Docket No. 21-56259

In the

United States Court of Appeals for the Ninth Circuit

JOHN DOE, an individual; JANE DOE, individually and as parent and next friend of JILL DOE, a minor child; and JILL DOE, a minor child, by and through her next friend, JANE DOE,
Plaintiffs-Appellants,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT; RICHARD BARRERA, in his official capacity as Board President; SHARON WHITEHURST-PAYNE, in her official capacity as Board Vice President; MICHAEL MCQUARY, in his official capacity as Board Member; KEVIN BEISER, in his official capacity as Board Member; SABRINA BAZZO, in her official capacity as Board Member; and LAMONT JACKSON, in his official capacity as Interim Superintendent,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Southern District of California, Case No. 3:21-cv-1809-CAB
Honorable Cathy Ann Bencivengo, District Judge

URGENT MOTION FOR AN INJUNCTION PENDING APPEAL UNDER CIRCUIT RULE 27-3; RELIEF REQUESTED BY MONDAY, NOVEMBER 29

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CIRCUIT RULE 27-3 CERTIFICATE

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(ii) Facts showing the existence and nature of the emergency:

This appeal presents a challenge to a "vaccine mandate" for all students imposed by the San Diego Unified School District ("SDUSD") in defiance of First Amendment principles established in the line of

Supreme Court cases striking down restrictions on Free Exercise in the COVID-19 regimes of California and New York, beginning with *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) and ending with *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).[1]

These cases supply clear guidance for application of the analytical framework established by *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which holds while "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability," laws that "are not 'neutral' and of 'general applicability' … must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest." *Id*. at 879.

For 115 years, courts relied on *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11 (1905) to dismiss objections to compulsory vaccination laws. Whether based on substantive due process, equal

[1] *See also* the interim decisions in *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Gish v. Newsom*, 141 S. Ct. 1290 (2021) and *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); as well as *Brach v. Newsom*, 6 F.4th 904, 933 n.26 (9th Cir. 2021) (noting that five Justices joined Justice Gorsuch's statement in *South Bay*).

protection, or free exercise of religion, all objections failed in the face of *Jacobson*, which was handed down long before the development of the Supreme Court's modern Free Exercise jurisprudence.

With the emergence of the COVID-19 pandemic in April 2020, the Southern District of California became the first venue in the nation to apply *Jacobson* to Free Exercise challenges to pandemic regulations generally. *Abiding Place Ministries, Inc. v. Wooten*, No. 3:20-cv-00683-BAS-AHG, ECF Nos. 7 & 10 (S.D. Cal. Apr. 10, 2020), https://bit.ly/3DYZcmt. This jurisprudential error spread as its own pandemic through the federal courts, and it took six emergency orders from the Supreme Court before it was effectively stamped out—including five orders directed to California and the courts of this Circuit.

In the pandemic cases of 2020 and 2021, however, the Supreme Court surpassed the antiquated holding in *Jacobson* in the process of enunciating the governing rules of Free Exercise analysis under *Smith*. Those rules could not have been more clearly stated than in *Tandon*:

> First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.

> Second, whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.... Comparability is concerned with the risks various activities pose, not the reasons why people [engage in them]....

Tandon, 141 S. Ct. at 1296 (emphasis in original) (cleaned up)

Post-*Tandon*, even California has learned the lesson that pandemic-related restrictions cannot burden religion if *any* comparable secular activity, posing the same sort of health risk as a religious activity, is not so burdened.

Even Governor Newsom's unprecedented directive to the California Department of Public Health ("CDPH") to mandate COVID-19 vaccination for all students in California—the only mandate of its kind in the entire country (2-EX-48;7-EX-1596)—at least allows for "personal belief" exemptions, including religious beliefs. 7-EX-1599. This provision is in keeping with California law's preexisting protection of students with religious or personal belief objections for coercive vaccination with novel vaccines, such as the COVID-19 vaccines. *See* Cal. Health & Saf. Code § 120338.

But the ghost of *Jacobson* has returned to haunt the precincts of a local school district. In an attempt to evade even California's minimal state law protection for religious freedom, the SDUSD, its Board of Education, and its Interim Superintendent, ***acting independently of the public health departments of both California and San Diego County***, have issued a vaccine mandate on their own purported authority that contains no exemption for personal or religious beliefs. Students who do not comply with the SDUSD mandate, dubbed the "Vaccination Roadmap," are relegated to remote learning and are thus segregated from the student body based on nothing more than their religious beliefs.

In defiance of First Amendment principles even the recalcitrant Governor of California has learned to follow, the SDUSD mandate repeats the pattern of constitutional infirmity that led to the *Tandon* line of Supreme Court decisions. The Vaccination Roadmap picks "winners" who receive exemptions from vaccination and are allowed to "spread the virus" on school premises, while the "losers" are exclusively students who seek exemptions based on their religious beliefs. The following "winners" are not required to be vaccinated for in-person learning even though their presence on campus manifestly poses a risk of transmitting COVID-19:

- Students, teachers and staff with medical contraindications to vaccination;
- Teachers (but *not* students) with personal belief or *religious* objections to vaccination;
- Pregnant women throughout their pregnancies;
- Disabled students with an individual education program (IEP); and
- Foster children, children from military families, migrant or homeless students, all of whom can be enrolled conditionally for in-person learning for a period of 30 days while they obtain vaccination or retrieve records proving vaccination.

