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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 behalf  
17 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 **SANTA CLARA COUNTY**,

23 Defendant.

Case No.: 22-cv-01019 BLF

**PLAINTIFFS' OPPOSITION TO**  
**DEFENDANT'S MOTION FOR CLASS**  
**DECERTIFICATION**

DATE: March 13, 2025  
TIME: 9:00 a.m.  
CTRM: 3, 5th Floor  
JUDGE: Hon. Beth Labson Freeman

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1 **I. INTRODUCTION**

2 On January 29, 2024, this Court certified a Class of 463 County personnel who received  
3 religious exemptions to Defendant Santa Clara County’s (“the County” or “Defendant”) August 5,  
4 2021 COVID-19 vaccination policy, and who worked in what the County labeled as “high-risk” jobs.  
5 *See* ECF No. 125 at 5, 25. Defendant now asks the Court to decertify the Class, asserting that the premise  
6 that led to certification – that the County put all Class members on involuntary unpaid administrative  
7 leave – is incorrect. ECF No. 176 (“Mot.”). However, the County’s vaccination policies and orders  
8 prove the opposite as true, rendering decertification inappropriate.

9 Specifically, the County informed each Class member via letter that, unless they got vaccinated  
10 by November 1, 2021, they would be placed on an indefinite unpaid leave of absence. Pursuant to  
11 County policy, Class members could utilize their already earned and accrued leave bank time (such as  
12 vacation, STO, comp time, or sick time) during their leaves of absence, after which their leave would  
13 be unpaid. The Class’s injuries – whether constitutional or economic – stem from this one policy.  
14 Plaintiffs’ claims concerning the County’s prioritization of medical and disability exemptions for  
15 accommodation are also claims concerning the County’s policy – which applied to every member of  
16 the Class in the same way – rather than against the County’s conduct toward certain employees.

17 Additionally, the County’s arguments pertaining to ascertainability rest upon the incorrect  
18 assertion that over half of the members of the Class lack standing. The 238 class members who never  
19 went on administrative leave because they took the vaccine have standing under both their  
20 Constitutional claims and their Title VII/FEHA claims. These Class members suffered constitutional  
21 injury when they were unlawfully coerced into taking the COVID-19 vaccine, only after seeking an  
22 accommodation, in violation of the sincerely held religious beliefs. And they have standing under Title  
23 VII and FEHA because in the Ninth Circuit one element of a prima facie case of failure to accommodate  
24 claim is the employer *threatened* or otherwise subjected them to an adverse employment action because  
25 of their inability to fulfill the job requirement that conflicted with their religious belief. The case the  
26 Court relied upon in its Order Denying Plaintiffs’ Partial Motion for Summary Judgment, and Granting  
27 in Part and Denying in Part Defendant’s Cross-Motion for Summary Judgment (ECF No. 178) (the  
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1 “MSJ Order”) was from a district court in the Third Circuit, which requires a different showing that  
2 does not include threatened adverse action. But, in the Ninth Circuit, demonstrating the employer  
3 *threatened* adverse employment action is sufficient. Therefore, every member of the Class has standing  
4 and Plaintiffs’ claims are typical of the Class. In any event, decertification is not the solution since the  
5 Court can narrow the Class to exclude the members who never went on leave, should the Court find  
6 they lack standing.

7 Moreover, Plaintiffs and the Class have standing to pursue their Free Exercise Clause claim  
8 even if they did not apply for a lower-risk job through the Employment Services Agency (“ESA”). The  
9 County unlawfully gave preferential treatment to individuals to whom the County granted medical and  
10 disability exemptions in the accommodation process over those with religious exemptions, including  
11 by accommodating the former group *before* assisting Class members. And the minimal assistance  
12 provided to Class members was not comparable or equal to the assistance the County provided to  
13 individuals with medical and disability exemptions. All Class members were subjected to these  
14 unlawful County accommodations policies and therefore have suffered constitutional injury, entitling  
15 them to, at a minimum, nominal damages. Class members are not required to somehow unwind all of  
16 the unequal treatment they received as a result the County’s discriminatory process in order to prove  
17 that in a “but for” world they would have received a transfer or reassignment to a comparable position.

18 Moreover, the overwhelming evidence demonstrates that Class members were placed on or  
19 threatened with indefinite, involuntary and *unpaid* administrative leave. While Class members were  
20 permitted to use their *already earned and accrued* leave bank time in order to continue to receive a  
21 paycheck—and an identifiable subset of the Class did so for some portion of the Class Period—using  
22 leave bank time does not make the leave “paid”, distinguishing the facts here from the cases cited by  
23 the County and the Court in its MSJ Order.

24 Furthermore, as this Court previously held, “Plaintiffs have sufficiently identified [five]  
25 common questions of law or fact to meet their burden under Rule 23(a)(2).” ECF No. 125 at 8. There  
26 is no change in circumstances or facts that would require the Court to amend its ruling and decertify the  
27 Class. Plaintiffs still challenge discrete County-wide policies guided and supervised by County  
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1 executives that predominate over individualized issues.

2 Accordingly, Plaintiffs and Class members respectfully request that this Court deny Defendant's  
3 Motion for Class Decertification.

## 4 **II. BACKGROUND**

### 5 **A. Procedural History**

6 Plaintiffs UnifySCC, Tom Davis and Maria Ramirez filed this action on February 18, 2022,  
7 alleging claims against Sara H. Cody, James Williams, Jeffrey Smith and Santa Clara County (the  
8 "County" or "Defendant). *See* ECF No. 1. Plaintiffs UnifySCC, Tom Davis, Maria Ramirez, and  
9 Elizabeth Baluyut ("Plaintiffs") filed a Verified First Amended Class Action Complaint for Declaratory  
10 and Injunctive Relief and Damages (the "FAC") on August 23, 2022. ECF No. 55. The FAC added  
11 Plaintiff Elizabeth Baluyut and class allegations, and asserted claims for: (1) Violation of the Free  
12 Exercise Clause of the First Amendment to the United States Constitution (42 U.S.C. § 1983) (FAC,  
13 ¶¶ 63–71); (2) Violation of FEHA (FAC, ¶¶ 72–78); (3) Violation of the Equal Protection Clause of the  
14 Fourteenth Amendment to the United States Constitution (42 U.S.C. § 1983) (FAC, ¶¶ 79–85);  
15 (4) Violation of the Establishment Clause of the First Amendment to the United States Constitution (42  
16 U.S.C. § 1983) (FAC, ¶¶ 86–89); (5) Violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C.  
17 § 2000e, *et seq.*) (FAC, ¶¶ 90–93); and (6) Deprivation of Civil Rights Under 42 U.S.C. § 1983 (*Monell*)  
18 (FAC, ¶¶ 94–97).

19 On July 14, 2023, Plaintiffs moved for class certification. ECF No. 81. On January 29, 2024,  
20 the Court certified the following class with respect to liability but not damages:

21 All individuals who: 1) work or worked for the County and/or  were subject to its vaccine  
22 policies and orders, including the Risk Tier System; 2) were forced by the County to  
23 choose between taking the vaccine to maintain their jobs and/or their employment-related  
24 benefits or being placed on unpaid leave; 3) were  classified as working in high risk jobs  
pursuant to the County's Risk Tier System; and 4) received  a religious exemption from  
the County (the "Class") between August 5, 2021 and September 27, 2022 (the "Class  
Period").

