constitution contains an express right to privacy. *See Hill v. Nat. Collegiate Athletic Ass.*, 7 Cal. 4th 1, 20 (1994). The protection, however, is far from absolute, and must be balanced against "other important interests." *Id.* at 37. To survive a motion to dismiss, the plaintiff must plead the following threshold elements: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." *Id.* at 39–40. A defendant may defeat a state constitutional privacy claim either by "negating any of the three elements" or by showing "that the invasion of privacy is justified because it substantially furthers one or more countervailing interests." *Id.* at 40. When "the state asserts important interests in safeguarding health," the challenged law is reviewed under the "rational basis standard. In the area of health and health care legislation, there is a presumption both of constitutional validity and that no violation of privacy has occurred." *Coshow v. City of Escondio*, 132 Cal. App. 4th 687, 712 (2005).

The Ordinance directly relates to health care, and Plaintiffs are unable to show that it is not at least rationally related to the state's interest in preventing the spread of COVID; in other words, they cannot defeat the "presumption of constitutional validity." *Id.* California courts have recently analyzed right-to-privacy challenges to a universal vaccine mandate for schoolchildren. In two cases holding that plaintiffs had failed to state a claim, the courts noted that the California right to privacy is "no more sacred than any other fundamental rights that have readily given way to a State's interest in protecting the health and safety of its citizens." *Love v. State Dept. of Educ.*, 29 Cal. App. 5th 980, 994 (2018); *see also Brown v. Smith*, 24 Cal. App. 5th 1135, 1146–47 (2018). Indeed, "compulsory immunization has long been recognized as the gold standard for preventing the spread of contagious diseases." *Brown*, 24 Cal. App. 5th at 1148. The vaccine mandate at issue in *Love* and *Brown* was stricter than the Ordinance here, forbidding a child to attend school unless immunized against at least "10 specific diseases and any other disease deemed appropriate," with no exemption for personal religious beliefs. *Love*, 29 Cal. App. 5th at 865. Nonetheless, the *Love* and *Brown* courts affirmed dismissal of the plaintiffs' claims.

The Court follows the guidance of these California courts in applying California law and holds that Plaintiffs have failed to state a claim for right to privacy violations.[3]

3. *Claim 3: Violations of the Right to Substantive Due Process Guaranteed by the Fourteenth Amendment*

In their third claim, Plaintiffs allege that the Ordinance treads upon their "fundamental rights to bodily integrity" and their "property interests associated with their employment by the City." (FAC ¶¶ 116, 121.) Because the Ordinance impinges upon fundamental rights, they argue, it must be analyzed with strict scrutiny, and it fails that demanding test. Defendants counter that there has never been a fundamental right to refuse vaccination or to governmental employment, and therefore the Court should review the Ordinance under the rational basis standard. The Court agrees with Defendants and finds that the Ordinance passes the rational basis test.

The right to substantive due process provided by the Fourteenth Amendment "protects individuals from arbitrary deprivation of their liberty by government." *Sylvia Landfield Tr. v. City of Los Angeles*, 729 F.3d 1189, 1195 (9th Cir. 2013). Heightened protection under substantive due process applies to "those fundamental rights which are deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997). Thus, when the government infringes upon a fundamental right, a court must apply a strict scrutiny analysis to determine whether the law passes

[3] Plaintiffs make much of the fact that *Love* and *Brown* discuss vaccine mandates for schoolchildren, arguing that the reduced privacy interest that children have at school clearly distinguishes those mandates from the Ordinance. For the reasons discussed in the Fourth Amendment analysis, however, Plaintiffs, who are responsible for public safety and have contractually agreed to randomized invasive drug testing, have a similarly reduced privacy interest.

constitutional muster. *Id.* at 721. When the government infringes upon non-fundamental rights, however, the alleged infringement needs merely to pass a rational basis analysis. *Id.* at 722. Under rational basis analysis, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

The Supreme Court has long rejected a fundamental right to refuse vaccination. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905). After all, the "liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Id.* at 26. Communities have "the right to protect [themselves] against an epidemic of disease which threatens the safety of [their] members." *Id.* at 27. It is not the judiciary's role to determine the most effective method of protecting the public from disease; that responsibility rests with the other branches of government "to determine in the light of all the information" they can obtain. *Id.* at 30.

There is also no fundamental right to continued governmental employment. When the state acts as employer, the court must consider the "crucial difference . . . between the government exercising the power to regulate or license, as lawmaker, and the government acting as proprietor, to manage [its] internal operation." *Engquist v. Or. Dep't of Agr.*, 553 U.S. 591, 598 (2008). Therefore, the Supreme Court has applied rational basis analysis to claims brought by government employees. *See, e.g.*, *Kelley v. Johnson*, 425 U.S. 238, 244–48 (1976); *see also Engquist*, 553 U.S. at 599 ("Given the common-sense realization that government offices could not function if every employment decision became a constitutional matter, constitutional review of government employment decisions must rest on different principles than review of . . . restraints imposed by the government as sovereign.").

Because neither of Plaintiffs' claimed rights is fundamental, the Court applies the rational basis test to the Ordinance. In other words, the Ordinance will pass constitutional muster so long as there is a "legitimate state interest" and the Ordinance is rationally related to that interest. *City of Cleburne*, 473 U.S. at 440. As an initial matter, there is no question that the city's interest in preventing the spread of COVID-19 is not merely legitimate; it is "unquestionably . . . compelling." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). The only remaining question, then, is whether the Ordinance is rationally related to this interest. Plaintiffs allege that several scientific studies have found that the vaccines are in fact less effective than the natural antibodies they have obtained after previously contracting COVID-19, and that those who are vaccinated continue to "transmit the virus at concerning levels." (FAC ¶¶ 14, 31–35.) Unfortunately for Plaintiffs, "[t]he Due Process Clause does not require scientific consensus to justify government action." *Guilfoyle*, 2021 WL 4594780, at *16; *see also United States v. Navarro*, 800 F.3d 1104, 1114 (9th Cir. 2015) ("[R]ational basis review allows for decision based on rational speculation unsupported by evidence or empirical data."). Because the Ordinance follows guidelines from governmental organizations such as the CDC, the Food and Drug

Administration ("FDA"), and the California Department of Public Health, the Court finds that the City's decisionmakers could conclude that the Ordinance was at least rationally related to controlling the spread of COVID-19. (*See* Request for Judicial Notice, Exs. A, G–I.)

