

1 Robert H. Tyler, CA Bar No. 179572
btyler@faith-freedom.com
2 Bethany Onishenko, AR Bar No. 2022079
bonishenko@faith-freedom.com
3 ADVOCATES FOR FAITH & FREEDOM
25026 Las Brisas Road
4 Murrieta, California 92562
Telephone: (951) 600-2733
5 Facsimile: (951) 600-4996

6 Rachele R. Byrd (1906340)
byrd@whafh.com
7 WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
8 750 B Street, Suite 1820
San Diego, California 92101
Telephone: (619) 239-4599
9 Facsimile: (619) 234-4599

10 *Plaintiffs' Class Counsel*

11
12 **UNITED STATES DISTRICT COURT**
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN JOSE DIVISION**

15 **UNIFYSCC**, an unincorporated California
16 association on behalf of employees in Santa Clara
County; **TOM DAVIS**, individually, and on
17 behalf of all others similarly situated; **MARIA**
RAMIREZ, individually, and on behalf of all
18 others similarly situated; **ELIZABETH**
BALAYUT, individually, and on behalf of all
19 others similarly situated;

20 Plaintiffs,

21 vs.

22 **SARA H. CODY**, in her official capacity as the
Santa Clara County Public Health Officer;
23 **JAMES WILLIAMS**, in his official capacity as
the County Counsel of Santa Clara County;
24 **JEFFREY SMITH**, in his official capacity as
the County Executive of Santa Clara County; and
25 **SANTA CLARA COUNTY**;

26 Defendants.

Case No.: 22-cv-01019 BLF

**PLAINTIFFS' REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF OPPOSITION
TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

DATE: October 24, 2024
TIME: 9:00 a.m.
CTRM: 3, 5th Floor
JUDGE: Hon. Beth Labson Freeman

1 Pursuant to Fed. R. Evid 201, Plaintiffs request that this Court take judicial notice of the the
2 court’s decision in *Kevin Rapport, et al., v. Sara Cody, et al.*, Superior Court of California, Case No.
3 22CV394948, a true and correct copy of which is attached hereto as **Exhibit 1**.

4 Plaintiffs respectfully submit that the document referenced above is proper for judicial notice, as
5 well as for consideration by this Court. District courts may take judicial notice of “a fact that is not subject
6 to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or
7 (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be
8 questioned.” Fed. R. Evid. 201(b). Courts have consistently held that courts may take judicial notice of
9 documents filed in other court proceedings. *See Schulze v. FBI*, 2010 WL 2902518, at *1 (E.D. Cal. July
10 22, 2010) (quoting *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir.2007) (“A federal court may
11 ‘take notice of proceedings in other courts, both within and without the federal judicial system, if those
12 proceedings have a direct relation to matters at issue.’”)); *Cartmill v. Sea World*, 2010 WL 4569922, at
13 *1 (S.D. Cal. Nov. 5, 2010) (taking judicial notice of documents filed in other court proceedings). Here,
14 the attached exhibit is a document filed in another court proceeding.

15 Respectfully submitted,

16 DATED: September 5, 2024

ADVOCATES FOR FAITH & FREEDOM

17
18 /s/ Bethany Onishenko

Bethany Onishenko, Esq.

19
20 Robert H. Tyler, Esq.
Bethany Onishenko, Esq.
25026 Las Brisas Road
21 Murrieta, California 92562
22 Telephone: (951) 600-2733

23 Rachele R. Byrd
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
24 750 B Street, Suite 1820
San Diego, CA 92101
25 Telephone: (619) 239-4599

26 *Plaintiffs’ Class Counsel*

EXHIBIT “1”

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OCT 07 2022
Clerk of the Court
Superior Court of California County of Santa Clara
BY [Signature] DEPUTY
FARRIS BRYANT

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

KEVIN RAPPORT, ET AL.,
Plaintiffs,
vs.
SARA CODY, ET AL.,
Defendants,

Case No. 22CV394948
ORDER RE: DEFENDANTS'
DEMURRER TO THE FIRST
AMENDED COMPLAINT

The demurrer to the first amended complaint ("FAC") by defendants Sara Cody ("Cody"), County of Santa Clara ("County"), Brian Glass ("Glass") and Santa Clara County Fire Department ("Department") (collectively, "Defendants") came on for hearing before the Honorable Drew C. Takaichi on August 30, 2022 at 9:00 a.m. in Department 2. The matter having been submitted, after full consideration of the authorities submitted by each party, and arguments made by the parties in their papers and the hearing, the court makes the following ruling:

1 This is an action for declaratory relief regarding Santa Clara County's COVID-19 prior
2 vaccine mandate. According to the allegations of the first amended complaint ("FAC"), plaintiff
3 Kevin Rapport ("Rapport") resides in El Dorado County and works for the Santa Clara County
4 Fire Department. (See FAC, ¶ 9.) Rapport has received the COVID-19 vaccine but has not
5 received the booster. (*Id.*) Plaintiff Michael Vergona ("Vergona") resides in Santa Cruz County
6 and also works for the Santa Clara County Fire Department. (See FAC, ¶ 10.) Vergona has not
7 received the COVID-19 vaccine. (*Id.*) Plaintiff Santa Clara County Firefighters 4 Freedom
8 ("SCCF4F") is an unincorporated association that advocates for civil rights issues, bodily
9 autonomy, medical freedom and other rights, formed specifically to advocate for firefighters in
10 Santa Clara County during the COVID-19 pandemic. (See FAC, ¶ 12.) On December 28, 2021,
11 defendant Health Officer of Santa Clara County Sara Cody ("Cody"), pursuant to powers
12 delegated to her by defendant County of Santa Clara's Board of Supervisors, ordered that all
13 medical first responders, including EMTs and paramedics, in Santa Clara County receive the
14 COVID-19 vaccine and available boosters. (See FAC, ¶¶ 14, 38.) Defendant Brian Glass, as
15 Acting Chief of defendant Santa Clara County Fire Department (collectively, "Department
16 Defendants"), issued a vaccine/booster mandate pursuant to his authority under state law and
17 pursuant to authority delegated to him from the County's Board of Supervisors, who serve as the
18 Department's Board of Directors. (See FAC, ¶¶ 16-17.) During January 2022, Cody amended
19 the mandate order to allow an entity to apply for a waiver if it showed that imposing the strict
20 mandate would cause a staffing crisis. (See FAC, ¶ 39.) Plaintiffs Rapport, Vergona and
21 SCCF4F (collectively, "Plaintiffs") assert that the County has no power to enforce a vaccine
22 mandate on the Department, and that the mandates are unlawful. (See FAC, ¶¶ 42-44.)

23 On April 7, 2022, Plaintiffs filed the FAC against Cody and County of Santa Clara
24 (collectively, "County defendants") and Department Defendants (collectively with County
25 defendants, "Defendants"), asserting causes of action for:
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- 1 1) Declaratory and injunctive relief (against County defendants);
- 2 2) Declaratory and injunctive relief (against Department defendants);
- 3 3) Declaratory and injunctive relief, due process/*Skelly* (against Department
- 4 defendants);
- 5 4) Violation of Article I, section 1 of the California Constitution (against all defendants);
- 6 and,
- 7 5) Declaratory and injunctive relief under FEHA/medical condition discrimination
- 8 (against all defendants).

