TONY LOPRESTI, County Counsel (S.B. #289269)
BRYAN K. ANDERSON, Deputy County Counsel (S.B. #170666)
NATHAN A. GREENBLATT, Deputy County Counsel (S.B. #262279)
OFFICE OF THE COUNTY COUNSEL
70 West Hedding Street, East Wing, Ninth Floor
San José, California 95110-1770
Telephone: (408) 299-5900
Facsimile: (408) 292-7240
Bryan.Anderson@cco.sccgov.org
Nathan.Greenblatt@cco.sccgov.org

Attorneys for Defendants
COUNTY OF SANTA CLARA, SARA H. CODY,
JAMES WILLIAMS, and JEFFREY SMITH

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(San José Division)

UNIFYSCC, et al., Plaintiffs, v. SARA H. CODY, et al., Defendants.	No. 22-CV-01019 BLF **DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT** Date: October 24, 2024 Time: 9:00 a.m. Ctrm: 3, 5th Floor Judge: The Honorable Beth Labson Freeman

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I. INTRODUCTION

The Court should grant summary judgment for the County on all claims.

Plaintiffs' constitutional challenges to the County's vaccination policy fail for two simple reasons. First, the risk tier classifications had nothing to do with religion. Plaintiffs cite no evidence that *any* employee's religious beliefs impacted the risk tier classification. Second, the County's vaccination policy survives any level of scrutiny, as it was designed to—and did—save lives at the height of the deadly COVID-19 pandemic.

Plaintiffs' constitutional challenges to the County's accommodations framework also fail. The County had no choice but to follow existing state and federal disability law (until the Court issued its preliminary injunction), and therefore the County made no *Monell* policy choice. Plaintiffs do not dispute that the County was *required* by law to provide "preferential consideration" in job transfers to employees with medical and disability exemptions, and acted in good faith by doing so.

Plaintiffs' Title VII and FEHA claims fail because *half of the class members never went on leave*, and therefore never required *any* accommodations. Those class members cannot complain that the accommodations the County provided to other employees were insufficient, and as a result, Plaintiffs cannot meet their burden of establishing classwide liability. Plaintiffs' effort to establish classwide liability further falters because hundreds of class members received paid leave, and paid leave is not an adverse employment action. Moreover, well over half of the class (309) refused to engage in the interactive process. Finally, Plaintiffs' Title VII and FEHA claims fail because increasing death and serious illness from COVID-19 constituted an undue hardship. The undisputed evidence shows that the County's vaccination policy prevented such death and serious illness, to the benefit of the Plaintiffs and the community alike.

II. ARGUMENT

A. PLAINTIFFS' CONSTITUTIONAL CLAIMS FAIL.

As the County explained in its opening brief, Plaintiffs' constitutional claims fail because Plaintiffs cannot meet the requirements of *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), and because the County's vaccination policy did not violate Plaintiffs' constitutional rights. County MSJ ("CMSJ") at 9-19. In response, Plaintiffs fail to establish a genuine issue of material fact.

1. Plaintiffs cannot meet the requirements of *Monell*.

Plaintiffs concede that they cannot meet the requirements of *Monell* by pointing to isolated examples of unvaccinated employees working in high-risk roles, or isolated examples of mis-designated jobs as high-risk. *See* Opp'n at 17-18. Plaintiffs concede that they must base their constitutional claims on the County's vaccination policy itself, because the County had no official policy of permitting unvaccinated employees to work in high-risk roles or mis-designating jobs as high-risk. *Id.* Therefore, Plaintiffs' arguments that a single department permitted three unvaccinated employees to briefly work in high-risk roles, and two departments' mis-designated three jobs as high-risk, cannot satisfy *Monell*. *See id.* at 19, 22.

Plaintiffs also do not dispute that state and federal law required the County to provide "preferential consideration" in job transfers to employees with medical/disability exemptions. *See* CMSJ at 10-11; Opp'n at 18. Plaintiffs do not dispute that the County therefore made no *Monell* policy decision on that issue. Plaintiffs try to sidestep this dispositive fact by arguing that the County had "an identical burden" to provide "preferential consideration" in job transfers to employees with religious exemptions. Opp'n at 18. There are several problems with this argument.

First, federal law prohibits Plaintiffs' reverse-disability discrimination claim—that they were not provided the same hiring preferences as disabled employees. *See, e.g.*, *Ingram v. Henry Ford Health Sys.*, No. 13-11567, 2014 WL 1584355, at *5 (E.D. Mich. Apr. 21, 2014) ("[T]hese 'reverse-disability' discrimination claims fail as a matter of law.") (collecting cases). In fact, the federal government and "virtually all of the states" have provided hiring preference to individuals with disabilities since the Civil War, and the Supreme Court has upheld these laws against claims of reverse discrimination. *See Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 261 (1979) (upholding hiring preferences for veterans and disabled veterans against equal protection claim that the laws discriminated against women); *see also Tennessee v. Lane*, 541 U.S. 509, 529 (2004) (upholding law benefitting disabled persons based on historical "extensive record of disability discrimination"). Plaintiffs cite no case holding that Title VII or the Constitution requires employers to provide the same preferences to other suspect classes.

