No. 25-___

IN THE

Supreme Court of the United States

HEALTH FREEDOM DEFENSE FUND INC., *et al.*,

Petitioners,

v.

ALBERTO CARVALHO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court's opinion in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), limit a court's review of government mandated medical treatments to the highly deferential rational basis review or does *Jacobson* require heightened scrutiny based on a balancing test, as the Court held in *Cruzan v. Director of Missouri Department of Health*, 497 U.S. 261 (1990)?

2. If, as the Ninth Circuit held, *Jacobson* limits courts to rational basis review, should it be overruled or limited to its specific facts because it is inconsistent with modern constitutional scrutiny, including this Court's opinions in *Cruzan* and *Sell v. United States*, 539 U.S. 166 (2003), which explicitly recognized a person's fundamental interest in rejecting unwanted medical treatments?

LIST OF ALL PARTIES

The petitioners are Health Freedom Defense Fund, Inc. ("HFDF"), a Wyoming non-profit corporation, and Sandra Garcia, Hovhannes Saponghian, Norma Brambila, and California Educators for Medical Freedom. The respondents are Alberto Carvalho, Ileana Davolos, George McKenna, Monica Garcia, Scott Schmerelson, Nick Melvoin, Jackie Goldberg, Kelly Gonez, and Tanya Ortiz Franklin, all sued in their official capacities as executives or board members of the Los Angeles Unified School District.

CORPORATE DISCLOSURE STATEMENT

Petitioners have no information to disclose under Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals which affirmed an order granting judgment on the pleadings for Respondents.

OPINIONS BELOW

The opinion of the Ninth Circuit's en banc panel was reported at 148 F.4th 1020 (9th Cir. 2025), and is included in its original form in Appendix ("App.") A. The Ninth Circuit's panel opinion was reported at 104 F.4th 715 (2024), and is included in its original form in App. B. The district court's opinion was not published but is included in App. C.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fourteenth Amendment provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Fifth Amendment, as incorporated against the States by the Fourteenth Amendment, provides, in relevant part: "No person shall … be deprived of life, liberty, or property, without due process of law."

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254. The Ninth Circuit issued its en banc opinion on July 31, 2025. The Court extended Petitioners' deadline to file this petition to December 28, 2025.

INTRODUCTION

This petition poses one of the most important constitutional questions the Court can consider: whether the Court should reconsider or clarify one of its prior decisions.

It is an important duty. And it is not one the Court takes lightly. The doctrine of *stare decisis* requires fidelity to past precedents. "But as the Court has reiterated time and time again, adherence to precedent is not 'an inexorable command.'" *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 262 (2022) (quoting *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015)). And it "is at its weakest when we interpret the Constitution …." *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (quotations omitted).

So here. This case presents a burning question of federal law that has not been, but should be, answered by this Court; namely, are there any meaningful limits on a government's ability to impose medical mandates in the name of public health? During the most recent pandemic, courts treated this Court's 1905 opinion in *Jacobson* as a blank check that allows governments to issue mandates of every sort (even closing supposedly "non-essential" businesses) with such intrusions typically subject only to "rational basis" review, a measure of constitutional review that one scholar has described as "no test at all" because it operates "on the basis of what the legislature 'could have thought,' without regard to what the legislature's actual purpose was or whether that purpose or any other legitimate purpose is actually served by the legislation." Jeffrey D. Jackson, *Classical Rational Basis and the Right To Be Free of Arbitrary Legislation*, 14 Geo. J.L. & Pub. Pol y 493, 494 (2016).

This overly broad reading of *Jacobson* is inconsistent with pre-pandemic interpretations of *Jacobson*, including *Cruzan*, which described *Jacobson* as a case in which "the Court *balanced* an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in *preventing* disease." *Cruzan*, 497 U.S. at 278 (emphasis added). Moreover, *Jacobson* did not use the term "rational basis" review. Nor did it dwell on what the City of Cambridge *might* have been thinking when enacting the smallpox vaccine mandate that Mr. Jacobson challenged. Instead, the courts in *Jacobson* relied on evidence that the City put forth about the benefits of the smallpox mandate under the circumstances and then they balanced that evidence of a public health benefit to the intrusion on Jacobson's interest in bodily autonomy.

As the dissenting Ninth Circuit judges observed, *Jacobson's* holding should be limited to a shot that prevents the spread of disease. After all, that is how the law defines a vaccine. See 26 U.S.C. § 4132(a)(2) ("The term 'vaccine' means any substance designed to be administered to a human being for the prevention of 1 or more diseases."). Thus, a shot that does not prevent disease, which only reduces the symptoms of disease, should not be controlled by the vaccine-related decision in *Jacobson*. It should be treated as a medical treatment and, under *Cruzan*, subject to heightened scrutiny, based on the submission of evidence, not on a "rational basis" test that is no test at all, and which allows judges to speculate about what the government thought.

This is not a new right. The Court has long recognized "that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." *Missouri v. McNeely*,

569 U.S. 141, 159 (2013). In *Cruzan*, the Court made clear that a person has a liberty interest in refusing unwanted medicine. *Cruzan*, 497 U.S. at 278. In doing so, it implicitly rejected the logic of cases like *Buck v. Bell*, 274 U.S. 200 (1927), in which the Court upheld the forced sterilization of a young woman and in which Justice Oliver Wendell Holmes famously wrote: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough." *Id.* at 207 (citing *Jacobson*).

Decisions like that faded after World War II. Compulsory vaccination laws were largely relegated to public elementary schools and, even then, families could decline the shots for philosophical, religious or medical reasons. Educated autonomy became the norm. That changed during the most recent pandemic. That is unfortunate. And while most governments backed away from the mandates after a few years—LAUSD tried to moot this case by rescinding its policy twice, including immediately after a disastrous appellate argument—they did not change their positions. They insist that the government's police power trumps personal autonomy during an emergency. And they insist that *Jacobson* precludes people from presenting evidence in court to challenge the government's emergency actions.

The Ninth Circuit agreed. The en banc panel refused to consider the tension between *Jacobson* and *Cruzan* and other medical treatment-based autonomy cases. It said only this Court can reconcile *Jacobson* and *Cruzan*. The Court should grant review and do that. That is the only way to square *Jacobson* with modern constitutional scrutiny and ensure that this outdated decision does not continue to imperil the lives and

livelihoods of people like Petitioners, who just wanted to make their own health decisions, free of pressure from the government and their employer.

Time is of the essence. The Ninth Circuit's flawed analysis in the en banc opinion is already affecting other cases. For example, in *Curtis v. Inslee*, 154 F.4th 678, 692 (9th Cir. 2025), a Ninth Circuit panel held that "*Jacobson* and *Carvalho foreclose* Employees' substantive due process claim regarding the purported "right to refuse an investigational drug without penalty or pressure."" (Emphasis added.) In a published opinion, it affirmed the dismissal of a substantive due process claim that, like this case, specifically alleged that the COVID-19 shots were not vaccines because they did not prevent the spread of disease. And it treated *Jacobson* as a bedrock principle of constitutional law whose logic and result cannot be questioned.