Accordingly, Plaintiffs fail to state a claim for violation of their substantive due process rights.[4]

4. *Claim 4: Violations of Due Process Based on the EUA Statute*

Plaintiffs also allege that the Ordinance violates their due process rights because the Emergency Use Authorization ("EUA") statute "mandates informed and voluntary consent." (FAC ¶ 136.) Because the Ordinance requires Plaintiffs to obtain the vaccine without consenting, Plaintiffs argue, it acts to improperly supersede the requirements of the EUA statute. The Court disagrees.

The EUA statute allows the FDA to authorize emergency use of a vaccine that has yet to receive full FDA approval. *See* 21 U.S.C. § 360bbb-3(a)(2). Before a health provider may administer an unapproved product, however, they must give a patient "the option to accept or refuse administration." *Id.* § 360bbb-3(e)(1)(A)(ii)(III).

The Pfizer vaccine has received full FDA approval, and is no longer merely authorized under the EUA statute. (*See* RJN, Ex. J.) Therefore, the informed consent requirements of the EUA statute do not apply to the Pfizer vaccine. In addition, the informed consent requirement "only applies to medical providers." *Klaassen*, 2021 WL 3073926, at *25. The statutory provisions do not apply to an employer when the employer is not "directly administering the vaccine." *See id.* Because the Pfizer vaccine now has full FDA authorization and the relevant provisions of the EUA statute apply only to medical providers (and not employers like the City), Plaintiffs fail to state their fourth claim.

[4] To the extent Plaintiffs argue that the mandate is an unconstitutional condition, they are also incorrect. Under the unconstitutional conditions doctrine, "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). A "hard choice doesn't amount to coercion," however, and a person's liberty interest may be confined by "the state's legitimate interests that it had rationally pursued in regulation." *Klaassen v. Trustees of Ind. Univ.*, 2021 WL 3073926, at *23, 25 (N.D. Ind. Jul 18, 2021), *aff'd by Klaassen v. Trustees of Ind. Univ.*, 7 F.4th 592 (7th Cir. 2021). In other words, a government entity does not impose an unconstitutional condition by enforcing a duly enacted, constitutional law. The Court has found that the Ordinance is constitutional, so there can be no unconstitutional condition here.

5. *Claims 5 and 6: Violations of Title VII and the Fair Employment and Housing Act*

Plaintiffs' fifth and sixth claims are for religious discrimination in violation of Title VII and FEHA.[5] Defendants argue that Plaintiffs have not alleged facts sufficient to establish a *prima facie* case of religious discrimination. The Court agrees.

Title VII and FEHA make it unlawful for an employer to discriminate against an employee based on their religion. *See* 42 U.S.C. § 2000e-2(a); Cal. Gov. Code § 12940(a). To plead a *prima facie* case of religious discrimination, a plaintiff must allege facts that plausibly demonstrate: (1) he holds a "bona fide religious belief, the practice of which conflicted with an employment duty; (2) he informed the employer of that belief and conflict; and (3) the employer threatened the employee with or subjected him to discriminatory treatment, including discharge, because of an inability to fulfill the job requirements." *E.E.O.C. v. AutoNation USA Corp.*, 52 Fed. App'x 327, 329 (9th Cir. 2002).

Here, Plaintiffs fail to allege facts sufficient to satisfy the third element. While Plaintiffs allege that they have submitted requests for religious exemptions, at no point in the FAC do they state that those requests have been denied or are likely to be denied. Without allegations that Defendants have not, or are not likely to, deny Plaintiffs' requests for accommodation, Plaintiffs do not plausibly allege that Defendants have discriminated, or threatened to discriminate, against them. In their Opposition (but not the FAC), Plaintiffs point to Section 4.704 of the Ordinance, which may prohibit unvaccinated employees from receiving promotions or transfers. (Pls.' Opp. to Mot. Dismiss, at 25, ECF No. 50.) However, neither the FAC nor the Opposition contain specific allegations that any of the thirteen plaintiffs have been passed for promotion, are likely to be passed for promotion, or even have the potential to be passed for promotion because of their refusal to become vaccinated.

Because Plaintiffs have failed to state a claim under Title VII or FEHA, the Court dismisses both claims. However, the Court finds that Plaintiffs may be able to allege that one or more of them have specifically been threatened with or subjected to discriminatory treatment. Because amendment will not necessarily be futile, the Court grants Plaintiffs leave to amend these claims.

B. Motion for Preliminary Injunction

Because no claim survives the Motion to Dismiss, the Court **DENIES *as moot*** Plaintiffs' Motion for Preliminary Injunction.

[5] Courts analyze Title VII and FEHA claims identically. *Dykzeul v. Charter Comms., Inc.*, 2019 WL 8198218, at *3 (C.D. Cal. Nov. 18, 2019). As such, the Court analyzes the claims together.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:21-cv-07296-RGK-JPR	Date	January 7, 2022
Title	***Jason Burcham, et al. v. City of Los Angeles, et al.***		

VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motion to Dismiss. Plaintiffs are granted leave to amend only the claims alleging Title VII and FEHA violations. If Plaintiffs choose to amend, they must file an amended complaint no later than January 14, 2022.

Because the Court dismisses all of Plaintiffs' claims as currently alleged, Plaintiffs' Motion for Preliminary Injunction is **DENIED** ***as moot.***

IT IS SO ORDERED.

_____ : _____

Initials of Preparer _____

Attachment 2

Kheriaty v. The Regents of the University of California et al., No. 8:21-CV-01367

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 21-1367 JVS (KESx)	Date	September 29, 2021
Title	Aaron Kheriaty v. Regents of the University of California, et al.		

Present: The Honorable	**James V. Selna, U.S. District Court Judge**
Deborah Lewman	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **[IN CHAMBERS] Order Regarding Motion for Default Judgment and Permanent Injunction**

Plaintiff Aaron Kheriaty, M.D., ("Kheriaty") filed a motion for a preliminary injunction. Mot., Dkt. No. 15. Defendant Regents of the University of California ("The Regents") filed a response. Opp'n, Dkt. No. 22. Kheriaty filed a reply. Reply, Dkt. No. 31.

For the following reasons, the Court **DENIES** the motion.