9 Defendants demur to: each of the causes of the FAC as to SCCF4F on the ground that the
10 FAC fails to allege facts sufficient to establish SCCF4F's associational standing, each of the
11 causes of the FAC as the individual plaintiffs on the ground that the FAC fails to allege facts
12 sufficient to establish the individual plaintiffs' standing; the first cause of action is moot to the
13 extent it is based on the County's December 28, 2021 order; the first cause of action is barred as
14 a matter of law because Cody issued the County's health orders within her authority as County
15 Health Officer, the Health Orders are rationally related to the compelling government interest in
16 preventing the spread of COVID-19, and Cody's public health authority is not an unconstitutional
17 delegation of power; the second cause of action on the ground that the Department's
18 implementation of the County's December 28, 2021 health order is not arbitrary and capricious
19 because the Department simply complied with its legal obligations; the second cause of action
20 on the ground that it fails to allege administrative exhaustion or Plaintiffs' standing to challenge
21 the Department's alleged unlawful change to the terms and conditions of their employment; the
22 third cause of action on the ground that its allegations that the Department may violate their
23 asserted due process rights is unduly speculative; the third cause of action on the ground that it
24 fails to allege facts showing that Plaintiffs are subject to the terms of the Firefighters Procedural
25 Bill of Rights (FBOR); the third cause of action on the ground that Plaintiffs' asserted pre-
26 deprivation due process rights do not apply to the emergency Health Orders and the Department's
27 implementation of them; the fourth cause of action on the ground that the County's health orders
28 do not unconstitutionally infringe upon a protected privacy interest; the fourth cause of action on
the ground that the County's health orders do not involve a serious invasion of privacy; the fourth
cause of action on the ground that compelling, countervailing public health interests defeat

1 Plaintiffs' privacy claim; the fifth cause of action on the ground that it fails to allege
2 administrative exhaustion; and the fifth cause of action on the ground that the FAC fails to allege
3 any facts showing that Plaintiffs have a "medical condition" under the Fair Employment and
4 Housing Act.

5 On August 15, 2022, Plaintiffs filed a request for dismissal of their third and fifth causes
6 of action.

7 On September 12, 2022, the County issued a health order explicitly rescinding the March
8 7, 2022 Health Officer Order requiring up to date COVID-19 vaccination of personnel in higher-
9 risk settings, the January 31, 2022 Health Officer Order requiring certain healthcare facilities
10 within the County to provide COVID-19 diagnostic testing and the September 4, 2020 Health
11 Officer Order mandating that all health care facilities in Santa Clara County require healthcare
12 workers to receive an annual influenza vaccination, and any other mandatory COVID-19 related
13 countywide Health Officer order other than the mandatory requirement to wear face coverings in
14 higher-risk settings.¹

15
16 ¹ The September 12, 2022 Health Officer Order Requiring Use of Face Coverings in Higher-Risk Settings;
17 and Rescission of Prior Health Orders states:

18 UNDER THE AUTHORITY OF CALIFORNIA HEALTH AND SAFETY CODE SECTIONS
19 101040, 101085, 120175, AND SANTA CLARA COUNTY ORDINANCE CODE SECTION
20 A18-33, THE HEALTH OFFICER OF THE COUNTY OF SANTA CLARA ("HEALTH
21 OFFICER") ORDERS:

- 22
- 23 1. **Background and Purpose.** The Health Officer makes this Order in light of the current state
24 of the COVID-19 pandemic emergency. Specifically, at this stage and time of the pandemic,
25 including consideration of the widespread availability of testing and vaccinations and the high
26 level of community vaccination in Santa Clara County (the "County"), the necessity for
27 mandatory orders related to vaccination and access to testing has diminished. However, the
28 risk of COVID-19 in Higher-Risk Settings remains significant, and so it continues to be
important for Face Coverings to be used in Higher-Risk Settings. This Order therefore
rescinds prior Health Orders, as described in Section 2 below, while maintaining existing Face
Covering requirements in Higher-Risk Settings, as set forth in Section 3 below. This Order
also sets forth a number of important recommendations by the Health Officer in response to
the continued risks posed by COVID-19 in our community.
 2. **Rescission of Prior Health Orders.** The March 7, 2022 Health Officer Order Requiring Up-
To-Date COVID-19 Vaccination of Personnel in Higher-Risk Settings is hereby rescinded.
The January 31, 2022 Health Officer Order Requiring Certain Healthcare Facilities Within the
County to Provide COVID-19 Diagnostic Testing is hereby rescinded. The September 4,
2020 Health Officer Order Mandating that All Health Care Facilities in Santa Clara County
Require Healthcare Workers Receive an Annual Influenza Vaccination is hereby rescinded.

1 **Defendants’ request for judicial notice**

2 In support of their demurrer, Defendants request judicial notice of the following:

- 3 • The March 4, 2020 Proclamation of a State of Emergency of the Executive Department of the State of California, signed by Governor Gavin Newsom, including section 8’s order that states that “[t]he 60-day time period in Government Code section 8630, within which local government authorities must renew a local emergency, is hereby waived for the duration of this statewide emergency. Any local emergency proclaimed will remain in effect until each local governing authority terminates its respective local emergency” (attached as Exhibit 1);
- 4 • County of Santa Clara Board of Supervisors Resolution BOS-2020-9 ratifying a Declaration of Local Health Emergency by the County Health Officer related to the 2019 Novel Coronavirus (attached as Exhibit 2);
- 5 • The February 15, 2022 order re: demurrer to SAC in *Firefighters4Freedom Foundation v. City of Los Angeles* (Super. Ct. of County of Los Angeles, Case No.21STCV34490) (attached as Exhibit 3);
- 6 • The Centers for Disease Control and Prevention (CDC) COVID Data Tracker (attached as Exhibit 4);
- 7 • CDC publication titled “Safety of COVID-19 Vaccines” (attached as Exhibit 6);
- 8 • CDC publication titled “CDC Expands Eligibility for COVID-19 Booster Shots to All Adults” (attached as Exhibit 6);
- 9 • CDC publication titled “Stay Up to Date with Your COVID-19 Vaccines” (attached as Exhibit 7);
- 10 • CDC publication titled “Variant Proportions” (attached as Exhibit 8);
- 11 • CDC publication titled “New CDC Study: Vaccination Offers Higher Protection than Previous COVID-19 Infection” (attached as Exhibit 9);
- 12 • CDC publication titled “Interim Guidelines for COVID-19 Antibody Testing” (attached as Exhibit 10);
- 13 • CDC publication titled “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” (attached as Exhibit 11);
- 14 • CDC publication titled “Omicron Variant: What You Need to Know” (attached as Exhibit 12); and,
- 15 • CDC publication titled “What You Need to Know about Variants” (attached as Exhibit 13).

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22 For clarity, other than the mandatory requirement to wear Face Coverings in Higher-Risk Settings as provided in this Order, all other mandatory COVID-19-related countywide Health Officer Orders that are currently still in effect are hereby rescinded

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28 (September 12, 2022 Health Officer Order Requiring Use of Face Coverings in Higher-Risk Settings; and Rescission of Prior Health Orders, §§ 1-2.)