25 ECF No. 125 at 25.

26 In July and August 2024, the Parties filed cross-motions for summary judgment. *See* ECF No.  
27 141 ("Plaintiffs' MSJ"), ECF No. 143 ("Defendant's MSJ"). The Court heard oral argument on October  
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1 25, 2024, and issued a ruling on January 15, 2025. ECF No. 178. The Court’s MSJ Order: (1) denied  
2 Defendant’s MSJ and Plaintiffs’ MSJ as to the FEHA and Title VII causes of action; (2) Granted  
3 Defendant’s MSJ and denied Plaintiffs’ MSJ as to the Free Exercise and Equal Protection Claims insofar  
4 as they are based on the Risk Tier System, but denied Plaintiffs’ MSJ and Defendant’s MSJ as to the  
5 Free Exercise and Equal Protection Claims insofar as they are based on the accommodations procedure;  
6 (3) denied Plaintiffs’ MSJ on the County’s *Monell* liability for the accommodations policy, since  
7 Plaintiffs have not yet prevailed in proving a constitutional violation; (4) denied Defendant’s MSJ on  
8 the Establishment Clause Claim; and (5) dismissed sara Cody, James Williams and Jeffrey Smith as  
9 defendants. *Id.* at 27.

10 At the hearing on Plaintiffs’ MSJ and Defendant’s MSJ, the Court invited Defendant to file a  
11 motion for decertification of the Class (the “Motion” or “Mot.”). Defendant filed its Motion on  
12 December 4, 2024. ECF No. 176.

13 **B. Statement of Facts**

14 On August 5, 2021, Defendant issued a policy requiring all employees take the COVID-19  
15 vaccine or request a medical and/or religious exemption. Declaration of Rachele R. Byrd in Support of  
16 Plaintiffs’ Opposition to Defendant’s Motion for Class Decertification (“Byrd Decl.”), Ex. 1.  
17 Defendant’s policy also created a risk tier system that classified employees as low risk, intermediate  
18 risk, or high risk (the “Risk Tier System”). *Id.* Ex 2. Employees in high-risk settings, including all Class  
19 Members, could not continue to work if they remained unvaccinated, even if they received a religious  
20 exemption. *Id.* Ex. 2 at 2.

21 On December 28, 2021, the County issued a health order “requiring up-to-date vaccination of  
22 personnel in higher-risk settings” in the County (i.e., both fully vaccinated and boosted against COVID-  
23 19 if eligible for a booster) by January 24, 2022. *Id.* Ex. 3. The higher risk settings included skilled  
24 nursing facilities, healthcare delivery facilities, medical first responders, and jails and other correctional  
25 facilities. *Id.* Ex. 3 at 3. The December 28 order also expanded the number of settings and positions  
26 considered high-risk. *Id.* Ex. 4 at -4742. On March 28, 2022, the County issued an updated vaccination  
27 policy requiring “all County personnel [to] be fully vaccinated and up-to-date on boosters for which  
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1 they are eligible.” *Id.* Ex. 5 at -690.

2 The County granted all Class members religious exemptions, but the County purported to  
3 “accommodate” them by relegating them to unpaid leave unless they received the COVID-19  
4 vaccination in violation of their recognized religious beliefs. *Id.* Ex. 6 at 131:6–15; 134:16–19; Ex. 7 at  
5 17:9–12; 17:24–18:16; Ex. 8. Defendant told Class members they could use their already earned leave  
6 bank time while out on administrative leave, if available, **but no Class members were actually “paid”**  
7 **while on administrative leave.** *Id.* Ex. 6 at 129:17–24; Ex. 9; Ex. 10 at -7394; Ex. 11 at -25410, -26972,  
8 -28701, -174, -181 (“You may apply your applicable leave banks (such as accrued vacation, STO, comp  
9 time, and, if applicable, sick time) to this leave of absence, after which your leave will be unpaid.”).  
10 Faced with the County’s threat that they would be placed on administrative leave without pay if they  
11 did not vaccinate by November 1, 2021 (*id.* Ex. 11), 238 Class Members avoided being placed on  
12 administrative leave by taking the vaccine. *See* Mot. at 3 (citing Anderson Decl., Ex. 31 [Volk Decl.]  
13 ¶¶ 11–15). 225 Class members, however, were placed on administrative leave without pay because they  
14 refused to compromise their religious beliefs.

15 The County did not offer reasonable accommodations to Plaintiffs and Class members such as  
16 weekly testing, teleworking, working a modified shift, or requiring them to wear N95 masks. And,  
17 County policy reflects that medically exempt employees were given “priority consideration for  
18 placement in or selection for vacant positions as part of the accommodation process, consistent with  
19 disability law.” Byrd Decl., Ex. 8 at -2196.02; *id.* Ex. 6 at 93:20–94:3, 126:2–7. The County’s own  
20 documents demonstrate that it was the County’s policy to accommodate individuals with medical and  
21 disability exemptions **before** assisting Class members who had religious exemptions. *Id.* Ex. 12 at  
22 -6684; *id.* Ex. 13 at -7090–921. But this assistance was nothing more than directing Class members to  
23 apply for open County positions. The County Equal Opportunity Division (“EOD”) worked with  
24 medically exempt employees to place them in new roles (specifically in lower risk tiers), while the  
25 County directed employees with religious exemptions to the Employee Services Agency (“ESA”),  
26 which gave them minimal assistance in applying for open County positions. *Id.* Ex. 10 at -7396; Ex. 14.  
27 Approximately 463 employees were provided with religious exemptions in high-risk settings, and 52  
28

1 were provided with medical exemptions. *Id.* Ex. 15; *id.* Ex. 16. As a result of the County’s unfair  
2 process, the County placed more than twice as many medically exempt personnel in alternative positions  
3 as religiously exempt personnel (7.69% versus 3.45%). *Id.* Ex. 17 (the County placed four employees  
4 with medical/disability exemptions in alternative positions and sixteen employees with religious  
5 exemptions in alternative positions).

### 6 III. LEGAL STANDARD

7 “[C]ourts retain discretion to revisit class certification throughout the legal proceedings, and  
8 may rescind, modify, or amend the class definition in light of subsequent developments in the  
9 litigation.” *Krueger v. Wyeth, Inc.*, 310 F.R.D. 468, 473–74 (S.D. Cal. 2015). This authority is found in  
10 Federal Rule of Civil Procedure 23(c)(1)(C), which states, “[a]n order that grants or denies class  
11 certification may be altered or amended before final judgment[,]” and in Supreme Court case law. *See*  
12 *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (“Even after a certification order is entered,  
13 the judge remains free to modify it in the light of subsequent developments in the litigation.”). “Once a  
14 class is certified, . . . it will not be altered except for good cause.” *Palmer v. Cognizant Tech. Sols.*  
15 *Corp.*, No. CV 17-6848-DMG (PLAX), 2024 WL 4329110, at \*2 (C.D. Cal. Sept. 10, 2024) (internal  
16 quotations and citation omitted). In considering the appropriateness of modification or decertification,  
17 “the standard of review is the same as a motion for class certification: whether the Rule 23 requirements  
18 are met.” *Roy v. Cnty. of Los Angeles*, No. CV 13-04416-AB (FFMx), 2018 WL 3435417, at \*2 (C.D.  
19 Cal. July 11, 2018) (internal citation omitted); *see also Lyon v. U.S. Immigr. & Customs Enf’t*, 308  
20 F.R.D. 203, 210–11 (N.D. Cal. 2015); *Astiana v. Kashi Co.*, 295 F.R.D. 490, 492 (S.D. Cal. 2013).

