Docket No. 21-56259

In the

United States Court of Appeals for the Ninth Circuit

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

v.

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

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Southern District of California, Case No. 3:21-cv-1809

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

CASES

TABLE OF AUTHORITIES—Continued

CASES

TABLE OF AUTHORITIES—Continued

CASES

TABLE OF AUTHORITIES—Continued

CASES

RULES

STATUTES & REGULATIONS

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

Two years into the pandemic, nearly every other school district in the nation has found a way to protect students from COVID without banishing the handful of students with religious objections. But not San Diego Unified School District. Indeed, on any given day, the District exempts 85% of its students from its mandate, for reasons ranging from medical accommodations (because they might have allergic reactions) to administrative convenience (because they had not turned 16 by November 1, 2021). But the District expressly forbids accommodations for religious believers like Plaintiff-Appellant Jill Doe.

Jill thus faces a stark choice: violate her religious beliefs, or receive "severe punishment"—"Expulsion from school. Kicked off sports teams. Isolated from teachers and classmates." *Doe v. San Diego Unified Sch. Dist.*, 22 F.4th 1099, 1109 (9th Cir. 2022) (Bumatay, J., dissenting) ("*Doe II*"). Under clear Supreme Court and Ninth Circuit precedent, the District's imposition of that forced choice triggers strict scrutiny. That is why eleven judges of this Court took the unusual step of favoring en banc review of a motions panel decision declining to protect Jill. As Judge Bumatay, joined by seven others, observed, the District's mandate

"*expressly* targets the religious for worse treatment." *Doe II*, 22 F.4th at 1103. The District's schools "are teeming with students who are unvaccinated, because of either their birthdays, allergies, learning disabilities, or familial statuses." *Id.* at 1108. Under the Supreme Court's recent decisions in *Fulton, South Bay, Tandon,* and *Diocese of Brooklyn* this underinclusiveness and targeting are more than enough to trigger strict scrutiny, a standard that the District cannot hope to meet.

In the month since this Court denied emergency relief, the District's argument for punishing Jill Doe and students like her has only weakened. The District has now postponed its mandate until Fall 2022, while simultaneously hinting that it may pursue its efforts to exclude students like Jill from extracurricular activities as early as this month.[1] The CDC has admitted that COVID survivors with natural immunity, like Jill, may have less risk of re-infection than those who acquired immunity through vaccination alone.[2] The District's own behavior, the

[1] *See* Letter from Paul M. Jonna to the Hon. Scott S. Harris re: *Doe v. San Diego Unified Sch. Dist.*, Supreme Court No. 21A217 (Feb. 11, 2022), https://bit.ly/3gR5Pxz.

[2] Tomás M. León, et al., *COVID-19 Cases and Hospitalizations by COVID-19 Vaccination Status and Previous COVID-19 Diagnosis–California and New York, May–November 2021*, 71 Morbidity & Mortality Weekly

behavior of other school districts across the country, basic science, and common sense all confirm that the school district has no compelling interest that requires Jill Doe's exclusion from school.

Tandon was "the fifth time the [Supreme] Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). As Judge Bumatay noted in dissent from the denial of en banc review, the motions panel's decision in this case invites a sixth rebuke. *Doe II*, 22 F.4th at 1100. But this Court is not obligated to repeat the motions panel's error, a point the motions panel itself has repeatedly stressed. *Id.* at 1110 & n.1 (Berzon & Bennett, JJ., concurring) (citing *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177 & n.4 (9th Cir. 2021) ("*Doe I*")). Instead this Court can and should apply bedrock First Amendment law and reverse the District Court with instructions to grant a preliminary injunction.

Report (MMWR) 125-131 (2022), https://www.cdc.gov/mmwr/volumes/71/wr/mm7104e1.htm.

JURISDICTIONAL STATEMENT

The federal courts have federal-question jurisdiction over Appellants' claim. 28 U.S.C. §§ 1331, 1343. This appeal challenges the denial of a motion seeking preliminary injunctive relief. On November 18, 2021, the District Court denied Appellants' motion, 1-ER-2-12, and that same day Appellants filed their notice of appeal under Federal Rule of Appellate Procedure 4. 7-ER-601-15. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). *See Nat. Res. Def. Council v. Cty. of Los Angeles*, 840 F.3d 1098, 1101-02 (9th Cir. 2016).

STATEMENT OF ISSUES

1. Whether a government must, under *Lukumi* and *Tandon*, extend a religious exemption from a vaccination mandate where it has already granted a series of categorical exemptions from the vaccination mandate to others.

2. Whether a government must, under *Lukumi* and *Fulton*, extend a religious exemption from a vaccination mandate where it has provided for individual and discretionary exemptions from the vaccination mandate.

3. Whether requiring parents to provide parental consent to a vaccination procedure to be conducted on their child against their and their child's sincere religious beliefs triggers strict scrutiny under *Wisconsin v. Yoder*.

4. Whether a government must, under *Smith*, extend a religious exemption from a vaccination mandate where it does not apply the vaccination mandate neutrally or in a generally applicable way.

STATEMENT OF THE CASE

1. The Doe Family

Plaintiff-Appellant Jill Doe is a 16-year-old junior enrolled at Scripps Ranch High School within the San Diego Unified School District. She is an excellent athlete who has played multiple sports for Scripps Ranch High School. 7-ER-1447, 1535. Jill's parents, Plaintiffs-Appellants John and Jane Doe, are suing on their own behalf, as parents of Jill, and Mrs. Jane Doe is also suing as the next friend of Jill Doe. 7-ER-1526, 1535:4-5, 1538:27-1539:2.

Jill Doe and her parents attend a Christian church in San Diego County. Jill's sincere Christian beliefs prevent her from taking any of the now-available COVID-19 vaccinations due to their association with

abortion. 7-ER-1447, 1535. Jill's parents—John Doe and Jane Doe—share her religious beliefs. *Ibid.* The Doe Family's religious sincerity is uncontested.

Jill Doe is also a strong athlete. She is looking forward to her sports seasons because she hopes to draw the attention of college recruiters. Jill Doe believes that, with good seasons, she can earn a sports scholarship. 7-ER-1447, 1535.

Last spring, Jill Doe and several others were exposed to an individual who tested positive for COVID-19. All of the other individuals in the group quickly contracted COVID-19, but Jill Doe never got sick and never tested positive. Confused by this, Jill Doe took an antibody test which showed that she had already contracted and recovered from the virus. Thus, Jill Doe has natural immunity that is sufficiently potent to prevent her from catching and spreading COVID-19 even when those immediately around her contract it. 7-ER-1536. This immunity is at least as great as vaccine-induced immunity. 6-ER-1038-40; 7-ER-1381-92; 2-ER-44-46; León et al., *supra*, n.2.

As a result of this, there is no rational reason to require Jill Doe to become vaccinated. Yet, as explained below, the San Diego Unified School

District's COVID-19 vaccine mandate requires her to either abandon her faith, or enroll in independent online study. The District's vaccination mandate also requires that she either abandon her faith or forgo high school sports, dooming any chances at a sports scholarship.

