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

UNIFYSCC, et al.,

Plaintiffs,

v.

SARA H. CODY, et al.,

Defendants.

No. 22-CV-01019 BLF

DEFENDANTS' NOTICE OF MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: October 24, 2024
Time: 9:00 a.m.
Ctrm: 3, 5th Floor
Judge: The Honorable Beth Labson Freeman

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on **October 24, 2024**, at **9:00 a.m.**, or as soon thereafter as the matter may be heard, in **Courtroom 3, 5th Floor** of the above-entitled Court, located at 280 South 1st Street, San José, CA 95113, Defendants will, and hereby do respectfully move this Court under Federal Rule of Civil Procedure 56 for summary judgment pursuant to the Scheduling Order in this matter. ECF 77; *see also* ECF 127, 140.

Defendants respectfully request the Court enter judgment in their favor because the undisputed evidence establishes that Plaintiffs' constitutional claims fail because they cannot meet the requirements of *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978); the County's vaccination policy did not violate Plaintiffs' constitutional rights because it did not burden Plaintiffs' religious practice and was neutral, generally applicable, and easily satisfies both rational basis review and strict scrutiny; Plaintiffs cannot meet the requirements of their Title VII and FEHA claims on multiple grounds, including because the County did not take an adverse action against the class, Plaintiff class member claims are barred by their failure to cooperate in the County's offered accommodations, Plaintiffs cannot establish disparate treatment, and Plaintiffs proffered accommodations would have imposed an undue burden on the County; and, finally, Plaintiffs' claims against Defendants Dr. Sara Cody, James Williams, and Jeffrey Smith should be dismissed as redundant and improper. This motion is based on this notice of motion and motion for summary judgment, the appended memorandum of points and authorities, the accompanying declarations, the [proposed] order, and other evidence or arguments as may be presented.

Dated: August 8, 2024

Respectfully submitted,

TONY LOPRESTI
COUNTY COUNSEL

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

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

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STATUTES

I. INTRODUCTION

The Court should deny Plaintiffs' motion for partial summary judgment and grant Defendants' motion for summary judgment on all claims.

Plaintiffs' constitutional challenges to the County of Santa Clara's ("County") vaccination policy fail, because it is undisputed that FDA approved vaccines prevented serious illness, death, and the spread of COVID-19, and "[s]temming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 18 (2020). Plaintiffs have adduced no evidence that could change this conclusion, since the Court's preliminary injunction ruling. Even Plaintiffs' expert concedes that vaccines prevent serious illness, death, and substantially reduce the spread of COVID-19. The overwhelming scientific consensus, and the overwhelming weight of legal authority, supports the County's authority to require vaccination at the height of the pandemic.

Plaintiffs' constitutional, Title VII, and Fair Employment and Housing Act ("FEHA") challenges to the County's accommodations framework also fail. Plaintiffs' challenges boil down to the arguments that the County impermissibly gave individuals with medical and disability exemptions "preferential consideration" in job transfers, and that the County could have done more to accommodate individuals with religious exemptions by allowing them to continue working unvaccinated. But it is undisputed that state and federal disability law *required* the County to give "preferential consideration" in job transfers to individuals with medical and disability exemptions. The County had no discretion to disregard that requirement. Under well-settled authority, the County cannot be held liable for following the law. It is also undisputed that vaccination was the most effective means of stemming the spread of COVID-19, and that Plaintiffs' proffered alternatives such as masking and testing were insufficient at the height of the pandemic. Importantly for this motion, Plaintiffs' arguments about alternatives consist solely of attorney argument. Plaintiffs' sole expert did not opine about masking, testing, social distancing, or the like. Under black-letter law, unsupported attorney argument is insufficient to withstand summary judgment.

Accordingly, the County respectfully requests that the Court grant its motion and deny Plaintiffs' motion.

II. STATEMENT OF FACTS

A. THE COVID-19 PANDEMIC WAS A PUBLIC HEALTH EMERGENCY.

COVID-19 was a new, highly contagious disease first identified in late 2019. Rudman Decl., ¶ 6, Ex. 2 at 0011, 0020-22. It spread rapidly throughout the United States beginning in March 2020. *Ibid*. Almost everything about COVID-19 was unknown initially. Its origin was unknown. *Id*. ¶ 8. Its mechanisms of transmission were unknown. *Ibid*. Its symptoms were unknown. *Ibid.* Its long-term effects were unknown. *Ibid.* How to treat it was unknown. *Ibid*. Whether a vaccine could be developed was unknown. *Ibid.*

When the COVID-19 pandemic began in 2020, few, if any people anywhere in the world had either acquired or innate immunity. Reingold Decl. ¶ 17. Through June 29, 2020, over 1,300,000 COVID-19 cases and over 36,000 COVID-19 deaths had been reported worldwide, including over 342,000 cases and over 4,400 deaths in the U.S. *Id*. ¶ 19; *see also* Rudman Decl. Ex. 2 at 0011. By July 30, 2021, just over one year later, almost 200,000,000 COVID-19 cases and over 4,000,000 COVID-19 deaths had been reported worldwide, including almost 35,000,000 cases and over 612,000 deaths in the U.S. *Ibid.* In Santa Clara County, through June 29, 2020, 4,884 COVID-19 cases and 155 COVID-19 deaths were reported. Reingold Decl. ¶ 44. By July 30, 2021, just over one year later, 124,060 COVID-19 cases and 1,747 COVID-19 deaths had been reported in the County. *Ibid*.; *see also* Rudman Decl. Ex. 2 at 0011, 0013, 0023-24, 0215, 0219.

During large peaks of SARS-CoV-2 infections (the virus that causes COVID-19) and COVID-19-related illnesses and hospitalizations in the U.S. and in other countries in 2020-2021, the capacity of hospitals and intensive care units to handle the large influx of patients needing care was often overwhelmed, resulting in the need to transfer severely ill patients; keep and provide care to patients in the emergency department for many hours, even days; and delays in care of non-COVID patients. Reingold Decl. ¶ 20; *see also* Rudman Decl. Ex. 2 at 0023, 0044, 0055-59, 0213, 0217. The ability to care for hospitalized patients during these peaks in COVID-19 cases and hospitalizations was often severely constrained by staff shortages, including shortages caused by COVID-19 illnesses in hospital staff and the need to exclude SARS-CoV-2-infected staff from the workplace. *Ibid*.; *See also* Anderson Decl. at 006-008.

B. VACCINES WERE A CRITICAL PUBLIC HEALTH MEASURE TO MITIGATE DEADLY SURGES IN COVID-19 INFECTIONS, DISEASE, AND DEATH.

Development of vaccines against COVID-19 began soon after SARS-CoV-2 was determined to be the cause of the disease. In December 2020 and January 2021, the Food and Drug Administration (FDA) granted Emergency Use Authorization (EUA) to four vaccines for use in the United States. Reingold Decl. ¶ 32. Scientific studies have overwhelmingly demonstrated that vaccination reduces the risk of infection and transmission of SARS-CoV-2. *Id.* ¶ 33; *see also* Rudman Decl. ¶¶6-8, Ex. 2 at 023-0027, 0041-42, 0044, 0065, 0079-80, 0085, 0094, 0114-135; *see also* Anderson Decl. at 0046-50, 0078-81, 0188-197, 201-214. These studies also show that when "breakthrough" infections do occur—i.e., infections in vaccinated individuals—the amount of virus present in the nose is lower than that in unvaccinated, infected individuals and that virus is detectable for a significantly shorter period. Reingold Decl. ¶ 35. As a result, previously vaccinated individuals with a "breakthrough" SARS-CoV-2 infection are less likely than unvaccinated individuals to transmit the infection. *Ibid.* In October-November, 2021, unvaccinated individuals ≥ 18 years of age or older had 13.9- and 53.2-times higher risk of SARS-CoV-2 infection and COVID-19-associated death, respectively, compared with individuals who had been fully vaccinated and boosted. *Id.* ¶ 34; *see also* Rudman Decl. Ex. 2 at 0024; Anderson Decl. at 0173-175.