1 Defendants' request for judicial notice of the March 4, 2020 Proclamation of a State of
 2 Emergency and the County of Santa Clara Board of Supervisors Resolution BOS-2020-9 is
 3 GRANTED. (Evid. Code § 452, subs. (b), (c), (h); see also *Bullock v. Super. Ct. (People)* (2020)
 4 51 Cal.App.5th 134, 141, fn. 4 (taking judicial notice of the March 4, 2020 Proclamation of a
 5 State of Emergency).) Defendants' request for judicial notice of the February 15, 2022 order re:
 6 demurrer to SAC in *Firefighters4Freedom Foundation v. City of Los Angeles* is GRANTED as
 7 to their existence and content of the order but not to the truth of any factual assertions or findings.
 8 (See *Midway Venture LLC v. County of San Diego* (2021) 60 Cal.App.5th 58, 81 (taking judicial
 9 notice of the order in litigation before a different judge in a trial court, but stating that "[o]ur
 10 judicial notice is expressly limited to the existence and content of the order, but not the truth of
 11 any factual assertions or findings").) Defendants' request for judicial notice of the CDC
 12 publications and COVID Data Tracker is GRANTED. (Evid. Code § 452, subs.(c), (h); see also
 13 *County of Los Angeles Dept. of Public Health v. Superior Court* (2021) 61 Cal.App.5th 478, 494,
 14 fn. 8 (taking judicial notice of the CDC website tracking numbers of COVID-19 deaths); see also
 15 *In re A.V.* (2021) 73 Cal.App.5th 949, 957, fn. 3 (taking "judicial notice of official guidance from
 16 the CDC").)

17
 18 **Plaintiffs' request for judicial notice**

19 In support of their opposition to the demurrer, Plaintiffs request judicial notice of the
 20 following documents:

- 21
- 22 • An excerpt from the CDC's website titled "How much physical activity do adults
 23 need?" (attached as Exhibit A);
 - 24 • An excerpt from the CDC's website entitled "Healthy Eating for a Healthy
 25 Weight" (attached as Exhibit B); and,
 - 26 • A press release from the CDC titled "CDC streamlines COVID-19 guidance to
 27 help the public better protect themselves and understand their risk" (attached as
 28 Exhibit C).

26 As to the excerpts from the CDC website, the request for judicial notice is DENIED.
 27 While the Court does not dispute the benefits of exercise and healthy eating, Plaintiffs fail to
 28 demonstrate that these materials are relevant to the issues on demurrer. (See *Gbur v. Cohen*

1 (1979) 93 Cal.App.3d 296, 301 (stating that “judicial notice, since it is a substitute for proof... is
2 always confined to those matters which are relevant to the issue at hand”); see also *Aquila, Inc.*
3 *v. Super. Ct. (City and County of San Francisco)* (2007) 148 Cal.App.4th 556, 569 (stating that
4 “[a]lthough a court may judicially notice a variety of matters... only relevant material may be
5 noticed”); see also *Owens v. City of Oakland Housing, Residential Rent & Relocation Bd.* (2020)
6 49 Cal.App.5th 739, 745, fn. 3 (stating same); see also *Hayward Area Planning Assn. v. City of*
7 *Hayward* (2005) 128 Cal.App.4th 176, 182 (stating that “[o]nly relevant material is a proper
8 subject of judicial notice, even where the Evidence Code provides in mandatory terms that
9 matters be judicially noticed”).)

10 As to the press release from the CDC, the request for judicial notice is GRANTED as to
11 the existence and its contents. (Evid. Code § 452, subs. (c), (h).)

12
13 **Demurrer to the third and fifth causes of action is moot**

14 As previously stated, on August 15, 2022, Plaintiffs filed a request for dismissal of their
15 third and fifth causes of action. Accordingly, the demurrer to the third and fifth causes of action
16 is MOOT.

17
18 **Standing of SCCF4F**

19 “[A]n association has standing to bring suit on behalf of its members when: (a) its
20 members would otherwise have standing to sue in their own right; (b) the interests it seeks to
21 protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief
22 requested requires the participation of individual members in the lawsuit.” (*United Farmers*
23 *Agents Assn., Inc. v. Farmers Group, Inc.* (2019) 32 Cal.App.5th 478, 488; see also *Airline Pilots*
24 *Assn. Internat. v. United Airlines, Inc.* (2014) 223 Cal.App.4th 706, 726 (stating same); see also
25 *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2006) 136 Cal.App.4th 119,
26 129.) Defendants contend that SCCF4F has failed to allege such standing as the FAC neither
27 alleges that its members would have standing to sue in their own right, nor that the participation
28

1 of the individual members are not required for the relief requested. (See Defs.’ memorandum of
 2 points and authorities in support of demurrer to FAC (“Defs.’ memo”), pp.9:26-28, 10:1-10.)

3 In opposition, SCCF4F argues that “[u]nder state law, a party must be ‘beneficially
 4 interested’ in the subject matter to have standing to seek declaratory relief.” (Pls.’ opposition to
 5 demurrer to FAC (“Opposition”), p.17:13-16, citing *Associated Builders & Contractors, Inc. v.*
 6 *San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361.) However, *Associated Builders &*
 7 *Contractor, supra*, specifically references “standing to seek a writ of mandate,” citing to Code
 8 of Civil Procedure section 1086, not standing to seek declaratory relief pursuant to Code of Civil
 9 Procedure section 1060.² In *Associated Builders & Contractor, supra*, petitioner ABC filed a
 10 petition for writ of mandate to strike a certain requirement from bid specifications, and the court
 11 noted that “[t]o have standing to seek a writ of mandate, a party must be ‘beneficially interested’”
 12 (*Associated Builders & Contractor, supra*, 21 Cal.4th at p.361), citing Code of Civil Procedure
 13 section 1086, which states that “[t]he writ... must be issued upon the verified petition of the party
 14 beneficially interested.” (Code Civ. Proc. § 1086.) Similarly, in *Carsten v. Psychology*
 15 *Examining Com.* (1980) 27 Cal.3d 793—also cited by SCCF4F—petitioner Arlene Carsten also
 16 filed a petition for writ of mandate, in this case, to compel the Psychology Examining Committee
 17 of the Board of Medical Quality Assurance of the State of California to comply with Business
 18 and Professions Code section 2942. Here, SCCF4F has not filed a petition for writ of mandate.
 19 They have not made any argument as to how the standing requirement to seek a writ of mandate
 20 pursuant to section 1086 supplants or is otherwise equivalent to the standing requirement for
 21 declaratory relief causes of action, as stated in cases such as *Apartment Assn. of Los Angeles*
 22 *County, supra*, 136 Cal.App.4th 119, 128-129. SCCF4F fails to allege standing to assert the
 23 causes of action alleged in the FAC and they have not suggested that there is a viable means to
 24 amend the FAC so as to allege such standing. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335,
 25 349 (stating that “Plaintiff must show in what manner he can amend his complaint and how that

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 28 ² Plaintiffs’ counsel are admonished that “[w]ritten materials submitted to the court should always be factual,
 concise, accurately state current law and fairly represent the parties’ positions....” (Santa Clara County Bar
 Association Code of Professionalism, § 7 (“Writings Submitted to the Court”).)

1 amendment will change the legal effect of his pleading”); see also *Cooper v. Leslie Salt Co.*
 2 (1969) 70 Cal.2d 627, 636 (stating same); see also *Hendy v. Losse* (1991) 54 Cal.3d 723, 742
 3 (stating that “[t]he burden is on the plaintiff, however, to demonstrate the manner in which the
 4 complaint might be amended”).) The demurrer to the FAC as to plaintiff SCCF4F is
 5 SUSTAINED without leave to amend.

6
 7 **Mootness of the first cause of action to the extent that it is premised on the December 28,**
 8 **2021 order**

9 Defendants assert that to the extent that the first cause of action is premised on the
 10 requirements of the December 28, 2021 Health Order, the claim is moot because the March 7,
 11 2022 Order expressly superseded the December 28, 2021 Health Order. In opposition, Plaintiffs
 12 argue that “[t]he March order did not moot this case... [because] the amended order did not
 13 rescind the County’s vaccine/booster order... [i]t continued the mandatory vaccination policy
 14 but allowed unvaccinated/un-boostered individuals who had approved exemptions to keep
 15 working.” (Opposition, p.11:23-26, citing FAC, ¶¶ 50-53.)