21 Rule 23(a) requires that class members demonstrate numerosity, commonality, typicality, and  
22 adequate representation of the class’s interests. FED. R. CIV. PRO. 23(a); *Hanon v. Dataproducts Corp.*,  
23 976 F.2d 497, 508 (9th Cir. 1992). Rule 23(b)(3) additionally requires that the court find “questions of  
24 law or fact common to the members of the class predominate over any questions affecting only individual  
25 members, and that a class action is superior to other available methods for the fair and efficient  
26 adjudication of the controversy.” Fed. R. Civ. Pro. 23(b)(3).

27 The decision on whether to decertify lies within the court’s sound discretion. *Knight v. Kenai*

1 *Peninsula Borough Sch. Dist.*, 131 F.3d 807, 816 (9th Cir. 1997). The party seeking class decertification  
2 bears the burden of demonstrating that the elements of Rule 23 have not been established. *Weigele v.*  
3 *FedEx Ground Package Sys. Inc.*, 267 F.R.D. 614, 617 (S.D. Cal. 2010).

#### 4 **IV. ARGUMENT**

##### 5 **A. Defendant Has Not Demonstrated Decertification Is Appropriate**

6 The Court should deny Defendant’s Motion for Class Decertification (the “Motion” or “Mot.”)  
7 for four reasons: (1) the basic premise that led to this Court’s certification of the Class was correct;  
8 (2) the Class is ascertainable and class members have standing; (3) the Class shares a common injury;  
9 and (4) there may be conflicting evidence, but it is either evidence common to the class or not germane  
10 to the common liability issues.

##### 11 **1. The Basic Premise That Led to Certification is Correct**

12 As this Court correctly found in granting class certification, “Plaintiffs’ claims against the Risk  
13 Tier System and the prioritization of medical and disability exemptions *are against the County’s Policy*  
14 – which applied to every member of the class in the same way – rather than against the County’s conduct  
15 toward certain employees.” ECF No. 125 at 8 (emphasis added). Defendant contends this premise, and  
16 the Court’s statement that “the Risk Tier System affected Class members in the same way—by putting  
17 them on leave because their roles were classified as high-risk,” are false. Mot. at 7 (citing ECF No. 125  
18 at 8–9). But, Defendant fails to establish this. Pursuant to its vaccination policies and orders, the County  
19 labeled every Class member as working in a “high-risk” job and informed each of them that *they would*  
20 *be placed on administrative leave without pay if they did not vaccinate by November 1, 2021*. Byrd  
21 Decl., Ex. 11. Under such coercion, 238 Class members ultimately chose to get vaccinated. However,  
22 regardless of what these Class members chose to do under such duress, the County’s policy remained the  
23 same and adversely affected all Class members. Accordingly, there is no “absence of a uniform policy  
24 and practice.” Mot. at 7.

25 Defendant contends that individualized issues control because Class members “had highly  
26 individualized experiences with respect to accommodations, including paid leave, unpaid leave, job  
27 modifications that allowed them to continue working, and unique circumstances such as extended  
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1 worker’s compensation leave or special assignments.” Mot. at 7. However, the Court already rejected  
2 this argument and individualized inquiries do not control. ECF No. 125 at 8–9. The Court found it  
3 sufficient that each Class member was adversely affected by the County’s uniform vaccination policies  
4 and orders as they were consistently applied to all Class members, regardless of the County providing  
5 individualized accommodations. *See id.* at 9 (“[T]he finder of fact need not determine whether each Class  
6 member sought a job transfer and did not secure it because of preferential treatment . . . . It is sufficient  
7 that Plaintiffs are challenging a policy that adversely affected the Class.”). *See also Stockwell v. City &*  
8 *Cnty. of San Francisco*, 749 F.3d 1107, 1116 (9th Cir. 2014) (“the officers are all challenging a single  
9 policy they contend has adversely affected them.”); *Doster v. Kendall*, 54 F.4th 398, 434–35 (6th Cir.  
10 2022) (finding a common question where “[a] decisionmaker can answer ‘yes’ or ‘no’ to the question of  
11 whether the Air Force has followed a policy of denying religious exemptions based on its generic health  
12 and readiness justifications regardless of a service member’s circumstances.”), *cert. granted, judgment*  
13 *vacated on other grounds*, No. 23-154, 2023 WL 8531840 (U.S. Dec. 11, 2023). There are no grounds  
14 for the Court to reverse that finding. As discussed further *infra.*, even the Class members who were  
15 coerced into getting vaccinated suffered injury, and the County’s vaccination and “accommodation”  
16 policies were uniform and impacted each and every Class member.

17 Defendant’s cases are inapposite. *See* Mot. at 7. In *In re AutoZone, Inc. Wage and Hour*  
18 *Employment Practices Litigation*, a wage-and-hour case concerning rest breaks, the court granted the  
19 defendant’s motion to decertify the class because it had demonstrated that the policy that the Court had  
20 based its class certification ruling upon was “not in place throughout the class period” and that there were  
21 “no audit records or any other time records of when class members took rest breaks.” No. 3:10-md-  
22 02159-CRB, 2016 WL 4208200, at \*9 (N.D. Cal. Aug. 10, 2016). In *Heredia v. Eddie Bauer LLC*, “[t]he  
23 Court certified the class based on the premise (supported by the record at the time) that . . . the class  
24 [members] . . . were all equally subject to the same uniform security inspection policy.” The defendant  
25 moved for decertification and demonstrated that the premise was “no longer supported by the record”  
26 because the defendant’s “written security inspection policy . . . is silent on whether the exit inspections  
27 should be performed on the clock or off the clock,” and the record showed that class members did not  
28

1 experience a uniform policy. No. 16-CV-06236-BLF, 2020 WL 127489, at \*4 (N.D. Cal. Jan. 10, 2020).  
2 There has been no similar showing here of a lack of a uniform policy consistently applied.

3 Therefore, the basic premise Defendant is challenging was and still is correct.

## 4 **2. The Class is Ascertainable and Has Standing**

5 Defendant next incorrectly argues that the Class is not ascertainable because “over half the class  
6 lacks standing.” Mot. at 8. Defendant cites three facts in support: (1) 238 class members never went on  
7 leave; (2) 309 class members never sought job transfers; and (3) employees who received  
8 accommodations, such as paid leave, cannot allege injury because paid leave is not an adverse  
9 employment action. *Id.* Plaintiffs address each argument in turn.

### 10 **a. Class Members Who Vaccinated and Were Therefore Not Placed on 11 Administrative Leave Were Nonetheless Injured and Have Standing**

12 *First*, the fact that 238 Class members never went on administrative leave is not new evidence.  
13 Defendant opposed Plaintiffs’ Motion for Class Certification by arguing that “[o]ver half [of the proposed  
14 class] (246) decided to vaccinate after initially obtaining an exemption” and “[n]early half of the proposed  
15 class members never went on leave.” ECF No. 94 at 6; *see also id.* at 13 (“over half got vaccinated”).  
16 The Court already considered this evidence, Defendant’s opposition, and still certified the Class. And  
17 rightly so. These 238 Class members were injured and have standing.