When safe and effective COVID-19 vaccines became available in 2021, routine COVID-19 vaccination was seen as the most effective means of reducing the risk of SARS-CoV-2 infections and COVID-19 outbreaks, with all of their attendant illnesses and deaths. *Ibid;* Rudman Decl. ¶¶ 8-9. In many instances, COVID-19 vaccination was made a condition of employment, not only to help reduce the likelihood that individuals working in such settings could become infected (while at work or while in the community) and transmit the virus to others, but also to safeguard the health of those individuals. Reingold Decl. ¶ 30. In addition, by reducing the likelihood of SARS-CoV-2 infection or COVID-19 illness in those working in these institutions, COVID-19 vaccination was seen as a means of reducing staffing shortages. *Ibid.*; *see also* Rudman Decl. Ex. 2 at 0024-0027.

Sharing indoor space increases the risk of transmission of and infection. Reingold Decl. ¶ 23; *see also* Anderson Decl. at 0144-147. Since the approval of COVID-19 vaccines, numerous public

health agencies, including the CDC, have stressed the importance of assuring that healthcare workers and others working in healthcare delivery settings be vaccinated against COVID-19. *Id.* ¶ 31. Outbreaks of SARS-CoV-2 infection and resultant COVID-19 cases and deaths in prisons and other carceral settings had also been well-documented by mid-2021. *Id.* ¶ 28; Anderson Decl. at 0008-9, 0051-77, 0161-0166. In these outbreaks, which were challenging to control, both incarcerated individuals and staff were infected, and there was often evidence of subsequent transmission of the virus by staff to those in their households and communities. *Ibid.*; *see also* Rudman Decl. Ex. 2 at 0024-0027; Anderson Decl. 008-29.

C. THE COUNTY ISSUED THE VACCINATION EMPLOYEE POLICY TO SLOW THE SPREAD OF INFECTION, DISEASE, AND DEATH.

When the COVID-19 pandemic hit Santa Clara County, the County's public health officials marshalled all available resources to protect the public. Rudman Decl. Ex. 2 at 0011; Smith Decl. ¶ 5, Ex. 1; *see also* Anderson Decl. at 0184-0187, 0199-200. The Public Health Department mobilized to develop public health policies that the developing science indicated could protect the public from infection, disease, and death. *Ibid.* *See also* Anderson Decl. at 0167-171, 0184-187, 198. The County procured personal protective equipment, established and expanded clinical and supportive services, and set up an Emergency Response Center that the County staffed with dedicated employees 24/7. *Ibid.* The County also promulgated health orders to protect the public. *Id.* at 0011-12. For example, the County's Health Officer swiftly issued orders to cancel mass gatherings and to shelter in place in March 2020, issued orders to safeguard supplies of personal protective equipment in April 2020, and established face covering and social distancing protocols in July 2020. *Ibid.* The County instituted these temporary protective measures while awaiting medical measures that could effectively prevent or treat COVID-19 infections, disease, and death. *Ibid.*

In summer 2021, the Delta variant of COVID-19 began spreading rapidly in the United States. Rudman Decl. Ex. 2 at 0012, 0027-0028; Smith Decl. ¶ 6; Anderson Decl. at 0010, 0023-30, 0038. The Delta variant was more than twice as contagious as variants that preceded it and caused more severe illness. Rudman Decl. Ex. 2 at 0012, 0027-0028. The County responded accordingly. In July 2021, public health professionals urged all businesses and governmental entities to

implement mandatory vaccination requirements for all personnel. *Id.* at 0028. On August 5, 2021, the County issued a policy requiring County employees to vaccinate and provided an accommodations framework for employees seeking an exemption based on medical and religious grounds. Smith Decl. ¶¶ 9-23, Exs. 2-6; Anderson Decl. at 0126.

In winter 2021, Omicron caused COVID-19 cases to surge. Anderson Decl. 0013-14, 0023-30, 0038. Omicron was two to four times as infectious as Delta. Rudman Decl. Ex. 2 at 0025; *see also* Anderson Decl. at 0171-172. To address the Omicron surge, Dr. Cody issued a December 28, 2021 Order Requiring Up-to-Date COVID-19 Vaccination of Personnel in Higher-Risk Settings. Rudman Decl. Ex. 2 at 0028-0030, 0084-91; Smith Decl. ¶ 18; Anderson Decl. at 0014-17.

The County's efforts to protect the public from COVID-19 were successful. While the U.S. had 316 deaths per 100,000 residents and California had 259, Santa Clara County had significantly fewer—only 130—despite being in Silicon Valley, an epicenter of commerce and virus transmission risk. Rudman Decl. at 0015-16. The County's efforts to promote vaccination in the community resulted in 90% of county residents receiving vaccinations by the end of August 2022. *Ibid.* These efforts also correlated closely to the infection and mortality rates for COVID moderating substantially in the summer of 2022. *Ibid.* In July 2022, COVID-19 death rates were at levels significantly lower than prior surges, especially as compared to earlier periods in the pandemic when similar wastewater levels of SARS-CoV-2 DNA had been measured in the county's four major sewer sheds. *Ibid.* Death rates decreased further during August and early September 2022. *Ibid.* The number of confirmed and suspected patients hospitalized with COVID peaked at 295 on August 2, 2022 and then declined further from August 2022 through September 2022. *Ibid.* This pattern indicated that the current wave of COVID had subsided and, in the context of current levels of vaccination, had caused milder disease with lesser harm to individuals and lesser strain on health care systems than prior similar waves. *Ibid.*

These patterns indicated that the COVID wave had subsided and, in the context of high vaccination levels, had caused milder disease with less harm to individuals and less strain on health care systems than prior similar waves. *Ibid.* This pattern of decreased virulence, as well ready access to approved inpatient and outpatient treatment options and an authorized updated vaccine,

allowed the County to modify the vaccination policy to permit employees exempt from the vaccination requirement to work in high-risk roles on a going forward basis, but still, with certain safeguards. Smith Decl., ¶ 23, Ex. 6; Rudman Decl. at 0015-16

D. THE COUNTY EXEMPTED EMPLOYEES WITH A MEDICAL OR RELIGIOUS BASIS FROM THE VACCINATION REQUIREMENT.

The County's employee vaccination policy provided for "limited exceptions," permitting County employees to request an exemption if they (1) had "a contraindication"—*i.e.*, a "condition that makes vaccination inadvisable"—"recognized by the U.S. Centers for Disease Control and Prevention (CDC) or by the vaccine's manufacturer to ***every*** approved COVID-19 vaccine"; (2) had a disability and required a reasonable accommodation; or (3) objected to COVID-19 vaccination "based on their sincerely-held religious belief, practice, or observance." Smith Decl. ¶¶ 10-11, Ex. 2-3. Employees who requested an exemption could also request a reasonable accommodation. *Id.*