Second, requiring the County to give employees with religious exemptions hiring preferences

would violate the Establishment Clause and Title VII. The County's vaccination policy already treated employees with religious objections to the vaccination requirement *better* than almost all other County employees by not requiring them to be vaccinated, by allowing them to remain employed, by offering paid and unpaid leave, and by providing assistance in job transfers. As the Court noted in its preliminary injunction order, the exemption *benefitted* religious employees, and the County was not legally required to provide a religious exemption at all. *See* ECF No. 44 at 10-11. To further give religious employees an explicit hiring preference over other applicants would indisputably violate the Establishment Clause and Title VII, as it is well-settled that only religious organizations, not secular institutions such as the County, are exempt "from Title VII's prohibition against discrimination in employment on the basis of religion." *See, e.g. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 329 (1987); *Hittle v. City of Stockton, California*, 101 F.4th 1000, 1013 (9th Cir. 2024) (noting "legitimate concern" that "City could violate constitutional prohibitions and face liability if it is seen to engage in favoritism with certain employees because they happen to be members of a particular religion"). The County had no authority to violate the Establishment Clause and Title VII. The County therefore made no *Monell* policy choice in not providing a job transfer preference to religious employees, just as the County made no *Monell* policy choice in providing a job transfer preference to disabled employees as expressly required by state and federal law. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 (1986) (stating liability requires "deliberate choice . . . among various alternatives").

Third, Plaintiffs' reliance on the Court's preliminary injunction ruling is unavailing. *See* Opp'n at 18. In its ruling, the Court held that state and federal disability statutes and regulations must give way to the Free Exercise Clause. *See* ECF No. 44 at 17. Until the Court so ruled, the County had no legal authority to disregard those laws. *See Lockyer v. City and Cnty. of San Francisco*, 33 Cal.4th 1055, 1094, 1119 (2004) (explaining that "a local executive official d[oes] not have the authority to determine that a statute is unconstitutional or to refuse to enforce a statute in the absence of a judicial determination that the statute is unconstitutional"). After the Court so ruled, the County heeded the ruling by treating all exempt employees equally, as Plaintiffs admit. *See* Opp'n at 5:23-25. Thus, the County made no *Monell* policy decision either before the ruling (by

following the express dictates of disability law), or after the ruling (by heeding the Court's order).

In short, the County followed the law, as it must, by providing "preferential consideration" in job transfers to disabled persons, until the Court's P.I. Order held that disability law gave way to constitutional principles. That is not a *Monell* policy choice.

2. The vaccination policy was neutral and generally applicable.

Plaintiffs argue the risk tier system was not neutral and generally applicable, because department heads could "inject their own subjective beliefs and opinions regarding whether religiously exempt personnel's roles were 'high-risk.'" Opp'n at 19. Plaintiffs, however, cite not one bit of evidence that *any* employee's religious beliefs impacted the risk tier determination in any way. And the record proves the opposite—employees with the same job duties were designated at the same risk level regardless of exemption type. *See* ECF 141-2 (Davis); ECF 141-8 at pp. 134-136 (Kacir); Anderson Decl. at 0223-225 (Davis), 0245-246 0254 (Kacir). Plaintiffs also incorrectly argue that the County failed to identify objective factors that guided the risk tier determination. The County did so—and none of the factors has anything to do with religion. *See* Smith Decl. ¶ 14; Anderson Decl. at 009, 11-14; Rudman, Ex. 2 at 0087. The fact that department heads did not consult with medical professionals when making individual risk tier determinations likewise does not show that religion played any role in the risk tier determination. To the contrary, the same risk tier determination process and standards applied to *all* exempt employees. Thus, there is no genuine dispute that County's vaccination policy was neutral and generally applicable.

3. The vaccination policy satisfies rational basis review and strict scrutiny.

Plaintiffs admit that they are not challenging the County's vaccination requirement but are only challenging the risk tier system. Opp'n at 21:14-15. Plaintiffs' assertion that the County has "failed to produce any evidence" to support the implementation of the risk tier system is incorrect.