2. The COVID-19 Pandemic & Vaccines

In response to the SARS-CoV-2 virus, the U.S. Food and Drug Administration approved three COVID-19 vaccines for emergency use in the United States. These vaccines—in order of approval—were produced by Pfizer-BioNTech (Dec. 11, 2020), Moderna (Dec. 18, 2020), and Janssen Biotech, a subsidiary of Johnson & Johnson (Feb. 27, 2021). The Pfizer vaccine was approved for emergency use with individuals age 16 and up, but the Moderna and Johnson & Johnson vaccines were only approved for individuals age 18 and up. 7-ER-1529.

In the following months, approval of use of the Pfizer vaccine has expanded. On May 10, 2021, emergency use of the Pfizer vaccine was expanded to include children age 12 and up, and on August 23, 2021, full approval was granted for the Pfizer vaccine for individuals age 16 and up. The Moderna and Johnson & Johnson vaccines remain available solely for adults on an emergency basis. 7-ER-1530.

All three of these vaccines have been manufactured or tested using material derived from stem cell lines from aborted fetuses. 7-ER-1447, 1530. Making the vaccines in this manner conflicted with many Americans' belief that abortion is a grave evil in which they cannot participate, and from which they cannot benefit, even remotely. 7-ER-1413-14.

3. The Move to COVID-19 School Vaccine Mandates

On August 18 and September 9, 2021, respectively, Culver City Unified School District and Los Angeles Unified School District mandated that all students receive a COVID-19 vaccination in order to attend in-person classes. 7-ER-1530. At the time, no other jurisdiction—state or local—mandated COVID-19 vaccination for students. 7-ER-1596. This sparked a closed-door session of the San Diego Unified School District Board of Education, on September 15, 2021, to consider a similar mandate. 7-ER-1530.

As a result of this closed-door session, the next day, September 16, 2021, the District proposed holding a public board meeting to discuss imposing a COVID-19 vaccination mandate. 7-ER-1530-31. Following this, a few other school districts began contemplating mandating

vaccination from COVID-19 to attend school in person, including Oakland Unified School District and Sacramento City Unified School District. Oakland and Sacramento, however, allowed students to opt out of vaccination due to personal or religious beliefs. 7-ER-1531.[3]

Los Angeles ended up delaying implementation of its COVID-19 vaccine mandate until the Fall 2022 semester. It determined that even with 90% compliance, its mandate would force tens of thousands of students into online learning, which was not feasible.[4] All of these schools mandated vaccination for students aged 12 and up.[5]

The San Diego Unified School District Board of Education scheduled its open meeting to discuss imposing a COVID-19 vaccine mandate for Tuesday, September 28, 2021 at 5:00 pm. 7-ER-1531. In advance of that meeting, Board President Beiser shared Interim Superintendent Jackson's proposed Vaccination Roadmap (7-ER-1545-

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[3] https://www.scusd.edu/covid-19-vaccination-requirement-faq.

[4] Jacey Fortin & Giulia Heyward, *Why Los Angeles Delayed Enforcing Its Student Vaccine Mandate*, New York Times (Dec. 18, 2021), https://nyti.ms/3rL7N9c.

[5] *See, e.g.*, https://achieve.lausd.net/covidfaq; https://www.wccusd.net/Page/16082.

61), and in interviews made clear that no religious objection would be considered. 7-ER-1531.

On September 28, 2021, the District's Board of Education held its open meeting to discuss imposing a COVID-19 vaccine mandate. 7-ER-1533. Approximately 1,651 parents signed up to speak in opposition to the COVID-19 vaccine mandate (7-ER-1533), but the vast majority were unable to speak.

At the end of the meeting, the Board voted unanimously to approve the vaccination mandate. 7-ER-1533; 3-ER-317:22-320:17. The next day, September 29, 2021, the District issued a press release (7-ER-1565-68), sent a letter to all parents (7-ER-1570-71), updated their FAQ page (7-ER-1573-94), and created a new website (*COVID-19 Vaccine*, https://perma.cc/EAG9-RSFF), all to update the public about its new mandate.

4. The District's Vaccination Mandate

The District is mandating COVID-19 vaccination for approximately 15% of its total students and 40% of its high school students. *See* 5-ER-1017-18; 7-ER-1545-61. Stage 1 of the District's Vaccination Roadmap requires vaccination of most staff and some students 16 and older. 7-ER-

1556. Later stages, which will be tied to full FDA authorization of vaccines, will apply to additional age groups.

For those covered by Stage 1, if they are not vaccinated and not exempt from the requirement, they will be enrolled in "iHigh," the District's independent online study program. 7-ER-1554, 1559; 3-ER-290-91. They will be barred from in-person education and extracurricular activities, including sports. 7-ER-1559, 1584.

As initially proposed, covered students were required to submit evidence of being fully vaccinated by January 4, 2022 to avoid being barred from in-person instruction and extracurricular activities when the new Spring semester began on January 24. 3-ER-290; 7-ER-1557; *Student Vaccine FAQs*, https://perma.cc/EAG9-RSFF. The District considers a student fully vaccinated two weeks after their second dose, meaning that, in order to meet the January 4 deadline, students had to receive their first dose by November 29, 2021 and their second dose by December 20. 2-ER-261; 7-ER-1557.

However, on February 8, 2022, the Board voted to delay implementation of its vaccine mandate to the Fall 2022 semester. The

Board reserved the right to impose a vaccine mandate for participation in extracurricular activities before that time.[6]

5. Exemptions to the Vaccine Mandate

The District's Interim Superintendent and Board Members made clear that no religious exemptions will be allowed. *See* 7-ER-1461. But the vaccine mandate does not apply to the great majority of students in the District, along with certain staff, who are welcome to attend in-person instruction and participate in extracurricular activities so long as they continue masking and regular testing. 5-ER-1025 (describing "Non-Pharmaceutical Interventions").

Exempted students and staff include:

Students under 16. The mandate categorically does not apply to students under 16. 7-ER-1565. The District has approximately 97,675 students, 5-ER-1021, with about 36,260 students in grades 9-12.[7] The District estimates that the 16-and-older group to whom the mandate applies consists of only 14,360 students. 3-ER-288. This means that over

[6] *See* Letter from Paul M. Jonna, *supra* n.1.

[7] Ed-Data, *San Diego Unified District Summary*, https://perma.cc/Q2V5-7BX9 (total enrollment for grades 9-12 in the District for 2020-21 school year); *see also* 5-ER-1021.

83,000 District students, or 85% of the District's total students, are exempt. Similarly, over 60% of its high school students—that is, 21,900 teenagers attending Jane Doe's school or one like it—are allowed to remain unvaccinated while attending school in person.

Students who turn 16 after November 1. Students who turned 16 after November 1, 2021 were not required to vaccinate immediately. Rather, the District permitted them to remain in school for the entire academic year, including in-person instruction, extracurricular activities, and sports. 3-ER-452; *see also Student Vaccine FAQs*, https://perma.cc/DZV6-RE8X. They did not need to be vaccinated until the Fall 2022 semester. *Ibid*. Plaintiffs-Appellants expect that a similar administrative convenience rule will come into force now that the District has delayed vaccination for all students until the Fall 2022 semester.