As explained below, according to Defendants' Vaccination Roadmap, all students age 16 and up must receive their first dose of the Pfizer vaccine by November 29, 2021. That is needed so they can take a second dose by December 20, 2021, and then have two weeks to become "fully vaccinated" before classes in 2022. *See* 7-EX-1552, 1557; 3-EX-290:2-11.

Plaintiffs are a devout Christian family, with a 16-year old daughter (Jill Doe) attending Scripps Ranch High School within the SDUSD. Plaintiffs' faith precludes them from taking any of the currently available COVID-19 vaccines. Plaintiff Jill Doe is a preeminent athlete who is hoping to obtain a college sports scholarship based on her

performance this academic year. Because she cannot receive any COVID-19 vaccine, SDUSD's mandate bars her from campus, including extracurricular activities, dooming her prospects for a college scholarship. Plaintiff Jill Doe has already contracted and recovered from COVID-19, granting her greater immunity than from any COVID-19 vaccine. 7-EX-1447, 1535-36.

In light of the conflict between SDUSD's Vaccination Roadmap and Plaintiffs' religious beliefs, on Friday, October 22, 2021, Plaintiffs initiated this action in the Southern District of California. 7-EX-1524-600. Plaintiff Jane Doe brought suit on behalf of her daughter, Plaintiff Jill Doe. *See* Fed. R. Civ. P. 17(c); *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 26 F. Supp. 2d 1001, 1006 (W.D. Mich. 1998).

Relying on older cases involving Free Exercise challenges to mandatory vaccination laws, and essentially ignoring the post-*Jacobson* legal standard enunciated in the *Tandon* line, on Thursday, November 18, 2021, the district court denied Plaintiffs' motion for interim injunctive relief. 1-EX-2-12. Plaintiffs immediately appealed (7-EX-1601-15), and now respectfully request that this Court issue an injunction pending appeal, **before Monday, November 29, 2021**, preventing Defendants

from requiring Plaintiffs to comply with their COVID-19 vaccination mandate for in-person attendance and participation in extracurricular activities.[2]

(iii) Whether the motion could have been filed earlier.

This motion could not have been filed earlier. The suit was filed within five days of counsel being retained (7-EX-1453), and the motion for injunctive relief six court days after that. (Dist. Ct. Doc. No. 7.) On Thursday, November 18, 2021, the district court denied Plaintiffs' application for a temporary restraining order and an OSC re: preliminary injunction. 1-EX-2-12. That same day, Plaintiffs filed their notice of appeal (7-EX-601-15), and on the next day, the present motion.

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[2] Below, Plaintiffs framed this injunctive relief in the negative, asking the district court to grant Plaintiffs an equal exemption to the most favored student or teacher. 7-EX-1541. The district court criticized this framing, stating that it would not ensure redressability because Defendants could simply remove all exemptions. 1-EX-4-6. But this hypothetical that the district court conjured up cannot exist. Defendants have made clear that, for many (not all) of those exemptions, they are precluded from removing them by state or federal law. 5-EX-981-83; 5-EX-1020-21. In any event, the courts, "in fashioning interim relief" and bringing to bear their own "equitable judgment," may craft a "tailor[ed]" injunction "to meet the exigencies of the particular case." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017); *see California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018).

(iv) When and how counsel was notified:

On Thursday, November 18, 2021, counsel for Defendants-Appellees San Diego Unified School District, its Board of Education, and its Interim Superintendent were copied on an email to the Emergency Clerk, informing them of this motion. Immediately after this motion was filed, it was emailed to the Emergency Clerk and all counsel. Based on prior communications, Defendants have made clear that they oppose the injunctive relief sought.

(v) Whether relief was first sought in the District Court

In its order denying interim injunctive relief, the district court denied an injunction pending appeal, stating: "For the same reasons, an injunction pending any appeal of this ruling is not warranted." 1-EX-12.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

///

///

///

RULES

STATUTES & REGULATIONS

INTRODUCTION

Ignoring the teaching of the Supreme Court in the pandemic Free Exercise cases of 2020 and 2021, as well as the pleas of thousands of parents, the Board of Education of the SDUSD voted to make vaccination from COVID-19 a requirement to attend school. In advance of the Board meeting, the Board made clear that no religious exemptions would be allowed for students, but *teachers* could get a religious exemption under Title VII. As noted above, students and teachers alike can obtain medical exemptions, pregnant students and students with an IEP are exempt, and certain preferred categories of students (migrants, homeless, foster, and military families) are totally exempted during a "conditional" enrollment period of 30 days. All of these favored exemptees are free to "spread the virus" on school premises, while students seeking religious exemptions are totally barred under this policy of segregation.

In light of a long line of cases relying on *Jacobson* to reject Free Exercise challenges to mandatory vaccination laws, the district court denied Plaintiffs' motion for preliminary injunctive relief, deeming inapplicable the Supreme Court's guidance in its most recent COVID-19 decisions. Thus, Plaintiffs now apply to this Court for an injunction

pending appeal, seeking relief in advance of the **November 29, 2021** deadline to take the first dose of the Pfizer vaccine.

LEGAL STANDARD

If exigencies require, the Courts of Appeal may "grant[] an injunction while an appeal is pending." Fed. R. App. P. 8. The factors for an "IPA" and a preliminary injunction are the same. *S.E. Alaska Conservation Council v. U.S. Army Corps of Engineers*, 472 F.3d 1097, 1100 (9th Cir. 2006). Thus, an IPA movant must establish (1) likelihood of success on the merits, (2) likelihood of irreparable harm, (3) the balance of harm tips in the movant's favor, and (4) that an IPA is in the public interest. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

However, because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Roman Catholic Diocese*, 141 S. Ct. at 67, "[r]eligious adherents are not required to establish irreparable harm independent of showing a Free Exercise Clause violation." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020). That is, "the [first] two prongs of the

preliminary injunction threshold merge into one." *Page v. Cuomo*, 478 F. Supp. 3d 355, 364 (N.D.N.Y. 2020) (cleaned up).