Forced medication is a gross violation of the most basic and fundamental of human rights. Thus, medical mandates of all sorts should be abhorrent to a free and just society. At minimum, people in a free society should be allowed to walk into a courtroom and hold such mandates to constitutional scrutiny, with at least some presentation of evidence required to justify the intrusion. It is time for this Court to make that clear and to set forth a clear standard that balances the private and public interests at stake.

STATEMENT OF THE CASE

The underlying case challenged LAUSD's adoption of a policy that required its employees to get the COVID-19 shot to keep their jobs. LAUSD issued the initial policy on March 4, 2021. ECF No. 65 at 2 That prompted Petitioners to file a lawsuit challenging the policy (the "First LAUSD Case"). *Id.*[1]

Under pressure from that lawsuit, LAUSD diluted, and effectively rescinded, the policy by giving employees who did not want to get the shot the option of regular testing. ECF No. 65 at 2-3. LAUSD then convinced the district court to dismiss the First LAUSD Case based on the ripeness doctrine. *Id.* Seventeen days later, after representing to the court that it did not intend to implement a COVID injection mandate, LAUSD adopted a new policy that required all employees to get the COVID-19 shot to keep their jobs. ECF No. 65 at 3. The new policy eliminated testing as an accommodation for those who did not wish to take the COVID shot (in fact, the policy required that even the "vaccinated" employees undergo regular COVID testing) and it implied that most requests for religious and medical accommodations would be denied. *Id.* at 40. That turned out to be true, as several of the Petitioners sought an accommodation to the mandate for religious and medical reasons but were told that the district would not accommodate them, period, and at least 500 people were eventually fired. *Id.* at 20-21.

[1] Since they were sued in their official capacities, the Petition refers to actions taken by Respondents as being taken by "LAUSD."

In response, Petitioners filed this case. The Second Amended Complaint alleged several claims. But the only ones still at issue were the first and second causes of action. The first alleged that LAUSD's new COVID policy violated its employees' fundamental right to privacy under the substantive component of the Due Process Clause. ECF No. 65 at 22-24. The complaint identified the relevant right as the right to bodily autonomy related to medical treatments and it invoked this Court's robust bodily integrity case law to support Petitioners' claim. *Id.* The complaint also alleged that the COVID-19 shots are not "vaccines" as federal law defines that term because they do not prevent people from becoming infected with the virus that causes COVID-19. The most the shots can do is reduce the severity of an infected person's symptoms (although even that is debated). Thus, the shots are medical treatments like medication and other therapeutics that people take when they are, or may become, sick. *Id.* at 13-17, 22-24.

The complaint highlighted some issues with the COVID-19 shots. For example, it cited evidence that people would have to get an endless stream of boosters to maintain the shot's efficacy, leading to a "regular cycle of vaccination and revaccination." ECF No. 65 at 19 (quotations omitted). It also cited evidence that people who took the COVID shots became sicker than people who did not take them. *Id.* at 16-20. And it discussed the significant, and growing, evidence of adverse reactions that people have reported in connection with the shots. *Id.* at 19-20. The individual plaintiffs cited these reasons, among others, for not wanting to take the COVID-19 shots. *Id.* at 20-21.

The district answered the second amended complaint on April 7, 2022. ECF No. 66. The parties agreed to a case management and discovery schedule that would have allowed trial to take place in March 2023. ECF No. 52. But, in late July 2022, the district changed its strategy and filed a motion for judgment on the pleadings. ECF No. 74. The district court granted the motion. App. C.

A three-judge Ninth Circuit panel reversed. App. B. It did so after LAUSD tried to moot the case by voting to rescind the challenged policy immediately after the appellate argument. Ninth Circuit ECF No. 49. But the Ninth Circuit then voted to take the case en banc and, after argument, the en banc panel issued its opinion on July 31, 2025. App. A. It rejected LAUSD's argument that the case was moot. *Id.* at 13a-17a. But it affirmed the district court's order of judgment on the pleadings because it believed that *Jacobson* requires that a challenge to a vaccine mandate be judged under rational basis review, which is not based on the presentation of evidence but on speculation about what the government might have been thinking, and because it believed that most (if not all) vaccine mandates survive that scrutiny under *Jacobson*. *Id.* at 18a-28a. Two judges dissented from that portion of the opinion. *Id.* at 34a-42a.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT MISCONSTRUED *JACOBSON* AND FAILED TO APPLY THE BALANCING TEST THAT *JACOBSON* AND *CRUZAN* REQUIRE

The Court should grant the petition because it involves an important question of federal law that only this Court has the authority to answer and because it is necessary to protect the fundamental liberty interests that generations of Americans fought to protect.

The Court may grant a writ of certiorari where "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Supreme Court Rule 10(c). That rule applies here, as the Ninth Circuit's en banc opinion rested entirely on a misunderstanding of this Court's precedents, including *Jacobson* and *Cruzan*. For example, the en banc opinion concluded that, under *Jacobson*, "the constitutionality of a vaccine mandate, like the Policy here, turns on what reasonable legislative and executive decisionmakers *could* have rationally concluded about whether a vaccine protects the public's health and safety, not whether a vaccine actually provides immunity to or prevents transmission of a disease. Whether a vaccine protects the public's health and safety is committed to policymakers, not a court or a jury." App. A at 22a. Thus, according to the Ninth Circuit, "*Jacobson* simply does not allow debate in the courts over whether a mandated vaccine prevents the spread of disease. *Jacobson* makes clear that it is up to the political branches, within the parameters of

rational basis review, to decide whether a vaccine effectively protects public health and safety." *Id.*; *see also id.* at 26a-27a (devoting just one paragraph of conclusory analysis to this question).