I. BACKGROUND

A. Introduction

This case concerns the constitutionality of the University of California's COVID-19 vaccine policy. On July 15, 2021, the Regents enacted the University of California Policy regarding the COVID-19 Vaccination Program ("Vaccine Policy") which requires all students, faculty, and staff, with limited exemptions, to be fully vaccinated against COVID-19 before accessing University of California ("University") facilities. Vaccine Policy, Dkt. No. 15-2, Ex. B, at 2. Kheriaty is a professor of Psychiatry and Human Behavior at the University of California Irvine ("UCI") School of Medicine and the director of the Medical Ethics Program at the UCI School of Medicine. Kheriaty Decl., Dkt. No. 15-2, ¶ 7. As an employee of UCI, Kheriaty is subject to the Vaccine Policy. Kheriaty Decl. ¶ 4. Kheriaty contracted COVID-19 in July of 2020 and has since fully recovered. Kheriaty Decl. ¶ 2. Kheriaty seeks an injunction preventing the Regents from enforcing the Vaccine Policy against him because he alleges that his prior infection gives him superior immunity to COVID-19 than vaccinated individuals. Compl., Dkt. No. 1, ¶ 10.

B. COVID-19

SARS-CoV-2, the virus that causes COVID-19, likely first infected humans in November of 2019. Reingold Decl., Dkt. No. 22-4, ¶ 8. In the nearly two years since, the COVID-19 pandemic

upended everyday life across the globe. Since the first cases were detected in the United States in early 2020, the United States has diagnosed over 42 million cases of COVID-19 and more than 670,000 Americans died from COVID-19.[1] While the true number may be higher, there are more than two million documented hospitalizations of people with COVID-19 in the United States. Crotty Decl., Dkt. No. 22-3, ¶ 8. Older populations and individuals with preexisting immunosuppressive conditions are more susceptible to severe complications from COVID-19. Reingold Decl. ¶ 12. However, the impact is not limited to a particular segment of the population. Individuals over the age of 50 make up one quarter of total hospitalizations, and over 117,000 Americans between the ages of eighteen and twenty-nine were hospitalized with COVID-19 in the past year. Crotty Decl. ¶ 8.

The impacts of a SARS-CoV-2 infection can extend beyond the immediate threat of COVID-19 to an individual's health. It is known to cause severe illnesses, including Multisystem Inflammatory Syndrome in Children and Multisystem Inflammatory Syndrome in Adults, as well as "long COVID," a descriptor for a lingering set of symptoms. Reingold Decl. ¶ 12. When the community-wide prevalence of COVID-19 reaches a certain threshold, it also impacts the ability of healthcare facilities to provide the typical standard of care. de St. Maurice Decl., Dkt. No. 22-7, ¶ 7.

The trajectory of COVID-19 has fluctuated dramatically throughout the United States. After cases appeared to be on the wane in the spring and early summer of 2021, infection rates and hospitalizations dramatically increased in recent months. Reingold Decl. ¶ 13. As of September 17, 2021, the seven-day moving average of new COVID-19 cases in the United States was over 146,000 new cases a day, with a seven-day moving average of more than 1,400 deaths per day.[2] California is not at the epicenter of the current surge, yet the state is still averaging more than 9,000 COVID-19 infections per day and over 120 deaths per day from COVID-19.[3] The current spike in infections is driven by the Delta Variant, a more infectious form of SARS-CoV-2 that became the dominant form of COVID-19 in the United States as of July 2021. Byington Decl., Dkt. No. 22-5, ¶ 6.

C. COVID-19 Vaccines

The global effort to develop vaccines began in early 2020, shortly after SARS-CoV-2 was identified as the cause of COVID-19. Reingold Decl. ¶ 15. As of September 2021, there are three

[1]Data current as of September 21, 2021. For updated statistics, see CDC, Covid Data Tracker, available at https://covid.cdc.gov/covid-data-tracker/#datatracker-home.

[2]Data current as of September 18, 2021. For updated statistics, see CDC, COVID Data Tracker Weekly Review, available at https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html.

[3]Data current as of September 18, 2021. For updated statistics, see New York Times, Coronavirus in the U.S.: Latest Map and Case Count, available at https://www.nytimes.com/interactive/2021/us/covid-cases.html.

COVID-19 vaccines available in the United States. Reingold Decl. ¶ 15. After extensive trials and review of safety and efficacy data, the United States Food and Drug Administration ("FDA") issued emergency use authorizations for the Moderna and Johnson & Johnson vaccines, and full approval to the Pfizer vaccine. Crotty Decl. ¶ 15. By September 18, 2021, over 384 million doses of the COVID-19 vaccine have been administered in the United States.[4] The parties disagree about the safety and effectiveness of the COVID-19 vaccines, as well as the relative merits of vaccine-induced immunity compared with infection-induced immunity. The Court briefly reviews their positions here, not to determine which party is correct, but simply to highlight the points of contention.

The first area of disagreement is the safety of the COVID-19 vaccines. The Regents rely on Centers for Disease Control ("CDC") statements that "COVID-19 vaccines are safe and effective," and that "serious side effects that could cause a long-term health problem are extremely unlikely." CDC, Safety of COVID-19 Vaccines, Dkt. No. 22-9, Ex. 2, at 1-2. According to the CDC, "no long-term side effects have been detected" from the hundreds of millions of doses of COVID-19 vaccines administered to date. Id. at 14. The Regents' medical experts specifically note that clinical trials for COVID-19 vaccines included previously infected individuals, and cite to studies finding that vaccine safety is the same for previously infected individuals as it is for individuals who have never had COVID-19. Crotty Decl. ¶¶ 16-19, 40. Additionally, the CDC currently recommends that individuals who have previously been infected with COVID-19 receive the vaccination. CDC, Frequently Asked Questions about COVID-19, Dkt. No. 22-9, Ex. 3, at 1.

Kheriaty argues that user-reported entries into the CDC's Vaccine Adverse Event Reporting System show that the rate of serious reactions to the COVID-19 vaccine are significantly higher than indicated by CDC tracking. Kheriaty Decl. ¶¶ 22-25. Additionally, Kheriaty asserts that post-vaccination cases of myocarditis, pericarditis, thrombocytopenia, and blood clots could be linked to COVID-19 vaccination. Declaration of Joseph Ladapo, MD, Phd, et al. ("Ladapo Decl.), Dkt. No. 15-4, ¶ 26. Kheriaty also points to three studies suggesting that there may be higher rates of vaccine reactions among individuals who have previously had COVID-19. Ladapo Decl. ¶ 23.