The County has presented copious, compelling evidence that its vaccination policy, which includes the risk tier system, was implemented to stem the spread of COVID. To wit, COVID was (and is) a public health emergency that killed millions, including thousands of County residents. CMSJ at 2. Extensive scientific evidence—***unchallenged by Plaintiffs***—showed that congregate settings, such as healthcare facilities and jails, increase the risk of COVID transmission and

infection. Reingold Decl. ¶ 23, 25-26, 28-31; Rudman Decl., Ex. 2 at 0024-0027; *see also* Anderson Decl. at 0008-29, 0051-77, 0144-147, 0161-0166; CMSJ at 4-6. The County designated those same facilities as "high-risk," thereby not allowing employees to work in them unvaccinated. Smith Decl. ¶¶ 7, 13, 22, Ex. 2-5; Anderson Decl. at 00009-0011; Rudman Decl., Ex. 2 at 0074-77. Scientific studies have overwhelmingly demonstrated that vaccination reduces the risk of infection, transmission, serious illness, and death from COVID. CMSJ at 3-4. Accordingly, the County's vaccination policy, including the risk tier system, was amply supported by scientific evidence.

Plaintiffs have adduced no contrary evidence. Plaintiffs' sole expert, Dr. Duriseti, concedes that vaccination reduces death and serious illness from COVID and substantially reduces transmission. Anderson Decl. at 860-864, 872-873, 906-935. Duriseti offers no opinion challenging the risk tier system or that *any* County employee was misclassified as high-risk. He offers no opinion about the efficacy of masking, testing, or social distancing. See ECF 141-7 at 72-123. He offers no opinion that the County should have rescinded its vaccination requirement after March 7, 2022. He offers no opinion that the County should have adopted a vaccination policy based on less stringent policies in other counties. Quite simply, Plaintiffs' sole expert offers no opinion pertinent to Plaintiffs' summary judgment argument. Plaintiffs cannot create a genuine dispute of material fact about the County's vaccination policy, including its risk tier system, with no pertinent expert evidence. *See, e.g.*, *Dhillon v. Princess Cruise Lines, Ltd.*, No. 22-55215, 2023 WL 5696529, at *1 (9th Cir. Sept. 5, 2023) (affirming grant of summary judgment, finding that "specialized knowledge about the nature of COVID-19 infections, symptoms, and transmissibility" was required); *Wilson v. Ponce*, No. CV204451MWFMRWX, 2022 WL 2155119, at *7 (C.D. Cal. Feb. 2, 2022) (similar).

Plaintiffs then assert, with no supporting evidence, that "personnel working in high-risk settings" do not "pose a greater threat of COVID-19 transmission than exempt personnel working in low and intermediate risk settings." Opp'n at 22. Plaintiffs cite no evidence, including no expert opinion, in support of this false assertion. The above-cited evidence clearly shows the opposite.

Plaintiffs question why employees were not allowed to continue working in high-risk settings while masking and testing. *Id.* Plaintiffs again cite no evidence, including no expert opinion, that this alternative would have had the same or similar benefits as the vaccination requirement. The

undisputed evidence shows that vaccines are the most effective means of preventing serious illness, death, and transmission of COVID-19—more effective than masking, testing, and social distancing. Rudman Decl., Ex. 2 at 0024-0027; Reingold Decl. ¶ 30-37, 54-57; Anderson Decl. at 0019.

Plaintiffs note that some governmental entities adopted less stringent vaccination policies compared to the County. Opp'n at 22. Plaintiffs cite no evidence, including no expert opinion, showing that less stringent vaccination policies would have been as effective in Santa Clara County. And it is undisputed that the County's policies were ***more effective*** at saving lives than less restrictive options. Rudman Decl., Ex. 2 at 0015-16.

Plaintiffs repeat their misleading claim that the County permitted three exempt employees in high-risk roles—out of more than 20,000 County employees—to work unvaccinated. Opp'n at 22. One of those employees returned for a total of four days due to an administrative error; another was given a special assignment that did not require him to enter correctional facilities; and the third only states that he worked unvaccinated before the vaccination policy went into effect. ECF 141-8 at 187-188; Anderson Decl. at 545-548; *see also id.* at 358-401, 418-446, 549-585. These aberrant, misleading examples do not represent any official County policy and cannot support a constitutional challenge, as Plaintiffs admit elsewhere in their brief. *See* Opp'n at 17-18.

Finally, Plaintiffs assert that the County's risk tier system was "particularly unreasonable" after March 7, 2022. The evidence Plaintiffs cite, however, does not support this assertion. Plaintiffs point to an email from one of the County's five Supervisors expressing "puzzle[ment]" about certain aspects of the County's March 29, 2022 updated vaccination policy, but contrary to Plaintiffs' misleading assertions, the email does not even mention the Public Health Officer's March 7, 2022 Health Order, much less identify a "discrepancy" between the Health Order and the County vaccination policy. *See* Opp'n at 7 (citing Onishenko Decl., Ex. 80 at 1-2). In any event, the fact that an official asked questions about the updated vaccination policy to help her better respond to constituents does not show that the policy was unjustified. Notably, the County Executive, Dr. Jeffrey Smith, subsequently provided cogent answers to her questions. *See* Smith Decl., Ex. 3.