Students with conditional admissions. The District has also created discretionary exceptions for students in five groups: "foster youth, homeless, migrant, military family, or have an IEP." 7-ER-1559. Students in these groups may be "conditionally enrolled via in-person learning" before they are vaccinated. *Ibid*. The District's Roadmap does

not provide criteria or time limits for these exceptions except to specify that they do not include "religious or personal belief exemptions." *Ibid.*

Students and staff with medical exemptions. Students and staff can apply for medical exemptions to vaccination, for which they can be eligible if a state-licensed medical professional articulates a "medical rationale" supporting exemption. 7-ER-1585; C.A.9. Doc. 13 at ECF pp.6-8; 7-ER-1461 ("case-by-case basis"); *see also* 7-ER-1567 (staff).

Staff with religious exemptions. Staff members can apply for religious exemptions to COVID-19 vaccination. 7-ER-1567; 5-ER-982. Contrary to the Board President's assertion that religious exemptions are a "loophole" that results in "large numbers" of people not getting vaccinated, only 1.7% of District staff—238 out of 14,000—had requested religious accommodations as of November 8, 2021. *Compare* 7-ER-1461; *with* 5-ER-983 (describing religious accommodation requests based on Title VII and EEOC guidance).

Other exceptions. The District also allows students and others to be present on campus without vaccination. This includes some students with Individualized Education Programs (IEPs) covered by 20 U.S.C. § 1415(j). 7-ER-1559. It also includes visiting sports teams, since the

District has chosen to continue competitions against schools without vaccination mandates, 7-ER-1585. Until recently, the District also had a deferral for pregnant students created by the discretion of the Interim Superintendent, but eliminated that exception in response to this litigation in order to remove an injunction that was granted due to the exemption for pregnant students. C.A.9. Doc. 13 at ECF pp.3-4.

6. District Court Proceedings

In light of the conflict between the District's vaccine mandate and the Doe Family's religious beliefs, on Friday, October 22, 2021, the Doe Family initiated this action. 7-ER-1524-600.

The Doe Family requested leave to proceed pseudonymously for fear of retaliation and harassment by District officials, teachers, or students. 7-ER-1536, 1452-53, 1463-506. That fear proved justified. The next school day after the lawsuit was filed, Jill Doe "learned that one of the teachers at my school read a news article to the class about this case. In response, certain students at my school got angry and upset about what I am doing. They're so upset that they claim that they want to find out who I am and hurt me." 7-ER-1448.

In support of their application for a preliminary injunction, the Doe Family relied on their verified complaint (7-ER-1524-600; 7-ER-1450-51) and submitted declarations from Mrs. Jane Doe (2-ER-258-59), student Jill Doe (7-ER-1446-48), as well as experts Prof. Jayanta Bhattacharya (7-ER-1377-416) and Dr. Richard Scott French (6-ER-1027-56; 2-ER-27-49).

In opposition, the District submitted fact-witness declarations from Chief Human Resources Officer Acacia Thede (5-ER-980-83) and Executive Director, Nursing & Wellness Susan Barndollar (5-ER-1016-21). The District also submitted a hybrid fact-witness and expert-witness declaration from Dr. Howard Taras, who spearheaded the District's vaccine mandate (3-ER-448-64), and attached various CDC documents to an attorney declaration without discussing them (3-ER-264-67).

On Thursday, November 18, 2021, the District Court issued an order denying the Doe Family's application without a hearing. 1-ER-2-12.

7. Ninth Circuit Proceedings

Immediately after the order was issued, the Doe Family filed their notice of appeal. 7-ER-601-15. The next day, November 19, 2021, they

filed with this Court an urgent motion for an injunction pending appeal. C.A.9. Doc. 5.

On November 28, a divided motions panel of this Court issued an emergency injunction pending appeal, temporarily protecting students with religious objections. The majority granted the injunction for as long as a secular exemption for pregnant students remained in place. C.A.9. Doc. 12. Judge Ikuta concurred in granting the motion but partially dissented, noting she would keep the injunction in effect until the school district "ceases to treat any . . . secular reasons more favorably than . . . religious reasons" for declining vaccination, not just pregnancy-related secular reasons. *Id.* at ECF p.3.

The following day, the District submitted a declaration from Interim Superintendent Lamont Jackson stating that he had unilaterally removed the pregnancy exemption and requesting the injunction be dissolved. C.A.9. Doc. 13. Jackson explained he had inserted the pregnancy exemption without the approval of the Board of Education, and therefore he could remove it without the approval of the Board. *Id.* at ECF p.4.

On December 4, the same divided motions panel denied the Doe Family's motion for an injunction pending appeal in full. C.A.9. Doc. 18; *Doe I*, 19 F.4th 1173. On neutrality, the majority held that the District's vaccine mandate does not specifically reference religion or religious practice and that the Doe Family "ha[s] not shown a likelihood of establishing that the mandate was implemented with the aim of suppressing religious belief, rather than protecting the health and safety of students, staff, and the community." C.A.9. Doc. 18 at ECF p.6.

Turning to general applicability, the majority concluded that the Doe Family has not raised a "serious question" on the issue. *Id*. The majority explained that the District's medical exemption "would not qualify as 'comparable' to the religious exemption in terms of the 'risk' each exemption poses to the government's asserted interests," while noting that the record "does not disclose the number of students who have sought or are likely to seek a medical exemption." *Id*. at ECF p.8 (citing *We The Patriots USA, Inc. v. Hochul,* 17 F.4th 266, 286-87 (2d Cir. 2021)). The majority distinguished conditional enrollment because it "is both of temporary duration and of limited scope," and likewise concluded that the exemption for students with IEPs was dissimilar because "any delay

in vaccination caused by this provision is likely to be brief and limited to a small number of students." *Id.* at ECF pp.11-12.

Judge Ikuta dissented. Citing *Tandon*, the dissent concluded that strict scrutiny should apply and that the District failed to meet its burden under that demanding standard. Judge Ikuta noted that the majority here "err[ed] at the first step in the [general applicability] framework by focusing on the School District's reasons for offering an exemption, rather than the interest that the School District actually asserts to justify the mandate." *Id.* at ECF p.25. The District's mandate, Judge Ikuta explained, "treats secular and religious activity differently" by allowing "in-person attendance by students unvaccinated for medical reasons, and in-person attendance by unvaccinated new enrollees who meet certain criteria" while disallowing "*any* form of in-person attendance by students unvaccinated for religious reasons." *Id.* at ECF p.23.

Judge Ikuta characterized the majority's claim that "far fewer students will seek medical exemptions than religious exemptions" as "entirely speculative." *Id.* at ECF p.25. In addressing the majority's point that conditional enrollment deferrals and a religious exemption are not comparable, the dissent called out the majority for "again confus[ing] the

reasons for the exemption with the *asserted interest* that justifies the mandate." *Id.* at ECF p.27. And given that the case implicates First Amendment freedoms, Judge Ikuta concluded that the Doe Family established a likelihood of irreparable injury and that the balance of hardships and public interest weighed in their favor. *Id.* at ECF pp.30-32.