Similarly, "[w]here the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge." *South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1149 (9th Cir. 2021), *abrogated on other grounds*, 141 S. Ct. 716 (2021). The Ninth Circuit evaluates these factors through a "sliding scale approach" under which "a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." *All. for the Wild Rockies*, 632 F.3d at 1131.

A motion under Rule 8 for an IPA is reviewed *de novo* because it is *not* an appeal from a district court order. *Priorities USA v. Nessel*, 978 F.3d 976, 982 (6th Cir. 2020); *see also E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 769–770 (9th Cir. 2018) (adjudicating motion for a stay of injunction pending appeal without deference to trial court). Further, when First Amendment rights are at stake, reviewing courts must "make an independent examination of the whole record so as to assure [them]selves that the judgment does not constitute a forbidden intrusion on" constitutional rights. *Old Dominion Branch No. 496, Nat'l*

Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 282 (1974). Thus, "[w]hen an injunction involves a First Amendment challenge, constitutional questions of fact … are reviewed de novo." *Edge v. City of Everett*, 929 F.3d 657, 664 (9th Cir. 2019).

JURISDICTIONAL STATEMENT

Plaintiffs' Free Exercise claim is a federal question. 28 U.S.C. §§ 1331, 1343. As this appeal (7-EX-601-15) challenges a denial of a preliminary injunctive relief (1-EX-2-12), this court has jurisdiction under 28 U.S.C. § 1292(a)(1). *See Nat. Res. Def. Council v. Cty. of Los Angeles*, 840 F.3d 1098 (9th Cir. 2016).

FACTUAL BACKGROUND

A. The COVID-19 Pandemic& Vaccines

The U.S. Food and Drug Administration has approved three COVID-19 vaccines for emergency use in the United States: Pfizer-BioNTech (Dec. 11, 2020), Moderna (Dec. 18, 2020), and Janssen Biotech, a subsidiary of Johnson & Johnson (Feb. 27, 2021). On August 23, 2021, the Pfizer vaccine was approved for full use (non-emergency) with individuals age 16 and up, but the Moderna and Johnson & Johnson

vaccines remain approved only for individuals age 18 and up. 7-EX-1529-30.

All three of these vaccines have been manufactured or tested using material derived from stem cell lines from aborted fetuses. Making the vaccines in this manner was a grave oversight by the U.S. government and the pharmaceutical industry in light of many Americans' belief that abortion is a grave evil in which they cannot participate, and from which they cannot benefit, even remotely. 7-EX-1413-14, 1530.

B. The Vaccination Mandates

Despite the morally problematic nature of the currently available COVID-19 vaccines, on September 15, 2021, the SDUSD Board of Education held a closed-door session to consider whether to mandate that all students receive a COVID-19 vaccination in order to attend in-person classes. 7-EX-1530.

The SDUSD Board of Education then scheduled an open meeting to discuss imposing a COVID-19 vaccine mandate for Tuesday, September 28, 2021 at 5:00 pm. 7-EX-1531. In interviews made before the meeting, SDUSD Board President Beiser shared Interim Superintendent Jackson's proposed Vaccination Roadmap (7-EX-1545-61), and stated

that no religious objection for students would be considered. 7-EX-1531.

According to that Vaccination Roadmap, all eligible students—i.e., students in an age group for which there is a fully FDA approved COVID-19 vaccine, currently ages 16 and up—must be fully vaccinated by the start of classes next year, on January 4, 2022. The only vaccine available to students is the Pfizer double-dose vaccine, for which "full immunity" is not achieved until two weeks after the second dose is taken. At the very latest, this requires students to take their first dose by November 29, 2021. *See* 7-EX-1552, 1557; 3-EX-290:2-11.

As soon as the FDA approves vaccines for children ages 5-12, SDUSD will inform the parents of students that they must also get their children vaccinated to continue attending school in-person. *See* 7-EX-1556, 1558; 3-EX-290:17-291:2, 294:2-7. Unvaccinated students are relegated to independent online study (7-EX-1554, 1559; 3-EX-290:12-16, 291:2-5) and barred from extracurricular activities, including sports. 7-EX-1559; 3-EX-292:2-7.

Under the Vaccination Roadmap, religious belief is disallowed as a basis for student exemption. The stated rationale for this discrimination

is simply false: "State law does not recognize religious or personal belief exemptions for student immunizations." 7-EX-1559; *see also* 7-EX-1584.

The Vaccination Roadmap has five categories of exemption for favored individuals:

> (1) Staff members can apply for religious exemptions, and indeed 238 already have. 7-EX-1567; 5-EX-981-83.
>
> (2) Students and staff can apply for medical exemptions. 7-EX-1559, 1582-83, 1585; 5-EX-1017-20; 3:EX-291:16-18; 3-EX-461; *see also* 7-EX-1567.
>
> (3) Pregnant women can defer vaccination during pregnancy. 3-EX-463; 5-EX-1024.
>
> (4) Disabled students with an IEP (individual education plan), need not get a COVID-19 vaccination at all. 7-EX-1559. SDUSD officials have the discretion to craft unique requirements for them: *e.g.*, if they are not on SDUSD property for too long, they may be exempt from vaccination. 3-EX-295:16-297:1; 5-EX-1020-21.
>
> (5) Children "in one of these groups: foster youth, homeless, migrant, military family," "[m]ay be conditionally enrolled" for in-person learning for up to 30 days before vaccination is required. 7-EX-1559; 3-EX-291:22-292:1, 297:2-18; 5-EX-1020.