Plaintiffs next cite vaccination rate statistics from March and August 2022. Opp'n at 7. But Plaintiffs offer no expert opinion interpreting such statistics. Attorney argument is plainly

insufficient. *See* CMSJ at 25. Plaintiffs then provide a string cite to supposedly "uncontroverted evidence and expert testimony," but without explanation. Opp'n at 7. The evidence consists of: (i) testimony of Dr. Sarah Rudman stating that the County was "still seeing very high case rates" in March 2022 (Ex. 3 at 83:19-20); (ii) the County's September 12, 2022 Health Order "strongly urg[ing]" all eligible persons to get vaccinated "as soon as possible" and recommending "[b]usinesses and governmental entities to implement mandatory vaccination requirements for all personnel," including "more stringent standards for those working in Higher-Risk Settings" (Ex. 9 at 3); (iii) testimony of Chief Operating Officer Miguel Marquez explaining that the County continued its vaccination requirement past March 2022 because it had "so many unique facilities" like its hospitals and jails, consistent with the Health Officer's "strong recommendations" (Ex. 15 at 95:14-19, 98:14-99:17); and (iv) a March 29, 2022 email from Mr. Marquez attaching the County's updated vaccination policy, which itself states that "[c]linical trials, scientific research, and safety monitoring" have shown that COVID vaccines "are the most effective method of preventing people from getting and spreading" COVID, and that "new variants are significantly more transmissible than prior variants of the virus" (Ex. 17 at 113-118). This evidence strongly supports the County's decision to continue its vaccination requirement after March 7, 2022. And dispositively, ***Plaintiffs' proffered evidence includes no opinion from Plaintiffs' expert***. Plaintiffs cannot create a genuine dispute about whether the County's vaccination policy was justified (before or after March 7, 2022) based on attorney argument, particularly where the evidence overwhelmingly supports the County's policy. *See Dhillon*, 2023 WL 5696529, at *1; *Wilson*, 2022 WL 2155119, at *7.

Accordingly, as the Court found in its preliminary injunction order, the vaccination policy satisfies any level of scrutiny. *See* ECF No. 44 at 13-15.

4. Plaintiffs' constitutional challenges to the County's accommodations framework fail.

As the County explained in its opening brief, Plaintiffs base their constitutional challenges to the County's accommodations framework on the County giving "preferential consideration" to employees with medical and disability exemptions, pursuant to state and federal law. CMSJ at 18-19. The County cannot be held monetarily liable for complying with the law. *Id.*

In response, Plaintiffs first argue that "disability law is not at issue here." Opp'n at 23. That

argument makes no sense. Plaintiffs' constitutional challenge to the County's accommodations framework is based *entirely* on the County complying with disability law, which Plaintiffs do not dispute *required* the County to give "preferential consideration" to employees with medical and disability exemptions. The County had to comply with those laws (until the Court issued its preliminary injunction), just as it could not violate express prohibitions of Title VII and the Establishment Clause by giving hiring preferences to religious employees. *Supra*, Section II.A.1.

Plaintiffs next argue that the County is not entitled to a good faith defense. Opp'n at 23. Plaintiffs do not, and cannot, challenge the basic proposition that the County is entitled to a good faith defense, as the Ninth Circuit has previously held. *See Allen v. Santa Clara County Correctional Peace Officers Association*, 38 F.4th 68 (9th Cir. 2022) (extending good faith defense to municipalities). Plaintiffs also do not, and cannot, challenge the fact that the County acted in good faith by complying with state and federal disability law. Plaintiffs assert only that the cases the County cites "are irrelevant, as the County did not rely on a presumptively valid state law that was later determined to be unconstitutional." Opp'n at 23. But that is exactly what happened. The County relied on a presumptively valid state regulation—namely, 2 C.C.R. section 11068 (d)(5)—until the Court effectively—and for the first time—deemed the County's application of that regulation unconstitutional in the circumstances of this case. *See* ECF No. 44 at 17. The County is therefore entitled to a good faith defense as a matter of law.