18 To establish standing in federal court, a plaintiff must demonstrate three elements: (1) plaintiff  
19 must have suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) there  
20 must be a causal connection between the injury and the challenged conduct that is fairly traceable to the  
21 defendant’s actions; and (3) it must be “likely” as opposed to “speculative” that the injury will be  
22 redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Each member  
23 of the Class meets these standing requirements.

24 Class members suffered injury and have standing under the Free Exercise Clause and the Equal  
25 Protection Clause because the County forced them to choose: receive the COVID-19 vaccination in  
26 violation of religious convictions; or be placed on unpaid administrative leave. In each Class member’s  
27 religious exemption letter, the County informed them that if they did not vaccinate by a certain date they  
28 would be placed on unpaid administrative leave, despite their religious convictions expressed in their

1 religious exemption requests, which the County accepted as sincerely held in granting them. Byrd Decl.,  
2 Ex. 11. Under such coercion, and not until after they sought a reasonable accommodation, 238 Class  
3 members received the COVID-19 vaccine to the peril of their constitutional liberties. This is unlawful  
4 coercion. “[T]he forfeiture of unemployment benefits for choosing [fidelity to religious belief over  
5 continued employment] brings **unlawful coercion** to bear on the employee’s choice.” *Hobbie v.*  
6 *Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 144 (1987) (emphasis added) (“[A] violation of  
7 the Free Exercise Clause is predicated on coercion.”). *See also Sch. Dist. of Abington Twp., Pa. v.*  
8 *Schempp*, 374 U.S. 203, 223 (1963) (“[I]t is necessary in a free exercise case for one to show the coercive  
9 effect of the enactment as it operates against him in the practice of his religion.”); *Tilton v. Richardson*,  
10 403 U.S. 672, 689 (1971) (plurality) (“Appellants, however, are unable to identify any coercion directed  
11 at the practice or exercise of their religious beliefs.”); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392  
12 U.S. 236, 249 (1968) (“[A]ppellants have not contended that the New York law in any way coerces them  
13 as individuals in the practice of their religion.”).

14         These 238 Class members also have standing under Title VII and FEHA. To establish standing  
15 for a Title VII failure to accommodate claim, a plaintiff must first make out a prima facie case by  
16 demonstrating three elements: (1) the plaintiff had a bona fide religious belief that conflicts with an  
17 employment duty; (2) the plaintiff informed the employer of the belief and the conflict; and (3) the  
18 employer **threatened**, or otherwise subjected the plaintiff to an adverse employment action because of  
19 the plaintiff’s inability to fulfill the job requirement. *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir.  
20 1993); *Gage v. Mayo Clinic*, 707 F. Supp. 3d 870, 878 (D. Ariz. 2023); *Zimmerman v. PeaceHealth*, 701  
21 F. Supp. 3d 1099, 1109 (W.D. Wash. 2023); *Keene v. City & Cnty. of San Francisco*, No. 22-16567, 2023  
22 WL 3451687, at \*1 (9th Cir. May 15, 2023) (applying same standard to FEHA claim) (citing *Metoyer v.*  
23 *Chassman*, 504 F.3d 919, 941 (9th Cir. 2007) (courts evaluate FEHA claims under the Title VII  
24 framework), *abrogated on other grounds by Nat’l Ass’n of Afr. Am.-Owned Media v. Charter Comm’ns,*  
25 *Inc.*, 915 F.3d 617 (9th Cir. 2019)).

26         Each Class member had a bona fide religious belief that conflicted with the County’s vaccination  
27 policies and orders, and the Class members informed the County of these beliefs when they requested  
28

1 (and were granted) religious exemptions. Indeed, the Court found in its MSJ Order that “the first two  
2 elements of the *prima facie* Title VII/FEHA case are established.” ECF No. 178 at 10.

3 With respect to the third element of the prima facie case, after granting each Class member’s  
4 religious exemption request, the County then **threatened** each Class member with adverse employment  
5 action: involuntary unpaid leave. Byrd Decl., Ex. 11. The County’s threat of adverse employment action  
6 is sufficient to confer standing under Title VII. See *E.E.O.C. v. Townley Eng’g & Mfg. Co.*, 859 F.2d  
7 610, 614 n.5 (9th Cir. 1988) (“The threat of discharge (or other adverse employment practices) is a  
8 sufficient penalty.”); *Opuku-Boateng v. State of Cal.*, 95 F.3d 146, 1467 n.9 (9th Cir. 1996) (“The  
9 employee need not be penalized with discharge to establish a prima facie case.”); *Rodriguez v. City of*  
10 *Chicago*, No. 95 C 5371, 1996 WL 22964, at \*3 (N.D. Ill. Jan. 12, 1996) (“It is nonsensical to suggest  
11 that an employee who, when forced by his employer to choose between his job and his faith, elects to  
12 avoid potential financial and/or professional damage by acceding to his employer’s religiously  
13 objectionable demands has not been the victim of religious discrimination[.]”). Therefore, even though  
14 238 Class members succumbed to that threat and took the vaccine in violation of their sincerely held  
15 religious beliefs, they were injured and have standing under Title VII and FEHA.

16 Plaintiffs recognize this argument is contrary to the Court’s recent holding in its MSJ Order that  
17 “any member of the class who chose to get vaccinated rather than be placed on leave did not suffer an  
18 adverse employment action.” ECF No. 178 at 13. However, respectfully, the cases the Court cited are  
19 either out of Circuit and relied upon a different standard or are distinguishable, and Plaintiffs request the  
20 Court reconsider its holding.

21 First, in *Doe(s) v. Pittsburgh Reg’l Transit*, 684 F. Supp. 3d 417, 426 (W.D. Pa. 2023), the court  
22 relied upon the standard in the Third Circuit as expressed in *Fallon v. Mercy Cath. Med. Ctr. of Se.*  
23 *Pennsylvania*, 877 F.3d 487, 490 (3rd Cir. 2017): “[U]nder Title VII, an employee must show that ‘. . .  
24 he was disciplined for failing to comply with the conflicting requirement.’” *Doe(s)*, 684 F. Supp. 3d at  
25 425 (quoting *Fallon*, 877 F.3d at 490). That showing is different than the one required in the Ninth  
26 Circuit: that “the employer **threatened** him with or subjected him to discriminatory treatment.” *Heller*, 8  
27 F.3d at 1438.