That misreads *Jacobson* and ignores the development of constitutional law during the past 120 years. Substantive due process is not a novel concept, but this Court began discussing it more explicitly only in the second half of the twentieth century. The second Justice Harlan explained this in 1960, stating that constitutional "'liberty' is not a series of isolated points" but "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

A majority adopted Justice Harlan's position four years later in *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992) (recognizing this). Justice Byron White concurred in *Griswold* but wrote separately to explain why. In doing so, he rejected the dissent's argument that "the Court is without authority to ascertain whether a challenged statute, or its application, has a permissible purpose and whether the manner of regulation bears a rational or justifying relationship to this purpose. A long line of cases makes very clear that this has not been the view of this Court." *Griswold*, 381 U.S. at 504 n.* (White, J., concurring). One of the cases Justice White cited for that proposition was *Jacobson*. Eight years later, Justice Douglas explained that privacy "rights, though

fundamental, are likewise subject to regulation on a showing of compelling state interest." *Roe v. Wade*, 410 U.S. 113 at 213 (1973). *Jacobson* was one of the cases he cited, and he distinguished it from *Roe* by noting the compelling state interest in *Jacobson*, which Justice Douglas defined as: "Vaccinations to *prevent* epidemics …." *Id.* at 215 (emphasis added).[2]

This trend continued during the latter part of the twentieth century. In fact, by 1990, the Court was describing *Jacobson* as a case in which "the Court *balanced* an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in *preventing* disease." *Cruzan*, 497 U.S. at 278 (emphasis added); *see also O'Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975) (Burger, C.J., concurring) (citing *Jacobson* when explaining that "a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease"). That was consistent with the en banc opinion in the *Washington v. Glucksberg*, 521 U.S. 702 (1997) right-to-die case, where the Ninth Circuit cited *Jacobson* to justify the use of a higher standard than rational basis review, saying: "The [Supreme] Court has been applying a balancing test in substantive due process cases at least since 1905, when in *Jacobson v. Massachusetts* … 'the Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease.'" *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 799 (9th Cir. 1996) (en banc) (quoting *Cruzan*, 497 U.S. at 278); *see also id.* at 804 (noting "the

[2] *Dobbs* "stated unequivocally that nothing in this opinion should be understood to cast doubt on precedents [like *Griswold* and other privacy cases] that do not concern abortion." *Dobbs*, 597 U.S. at 295.

Court's ninety-year-old practice of using a balancing test in liberty interest cases that raise important issues of the type before us").

The Ninth Circuit was not the only court to reach that conclusion. The Sixth Circuit also relied on *Jacobson* in finding that a competent adult has a constitutional right to refuse unwanted medical treatment." *Guertin v. State*, 912 F.3d 907, 920 (6th Cir. 2019). Others referred to *Jacobson* and *Cruzan* as involving a balancing test. *See, e.g., Williams v. DeLeon*, No. 115-CV-00543-SKOPC, 2018 WL 4352902, at *9 (E.D. Cal. Sept. 11, 2018) (describing *Jacobson* as case in which Supreme Court "balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease"); *Cavuoto v. Buchanan Cnty. Dep't of Soc. Servs.*, 605 S.E.2d 287, 288 (Va. Ct. App. 2004) (discussing competent adult's interest in refusing unwanted medical treatment and describing *Jacobson* as "balancing" case); *Boone v. Bozeman*, 217 F. Supp. 2d 938, 955-56 (E.D. Ark. 2002) (citing *Cruzan* for the proposition that, in this context, deciding "whether [an individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests" (quotations omitted)).

Likewise, in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008), a Ninth Circuit panel reversed an order dismissing a substantive due process claim brought by a female Air Force commander who alleged that she had been suspended from duty because she was a lesbian. The court applied something more than rational basis review, but something less than strict scrutiny, to that claim. It did so based on a forced-medication case, *Sell v. United States*, 539 U.S. 166, 178-80 (2003), in which this Court "recognized a

'significant' liberty interest ... and balanced that liberty interest against the 'legitimate' and 'important' state interest 'in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself and others.'" *Witt*, 527 F.3d at 818 (quoting *Sell*, 539 U.S. at 178); *see also Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) (deciding "whether respondent's constitutional rights [under Substantive Due Process Clause] have been violated must be determined by balancing his liberty interest against the relevant state interests"); *Mills v. Rogers*, 457 U.S. 291, 299 (1982) (noting that substantive part of due process analysis "involves a definition of that protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it").

Jacobson also recognized the possibility that government would overreach or act arbitrarily. *Jacobson*, 197 U.S. at 38. And it recognized the need for judicial intervention if, for example, a person could show "that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death." *Id.* In other words, contrary to the Ninth Circuit's opinion, a review of modern case law makes abundantly clear that *Jacobson* required heightened scrutiny of mandated medical treatments. It applied a balancing test in which it acknowledged the need to gather and present evidence under certain circumstances.

That was the part of *Jacobson* that this Court relied on in *Cruzan*. For more than 100 years, that was *Jacobson's* legacy. It was not until recently that courts reinterpreted *Jacobson* to reject challenges to compulsory health policies without any presentation of evidence. Even then, courts often took pains to

emphasize the narrowness of their rulings. For example, Second Circuit Judge James Oakes invoked *Jacobson* when considering a lawsuit brought by a kindergarten teacher accused of being incompetent. He explained: "Although compulsory vaccinations, *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905), compelled blood tests, *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), and rectal cavity searches, *Rivas v. United States*, 368 F.2d 703 (9th Cir.1966), *cert. denied*, 386 U.S. 945, 87 S.Ct. 980, 17 L.Ed.2d 875 (1967), have from time to time been upheld where there is clear necessity, procedural regularity, and little or no physical risk, ... 'in each case ... [the] government's burden was to provide *more than minimal justification* for its action." *Gargiul v. Tompkins*, 704 F.2d 661, 669-70 (2d Cir. 1983) (Oakes, J., concurring), *cert. granted, judgment vacated*, 465 U.S. 1016 (1984) (quoting L. Tribe, *American Constitutional Law* 914-15 (1978)) (emphasis added).

Applying typical rational basis review to a substantive due process claim grounded in a person's liberty interest in rejecting unwanted medical treatment conflicts with *Jacobson* and *Cruzan*. It does not force the government to provide more than minimal justification for its action. It does not require that the government justify anything at all. Rational basis review allows a judge "to hypothesize about potential motivations of the legislature, in order to find a legitimate government interest sufficient to justify the challenged provision." *Gill v. Off. Of Pers. Mgmt.*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010), aff'd sub nom. *Massachusetts v. U.S. Dep't of Health & Hum. Servs.*, 682 F.3d 1 (1st Cir. 2012). It requires the plaintiff to "negative every conceivable basis which might support [the policy], whether or not the basis has a foundation

in the record." *Heller v. Doe by Doe*, 509 U.S. 312, 320-321 (1993) (quotations omitted).

Rational basis review is the appropriate test to apply in an equal protection case that does not involve a suspect classification. *See United States v. Ayala-Bello*, 995 F.3d 710, 715 (9th Cir. 2021). And it may be equivalent to the level of scrutiny at one end of the due process balancing test. But it is not the right test to apply in a substantive due process case involving government action that interferes with an individual's fundamental interest in bodily autonomy because it does not allow for the balancing that *Jacobson* and *Cruzan* require to justify such intrusions. It does not allow for the gathering and presentation of evidence.

Put simply, *Jacobson* did not say that only the political branches can decide whether a particular shot would prevent infection. And *Jacobson* did not bar consideration of the surrounding circumstances in assessing the constitutionality of a compulsory health policy. Indeed, visitors to Cambridge could have opted out of the smallpox mandate in *Jacobson* by paying a small fine or by seeking an exemption, making any interference with individual freedom "avoidable and relatively modest." *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 24 (2020) (Gorsuch, J., concurring). The Ninth Circuit was wrong to suggest that it does.