16 While paragraph 52 alleges that the March 7, 2022 Health Order did not render moot
 17 claims based on the December 28, 2021 Health Order, that allegation is a conclusion of law that
 18 is disregarded on demurrer. (See *Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761,
 19 765 (stating that “[w]e treat the demurrer as admitting all material facts properly pleaded, but not
 20 contentions, deductions or conclusions of fact or law”); see also *Blank v. Kirwan* (1985) 39
 21 Cal.3d 311, 318.) Plaintiffs’ assertion and allegations that “the amended did not rescind the
 22 County’s vaccine/booster order” is belied by the March 7, 2022 Health Order itself, which
 23 Plaintiffs attached to the FAC. The Order clearly states “The December 28th Order is superseded
 24 by this Order as of the effective date.” (FAC, exh. C (“March 7, 2022 Order”), ¶ 9.) “Where
 25 facts appearing in attached exhibits or judicially noticed documents contradict, or are inconsistent
 26 with, the complaint’s allegations, we must rely on the facts in the exhibits and judicially noticed
 27 documents.” (*Genis v. Schainbaum* (2021) 66 Cal.App.5th 1007, 1015; see also *Brakke, supra*,
 28 213 Cal.App.4th at p.767 (stating that “[w]hile the ‘allegations [of a complaint] must be accepted

1 as true for purposes of demurrer,' the 'facts appearing in exhibits attached to the complaint will
2 also be accepted as true and, if contrary to the allegations in the pleading, will be given
3 precedence'''); see also *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83
4 (stating that "[i]f the allegations in the complaint conflict with the exhibits, we rely on and accept
5 as true the contents of the exhibits".) Regardless, even if the March 7, 2022 order did not rescind
6 the County Health Order requiring an up-to-date COVID-19 vaccine, it is clear that the
7 September 12, 2022 Health Order explicitly rescinded any such requirement.

8 Plaintiffs' assertion regarding mootness is clearly without merit.

9 As Defendants argue, "California courts will decide only justiciable controversies."
10 (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.) "A case
11 is considered moot when 'the question addressed was at one time a live issue in the case,' but
12 has been deprived of life 'because of events occurring after the judicial process was initiated.'" *(Id.*
13 *at p.1574.)* Code of Civil Procedure section 1061 also states that, as to causes of action for
14 declaratory relief, the court may refuse to act on any causes of action "where its declaration or
15 determination is not necessary or proper at the time under all the circumstances." (Code Civ.
16 Proc. § 1061.) Here, it is clear that any cause of action premised on a superseded Health Order
17 is neither necessary nor proper and any question regarding the December 28, 2021 Health Order
18 has been deprived of life because the March 7, 2022 Health Order superseded it, or at minimum,
19 the September 12, 2022 Health Order explicitly rescinded the December 28, 2021 order.
20 Plaintiffs fail to show in what manner the FAC can be amended such that the first cause of action
21 is not moot. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (stating that "Plaintiff must
22 show in what manner he can amend his complaint and how that amendment will change the legal
23 effect of his pleading"); see also *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636 (stating
24 same); see also *Hendy v. Losse* (1991) 54 Cal.3d 723, 742 (stating that "[t]he burden is on the
25 plaintiff, however, to demonstrate the manner in which the complaint might be amended".) The
26 demurrer to the FAC to the extent that it is premised on the December 28, 2021 Health Order is
27 SUSTAINED without leave to amend.

28

1 **Individual plaintiffs' standing regarding the March 7, 2022 Health Order**

2 The FAC alleges that on March 7, 2022, Cody issued an amended order modifying the
3 vaccine/booster mandate to let unvaccinated employees with approved medical and religious
4 exemptions keep working, and that both Rapport and Vergona sought medical exemptions from
5 the vaccine/booster mandate. (See FAC, ¶¶ 9-11, 50.) The FAC alleges that employees who did
6 not receive the vaccine or booster were allowed to return to work under the March 7, 2022 order.
7 (See FAC, ¶ 54.)

8 Defendants assert that the individual plaintiffs lack standing because the FAC fails to
9 allege any injury. (See Defs.' Memo, p.11:2-19.) "Where a petitioner seeks declaratory or
10 injunctive relief, it is insufficient that he has been injured in the past; 'he must instead show a
11 very significant possibility of future harm in order to have standing.'" (*Coral Construction, Inc.*
12 *v. City and County of San Francisco* (2004) 116 Cal.App.4th 6, 17; see also *Monterey*
13 *Coastkeeper v. California Regional Water Quality Control Bd., etc.* (2022) 76 Cal.App.5th 1, 13
14 (stating that "[a] party seeking declaratory relief must show a very significant possibility of future
15 harm"); see also *Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th
16 993, 1004 (stating that "for standing to seek the prospective relief of an injunction, a plaintiff
17 must show a likelihood he will be harmed in the future if the injunction is not granted").)

18 In opposition, Plaintiffs argue that "a party must be 'beneficially interested' in the subject
19 matter to have standing to seek declaratory relief." (Opposition, p.17:13-25, citing *Associated*
20 *Builders & Contractors, Inc., supra*, 21 Cal.4th at p. 361 and *Carsten, supra*, 27 Cal.3d 793.)
21 However, as stated previously, Plaintiffs' cited authorities refer to petitions for writ of mandate
22 rather than declaratory relief causes of action and thus lack merit. Plaintiffs also argue that
23 unvaccinated and unboosted must comply with draconian testing and leave requirements that do
24 not apply to others. However, as Defendants argue, the FAC does not allege that *Plaintiffs* suffer
25 a very significant possibility of future harm. Moreover, the September 12, 2022 Health Officer
26 Order rescinding any requirement for COVID-19 vaccination further demonstrates that Plaintiffs
27 lack a very significant possibility of future harm. In opposition, Plaintiffs do not otherwise
28 suggest how they may amend the SAC to allege standing. (See *Goodman v. Kennedy* (1976) 18

1 Cal.3d 335, 349 (stating that “Plaintiff must show in what manner he can amend his complaint
2 and how that amendment will change the legal effect of his pleading”); see also *Cooper v. Leslie*
3 *Salt Co.* (1969) 70 Cal.2d 627, 636 (stating same); see also *Hendy v. Losse* (1991) 54 Cal.3d 723,
4 742 (stating that “[t]he burden is on the plaintiff, however, to demonstrate the manner in which
5 the complaint might be amended”).)

6 Accordingly, the demurrer to the FAC as to the individual defendants is SUSTAINED
7 without leave to amend.

8
9 While the Court agrees with Defendants that Plaintiffs have not pleaded their standing
10 to assert their claims, it will nevertheless address the merits of the causes of action in the FAC:

11
12 **Demurrer to the first cause of action on the ground that it fails to state facts sufficient to**
13 **constitute a cause of action**

14 The first cause of action for declaratory relief seeks “a judicial declaration that the County
15 Health Mandate exceeds the County Defendants’ powers under state law or, in the alternative,
16 that the law giving them such power is unconstitutional because granting an unelected health
17 official like Dr. Cody these powers without sufficient standards to guide her exercise of discretion
18 violates the non-delegation doctrine... [and] also seek an order that Dr. Cody acted arbitrarily
19 and capriciously in adopting the mandate.” (FAC, ¶ 61.) Defendants assert that, as a matter of
20 law, the cause of action lacks merit because the County Health Orders are legal and rationally
21 related to the compelling governmental interest in preventing the spread of COVID-19, the
22 Health Orders are not based on an unconstitutional delegation of power, and the United States
23 Supreme Court established an extremely deferential standard of review applicable to emergency
24 exercises of governmental authority during a public health emergency.