Next, the parties disagree on the effectiveness of the COVID-19 vaccines at preventing infections. The Regents cite to evidence showing that the vaccines remain highly effective, including against the Delta variant. Crotty Decl. ¶¶ 22, 45-46. They present data showing a 93% reduction in transmissions for a vaccinated individual compared to an unvaccinated individual because of the decrease in infections and shorter window of time for transmission. Crotty Decl. ¶ 46. Some studies also show that previously infected individuals who are vaccinated have a more potent immune response and recognize variants better than unvaccinated individuals with infection-induced immunity. Crotty Decl. ¶ 26.

[4]Data current as of September 18, 2021. For updated statistics, see CDC, COVID-19 Vaccinations in the United States, available at https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total.

Kheriaty takes the opposite view of the effectiveness of the COVID-19 vaccines. Among other sources, he cites to a study of a community outbreak that found that most individuals who were infected were previously vaccinated, Ladapo Decl. ¶ 19, and a statement from the CDC Director during a CNN appearance that the vaccines cannot prevent transmission any longer. Ladapo Decl. ¶ 20. Kheriaty also points to studies of monkeys suggesting that the COVID-19 vaccines do not fully block viral infection and replication. Ladapo Decl. ¶ 18.

Finally, the parties disagree on the scientific certainty regarding the effectiveness of infection-induced immunity. While the Regents acknowledge that data supports the theory that previously infected individuals have "some level of immunity," they argue that the "scientific consensus regarding infection-induced immunity is still developing." Opp'n at 6. They cite to a large study from the United Kingdom showing that vaccine-induced immunity was "somewhat better" than infection-induced immunity. Crotty Decl. ¶ 49. Their experts also raise concerns that "neither the completeness nor the durability of protection" provided by infection-induced immunity has been established. Reingold Decl. ¶ 21. Looking forward, they express concerns that infection-induced immunity may provide less protection against emerging variants than "hybrid immunity" (a descriptor for someone who has both had a prior SARS-Cov-2 infection and received a COVID-19 vaccine). Crotty Decl. ¶ 27. Finally, they note that the FDA and CDC do not recommend the use of current antibody tests to determine whether a particular individual has immunity to SARS-Cov-2 infection. Reingold Decl. ¶ 22.

Meanwhile, Kheriaty asserts that infection-induced immunity is definitively more than 99% effective at preventing reinfection. Mot. at 7-8; see Ladapo Decl. ¶ 14. As support for that proposition, he relies on the fact that as of May 2021 there were no documented cases of re-infected individuals contracting SARS-Cov-2 and transmitting the virus. Ladapo Decl. ¶ 12; McCullough Decl. ¶ 17. Kheriaty's experts present several studies finding that infection-induced immunity lasts for at least several months. Ladapo Decl. ¶ 8. They also cite to a selection of studies from Israel, French Guiana, the Cleveland Clinic, and UCLA suggesting that infection-induced immunity may be more effective than vaccine-induced immunity. Ladapo Decl. ¶ 11. In light of those data, Kheriaty reaches the conclusion that infection-induced immunity "confers an additional benefit" over vaccine-induced immunity. Mot. at 11.

D. University of California Vaccine Policy

Throughout the pandemic, the Regents adopted numerous new University-wide policies in response to rapidly changing public health conditions and scientific knowledge. See Drake Decl. ¶ 7; Bolden-Albala Decl., Dkt. No. 22-6, ¶ 4; Kheriaty Decl. ¶ 9. After more than a year of online instruction, the University is resuming in-person activities this fall, with more than 280,000 students and over 227,000 faculty and staff returning to locations across the state of California. Boden-Albala Decl. ¶ 8. On July 15, 2021, the Regents issued the Vaccine Policy "to maintain the health and well-being of the campus community and that of the general public." Drake Letter, Dkt. No. 22-8, Ex. A, at 1. The Regents formulated the Vaccine Policy through consultation with "infectious disease experts and ongoing review of the evidence from medical studies concerning the dangerousness of COVID-19 and

emerging variants of concern, as well as the safety and effectiveness of the vaccines." Id.

The Vaccine Policy requires every member of the campus community, including students, faculty, and staff, to receive a COVID-19 vaccination as a condition of access to University facilities. Id. The Vaccine Policy does provide exceptions on the basis of medical exemption, disability, or religious objection. Vaccine Policy at 3. However, an individual with documentation of a recent COVID-19 diagnosis or an antibody test showing infection-induced immunity is only eligible to apply for a temporary medical exemption of up to 90 days. Vaccine Policy at 11. Elaborating on the rationale for that decision, the Vaccine Policy quotes an FDA publication stating that "a positive result from an antibody test does not mean you have a specific amount of immunity or protection from SARS-CoV-2 infection . . . Currently authorized SARS-CoV-2 antibody tests are not validated to evaluate specific immunity or protection from SARS-CoV-2 infection." Vaccine Policy at 11 (quoting FDA Safety Communication, Antibody Testing Is Not Currently Recommended to Assess Immunity After COVID-19 Vaccination, Dkt. No. 22-9, Ex. 4).

E. Procedural History

On August 18, 2021, Kheriaty filed his complaint seeking declaratory and injunctive relief based on the alleged unconstitutionality of the Vaccine Policy. Compl., Dkt. No. 1. On August 23, 2021, Kheriaty filed the instant motion for this preliminary injunction. Mot., Dkt. No. 15. On September 14, 2021, after briefing closed, the Regents moved to dismiss this motion. Mot. to Dismiss, Dkt. No. 32. On September 17, 2021, the Regents filed an answer to the complaint. Answer, Dkt. No. 34. In reaching this ruling, the Court has not considered any additional materials beyond the briefing on this motion.

II. LEGAL STANDARD

On an application for a preliminary injunction, the plaintiff has the burden to establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm if the preliminary relief is not granted, (3) the balance of equities favors the plaintiff, and (4) the injunction is in the public interest. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 5, 20 (2008).

In the Ninth Circuit, the Winter factors may be evaluated on a sliding scale: "serious questions going to the merits, and a balance of hardships that tips sharply toward the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir. 2011). "To reach this sliding scale analysis, however, a moving party must, at an 'irreducible minimum,' demonstrate some chance of success on the merits." Global Horizons, Inc. v. U.S. Dep't of Labor, 510 F.3d 1054, 1058 (9th Cir. 2007) (citing Arcamuzi v. Cont'l Air Lines, Inc., 819 F.2d 935, 937 (9th Cir. 1987)).

