CONNIE L. MICHAELS, Bar No. 128065
cmichaels@littler.com
DONNA LEUNG, Bar No. 305955
DLeung@littler.com
LITTLER MENDELSON P.C.
2049 Century Park East, 5th Floor
Los Angeles, California 90067.3107
Telephone: 310.553.0308
Fax No.: 310.553.5583

ROBERT W. CONTI, Bar No. 137307
rconti@littler.com
LITTLER MENDELSON P.C.
18565 Jamboree Road, Suite 800
Irvine, California 92612
Telephone: 949.705.3000
Fax No.: 949.724.1201

Attorneys for Defendants
LOS ANGELES UNIFIED SCHOOL DISTRICT, AUSTIN BEUTNER and LINDA DEL CUETO

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA EDUCATORS FOR MEDICAL FREEDOM, ARTEMIO QUINTERO, MIGUEL SOTELO, JANET PHYLLIS BREGMAN, CEDRIC JOHNSON, MISANON (SONI) LLOYD, HEATHER POUNDSTONE, and THERESA D. SANFORD,

Plaintiffs,

v.

THE LOS ANGELES UNIFIED SCHOOL DISTRICT, AUSTIN BEUTNER, in his official capacity as Superintendent of the Los Angeles Unified School District, and LINDA DEL CUETO, in her official capacity as the Director of Human Resources for the Los Angeles Unified School District,

Defendants.

Case No. 2:21-cv-02388

DEFENDANTS AUSTIN BEUTNER AND LINDA DEL CUETO'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS ALL CAUSES OF ACTION IN PLAINTIFFS' FIRST AMENDED COMPLAINT [DOC. NO. 33]

Date: August 2, 2021
Time: 1:30 p.m.
Dept: Courtroom 7D

Complaint Filed:	March 17, 2021
FAC Filed:	May 24, 2021
Trial Date:	June 14, 2022

Complaint Filed:	March 17, 2021
Trial Date:	TBD

TABLE OF CONTENTS

LITTLER MENDELSON P.C.
2049 Century Park East
5th Floor
Los Angeles, CA 90067 310
310 553 0308

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

TABLE OF AUTHORITIES

Page(s)

Statutes

I. INTRODUCTION

Trying to salvage the claims contested by Defendants Austin Beutner ("Beutner")[1] and Linda Del Cueto ("Del Cueto") (collectively "Defendants"), Plaintiffs make several assertions containing factual and legal distortions in their Opposition (Doc. 37) ("Oppo.") to their Motion to Dismiss All Causes of Action in Plaintiffs' First Amended Complaint (Doc. 33) ("Motion"). This Reply Memorandum highlights the most glaring flaws in Plaintiffs' arguments. As a preliminary matter, Plaintiffs' Opposition relies on an erroneous assumption – that Defendants have enacted a mandatory COVID-19 vaccination policy. Yet, as clearly demonstrated in the Motion, no such mandatory policy exists. For the Court to even entertain the First Amended Complaint filed by Plaintiffs, such a condition precedent must be met. Without it, Plaintiffs' claims are not ripe for adjudication.

Nevertheless, for the sake of argument and for the reasons set forth below, Plaintiffs' claims must also be dismissed for the following reasons:

(1) Insufficient facts are pled to state a claim against Defendants in their individual capacities;

(2) Plaintiffs' re-casting of the first cause of action for "Federal Preemption" as a claim for equitable relief does not justify Plaintiffs' request for prospective relief;

(3) Plaintiffs do not adequately allege a violation of a constitutional right under 28 U.S.C. § 1983 to support the second cause of action for Substantive Due Process; and

(4) Plaintiffs' inadequate factual allegations do not support the third cause of action for Violation of California's Protection of Human Subjects in Medical Experimentation Act.

---

[1] Defendants' counsel is now also appearing on behalf of Mr. Beutner individually. Further, it should be noted that Mr. Beutner is no longer the superintendent of the Los Angeles Unified School District ("District").