On September 28, 2021, the SDUSD Board of Education held its open meeting on the vaccine mandate. 7-EX-1533. Approximately 1,651 parents signed up to speak in opposition to the COVID-19 vaccine mandate (7-EX-1533), but the vast majority were unable to speak in

light of SDUSD's strange decision to hold the meeting virtually. *See* 2-EX-14-26. At the end of the meeting, the Board voted unanimously to approve the mandate. 7-EX-1533; 3-EX-317:22-320:17; *see* 7-EX-1565-68 (press release); 7-EX-1570-71 (letter to parents); 7-EX-1573-94 (FAQ page).

On October 1, 2021, Governor Newsom announced that he would issue an executive order making California the first State in the nation to mandate that all public school students must be vaccinated against COVID-19 in order to attend any school, public or private. 7-EX-1596. He acknowledged, however, that: "Requirements established by regulation, not legislation, must be subject to exemptions 'for both medical reasons and personal beliefs.'" 7-EX-1598-600 (quoting Cal. Health & Saf. Code § 120338).

In response to Governor Newsom's recitation of state law, Defendants modified their aforementioned false reference to state law, relying solely on the will of the SDUSD: "San Diego Unified does not allow religious exemptions for this particular vaccine." 2-EX-261-62. No other State has yet followed California's lead in mandating COVID-19 vaccination for school students. 2-EX-48.

C. The Doe Family

Mr. and Mrs. Doe, and their daughter Jill Doe, are bringing this case to protect each of their Free Exercise rights. Jill Doe, age 16, is a junior at Scripps Ranch High School in the SDSUD. Jill has played multiple sports for Scripps. 7-EX-1447, 1535.

Jill's faith prevents her from taking any of the currently available COVID-19 vaccinations connected to aborted fetal cell lines. According to SDUSD's vaccination mandate, she must either abandon her faith or enroll in independent, online study. Mr. and Mrs. Doe share her religious beliefs. 7-EX-1447, 1535. Jill Doe is a standout athlete who hopes to draw the attention of college recruiters. She reasonably believes that, with a good season, she can earn a sports scholarship. 7-EX-1447, 1535.

The Doe family attends a Christian church in San Diego County. Their faith recognizes the morally problematic nature of the currently available COVID-19 vaccines, which they cannot receive without violating their sincere religious beliefs. Many other Christian faith traditions have similar objections to these vaccines. 7-EX-1447, 1535.

In the past five years, Jill Doe's faith in particular has deepened. She is firmly pro-life and cannot in conscience participate in abortion in

any way. In the past year, the COVID-19 pandemic has further deepened her faith, teaching her that life is short and precious, and that she must stand up every day for her faith. 7-EX-1447, 1536.

Last spring, Jill and several others were exposed to an individual who tested positive for COVID-19. All of the other individuals in the group quickly contracted COVID-19, but Jill never got sick and never tested positive. Confused by this, she took an antibody test which showed that she had contracted the virus much earlier, leaving her with natural immunity sufficient to prevent her from contracting or spreading the virus. 7-EX-1536. This immunity is greater than vaccine-induced immunity. 6-EX-1038-40; 7-EX-1381-92; 2-EX-44-46.

D. Proceedings Below

In light of the conflict between SDUSD's Vaccination Roadmap and Plaintiffs' religious beliefs, on Friday, October 22, 2021, Plaintiffs initiated this action. 7-EX-1524-600.

Plaintiffs requested leave to proceed pseudonymously for fear of retaliation and harassment by SDUSD officials, teachers, or students. 7-EX-1536, 1452-53, 1463-506. That fear proved justified. The next school day after the lawsuit was filed, Jill Doe learned that one of the teachers

had read a news article to the class about her suit, inciting some of them to "want to find out who I am and hurt me." 7-EX-1448.

The parties began meeting and conferring on Thursday, October 28, 2021. 7-EX-1454, 1514-23. Service of the complaint on all Defendants was completed by Monday, November 1, 2021. (ECF Nos. 5 & 6.) That same day, Plaintiffs applied ex parte for a TRO and an order to show cause re: preliminary injunction. (ECF No. 7.) The District Court adopted the parties' proposed briefing schedule and set a hearing for November 19, 2021 at 2:00 p.m. (ECF No. 8.)

In support of their application, Plaintiffs relied on their verified complaint (7-EX-1524-600; 7-EX-1450-51), declarations from Mrs. Jane Doe (2-EX-258-59), Jill Doe (7-EX-1446-48), and experts Prof. Jayanta Bhattacharya (7-EX-1377-416) and Dr. Richard Scott French (6-EX-1027-56; 2-EX-27-49).

In opposition, Defendants submitted fact-witness declarations from Chief Human Resources Officer Acacia Thede (5-EX-980-83v), and Executive Director, Nursing & Wellness Susan Barndollar 5-EX-1016-21). Defendants also submitted a declaration from Dr. Howard Taras, who spearheaded the vaccine mandate (3-EX-448-64), along with various

CDC documents appended to an attorney declaration without discussion (3-EX-264-67).