E. THE COUNTY PROVIDED ACCOMMODATIONS TO EXEMPT EMPLOYEES BASED ON THE INFECTION RISK POSED BY THEIR WORK.

Consistent with the employee vaccination policy and the known risk of infection in congregate facilities, each County department designated positions occupied by employees who sought exemptions based on the level of COVID-19 transmission risk as lower-, intermediate-, or high-risk. Smith Decl. ¶¶ 10-22, Ex. 2-5; Anderson Decl. at 0011. Among the factors considered were the nature of contact an employee had with others; the risk posed to vulnerable populations served by the County; the risk posed to employees and others at serious risk of illness and death from COVID-19; the risk of COVID-19 outbreaks in a given setting; and the essential job functions the employee must perform with or without accommodations. *Ibid.* The County also identified facilities that presented a high infection risk, severe illness, and death given the vulnerability of the populations served in the facilities (*e.g.*, individuals in hospitals) and the nature of the facilities (*e.g.*, congregate settings with a large quantity of people in close proximity). *Ibid.; see also* Anderson Decl. at 0009. Such high-risk facilities included the County's healthcare and jail facilities, shelters, and other congregate settings. *See id.; see also* Rudman Decl. Ex. 2 at 0074-77.

The County identified reasonable accommodations for exempt employees in each type of

low, intermediate, and high-risk role. Smith Decl. ¶¶ 10-22, Ex. 2-5; Anderson Decl. at 0011. Unvaccinated lower-risk workers—like an office worker who has minimal to no contact with the public—could be reasonably accommodated by wearing a surgical mask and receiving a COVID-19 test each week. *Ibid.* Unvaccinated high-risk workers, on the other hand—like a nurse providing in-person patient care, or an employee in a County jail—could not be safely accommodated in their positions because of their unvaccinated status and the significant health and safety risks to themselves and others posed by their position, duties, and work environment. *Ibid.*; *see also* Anderson Decl. at 0009, 011-12. The County reasonably accommodated those employees with paid and unpaid leave and helped them seek reassignment or transfer to a suitable lower- or intermediate-risk position, if one were available. *Ibid*.

Class representatives Maria Ramirez and Elizabeth Baluyut are employed by the County as registered nurses. Anderson Decl. at 0018, 0270-285, 0286-319; *see also id.* at 723-782. Ramirez works in an acute medical care unit with patients who are significantly ill and extremely vulnerable to acquiring other infections. *Ibid*. Baluyut works with pregnant women. *Ibid*. Their duties do not permit these nurses to work remotely or in non-clinical facilities. *Ibid.* Both were granted religious exemptions to the vaccination policy. *Ibid.*

Class representative Tom Davis and Plaintiffs' declarants Daniel Kacir and Jorge Alvarez were employed by the County in the Fleet and Facilities Department ("FAF"). Anderson Decl. at 009, 222-225, 244-268, 792-825. Davis and Alvarez were granted a religious exemption by the County, while Kacir was granted a medical/disability exemption and never applied for a religious exemption. *Ibid*. The work required by their positions could not be limited to lower-risk facilities given the service demand of the 24/7 high-risk facilities, the lack of staffing to meet such demand, and equity considerations with non-exempt workers concerning high-risk work assignments. *Ibid*.

Declarant Melanie Nguyen was employed by the County as a Pretrial Services Officer. Anderson Decl. at 0320-343. Nguyen worked in the County jails in close contact with inmates. *Ibid*. Nguyen declined to pursue alternative lower risk positions with the County. *Ibid.*

Declarants Brandon Lim, James Luna, and Adam Valle worked for the Sheriff's Office in roles that required their presence in the jails. Anderson Decl. at 0545-585. All three were notified

that they could not work in their high-risk roles. *Ibid.* All three refused alternative lower risk positions. Anderson Decl. at 0546-547; ECF 141-8 at 143, 148, 188.

F. THE COUNTY ACCOMMODATED EXEMPT EMPLOYEES IN HIGH-RISK ROLES WITH PAID AND UNPAID LEAVE, AND JOB TRANSFER ASSISTANCE.

The County departments notified unvaccinated employees with approved exemptions performing high-risk roles that the County could not safely accommodate them in those roles. Smith Decl. ¶¶ 15-17, Ex. 3; Anderson Decl. at 0012-13. The County also informed all such exempt employees that it would place them on administrative leave while their departments worked with them to determine whether reassignments or transfers within their departments were available. *Ibid.* These employees were allowed to apply their accrued, paid leave banks to this period of leave. *Ibid.*

The County also informed all exempt employees in high-risk roles that they could seek lower- and intermediate-risk roles in County departments outside of their own, and that the County's Equal Opportunity Division (EOD) and Employee Services Agency (ESA) would assist them in this process. *Ibid.* Those who had received disability or medical exemptions were informed they may be entitled to priority consideration for vacant positions, consistent with the requirements of the Americans with Disabilities Act and the Fair Employment and Housing Act. *Ibid.* The County also set up a team within ESA specifically to work with exempt employees to help identify and recommend vacant positions within the County for which the employee could consider applying. *Ibid.* Then, after entry of this Court's June 30, 2022 preliminary injunction ("P.I.") order, the County instructed the teams assisting exempt employees with job placements not to give priority consideration to any exempt employee. *Ibid.*

Ultimately, the County provided job placement or modification accommodations to 20 exempt employees. *See* ECF 141-7 at 14-18. Of those 20 employees, four had medical/disability exemptions, while sixteen had religious exemptions. *See ibid.* No religious exempt employee lost out on a job, placement assistance, or any other opportunity due to preferential treatment given to other exempt employees. ECF 101 ¶ 10.

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G. THE MAJORITY OF CLASS MEMBERS REFUSED TO PURSUE TRANSFERS.

Ramirez, upon being invited to apply for lower-risk positions, stated that "[a]pplying for open vacancies [within the County] is not an adequate accommodation." Anderson Decl. at 0273-274. Ramirez then ***never*** applied for any alternative lower-risk positions within her department or the County, despite the County's efforts to assist her in doing so. *Id* at 0273-274, 534-535. Other class members have admitted they refused to consider alternate positions proposed by their departments during interactive meetings. *See, e.g.*, ECF 141-8 at 143, 148, 188; Anderson Decl. at 0322, 0545-546. Of the 463 class members, 309 ***never*** applied for any alternative lower-risk positions within the County, despite the County's efforts to assist them. Quon Decl. ¶¶ 3-5, Ex. 1.

III. ARGUMENT

A. PLAINTIFFS' CONSTITUTIONAL CLAIMS FAIL.

Plaintiffs assert four constitutional claims—for alleged violations of the Free Exercise Clause, the Equal Protection Clause, and the Establishment Clause, all via 42 U.S.C. § 1983. ECF No. 55 at 10, 12-14. Plaintiffs cannot meet the requirements of *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) in pursuit of their constitutional claims against the County. Further, the County's vaccination policy did not violate Plaintiffs' constitutional rights because it did not burden Plaintiffs' religious practice and was neutral, generally applicable, and easily satisfies both rational basis review and strict scrutiny.