1 Furthermore, *Donovan v. Biden*, 603 F. Supp. 3d 975 (E.D. Wash. 2022), *aff'd in part, appeal*  
2 *dismissed in part and remanded sub nom. Donovan v. Vance*, 70 F.4th 1167 (9th Cir. 2023) (“*Donovan*  
3 *II*”) is distinguishable. That case related to President Biden’s Executive Orders issued on September 9,  
4 2021, and referenced “[a] detailed factual background . . . discussed in the Court’s Order Denying  
5 Temporary Restraining Order [the ‘Order’].” *Id.* at 980. As is clear from that prior Order, there were no  
6 allegations in the complaint or evidence in the record that the plaintiffs faced any imminent adverse  
7 employment action. *Donovan v. Vance*, 576 F. Supp. 3d 816, 824 (E.D. Wash. 2021), *aff'd in part, appeal*  
8 *dismissed in part and remanded*, 70 F.4th 1167 (9th Cir. 2023) (“*Donovan I*”). These facts led the court  
9 to conclude that the plaintiffs had “failed to allege a claim that is ripe for adjudication” (*id.*) and had “not  
10 alleged sufficient facts demonstrating their sincerely held religious views have been affected by the  
11 Executive Orders” (*id.* at 826). Then, in *Donovan II*, the court found that 307 of the 314 plaintiffs lacked  
12 standing because, *inter alia*, they had already been vaccinated or provided accommodations. *Id.* at 982.  
13 There was no indication, however, that the plaintiffs were facing adverse employment action when they  
14 decided to get vaccinated, and the Court held, “Plaintiffs have failed to allege any facts indicating their  
15 sincerely held religious beliefs have been adversely affected by the Executive Orders.” *Id.* at 984.  
16 *Donovan II* did not hold that anyone who has been vaccinated lacks standing and cannot allege harm.  
17 Here, Plaintiffs were harmed because, as discussed above, they were all threatened with being placed on  
18 unpaid administrative leave when they were forced to choose between violating their religious beliefs or  
19 keeping their employment benefits.

20 Moreover, in its Motion, Defendant cites *Andre-Rodney v. Hochul*, 618 F. Supp. 3d 72, 76 n.3  
21 (N.D.N.Y. 2022), which noted in a footnote that seven of the plaintiffs no longer had standing because  
22 they either retired or received the vaccine and returned to work and therefore their claims were “moot.”  
23 But, this issue was not contested, and the case did not involve sincerely held religious beliefs or religious  
24 exemptions. It is therefore entirely unhelpful on this issue.

25 Finally, while some courts discuss the standing issue in terms of ascertainability, here the Class  
26 is also ascertainable. A class is ascertainable if it is “administratively feasible for the court to ascertain  
27 whether an individual is a member” by reference to “objective criteria.” *Heredia*, 2020 WL 12748, at \*5.  
28

1 Unlike the circumstances in *Heredia*, 2020 WL 127489, where it was “impossible to know, without  
 2 individualized inquiries, which employees have undergone exit inspections off the clock” (*id.* at \*5),  
 3 here, the County has data from which it can ascertain which individuals were granted religious  
 4 exemptions, which individuals were categorized as working in “high-risk” jobs, which individuals were  
 5 placed on administrative leave, which Class members eventually took the vaccine and when, and which  
 6 Class members used leave bank time and how much. *See* Mot. at 8 (citing Anderson Decl. Ex. 31 [Volk  
 7 Decl.] ¶¶ 11–15). Similarly, unlike the facts of *Hovsepian v. Apple, Inc.*, No. 08-5788 JF (PVT), 2009  
 8 WL 5069144, at \*6 (N.D. Cal. Dec. 17, 2009), where the court found “the class is not ascertainable  
 9 because it includes members who have not experienced any problems with their iMac display screens,”  
 10 here, as discussed above, each Class member was subject to the County’s uniformly applied policies and  
 11 was injured. Nor is the class overbroad as it was in *In re AutoZone, Inc., Wage & Hour Emp. Prac.*  
 12 *Litig.*, where the proposed class included employees who never sought reimbursement for travel expenses  
 13 and therefore lacked standing to sue. 289 F.R.D. 526, 545 (N.D. Cal. 2012). Here, again, every member  
 14 of the Class has standing to sue and is ascertainable from Defendant’s records.

15 In the alternative, even if the Court finds that the 238 Class members who never went on  
 16 administrative leave because they took the vaccine lack standing, rather than decertify the entire Class,  
 17 the Court should redefine the Class to exclude them. “There is no dispute ‘courts retain discretion to  
 18 revisit class certification throughout the legal proceedings, and may rescind, modify, or amend the class  
 19 definition in light of subsequent developments in the litigation.’” *Ms. L. v. U.S. Immigr. & Customs Enf’t*  
 20 (*“ICE”*), 330 F.R.D. 284, 287 (S.D. Cal. 2019) (quoting *Krueger*, 310 F.R.D. at 473–74). Plaintiffs  
 21 propose the following alternative class definition:

22 All individuals who: 1) worked for the County; 2) were classified as working in high risk  
 23 jobs pursuant to the County’s Risk Tier System; 3) applied for and received from the  
 24 County a religious exemption; and 4) were nevertheless placed on administrative leave  
 for failure to vaccinate (the “Class”) at any time between August 5, 2021 and September  
 27, 2022 (the “Class Period”).

25 **b. Class Members Who Did Not Apply for Lower-Risk Jobs Nevertheless**  
 26 **Have Standing**

27 *Second*, Defendant argues—and the Court denied Plaintiffs’ partial MSJ on the Free Exercise  
 28 Claim related to the accommodations framework because—309 Class members never applied for lower-

1 risk jobs. Mot. at 8; ECF No. 178 at 24. Respectfully, the Court’s finding that because “309 never even  
2 applied for lower-risk jobs, . . . they could not have experienced discrimination with regard to the  
3 placement procedures” and therefore “cannot establish injury” (ECF No. 178 at 24) fails to consider that  
4 the entire accommodations process—which every Class member was subjected to—was tainted with  
5 discrimination, including the requirement that Class members apply for a new job through NEOGOV  
6 without assistance from EOD. Andersen Decl., Ex. 32 [Quon Decl.], ¶ 5. The “assistance” the County  
7 provided to Class members was not comparable or equal to the assistance provided to the individuals  
8 with medical and disability exemptions. The County’s EOD worked with medically exempt employees  
9 to place them in new roles (specifically in lower risk tiers), while the County directed employees with  
10 religious exemptions to the ESA, which gave them minimal assistance in applying for open County  
11 positions. Byrd Decl., Ex. 10 at -7394, -7396. This is why the Court granted Plaintiffs’ motion for  
12 preliminary injunction on this issue: “Plaintiffs have shown irreparable injury. Plaintiffs are correct that  
13 loss of Free Exercise rights ‘for even minimal periods of time’ is irreparable injury.” ECF No. 44 at 21  
14 (quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (citation omitted)).

15 Class member Ms. Melanie Nguyen’s experience serves as a good example of the minimal  
16 assistance Class members received from ESA. Defendant submitted the Declaration of Matthew Fisk  
17 (Anderson Decl., Ex. 6), who states that he offered Ms. Nguyen a demotion (which, understandably, she  
18 did not take) and also that the County identified “several positions” for which she “appeared qualified.”  
19 *Id.* ¶¶ 8–9 (citing Exhibit 3 thereto). Upon closer examination, however, Mr. Fisk’s declaration illustrates  
20 how minimal this the “assistance” really was. In the email correspondence between Ms. Nguyen and  
21 Terry Chavarria of VaxJobReview, it’s clear Ms. Nguyen attempted to follow the County’s  
22 recommendation to visit “ESA’s website” and look for “transfer, promotion, or open competitive  
23 positions” because she told Mr. Chavarria that the website had “no job opportunities that fit my  
24 descriptions/criteria for me to even apply.” *Id.* at Ex. 3. Mr. Chavarria responded: “Just by looking at it  
25 you could look on the transfer/promotion or Open competitive [sic] lines for OS III, OS II, Justice System  
26 Clerk, management aide, Associate Mgmt Analyst ...??” *Id.* This is hardly an “identification” of several  
27 positions for which she “appeared qualified.” Ms. Nguyen was cooperative but was placed at a  
28

1 disadvantage because she did not receive the preferential assistance through EOD that individuals with  
2 disability and medical exemptions received. And, despite engaging in the County’s accommodations  
3 process, she remained on leave for the entirety of the Class period. *See id.* ¶ 10.