On November 18, 2021, the district court issued its order denying Plaintiffs' application and vacating the hearing that had been scheduled for the next day. 1-EX-2–12. The order stated that the court would not grant any motion for an IPA. Plaintiffs immediately filed their notice of appeal. 7-EX-601-15. This motion followed.[3]

ARGUMENT

1. Legal & Jurisprudential Background

115 years ago, in *Jacobson*, the Supreme Court addressed whether the U.S. Constitution protected an individual's right to refuse the smallpox vaccine in contravention of a local ordinance during an epidemic. *Jacobson* explained that governments can validly enact restrictions on substantive due process rights to stop the spread of diseases, but they cannot do so in "an arbitrary, unreasonable manner,"

[3] In the same order, the district court granted Plaintiffs temporary leave to proceed pseudonymously, without prejudice to Defendants filing a motion to lift that temporary relief. 1-EX-11-12. Plaintiffs believe that a specific threat of physical violence to minor Jill Doe should be sufficient, *see* 7-EX-1448, and request that the Court specifically find as much to justify having this appeal docketed under pseudonymous names.

or in a way that "go[es] so far beyond what was reasonably required for the safety of the public." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 28 (1905).

Jacobson was decided decades before the First Amendment was held to apply to the States by incorporation, and thus was not a Free Exercise case. Yet courts have relied on that outmoded case to dismiss all objections to compulsory vaccination laws, whether based on substantive due process, equal protection, or free exercise of religion—and in 2020 began relying on it as justification for any government measure during a pandemic.

In *Tandon*, which represented "the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise," *Tandon*, 141 S. Ct. at 1297, the Court struck down Governor Newsom's absurd ban on worship in private homes, his church closure measures having already been struck down in the prior decision in *South Bay*, in which the Court observed that "[t]oday's order should have been needless; the lower courts in these cases should have followed the extensive guidance this Court already gave" in

Brooklyn Diocese. *South Bay*, 141 S. Ct. at 719 (Statement of Gorsuch, J.).

Finally following this guidance, lower courts have begun striking down mandatory vaccination requirements that make no exception for religious beliefs. In the Sixth Circuit, the district court granted a preliminary injunction for a student, and the circuit refused to issue a stay pending appeal. *Dahl v. Bd. of Trustees of W. Michigan Univ.*, 2021 WL 3891620 (W.D. Mich., Aug. 31, 2021); *stay pending appeal denied*, 15 F.4th 728 (6th Cir. 2021).

In the Fifth Circuit, the court of appeal stayed enforcement of OSHA's nationwide employee-vaccine mandate, primarily on statutory grounds, but also analyzed individuals' Free Exercise rights as part of the balancing of interests. *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, __ F.4th __, 2021 WL 5279381 (5th Cir. 2021).

In the Second Circuit, concerning two consolidated cases brought by healthcare workers, the district court in one case granted a preliminary injunction, *Dr. A. v. Hochul*, 2021 WL 4734404 (N.D.N.Y., Oct. 12, 2021), and the Second Circuit granted an injunction pending appeal in the other case. (7-EX-1456). However, when the two cases were

consolidated before a merits panel, the Second Circuit vacated the preliminary injunction in *Dr. A. We The Patriots USA, Inc. v. Hochul*, __ F.4th __, 2021 WL 5121983 (2d Cir. 2021). Both cases are now before the Supreme Court on emergency applications. Nos. 21A125 & 21A145.

In a case arriving from the First Circuit, which had upheld Maine's vaccine mandate for health care workers, the Supreme Court denied an emergency application on a non-merits basis, but only over a vigorous dissent from three Justices. *Does 1–3 v. Mills*, __ S. Ct. __, 2021 WL 5027177, at *1–4 (2021) ("*Mills III*") (Gorsuch, J., dissenting from denial of application). Concurring Justices Barrett and Kavanaugh wrote separately to make clear that the denial was *not an adjudication of the merits*, but merely a prudential denial. *Id.* at *1 (Barrett, J., concurring in denial of application). *See Roman Catholic Archbishop of Washington v. Bowser*, 531 F. Supp. 3d 22, at *6 n.5 (D.D.C. 2021) (discussing how denial of emergency relief is usually prudential, and therefore not precedential).

2. Likelihood of Success on the Merits & Irreparable Harm

Under current constitutional jurisprudence, already noted, "the right of free exercise does not relieve an individual of the obligation to

comply with a 'valid and neutral law of general applicability.'" *Smith*, 494 U.S. at 879. But laws or regulations that "are not 'neutral' and of 'general applicability,' [] must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest." *Roman Catholic Diocese*, 141 S. Ct. at 67; *accord Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

Here, the district court primarily cited, without analysis, older *Jacobson*-reliant cases that upheld mandatory vaccination laws in the face of Free Exercise challenges. 1-EX-7-9. The district court also cited, without analyzing, *We The Patriots* and *Mills*, to conclude that none of the Supreme Court's COVID-19 precedents are applicable here. 1-EX-9-10. But as discussed below, both old and new precedent make clear that the Vaccination Roadmap is subject to, and cannot survive, strict scrutiny.