Plaintiffs further admit that "most Class members"—309 out of 463—"never applied for lower-risk jobs" and thus cannot establish injury. Opp'n at 24. Plaintiffs contend that this fact is "irrelevant," because it pertains only to damages, not liability. Not so. To pursue their constitutional claims, Plaintiffs must present evidence of an injury that is "concrete and particularized," "actual or imminent, not conjectural or hypothetical," and "fairly traceable" to the County's policies. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1121 (9th Cir. 2009). But here, Plaintiffs present no argument, evidence, or legal authority showing how any of the 309 class members who never sought job transfers were injured by "preferential consideration" in job transfers given to other employees. The precise level of job transfer assistance simply did not matter for employees who never sought a job transfer to begin with. Those 309 class members therefore lack standing, and the class is

overbroad and not ascertainable. *See, e.g.*, *Donovan v. Biden*, 603 F.Supp.3d 975, 982 (E.D. Wash. 2022) (finding that "[p]laintiffs who have been vaccinated or provided accommodations cannot allege any actual or imminent harm"), *aff'd in part*, 70 F.4th 1167 (9th Cir. 2023); *Andre-Rodney v. Hochul*, 618 F.Supp.3d 72, 76 (N.D.N.Y. 2022) (finding plaintiffs who vaccinated and returned to work lacked standing); *Heredia v. Eddie Bauer LLC*, No. 16-CV-06236-BLF, 2020 WL 127489, at *4–5 (N.D. Cal. Jan. 10, 2020) (finding class overbroad and not ascertainable, where majority of class members not affected by challenged policy). Plaintiffs assert that "under Title VII," Defendants bear the burden of proving that Plaintiffs failed to mitigate their damages, but Plaintiffs fail to explain what Title VII has to do with their constitutional claims. Opp'n at 24. The failure of the vast majority of class members to show injury has nothing to do with mitigation.

Accordingly, Plaintiffs' constitutional challenges to the accommodations framework fail.

5. Plaintiffs' Establishment Clause claim fails.

Plaintiffs' Establishment Clause claim fails both legally and factually.

Legally, Plaintiffs argue that the Court should apply a "neutrality" test for the Establishment Clause, based on a statement plucked from the end of a 1947 case. There is no such test. The Establishment Clause is "interpreted by reference to historical practices and understandings, drawing the line between permissible and impermissible government action in a way that accord[s] with history and faithfully reflect[s] the understanding of the Founding Fathers." *Hunter v. U.S. Dep't of Educ.*, No. 23-35174, 2024 WL 3998788, at *5 (9th Cir. Aug. 30, 2024). Cases decided under the three-part test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) remain relevant, insofar as they demonstrate historical practice. *Id.* at *7. Here, Plaintiffs' "neutrality" test simply repackages their Free Exercise and Equal Protection claims, by arguing that the County's vaccination policy was not neutral. Plaintiffs present no argument or evidence under the proper Establishment Clause test. Plaintiffs' Establishment Clause claim fails for that reason alone. And historically, providing "preferential consideration" to disabled persons has been permitted since at least the Civil War, while reverse discrimination claims have long been rejected. *See supra*, Section II.A.1.

Plaintiffs fail to present any cognizable evidence that the County demonstrated hostility to religion. The only alleged evidence of hostility is the bare allegation that the County's "preferential

consideration" in job transfers for employees with medical and disability exemptions was not neutral. *See* Opp'n at 24-25. Courts have repeatedly rejected the proposition that government action violates the Establishment Clause simply because it is not neutral. *See, e.g.*, *Hunter*, 2024 WL 3998788, at *5 (finding Title IX exception allowing religious institutions to discriminate based on gender did not violate Establishment Clause); *see also Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1255 (9th Cir. 2007) (stating that "we should also be reluctant to attribute unconstitutional motives to the [government]"). Tellingly, Plaintiffs do not cite a single comment, email, or document showing hostility. Even worse, Plaintiffs object to ***their own testimony***, in which they admit that they did not experience any hostility. Opp'n at 25. Plaintiffs' answer to that straightforward, factual question is admissible, *see* Fed. R. Evid. 801(d)(2), and conclusive. Thus, Plaintiffs' claim fails.

B. PLAINTIFFS' TITLE VII AND FEHA ACCOMMODATION CLAIMS FAIL.

Plaintiffs' Title VII and FEHA claims fail for numerous reasons, including because half of the class never went on leave and never needed any accommodations, and Plaintiffs' proffered accommodations would have materially increased the risk of additional infections, serious illness, and death from COVID-19. CMSJ at 19-25. In response, Plaintiffs largely repeat the incorrect assertions from their original brief, without disputing dispositive facts that negate their claims.