II. ONLY THIS COURT CAN RECONCILE *JACOBSON* AND *CRUZAN* AND DECIDE WHETHER *JACOBSON* IS STILL GOOD LAW OR SHOULD BE OVERRULED

The Ninth Circuit erred in construing *Jacobson* to (1) apply rational basis review whenever a person challenges a mandatory vaccination policy and (2) to

uphold such a policy, on the pleadings, so long as the government cites public health in enacting it.

Not every error justifies review, of course. But this one comes from an en banc panel that disregarded its own prior interpretation of *Jacobson* from *Glucksberg*. It would not even consider Petitioners' arguments about how the substantive due process analysis has changed without guidance from this Court. App. A at 26a-27a. And it is not alone. As the Ninth Circuit observed, most of the circuit courts have taken the same approach during the COVID pandemic, with none willing to consider *Jacobson* under *Cruzan, Sell* and other more recent constitutional cases. *Id.* at 28a n.13. The Ninth Circuit again refused to think deeply about *Jacobson* in *Curtis*, saying that "*Jacobson* and *Carvalho foreclose* Employees' substantive due process claim regarding the purported "right to refuse an investigational drug without penalty or pressure." *Curtis*, 154 F.4th at 692 (emphasis added.) Thus, this is the only court that can reconcile *Jacobson*, *Cruzan* and *Sell*. This is the only court that can decide whether a person's fundamental interest in rejecting unwanted medical treatment extends to all people and all medications or whether it is limited to life-saving medical treatment and shots that prevent disease (thus qualifying as a "vaccine" under federal law) offered under certain circumstances.

Those are not rhetorical questions. Judge Lee's dissent in the en banc opinion explained why. The majority held that *Jacobson* barred a challenge to "vaccination requirements regardless of whether such vaccines actually provide immunity and prevent the spread of disease or whether they provide no immunity and merely render COVID-19 less dangerous to those who contract it …." App. A at 26a. Judge Lee countered:

"If we accept the majority's holding that a state can impose a vaccine mandate just to 'lessen the severity of symptoms' of sick persons—without considering whether it lessens transmission and contraction of this disease—then we are opening the door for compulsory medical treatment against people's wishes …. Indeed, under the majority's reasoning, we are only a step or two from allowing the government to require COVID-19 patients to take, say, Ivermectin if the government in its judgment believes that it would 'lessen the severity of symptoms.'" *Id.* at 41a-42a (Lee and Collins, JJ., dissenting).

An ivermectin mandate would just be the starting point. Under the Ninth Circuit's reasoning, the government could compel a woman to have an abortion to avoid a high-risk pregnancy if the government believes it would serve public health. *Buck v. Bell* lives on in this era of "government knows best" public health policies.

The Court should stop that now. Personal health decisions are a fundamental part of individual liberty. And we learned during the second half of the twentieth century that public health can be protected without compromising personal autonomy. That is why *Jacobson* faded from memory after World War II. One wonders how it was resurrected and turned into a bedrock principle of constitutional law, a case whose holding cannot be questioned or even examined in the depth normally given by an en banc panel. Perhaps judges did not read the opinion closely. Perhaps they did, and they simply decided not to think critically about the constitutional problems that arise when the government forces people to put something into their body against their will. Perhaps they viewed the COVID-19 pandemic as a once-in-a-century event, an

emergency that justified suspending typical legal analysis for the public good.

If so, that was a mistake. "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

Well-meaning but without understanding. Judge Lee's dissent echoed that wisdom, pointing out that, despite their best efforts, during the COVID pandemic, "the government—and the scientific establishment—were wrong about a lot of things." App. A at 36a. Shouldn't people be allowed to challenge the government when it is wrong? What precedent does it set to say, as the Ninth Circuit did here, that judicial review is simply not available to those aggrieved?

The Court should grant certiorari to correct the flawed interpretation given to *Jacobson* by the Ninth Circuit and other circuits that have considered it during the pandemic. It should reconcile *Jacobson* and *Cruzan* and make clear what other courts said before the pandemic: that when the government interferes with a person's fundamental interest in bodily autonomy—the right to choose what to do with his or her body—courts must apply a balancing test, *not* the rational basis review that allows courts to hypothesize about the government's rationale and which precludes people from presenting evidence to challenge the government's means.

That may require overruling *Jacobson* or limiting it to its facts. "*[S]tare decisis* is not a straitjacket." *Dobbs*, 597 U.S. at 294. But that is what *Jacobson* became during the pandemic. This Court should make sure that ends. Either reconcile *Jacobson* with *Cruzan* and *Sell* or disavow *Jacobson*. Americans must know if they have a right to reject unwanted medical treatment, even during a pandemic. Judges also deserve to know how to interpret *Jacobson* considering *Cruzan* and *Sell*. And governments should know whether the definition of a "vaccine" still matters—whether a shot's failure to prevent infection renders it a medical treatment that is subject to heightened judicial scrutiny.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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December 23, 2025

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-55908
D.C. No. 2:21-cv-08688-DSF-PVC

HEALTH FREEDOM DEFENSE FUND, INC., a Wyoming Not-for-Profit Corporation; JEFFREY FUENTES; SANDRA GARCIA; HOVHANNES SAPONGHIAN; NORMA BRAMBILA; CALIFORNIA EDUCATORS FOR MEDICAL FREEDOM,

Plaintiffs-Appellants,

v.

ALBERTO CARVALHO, in his official capacity as Superintendent of the Los Angeles Unified School District; ILEANA DAVALOS, in her official capacity as Chief Human Resources Officer for the Los Angeles School District; GEORGE MCKENNA; MONICA GARCIA; SCOTT SCHMERELSON; NICK MELVOIN; JACKIE GOLDBERG; KELLY GONEZ; TANYA ORTIZ FRANKLIN, in their official capacities as members of the Los Angeles Unified School District governing board,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted En Banc March 18, 2025
San Francisco, California

Filed July 31, 2025

Before: Mary H. Murguia, Chief Judge, and Kim McLane Wardlaw, Consuelo M. Callahan, John B. Owens, Mark J. Bennett, Bridget S. Bade, Daniel P. Collins, Kenneth K. Lee, Danielle J. Forrest, Salvador Mendoza, Jr. and Roopali H. Desai, Circuit Judges.

Opinion by Judge Bennett;
Dissent by Judge Owens;
Partial Dissent by Judge Lee

OPINION

SUMMARY*

COVID-19 Vaccination Policy

The en banc court affirmed the district court's judgment on the pleadings in favor of the Los Angeles Unified School District (LAUSD) in an action brought pursuant to 42 U.S.C. § 1983 alleging that LAUSD's COVID-19 vaccination policy (the Policy), which required all employees to be fully vaccinated, violated plaintiffs' substantive due process and equal protection rights.