III. DISCUSSION

A. Standing

As a threshold matter, the Regents contend that Kheriaty lacks standing because his injury is not redressable by a favorable decision. Mot. at 10. The constitutional minimum for standing requires an injury in fact, a causal connection between the injury and the defendant's action, and a showing that a favorable decision will likely redress the injury. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992). The Regents argue that a separate California Department of Health mandate that "all health care workers must be vaccinated" by September 30, 2021 would prevent a favorable decision in this case from redressing Kheriaty's injury. State Public Health Officer Order of August 5, 2021 ("Department of Health Order"), Dkt. No. 22-9, Ex. 1, at 2.

As Kheriaty notes, the Vaccine Policy will impact his professional activities in ways that fall outside of the scope of the Department of Health Order. For instance, if he were to remain unvaccinated, the Vaccine Policy would limit his ability to enter the UCI campus or teach in a classroom setting, which are not covered by the Department of Health Order. Kheriaty has thus sufficiently alleged an injury that can be redressed. See Ariz. Attorneys for Criminal Justice v. Brnovich, -- Fed. App'x --, 2021 WL 3743888, at *2 ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury.") (quoting Larson v. Valente, 456 U.S. 228, 243 n.15 (1982)).

The Regents do not challenge the other standing requirements. Accordingly, the Court finds that Kheriaty has standing to bring a challenge against the UC Vaccine Policy.

B. Likelihood of Success on the Merits

The Court begins by considering the likelihood that Kheriaty's complaint will succeed on the merits, the most important factor in the preliminary injunction analysis. See Garcia v. Google, Inc., 786 F.3d 733 (9th Cir. 2015). Kheriaty's complaint alleges two violations of the Fourteenth Amendment, one based on equal protection and one based on substantive due process. Compl. ¶¶ 63-87. The Court begins by considering Kheriaty's substantive due process claim.

i. Standard of Review Under the Due Process Clause

"To state a prima facie substantive or procedural due process claim, one must, as a threshold matter, identify a liberty or property interest protected by the Constitution." United States v. Guillen-Cervantes, 748 F.3d 870, 872 (9th Cir. 2014). The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." Washington v. Glucksberg, 521 U.S. 702, 720 (1997). Supreme Court jurisprudence "establish[es] a threshold requirement–that a challenged state action implicate a fundamental right–before requiring more than a reasonable relation to a legitimate state interest to justify the action." Glucksberg, 521 U.S. at 722. To determine the correct level of scrutiny to apply, the Court first looks to whether Kheriaty has identified a fundamental right that is violated by the Vaccine Policy.

Kheriaty first argues that the Vaccine Policy violates his fundamental right to bodily integrity. Mot. at 20-21. As support, he relies on "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278 (1990). However, the Supreme Court follows a "tradition of carefully formulating the interest at stake in substantive-due-process cases." Glucksberg, 521 U.S. at 722. In Glucksberg, the Supreme Court clarified that the Cruzan holding narrowly "assumed that the Constitution granted competent persons a 'constitutionally protected right to refuse lifesaving hydration and nutrition.'" Glucksberg, 521 U.S. at 723 (quoting Cruzan, 497 U.S. at 279). The Vaccine Policy clearly implicates different liberty interests from Cruzan. Kheriaty is not refusing "lifesaving hydration and nutrition." Instead, he is seeking an injunction against an employer mandate to take a vaccine with the stated purpose of not only protecting himself against an infectious disease, but also protecting the broader community at large.

As the Regents note, the Supreme Court previously considered the carefully formulated liberty interest at stake here. In Jacobson v. Massachusetts, the Court considered a challenge to a Massachusetts law allowing cities to enforce vaccination for smallpox under penalty of fines if "necessary for the public health or safety." 197 U.S. 11, 12 (1905). The Court held that "the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." Id. at 25. Notably, the Court deferred to the policymaking role of the State, finding that judicial intervention would only be appropriate if the statute had "no real or substantial relation" to public health, morals, or safety despite its purported purpose. Id. at 31.

While the case predates the formalized tiers of review, the Court later acknowledged that Jacobson "essentially applied rational basis review." Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring). Indeed, in the intervening century, courts routinely applied rational basis review when considering challenges to vaccine policies. See Klaasen v. Trs. of Ind. Univ., -- F. Supp. 3d --, 2021 WL 3073926, at *24 (N.D. Ind. July 18, 2021) (collecting cases). Other courts continued to apply that same standard when evaluating challenges to vaccine policies issued during the COVID-19 pandemic. See Klaasen, 2021 WL 3073926, at *24; Harris v. Univ. of Mass., 2021 WL 3848012, at *6 (D. Mass. Aug. 27, 2021).

To be clear, that does not mean that a court must find any vaccination effort to be constitutional. As the Supreme Court recently emphasized, "even in a pandemic, the Constitution cannot be put away and forgotten." Diocese of Brooklyn, 141 S. Ct. at 68. But the Diocese of Brooklyn court applied strict scrutiny because the challenged regulation's impact on religious institutions "str[uck] at the very heart of the First Amendment's guarantee of religious liberty," not because the policies were promoting public health. Id. at 68. Kheriaty does not allege any infringement of religious liberty in this case. See also Policy at 3-4 (providing exceptions for medical reasons, disability, and for religious objections based on a person's "sincerely held religious belief, practice, or observance").

Alternatively, Kheriaty argues that the UC Vaccine Policy implicates his fundamental right to informational privacy by requiring disclosure of vaccination status to his employers. Mot. at 22-23. The Ninth Circuit recognizes an "individual interest in avoiding disclosure of personal matters." In re Crawford, 194 F.3d 954, 958 (9th Cir. 1999) (internal quotations omitted). Medical information falls within the scope of that right. See Nelson v. Nat'l Aeronautics & Space Admin., 530 F.3d 865, 877 (9th Cir. 2008). The right to informational privacy, however, is "a conditional right which may be infringed upon a showing of proper governmental interest." Crawford, 194 F.3d at 959. "Legitimate governmental interests combined with protections against public dissemination can foreclose a constitutional violation." Endy v. County of Los Angeles, 975 F.3d 757, 768 (9th Cir. 2020).