LITTLER MENDELSON P.C.
2049 Century Park East
5th Floor
Los Angeles, CA 90067.3107
310.553.0308

Accordingly, Plaintiffs' First Amended Complaint should be dismissed with prejudice.

II. LEGAL ARGUMENT

A. Plaintiffs' Ripeness Analysis Is Flawed And They Cannot Meet The Requisite Elements For Declaratory Or Injunctive Relief

Dismissal is unequivocally supported by the legal authorities cited and the facts alleged. Plaintiffs concede that to obtain declaratory or injunctive relief, a case or controversy must be definite and concrete – "not hypothetical or abstract." (Oppo. 3:5.) *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000). Yet here, in stark contrast, Plaintiffs' claims are all abstract and hypothetical.

Not only do Plaintiffs fail to support their assertion that Defendants implemented a mandatory COVID-19 policy, they acknowledge just the opposite. While conveniently omitted as one of the 108 attachments to the FAC, they nevertheless acknowledge that Defendant Del Cueto circulated a March 18, 2021 memorandum emphasizing that the vaccine is *optional* for District employees. (First Amended Complaint ("FAC"), ¶86.)[2] Plaintiffs plead no allegation regarding the District's vaccine policy thereafter.

Further, there are no allegations that Defendants disciplined Plaintiffs – or any of the District employees – due to their unvaccinated status or views about vaccines.

Accordingly, there is no actual controversy. Plaintiffs' concern that the District *may* mandate the vaccine in the future and that they *may* be disciplined is as uncertain as the progression of the COVID-19 pandemic itself, and too speculative to justify the relief sought.

/ / /

/ / /

---

[2] That memorandum was attached as **Exhibit H** by Plaintiffs to their Memorandum Of Points And Authorities In Support Of Motion For Preliminary Injunction (Doc. 13-9). It explicitly says, "vaccines are not mandatory at this time." In accordance with Federal Rule of Evidence 201, Defendants request the Court take judicial notice of Doc. 13-9.

1. Plaintiffs Do Not Satisfy The Constitutional Ripeness Inquiry

Plaintiffs address the ripeness inquiry as two-fold: (1) constitutional ripeness; and (2) prudential ripeness. Their claims fail under both inquiries.

Under the constitutional ripeness inquiry, Plaintiffs focus on the fact that Defendants refused to stipulate on the record that a mandate will not be instated while vaccines are in the emergency use status, arguing that this position means that a real and immediate threat of a future injury remains. The cases cited by Plaintiffs are, however, distinguishable.

In *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), constitutional ripeness was satisfied because the Court found appellees would sustain immediate injury from the operation of the disputed power plants and that such injury would be redressed by the relief requested. The power plants were *already* in construction, and the plaintiffs there provided sufficient evidence to show there would be *immediate* adverse effects upon the citizens nearby. *See Duke Power Co., supra*, at 60. Here, Defendants have not instituted a mandatory vaccine policy – in fact, Defendant Cueto's March 18, 2021 memorandum clarified the vaccination policy is voluntary. Nor is there an allegation that Defendants engaged in any personnel decisions based upon an employee's refusal to become vaccinated. Thus, *Duke Power Co.* is wholly distinguishable and inapplicable.

In *Oklevueha Native American Church of Hawaii, Inc. v. Holder,* 676 F.3d 829 (9th. Cir. 2012), the constitutional ripeness requirement was met because plaintiffs were able to establish a "genuine threat of imminent prosecution." *See Oklevueha, supra,* at 835. Specifically, plaintiffs admitted that they had violated the Controlled Substances Act (CSA) – the law in question – by purchasing and consuming marijuana, and planned to continue to do so. Violation of the law had *already* triggered seizure of plaintiffs' marijuana, and the court emphasized it did not matter whether the government would prosecute the plaintiffs for violation of the CSA. The circumstances were sufficient to end the ripeness inquiry. Contrary to *Oklevueha*, Plaintiffs' refusal to get vaccinated by

an emergency vaccine does *not* trigger any law, policy, or mandate. Defendants are not mandating the COVID-19 vaccine on District employees. There is no legal requirement addressing this issue, as observed by the EEOC and noted in Defendants' Motion. Because Plaintiffs' conduct will not trigger the violation of a policy or law, there is no "genuine threat of imminent prosecution" here that would remotely satisfy the constitutional ripeness inquiry.