25 In opposition, Plaintiffs argue that Defendants’ arguments do not accept the FAC’s
26 allegation that the COVID vaccine does not prevent infection from COVID-19 as true and instead
27 relies on extrinsic evidence, and the Court cannot decide whether the vaccine mandates are
28 necessary at the pleading stage. (See Opposition, pp.8:23-28, 9:1-10.) Additionally, Plaintiffs

1 distinguish Cody’s power to issue the mandate from the police power since “[t]he police power
 2 usually ‘extends to legislative objectives in furtherance of public peace, safety, morals, health
 3 and welfare.’” (Opposition, p.9:11-21.) Plaintiffs argue that the Court may not take judicial
 4 notice of the safety and effectiveness of the COVID vaccine and a determination on the
 5 reasonable relation to promoting the public health, safety, comfort and welfare to the regulation
 6 must be made through an evidentiary proceeding. (See Opposition, pp.9:24-28, 10:1-28, 11:1-
 7 11.) Lastly, Plaintiff argues that because the CDC also recommends that adults be physically
 8 active and eats more fruits and vegetables, the vaccine mandate is arbitrary since Defendants’
 9 enforcement of the recommendation that employees eat more fruits and vegetables or exercise
 10 more often would likewise be arbitrary. (See Opposition, p.11:13-19.)

11 First, Health and Safety Code section 120175 states:

12 Each health officer knowing or having reason to believe that any
 13 case of the diseases made reportable by regulation of the
 14 department, or any other contagious, infectious or communicable
 15 disease exists, or has recently existed, within the territory under his
 or her jurisdiction, shall take measures as may be necessary to
 prevent the spread of the disease or occurrence of additional cases.

16 (Health & Saf. Code § 120175.)

17 Section 120175 “impose[s] a mandatory duty on a health officer to take measures to
 18 prevent the spread of contagious and communicable diseases... [and t]his duty is one of disease
 19 prevention and control, which establishes the goals and policies of the Department.” (*AIDS*
 20 *Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th
 21 693, 702.) “The Department’s health officer must take ‘measures as may be necessary,’ or
 22 ‘reasonably necessary,’ to achieve the Department’s goals and policies, leaving the course of
 23 action to the health officer’s discretion.” (*Id.*) Citing Health and Safety Codes sections 120200
 24 (“Establishment of places of quarantine”), 120205 (“Quarantine of county or city”), 120210
 25 (“Quarantine procedures; Destruction of infected property; Compensation”), 120215 (“Action of
 26 health officer upon receiving information of communicable disease”), 120225 (“Physical
 27 restrictions of quarantine”), 120585 (“Inspection and quarantine by local health officer), and
 28 120350, et seq., “the statutory scheme sets forth certain actions, ranging from quarantine and

1 isolation for contagious and communicable diseases [citation], to immunization requirements for
 2 the prevention of diseases [citation]....” (*Id.*) “These statutory measures, however, are not
 3 exhaustive or mandatory, giving the health officer discretion to act in a particular manner
 4 depending upon the circumstances.” (*Id.*) “[T]he local public health officer is vested with
 5 considerable discretion as to what actions he should take to control the spread of an infectious
 6 disease.” (*Derrick v. Ontario Community Hospital* (1975) 47 Cal.App.3d 145, 152.) “[C]ourts
 7 should be extremely deferential to public health authorities, particularly during a pandemic, and
 8 particularly where, as here, the public health authorities have demonstrated a rational basis for
 9 their actions.” (*County of Los Angeles Dept. of Public Health v. Super. Ct. (Cal. Restaurant*
 10 *Assn., Inc.)* (2021) 61 Cal.App.5th 478, 483.)

11 Also, Health and Safety Code section 101040, subdivision (a) states:

12 The local health officer may take any preventive measure that may
 13 be necessary to protect and preserve the public health from any
 14 public health hazard during any... “state of emergency,” or “local
 15 emergency,” as defined by Section 8558 of the Government Code,
 within his or her jurisdiction.

16 (Health & Saf. Code, § 101040, subd. (a); see also *County of Los Angeles Dept. of Public Health,*
 17 *supra*, 61 Cal.App.5th at p.484, fn.1 (stating that “[t]he California Emergency Services Act [Gov.
 18 Code, §§ 8550–8669.7.] empowers state and local governments to declare emergencies and
 19 coordinate efforts to provide services... [a] ‘state of emergency’ means ‘the existence of
 20 conditions of disaster or of extreme peril to the safety of persons and property within the state
 21 caused by conditions’ including an ‘epidemic’ and ‘which, by reason of their magnitude, are or
 22 are likely to be beyond the control of’ any single county or city and ‘require the combined forces
 23 of a mutual aid region or regions’”), citing Gov. Code, § 8558.) Here, Governor Newsom issued
 24 a Proclamation of a State of Emergency. It is unquestionable that Cody as the County’s Health
 25 Officer has the authority pursuant to statute to issue the County Health Orders. The Order
 26 expressly states that it is a measure to prevent the spread of COVID-19 and reasonably necessary
 27 to achieve the goals of the Public Health Department. (See FAC, exh. A, § 1 (“Background and
 28 Purpose”), subsections (a)-(d) (stating bases for Order, evidence regarding the variant, the

1 imminent threat to the health of County residents, and the effectiveness of the booster shot and
2 the vaccine, that “[e]nsuring that all individuals working in higher-risk settings are both
3 vaccinated and boosted when eligible is critical given the emergence of the Omicron variant, the
4 risk that health care systems will be overwhelmed, and other ongoing risks associated with
5 COVID-19”... that “[i]n considering options to stem the anticipated rapid increase in COVID-
6 19 transmission and associated demands on our healthcare delivery system, ensuring that
7 individuals who work in higher-risk settings are all vaccinated and boosted when eligible is
8 critically important,” and that the purpose of the Order is “to protect highly vulnerable workers
9 and community members from infection, serious illness, and death from COVID-19”).)

10 The FAC alleges that “Cody’s adoption of the County Health Mandate was arbitrary and
11 capricious because she failed to consider evidence of the COVID-19 shots’ effectiveness and
12 necessity... [i]n indeed, Dr. Cody refused to consider any evidence that undermined her pre-
13 determined judgment to require the shots, a quintessentially arbitrary and capricious action.”
14 (FAC, ¶ 59.) Plaintiffs argue that the Court may not rely on extrinsic evidence rather than defects
15 on the face of the FAC. (See Opposition, pp.8:23-28, 9:1-2.) However, the Court necessarily
16 must look to the Order which Plaintiffs attach as an exhibit to the FAC. (See *Genis, supra*, 66
17 Cal.App.5th at p.1015 (stating that “[w]here facts appearing in attached exhibits or judicially
18 noticed documents contradict, or are inconsistent with, the complaint’s allegations, we must rely
19 on the facts in the exhibits and judicially noticed documents”); see also *Brakke, supra*, 213
20 Cal.App.4th at p.767 (stating that “[w]hile the ‘allegations [of a complaint] must be accepted as
21 true for purposes of demurrer,’ the ‘facts appearing in exhibits attached to the complaint will also
22 be accepted as true and, if contrary to the allegations in the pleading, will be given precedence”);
23 see also *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83 (stating that “[i]f
24 the allegations in the complaint conflict with the exhibits, we rely on and accept as true the
25 contents of the exhibits”).) Plainly, the Order cannot be considered arbitrary and capricious
26 because Cody failed to consider evidence of the COVID-19’s effectiveness and necessity—it
27 specifically states that such evidence was considered and the Order was critically important to
28 limiting spread of COVID-19. “[I]t is undisputed limiting the spread of COVID-19 is a legitimate