On December 10, 2021, the Doe Family filed an emergency application for a writ of injunction with the Supreme Court, No. 21A217, and on December 17, 2021, the Doe Family filed a motion for reconsideration en banc with this Court. C.A.9. Doc. 22.

On January 14, 2022, this Court denied en banc review of the motions panel order. C.A.9. Doc. 28; *Doe II*, 22 F.4th 1099. Ten active Judges dissented from the denial of en banc review, in three separate dissenting opinions. Judge O'Scannlain also submitted a statement respecting the denial of en banc review. The lead dissenting opinion was authored by Judge Bumatay. C.A.9. Doc. 28 at ECF pp.3-25.

According to Judge Bumatay, the District's Vaccination Roadmap failed the most basic test of not being facially neutral, but instead expressly targeting religion for non-generally applicable treatment, thus

triggering strict scrutiny review. *Id.* at ECF pp.8-11. Further, strict scrutiny was triggered "because the District's secular exemptions pose nearly identical risks as religious ones." *Id.* at ECF pp.11-15. Judge Bumatay also criticized the motions panel's avoidance of strict scrutiny by: (1) justifying numerous exemptions on a vague "health and safety" rationale, instead of the more precise one of "combat[ting] the spread of COVID-19 school-district wide," and (2) justifying exemptions as necessitated by federal or state statutory law (even forthcoming law), while ignoring federal constitutional law, i.e., the Free Exercise clause. *Id.* at ECF pp.15-17.

Judge Bumatay also pointed out that the motions panel had simply ignored other exemptions it could justify on neither of those two bases, and otherwise engaged in baseless speculation to distinguish religious from other objections. *Id.* at ECF pp.17-20. Finally, using *Tandon's* very clear-cut strict scrutiny analysis, Judge Bumatay concluded that granting Jill Doe a religious exemption could not satisfy strict scrutiny. *Id.* at ECF pp.21-22.

The majority from the motions panel also wrote separately to concur in the denial of en banc review. In that respect, they wrote:

"Notably, the motions panel's majority opinion is explicit that, under Ninth Circuit case law, its reasoning is not binding on the panel to which the preliminary injunction appeal is assigned." *Id.* at ECF p.26.

8. Related Developments

A few days after the District announced its vaccine mandate, on Friday, October 1, 2021, Governor Newsom announced that he would make California the first State in the nation to mandate that all public school students must be vaccinated against COVID-19 in order to attend any school, public or private. 7-ER-1596. He acknowledged, however, that by acting unilaterally to direct the California Public Health Officer to issue such a regulation, his authority would be limited. Thus, he noted that "[r]equirements established by regulation, not legislation, must be subject to exemptions 'for both medical reasons and personal beliefs.'" 7-ER-1598-600 (quoting Cal. Health & Saf. Code § 120338).

On December 20, in a parallel but unrelated proceeding against San Diego Unified School District in California Superior Court, the trial court issued a writ of prohibition against the District, enjoining the implementation of its vaccine mandate on the basis that California had occupied the field of school-related vaccines such that the District's

mandate was preempted. *Let Them Choose v. San Diego Unified Sch. Dist.*, S.D. Cnty. No. 37-2021-00043172-CU-WM-CTL (Cal. Super. 2021). *See* C.A.9. Doc. 25.

In response to this, the District emailed all students and their parents that it intended to appeal "in order to keep our vaccine mandate for students ages 16 and up in place" because "we are 100-percent determined to maintain the vaccination mandate."[8]

After some delay, the California Court of Appeal granted a writ of supersedeas staying enforcement of the writ of prohibition pending appeal. *Let Them Choose v. San Diego Unified Sch. Dist.*, 4th Dist., Div. 1, No. D079906 (Cal. App. 2022). Nevertheless, the District chose to delay implementation of its vaccine mandate to the Fall 2022 semester.[9]

STANDARD OF REVIEW

A plaintiff seeking preliminary injunctive relief must establish (1) that she is likely to succeed on the merits, (2) that she is likely to

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[8] *See* Letter from Paul M. Jonna to the Hon. Scott S. Harris re: *Doe v. San Diego Unified Sch. Dist.*, Supreme Court No. 21A217 (Jan. 4, 2022), https://bit.ly/351oQKY (quoting Mark Saunders, *San Diego Unified unanimously votes to appeal ruling against its COVID-19 vaccine mandate*, ABC News San Diego (Dec. 22, 2021), https://bit.ly/3mW1lJy).

[9] *See* Letter from Paul M. Jonna, *supra* n.1.

suffer irreparable harm without injunctive relief, (3) that the balance of harm tips in her favor, and (4) that a temporary restraining order is in the public interest. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)). The Ninth Circuit evaluates these factors through a "sliding scale approach." *Id.* So, for example, "a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." *Id.*

The totality of a district court's preliminary injunction order is reviewed for "an abuse of discretion." *Edge v. City of Everett,* 929 F.3d 657, 664 (9th Cir. 2019). However, when constitutional rights are at stake, reviewing courts must "make an independent examination of the whole record so as to assure [them]selves that the judgment does not constitute a forbidden intrusion on" constitutional rights. *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 (1982). Thus, "[w]hen an injunction involves a First Amendment challenge, constitutional questions of fact . . . are reviewed de novo." *Edge*, 929 F.3d at 664.

ARGUMENT

I. Likelihood of Success on the Merits

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*." U.S. Const., amend. I (emphasis added). "Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle." *Girouard v. United States*, 328 U.S. 61, 68 (1946).

Under current constitutional jurisprudence, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). Thus, a law that is "neutral" and "generally applicable" is not subject to strict scrutiny even if it incidentally burdens a religious belief or practice. *See id.*

But if laws or regulations that burden religious belief "are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*,

141 S. Ct. 63, 67 (2020); *accord Dahl v. Bd. of Trustees of W. Michigan Univ.*, 15 F.4th 728 (6th Cir. 2021) (athlete was entitled to COVID-19 exemption on Free Exercise grounds); *BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab.*, 17 F.4th 604, 618 n.21 (5th Cir. 2021) (OSHA COVID-19 mandate is problematic to the extent it fails to have a religious exemption); *Biden v. Missouri*, 142 S. Ct. 647, 650 (2022) (noting that Medicare COVID-19 vaccine mandate properly has religious exemption).

A. The Vaccination Roadmap Burdens Plaintiffs-Appellants' Sincere Free Exercise of their Religious Beliefs.

No claim under the Free Exercise Clause can be made unless complying with the government regulation burdens the sincere exercise of a religious belief. *See Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972). Establishing this is the religious claimant's burden. *See id.* at 235.

"Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas v. Review Board of*

Indiana, 450 U.S. 707, 717-18 (1981); *see Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

Here, the Doe Family has met their burden. *See Jones v. Slade*, 23 F.4th 1124 (9th Cir. 2022). All three of the COVID-19 vaccines approved by the U.S. Food and Drug Administration have connections to abortion. 7-ER-1530; 7-ER-1413-14. Presently, there is an ongoing debate within many religious traditions about the morality of taking these vaccines, with respected authorities coming to different conclusions. *See* 7-ER-1535 & n.27; 7-ER-1413-14 & nn.73-75. While some hold "longstanding objections to vaccines derived using aborted tissue lines" (7-ER-1414 & n.75), others assert that the remoteness of the abortion, coupled with the severity of the COVID-19 pandemic, make the vaccines morally licit on balance. 7-ER-1414 & n.73.

But the Doe Family's faith tradition accepts the longstanding objection to vaccines that were developed or tested using material derived from abortions. 7-ER-1447, 1535. Thus, none of them can receive the vaccines without violating their religious beliefs. 7-ER-1447, 1535.

Forcing the Doe Family to choose between having Jill Doe violate her religious beliefs to attend school, or adherence to those beliefs and exclusion from school, is a substantial burden on the free exercise of their religious beliefs.

The burden here is also particularly acute because Jill Doe needs to attend classes in-person and participate in extracurricular activities if she has any hope of earning a collegiate sports scholarship (7-ER-1535, 1538), with "the thrill of victory, the agony of defeat, and the many tangible benefits that flow from just being given a chance to participate in intercollegiate athletics." *Neal v. Bd. of Trustees of California State Universities*, 198 F.3d 763, 773 (9th Cir. 1999); *see Dahl*, 15 F.4th at 732 ("Application of these benchmarks leads us to conclude that the University's failure to grant religious exemptions to plaintiffs burdened their free exercise rights. The University put plaintiffs to the choice: get vaccinated or stop fully participating in intercollegiate sports.").

The Doe Family's sincerity is uncontested. The District did not contest the sincerity of their religious beliefs, or the burden imposed on them by the vaccine mandate, and the District Court was silent as to it. 1-ER-2-12. However, the District Court and the motions panel strangely

found that the Doe Family would suffer no irreparable harm from the denial of injunctive relief because "the harm Jill Doe will suffer if a TRO does not issue is not . . . the loss of a First Amendment freedom, but rather the ability to attend in-person classes or participate in extra-curricular activities at her current public high school." 1-ER-11; C.A.9. Doc. 18 at ECF pp.14-15.

But the lost benefits and privileges of an in-person education as penalties for exercising her religion is a significant harm. As Judge Ikuta's dissent noted, if that were *not* true, "then *all* unvaccinated students should participate in remote learning. Otherwise, the School District's mandate would be severely underinclusive." C.A.9. Doc. 18 at ECF p.30 & n.9. And the state of California has justified its own vaccine mandate on the basis that "Educators, public health experts and parents know there is no substitute for in-person instruction[.]" 7-ER-1599. The loss of that for which there is no substitute is irreparable harm. The District has conditioned irreplaceable benefits and privileges on the surrender of First Amendment rights.

In any event, this reasoning is foreclosed by *Thomas* and *Sherbert* cited above: "It is true the Department has not criminalized the way

[plaintiff] worships. . . . But . . . the Free Exercise Clause protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (citing *Sherbert*). Forcing the Doe Family to choose between their faith and in-person schooling and a sports scholarship for Jill Doe is itself "[t]he loss of First Amendment freedoms, for even [a] minimal period[] of time[.]" *Diocese of Brooklyn*, 141 S. Ct. at 67; *accord Dahl*, 15 F.4th at 736; *BST Holdings*, 17 F.4th at 618 & n.21.

B. The Vaccination Roadmap Triggers Strict Scrutiny In At Least Four Different Ways

i. The mandate triggers strict scrutiny under *Lukumi* and *Tandon* because it is subject to categorical exemptions.

The mandate triggers strict scrutiny because the District has created a series of categorical exemptions from mandatory vaccination. The Supreme Court has long recognized that categorical exemptions from government-created burdens trigger strict scrutiny under the Free Exercise Clause. The *Lukumi* Court called this the problem of "underinclusiv[ity]": "categories of selection are of paramount concern" when a law burdens religious practice. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542, 543 (1993). In *Lukumi*, the

Supreme Court found the City of Hialeah's rules governing animal killing substantially "underinclusive" and thus not generally applicable with regard to conduct that undermined the government's asserted interests "in a similar or greater degree." *Id.* at 543-44.

Similarly, in *Tandon v. Newsom* and *South Bay United Pentecostal Church v. Newsom*, the Supreme Court recognized that government actions—like selective burdens on home worship—that "treat *any* comparable secular activity more favorably than religious exercise" trigger strict scrutiny under the Free Exercise Clause. *Tandon*, 141 S. Ct. at 1296 (emphasis added) (citing *Diocese of Brooklyn*, 141 S. Ct. at 67-68). Governmental action is not generally applicable if the government "openly impose[s] more stringent regulations on religious" activity than secular activity. *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) (Statement of Gorsuch, J.); *see id.* (Barrett, J., concurring).[10]

[10] The reasoning in Justice Gorsuch's statement was joined by four other Justices, making it a binding opinion. *See Roman Catholic Archbishop of Washington v. Bowser*, 531 F. Supp. 3d 22, 42 n.15 (D.D.C. 2021) (noting that five Justices joined); *id.* at 32 n.5; *see also Tandon*, 141 S. Ct. at 1296-97 (citing Justice Gorsuch's statement as if it were binding authority).

And also like *Lukumi*, *Tandon* and *South Bay* judged "whether two activities are comparable for purposes of the Free Exercise Clause" "against the asserted government interest that justifies the regulation at issue." *Tandon*, 141 S. Ct. at 1296. A law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).

Here, the District enrolls more than 36,000 high school students, approximately 14,000 of whom are sixteen or older and thus covered by the vaccine mandate. 3-ER-288; Ed-Data, *supra* n.7. It has chosen to exempt thousands of these students—and many of its own employees—from its COVID vaccine mandate because of their age, medical condition, secular status, or simply its own administrative convenience. Each of these exemptions presents "similar risks" to the District's interest in protecting health and safety because each of them results in unvaccinated people present during in-person learning. *Tandon*, 141 S. Ct. at 1296. As a result, the District's policy is not generally applicable, and the District must meet strict scrutiny, which it cannot do. *Infra* at Section I.C.

The District Court and the motions panel reached the contrary conclusion only by narrowing their lens to focus on healthy students without an Individual Education Program who are already enrolled in the District and who are 16 by November 1, 2021. *See* C.A.9. Doc. 18 at ECF pp.2-8; 1-ER-8-10. But that is not how general applicability works. "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon*, 141 S. Ct. at 1296.

Here, the District has asserted that its interest is in "health and safety" (C.A.9. Doc. 18 at ECF p.7; 3-ER-284, 286, 318; 7-ER-1461), and this broadly formulated interest is equally undermined whether the unvaccinated person is 15 or 16 or 50. Yet the District has crafted a policy that does not apply to tens of thousands of its students and employees, who are allowed to be exactly what Jill Doe seeks to be: unvaccinated participants at in-person school. Those not covered include:

- Students under 16;
- Students who turned 16 after November 1, 2021;
- Students with conditional admissions;
- Students and staff with medical exemptions; and

- Staff with religious exemptions.