Plaintiffs also suggest Defendants' March 18, 2021 memorandum was in response to the lawsuit. Not so. They did not send the lawsuit to Defendants until days later. (Docs. 10-12.) In support of their erroneous position, Plaintiffs cite to cases to show the ripeness inquiry is still satisfied despite a change in Defendants' activity. **Significantly, however, there was no change in Defendants' activity – and no voluntary cessation of a practice challenged by Plaintiffs.** Therefore, the authority cited by Plaintiffs are inapposite to the facts here because: (1) there was never a vaccination mandate; and (2) the alleged "change in activity" was merely a clarification of Defendant Del Cueto's original March 4, 2021 memorandum. (*See* FAC, Exhibit G.) Nothing in the March 4, 2021 memorandum reflects a mandatory vaccination policy. Rather, it describes the process for employees to follow if they wanted to get vaccinated through the District.

In their Opposition, Plaintiffs concede the general rule is that the repeal, amendment, or expiration of legislation will render an action challenging the legislation moot, unless there is a reasonable expectation that the legislative body will reenact the challenged provision or one similar to it, citing to *Bd. of Trustees of the Glazing Health & Welfare Trust v. Chambers*, 941 F.3d 1195 (9th Cir. 2019). This case and proposition, however, once again supports dismissal of this action. Assuming for the sake of argument that the March 18th memorandum amended and/or repealed the March 4th memorandum, then applying the general rule, Defendants acted in good faith in repealing or amending the challenged provision. "The party challenging the presumption of mootness need not show that the enactment of the same or similar

legislation is a 'virtual certainty,' only that there is a reasonable expectation of reenactment." *Bd. of Trustees of the Glazing Health & Welfare Trust, supra*, at 1199. A determination that such a reasonable expectation exists must be founded in the record, rather than on speculation alone. *Id.* Here, Plaintiffs cannot show, and fail to allege that, Defendants will instate or "reinstate" the alleged mandate. Their position is based purely on speculation, and the Court should disregard Plaintiffs' argument in this regard.

2. Plaintiffs Also Fail to Satisfy The Prudential Ripeness Inquiry

Plaintiffs vaguely argue "hardship" and the need for this Court to make a judicial decision in support of the prudential inquiry analysis, but this is not persuasive. Plaintiffs fail to specify what hardship requires immediate court attention now. *See, e.g., Municipality of Anchorage v. United States,* 980 F.2d 1320, 1326 (9th Cir.1992) ("[T]his hardship is insufficient to overcome the uncertainty of the legal issue presented in the case in its current posture."); *see Oklevueha, supra*, at 838-839 ("[M]ere potential for future injury does not overcome the interest of the judiciary in delaying review." (internal quotation marks omitted).) Here, the situation is even more remote – Plaintiffs' mere speculation of disciplinary action should they refuse to become vaccinated. As prudential ripeness is not met, the pursuit of the FAC is a waste of judicial resources. As such, Defendants respectfully submit that the Court dismiss Plaintiffs' claims.

3. The Declaratory Relief Claim Is Also Not Ripe For Adjudication As There Exists No Actual Controversy

Plaintiffs misrepresent the facts. They mistakenly allege they will lose their job if they do not receive the COVID-19 vaccine under the District's mandate. There is no evidence of this. The March 18, 2021 memorandum makes it clear that the vaccination policy is voluntary. This evidence is *not* outside the FAC, as Plaintiffs referenced the clarifying memorandum in ¶ 86 of the FAC.