Plaintiffs alleged that the Policy violated their fundamental right to bodily integrity in refusing medical treatment because COVID-19 vaccines are therapeutic treatments that reduce symptoms but do not prevent infection or transmission and additionally

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

pose significant health risks to the recipients. Plaintiffs also alleged that the Policy violated their right to equal protection because it arbitrarily classifies employees based on their vaccination status.

As a threshold issue, the en banc court held that this case was not moot. Although LAUSD rescinded the Policy shortly after oral argument before the three-judge panel, the court could still grant effective relief by ordering reinstatement of the individual plaintiffs who remain terminated from their original positions under the Policy.

On the merits, the en banc court, joining all the sister circuits that have considered substantive due process challenges to COVID-19 vaccine mandates, held that the Policy was subject to rational basis review because *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which upheld a smallpox vaccine mandate, remains binding. *Jacobson* holds that the constitutionality of a vaccine mandate, like the Policy here, turns on what reasonable legislative and executive decisionmakers could have rationally concluded about whether a vaccine protects the public's health and safety, not whether a vaccine actually provides immunity to or prevents transmission of a disease.

The Policy survives such review, as the LAUSD could have reasonably concluded that COVID-19 vaccines would protect the health and safety of its employees and students. For this reason, plaintiffs' equal protection claim also failed under rational basis review. The en banc court therefore affirmed the district court's order granting LAUSD's motion for judgment on the pleadings.

Dissenting, Judge Owens wrote that the court lacks jurisdiction because the case is moot, given that there

is no longer any policy for the court to enjoin or declare unlawful. Nothing in the record (or the world) even hints at the possibility that LAUSD would resurrect its COVID-19 vaccine mandate. The majority's assertion that the complaint's boilerplate language fairly encompassed a request for employment reinstatement did not survive close inspection.

Dissenting in part, Judge Lee, joined by Judge Collins, wrote that although he agrees that the case is not moot, he believes that the court should not affirm the dismissal of this lawsuit without permitting the plaintiffs to offer evidence to rebut government officials' far-reaching claims. Contrary to the majority, he read the Supreme Court's decision in *Jacobson* as applying only if a vaccine prevents the transmission and contraction of a disease. The plaintiffs here plausibly claimed—at least at the pleading stage—that the COVID-19 vaccine mitigates serious symptoms but does not "prevent transmission or contraction of COVID-19." And if that is true, then *Jacobson*'s rational basis review does not apply, and the court must examine the vaccine mandate under a more stringent standard of review. Ultimately, the plaintiffs may be wrong about the COVID-19 vaccine, but they should be given a chance to challenge the government's assertions about it.

COUNSEL

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Washington, and the District of Columbia, and the Commonwealth of the Northern Mariana Islands.

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OPINION

BENNETT, Circuit Judge:

This case concerns the Los Angeles Unified School District's ("LAUSD") COVID-19 vaccination policy ("Policy"), which essentially required all of its employees to be fully vaccinated. As relevant here, Plaintiffs[1] filed suit under 42 U.S.C. § 1983, claiming that the Policy violated their Fourteenth Amendment substantive due process and equal protection rights. The district court granted judgment on the pleadings to the LAUSD.[2] Plaintiffs appeal. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

As a threshold issue, this case is not moot. Although the LAUSD rescinded the Policy shortly after oral argument before the three-judge panel, a court could still grant effective relief by ordering reinstatement of

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[1] "Plaintiffs" are the Health Freedom Defense Fund, California Educators for Medical Freedom, and certain individuals who are or were employed by the LAUSD.

[2] Defendants are LAUSD employees and board members, named in their official capacities. For simplicity, we refer to defendants collectively as the "LAUSD."

the individual Plaintiffs who remain terminated from their original positions under the Policy.

On the merits, we hold that the Policy is subject to rational basis review because *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), is binding and controls. The Policy survives such review, as the LAUSD could have reasonably concluded that COVID-19 vaccines would protect the health and safety of its employees and students. For this reason, Plaintiffs' equal protection claim also fails under rational basis review. We therefore affirm the district court's order granting the LAUSD's motion for judgment on the pleadings.

BACKGROUND AND PROCEDURAL HISTORY[3]

On January 30, 2020, the World Health Organization declared COVID-19 a public health emergency. The next day, President Trump and the Secretary of Health and Human Services ("Secretary") declared COVID-19 a public health emergency. These emergency declarations were renewed and extended into at least 2021. In February 2021, President Biden extended the emergency declaration because more than "500,000 people in th[e] Nation ha[d] perished from the disease." The Secretary renewed his emergency declaration in January, April, and July 2021.

On August 13, 2021, the LAUSD issued the Policy challenged here. The Policy established a mandatory

[3] These facts are based on the allegations in the operative second amended complaint, which we accept as true and construe in Plaintiffs' favor. *See Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). We also consider documents incorporated into the complaint by reference. *See Webb v. Trader Joe's Co.*, 999 F.3d 1196, 1201 (9th Cir. 2021). We GRANT Plaintiffs' motion to take judicial notice that the LAUSD voted to withdraw the Policy on September 26, 2023. Dkt. No. 46.

vaccination requirement for all LAUSD employees. Under the Policy, employees had to be fully vaccinated[4] against COVID-19 by October 15, 2021. The Policy allowed employees to apply for religious or medical exemptions. But even "exempt" employees were excludable from the workplace "[i]f a risk to the health and safety of others [could not] be reduced to an acceptable level through a workplace accommodation." The Policy explained that its purpose was to "provide the safest possible environment in which to learn and work."

At the time the LAUSD issued the Policy, health experts had been recommending that individuals get COVID-19 vaccinations and had been reporting that such vaccinations are effective in preventing and spreading the disease. For example, the U.S. Centers for Disease Control and Prevention ("CDC") reported that COVID-19 vaccines "are highly effective at protecting vaccinated people against symptomatic and severe COVID-19," and "[f]ully vaccinated people are less likely to become infected" and "less likely to get and spread SARS-CoV-2." *Interim Public Health Recommendations for Fully Vaccinated People*, CDC (July 28, 2021), https://stacks.cdc.gov/view/cdc/108355 [https://perma.cc/AMW8-KH3Z]. The director of the CDC reiterated that COVID-19 vaccines prevent "severe illness and death." Madeline Holcombe & Christina Maxouris, *Fully Vaccinated People Who Get a Covid-19 Breakthrough Infection Can Transmit the Virus, CDC Chief Says*, CNN Health (Aug. 6, 2021), https://edition.cnn.com/2021/08/05/health/us-coronavi

[4] The Policy defines "fully-vaccinated" as having "received the first and second doses of the vaccine (or, in the case of Johnson & Johnson, the single required dose) and [having] completed the two-week period that follows to ensure maximum immunity."