The Regents adopted a policy that requires knowing which members of the campus community are vaccinated in an effort to combat COVID-19. "Stemming the spread of COVID-19 is unquestionably a compelling interest." Diocese of Brooklyn, 141 S. Ct. at 67. Thus, the Regents have shown a legitimate governmental interest in receiving the information of whether employees and students are vaccinated. Additionally, the Vaccine Policy expressly states that "the University will not disclose vaccine status . . . except on a need-to-know basis." Vaccine Policy at 11. Combined with the legitimate governmental interest in receiving the information, these protections against publicly sharing Kheriaty's vaccination status foreclose a constitutional violation under Ninth Circuit precedent. See Endy, 975 F.3d at 768.

The Court finds that Kheriaty has not established that the Vaccine Policy implicates a fundamental right. Accordingly, rational basis review is the appropriate standard to apply to the substantive due process claim.

ii. Standard of Review Under the Equal Protection Clause

Alternatively, Kheriaty argues that the Policy violates the Equal Protection Clause. The Equal Protection Clause mandates that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Cent., 473 U.S. 432, 439 (1985). To prevail on an equal protection claim, a plaintiff must "show that a class that is similarly situated has been treated disparately." Boardman v. Inslee, 978 F.3d 1092, 1117 (9th Cir. 2020). If the identifiable group is recognized as a suspect or quasi-suspect class, courts examine the classification under a heightened level of scrutiny. Cleburne, 473 U.S. at 440; see Regents v. Bakke, 438 U.S. 265, 290-91 (1978) (Powell, J.) (treating race as a suspect classification); Craig v. Boren, 429 U.S. 190, 197 (1976) (treating gender as a quasi-suspect classification). Outside of the limited number of traits that have been recognized as suspect or quasi-suspect classes, courts apply rational basis review. See, e.g., Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) (applying rational basis review to an equal protection claim alleging discrimination based on age). If there is no suspect class at issue, differential treatment is presumed to be valid so long as it is "rationally related to a legitimate state interest." Cleburne, 473 U.S. at 440. Thus, to determine the

appropriate standard of review of an Equal Protection Clause claim, the first step is to determine the type of classification at issue.

Kheriaty identifies the two classes that the Vaccine Policy treats disparately as individuals who have vaccine-induced immunity and individuals who have infection-induced immunity. Mot. at 16. While Kheriaty is correct that the Vaccine Policy treats those two groups differently, the Regents take the position that "[t]he Policy does not target a suspect class." Opp'n at 11. The Court agrees with the Regents. Whether the class here is formulated as "non-vaccinated individuals," "individuals who have previously had COVID-19," or "non-vaccinated individuals with immunity to COVID-19," Kheriaty presents no authority to show that any court has found a similar classification to be suspect or quasi-suspect. See Ball v. Massanari, 254 F.3d 817, 823-24 (9th Cir. 2001) (declining to find that alcoholics are a suspect or quasi-suspect class while noting that the Supreme Court has extended heightened scrutiny to classifications based on race, sex, national origin, alienage, and illegitimacy).

In arguing for the application of strict scrutiny, Kheriaty cites Culinary Studios, Inc. v. Newsom for the proposition that "[a] public health emergency does not give rise to an alternative standard of review." 517 F. Supp. 3d 1042, 1063 (E.D. Cal. 2021). While the general proposition is correct, Kheriaty is in fact the party seeking an alternative standard of review. See Reply at 3 (arguing that strict scrutiny applies because "Plaintiff is asserting a violation of equal protection because Defendants are treating differently two groups, both of which are immune to SARS-CoV-2"). As discussed above, courts apply rational basis review to an equal protection claim unless there is a suspect or quasi-suspect classification at issue. Kheriaty provides no precedent showing a court that extended the heightened protections provided to other suspect or quasi-suspect classes to vaccination status. This Court declines to do so here as well.

Accordingly, the Court applies rational basis review to Kheriaty's Equal Protection claim, the typical standard where there is not a suspect class at issue.

iii. Application of Rational Basis Review

The rational basis review test is functionally the same under substantive due process and the Equal Protection Clause. Gamble v. City of Escondido, 104 F.3d 300, 307 (9th Cir. 1997). Substantive due process only requires a rational relationship between the challenged policy and a legitimate governmental objective. Brach v. Newsom, 6 F.4th 904, 924 (9th Cir. 2021). "Governmental action is rationally related to a legitimate goal unless the action is clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals, or general welfare." Sylvia Landfield Trust v. City of Los Angeles, 729 F.3d 1189, 1193 (9th Cir. 2013) (internal quotations omitted).

Under the Equal Protection Clause, if there is no suspect class at issue a policy "need only rationally further a legitimate state purpose to be valid." Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 291 (1984) (internal quotations omitted). The Equal Protection Clause is satisfied so long as there is a "plausible policy reason for the classification," the government decisionmaker relied on facts

that "may have been considered to be true," and "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." Nordlinger v. Hahn, 505 US 1, 11 (1992). "Given the standard of review, it should come as no surprise [courts] hardly ever strike[] down a policy as illegitimate under rational basis scrutiny." Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018).

The two-tiered rational basis inquiry first asks whether the challenged law has a legitimate purpose, then whether the challenged law promotes that purpose. Erotic Serv. Provider Legal Educ. and Research Project v. Gascon, 880 F.3d 450, 457 (9th Cir. 2018). The Court finds that the Vaccine Policy easily satisfies that inquiry. First, the Regents describe a clear goal of maintaining the health and well being of the campus community. Oppn at 14-15. "Stemming the spread of COVID-19 is unquestionably a compelling interest." Diocese of Brooklyn, 141 S. Ct. at 67. Next, while formulating the Vaccine Policy, the Regents considered extensive peer-reviewed data showing vaccination as an effective strategy to combat the spread of COVID-19. Oppn. at 15-16. This is sufficient to establish that the Vaccine Policy rationally furthers a legitimate state purpose.

Kheriaty argues that the Vaccine Policy cannot survive rational basis review because the distinction between individuals with vaccine-induced immunity and infection-induced immunity is arbitrary and irrational. Reply at 9-10. The Regents, however, made a considered decision to only provide a temporary exemption for previously infected individuals. Opp'n at 16. Relying on experts who reviewed the current status of research and underlying data, the Regents reached the conclusion that they could not justify allowing individuals with prior COVID-19 infections to opt out of the vaccination requirement because "doing so would put the greater UC community at risk." Opp'n at 16. Kheriaty and the experts he relies on draw a different conclusion based on their perception of the current medical science. Reply at 9-10.