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

A "municipality can be found liable under § 1983 only where . . . there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989) (citing *Monell*, 436 U.S. 658). Liability attaches "where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 (1986); *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1075 (9th Cir. 2016). Policymakers cannot be said to have deliberately chosen an action unless there was a pattern of similar violations putting the policymaker on notice of the violations. *Connick v. Thompson*, 563 U.S. 51, 62 (2011).

Here, Plaintiffs cannot meet the requirements of *Monell* because they do not and cannot establish that the County had a policy to (1) permit violations of the vaccination mandate by allowing unvaccinated employees to work in high-risk roles or (2) mis- designate jobs with a low risk of infection as high-risk. The County cannot be vicariously liable under section 1983 for alleged sporadic failures to follow or properly implement the policy by its employees. *Bd. of the Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997). The record evidence demonstrates that the few incidents on which Plaintiffs rely—with respect to alleged unvaccinated employees working and alleged risk-tier mis- designations—do not raise a material issue of fact that the County had policies to violate the vaccination mandate, to designate employees with low risk of infection in the high-risk-tier, or to disfavor employees with religious exemptions. *See* II.E., *supra*.

Plaintiffs also fail to meet the requirements of *Monell* with respect to the County providing "preferential consideration" in job transfers to employees with medical/disability exemptions. It is undisputed that state and federal law *required* the County to provide such "preferential consideration." Smith Decl. ¶ 16, Ex. 3 at 1836-1837; Anderson Decl. at 0013, 0128-129. The County had no authority to disregard those laws, or to deem them unconstitutional. *See Lockyer v. City and Cnty. of San Francisco*, 33 Cal.4th 1055, 1094, 1119 (2004) (citing to the California Constitution, article III, section 3.5, the California Supreme Court stated that it has long been "clear under California law that a local executive official d[oes] not have the authority to determine that a statute is unconstitutional or to refuse to enforce a statute in the absence of a judicial determination that the statute is unconstitutional."). The County therefore made no *Monell* policy decision on that issue. *See Pembaur*, 475 U.S. at 484 (1986) (stating liability requires "deliberate choice . . . among various alternatives"); *Est. of Brooks ex rel. Brooks v. United States*, 197 F.3d 1245, 1248 (9th Cir. 1999) (finding no *Monell* liability where "[t]he County acted pursuant to a state statute," and "was without authority" to not follow the law); *Humphries v. Los Angeles Cnty.*, No. SACV03697JVSMANX, 2012 WL 13014632, at *3 (C.D. Cal. Oct. 17, 2012) ("A municipality cannot be held liable under *Monell* merely for enforcing a state law. . . . It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the 'policy' of enforcing state law.") (citations

omitted); *Correction Officers Benev. Ass'n of Rockland Cnty. v. Kralik*, No. 04 CIV. 2199 PGG, 2011 WL 1236135, at *8 (S.D.N.Y. Mar. 30, 2011) ("[W]here a state law mandates enforcement by local authorities, a municipality's decision to honor this obligation is not a conscious choice. As a result, the municipality cannot be liable under *Monell*") (citation omitted). Plaintiffs' claims therefore fail.

2. The vaccination policy was neutral and generally applicable.

The Free Exercise Clause provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. Const. amend. I. Showing a free exercise violation "hinges on showing that the challenged law is either not neutral or not generally applicable." *Am. Family Ass'n, Inc. v. City & Cnty. of S.F.*, 277 F.3d 1114, 1123 (9th Cir. 2002) (citing *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–34 (1993) ("*Lukumi*")). "A law lacks facial neutrality if it refers to a religious practice without secular meaning discernable from the language or context." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1084 (9th Cir. 2015). A rule that is both neutral and generally applicable is subject only to rational basis review, which is satisfied where government action is "rationally related to a legitimate governmental purpose." *Id.* Otherwise, the rule must satisfy strict scrutiny. *Lukumi*, 508 U.S. at 546. Plaintiffs' equal protection claim rises or falls with their free exercise claim, since "the one is but another phrasing of the other." *Prince v. Mass.*, 321 U.S. 158, 170 (1944).

Here, as the Court previously found, the Policy was facially and operationally neutral because it applied to all County personnel and did not single out employees who declined vaccination on religious grounds. ECF No. 44 at 10. The Policy was also generally applicable because it did not "prohibit[] religious conduct while permitting secular conduct that undermines the government's asserted interest in a similar way." ECF No. 44 at 11 (quoting *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021)). The opposite is true: "the Mandate expressly accommodates employees with religious exemptions," by allowing them to seek an exemption. *Id.*

Plaintiffs contend that the Policy was not neutral and generally applicable, because it gave "unfettered discretion" to County department heads "to determine the risk level of an employee's job." Mot. at 19. But as the Court previously found, "[t]he sorting of exempt employees into three

risk tiers, based on criteria that do not include the basis for which the employee's exemption was obtained, neither 'refers to a religious practice without secular meaning discernable from the language or context,' *Stormans*, 794 F.3d at 1076, nor 'target[s] religious practices through careful legislative drafting' but discriminatory implementation, *id.*" ECF No. 44 at 16. ***Plaintiffs do not argue, and cite no evidence, that any employee's religious beliefs impacted the risk tier determination in any way.*** The risk tier system was instead used to determine whether specific job conditions placed an already exempt employee in a high, intermediate, or low-risk position regardless of which type of exemption the employee had received. Smith Decl. ¶¶ 13-14, Ex. 3 at 1836-37; Anderson Decl. at 0011-13.

Moreover, Plaintiffs are incorrect that the department heads exercised "unfettered discretion" without relying on "objective" criteria. County departments implemented guidance from the Public Health department to determine the level of COVID-19 transmission risk, based on objective factors such as the risk of COVID-19 outbreaks in the particular work setting. Smith Decl. ¶ 14; Anderson Decl. at 009, 11-13. The Health Order defined "Higher-Risk Settings" as "settings that involve working in shared air space or proximity to people who are at higher risk of severe illness, hospitalization, or death from COVID because of age or underlying medical condition, as well as congregate settings where outbreaks are likely to occur." Rudman Ex. 2 at 0087; Anderson Decl. at 0014. Employees whose position required them to work in congregate settings such as County hospitals, clinics, and jails could not do so unvaccinated regardless of their exemption type. *Ibid.* Tellingly, Plaintiffs only identify three asserted incidents where unvaccinated employees were allowed to work in a high-risk role—all of which benefited employees with religious exemptions. ECF 141-8 at 142-150, 187-189. In each case, the employee's position required that he work in a correctional facility. Anderson Decl. at 0223-225, 0245-246, 0254. Plaintiffs' proffered evidence also demonstrates that employees with the same job duties were designated at the same risk level regardless of exemption type. *See* ECF 141-2 (Davis); ECF 141-8 at pp. 134-136 (Kacir); Anderson Decl. at 0223-225 (Davis), 0245-246 0254 (Kacir).

Regardless, County department heads are not final policymakers under *Monell*, and individual risk tier determinations are not set forth in the Policy, so the County cannot be held liable

under § 1983 for alleged instances of risk tier mis designations. *See Mauck v. McKee*, No. 18-CV-04482-NC, 2019 WL 11585408, at *8 (N.D. Cal. Aug. 2, 2019) (finding County department heads were not final policymakers under *Monell*). The County policy was, quite simply, to accurately sort exempt employees into risk tiers, without regard to the basis for the exemption.