1. Plaintiffs fail to show that the County took adverse action against the Class.

Critically, Plaintiffs do not dispute that 238 class members ***never went on leave*** due to the County's vaccination policy. CMSJ at 20; Anderson Decl. at 1044-1045; Opp'n at 8-10. Those class members therefore did not need *any* form of accommodation. This fact is dispositive of Plaintiffs' Title VII and FEHA claims. Over half the class members needed no accommodations and cannot complain that the accommodations the County provided to other employees were insufficient. *See, e.g.*, *Donovan*, 603 F.Supp.3d at 982 (vaccinated plaintiffs "cannot allege any actual or imminent harm"); *Andre-Rodney*, 618 F.Supp.3d at 76 (vaccinated plaintiffs lacked standing); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (stating that in class action, common answers required); *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 268 F.R.D. 604, 612 (N.D. Cal. 2010) ("Plaintiff has not identified a single case in which a court certified an overbroad class that included both injured and uninjured parties.").

Plaintiffs' only response to this dispositive fact is a one-sentence argument that the County "threatened these individuals with unpaid leave." Opp'n at 9. Apparently, Plaintiffs contend that giving employees a choice to vaccinate or take leave is, standing alone, an adverse employment action. Plaintiffs cite no legal authority in support of this dubious proposition. And courts have repeatedly rejected it. *See Donovan v. Biden*, 603 F.Supp.3d 975, 982 (E.D. Wash. 2022), *aff'd in part*, 70 F.4th 1167 (9th Cir. 2023) ("Plaintiffs who have been vaccinated . . . cannot allege any actual or imminent harm because they are in compliance with the vaccine requirements and do not face any potential adverse employment actions."); *Doe(s) v. Pittsburgh Reg'l Transit*, 684 F.Supp.3d 417, 425–26 (W.D. Pa. 2023) (rejecting argument "that being forced to take an unwanted vaccine to avoid being fired constitutes an adverse employment action"); *Bir v. McKesson Corp.*, No. 5:22-CV-00412-M, 2023 WL 5960640, at *3 (E.D.N.C. Sept. 13, 2023) (finding that "pressur[ing] Plaintiff to capitulate and get the COVID-19 vaccine" does not "rise to the level of an adverse employment action"); *Ananias v. St. Vincent Med. Grp., Inc.*, No. 1:22-CV-1723-RLM-MPB, 2022 WL 17752208, at *3 (S.D. Ind. Dec. 19, 2022) (similar). The simple fact is that over half the class members cannot pursue failure-to-accommodate claims, because they never needed accommodations. Plaintiffs' Title VII and FEHA claims fail for this reason alone.

Plaintiffs do not dispute that the County provided exempt employees with paid leave—not only unpaid leave. Opp'n at 9. Paid leave is not an adverse employment action. *See Longmire v. City of Oakland*, No. C 10-01465 JSW, 2011 WL 5520958, at *5 (N.D. Cal. Nov. 14, 2011) ("[P]aid administrative leave . . . [is] not considered [an] adverse employment action[]."), *aff'd*, 584 F. App'x 623 (9th Cir. 2014); *Gannon v. Potter*, No. C 05-2299SBA, 2006 WL 3422215, at *5 (N.D. Cal. Nov. 28, 2006) (same), *aff'd*, 298 F. App'x 623 (9th Cir. 2008); *Foraker v. Apollo Grp., Inc.*, 427 F.Supp.2d 936, 942 (D. Ariz. 2006) (same), *aff'd*, 302 F. App'x 591 (9th Cir. 2008); *Green v. Safeway Stores*, No. C 96-03471 CRB, 1998 WL 898366, at *3 (N.D. Cal. Dec. 14, 1998) ("Plaintiff has not cited any case which holds that *paid* leave constitutes an adverse employment action. In fact, the case law holds to the contrary."). That is true regardless of whether the leave is administrative, sick, or vacation leave. *See Ravel v. Hewlett-Packard Enter., Inc.*, 228 F.Supp.3d 1086, 1094 (E.D. Cal. 2017) (medical leave); *Robinson v. Los Angeles Unified Sch. Dist.*, No.

B217034, 2010 WL 3064382, at *10 (Cal. Ct. App. Aug. 6, 2010) (sick leave); *Cali v. Mayorkas*, No. 22-CV-942S, 2024 WL 3877393, at *6 (W.D.N.Y. Aug. 20, 2024) (sick leave); *Blackwell v. SecTek, Inc.*, 61 F.Supp.3d 149, 160 (D.D.C. 2014) (vacation leave). Plaintiffs cite no legal authority to the contrary. The undisputed fact that 231 class members took paid leave directly refutes Plaintiffs' false argument that "involuntary unpaid administrative leave was the only accommodation offered to Plaintiffs and Class members." PMSJ at 13. Plaintiffs therefore have failed to show "in one stroke" that the County took adverse action against the Class. *Heredia*, 2020 WL 127489, at *4–5.

2. The accommodation claims of 309 class members are barred by their failure to cooperate in the County's efforts to provide transfers and reassignments.