4 Tellingly, while Ms. Quon testifies in her declaration that 309 Class members never applied for a  
5 new position through NEOGOV, this is only part of the story because she does not indicate how many  
6 individuals with medical and disability exemptions also did not apply for new positions through  
7 NEOGOV and yet were still placed by EOD in alternative jobs. The evidence shows that the County’s  
8 policies favored those individuals with disability and medical exemptions over the Class members who  
9 had religious exemptions by prioritizing the former “for placement or selection for vacant positions” over  
10 Class members (Byrd Decl., Ex. 8 at -2196.02; *see also id.* Ex. 6 at 93:20–94:3, 126:2–7), including by  
11 accommodating individuals with medical and disability exemptions *before* assisting Class members (*id.*  
12 Ex. 12; *id.* Ex. 13 at -7090–91). And evidence common to the Class demonstrates the impact of this  
13 discrimination: statistically, the County placed more than twice as many medically exempt personnel in  
14 alternative positions as religiously exempt personnel (7.69% versus 3.45%). While the Court relied upon  
15 evidence that the County placed four employees with medical/disability exemptions in alternative  
16 positions and 16 employees with religious exemptions in alternative positions (ECF No. 178 at 24), the  
17 raw numbers do not provide the entire picture since the County granted a much larger number of religious  
18 exemptions than medical and disability exemptions. *See* Byrd Decl., Exs. 15–16 (approximately 463  
19 employees were provided with religious exemptions in high-risk settings, and 52 were provided with  
20 medical exemptions). Plaintiffs are entitled to rely upon this and other common statistical evidence to  
21 demonstrate discriminatory impact under their Establishment Clause and Equal Protection claims.

22 Furthermore, since the accommodation process was so different for Class members than it was  
23 for the other exempt individuals, it would be difficult if not impossible for Class members to unwind the  
24 process and demonstrate that a particular individual obtained a transfer that any particular Class member  
25 would have otherwise received had the County treated the two groups equally. The County should not  
26 benefit because the discriminatory process it put into place makes it difficult or impossible for Class  
27 members to demonstrate what would have happened in the “but for” world. Simply by virtue of the  
28

1 discriminatory accommodations process, all Class members were injured and have constitutional  
2 standing to sue (at a minimum, for nominal damages), regardless of whether they utilized NEOGOV to  
3 look for a new job. *See Schneider v. Cnty. of San Diego*, 285 F.3d 784, 794 (9th Cir. 2002) (“[N]ominal  
4 damages must be awarded if a plaintiff proves a violation of his [or her] constitutional rights.”) (quoting  
5 *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000) (citations omitted)). And the issue of  
6 individual Class member damages has been bifurcated, so Defendant can make its arguments at a later  
7 date that particular Class members are only entitled to nominal damages.

8 Defendant seems to also argue that these same 309 Class members do not have standing to pursue  
9 their Title VII and FEHA claims but cites no authority for that proposition. Mot. at 8, As set forth *supra*,  
10 Plaintiffs will establish a prima facie case (and have already established the first two elements—*see* ECF  
11 No. 178 at 10) using common evidence that each Class member: (1) had a bona fide religious belief that  
12 conflicted with the County’s vaccination policy; (2) they informed the County of the belief and the  
13 conflict; and (3) the County threatened, or otherwise subjected them to adverse employment action  
14 because of their inability to fulfill the job requirement. *Heller*, 8 F.3d at 1438. They therefore have  
15 standing to pursue their Title VII and FEHA claims, regardless of whether they “sought job transfers.”  
16 Mot. at 8.

17 **c. Permitting Class Members to Use Their Leave Banks Is Not “Paid”**  
18 **Leave**

19 *Finally*, Defendant argues that it offered “paid leave” to Class members. Mot. at 8. Indeed, the  
20 Court found in its MSJ Order that “the undisputed evidence also shows that hundreds of Class members  
21 took *paid* rather than unpaid leave for at least some period of time.” ECF No. 178 at 13. Plaintiffs  
22 respectfully request the Court reconsider this finding. The Court cited to Exhibit 57 of the Onishenko  
23 Declaration, which is a table showing “Leave Type” for each Class member which included “Paid Leave”  
24 and “Leave of Absence,” but the table is vague on the meaning of “Paid Leave.” The Court also cited to  
25 ECF No. 141-8, the Declaration of Jorge Alvarez, ¶ 3, which says, “I chose to use my personal time to  
26 earn money, which expired on or around March 2022,” clearly indicating he used his leave bank time in  
27 order to be “paid.”

28 The evidence overwhelmingly demonstrates that whenever the County labeled the leave as “paid”

1 it was only because Class members used their already earned leave bank hours, which is not truly paid  
2 leave. The County informed Class members: “You may apply your applicable leave banks (such as  
3 accrued vacation, STO, comp time, and, if applicable, sick time) to this leave of absence, after which  
4 your leave will be unpaid.” Byrd Decl., Ex. 11; *id.* Ex. 10 at -7394; *id.* Ex. 6 at 129:17-22. Class members  
5 were required to use their already hard-earned leave banks if they wanted to be “paid” during their  
6 otherwise unpaid, involuntary and indefinite administrative leave. Considering this to be “paid” leave is  
7 akin to considering a Class member who dipped into her savings account to pay her bills while on  
8 administrative leave as “paid.” Leave bank time is already-earned compensation and its depletion cannot  
9 be properly characterized as “paid.”

10 As the Court found in its MSJ Order, “indefinite, involuntary unpaid leave is, as a practical matter,  
11 not much different from termination, and thus qualifies as ‘adverse employment action.’” ECF No. 178  
12 at 12. *See also Sambrano v. United Airlines, Inc.*, 45 F.4th 877, 879 (5th Cir. 2022) (Ho, J., concurring)  
13 (“Being placed on indefinite unpaid leave because your employer doesn’t like your religious beliefs is  
14 obviously an adverse employment action and an actionable claim under Title VII of the Civil Rights Act  
15 of 1964.”); *Dawson v. Akal Sec. Inc.*, 660 F. App’x 504, 506 (9th Cir. 2016) (unpublished) (involuntary  
16 unpaid leave may be an adverse employment action); *Mois v. Wynn Las Vegas LLC*, 715 F. App’x 600,  
17 601 (9th Cir. 2017) (unpublished) (unpaid leave was not a reasonable accommodation under ADA where  
18 light duty work was an option); *Zimmerman*, 701 F. Supp. 3d at 1110 (indefinite unpaid leave was an  
19 adverse employment action and not a reasonable accommodation); *cf. Steenmeyer v. Boeing Co.*, 92 F.  
20 Supp. 3d 1024, 1031 (W.D. Wash. 2015) (unpaid leave may be a reasonable accommodation when it is  
21 requested).