The cases cited by Plaintiffs do not support their contention that strict scrutiny is warranted—as the Court already found at the preliminary injunction phase. *See* ECF No. 44 at 12. In one, the university administering the vaccine mandate "evaluate[d] whether to grant religious exemptions 'on an individual basis.'" *Dahl v. Bd. of Tr. of W. Mich. Univ.*, 15 F.4th 728, 733 (6th Cir. 2021). Here, the County granted all religious exemptions that articulated a claimed religious belief. Anderson Decl. at 0012. Plaintiffs do not contend otherwise. *Fulton* is also inapposite, since there, exemptions from a city rule prohibiting foster care providers from failing to serve potential foster parents based on sexual orientation were available "at the sole discretion" of a single city official. 593 U.S. at 535. Neither *Dahl* nor *Fulton* have anything to do with a religion-neutral risk tier.

3. The vaccination policy satisfies rational basis review.

Because the Policy is neutral and generally applicable, rational-basis review applies. *Stormans*, 794 F.3d at 1084. "Under rational basis review, [courts] must uphold the rules if they are rationally related to a legitimate government purpose." *Id.* The Policy easily satisfies that standard.

For over a century, courts have consistently affirmed that governments may rationally require vaccination in the face of epidemics threatening public health and safety. *See Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (communities have "the right to protect [themselves] against an epidemic of disease which threatens the safety of [their] members"); *Bauer v. Summey*, 568 F.Supp.3d 573, 593–94 (D.S.C. 2021) (collecting cases). In the face of the COVID pandemic, courts have reaffirmed that communities continue to have the right to protect themselves through vaccination mandates. *See, e.g., Roman Catholic Diocese of Brooklyn, supra,*, 592 U.S. at 18 (2020) ("[s]temming the spread of COVID is unquestionably a compelling interest").

Courts have also repeatedly recognized that requiring government employees to be vaccinated is rationally related to the government's legitimate interest in protecting public health. *See, e.g., We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 290 (2nd Cir. 2021) ("*WTP*") ("Faced

with an especially contagious variant of the virus in the midst of a pandemic that has now claimed the lives of 750,000 in the United States and some 55,000 in New York, the State decided as an emergency measure to require vaccination for all employees at healthcare facilities who might become infected and expose others to the virus, to the extent they can be safely vaccinated."); *Does 1–6 v. Mills*, 16 F.4th 20, 31-32 (1st Cir. 2021) ("*Mills II*") (upholding vaccine requirement for healthcare workers); *Wise v. Inslee*, No. 2:21-CV-0288-TOR, 2021 WL 4951571, at *3 (finding vaccination requirement satisfied rational basis review in part because increasing vaccination rates among employees "who come into regular contact with vulnerable populations," including "those who must interact with public employees—like prisoners," is a "rational action" to stem COVID-19); *see also Seaplane Adventures, LLC v. Cnty. of Marin*, 71 F.4th 724, 726, 730–31 (9th Cir. 2023) ("When actions are undertaken during a time of great uncertainty with a novel disease, 'medical uncertainties afford little basis for judicial responses in absolute terms' and that legislative authority 'must be especially broad' in 'areas fraught with medical and scientific uncertainties.'").

This Court should likewise uphold the Policy on rational basis review. There can be no dispute that COVID-19 presented an extraordinary public health emergency, which killed millions, including thousands of County residents. *See* II.A., *supra*. By its terms, the Policy was based on data "demonstrat[ing] that federally approved COVID-19 vaccines are safe and are the most effective method of preventing people from getting and spreading the virus that causes COVID-19 and from getting seriously ill, ending up hospitalized, or dying, even if they do get COVID-19." Smith Decl. ¶ 9, Ex. 2. Plaintiffs do not dispute that the Policy satisfies rational basis review.

4. The vaccination policy also satisfies strict scrutiny.

Even if the Court concludes that the Policy must survive strict scrutiny, it would. The strict scrutiny analysis looks to whether a policy is "justified by a compelling interest" and "narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531–32. Because the Supreme Court has held that "[s]temming the spread of COVID-19 is unquestionably a compelling interest," *Cuomo*, 592 U.S. at 18, the sole question is whether the Policy is narrowly tailored, or "drawn in narrow terms to accomplish" that interest, *Lukumi*, 508 U.S. at 546. A decision finding that Maine's vaccination mandate satisfied both rational-basis review and strict scrutiny persuasively illustrates why such

policies are narrowly tailored to address COVID-19 risk. *Does 1–6 v. Mills*, 566 F.Supp.3d 34 (D. Me. 2021) ("*Mills I*"), *aff'd*, 16 F.4th 20 (1st Cir. 2021). In that case, the court noted in its narrow-tailoring analysis that the "gold standard to prevent and stop the spread of communicable diseases, including COVID-19, is vaccination." *Id.* at 53. It also rejected the plaintiffs' purported scientific challenge to the vaccination requirement, given their failure to address scientific evidence that "vaccinated individuals are less likely to become infected" and thus "less likely to transmit the disease." *Id.* at 53-54. Finally, the court noted that "PPE and regular testing are not sufficient to achieve Maine's compelling interest in stopping the spread of COVID-19." *Id* at 54.

The record in this case likewise establishes that the Policy is narrowly tailored. The County acted on the guidance of public health authorities' conclusion that vaccination is critical—and in fact, the most effective means—of reducing COVID-19 transmission and the resulting risk of severe illness, hospitalization, and death. *See* II.B-F, *supra*. In contrast, less restrictive measures like masking, testing, and the use of personal protective equipment, while important, are not as effective absent vaccination. Rudman Decl. Ex. 2 at 0024-0027; Reingold Decl. ¶ 30-37, 54-57; Anderson Decl. at 0019, 0150-155.

The Policy's narrow tailoring is further confirmed by the fact it provides for religious exemptions. *See Mills I*, *supra*, 566 F. Supp. 3d, at 53-55 (upholding under strict scrutiny vaccination policy providing only for medical exemptions). Because "the Constitution does not require" such exemptions, *Whitlow v. Cal.*, 203 F. Supp. 3d 1079, 1084 (S.D. Cal. 2016), the Policy goes ***beyond*** what the law requires and is ***more*** narrowly tailored than that upheld in *Mills*, because they permit religious objectors to seek an exemption.

The County instituted the Policy to protect County personnel, the community members with whom County personnel interact, and all residents in vulnerable settings like healthcare and correctional facilities. Smith Decl. ¶¶ 5-22, Exs. 2-5; Anderson Decl. at 003-21. As the court in *Mills II* held, exempting only those with medical contraindications (*i.e.*, those whom vaccines might harm) from Maine's policy did "not undermine Maine's asserted interests"—*i.e.*, protecting the health of its workers, the vulnerable populations served by its workers, and "all Mainers"—"***let alone in a manner similar to the way an exemption for religious objectors would***." 16 F.4th at 30–

31 (emphasis added); *see also WTP*, 17 F.4th at 286 (concluding "that the medical exemption is not as harmful to the legitimate governmental interests purportedly justifying the [vaccine] Rule as a religious exemption would be") (cleaned up). The narrow tailoring of the Policy is further confirmed by its limited duration. The County ended the Policy, which lasted only 13 months, as soon as conditions improved enough to do so. Smith Decl. ¶ 23, Ex. 6; *see also* Rudman Decl. Ex. 2 at 0015-17, 0206-219.