rus-thursday/index.html [https://perma.cc/Z5RV-UPLR]. Other experts urged that "[g]etting more people vaccinated . . . w[ould] help prevent other—potentially even more aggressive—variants from arising in the future." *Id.* A former CDC director explained that "outbreaks . . . w[ould] not be as explosive in areas with higher vaccination coverage." *Id.* And a children's hospital president characterized "adult vaccination" as a "simple solution" to protect children from COVID-19. *Id.*

After the LAUSD issued the Policy, health experts continued to urge the public to get vaccinated. Indeed, the CDC reported that "[v]accines remain the best public health measure to protect people from COVID-19, slow transmission, and reduce the likelihood of new variants emerging." *Omicron Variant: What You Need to Know*, CDC (Dec. 9, 2021), https://stacks.cdc.gov/view/cdc/112430 [https://perma.cc/B4EG-5QMR]. The CDC recommended that "everyone 5 years and older protect themselves from COVID-19 by getting fully vaccinated." *Id.*

In November 2021, Plaintiffs filed this suit challenging the Policy. The operative second amended complaint ("SAC") alleges that, under the Policy, the LAUSD threatened to terminate employees who failed to get the COVID-19 vaccination. According to the SAC, the LAUSD terminated at least two of the individual Plaintiffs based on their refusal to get vaccinated.

Although the SAC asserts several state and federal law claims, the only claims before us are Plaintiffs' Fourteenth Amendment substantive due process and equal protection claims brought under 42 U.S.C. § 1983. As to their due process claim, Plaintiffs allege that the Policy violates their fundamental right to

bodily integrity in refusing medical treatment, as the vaccines are "therapeutic treatments for COVID and not vaccines at all." According to Plaintiffs, COVID-19 vaccines do not prevent infection or transmission of COVID-19. Instead, the vaccines "only reduce symptoms of those who are infected by COVID," and thus they are medical "treatments" and not traditional vaccines. The SAC also alleges that the COVID-19 vaccines "cause a significantly higher incidence of injuries, adverse reactions, and deaths than any prior vaccines that have been allowed to remain on the market, and, therefore, pose a significant health risk to recipients."

Plaintiffs also claim that the Policy violates their right to equal protection because it arbitrarily classifies employees based on their vaccination status. The SAC alleges that vaccinated and unvaccinated employees are similarly situated because both groups can be infected with and transmit COVID-19. Thus, in Plaintiffs' view, the Policy arbitrarily treats the unvaccinated differently.

In terms of relief, the SAC seeks "[t]emporary, preliminary, and permanent injunctive relief restraining [the LAUSD] from enforcing" the Policy. It also contains a general prayer for relief for "such other and further relief as the Court may deem just and proper."

The LAUSD moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), and the district court granted the motion in September 2022. The court determined that, under *Jacobson*, the substantive due process claim failed because the Policy did not violate any fundamental right and survived rational basis review. The district court also decided that the equal protection claim failed under rational basis review. The district court's order permitted

Plaintiffs to amend their equal protection and ADA claims. Plaintiffs declined to do so and instead timely appealed.

A divided three-judge panel of our court vacated the district court's order and remanded. *Health Freedom Def. Fund, Inc. v. Carvalho*, 104 F.4th 715, 718 (9th Cir. 2024), *vacated and reh'g en banc granted*, 127 F.4th 750 (9th Cir. 2025). Before addressing the merits, the panel considered whether the case had become moot in light of the LAUSD's recent recission of the Policy (twelve days after oral argument). *Id.* at 721–22. Applying the voluntary cessation exception to mootness, the panel majority determined that the case was not moot because the LAUSD had failed to show it was reasonably clear that the Policy would not be reinstated.[5] *Id.* at 722–24. Judge Hawkins dissented from the majority's mootness determination. *Id.* at 728–32 (Hawkins, J., dissenting). In his view, the case was moot "[b]ecause there [wa]s no longer any policy for the court to enjoin or declare unlawful." *Id.* at 732 (Hawkins, J., dissenting).

On the merits, the panel majority held that the district court erred in applying *Jacobson*. *Id.* at 724–25. The majority reasoned that *Jacobson* did not apply, much less control, because it addressed only those vaccines that provide immunity and prevent transmission. *Id.* Because Plaintiffs alleged that COVID-19

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[5] *See Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169, 1173 (9th Cir. 2009) ("Under [the voluntary cessation exception to mootness], the mere cessation of illegal activity in response to pending litigation does not moot a case, unless the party alleging mootness can show that the 'allegedly wrongful behavior could not reasonably be expected to recur.'" (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000))).

vaccines, unlike traditional vaccines, do not provide immunity and prevent transmission (and the court must accept those allegations as true at the judgment-on-the-pleadings stage), the panel majority held that *Jacobson* did not apply. *Id.* Therefore, the panel vacated the district court's order and remanded for further proceedings. *Id.* at 725.

The LAUSD petitioned for rehearing en banc. Dkt. No. 56. While it continued to urge that the case was moot, the LAUSD also argued that the three-judge panel had misapplied *Jacobson*, creating a conflict with our sister circuits. *Id.* at 13–17. A majority of our active judges voted to rehear this case en banc, and we vacated the three-judge panel opinion. *Health Freedom*, 127 F.4th 750.

STANDARD OF REVIEW

"We review de novo an order granting a Rule 12(c) motion for judgment on the pleadings. We must accept all factual allegations in the complaint as true and construe them in the light most favorable to the non-moving party." *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009) (citation omitted). Along with the complaint, we may also consider documents incorporated into the complaint by reference and matters of which we may take judicial notice. *Webb v. Trader Joe's Co.*, 999 F.3d 1196, 1201 (9th Cir. 2021). "Judgment on the pleadings is properly granted when there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Fleming*, 581 F.3d at 925.

DISCUSSION

I.

We first explain why this case is not moot even though the Policy has been rescinded. "The test for mootness of an appeal is whether the appellate court can give the [plaintiff] *any* effective relief in the event that it decides the matter on the merits in his favor. If it can grant such relief, the matter is not moot." *Garcia v. Lawn*, 805 F.2d 1400, 1402 (9th Cir. 1986) (emphasis added). In the context of injunctive relief, a case is not moot if the court is able to "undo" the effects of the alleged illegal action. *Id.*; *see, e.g.*, *id.* ("The question [of mootness] thus becomes whether we can now give [plaintiff] effective relief which would 'undo' the effects of the alleged retaliatory action . . . .").

The SAC seeks "injunctive relief restraining [the LAUSD] from enforcing the [Policy]" and "other and further relief as the Court may deem just and proper." The SAC also alleges that one of the individual Plaintiffs was terminated from employment by the LAUSD for refusing to be vaccinated and another was "separated from his employment with LAUSD" after objecting to being vaccinated. There is no suggestion that these individuals have been reinstated,[6] and so construing these allegations in Plaintiffs' favor, *see Fleming*, 581 F.3d at 925, we accept that these individuals remain terminated from their original positions.