Plaintiffs' Title VII and FEHA claims also fail because 309 class members made no effort to engage in the interactive process with the County. CMSJ at 20-21. Plaintiffs' primary response is to move to object to the Declaration of Michelle Quon, which provides the 309 number, because Ms. Quon allegedly lacks personal knowledge of the facts in her declaration. Opp'n at 13. Plaintiffs' objection is baseless. Ms. Quon is the County's Assistant Human Resources Director who oversaw the VaxJobReview team that monitored and managed requirement inquiries related to COVID vaccination accommodations. Quon Decl. (ECF No. 145) ¶ 3. She has personal knowledge of all of the facts in her declaration, with the sole exception of the fact that the individuals listed in Exhibit 1 to her declaration are class members in this lawsuit. *See id.* ¶ 5. Ms. Quon need not have personal knowledge of that detail. Opposing counsel can easily verify that those individuals are class members. Plaintiffs identify no inaccuracy in Exhibit 1.

Plaintiffs' only other response is to assert that the County "placed the onus upon the employee to take the initial step towards accommodation, contrary to law." Opp'n at 14. That is indisputably false. Plaintiffs admit that the County took the initial step towards accommodation by providing exempt employees with information about paid leave, as well as "a link to County job postings," detailed information about the job transfer process, and the email address of a human resources team designated to assist with job transfers. *See id.* at 12 (citing Exs. 6, 10, 11, 15, 30-32, and 48; Anderson Decl. at 647-668, 673, 679-722, 787-788). Plaintiffs cite no case holding that an

employer must do more to "take the initial step towards accommodation." *E.E.O.C. v. AutoNation USA Corp.*, 52 F. App'x 327, 329 (9th Cir. 2002) (affirming summary judgment where employer "satisfied its initial burden by suggesting possible accommodations," and the "suggested accommodations were never [] given the opportunity to be implemented or tested").

3. Plaintiffs are not similarly situated to disabled employees and the County had a legitimate, non-discriminatory reason for the claimed "preference".

Plaintiffs concede that they cannot assert a disparate treatment claim. Opp'n at 8.

As explained above, it is also undisputed that the County acted in good faith by following state and federal disability law requiring "preferential consideration" in job transfers for employees with medical and disability exemptions. *See*, *supra*, Sections II.A.1, II.A.IV. This good faith defense disposes of Plaintiffs' Title VII and FEHA claims premised on any "preferential consideration" as a matter of law. *See Alaniz v. California Processors, Inc.*, 785 F.2d 1412, 1416 (9th Cir. 1986) ("Prior to a judicial determination such as evidenced by this opinion, an employer can hardly be faulted for following the explicit provisions of applicable state law.").

4. Plaintiffs' proffered accommodation would have imposed an undue hardship.

As the County explained in its motion, allowing Plaintiffs to continue working in high-risk roles unvaccinated would have compromised the health and safety of vulnerable populations under the County's care, thereby imposing an undue hardship on the County. CMSJ at 23-25. In response, Plaintiffs do not dispute that vaccines are the most effective means of preventing serious illness, death, and transmission of COVID-19. Opp'n at 14-16. Plaintiffs instead present a variety of arguments regarding undue hardship, none of which create a genuine dispute.

First, Plaintiffs argue that the scientific consensus that justified vaccine mandates does not "prove in every circumstance that any religious accommodation beyond indefinite unpaid leave was an undue hardship." *Id.* at 15 (quoting *Zimmerman v. PeaceHealth*, 701 F.Supp.3d 1099, 1114 (W.D. Wash. 2023)). This argument is a straw man based on a case decided on the pleadings. The County is not arguing about "every circumstance." For example, in September 2022 the County again allowed unvaccinated employees to work in high-risk roles. CMSJ at 5-6. It is undisputed, however, that allowing unvaccinated employees to work in high-risk roles at the height of the

pandemic would have compromised the health and safety of vulnerable populations. *Id.* at 23-25. Plaintiffs offer no admissible evidence to the contrary. *See supra*, Section II.A.3.

Second, Plaintiffs argue that the County "refused to honor" vaccination exemptions "in practice," and that accepting the County's "hardship argument would in effect allow it to fasten a 'for health and safety' button to any discriminatory employment policy." Opp'n at 15. These arguments are empty. The County honored exemptions by not requiring exempt employees to vaccinate. Plaintiffs cite no legal authority holding that employers *must* permit exempt, unvaccinated employees to continue working in high-risk roles. The notion that the Court should *require* the County to allow unvaccinated ICU nurses to treat critically ill cancer patients at the height of a deadly pandemic is senseless. Plaintiffs' "health and safety button" argument bears no relation to the facts. The County carefully fashioned its vaccination policy during the height of the pandemic based on the best available scientific evidence. CMSJ at 2-5.