Plaintiffs argue that the Policy does not satisfy strict scrutiny because "the primary benefit of vaccination was to the vaccine recipient." Mot. at 22. Plaintiffs fail to explain why this assertion renders the Policy constitutionally infirm. Moreover, it is undisputed that vaccines are the *most* effective means of reducing severe illness, hospitalization, death, and ***transmission*** of COVID-19. *See* II.B, *supra*. It is undisputed that less restrictive measures like masking, testing, and the use of personal protective equipment, while important, are not as effective as vaccination for the protection of others. Rudman Decl. Ex. 2 at 0024-0027; Reingold Decl. ¶¶ 30-37, 54-57; Anderson Decl. at 0019. Plaintiffs' sole expert Duriseti admits that vaccination is effective at reducing the spread of COVID-19. Anderson Decl. at 860-864, 872-873, 906-935. He offers no opinion that any alternative measure was more effective than vaccination. *See* ECF 141-7 at 72-123.

Plaintiffs note that the County's Policy "was more restrictive than State guidance and the policies of nearby counties." Mot. at 22-23. This argument ignores the fact that the State guidance set a floor, not a ceiling, for COVID-19 vaccination requirements. This argument also ignores the undisputed fact that the County's policies were more effective at saving lives than less restrictive options. Rudman Decl. Ex. 2 at 0015-16. And Plaintiffs offer no countervailing data—i.e., any comparison of infection statistics and local conditions between the County and other counties—to support their argument.

Plaintiffs question why the County "aggressively imposed" masking and testing for the first 18 months of the pandemic (Jan. 2020 to July 2021) but required vaccination during the Class period (Aug. 2021 to Sept. 2022). Mot. at 23. The simple answer is that COVID-19 vaccines were not available at all until December 2020 and were not available in the quantity needed to implement a vaccination policy for 20,000+ employees until months later, as anyone who lived through the

pandemic will remember. Rudman Decl. Ex. 2 at 0012; Reingold Decl. ¶¶ 30, 32; Smith Decl. ¶ 8. Plaintiffs assert that the County did not "give any consideration to the effects of natural immunity." Mot. at 23. The assertion is false. Rudman Decl. Ex. 2 at ¶¶ 0032-35.

Plaintiffs further argue that the "Risk Tier System does not survive strict scrutiny because the risk tier classifications were arbitrary and irrational." Mot. at 23. But, as explained above, the County department heads relied on Public Health guidance and objective criteria in making risk tier classifications. *See* II.E-F, *supra*. Moreover, in each example cited by Plaintiffs, the employee's position required that he or she work in a health care or correctional facility. *See* II.E, *supra*. Plaintiffs submit no expert opinion that *any* County employee was misclassified. Plaintiffs' sole expert (Duriseti) did not opine on that issue. *See* ECF 141-7 at 72-123. Regardless, three examples of allegedly misclassified employees cannot establish that the County's Policy, which applied to 20,000+ County employees, was constitutionally infirm.

Finally, Plaintiffs contend that "[a]t a minimum, the Court should grant summary judgment for the period of March 7, 2022, to September 27, 2022," because as of March 7, 2022, the County was no longer required by the Health Order to mandate vaccination. Mot. at 23. Plaintiffs ignore the fact that the March 7, 2022 Health Order strongly recommended that vaccination should continue. Smith Decl. ¶¶ 19-22; Rudman Decl. Ex. 2 at 0027-30; see also Anderson Decl. at 0156-157. The Health Order left it up to individual organizations in Santa Clara County (such as the County administration itself) to determine if their employees should be required to vaccinate. The County had well-considered, scientifically sound bases for continuing to require its employees to vaccinate between March 7, 2022 and September 27, 2022. *Ibid.* Notably, Plaintiffs have submitted no expert opinion on this point. They rely solely on attorney argument which is insufficient. *See, e.g., Dhillon v. Princess Cruise Lines, Ltd.*, No. 22-55215, 2023 WL 5696529, at *1 (9th Cir. Sept. 5, 2023) (affirming grant of summary judgment, finding that "specialized knowledge about the nature of COVID-19 infections, symptoms, and transmissibility" was required); *Wilson v. Ponce*, No. CV204451MWFMRWX, 2022 WL 2155119, at *7 (C.D. Cal. Feb. 2, 2022) (granting summary judgment, finding that what conditions create a risk of "COVID-19 infection is not a matter of common knowledge to be decided by a layperson").

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

As the Court previously found, the County's "general set of accommodations available to exempt employees" was both facially and operationally neutral. ECF No. 44 at 16. The County's masking and testing accommodations for lower- and intermediate-risk employees applied regardless of the basis for the exemption (medical/disability or religious). The County's accommodations of paid and unpaid leave for high-risk employees also applied regardless of the basis for the exemption. Smith Decl. ¶¶ 10-17, Ex. 2-5; Anderson Decl. at 0013.

While the Court found problematic—and enjoined—the County giving preferential consideration in job transfers to employees with medical or disability exemptions, it has been undisputed throughout this case that the County did so to comply with state and federal law. Smith Decl. ¶¶ 16, Ex. 3; Anderson Decl. at 0013. The County cannot be held monetarily liable for complying with the law, for several reasons.

First, as explained above, because the County had no discretion to disregard the law, it therefore cannot be held liable for a § 1983 violation under *Monell*.

Second, it is undisputed that the County acted in good faith by complying with state and federal law. Plaintiffs have not argued, and have no evidence, that the County gave disabled employees "preferential consideration" to discriminate against the Class. The Ninth Circuit has held that a local government official who acts in good faith reliance on existing law cannot be held monetarily liable. *See, e.g., Allen v. Santa Clara County Correctional Peace Officers Association*, 38 F.4th 68 (2022) (holding that municipalities are entitled to assert good faith defense, and cannot be held liable under Section 1983, due to good faith reliance on a "presumptively valid state law" later determined to be unconstitutional). That is exactly the case here. *See, e.g.*, *Lockyer*, 33 Cal. 4th at 1094 (local officials cannot "refuse to enforce a statute" absent court ruling).

Third, the majority of class members (309 of 463) *never* applied for lower-risk jobs. *See* II.G, *supra*. Thus, most class members cannot establish injury based on an alleged discrimination for job transfer assistance that they never sought. The class is therefore overbroad and not ascertainable with respect to this issue. *Heredia v. Eddie Bauer LLC*, No. 16-CV-06236-BLF, 2020 WL 127489, at *4–5 (N.D. Cal. Jan. 10, 2020) (finding class not ascertainable, and common

question not resolvable "in one stroke," where allegedly unlawful policy was not applied to the majority of class members). Accordingly, if the Court declines to grant summary judgment for the County, the Court should decertify the class on this issue.