Given the SAC's broad request for *any* proper injunctive relief, along with the allegations that individual Plaintiffs have been terminated under the

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[6] Indeed, during en banc oral argument, Plaintiffs' counsel represented that at least one individual remains terminated from his original full-time position. Oral Arg. at 1:47–2:12.

Policy and have not been reinstated to their prior positions, the SAC fairly encompasses a request for reinstatement. *See Garcia*, 805 F.2d at 1402–04 (noting that reinstatement to a prior position can be a proper injunctive remedy). Because reinstatement would undo some effects of the alleged illegal action—the LAUSD's enforcement of the Policy—a court could grant effective relief despite the Policy's rescission.[7] Thus, this case is not moot.[8] *See id.* at 1402–03 (holding, in an action seeking an injunction, that the case was not moot because the court could order reinstatement of the plaintiff to his prior position); *see also Norris v. Stanley*, 73 F.4th 431, 433 n.1 (6th Cir. 2023) (holding, in similar circumstances, that the case was not moot despite rescission of the vaccine policy at issue because, among other reasons, there was no "indication that [the university] ha[d] undone any of the negative employment actions faced by [some of the

[7] During en banc oral argument, Plaintiffs' counsel confirmed that if the case were remanded, Plaintiffs would explicitly seek reinstatement for all the individual Plaintiffs who have not been reinstated to their former positions. Oral Arg. at 52:14–52:25.

[8] For this reason, the LAUSD's motion to dismiss is DENIED, Dkt. No. 49, and we need not (and do not) decide whether the voluntary cessation exception to mootness applies. We also need not address whether our recent decision in *Kohn v. State Bar of California*, 87 F.4th 1021 (9th Cir. 2023) (en banc), *cert. denied*, 144 S. Ct. 1465 (2024), would permit Plaintiffs to seek damages against the LAUSD. *See Health Freedom*, 104 F.4th at 726–27 (R. Nelson, J., concurring) (opining that *Kohn* may conflict with our precedent holding that California school districts have sovereign immunity under the Eleventh Amendment); *id.* at 727 n.2 (R. Nelson, J., concurring) ("If LAUSD does not have sovereign immunity, Plaintiffs may be able to amend to raise a monetary claim, which would be another reason this case is not moot.").

plaintiffs], so the harm plaintiffs faced ha[d] not been removed"), *cert. denied*, 144 S. Ct. 1353 (2024).

Our precedent supports that this case is not moot. In *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059 (9th Cir. 2002), the plaintiffs sought an injunction to stop a timber sale on national forest land. *Id.* at 1064–65. Although the timber sale had been completed, we held that the case was not moot because the alleged "harm to old growth species may yet be remedied by any number of mitigation strategies." *Id.* at 1066. Significantly, we held that such mitigation measures were fairly requested in the complaint because "[i]n addition to an injunction, [the plaintiffs'] complaint request[ed] 'such further relief as may be necessary and appropriate to avoid further irreparable harm.'" *Id.* In so holding, we noted that our prior case law had recognized that we "may construe such requests for [other appropriate] relief 'broadly to avoid mootness.'" *Id.* (quoting *Headwaters, Inc. v. Bureau of Land Mgmt.*, 893 F.2d 1012, 1015 n.6 (9th Cir. 1989)); *see also Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 957 F.3d 1024, 1032 n.7 (9th Cir. 2020) (explaining that, even though the complaint "ask[ed] for injunctive relief only with respect to claims that [were] not on appeal," "we c[ould] consider further injunctive relief in deciding whether th[e] appeal [wa]s moot" because the complaint "also request[ed] 'any such further relief as requested by the Plaintiffs or as this Court deems just and proper'" (citing *Neighbors of Cuddy Mountain*, 303 F.3d at 1066)).[9]

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[9] Judge Owens's dissent argues that *Neighbors of Cuddy Mountain*'s mootness rationale should be limited to "the narrow context of [National Forest Management Act] and [National Environmental Policy Act] violations." Owens Dissent at 33. But we do not read *Neighbors of Cuddy Mountain* as suggesting such

Contrary to Judge Owens's suggestion in his dissent, *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), does not undermine our conclusion that this case is not moot. In *Arizonans for Official English*, the Supreme Court noted that we had held that the case was not moot because the plaintiff's broad request for "other relief" could encompass a request for nominal damages. *Id.* at 60 (quoting *Yniguez v. Arizona*, 975 F.2d 646, 647 n.1 (9th Cir. 1992) (per curiam)). The Supreme Court reversed that holding—but not because we relied on the broad request for other relief. Rather,

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a limitation. *See* 303 F.3d at 1065–66. Indeed, in *Neighbors of Cuddy Mountain*, our mootness analysis derived from the generally applicable and longstanding principle that "a case is moot only where no effective relief for the alleged violation can be given." *Id.* at 1065; *see also Garcia*, 805 F.2d at 1402 (noting that "[t]he test for mootness of an appeal"—"whether the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in his favor"—"goes back at least to" the Supreme Court's decision in *Mills v. Green*, 159 U.S. 651 (1895)).

We also note that our conclusion that this case is not moot is consistent with *Z Channel Limited Partnership v. Home Box Office, Inc.*, 931 F.2d 1338 (9th Cir. 1991). Federal Rule of Civil Procedure 54(c) provides that a final judgment "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." In *Z Channel*, "[t]he only relief expressly requested [in the complaint] . . . was declaratory and injunctive relief," and such relief had become "clearly moot" on appeal. 931 F.2d at 1340. Applying Rule 54(c), we held that the unavailability of declaratory and injunctive relief did not moot the case because, even though the plaintiff had not expressly requested relief in the form of damages in its complaint, a court could nonetheless award damages as a form of relief. *Id.* at 1340–41; *see also Walden v. Bodley*, 39 U.S. (14 Pet.) 156, 164 (1840) ("Under [a] general prayer for relief, the [c]ourt [in equity] will often extend relief beyond the specific prayer, and not exactly in accordance with it.").

the Supreme Court reversed because it would have been *impossible* for the plaintiff there to seek nominal damages against the state under 42 U.S.C. § 1983. *Id.* at 69 ("[T]he claim for relief the Ninth Circuit found sufficient to overcome mootness was *nonexistent* [because] . . . § 1983 creates no remedy against a State." (emphasis added)). But here, reinstatement of the individual Plaintiffs to their original positions is not impossible. *See Doe v. Lawrence Livermore Nat'l Lab'y*, 131 F.3d 836, 839–42 (9th Cir. 1997) (holding that a request for reinstatement of employment is a request for prospective injunctive relief that falls within the *Ex parte Young* exception to Eleventh Amendment immunity).[10]

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[10] Respectfully, we also disagree with Judge Owens's dissent because it is based on the incorrect premise that our holding rests only on the SAC's broad request for relief. Owens Dissent at 30–31. We also see no violation of the party presentation rule. *See United States v. SinenengSmith*, 590 U.S. 371, 375 (2020) ("In our adversarial system of adjudication, we follow the principle of party presentation."). As previously explained, Plaintiffs themselves fairly raised a request for reinstatement in the SAC.