But merely drawing different conclusions based on consideration of scientific evidence does not render the Vaccine Policy arbitrary and irrational. The Regents have met their burden under rational basis review. They considered the evidence and developed a policy that rationally furthers a legitimate state purpose. The role of this Court is not to make policy decisions about the exact scope of the policy that is appropriate. "Plaintiffs argue that a growing body of scientific evidence demonstrates that vaccines cause more harm to society than good, but as Jacobson made clear, that is a determination for the legislature, not the individual objectors." Phillips v. City of New York, 775 F.3d 538, 542 (2d Cir. 2015). That is particularly true here, where the scientific understanding of COVID-19 is rapidly developing. See also Vance v. Bradley, 440 U.S. 93, 108 (1979) (holding that even if a classification is "to some extent both underinclusive and overinclusive and hence the line drawn [is] imperfect," perfection is not required).

Kheriaty also suggests that the goal of the Vaccine Policy is to discriminate against the unvaccinated, who he describes as "a politically unpopular group." Mot. at 20. "[A] bare [] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest" under the Equal Protection Clause. Romer v. Evans, 517 U.S. 620, 634 (1996) (internal quotation omitted). But where there is no suspect class at issue, a challenged law may only be struck down on the basis of animus "if

the statute serves no legitimate governmental purpose and if impermissible animus toward an unpopular group prompted the statute's enactment." Boardman, 978 F.3d at 1119 (quoting Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1200 (9th Cir. 2018)).

Given that the Court has already found that the Vaccine Policy serves legitimate state interests, an animus claim under the Equal Protection Clause cannot prevail. See Boardman, 978 F.3d at 1119. The Court also notes that while the Regents present extensive scientific evidence explaining the legitimate reasons behind their decision to issue the Vaccine Policy, Kheriaty presents nothing more than mere conclusory statements to support his claim of animus or his assertion that unvaccinated individuals constitute a politically unpopular group.

The Vaccine Policy satisfies rational basis review under both substantive due process and the equal protection clause. Thus, the Court finds that Kheriaty has not shown a likelihood of success on the merits.

C. Irreparable Harm, Balance of the Harms, Public Interest

Within the Ninth Circuit, "serious questions going to the merits, and a balance of hardships that tips sharply toward the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Alliance for the Wild Rockies, 632 F.3d at 1134-35. At this stage, Kheriaty has not only failed to show a likelihood of success, he has not raised serious questions going to the merits.

Even if the Court found that Kheriaty had raised serious questions going to the merits, the other factors would weigh against granting a preliminary injunction. The balance of equities tips sharply towards the Regents. The Regents are attempting to protect a campus community of more than half a million students, faculty, and staff from a deadly infectious disease. This far outweighs any harm Kheriaty may face in choosing between receiving a medically-approved vaccination or suffering undetermined employment-related consequences. The public interest also weighs heavily in favor of the Regents. See Bruesewitz v. Wyeth LLC, 562 U.S. 223, 226 (2011) (describing "the elimination of communicable diseases through vaccination" as "one of the greatest achievements of public health in the 20th century") (internal quotations omitted). The Vaccination Policy not only impacts the members of the campus community who it directly applies to, but also provides indirect protections to other members of the public at large, including the patients that Kheriaty sees in his practice as a psychiatrist.

In light of the failure to raise serious questions going to the merits, the balance of hardships that weighs heavily towards the Regents, and the strong public interest that weighs against an injunction, the Court finds that a preliminary injunction is not appropriate in this case.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 21-1367 JVS (KESx)	Date	September 29, 2021
Title	Aaron Kheriaty v. Regents of the University of California, et al.		

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** the motion.

IT IS SO ORDERED.

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Initials of Preparer djl

Attachment 3

***Let them Choose v. San Diego Unified School Dist.*, No. 37-2021-43172**

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

LET THEM CHOOSE, an initiative of LET THEM BREATHE, a California nonprofit public benefit corporation;

Plaintiffs,

vs

SAN DIEGO UNIFIED SCHOOL DISTRICT; and DOES 1 -50,

Defendants.

Case Number: 37-2021-43172-CU-WM-CTL (consolidated with 37-2021-49949 *S.V. v. SDUSD*)

Hearing Date: December 20 2021

TENTATIVE RULING

In September 2021, Respondent San Diego Unified School District's (SDUSD) Board of Education voted to approve a "Vaccination Roadmap" (the Roadmap). The Roadmap requires all students eligible for a fully FDA approved COVID-19 vaccine to receive the vaccine in order to attend school in-person and participate in extra-curricular activities. Currently, only those students aged 16 and older fall within the mandate and must receive both doses of the vaccine by December 20, 2021. Students who do not comply will be placed into an independent study program beginning with the new semester. Petitioners Let Them Choose, an initiative of Let Them Breathe, and S.V., individually and on behalf of J.D. (collectively, Petitioners) seek a writ of mandate restraining SDUSD from implementing the Roadmap.

SDUSD "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." (Educ. Code, § 35160, emphasis added; see *Hartzell v. Connell* (1984) 35 Cal.3d 899, 915–916.) Petitioners contend that the Roadmap field is preempted by Education Code section 120325 et seq. and directly conflicts

with both California Code of Regulations, title 17, section 6025 and provisions of Education Code section 51745 et seq.

"Under the normal rules of preemption, a local ordinance that conflicts with state law is preempted by the state law and void. . . . Pursuant to preemption law, a conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Haytasingh v. City of San Diego* (2021) 286 Cal.Rptr.3d 364, 392; see generally *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061; *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239.)

More than a century ago, the Legislature began regulating the field of school vaccination requirements. In 1890, the California Supreme Court upheld a "Vaccination Act" that required schools to exclude children who had not been vaccinated against smallpox. (*Abeel v. Clark* (1890) 84 Cal. 226, 227–228, 230.) The Court stated that vaccination, "being the most effective method known of preventing the spread of the disease referred to, it was for the legislature to determine whether the scholars of the public schools should be subjected to it." (*Id.* at p. 230, emphasis added.) The Legislature subsequently put control of smallpox under the direction of the State Department of Public Health (DPH) and provided that "no rule or regulation on the subject of vaccination shall be adopted by school or local health authorities." (Educ. Code, § 49405, emphasis added; see also Health & Saf. Code § 131052, subd. (3).)