6. Plaintiffs' Establishment Clause claim fails.

The Court should grant summary judgment to Defendants on Plaintiffs' Establishment Clause claim. A "government act is consistent with the Establishment Clause if it: (1) has a secular purpose; (2) has a principal or primary effect that neither advances nor disapproves of religion; and (3) does not foster excessive governmental entanglement with religion." *Vasquez v. Los Angeles ("LA") Cnty.*, 487 F.3d 1246, 1255 (9th Cir. 2007). "Even statements exhibiting some hostility to religion do not violate the Establishment Clause if the government conduct at issue has a secular purpose, does not have as its principal or primary effect inhibiting religion and does not foster excessive government entanglement with religion." *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 985–86 (9th Cir. 2011).

Here, the County's Policies were indisputably adopted for the secular purpose of combating the COVID-19 emergency. The Policies neither advance nor disapprove of religion, and do not foster excessive government entanglement with religion. Plaintiffs offer no evidence to the contrary. Notably, Plaintiffs' class representatives admitted at deposition that they have not experienced hostility to their religion while at the County. Anderson Decl. at 0742, 0796, 0808-810. Therefore, Plaintiffs cannot even point to statements hostile to religion to support their Establishment Clause claim, much less establish a triable issue.

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

To assert a failure-to-accommodate claim under Title VII, an employee must first make a prima facie case that: "(1) he had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement." *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006). Once such a showing has been made, the burden shifts to the employer "to show that it initiated good faith efforts to accommodate reasonably the employee's religious practices or that it

could not reasonably accommodate the employee without undue hardship." *Id.* (cleaned up). Both generally and in the specific context of workplace vaccine requirements, courts have reiterated that "Title VII does not require covered entities to provide the accommodation that Plaintiffs ***prefer***—in this case, a blanket religious accommodation allowing them to continue working at their current positions unvaccinated." *WTP*, 17 F.4th at 292 (emphasis added).

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

Plaintiffs assert that the County took adverse action because "involuntary unpaid administrative leave was the only accommodation offered to Plaintiffs and Class members." Mot. at 13. That assertion is patently false. The County provided exempt employees with masking and testing for low- and intermediate-risk roles, and paid leave, unpaid leave, and job transfers or modifications for exempt employees in high-risk roles. Smith Decl. ¶¶ 11-23, Exs. 2-5. Plaintiffs' own exhibits plainly show that dozens of class members went on paid leave, and it is undisputed that others received job transfers or modifications. *See* ECF 141-7 at 15-181; ECF 141-8 at 198-218 ("Leave Type" column). Importantly, 205 Class members did not need *any* form of accommodation because they *never went on leave*. Anderson Decl. at 1044-1045. And 238 Class members—more than half the Class—*never went on leave* due to the Policy. *Ibid*. Plaintiffs therefore have failed to show "in one stroke" that the County took adverse action against the Class. *Heredia*, 2020 WL 127489, at *4–5. Their motion should be denied on that basis alone. *See Sharpe v. Am. Tel. & Tel. Co.*, 66 F.3d 1045, 1050 (9th Cir. 1995) ("[W]here the employer has already reasonably accommodated the employee's religious needs, . . .[t]he employer need not further show that each of the employee's alternative accommodations would result in undue hardship") (quoting *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68–69 (1986)).

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

As part of its robust effort to accommodate exempt employees, each department identified reassignments and transfers within the department during the interactive process *and* the County dedicated a team of human resources specialists with the Employee Services Agency (ESA) to work with all exempt employees seeking a job transfer within the County. Smith Decl. ¶ 16, Ex. 3 at

1836-37; ECF 141-8 at 143, 148, 188; Anderson Decl. at 273-274, 322-323, 0546-547, 582, 639. ESA is the human resources department in the County tasked with identifying all open positions in the County, publishing such positions, and processing all hiring. Anderson Decl. at 0130. County witnesses testified extensively about their efforts to assist Class members, and related communications. *See, e.g.*, Anderson Decl. at 0222-343, 545-580, 586-639, 642-666, 674-712. Plaintiffs' blanket assertion that the County "failed to engage in the interactive process with any Class member," because the County allegedly "did not entertain any other form of accommodations" besides unpaid leave, is therefore patently false and conclusory. Mot. at 16.

For the 309 class members who failed to pursue transfer or reassignments within the County, there is a threshold shortcoming in their failure to accommodate claims because they failed to engage with the County's attempts to accommodate in good faith. *See, e.g.*, ECF 141-8 at 143, 148, 188; Anderson Decl. at 0273-274, 0322, 534-535, 0545-546; Quon Decl. ¶¶ 3-5, Ex. 1. "Title VII is premised on bilateral cooperation," and employees have a "concomitant duty to cooperate in reaching an accommodation under Title VII"—*i.e.*, "make a good faith attempt to satisfy [her] needs ***through means offered by the employer***" once the employer "takes the initial step" toward accommodations. *E.E.O.C. v. AutoNation USA Corp.*, 52 F. App'x 327, 329 (9th Cir. 2002) (quoting *Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 777 (9th Cir. 1986) and *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1440–42 (9th Cir. 1993)) (original emphasis) (cleaned up); *see also Nadaf–Rahrov v. Neiman Marcus Grp., Inc.* 166 Cal.App.4th 952, 984-85 (2008) (explaining equivalent requirement under FEHA, stating that "both sides must communicate directly, exchange essential information and neither side can delay or obstruct the process").

Here, these 309 class members' Title VII and FEHA claims are barred by their failure to engage with the County's attempts to accommodate in good faith, because after they were advised they could apply for alternate, lower-risk positions in the County, they never attempted to do so.

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

For those class members who did seek re-assignment or transfer, Plaintiffs claim they were treated differently than medically exempt employees. To assert such a disparate-treatment claim

under Title VII, an employee must show that "(1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." *Berry*, 447 F.3d at 656. The burden then shifts to the employer to "offer a legitimate nondiscriminatory reason" for the challenged conduct. *Id.*; *Guz v. Bechtel Nat. Inc.*, 24 Cal.4th 317, 354 (2000) (same standards apply to FEHA claims).

Plaintiffs' disparate treatment claim fails both because they cannot show they are similarly situated to employees with medical/disability exemptions, and because the County had legitimate, non-discriminatory reasons for providing the asserted "preference" to medical/disability exempt employees. Smith Decl. ¶¶ 16, Ex. 3; Anderson Decl. at 0013, 0285. Federal and state disability laws required the County to provide an "employee with a disability [with] *preferential consideration* of reassignment to a vacant position over other applicants and existing employees." 2 C.C.R. § 11068 (d)(5) (emphasis added); *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1086 (9th Cir. 2004) (noting Americans with Disabilities Act and its implementing regulations both "contemplate[]" and "require[]" "preferential" concessions for disabled patrons); *Zamora v. Sec. Indus. Specialists, Inc.*, 71 Cal. App. 5th 1, 42 (2021) ("[T]he FEHA entitles a disabled employee to 'preferential consideration' in reassignment of existing employees."); *accord* Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act, 2002 WL 31994335, at *23 (Question and Answer No. 29). The County followed the reasonable accommodation process mandated by federal and state law disabled employees. Smith Decl., Ex. 3 at 1836-37; Anderson Decl. at 593-598, 610-635, 639-641, 785-786. Despite there being no similar federal or state "preference" requirement for non-disabled employees, the County also assigned human resource professionals to provide transfer and reassignment assistance to employees with religious exemptions. Anderson Decl. at 647-668, 673, 679-722, 787-788.