22 The cases Defendant cites (two of which the Court cited in its MSJ Order) for the argument that  
23 paid leave is not adverse employment action are distinguishable. The plaintiff in *Longmire v. City of*  
24 *Oakland*, No. C 10-01465 JSW, 2011 WL 5520958 (N.D. Cal. Nov. 14, 2011) was placed on paid  
25 administrative leave, with no indication he used his already earned vacation time in order to be “paid.”  
26 *See id.* at \*4–\*5 (“Plaintiff admits that he did not receive a pay change or a demotion of any type . . . .  
27 [T]he Court has not found support for the position that an allegedly biased investigation which results in  
28

1 paid administrative leave and a recommendation for, but not an actual, termination constitute adverse  
2 employment actions.”) Similarly, in *Gannon v. Potter*, No. C 05-2299SBA, 2006 WL 3422215 (N.D.  
3 Cal. Nov. 28, 2006), *aff’d*, 298 F. App’x 623 (9th Cir. 2008), the plaintiff was placed on truly paid  
4 administrative leave. *See id.* at \*5 (“Gannon was placed on paid administrative leave”). And the plaintiff  
5 in *Green v. Safeway Stores*, No. C 96-03471 CRB, 1998 WL 898366, at \*3 (N.D. Cal. Dec. 14, 1998)  
6 initially was required to take sick leave, but “defendant credited plaintiff for all the sick leave defendant  
7 initially required plaintiff to take.” *See id.* (“Requiring plaintiff to take sick leave might constitute an  
8 adverse employment action if plaintiff’s sick leave had not been restored.”). Defendant does not contend  
9 that the Class members’ leave banks were replenished. None of these cases hold allowing employees to  
10 use their already-accrued sick or vacation time in order to be “paid” while on administrative leave is not  
11 an adverse employment action. Accordingly, the Class is ascertainable and has standing.

### 12 3. The Class Shares a Common Injury

13 As this Court previously held, “Plaintiffs have sufficiently identified [five] common questions of  
14 law or fact to meet their burden under Rule 23(a)(2).” ECF No. 125 at 8. Nothing has changed which  
15 would require the Court to alter its ruling.

16 The first of Plaintiffs’ common questions is whether the County’s preferential consideration of  
17 medical exemptions over religious exemptions in high-risk settings violated the Class’s rights to free  
18 exercise and equal protection of law. This question generates a common answer. The County regurgitates  
19 the same rejected arguments it raised in opposition to Plaintiffs’ Motion for Class certification, namely  
20 that Plaintiffs who never went on leave and needed no job transfer, Plaintiffs who never sought a job  
21 transfer or declined an offered job transfer, Plaintiffs who received “paid” leave, and Plaintiffs with  
22 special circumstances such as extended worker’s compensation leave cannot allege any injury. *See* ECF  
23 No. 94 at 10–11. However, the County’s arguments speak to whether the Class is overly broad, not to  
24 whether individualized issues control. As discussed *supra*, each of these Class members claims a valid  
25 injury. *See* § IV.A.2, *supra*. Additionally, as this Court found at the class certification stage, “[i]n arguing  
26 that Plaintiffs’ common questions require individualized inquiries, the County either makes merits  
27 arguments or construes Plaintiffs’ claims too narrowly.” ECF No. 125 at 8–9. The County attempts to  
28

1 make the same rejected arguments now.

2           Nevertheless, the first question is capable of classwide resolution; whether Defendant prioritized  
3 individuals to whom it had granted medical exemptions over those to whom it had granted religious  
4 exemptions is “objective” and “can be proved through evidence common to the class” – namely, the  
5 County’s own policies. *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976). Indeed, when  
6 partially granting Plaintiffs’ motion for a preliminary injunction, this Court looked at the County’s policy  
7 of giving “those with disability or medical contraindication vaccine exemptions . . . “preferential  
8 consideration” . . . .” and enjoined this policy and practice because it is “a practice the County has  
9 admitted occurs.” ECF No. 44 at 7.

10           As to the second question, the Court granted Defendant’s MSJ as to the Free Exercise and Equal  
11 Protection Claims insofar as they are based on the Risk Tier System, therefore this question is moot. ECF  
12 No. 178 at 27.

13           Regarding the third common question—whether the County’s religious exemption and/or  
14 accommodation procedure was either non-neutral or not generally applicable such that it constitutes an  
15 individualized assessment under *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522 (2021), and  
16 is thereby subject to strict scrutiny—while the County is correct that the appropriate level of scrutiny is  
17 a preliminary legal determination, “this question is answered [] the same way with respect to every  
18 member of the Class and when considered with the other two common questions on Plaintiffs’ Free  
19 Exercise and Equal Protection claims, would ‘drive the resolution of the litigation’ by resolving these  
20 claims on a class-wide basis” ECF No. 125 at 9.

21           The fourth common question—whether Defendant provided Individual Plaintiffs and the Class  
22 members with reasonable accommodation as required under FEHA and Title VII—can also be resolved  
23 in one stroke by looking to the County’s vaccination policies and orders. Regardless of the Class  
24 members’ “diverse experiences with the County’s accommodations,” Mot. at 10, Plaintiffs’ argument is  
25 not that the County’s conduct toward individual employees is unreasonable but that “the accommodation  
26 provided in the Policy is unreasonable, especially when considering available alternatives.” ECF No. 125  
27 at 10. The County’s vaccine mandate, Risk Tier System, and accommodations policy were applicable to  
28

1 all personnel. Plaintiffs only need to prove that the County’s accommodations policy was unreasonable.  
2 This is a shared legal issue amongst proposed Class members, even if “divergent factual predicates”  
3 occur. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998), *overruled on other grounds by*  
4 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Therefore, it does not matter that Class members  
5 held different jobs, reacted to the vaccine mandate differently, or reacted to the accommodation process  
6 differently.

7       Regarding the fifth common question—Whether Defendant violated the Establishment Clause by  
8 demonstrating hostility towards religion—the County makes a merits argument that goes to the merits of  
9 Plaintiffs’ Establishment Clause claim but which is not relevant to decertification. Mot. at 11. Moreover,  
10 in denying Defendant’s MSJ on this claim the Court relied upon Plaintiffs’ evidence that “‘the County  
11 has demonstrated unequivocal hostility towards religion’ by ‘preferencing accommodations for secular  
12 objectors over religious objectors.’” ECF No. 178 at 25 (quoting Plfs.’ Opp. at 24–25). This is evidence  
13 common to the Class.

14       Accordingly, the County has not shown that it is entitled to decertification.

#### 15                               **4. The County’s Accommodations Policies Applied Classwide, and** 16                               **Mitigation Issues Have Been Bifurcated**

17       The Court has already considered and rejected the County’s argument that individualized factual  
18 issues regarding its accommodation of Class members will predominate. ECF No. 125 at 16. Moreover,  
19 it is the expectation that the parties will present conflicting evidence at trial, but this is not a reason for  
20 the Court to decertify the Class. As discussed *supra*, the fourth common question—whether Defendant  
21 provided Individual Plaintiffs and the Class members with reasonable accommodation as required under  
22 FEHA and Title VII—will be answered using common evidence.

23       Religious discrimination claims under Title VII religious are analyzed under a two-part  
24 framework. “*First*, the employee must establish a prima facie case by proving that (1) he had a bona fide  
25 religious belief, the practice of which conflicted with an employment duty; (2) he informed his employer  
26 of the belief and conflict; and (3) the employer threatened him with or subjected him to discriminatory  
27 treatment, including discharge, because of his inability to fulfill the job requirements.” *Heller*, 8 F.3d at  
28 1438. “*Second*, if the employee proves a prima facie case, the employer must establish that it initiated

1 good faith efforts to accommodate the employee’s religious practices.” *Id.* (citations omitted).