Thus, declaratory relief is inappropriate for the same reasons injunctive relief must be denied. Plaintiffs' contention that Defendants will reinstate the mandate is based purely on speculation. There is no controversy that requires adjudication at this juncture. Accordingly, there is no basis for a declaratory judgment ruling, and the Court should dismiss Plaintiffs' declaratory relief claim.

B. Plaintiffs Fail To Explain How Their Amended Complaint Asserts Individual Capacity Claims Against Defendants

Plaintiffs contend that their claims are subject to the notice pleading standard of Federal Rule of Civil Procedure Rule 8, but they fail to meet that standard. (Oppo. 8:21.) They fall short of articulating plausible claims against Defendants individually, and their allegations are insufficient to place Defendants on notice of the alleged claims and damages. Both the FAC and Opposition are devoid of any specific facts regarding actions allegedly taken by Defendants.

Plaintiffs attempt to reconcile their shortcomings by pointing to ¶¶ 76-85 of the FAC. First, ¶¶ 76-85 reference a non-existent COVID-19 vaccination policy, as clarified by the March 18, 2021 memorandum referenced in ¶ 86 – but purposefully excluded as an exhibit by Plaintiffs. Therefore, any allegations based upon this alleged policy are built upon an untrue foundation. Second and importantly, the allegations in ¶¶ 76-85, as reiterated by Plaintiffs, provide nothing more than "'naked assertion[s]] devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 678 (citing *Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544, 557). Accordingly, the facts as pled are insufficient to state a claim against Defendants in their individual capacities and the FAC must be dismissed against Defendants on this basis.

C. Plaintiffs' First Claim For Relief Under Federal Preemption Must Be Dismissed

1. The Contention That This Court Can Grant Prospective Relief Based On Federal Preemption Is Misguided

Plaintiffs seek a declaration under 21 U.S.C. §360bbb-3(e)(1)(A) that this provision voids Defendants' alleged mandate on the basis that it is invalid. More

specifically, Plaintiffs seek a declaration prohibiting Defendants from forcing Plaintiffs to undergo vaccinations so long as the vaccines remain investigational – *i.e.*, experimental. (Oppo. 13:2-4.) According to Plaintiffs, "[s]o long as the Mandate is preempted, nothing prevents the Court from granting such relief." (Oppo. 13:4-5.) This is incorrect. There is no reason for this Court to invest its time and resources to determine whether such relief is warranted because no mandate exists.

Assuming for the sake of argument, however, that such a mandate exists, Plaintiffs' arguments are still without merit. 21 U.S.C. § 360bbb-3 is a codified provision of the FDCA. *See generally* 21 U.S.C. §§ 301-399i. As conceded by Plaintiffs, the FDCA, however, provides *no private right of action*: "[A]ll such proceedings for the enforcement, or to restrain violations of [the FDCA] shall be by and in the name of the United States." 21 U.S.C. § 337(a). (Oppo. 11:14-20.) Under this authority, Plaintiffs have no standing to sue Defendants for an alleged violation of the FDCA, including under 21 U.S.C. § 360bbb-3. Plaintiffs' true goal is to privately enforce alleged violations of the FDCA, yet no such private right of action exists. 21 U.S.C. § 337(a).

Nor can Plaintiffs attempt to create a right that otherwise does not exist by couching the claim as one for equitable relief, as they have done here. The Federal Declaratory Judgment Act "only authorizes a federal court to 'declare the rights and other legal relations of any interested party seeking such declaration.'" *See* 28 U.S.C. § 2201(a). The Federal Declaratory Judgment Act "enlarged the range of remedies available in the federal courts" but "did *not create a new right to seek those remedies*." *Skelly Oil Co. v. Phillips Petrol. Co.*, 339 U.S. 667, 671 (1950) (emphasis added).

Not only is federal jurisdiction lacking under 21 U.S.C. § 360bbb-3, the Declaratory Judgment Act is also procedural[3] and does not create an independent

---

[3] *Skelly Oil Co. v. Phillips Petrol. Co.*, 339 U.S. 667, 671 (1950) (citing *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937)).

private right of action. Accordingly, Plaintiffs' first claim for Federal Preemption, couched as a claim for equitable relief, must be dismissed as a matter of law.