1 and substantial government interest.” (*County of Los Angeles Dept. of Public Health, supra*, 61
2 Cal.App.5th at p.496; see also *Roman Catholic Diocese v. Cuomo* (2020) 141 S.Ct. 63, 67 (stating
3 that “[s]temming the spread of COVID-19 is unquestionably a compelling interest”).) To the
4 extent that Plaintiffs argue that Cody failed to give purportedly proper weight to other specific
5 “evidence” more aligned with or supportive of Plaintiffs’ beliefs, this does not demonstrate
6 arbitrariness, capriciousness, or an entire lack of evidentiary support. (*Id.* at p.490 (stating that
7 “where judicial review of administrative action by an agency acting in its legislative capacity is
8 sought, that review begins and ends with a determination as to whether the agency’s action has
9 been ‘arbitrary, capricious, or entirely lacking in evidentiary support’”).) “A court reviewing a
10 quasi-legislative act cannot reweigh the evidence or substitute its own judgment for that of the
11 agency.” (*Id.*) To the extent that the Plaintiffs take umbrage with Cody’s specific means of
12 carrying out her duty to take measures to prevent the spread of contagious and communicable
13 diseases, this assertion runs counter to the law that “the local health officer has a mandatory duty
14 to take measures to prevent the spread of disease, but he or she has the discretion to determine
15 the appropriate measures to be taken in a given case.” (*AIDS Healthcare Foundation, supra*, 197
16 Cal.App.4th 693, 703 (also stating that “even if the Foundation’s course of action is allegedly
17 recognized by the Department as effective, the Department has the discretion to determine
18 whether a particular course of action is warranted, not the Foundation... [a] writ of mandate will
19 not lie to impose the Foundation’s discretion upon the Department’s health officer”).) Regardless,
20 Plaintiffs requested judicial notice of a press release by the CDC which states that “We’re in a
21 stronger place today as a nation, with more tools—like vaccination, boosters, and treatments—
22 to protect ourselves, and our communities, from severe illness from COVID-19.” (Pls.’ request
23 for judicial notice, exh. C., p.1.) The press release of which Plaintiffs sought judicial notice states
24 that “CDC is... [c]ontinuing to promote the importance of being up to date with vaccinations to
25 protect people against serious illness, hospitalization, and death... [p]rotection provided by the
26 current vaccine against symptomatic infection and transmission is less than that against severe
27 disease and diminishes over time, especially against the currently circulating variants... [and f]or
28 this reason, it is important to stay up to date, especially as new vaccines become available”).)

1 Here, Plaintiffs' own proffered document demonstrates that the Order is neither arbitrary,
2 capricious nor entirely lacking of evidentiary support and that the public health authorities have
3 demonstrated a rational basis for their actions during a pandemic. Moreover, "[m]ore than 100
4 years ago, the United States Supreme Court established the extremely deferential standard of
5 review applicable to emergency exercises of governmental authority during a public health
6 emergency... uph[o]ld[ing] a mandatory vaccination law against a substantive due process
7 challenge." (*County of Los Angeles Dept. of Public Health, supra*, 61 Cal.App.5th at pp.487-488;
8 see also *Altman v. Cty. of Santa Clara* (N.D.Cal. 2020) 464 F. Supp. 3d 1106, 1120 (stating that
9 "[t]he rationale in *Jacobson* applies with equal force".)

10 Additionally, Plaintiffs fail to identify a recognized fundamental right to which the Orders
11 must yield. (See *Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal.3d 392, 397 (stating
12 that "when determining which rights are 'fundamental' for due process purposes, a court's
13 attention focuses primarily on whether the right (1) is specifically guaranteed by the Constitution,
14 (2) affects the integrity of the political process, or (3) has a disproportionate impact upon a
15 discrete and insular minority... [t]here is little similarity between the analysis applied in
16 determining (1) whether a right is a 'fundamental right' for equal protection/due process purposes
17 on the one hand, and (2) which scrutiny is applicable for administrative review purposes, on the
18 other... [t]he principle of 'fundamentality' differs depending on the context or analysis within
19 which the concept arises".) However, even if Plaintiffs could identify a cognizable fundamental
20 right, "it has been settled since 1905 in *Jacobson, supra*, 197 U.S. 11, "that it is within the police
21 power of a State to provide for compulsory vaccination." (*Brown v. Smith* (2018) 24 Cal.App.5th
22 1135, 1143.) As Defendants argue, Plaintiffs fail to allege facts supporting that the County Order
23 lacks a real and substantial relation to their legitimate public health goal of reducing COVID-19
24 transmission and preserving health care resources. (See *Roman Catholic Diocese, supra*, 141
25 S.Ct. at p.67; see also *Altman, supra*, 464 F.Supp.3d at p.1121.)

26 The Court also agrees with Defendants that Plaintiffs' remaining contention that the
27 authority conferred on Dr. Cody, an unelected health official, is an unconstitutional delegation
28 of delegation of power (see FAC, ¶ 61) is wholly without merit. As a general matter, "[a]n

1 unconstitutional delegation of legislative powers occurs when the Legislature confers upon an
2 administrative agency unrestricted authority to make fundamental policy decisions.” (*People v.*
3 *Wright* (1982) 30 Cal.3d 705, 712.) The doctrine “rests upon the premise that the legislative
4 body must itself effectively resolve truly fundamental issues” and “cannot escape responsibility
5 by explicitly delegating that function to others or by failing to establish an effective mechanism
6 to assure the proper implementation of its policy decisions.” (*Id.*) While the Legislature must
7 make the fundamental policy decisions, “after declaring the legislative goals and establishing a
8 yardstick guiding the administrator, it may authorize the administrator to adopt rules and
9 regulations to promote the purposes of the legislation and to carry it into effect.” (*Id.* at 713,
10 citing *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 201.) Thus, there is no
11 unconstitutional delegation of power “when the statute [in question] provides standards to direct
12 implementation of legislation policy,” and “provide[s] ‘safeguards’ against the arbitrary exercise
13 of quasi-legislative authority.” (*Newsom v. Superior Court* (2021) 63 Cal.App.5th 1099, 1115-
14 1116.)

15 Here, as the County contends, the Legislature, via the provisions of the Health and Safety
16 Code, has provided Dr. Cody both standards and safeguards in fulfilling her duty to protect the
17 public from infectious diseases. These include, for example, Health and Safety Code section
18 120175, which “impose[s] a mandatory duty on a health officer to take measures to prevent the
19 spread of contagious and communicable diseases” and thus has the purpose of disease prevention
20 and control. While broad, this statutory purpose has been held to provide “sufficient guidance”-
21 specifically, to take actions that prevent the spread of disease- to survive a constitutionally-based
22 challenge. (See *Newsom, supra*, 63 Cal.App.5th at 1115-1116; see also *Rodriguez v. Solis* (1991)
23 1 Cal.App.4th 495, 510 (stating that “[a] general welfare standard is a sufficient guideline to
24 enable an agency to act constitutionally”).) Additionally, Health and Safety Code section 131080
25 proscribes the safeguard of permitting the state Department of Public Health to “control and
26 regulate” any local health authority’s action “when[,] in its judgment [,] the public health is
27 menaced.”