The County cannot be held liable for complying with state and federal disability law in good faith—even if that law is later deemed unconstitutional. As explained above, County officials *must* comply with state and federal law and cannot disregard such law by unilaterally deeming the laws

unconstitutional. *See Lockyer*, 33 Cal.4th at 1094. California state law explicitly immunizes municipalities from liability for following a law that is later found unconstitutional. *See id.* at 1097 (stating that Government Code section 820.6 "explicitly" provides such immunity). The Ninth Circuit has recognized that an employer is not liable under Title VII "when accommodating an employee's religious beliefs would require [it] to violate federal or state law." *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830 (9th Cir. 1999). Federal law likewise holds that a local government official who acts in good faith reliance on existing law cannot be held liable. *See, e.g.*, *Alaniz v. California Processors, Inc.*, 785 F.2d 1412, 1416 (9th Cir. 1986) ("Prior to a judicial determination such as evidenced by this opinion, an employer can hardly be faulted for following the explicit provisions of applicable state law.") (citation omitted); *Allen*, 38 F.4th 68 (holding municipality can assert good faith defense).

The County sought to comply with California state disability law and the ADA, which expressly required the County to give disabled individuals "preferential consideration" in job transfers. Smith Decl. ¶ 16, Ex. 3 at 1836-37; Anderson Decl. at 0013. Plaintiffs have adduced no evidence suggesting that the County implemented the process for assisting exempt employees other than to comply with state and federal law. The Court has already stated that it is "sympathetic to the County's commitment to fulfilling its statutory and ethical obligations to treat its disabled employees fairly." ECF 44 at 17. The County cannot be liable for compliance with the law and this fact alone disposes of Plaintiffs' Title VII and FEHA challenges to the County's alleged preferential treatment to individuals with medical/disability exemptions.

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

An employer suffers an undue hardship when requested accommodations impose a substantial burden in the context of an employer's business. *Groff v. DeJoy*, 600 U.S. 447,468 (2023). Compromising the health and safety of vulnerable populations under the County's care is unquestionably an undue hardship. In *Together Employees v. Mass General Brigham Inc.*, various hospital employees at Mass General Brigham (MGB)—including a physician, an electrician, a radiation technologist, and two registered nurses—sought to enjoin MGB from enforcing its COVID-19 vaccination policy, based in part on a Title VII failure-to-accommodate theory, and to

remain in their positions while unvaccinated. 573 F. Supp. 3d 412, 441 (D. Mass. 2021), *aff'd*, 32 F.4th 82 (1st Cir. 2022). The court found it would be an undue hardship for the hospital to "permit[] the named plaintiffs to continue to work at MGB without being vaccinated," as that would "materially increase the risk of spreading the disease and undermine public trust and confidence in the safety of its facilities." *Id.*

Courts analyzing similar COVID-19 vaccination requirements have reached the same conclusion. *See, e.g.*, *Mills II*, 16 F.4th at 36 (finding exemption from state's COVID-19 vaccination requirement for healthcare workers would impose undue hardship); *Barrington v. United Airlines, Inc.*, 566 F.Supp.3d 1102, 1109 (D. Colo. 2021) (rejecting Title VII failure-to-accommodate claim in part because fact that "other [vaccinated] employees may be placed at greater risk of contracting COVID-19 if they are required to come in contact with unvaccinated workers" was undue hardship). The same is true of courts considering workplace influenza vaccination requirements, which implicate similar interests. *See Robinson v. Children's Hosp. Boston*, No. 14-10262-DJC, 2016 WL 1337255, at *10 (D. Mass. Apr. 5, 2016) (accommodating plaintiff's "desire to be vaccine-free in her role" would be undue hardship "because it would have imposed more than a de minimis cost"); *Aukamp-Corcoran v. Lancaster Gen. Hosp.*, No. 19-5734, 2022 WL 507479, at *7 (E.D. Pa. Feb. 18, 2022) (finding plaintiffs' requested exemption from hospital's flu vaccination policy on religious grounds would cause hospital undue burden).

Here, it is undisputed that vaccines are the most effective means of preventing serious illness, death, and transmission of COVID-19—more effective than masking, testing, and social distancing. Rudman Decl. Ex. 2 at 0024-0027; Reingold Decl. ¶ 30-37, 54-57; Anderson Decl. at 0019. Public health experts agree that medical facilities and jails present a particular risk of COVID-19 outbreaks among vulnerable populations. Rudman Decl. Ex. 2 at 0026-27, 0074-77; Reingold Decl. ¶¶ 25-29; Anderson Decl. at 0008-9. Significantly, Plaintiffs' sole expert did not address alternatives such as masking and testing in his expert report, and Plaintiffs did not rely on any expert opinion on this issue in support of their summary judgment motion. *See* ECF 141-7 at 72-123.

Plaintiffs also argue that the County's high vaccination rates render the Policy unjustified. Mot. at 15. This argument is unsupported by any competent evidence, such as an expert opinion,

that could create a material factual dispute and refuted by evidence that the County's medical facilities and jails housed at risk populations. Anderson Decl. at 0008-9; Rudman Decl. Ex. 2 at 0026-27. Plainly, attorney argument cannot establish what rate of vaccination by County residents is sufficiently high to obviate the need for hospital nurses, correctional officers, and other high-risk County employees to vaccinate. *E.g.*, *Dhillon, supra*, 2023 WL 5696529, at *1. Plaintiffs' argument that "[t]he County's failure to accommodate is particularly unreasonable from the period of March 7, 2022 to September 27, 2022," Mot. at 16, is similarly based solely on attorney argument unsupported by any expert opinion and refuted by record evidence. *See* Smith Decl. ¶¶ 19-23, Ex. 5.

Accordingly, it is undisputed that allowing Plaintiffs to continue work in their high-risk roles without being vaccinated would impose an undue hardship on the County, its employees, and the vulnerable populations they serve. *See*, *e.g.*, Smith Decl. ¶¶ 21-22; Anderson Decl. ¶ 2, Ex. A at 0019-21. Title VII does not require the County to compromise the health and safety of these vulnerable residents by forcing the County to allow hundreds of unvaccinated staff members to continue working with them.

C. PLAINTIFF'S CLAIMS AGAINST THE COUNTY OFFICIAL DEFENDANTS FAIL.

The County officials sued by Plaintiffs solely in their official capacities, including the County's Health Officer Sara Cody, former County Counsel James Williams, and former County Executive Dr. Jeffrey Smith, are redundant and unnecessary parties and should be dismissed from the action. All of Plaintiffs' claims and the associated requests for relief concern County orders and policies and are appropriately directed to the County. The County is the only necessary party. "When both a municipal officer and a local government entity are named, and the officer is named only in an official capacity, the court may dismiss the officer as a redundant defendant." *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cty. Sheriff Dep't*, 533 F.3d 780, 799 (9th Cir. 2008). Thus, "it is no longer necessary or proper to name as a defendant a particular local government officer acting in official capacity." *Luke v. Abbott*, 954 F.Supp. 202, 203 (C.D. Cal. 1997).

The Court should therefore dismiss the County Officials from the action. See Fed. R. Civ. Proc. 21 ("On motion or on its own, the court may at any time, on just terms, add or drop a party.").

/ /

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Respectfully submitted,

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