2.1. The Vaccination Roadmap burdens Plaintiffs' free exercise of their religious beliefs.

"Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate

his beliefs, a burden upon religion exists." *Thomas v. Review Board of Indiana*, 450 U.S. 707, 717-18 (1981); *see Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (free exercise "may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

There is no dispute that all three of the available COVID-19 vaccines are, for these plaintiffs, morally tainted by their connection to abortion. 7-EX-1530; 7-EX-1413-14. Plaintiffs' faith tradition accepts the longstanding objection to vaccines that were developed or tested using material derived from abortions, even if other Christian believers might have a differing view. 7-EX-1447, 1535. None of these plaintiffs can receive these vaccines without violating their religious beliefs. 7-EX-1447, 1535. Forcing Plaintiffs to choose between having Jill Doe violate her religious beliefs to attend school, or stand fast in those beliefs and be barred from school premises with severe consequences for her future, is indubitably "substantial pressure on an adherent[s] to modify [their] behavior and to violate [their] beliefs…." *Thomas*, 450 U.S. at 717-18.

The burden here is particularly acute because Plaintiff needs to attend classes in-person and participate in extracurricular activities if she has any hope of earning a collegiate sports scholarship (7-EX-1535,

1538), with "the many tangible benefits that flow from just being given a chance to participate in intercollegiate athletics." *Neal v. Bd. of Trustees of California State Universities*, 198 F.3d 763, 773 (9th Cir. 1999). For that reason, the court in *Dahl*, refusing to stay the district court's preliminary injunction against the student vaccine mandate at issue there, held that "the University's failure to grant religious exemptions to plaintiffs burdened their free exercise rights" because that failure "put plaintiffs to the choice: get vaccinated or stop fully participating in intercollegiate sports." *Dahl*, 15 F.4th at 732.

Defendants did not contest the sincerity of Plaintiffs' religious beliefs, or the burden imposed on them by the Vaccination Roadmap, and the district court was silent on the matter. 1-EX-2-12. Heedless of the controlling precedents in *Thomas* and *Sherbert*, however, the district court found that "the harm Jill Doe will suffer … is not the loss of a First Amendment freedom, but rather the ability to attend in-person classes or participate in extra-curricular activities at her current public high school." 1-EX-11. This is precisely what constitutes "pressure on an adherent to modify [their] behavior and to violate [their] beliefs…" *Thomas*, 450 U.S. at 717–18.

The reasoning of this holding has been foreclosed for nearly 70 years: shunting students into separate educational channels based on protected characteristics is anathema to the Constitution, and necessarily causes irreparable harm. *Brown v. Board of Educ. of Topeka, Kan.*, 347 U.S. 483 (1954). In the Free Exercise context specifically, the Supreme Court reaffirmed quite recently: "[T]he Free Exercise Clause protects against *indirect coercion or penalties* on the free exercise of religion, *not just outright prohibitions*." *Trinity Lutheran*, 137 S. Ct. at 2022 (emphasis added) (citing *Sherbert*). Forcing Plaintiffs to choose between their faith and in-person schooling and a sports scholarship is itself "[t]he loss of First Amendment freedoms, for even [a] minimal period[] of time[.]" *Brooklyn Diocese*, 141 S. Ct. at 67; *accord Dahl*, 15 F.4th at 736; *BST Holdings*, 2021 WL 5279381, at *8 & n.21.

2.2. The Vaccination Roadmap is not neutral and of general application because it imposes more stringent burdens on Religious Exercise than other activities

Developing the mode of Free Exercise analysis established by the *Tandon* line, the Supreme Court, in *Fulton*, has affirmed that a law or regulation "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's

asserted interests in a similar way." *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1877 (2021); *see also Lukumi*, 508 U.S. at 543 (a law lacks general applicability if it is underinclusive).

In other words, a law or regulation is not "neutral" and "generally applicable" if the government "openly impose[s] more stringent regulations on religious institutions than on many businesses." *South Bay*, 141 S. Ct. at 717 (Statement of Gorsuch, J.). In that context, there is no need to assess "whether a law reflects 'subtle departures from neutrality,' 'religious gerrymander[ing],' or 'impermissible targeting' of religion." *Id.* (cleaned up).

Stated most forcefully, *and with the Supreme Court's own emphasis*, is the bright line rule noted above:

> [G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise….
>
> [W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. Comparability is concerned with the risks various activities pose, not the reasons why people [engage in them]."

Tandon, 141 S. Ct. at 1296.

In other words, the current Supreme Court has fully endorsed then-Judge Alito's rule in *Fraternal Order of Police*, wherein, respecting a "no-beards" policy for police officers, Judge Alito held that "the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*." *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999).

Here, Defendant SDUSD's interest is in providing "the highest-quality instruction in the safest environment possible for all students and employees" (7-EX-1546), by "protect[ing] schools and the community from Covid-19[.]" 7-EX-1565. Yet, Defendants' Vaccination Roadmap provides no fewer than five categories of exemption from the mandate which allow the exemptees access to school premises and extracurricular activities—permanently, during pregnancy, or for at least 30 days as the case may be. Each category of exemptees is no less likely to "spread COVID-19" than would be the category of student religious exemptees.

Defendants do not dispute this, nor can they. As these exemptions harm Defendant SDUSD's purported interest in curbing the spread of the virus, under *Lukumi*, *South Bay*, *Tandon*, and *Fulton*, they trigger strict scrutiny review. *See also*, *Mills III*, 2021 WL 5027177, at *2 (Gorsuch, J., dissenting) (strict scrutiny triggered because "Maine does not suggest a worker who is unvaccinated for medical reasons is less likely to spread or contract the virus than someone who is unvaccinated for religious reasons.").

2.3. The Vaccination Roadmap is not neutral because it references Religious Exercise for disfavor

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct *because it is undertaken for religious reasons*." *Lukumi*, 508 U.S. at 532 (emphasis added); *accord Trinity Lutheran*, 137 S. Ct. at 2021 ("Nor may a law regulate or outlaw conduct because it is religiously motivated.").