2. The Alleged Mandate Is Not Preempted

Plaintiffs have further misconstrued 21 U.S.C. § 360bbb-3(e)(1)(A). The plain text of § 360bbb-3(e)(1)(A) clearly confers certain powers and responsibilities to the Secretary of Health and Human Services – not an employer – in an emergency. § 360bbb-3(e)(1)(A) provides:

> With respect to the emergency use of an unapproved produced, the **Secretary,**[4] to the extent practicable given the applicable circumstances described in subsection (b)(1), shall, for a person who carries out any activity for which the authorization is issued, establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health, including the following....

(21 U.S.C. § 360bbb-3(e)(1)(A) (emphasis added).)

Plaintiffs rely upon the provisions related to "Conditions of Authorization," and specifically "Required Conditions" to be established *by the Secretary of Health and Human Services* when issuing an Emergency Use Authorization. (Oppo. 14:1-10.) While those conditions include "appropriate conditions designed to ensure that individuals to whom the product is administered are informed . . . of the option to accept or refuse administration of the product," (21 U.S.C. § 360bbb-3(e)(1)(A)), the statute does *not* confer a private opportunity to sue the government, an employer, or a worker. The statute also does not place any conditions on an employer, nor does it seek to regulate an employer's right to require COVID-19 vaccinations as a condition of employment.

Moreover, the reliance on a district court case from another circuit to support their preemption argument is also misguided. Plaintiffs assert the alleged mandate is

[4] *See* 21 U.S.C. § 321(d) (The term "Secretary" means the Secretary of Health and Human Services.)

preempted and that law in this area was made "clear" by *Doe v. Rumsfeld*, 297 F. Supp. 2d 119 (D.D.C 2003). (Oppo. 17:7-8.) However, *Doe v. Rumsfeld* involved the involuntary vaccination of American troops against the inhalation of anthrax. Military vaccination requirements are covered by an inapplicable statute,[5] and the facts of *Doe v. Rumsfeld* are plainly discernible from the circumstances in this case. Unlike here, the D.C. district court determined plaintiffs would suffer a harm that is concrete and imminent – not conjectural or hypothetical – as a result of the mass inoculation program. *Doe v. Rumsfeld, supra* at 21-22 ("Because all six plaintiffs have been ordered to appear for the inoculation, and three of the six have already begun the series with more inoculations to follow, all plaintiffs have established that they will imminently suffer a harm that is actual, concrete, and inflicted at the hands of defendants unless defendants are required to conform to 10 U.S.C. § 1107.) Indeed, as Defendants have not instituted an involuntary vaccination program or forced any of the Plaintiffs to get the COVID-19 vaccine, this Court must ignore *Rumsfeld*.

For these reasons, Plaintiffs' claim that 21 U.S.C. § 360bbb-3 preempts the alleged mandate necessarily fails.[6]

D. Plaintiffs' Second Claim Fails To Sufficiently Allege A Violation Of A Constitutional Right Under 42 U.S.C. § 1983

To be clear, Defendants are not conducting any medical research or experiments on Plaintiffs. Plaintiffs inaccurately equate the alleged mandate to a "human experiment" because no currently-available vaccine has been fully approved by the Food and Drug Administration. (Oppo. 23:16-18.) Plaintiffs are not participants in a human trial. They are teachers and staff members. Defendants have not conducted any clinical trials on Plaintiffs, nor do Plaintiffs allege facts to suggest this is their intent.

---

[5] See 10 U.S.C. § 1107

[6] While Plaintiffs contend neither the CDC nor the EEOC has responsibility for the licensure of medical products, surely Plaintiffs would agree that these federal agencies are entitled to provide guidance on this issue – especially since no federal authority actually preempts the alleged mandate. Plaintiffs fail to provide any support or basis to claim otherwise.