2 Contrary to Defendant’s argument, Plaintiffs’ establishment of a prima facie case will not involve  
3 individualized issues. While the Court did not resolve in its MSJ Order whether the entire class can  
4 establish a prima facie case, that outcome was dependent upon its findings, discussed *supra*, that a large  
5 number of Class members were not vaccinated and a large number of Class members were put on paid  
6 administrative leave, findings Plaintiffs respectfully request the Court reconsider for the reasons  
7 discussed *supra*. See §§ IV.A.2.a. and IV.A.2.c., *supra*.

8 Moreover, Defendant argues that “whether the County sufficiently engaged in the interactive  
9 process in its communications with exempt employees” (Mot. at 11) and “offered reasonable  
10 accommodations to[] each exempt employee[]” (Mot. at 12) may involve individualized evidence. But,  
11 the County’s accommodations policy was uniform: Class members were placed on unpaid administrative  
12 leave and allowed to use their leave banks. While the County did assist employees with their job search  
13 *after it placed them on leave*, the particulars of these communications are not material to the question of  
14 reasonable accommodation since any assistance the County provided was after Class members were  
15 placed on administrative leave. An employee’s duty to cooperate in the accommodation process “arises  
16 only *after* the employer has suggested possible accommodation.” *Heller*, 8 F.3d at 1440. Here, that duty  
17 never arose because the County had already taken adverse employment action against Class members by  
18 placing them on unpaid administrative leave. See *id.* (“Because EBB made no effort to accommodate  
19 Heller prior to his termination, his duty of cooperation never arose); Byrd Decl., Ex. 6 at 129:17–24  
20 (“they were placed on administrative leave, they were allowed to use any of their leave banks, and *then*  
21 – and *then* they were assisted in finding another position”) (emphasis added); *id.* Ex. 2 at 2 (the County  
22 cannot safely accommodate Class members in their “high-risk roles” but can “accommodate them  
23 through providing them a temporary leave of absence, *during which* the County will assist them in  
24 seeking reassignment or transfer to a lower- or intermediate-risk position”) (emphasis added).

25 Moreover, Title VII requires an employer to accommodate an employee’s religious beliefs “in a  
26 manner which will reasonably preserve that employee’s employment status, *i.e.*, compensation, terms,  
27 conditions, or privileges of employment.” *Am. Postal Workers Union, San Francisco Loc. v. Postmaster*

1 *Gen.*, 781 F.2d 772, 776–77 (9th Cir. 1986). “The determination of whether or not the employment status  
2 of the affected employee is reasonably preserved may be objectively assessed by the trier of fact.” *Id.* at  
3 777. The jury should therefore have no difficulty finding that Defendant’s accommodations, which were  
4 uniform as to the entire Class, were not reasonable since indefinite unpaid administrative leave does not  
5 preserve compensation and privileges of employment. But, in any event, the question will be one that is  
6 common to the entire Class. *See Arnold v. United Artists Theatre Cir., Inc.*, 158 F.R.D. 439, 448 (N.D.  
7 Cal. 1994) (the existence of common discriminatory practices satisfies commonality even when the  
8 practices affect each class member differently).

9       Moreover, as this Court noted in its class certification order, “to the extent that the County argues  
10 that individualized inquiries predominate—including . . . the nature of the particular assistance that the  
11 County provided to the employee—these questions go to individual damages rather than liability under  
12 the FEHA and Title VII.” ECF No. 125 at 16 (citing *Senne v. Kansas City Royals Baseball Corp.*, 934  
13 F.3d 918, 943 (9th Cir. 2019)); *see also id.* at 20; *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998)  
14 (INS case explaining that a common allegation of illegal procedures is sufficient to find commonality,  
15 even when subsequent complex individualized proceedings will be necessary to resolve individual class  
16 members’ claims). And the Court has already bifurcated the damages phase to be tried individually. ECF  
17 No. 125 at 25.

18       Defendant cites to *Soares v. Flowers Foods, Inc.*, 320 F.R.D. 464, 483 (N.D. Cal. 2017), but that  
19 case is distinguishable because the issue was whether the delivery driver class members “hired sub-  
20 drivers and whether they contracted with other companies,” which the court held would “require  
21 individual inquiries.” *See id.* (“While the class is limited to Distributors who ‘personally serviced’ their  
22 routes, the determination of which Distributors did so, and when, cannot be answered in one fell swoop.”)  
23 No such individualized inquiries are required here for a jury to find that the accommodations offered by  
24 the County were not reasonable as those accommodations are set forth in County policies that applied  
25 classwide.

26       Furthermore, the County, for the first time in this litigation, argues that some Class members do  
27 not appear to have had sincerely held religious beliefs and that it “may raise this issue on an individual  
28

1 basis at trial.” Mot. at 12. However, as this Court found in its MSJ Order, it is undisputed that Class  
2 members’ religious beliefs were bona fide and the Court found this element of Plaintiffs’ prima facie case  
3 has been established. ECF No. 178 at 10.

4 Finally, the County does not argue that its burden of establishing undue hardship will require  
5 individualized evidence. Indeed, it will not. The evidence the parties submitted on this issue in support  
6 of their cross-motions for summary judgment and relied upon by the Court in denying the motions on  
7 this issue was common to the Class. *See* ECF No. 178 at 16–18.

8 Accordingly, decertification of the Class is not appropriate.

### 9 **B. UnifySCC No Longer Has Standing**

10 At the summary judgment hearing, the parties agreed to brief the effect of *Arizona All. for*  
11 *Retired Americans v. Mayes*, No. 22-16490, 2024 WL 4246721 (9th Cir. Sept. 20, 2024), and the U.S.  
12 Supreme Court’s decision in *Food & Drug Admin. v. All. for Hippocratic Med.* (“*FDA*”), 602 U.S. 367  
13 (2024) on Plaintiff UnifySCC’s standing. Those cases deal with diversion of resources and do not deal  
14 with associational standing based on the standing of the members of the association. Pursuant to *Hunt*  
15 *v. Washington State Apple Advert. Comm’n*, 432 U.S. 333 (1977), an organizational plaintiff may  
16 establish standing on a representation basis by demonstrating that: (1) its members would otherwise  
17 have standing to sue in their own right, (2) the interests it seeks to protect are germane to the  
18 organization’s purpose, and (3) neither the claim asserted nor the relief requested requires the  
19 participation of individual members in the lawsuit. *Id.* at 343. *FDA* did not modify that standard.  
20 However, while UnifySCC had standing at the inception of the case because it sought declaratory and  
21 injunctive relief, Plaintiffs concede it no longer has standing because those claims for prospective relief  
22 have been mooted. Therefore, Plaintiffs stipulate to the dismissal of UnifySCC as a plaintiff.

### 23 **V. CONCLUSION**

24 Accordingly, this case continues to meet all the requirements of Rules 23(a) and (b) for class  
25 certification. Plaintiffs therefore request that the Court deny Defendant’s motion to decertify the Class.  
26  
27  
28

Respectfully submitted,

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