These groups are permitted to continue participating at in-person school, despite being unvaccinated. Just accounting for students alone, the District exempts tens of thousands of students, comprising over 85% of all District students and over 60% of its high school students. And that doesn't factor in other ways that the District allows unvaccinated individuals on campus, such as unvaccinated visiting athletes at sports games. Such an "exception-riddled policy" is the "antithesis of a neutral and generally applicable policy." *Roberts v. Neace*, 958 F.3d 409, 413-414 (6th Cir. 2020).

In short, because the District's policy "contains myriad exceptions and accommodations for comparable activities"—allowing over 21,000 high school students and many employees to attend school in person while unvaccinated—it is not generally applicable and strict scrutiny applies. *Tandon*, 141 S. Ct. at 1298.

ii. The mandate triggers strict scrutiny under the rule of *Lukumi* and *Fulton* because it provides for discretionary exceptions.

Similarly, the mandate triggers strict scrutiny because it creates a system of individual exemptions and a formal system of discretionary exceptions.

For several decades, the Supreme Court has recognized that where government imposes a burden on a large category of people but then creates a mechanism for individually exempting some people from the ambit of the burden, the exemption must be extended to religious people as well, unless the government has a compelling reason not to. Relying on *Bowen v. Roy*, 476 U.S. 693 (1986), and *Smith*, the *Lukumi* Court held that "in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason." 508 U.S. at 537 (cleaned up).

In *Fulton*, the Supreme Court further explained that where a law "incorporates a system of individual exemptions," or includes "a formal system of entirely discretionary exceptions," strict scrutiny is triggered. 141 S. Ct. at 1878. Importantly, it does not matter whether the system of

exceptions has ever been used: "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given[.]" *Id.* at 1879.

Here, the District has created a system that allows it to craft exemptions for certain students based on personal circumstances but not religious beliefs. 7-ER-1559. The Board-approved language of the mandate states that students "[m]ay be conditionally enrolled [for] in-person learning if they are in one of these groups: foster youth, homeless, migrant, military family, or have an IEP," but that this conditional enrollment rule does not allow "religious or personal belief exceptions." *Id.*

The District has said that conditional enrollment only lasts for 30 days, but this is not in the text of the Board-approved Vaccination Roadmap and the District later admitted that it is not true for the conditionally enrolled students with IEPs. 7-ER-1559; 3-ER-296. Thus, the 30-day limit appears to have been created by the Interim Superintendent and can be removed at the Interim Superintendent's discretion. The District is willing to create and modify exemptions for a

variety of other reasons, just not religion. Such "entirely discretionary exemptions" trigger strict scrutiny. *Fulton*, 141 S. Ct. at 1878.

The District further demonstrated its discretionary authority by removing an exemption for pregnant teenagers in less than 24 hours. The day after this Court issued an injunction pending appeal based on the District's exemption for pregnant students, Interim Superintendent Jackson unilaterally revoked the exemption and moved to vacate the injunction. C.A.9. Doc. No. 13 at ECF pp.3-4. Jackson said he "authorized and directed that the option for pregnant students to request a deferral of the vaccine mandate be removed" on his own authority. *Id*. at ECF p.3.

According to Jackson, because "the pregnancy deferral option was not the result of action or direction by the Board," he could remove this exemption absent Board approval. *Id*. at ECF p.4. Jackson's litigation-driven decision to abruptly revoke the pregnancy exemption underscores his discretion to institute, modify, and eliminate exemptions from the District's policy. Like the unused discretion in *Fulton*, 141 S. Ct. at 1879, this discretion makes the District's policy subject to strict scrutiny.

iii. The mandate triggers strict scrutiny under the rule of *Yoder* because it interferes with the Does' right as parents to control the upbringing of their daughter Jill.

The mandate also triggers strict scrutiny under the rule of the *Yoder* line of cases. In *Yoder*, the Supreme Court held that a rule impinging on parents' rights to control "the religious upbringing and education of their minor children" triggered strict scrutiny under the Free Exercise Clause. 406 U.S. at 231. *Yoder* drew on two earlier cases that have been treated as proto-Free Exercise cases because they predated incorporation of the Free Exercise Clause against the states: *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

Meyer and *Pierce* were thus formally decided on due process grounds, but both nevertheless later supported *Yoder*'s conclusion that parents have a "fundamental" interest "with respect to the religious upbringing of their children." 406 U.S. at 213-14. *See*, *e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (discussing *Meyer* and *Pierce* as First Amendment cases). *Smith* reaffirmed this line of precedent, describing "the right of parents . . . to direct the education of their

children," recognizing that these claims still receive heightened scrutiny, and citing *Yoder* and *Pierce* for the point. *Smith*, 494 U.S. at 881.

More recently, the Supreme Court has repeatedly reaffirmed the unique role of religious education. For example, *Espinoza* reaffirmed as an "'enduring American tradition' . . . the rights of parents to direct 'the religious upbringing' of their children." *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246, 2261 (2020) (quoting *Yoder*, 406 U.S. at 213-14). And pending before the Supreme Court is yet another case that concerns the right of parents to direct the religious upbringing of their children. *See Carson v. Makin*, No. 20-1088 (argued Dec. 8, 2021).

Here, the mandate triggers strict scrutiny under the *Yoder* line of cases because the District's mandate interferes directly with the ability of John and Jane Doe, Jill's parents, to direct the upbringing of their child. The District requires parental consent to obtain a COVID vaccine. 7-ER-322. By forcing Mr. and Mrs. Doe to have their child vaccinated—a medical procedure both they and Jill have sincere religious objections to—the District is directly interfering both with the Does' right to direct the religious upbringing of their child, and with Jill's right to have her upbringing controlled by her parents rather than a local government.

iv. The mandate triggers strict scrutiny because it is not neutral under *Smith*.

Finally, the mandate is nothing like the neutral "across-the-board criminal prohibition" that only "incidentally" burdened religion in *Smith*. 494 U.S. at 884, 878.

In this context, "[a] law lacks *facial* neutrality if it refers to a religious practice" unless it is clear that the words used were intended to have "a secular meaning." *Lukumi*, 508 U.S. at 533 (italics added). Government actions are also not neutral when the government "proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877. Part of this "minimum requirement of neutrality" is that the government cannot "single out" religion "for especially harsh treatment." *Diocese of Brooklyn*, 141 S. Ct. 63, 66.

Moreover, "even slight suspicion" that state action against religious conduct "stem[s] from animosity to religion or distrust of its practices" is enough to require government officials to reconsider. *Masterpiece Cakeshop Ltd. v. Colorado Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018). This is shown where the government "assume[s] the worst" about religious motivations for accommodation "but assume[s] the best" about

secular ones. *Tandon*, 141 S. Ct. at 1297 (quoting *Roberts*, 958 F.3d at 414). In essence, "[t]he constitutional benchmark is 'government neutrality,' not 'governmental avoidance of bigotry.' " *Roberts*, 958 F.3d at 415.