First of all, the Vaccination Roadmap is not neutral because it directly references religion as an invalid basis for opting out of vaccination from COVID-19. 7-EX-1559, 1584; 3-EX-291:16-21; 2-EX-261-62. This triggers strict scrutiny review. Laws that fail to operate

"without regard to religion" or that otherwise "single out the religious" for disadvantages "clear[ly] … impose[] a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2020–21; *accord Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2256 (2020) ("Status-based discrimination remains status based even if one of its goals or effects is" a valid, neutral goal); *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020) ("The constitutional benchmark is 'government neutrality,' not 'governmental avoidance of bigotry.'").

Leaving no doubt of the targeting of religion, Board President Barrera stated in an interview that SDUSD would not offer personal belief or religious belief exemptions because "that creates kind of a loophole[.]" 7-EX-1461. The use of the "pejorative"[4] term "loophole," "assume[s] the worst" about religious-based objections and "assume[s] the best" of medical-based objections. *Tandon*, 141 S. Ct. at 1297.

Further evidence of animus toward those students who would seek to enter this religious "loophole" is seen by the Defendants' false public representation that "State law does not recognize religious or personal

[4] *Est. of Clayton v. Comm'r*, 976 F.2d 1486, 1499 (5th Cir. 1992).

belief exemptions for student immunizations." 7-EX-1559; *see also* 7-EX-1584 As already noted, California law provides explicit protection for students with religious or personal belief objections to *novel* vaccines, such as the COVID-19 vaccines. Cal. Health & Saf. Code § 120338. That is why the CDPH mandate specifically mentions that the State is required to allow personal belief exemptions from mere regulations versus laws. 7-EX-1599. Only the California Legislature can add COVID vaccines to the list of *traditional* vaccines (currently just 10), as to which religious belief exemptions are not allowed. *See* Cal. Health & Saf. Code § 120335.

Confronted with this roadblock to their plan to segregate and marginalize religiously motived student objectors to vaccination—while allowing five categories of exemptions for favored persons, including *teachers* with religious exemptions under Title VII—Defendants decided to use their own loophole to circumvent state law by issuing a mandate on their own authority. And they did so independently of the CDPH *and even the County of San Diego* Department of Public Health. *See* 3-EX-338.

Given that "even slight suspicion" that state action against religious conduct "stem[s] from animosity to religion or distrust of its practices" is enough to require government officials to reconsider,

Masterpiece Cakeshop Ltd. v. Colorado Civ. Rts. Comm'n, 138 S. Ct. 1719, 1731 (2018), strict scrutiny is triggered here.

2.4. The Vaccination Roadmap is not of general application because it contains a system of individualized exemptions

In *Fulton*, a unanimous U.S. Supreme Court reiterated that "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.' " *Fulton*, 141 S. Ct. at 1877 (quoting *Smith*, 494 U.S. at 884). For example, permitting "the government to grant exemptions based on the circumstances underlying each" situation, *i.e.*, a "good cause" exemption, makes the law not generally applicable. *Id.* And "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id. See Dahl*, 15 F.4th at 733–34 (individual exemptions triggered strict scrutiny).

The Vaccination Roadmap contains a system of individualized exemptions for various youth if their circumstances make getting a COVID-19 vaccine medically contraindicated (as determined in the discretion of SDUSD officials). 7-EX-1559, 1582-83, 1585; 5-EX-1017-20

(Barndollar declaration); 3-EX-461 (Taras declaration); *see also* 7-EX-1567. That discretion has to be particularly broad because of the novelty of the COVID-19 vaccines and the consequent dearth of data on potential medical contraindications. 3-EX-461; 7-EX-1380, 1396-99. This triggers strict scrutiny.

2.5. The Vaccination Roadmap cannot satisfy Strict Scrutiny, both facially and as applied.

Once strict scrutiny is triggered, the government must show that the regulations are " 'narrowly tailored' to serve a 'compelling' state interest." *Roman Catholic Diocese*, 141 S. Ct. at 66. Strict scrutiny is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). "The government's justification 'must be genuine, not hypothesized or invented post hoc in response to litigation.' " *Agudath Israel*, 983 F.3d at 633 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). Even when the government has identified a problem in need of solving, the restriction "must be actually necessary to the solution." *Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 799 (2011). And "because [the government] bears the risk of uncertainty, *ambiguous proof* will not suffice." *Id.* at 799–800 (citations omitted; emphasis added).

"[T]he government must prove the 'compellingness' of its interest in the context of 'the burden on *that person*'[.]" *Yellowbear v. Lampert*, 741 F.3d 48, 57 (10th Cir. 2014) (Gorsuch, J.). "Rather than rely on 'broadly formulated interests,' courts must scrutinize the asserted harm of granting specific exemptions to *particular religious claimants*. The question, then, is not whether the [government] has a compelling interest in enforcing its [] policies generally, but whether it has such an interest in denying an exception to [the plaintiff]." *Fulton*, 141 S. Ct. at 1881 (cleaned up; emphasis added).

Where the alleged government interest in "limiting the spread" of COVID is concerned, narrow tailoring means that "[w]here the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is *more dangerous* than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too." *Tandon*, 141 S. Ct. at 1296–97 (emphasis added).