28

1 Plaintiffs' assertion that the foregoing determinations cannot be made on demurrer, and
2 that what is "necessary" for a public health official to do to prevent the spread of a contagious
3 disease during a state of emergency is by nature a question of fact" that cannot be determined at
4 the pleading stage, is unavailing. Notably, as the County Defendants point out in their reply,
5 Plaintiffs offer no authority which stands for the proposition that Dr. Cody's authority under state
6 law cannot be decided on demurrer, while the County has provided authority which demonstrates
7 to the contrary (see, e.g., *AIDS Healthcare Foundation, supra*, 197 Cal.App.4th 693 [petition for
8 writ of mandamus seeking issuance of regulatory health orders pursuant to the same provisions
9 of Health and Safety Code dismissed on demurrer and without leave to amend because a court is
10 not permitted to substitute its discretion for that of the legislative or executive bodies that
11 otherwise possess it]). Moreover, Plaintiffs citation to *Grissom v. Vons* (1991) 1 Cal.App.4th 52,
12 58, in which the court discussed the interpretation of Labor Code section 2802, "requir[ing] an
13 employer to indemnify an employee for all the employee necessarily expends in direct
14 consequence of the discharge of the employee's duties" does not address a public health official's
15 authority and is simply not relevant. Plaintiffs

16 Accordingly, Plaintiffs fail to state facts sufficient to constitute a cause of action for
17 declaratory and injunctive relief and do not otherwise suggest how they might amend the FAC
18 so as to allege a viable cause of action. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349
19 (stating that "Plaintiff must show in what manner he can amend his complaint and how that
20 amendment will change the legal effect of his pleading"); see also *Cooper v. Leslie Salt Co.*
21 (1969) 70 Cal.2d 627, 636 (stating same); see also *Hendy v. Losse* (1991) 54 Cal.3d 723, 742
22 (stating that "[t]he burden is on the plaintiff, however, to demonstrate the manner in which the
23 complaint might be amended".) Defendants' demurrer to the first cause of action on the ground
24 of failure to state facts sufficient to constitute a cause of action is SUSTAINED without leave to
25 amend.

26
27
28

1 **Demurrer to the second cause of action on the ground that Plaintiffs have failed to allege**
2 **standing under MMBA**

3 The second cause of action alleges that “Department does not have the authority to
4 unilaterally change the conditions of employment for unionized employees, such as Department
5 firefighters... [and thus] Department violated the law in demanding that Department firefighters
6 get the COVID-19 vaccines and booster shots as a condition of employment.” (FAC, ¶ 67.) The
7 second cause of action also alleges that “even if the Department does have the authority to adopt
8 the vaccine/booster mandate, the mandate is arbitrary and irrational, as studies and evidence
9 developed during the spread of the Omicron variant shows the COVID-19 vaccines do not
10 prevent people from contracting or transmitting COVID-19.” (FAC, ¶ 68.) As to the latter
11 allegation, it likewise ignores the Order, Plaintiffs’ own request for judicial notice, the
12 Legislature’s provision of both standards and safeguards in fulfilling Cody’s duty to protect the
13 public from infectious diseases via provisions of the Health and Safety Code and the
14 Department’s discretion in determining the appropriate measures in limiting the spread of
15 COVID-19, particularly during a pandemic, and particularly where, as here, the public health
16 authorities have demonstrated a rational basis for their actions. For reasons already stated above,
17 paragraph 68’s allegation that the mandate is arbitrary and irrational is merely a legal conclusion
18 that is not admitted on demurrer.

19 As to paragraph 67’s allegation regarding a unilateral change in the conditions of
20 employment for unionized employees, Defendants assert that Plaintiffs fail to alleged
21 administrative exhaustion or standing to challenge the Department’s claimed unlawful change to
22 the terms and conditions of their employment as the Public Employment Relations Board (PERB)
23 has jurisdiction over violations of the MMBA, the state law that governs the terms and conditions
24 of public employment. (See *City of San Jose v. Operating Engineers Local Union No. 3* (2010)
25 49 Cal.4th 597, 605-606 (stating that “[i]n 2000, the Legislature extended PERB’s jurisdiction to
26 cover matters arising under the MMBA... through enactment of Government Code section 3509,
27 which became effective July 1, 2001... [and] removed ‘from the courts their initial jurisdiction
28 over MMBA unfair practice charges’ (*Coachella Valley, supra*, 35 Cal.4th at p. 1089) and vested

1 such jurisdiction in PERB”; also stating that section 3509, subdivision (b) vests “initial
2 jurisdiction in PERB for claims of unfair practices arising under the MMBA... expressly
3 vest[ing] in the administrative board exclusive initial jurisdiction over unfair labor practice
4 charges”); see also Gov. Code § 3509 (stating that “[t]he initial determination as to whether the
5 charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the
6 purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board”).)
7 Government Code section 3505 requires public agency employers to “meet and confer in good
8 faith regarding wages, hours, and other terms and conditions of employment with representatives
9 of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and
10 shall consider fully such presentations as are made by the employee organization on behalf of its
11 members prior to arriving at a determination of policy or course of action.” (Gov. Code § 3505.)
12 Subdivision (b) of section 3501 defines a “recognized employee organization as “an employee
13 organization which has been formally acknowledged by the public agency as an employee
14 organization that represents employees of the public agency.” (Gov. Code § 3501, subd. (b).)
15 There is no allegation that Plaintiffs are a “recognized employee organization” pursuant to
16 MMBA. Instead, Plaintiffs allege that they are two individuals and an “unincorporated
17 association.” Plaintiffs again fail to allege standing under MMBA. (See *Relyea v. Ventura*
18 *County Fire Protection Dist.* (1992) 2 Cal.App.4th 875, 881 (stating that “[i]f an individual was
19 able to negotiate an agreement over working conditions which was more advantageous than a
20 union- negotiated agreement for employees of the same job classification, the union-represented
21 employees would be denied the same conditions simply by reason of choosing union
22 representation... [s]ection 3506, forbidding such result, would thereby be rendered
23 meaningless... [n]othing in the purposes or the legislative history of the MMBA hints at a
24 legislative concern over bargaining relations between employer and individual employees”; also
25 stating that “[a]ppellants’ interpretation of the MMBA would subvert the legislative scheme of
26 providing for a structured collective bargaining system by requiring an employer to negotiate
27 over working conditions with any number of employees”).) In opposition, Plaintiffs argue that
28 the second cause of action does not render these claims as “subject to PERB since, as the

1 Department recognizes, Plaintiffs do not have the power to file such a charge with PERB. Only
2 their union does.” (Opposition, p.12:25-27.) Plaintiffs contend that the cause of action “does
3 not even mention the Government Code... does not refer to collective bargaining or use the term
4 ‘unfair labor practice’... [and] does not allege that the Department engaged in bad faith in labor
5 negotiations.” (Opposition, p.12:16-18.) However, the second cause of action plainly alleges
6 that “Plaintiffs contend that the Department does not have the authority to unilaterally change
7 the conditions of employment for unionized employees, such as Department firefighters.” It is
8 clear that the second cause of action alleges a violation of the MMBA, a matter within the
9 exclusive initial jurisdiction of PERB, and Plaintiffs admit that they cannot cure the jurisdictional
10 defects with the claim. (See *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802,
11 823 (stating that “[t]he rule in California is well settled: a city’s unilateral change in a matter
12 within the scope of representation is a per se violation of the duty to meet and confer in good
13 faith,” the duty of which is set forth in section 3505); see also *Goodman v. Kennedy* (1976) 18
14 Cal.3d 335, 349 (stating that “Plaintiff must show in what manner he can amend his complaint
15 and how that amendment will change the legal effect of his pleading”); see also *Cooper v. Leslie*
16 *Salt Co.* (1969) 70 Cal.2d 627, 636 (stating same); see also *Hendy v. Losse* (1991) 54 Cal.3d 723,
17 742 (stating that “[t]he burden is on the plaintiff, however, to demonstrate the manner in which
18 the complaint might be amended”).)