Here, the District implemented the mandate knowing that it would burden religious believers while exempting thousands of students for secular reasons. 3-ER-291; 3-ER-278. The mandate's text lacks facial neutrality because it refers specifically to religious exemptions and directs that they will be rejected. 3-ER-1559, 1584. And when the motions panel suggested that some of the secular favoritism must be pared back in order to continue refusing religious exemptions, the District swiftly removed protections it had previously provided for pregnant students, just so it could keep excluding religious students.

In addition, the means by which this "religious-objectors-need-not-apply" announcement was made was unconstitutional. Board President Barrera first stated in an interview that the District would not offer personal belief or religious belief exemptions because "that creates kind

of a loophole[.]" 7-ER-1461. The use of the "pejorative"[11] term "loophole," "assume[s] the worst" about religious-based objections and "assume[s] the best" of medical-based objections. *See Tandon*, 141 S. Ct. at 1297.

Nothing about this mandate is neutral or generally applicable, and the burdens on religion are hardly incidental. Laws that fail to operate "without regard to religion," or that otherwise "single out the religious" for disfavored treatment, "clear[ly] . . . impose[] a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2020-21. Strict scrutiny is thus triggered here.

C. The Vaccination Roadmap Cannot Satisfy Strict Scrutiny.

Strict scrutiny is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). To pass the test, the District must prove that its denial of an exemption to Jill is "'narrowly tailored' to serve a 'compelling' state interest." *Diocese of Brooklyn*, 141 S. Ct. at 67. Even when the government has identified a problem in need of solving, the restriction "must be actually necessary to the solution." *Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 799 (2011). "That is

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

a demanding standard." *Id*. And "because [the government] bears the risk of uncertainty, ambiguous proof will not suffice." *Id*. at 799-800 (citations omitted).

Even though the Supreme Court has held that limiting the spread of COVID is generally a compelling government interest, *see Diocese of Brooklyn*, 141 S. Ct. at 67, the District cannot show that it has a compelling interest to burden Jill's religious exercise while exempting most other District students and hundreds of its staff from its mandate. Nor, for that reason, can it show that it has employed the least restrictive means, with respect to Jill's religious exercise, in advancing the interests it does have.

i. The District does not have a compelling interest in burdening the Doe Family's religious beliefs.

The District must go beyond "broadly formulated interests" to meet its evidentiary burden, and instead prove that specific harm will result to compelling interests if it "grant[s] specific exemptions to particular religious claimants," *Fulton*, 141 S. Ct. at 1881 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)), and that its denial of an exemption is "actually necessary" to prevent that

harm. *Brown*, 564 U.S. at 799. In other words, "the government must prove the 'compellingness' of its interest in the context of 'the burden on *that person*'[.]" *Yellowbear v. Lampert*, 741 F.3d 48, 57 (10th Cir. 2014) (Gorsuch, J.). The District cannot do this.

Most obviously, the District's interest in excluding Jill cannot be compelling because it "leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547. The underinclusiveness here is pronounced. The District's "primary interest for imposing the mandate" for on-campus students over age 16 is advancing "student health and safety." C.A.9. Doc. No. 18 at ECF p.7; 3-ER-284, 286, 318; 7-ER-1461. But the tens of thousands of exempt students in the District, including at least 21,000 exempt high school students, threaten that interest at least as much as Jill. As do the exempt District staff. Given that the District tolerates tens of thousands of unvaccinated persons on its campuses every day, its refusal to allow a single exemption for Jill "cannot be regarded as protecting an interest of the highest order." *Lukumi*, 508 U.S. at 547 (cleaned up).

Moreover, with such a broad interest at issue, the mandate is essentially per se underinclusive. For example, regular influenza seasons

are deadlier for children (6-ER-1050), yet a flu vaccine is not a requirement for school attendance, Cal. Health & Saf. Code § 120335, leaving "student health and safety" greatly undermined.

Indeed, Jill poses *less* of a risk to the District's health-and-safety interests than many other exempt individuals because she has recovered from COVID. *See* León et al., *supra*, n.2. The District comes nowhere near its burden to prove that a single 16-year-old with natural immunity "is more dangerous" than the numerous exempt students and staff who have neither been vaccinated nor recovered from COVID. *Tandon*, 141 S. Ct. at 1296-97.

Further, the District *expressly* accepts the exact same risk that it treats as unacceptable for Jill. In addition to all the unvaccinated students and employees who attend in-person school while exempt from the mandate for secular reasons, the District has resumed play of all traditional sports and has chosen to allow its students to play sports "against schools with no vaccine mandate" and thus against "teams with unvaccinated players." 7-ER-1585.

The District's written justification is that, "[b]ecause [District] students are vaccinated," they are adequately protected from exposure to

unvaccinated student competitors. *Ibid.* But it cannot be the case that allowing a single additional unvaccinated student—Jill—equal access to *education* is intolerably risky for her vaccinated peers, but letting those same peers play *sports* justifies far more exposure to an unlimited number of unvaccinated individuals—and in a context where unmasked and very close contact is inevitable.

Finally, the District's voluntary decision to defer its vaccination mandate for at least six months, to Fall 2022 at the earliest, belies any inference that the mandate could satisfy strict scrutiny. If the District itself does not view its mandate as compelling, neither should this Court. *See South Bay*, 141 S. Ct. at 717 (Roberts, C.J., concurring) ("[T]he State's present determination . . . appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake.")

ii. The District has not employed the least restrictive means of accomplishing its interests.

The "least-restrictive-means standard is exceptionally demanding" in that it requires the government to show that "it lacks other means of achieving its desired goal." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S.

682, 728 (2014). "[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881. As applied here, this standard "requires the [District] to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID." *Tandon*, 141 S. Ct. at 1296-97.

The District flunks this test for at least three independent reasons. First, because the District "permits other [individuals] to [access campus] with precautions, it must show that the religious exercise at issue is more dangerous than those [other individuals] even when the same precautions are applied." *Tandon,* 141 S. Ct. at 1297. The District has not made that showing.

Indeed, because the District did not offer any evidence that it considered Jill's specific situation and developed specific reasons why it could not accommodate her, it was destined for failure on this score alone. *NIFLA v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (government flunked the narrow-tailoring test where it had "identified no evidence" to "prove" tailoring). Thus, "precautions that suffice for other activities suffice for religious exercise too." *Tandon*, 141 S. Ct. at 1296-1297; *see also* C.A.9.

Doc. No. 18 at ECF p.29 (Ikuta, J., dissenting) (the District "already accommodates teachers and staff who remain unvaccinated due to personal beliefs," which "shows that the School District has determined that it can satisfy its safety interests while still allowing persons unvaccinated on religious grounds to access campus"). In sum, because the District can accommodate Jill, it must.