Further, as the Supreme Court has made clear, when "so many other [jurisdictions] offer an accommodation" the defender of a challenged regulation "must, *at a minimum*, offer persuasive reasons

why it believes that it must take a different course. *Holt v. Hobbs*, 574 U.S. 352, 369 (2015) (emphasis added) And as this Court has held, when a challenged regulation is "more severe than what many other jurisdictions have done," that fact "negat[es] any suggestion that [the government] adopted the least restrictive means of accomplishing its compelling interest." *Brach v. Newsom*, 6 F.4th 904, 932 (9th Cir. 2021).

Under these standards, the Vaccination Roadmap is anything but narrowly tailored to further a compelling governmental interest for several reasons:

First, Defendants' interest in curbing the spread of COVID-19 is not meaningfully served by mandating vaccinations of all children (6-EX-1032-34, 1046; 7-EX-1399-403; 2-EX-46-48), nor through refusing to recognize religious exemptions (7-EX-1403-09), nor through refusing to recognize a religious exemption for Plaintiff Jill Doe—who has natural immunity. 7-EX-1381-92; 6-EX-1038-40; 2-EX-44-46. Indeed, regular influenza seasons are deadlier for children (6-EX-1050), yet a flu vaccine is not a requirement for school attendance. Cal. Health & Saf. Code § 120335.

Moreover, even if mandating child vaccination against COVID-19 provided some minimal benefit to society, "this interest cannot qualify as [compelling] forever." *Mills III*, 2021 WL 5027177, at *3 (Gorsuch, J., dissenting). With "widely distributed vaccines," everybody who wants to get vaccinated has been, and so the government's interest appears less "compelling," and indeed dangerous, for "civil liberties face grave risks when governments proclaim indefinite states of emergency." *Id.*; *accord BST Holdings*, 2021 WL 5279381, at *3 & n.10, *5 (expressing skepticism over "a purported 'emergency' that the entire globe has now endured for nearly two years" that is "non-life-threatening to a vast majority").

Second, as already shown, Defendants permit numerous exemptions to their Vaccination Roadmap. *See* § B, *supra*. Defendants even permit teachers and other employees religious exemptions under Title VII. 7-EX-1567; 5-EX-981-83. There is no logical reason why teachers' religious rights need to be protected more than students' religious rights when "Covid's effects exhibit a significant age gradient … having little impact, statistically speaking, on children." *Brach*, 6 F.4th at 932. The Ninth Circuit came to that conclusion after reviewing "a veritable library of declarations from physicians, academics, and

public health commentators," *id.*, and that conclusion is confirmed by Plaintiffs' experts here. 6-EX-1034; 2-EX-47. Indeed, the "decision to deny a religious exemption in these circumstances doesn't just fail the least restrictive means test, it borders on the irrational." *Mills III*, 2021 WL 5027177, at *4 (Gorsuch, J., dissenting).

Third, the Vaccination Roadmap is also not narrowly tailored to further any compelling governmental interest because it is "more severe than what many other jurisdictions have done[.]" *Brach*, 6 F.4th at 932. Thus, the fact that the State itself allows religious exemptions in other school districts (7-EX-1599), and no other State even has a COVID-19 vaccination requirement for students (2-EX-48), "negat[es] any suggestion that [SDUSD] adopted the least restrictive means of accomplishing its compelling interest." *Brach*, 6 F.4th at 932; *accord Dahl*, 15 F.4th at 735.

Finally, as applied particularly to Plaintiff Jill Doe—as it must be, *Fulton*, 141 S. Ct. at 1881—the Vaccination Roadmap is not narrowly tailored because she has natural immunity as a recovered COVID case, 7-EX-1537, and that immunity is greater than that conferred by any vaccine. 6-EX-1038-40; 7-EX-1381-92; 2-EX-44-46; *see BST Holdings*,

2021 WL 5279381, at *6 (failure to account for natural immunity defeated narrow tailoring).

3. Balance of Harms & Public Interest

The balance of hardships and the public interest also favor Plaintiffs. Courts "have consistently recognized the significant public interest in upholding First Amendment principles." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002); *see Dahl*, 15 F.4th at 736 ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights"); *BST Holdings*, 2021 WL 5279381, at *8 ("The public interest is also served by maintaining our constitutional structure and … the liberty of individuals to make intensely personal decisions according to their own convictions—even, or perhaps *particularly*, when those decisions frustrate government officials.").

As to the balance of hardships, the existence of "serious First Amendment questions" "compels a finding that … the balance of hardships tips sharply in the plaintiffs' favor." *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (cleaned up). In terms of alleged harm on Defendants' side, granting these Plaintiffs—and in particular *one student*, Jill Doe—a religious exemption, to the vaccine

mandate cannot be shown measurably to hinder Defendants' efforts to curb the virus in San Diego County, where its spread is not a significant issue in the first place. 2-EX-47, 208-57 (San Diego's statistics).

Finally, Defendants have failed to show that granting religious exemptions would cause greater harm than granting medical or other exemptions. *See* 7-EX-1381-92, 1399-407; 6-EX-1032-38, 1046-56. The balance of hardships clearly favors Plaintiffs.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court issue an injunction pending appeal, before Monday, November 29, 2021, as detailed above.

Respectfully submitted,

Dated: November 19, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the requirements of Fed. R. App. P. 27(d) and 9th Cir. Rules 27-1(1)(d) and 32-3. The Motion was prepared in 14-point font and, other than the certificates, contains 5,963 words, as counted by Microsoft Word 2016.

November 19, 2021

/s/ Paul M. Jonna
Paul M. Jonna

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

/s/ Paul M. Jonna
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