Between 1961 and 2010, the Legislature imposed a total of 10 vaccine requirements for school children—diphtheria, hepatitis B, haemophilus influenza type b, measles, mumps, pertussis, poliomyelitis, rubella, tetanus, and varicella. (Health & Saf. Code, §§ 120325, subd. (a)(1)–(10), 120335, subd. (b)(1)–(10); see Assem. Com. on Health, Analysis of Sen. Bill No. 277 (2015–2016 Reg. Sess.) as amended May 7, 2015, p. 4.) "Each of the 10 diseases was added to the California code through legislative action, after careful consideration of the public health risks of these diseases, cost to the state and health system, communicability, and rates of transmission." (*Love v. State Department of Education* (2018) 29 Cal.App.5th 980, 987, emphasis added.) A detailed statutory and regulatory scheme has been established to implement the school vaccine mandates. (See Health & Saf. Code, § 120325 et seq.; Cal. Code Regs., tit. 17, § 6000 et seq.) The scheme included exemptions for both medical reasons and personal beliefs. (See Health & Saf. Code, § 120370; former Health & Saf. Code, § 120365.)

In 2015, in response to decreasing vaccination rates and a rise in measles, the Legislature removed the "personal beliefs" exemption to these 10 school vaccination requirements. (Sen. Bill No. 277 (2015–2016) §§ 1, 4; see generally *Love*, *supra*, 29 Cal.App.5th 980; *Brown v. Smith* (2018) 24 Cal.App.5th 1135.) In doing so, the Legislature considered whether "the issue of public health could be addressed by mandating vaccines on a community by community or school district [by] school district basis," but concluded that "a statewide approach is the correct approach." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 277 (2015–2016) as amended Apr. 22, 2015, p. 18.) "To provide a statewide standard, allows for a consistent policy that can be publicized in a uniform manner, so districts and educational efforts may be enacted with best practices for each district. . . . Further in consultation with various health officers, they believe a statewide policy provides them the tools to protect all children equally from an outbreak." (*Ibid.*)

Recognizing the need for additional vaccine mandates that may arise in the future, the Legislature added a "number 11" mandating that school children be vaccinated against "[a]ny other disease

deemed appropriate by the [State Department of Public Health], taking into consideration the recommendations of the Advisory Committee on Immunization Practices of the United States Department of Health and Human Services, the American Academy of Pediatrics, and the American Academy of Family Physicians." (Health & Saf. Code, §§ 120325, subd. (a)(11), 120335, subd. (b)(11); see also *id.* at § 131051, subd. (a)(3)(J).) However, because the addition of a new mandate via this "catch all" provision "disrupts the careful balancing of the various rights involved" in the legislative process, the Legislature decided to maintain the "personal beliefs" exemption for new vaccination requirements added by the DPH. (*Id.* at § 120338; Sen. Com. on Judiciary, Analysis of Sen. Bill No. 277 (2015–2016) as amended Apr. 22, 2015, pp. 17–18.)

The DPH is charged with adopting and enforcing regulations to carry out the vaccination requirements. (Health & Saf. Code, § 120330; see Cal. Code Regs., tit. 17, § 6000 et seq.) The DPH has not added COVID-19 as a required vaccine under the "catch all" provision, which would need to include a personal belief exemption. (Cal. Code Regs., tit. 17, § 6025; see Health & Saf. Code, § 120338.) Rather, DPH regulations state that a school "shall unconditionally admit or allow continued attendance" to any student who has either received each of 10 enumerated vaccines or obtained an exemption. (*Ibid.*, emphasis added; see also *Puerta v. Torres* (2011) 195 Cal.App.4th 1267, 1272 ["The term 'shall' is mandatory"].)

Vaccination requirements do not apply to students who are enrolled in an independent study program and not receiving classroom-based instruction. (Health & Saf. Code, § 120335, subd. (f).) However, the decision to participate in independent study must be voluntary. (See Educ. Code, §§ 51747, subds. (f), (g)(8), 51749.5, subd. (a)(9), (12), 51749.6, subd. (a)(6); Cal. Code Regs., tit. 5, § 11700, subd. (d).) Thus, if students have received all 10 vaccinations, a school district cannot force or coerce them into non-classroom-based independent study.

In light of the above, it is clear that SDUSD's Roadmap attempts to impose an additional requirement in a field that the Legislature fully occupies through Health and Safety Code section 120325 et seq. The Legislature intended a statewide standard for school vaccination requirements and established a detailed scheme. The Legislature expressly contemplated the addition of new vaccine mandates without further legislative action, but assigned that responsibility to the DPH, taking into account recommendations from other relevant agencies and organizations and mandating that those new mandates include a personal belief exemption. The statutory scheme leaves no room for each of the over 1,000 individual school districts to impose a patchwork of additional vaccine mandates, including those like the Roadmap that lack a personal belief exemption and therefore are even stricter than what the DPH could itself impose upon learned consideration.

SDUSD is correct that certain statutes contemplate school districts administering vaccines in cooperation with local health officers to help prevent and control communicable diseases in school age children, including "diseases that represent a current or potential outbreak as declared by a federal, state, or local public health officer," provided the district has received parental consent. (See Educ. Code, § 49403; see also Health & Saf. Code, §§ 120375, subd. (d), 120380.) However, the Roadmap was not enacted to cooperate with the local health officer, and more to the point, those statutes do not detract from the Legislature's intent to occupy the field of mandating a specific vaccine for school age children.

SDUSD's Roadmap also attempts to impose an additional requirement that directly conflicts with California Code of Regulations, title 17, section 6025 and the above referenced provisions of Education Code section 51745 et seq. SDUSD is required to admit students and allow their continued in-person attendance as long as they have received the 10 enumerated vaccines. SDUSD's attempt to impose an additional vaccine mandate and force students (both new and current) who defy it into non-classroom-based independent study directly conflicts with state law.

The sole function of this Court is to determine whether the Roadmap is preempted by state law. SDUSD's Roadmap appears to be necessary and rational, and the district's desire to protect its students from COVID-19 is commendable. Unfortunately, the field of school vaccine mandates has been fully occupied by the State, and the Roadmap directly conflicts with state law. The addition of a COVID-19 vaccine mandate without a personal belief exemption must be imposed by the Legislature. Accordingly, this Court is compelled to **GRANT** the petitions for writ of mandate.