Third, Plaintiffs argue that masking, testing, and social distancing should have been allowed. Opp'n at 15. But Plaintiffs offer no admissible evidence that masking, testing, and social distancing would have effectively prevented serious illness, death, and transmission of COVID-19 in high-risk situations during the relevant, or any, timeframe. Again, Plaintiffs' expert offers no opinion on masking, testing, or social distancing, while Defendants' distinguished experts explain why those options were not effective. Reingold Decl. ¶ 30-37, 54-57; Rudman Decl., Ex. 2 at 0024-0027; Anderson Decl. at 0019, 0150-155. Plaintiffs further rely on misleading examples of three employees who temporarily returned to work, *see supra* at 3, and do not dispute the evidence that exempt HVAC technicians could not safely work in high-risk facilities. Anderson Decl. at 009, 222-225, 244-268, 792-825.

Fourth, Plaintiffs assert that the County "has no justification for excluding Plaintiffs" from the workplace, "considering the County's high vaccination rates and that the Class made up only 2 percent of the County's overall workforce." Opp'n at 16. This is inadmissible attorney argument. *See Dhillon*, 2023 WL 5696529, at *1; *Wilson*, 2022 WL 2155119, at *7. Plaintiffs' expert offers no such opinion. And Defendants' experts opine that the County's vaccination policy prevented serious illness, death, and transmission of COVID-19. Reingold Decl. ¶ 30-37, 54-57; Rudman Decl., Ex. 2

at 0024-0027; Anderson Decl. at 0019, 0150-155.

Fifth, Plaintiffs assert that less stringent vaccination policies adopted by other jurisdictions allowed employees to continue working in high-risk roles. Opp'n at 16-17. Plaintiffs cite no evidence, including no expert opinion, showing that less stringent vaccination policies would have been as effective in Santa Clara County. And it is undisputed that the County's policies were more effective at saving lives than less restrictive options. Rudman Decl., Ex. 2 at 0015-16.

In short, increasing deaths and serious illnesses from COVID-19 would have constituted an undue hardship.

C. PLAINTIFFS' CLAIMS AGAINST THE COUNTY OFFICIAL DEFENDANTS FAIL.

Plaintiffs do not dispute that the Court should dismiss the County Officials Sara Cody, James Williams, and Jeffrey Smith from the action. *See* Fed. R. Civ. Proc. 21; CMSJ at 25.

D. OBJECTIONS TO PLAINTIFFS' EVIDENCE

The latest round of exhibits submitted by Plaintiffs (at ECF 156-1 through 156-21) do not support their arguments. Six of the exhibits do not concern class members. ECF 156-10 through 156-15; Anderson Decl., Exs. 2-7. These include email with or concerning medical exempted employees that demonstrate that the County followed the same process for designating risk regardless of exemption type. *Id.* Other exhibits are incomplete and redundant of more complete records already before the Court. *Compare* ECF 156-5 (Valle), 156-6 (Baluyut) and 156-16 (Ramirez), ECF 156-21 (Reingold), ECF-156-21 (pandemic status summer 2022) *with* ECF 150 at Ctrl_0391-446, 545-585 (Valle), Ctrl_0286-319 (Baluyut and Ramirez), ECF 141-8 at 12, ECF 152 at Ctrl_0953-954 (Reingold), ECF 144, ¶¶ 12 and 17-23, Ex. 3, ECF 147, ECF 153, ECF 149 at Ctrl_0113-118, 148-172, 184-205 (pandemic status summer 2022). Plaintiffs also submit correspondence from the prior Sheriff (ECF 156-18, 156-19) seeking a blanket exemption to the vaccination policy which the record demonstrates was never granted (ECF 149 at Ctrl_0016, ¶ 31 and ECF 150 at Ctrl_0391-446, 545-585) and which has no relevance to Plaintiffs' theories in this case. Nor can Plaintiffs rely on their own self-serving, hearsay interrogatory responses (ECF 156-9) as substantive evidence in opposing summary judgment. *S&S Logging Co. v. Barker*, 366 F.2d 617, 624 (9th Cir. 1966); *AT & T Corp. v. Dataway Inc.*, 577 F.Supp.2d 1099, 1109 (N.D. Cal. 2008).

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Respectfully submitted,

TONY LOPRESTI
COUNTY COUNSEL

By: /s/ *Bryan K. Anderson*
BRYAN K. ANDERSON
Deputy County Counsel

Attorneys for Defendants
COUNTY OF SANTA CLARA, SARA H. CODY, JAMES WILLIAMS and JEFFREY SMITH

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