19 The demurrer to the second cause of action is SUSTAINED without leave to amend.
20

21 **Demurrer to the fourth cause of action on the ground that it fails to state facts sufficient to**
22 **constitute a cause of action**

23 The fourth cause of action alleges that “Plaintiffs desire a judicial declaration that the
24 vaccine/booster mandates are unconstitutional because they violate Department employees’ right
25 to privacy under Article I, section 1 of the California Constitution.” (FAC, ¶ 92.) Plaintiffs
26 “object to the forced medical treatment set forth in the vaccine/booster mandates and they object
27 to being compelled to turn over their private medical information to the Department as a
28 condition of their employment.” (FAC, ¶ 85.)

1 Defendants assert that the fourth cause of action fails to allege a serious violation of their
2 privacy rights. As both parties state, “a plaintiff alleging an invasion of privacy in violation of
3 the state constitutional right to privacy must establish each of the following: (1) a legally
4 protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3)
5 conduct by defendant constituting a serious invasion of privacy.” (*Hill v. National Collegiate*
6 *Athletic Assn.* (1994) 7 Cal.4th 1, 39-40.) As Plaintiffs concede, “[w]hether a legally recognized
7 privacy interest is present in a given case is a question of law to be decided by the court.” (*Id.* at
8 p.40.) “If the undisputed material facts show no reasonable expectation of privacy or an
9 insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter
10 of law.” (*Id.*)

11 “Where, as here, the challenged action primarily concerns health and safety, no
12 fundamental right to privacy is at stake.” (*Coshov v. City of Escondido* (2005) 132 Cal.App.4th
13 687, 711; see also *Wilson v. California Health Facilities Com.* (1980) 110 Cal.App.3d 317, 322
14 (stating that “[w]here, as here, the statute primarily concerns health and safety, no fundamental
15 right to privacy is at stake”).) “Consequently, when the state asserts important interests in
16 safeguarding health, review is under the rational basis standard.” (*Id.*; see also *Love v. State*
17 *Dept. of Education* (2018) 29 Cal.App.5th 980, 993 (stating same).) “In the area of health and
18 health care legislation, there is a presumption both of constitutional validity and that no violation
19 of privacy has occurred.” (*Id.*; see also *Love, supra*, 29 Cal.App.5th at p.993 (stating same).) As
20 previously stated, the Order concerns health and safety.

21 While “[a] person’s medical history and information and the right to retain personal
22 control over the integrity of one’s body is protected under the right to privacy... [a]lthough the
23 right is important, it is not absolute; it ‘must be balanced against other important interests’ and
24 ‘may be outweighed by supervening public concerns.’” (*Love, supra*, 29 Cal.App.5th at p.993.)
25 As Defendants argue, California has long allowed compulsory vaccination. (See *Love, supra*, 29
26 Cal.App.5th at p.993-994 (stating that “‘compulsory immunization has long been recognized as
27 the gold standard for preventing the spread of contagious diseases’ and ‘federal and state courts,
28 beginning with *Abeel*, have held ‘either explicitly or implicitly’ that ‘society has a compelling

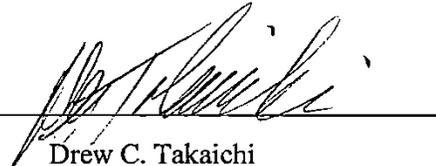
1 interest in fighting the spread of contagious diseases through mandatory vaccination of school-
2 aged children”); see also *Brown v. Smith* (2018) 24 Cal.App.5th 1135, 1146 (stating same, also
3 stating “[t]hat interest exists ‘regardless of the circumstances of the day, and is equally
4 compelling whether it is being used to prevent outbreaks or eradicate diseases’”).) “The right to
5 privacy, “fundamental as it may be is no more sacred than any of the other fundamental rights
6 that have readily given way to a State’s interest in protecting the health and safety of its citizens.”
7 (*Love, supra*, 29 Cal.App.5th at p.994; see also *Brown, supra*, 24 Cal.App.5th at p.1146 (stating
8 same).) As Defendants note, the compulsory vaccination orders that were the subject of *Love*
9 and *Brown* did not contain any exemptions. (See also *Burcham v. City of L.A.* (C.D.Cal. 2022)
10 562 F. Supp. 3d 694, 705 (stating that “[t]he vaccine mandate at issue in *Love* and *Brown* was
11 stricter than the Ordinance here, forbidding a child to attend school unless immunized against at
12 least ‘10 specific diseases and any other disease deemed appropriate,’ with no exemption for
13 personal religious beliefs... [n]onetheless, the *Love* and *Brown* courts affirmed dismissal of the
14 plaintiffs’ claims”).) The Orders meet the rational basis standard and Plaintiffs have not proffered
15 any facts that suggest that they may overcome the presumption of constitutional validity and that
16 no violation of privacy has occurred. (See *Love, supra*, 29 Cal.App.5th at p.985 (stating that
17 vaccination has “proved it to be the best method known to medical science to lessen the liability
18 to infection with the disease”).)

19 In opposition, Plaintiffs cite to *Mathews v. Becerra* (2019) 8 Cal.5th 756, in which plaintiff
20 psychotherapists contended that a privacy interest arises when a patient admits to possessing or
21 viewing child pornography in the context of voluntary psychotherapy to treat sexual disorders.
22 (*Id.* at p.773.) This case did not involve health and safety such that there is a presumption both
23 of constitutional validity and that no violation of privacy has occurred. *Mathews* is inapposite.

24 Here, it is clear that Plaintiffs cannot allege facts supporting the violation of a right of
25 privacy. In opposition, Plaintiffs do not suggest how they might amend the FAC so as to state a
26 viable cause of action for the violation of the right of privacy. (See *Goodman v. Kennedy* (1976)
27 18 Cal.3d 335, 349 (stating that “Plaintiff must show in what manner he can amend his complaint
28 and how that amendment will change the legal effect of his pleading”); see also *Cooper v. Leslie*

1 *Salt Co.* (1969) 70 Cal.2d 627, 636 (stating same); see also *Hendy v. Losse* (1991) 54 Cal.3d 723,
2 742 (stating that “[t]he burden is on the plaintiff, however, to demonstrate the manner in which
3 the complaint might be amended”).) The demurrer to the fourth cause of action is SUSTAINED
4 without leave to amend.

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7 October 6, 2022

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11 Drew C. Takaichi
12 Judge of the Superior Court
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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**
DOWNTOWN COURTHOUSE
191 NORTH FIRST STREET
SAN JOSE, CALIFORNIA 95113
CIVIL DIVISION

FILED
OCT 07 2022
Clerk of the Court
Superior Court of CA County of Santa Clara
BY Farris Bryant DEPUTY
FARRIS BRYANT

RE: **Kevin Rapport et al vs Sara Cody et al**
Case Number: **22CV394948**

PROOF OF SERVICE

ORDER RE: DEFENDANTS' DEMURRER TO THE FIRST AMENDED COMPLAINT was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408) 882-2700, or use the Court's TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on October 07, 2022. CLERK OF THE COURT, by Farris Bryant, Deputy.

cc: John W Howard JW Howard Attorneys 201 S Lake Avenue Suite 303 Pasadena CA 91101
Bryan Kevin Anderson Santa Clara County Counsel 70 West Hedding St East Wing Ninth Floor SAN JOSE CA 95110-1770