Second, the District provides no justification for why it must have a vaccine mandate that is an extreme outlier nationally. Only about "[f]ive districts nationwide—all in California—have moved forward with a student [vaccine] mandate." 7-ER-1600.[12] There are more than 13,000 public school districts in the United States, meaning that about 99.962% of school districts do not require vaccination in order to attend in-person

[12] *See* Howard Blume, *34,000 L.A. Unified Students Have Not Complied with Vaccine Mandate, Signaling Problems Ahead,* Los Angeles Times (Dec. 7, 2021), https://lat.ms/31Kiler (noting that only a "few [districts] in the nation" require students to obtain a COVID-19 vaccine to attend classes); *see also* Matt Zalaznick, *Vaccine Tracker: Schools in 14 States Now Require Students to Get COVID Shots*, District Administration (Nov. 15, 2021), https://perma.cc/WT9S-92PW (listing some districts nationwide that require vaccinations for sports or extracurricular activities, but only a handful of California districts that mandate it as a condition of in-class attendance).

classes.[13] Among states, only California has announced plans to impose a state-wide mandate for students, but that mandate does not take effect until the Fall, and will contain a "personal beliefs" exemption. 7-ER-1598-1600. And the District is unusual even among California schools: not only have the vast majority declined to issue mandates ahead of the statewide mandate, Oakland and Sacramento have provided religious exemptions.

Virtually no school system in the country imposes a similarly harsh mandate, which is "much tighter than those adopted by many other jurisdictions hard-hit by the pandemic." *Diocese of Brooklyn*, 141 S. Ct. at 67. "[W]hen so many" other jurisdictions "offer an accommodation, [the District] must, at a minimum, offer persuasive reasons why it believes that it must take a different course." *Holt v. Hobbs*, 574 U.S. 352, 369 (2015).

And until departing from the national consensus, the District itself primarily used such alternative "substantial measures to protect the

[13] *See* National Center for Education Statistics, https://nces.ed.gov/programs/digest/d20/tables/dt20_214.10.asp (listing number of U.S. public school districts through 2018-2019).

safety of all students," including masking, testing, distancing, facility ventilation, and upgraded HVAC filtration. 7-ER-1577. Given that it "has available to it a variety of approaches that appear capable of serving its interests," it must explain why it can no longer take the more common path, at least as it regards Jill. *McCullen v. Coakley*, 573 U.S. 464, 493-94 (2014) (considering policies of other states under intermediate scrutiny); *Holt*, 574 U.S. at 368-69 (same under strict scrutiny). In fact, these other measures appear to be quite successful to this day. The latest COVID tracker data for Scripps Ranch High School shows that out of 253 tests administered last week, exactly *zero* came back positive. There are only 2 kids in the entire school with COVID, or one tenth of one percent.[14] Because the District did not offer that persuasive explanation, it cannot meet its burden.

Third, other governments treat those like Jill who enjoy natural immunity because they have recovered from COVID as equivalent or better than those who have been vaccinated. For example, in Germany, the government uses "2G" or "3G" rules, which stand for "geimpft,

[14] *See* San Diego Unified School District, *COVID-19 Dashboard* (Feb. 6-12, 2022), https://bit.ly/3LGDqs6.

genesen, getestet"—vaccinated, recovered, or tested.[15] Someone who has medical records showing that they have recovered from a bout of COVID is allowed to enter the same facilities as someone who has been vaccinated. *Ibid.*

Indeed, recent peer-reviewed medical studies indicate that while vaccines provide robust protection from severe disease requiring hospitalization, natural immunity often provides similar protection. 7-ER-1382-92 ("[T]he evidence to date strongly suggests that while vaccines—like natural immunity—provide protection against severe disease, they, unlike natural immunity, provide only short-lasting protection against subsequent infection and disease spread.").

In an Israeli study of 187,000 unvaccinated persons with natural immunity, only 0.48% were reinfected and only 0.02% were hospitalized. 7-ER-1385. And another peer-reviewed study of 43,044 patients found that just 129 were reinfected and only one severely. *Ibid.* As similar studies continue to develop, they undermine the District's conclusion that

[15] Bundesministerium für Gesundheit, *Geimpft, genesen, getestet – welche Corona-Maßnahmen aktuell gelten* (Dec. 3, 2021) [Federal Ministry of Health, *Vaccinated, recovered, tested – which measures are currently in force*], https://perma.cc/Q8UP-BXPV.

for Jill Doe (but not tens of thousands of her classmates), vaccination is not only advisable but mandatory. And the District acknowledges that, simply by virtue of her status as a "school-age" child, Jill's "rate of sickness" is "very low compared to adults," including the teachers and staff that it exempts from the mandate even without proof of natural immunity. 3-ER-276.

II. The Other Injunction Factors are Satisfied

The remaining preliminary injunction factors are irreparable harm, balance of harms, and the public interest. *All. for the Wild Rockies*, 632 F.3d at 1131. With respect to irreparable harm, because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Diocese of Brooklyn*, 141 S. Ct. at 67, "[r]eligious adherents are not required to establish irreparable harm independent of showing a Free Exercise Clause violation." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020). "Thus, when a plaintiff seeks injunctive relief based on an alleged constitutional deprivation, the [first] two prongs of the preliminary injunction threshold merge into one." *Page v. Cuomo*, 478 F. Supp. 3d 355, 364 (N.D.N.Y. 2020) (cleaned up).

Similarly, when a party seeks a preliminary injunction against the government, the balance of equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). In a case involving Free Exercise rights, where the plaintiffs "have raised serious First Amendment questions," that "compels a finding that the balance of hardships tips sharply in Plaintiffs' favor." *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (cleaned up).

This is because "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (cleaned up); *see also, e.g., California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) ("Protecting religious liberty and conscience is obviously in the public interest."); *Dahl*, 15 F.4th at 736 ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights"); *BST Holdings*, 17 F.4th at 618 ("The public interest is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions—even, or perhaps *particularly*, when those decisions frustrate government officials.").

Thus, in the context of a Free Exercise challenge to a COVID-19 restriction, the remaining three preliminary injunction factors merge into an analysis of whether "the State has [] shown that 'public health would be imperiled' by employing less restrictive measures." *Tandon*, 141 S. Ct. at 1297 (quoting *Diocese of Brooklyn*, 141 S. Ct. at 68).

Here, not only would protection for the Doe Family not harm the public interest, it would *promote* the public interest. The District already permits thousands of students under 16 to attend classes subject to testing, masking, and other mitigation measures; presumably, some of those students attend the same classes as Jill Doe. Yet the District has not claimed that these students pose a health threat. Therefore, the District "has not shown that 'public health would be imperiled' by employing less restrictive measures." *Tandon*, 141 S. Ct. at 1297. And it is well accepted in the medical literature that keeping children out of school results in worse health and social outcomes.[16]

[16] Jorge V. Verlenden et al., *Association of Children's Mode of School Instruction with Child and Parent Experiences and Well-Being During the COVID-19 Pandemic—COVID Experiences Survey, United States, October 8–November 13, 2020*, 70 Morbidity and Mortality Weekly Report (MMWR) 369-376 (Mar. 19, 2021), https://perma.cc/UV3W-52SN; *see also*

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants John Doe, Jane Doe, and Jill Doe respectfully request that this Court reverse the District Court's denial of preliminary injunctive relief.

Respectfully submitted,

Dated: February 17, 2022

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Protecting Your Mental Health: The U.S. Surgeon General's Advisory (2021), https://perma.cc/94WM-UHYC (citing medical studies).

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