Defendants are not forcing Plaintiffs to "choose between their livelihoods and pensions and accepting administration of a medical product." (Oppo. 21:27-22:1.) That is a complete distortion of the facts. Plaintiffs' desire to be free from coerced administration of an experimental medicine is, therefore, irrelevant to this analysis and inapplicable under these circumstances.

Further, while Plaintiffs contend *Jacobson v. Massachusetts,* 197 U.S. 11 (1905) is inapplicable and predates the Court's tiered scrutiny analysis (Oppo. 20:25–21:1), the fact of the matter is that *Jacobson* has not been overruled, is still binding law, and is, therefore, instructive under these circumstances. Significantly, and ignored by Plaintiffs, the *Jacobson* court explained that the "liberty secured by the Constitution of the United States does not import an absolute right in each person to be at all times, and in all circumstances wholly freed from restraint." *See Jacobson v. Massachusetts, supra*, at 26. Rather, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* In describing a state's police power to combat an epidemic, the *Jacobson* Court explained:

> [I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id. at 29.

Ultimately, *Jacobson* cannot be ignored, and Plaintiffs cannot cite to any authority that overrules its foundational holding. Instead, Plaintiffs attempt to distinguish the recent authority in the case of *Jennifer Bridges, et al. v. The Methodist Hospital D/B/A The Methodist Hospital System*, No. 4:21-cv-01774, 2021 WL 2399994 (S.D. Tex. June 12, 2021), on the basis that Houston Methodist Hospital is a private employer. Their analysis fails for two reasons: (1) Houston Methodist Hospital enacted the mandatory vaccination policy and made personnel decisions based on facts that are inconsequential here as Defendants have not mandated a vaccination policy or made

any disciplinary decisions based on the same; and (2) the *Bridges* court did not expressly distinguish between private and public employers in its ruling. Failing to understand the confines to what Plaintiffs characterize as the right to bodily integrity, Plaintiffs' Section 1983 claim necessarily fails to adequately allege a violation of a constitutional right.

E. Plaintiffs Cannot Sustain A Claim Under California's Medical Experimentation Act

Plaintiffs are unable to overcome their failure to allege facts sufficient to support their third cause of action for the alleged violation of the Protection of Human Subjects in Medical Experimentation Act ("Medical Experimentation Act"). Plaintiffs' reliance on *Daum v. SpineCare Medical Group, Inc.*, 52 Cal.App.4th 1285 (1997) is of no consequence, and Plaintiffs' reading of the case inaccurate. The appellate court in *Daum* did not conclude that the defendant violated the Medical Experimentation Act by failing to obtain the patient's informed consent to the surgical insertion of a device which remained investigational, as asserted by Plaintiffs. (Oppo. 24:3-7.) Rather, the appellate court found all the elements of the negligence *per se* doctrine were sufficiently established, and the trial court erred in refusing the plaintiff's request for the proper jury instruction, BAJI No. 3.45. *Daum v. SpineCare Medical Group, Inc., supra* at 1312. Providing a jury instruction on negligence *per se* is hardly the same as the Court's finding of negligence *per se*.

The fact remains Plaintiffs are unable to establish a statutory right under which they may seek prospective relief against being forced to comply with an alleged mandatory vaccine policy. Accordingly, the Court should also dismiss Plaintiffs' state law claim under the Medical Experimentation Act.

III. CONCLUSION

For the reasons set forth herein and in Defendants' Motion, Plaintiffs have failed to establish subject matter jurisdiction over their claims and have also failed state a claim upon which relief can be granted. Accordingly, Defendants respectfully request

that this Court grant Defendant's Motion to Dismiss All Causes of Action in Plaintiffs' First Amended Complaint in its entirety without leave to amend.

Dated: July 19, 2021

LITTLER MENDELSON P.C.

/s/ Donna Leung
Connie L. Michaels
Donna Leung
Robert W. Conti
Attorneys for Defendants
LOS ANGELES UNIFIED SCHOOL DISTRICT, AUSTIN BEUTNER and LINDA DEL CUETO

4829-3732-5810.1 / 050758-1050