"We have noted in cases involving questions of mootness that ordinary discretionary principles of waiver and forfeiture can affect whether certain relief is available." *United States v. Yepez*, 108 F.4th 1093, 1099 n.1 (9th Cir. 2024); *see Bain v. Cal. Tchrs. Ass'n*, 891 F.3d 1206, 1212 (9th Cir. 2018) (holding that the plaintiffs' "eleventh hour" request for damages was an attempt "to transform their lawsuit from a request for prospective equitable relief into a plea for money damages to remedy past wrongs"); *Seven Words LLC v. Network Sols.*, 260 F.3d 1089, 1095 (9th Cir. 2001) (holding that the plaintiff's belated request for damages had been "effectively disavowed . . . for tactical reasons"). But Plaintiffs here have neither waived nor forfeited their request for reinstatement to their prior positions. Throughout this case (which was dismissed at the pleadings stage), the gravamen of the relief sought by Plaintiffs has been prospective injunctive relief to permit them to continue to work for the

II.

A.

The Due Process Clause of the Fourteenth Amendment includes "a substantive component that protects certain individual liberties from state interference." *Mullins v. Oregon*, 57 F.3d 789, 793 (9th Cir. 1995). "Only those aspects of liberty that we as a society traditionally have protected as fundamental are included within the substantive protection of the Due Process Clause." *Id.* When no fundamental liberty interest is implicated, a legislative act "must satisfy only the deferential rational basis standard of review." *Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon*, 880 F.3d 450, 455 (9th Cir.), *amended by* 881 F.3d 792 (9th Cir. 2018). Under that standard, we "merely look to see whether the government *could* have had a legitimate reason for acting as it did." *Dittman v. California*, 191 F.3d 1020, 1031 (9th Cir. 1999) (quoting *Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1994), *amended on denial of reh'g* (9th Cir. Feb. 9, 1995)). "Rational basis review is highly deferential to the government, allowing any conceivable rational basis to suffice." *Erotic Serv. Provider*, 880 F.3d at 457.

Like all our sister circuits that have considered substantive due process challenges to COVID-19 vaccine mandates, we hold that *Jacobson* controls our analysis. *See We The Patriots USA, Inc. v. Hochul*, 17

LAUSD without also having to comply with the Policy. For this reason, we also believe that the out-of-circuit and rescinded-COVID-19-policy cases relied upon by Judge Owens are inapt. *See* Owens Dissent at 31–32, 31 n.1. In none of those cases did the courts find that they could still grant effective injunctive relief consistent with the gravamen of the injunctive relief sought by the respective plaintiffs all along.

F.4th 266, 293–94 (2d Cir.) (per curiam) (applying *Jacobson* to plaintiffs' claim that a COVID-19 vaccine mandate "violate[d] their fundamental rights to privacy, medical freedom, and bodily autonomy under the Fourteenth Amendment"), *clarified*, 17 F.4th 368 (2d Cir. 2021); *Child.'s Health Def., Inc. v. Rutgers, The State Univ. of N.J.*, 93 F.4th 66 (3d Cir.) (holding that "*Jacobson* control[led]," *id.* at 80, plaintiffs' claim that a COVID-19 vaccine mandate "violated their substantive due process rights under the Fourteenth Amendment," *id.* at 78), *cert. denied*, 144 S. Ct. 2688 (2024); *Norris*, 73 F.4th at 435 (applying *Jacobson* to plaintiffs' substantive due process challenge to a COVID-19 vaccine mandate); *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (holding that, because the court "must apply the law established by the Supreme Court," *Jacobson* applied to plaintiffs' substantive due process claim challenging a COVID-19 vaccine mandate); *see also Antunes v. Becerra*, No. 22-2190, 2024 WL 511038, at *1 (4th Cir. Feb. 9, 2024) (per curiam) (adopting the district court's decision in *Antunes v. Rector & Visitors of Univ. of Va.*, 627 F. Supp. 3d 553 (W.D. Va. 2022), which applied *Jacobson* in rejecting plaintiff's claim that a COVID-19 vaccine mandate violated her due process right to refuse unwanted medical treatment, *id.* at 564–65), *cert. denied*, 145 S. Ct. 159 (2024); *Brox v. Hole*, 83 F.4th 87, 100–01 (1st Cir. 2023) (applying *Jacobson*'s rational basis test to a due process challenge to a COVID-19 vaccination mandate (based on plaintiffs' failure to challenge the application of the rational basis test) and holding that the mandate easily satisfied rational basis review).

In *Jacobson*, the Supreme Court considered a substantive due process challenge to a smallpox vaccination requirement for all adult residents of

Cambridge, Massachusetts, with criminal penalties. 197 U.S. at 12–14. The Massachusetts legislature provided that certain municipalities could require vaccinations, if the board of health of a municipality determined that "in its opinion, it [wa]s necessary for the public health or safety . . . [to] require and enforce the vaccination and revaccination of all [its] inhabitants." *Id.* at 12. The Board of Health of the City of Cambridge adopted the following regulation in the face of a health emergency:

> Whereas, smallpox has been prevalent to some extent in the city of Cambridge, and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated; and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge; be it ordered, that all the inhabitants of the city who have not been successfully vaccinated since March 1st, 1897, be vaccinated or revaccinated.

Id. at 12–13.

Jacobson, who had been convicted for refusing to get vaccinated for smallpox in violation of the Cambridge regulation, *id.* at 14, argued that the statute was "hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best," *id.* at 26. He claimed, among other things, that the vaccine resulted in "injurious or dangerous effects." *Id.* at 23.

The Court first explained that state legislatures and other policymakers have the authority to enforce

"reasonable [laws] . . . as will protect the public health and the public safety," like vaccination requirements. *Id.* at 25. But because such laws remain subject to the Constitution of the United States, the Court next considered whether the statute violated a right to bodily integrity secured by the Constitution. *Id.* at 25–26; *see also Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 24 (2020) (per curiam) (Gorsuch, J., concurring) ("Mr. Jacobson claimed that he possessed an implied 'substantive due process' right to 'bodily integrity' that emanated from the Fourteenth Amendment . . . ."). The Court determined that the Constitution secured no fundamental right to be free from vaccine requirements imposed to protect the safety and health of the community. *Jacobson*, 197 U.S. at 26–27. And the Court stressed that whether a vaccine requirement would protect the safety and health of the community is a matter for the legislature or policymakers, not a question for a court or jury. *Id.* at 30 ("It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain.").

Having determined that Jacobson had no fundamental right to refuse the vaccination, the Court essentially applied rational basis review to his due process challenge. *Id.* at 31 ("[But] if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."); *see also Roman Cath. Diocese*, 592 U.S.

at 23 (Gorsuch, J., concurring) ("Although *Jacobson* pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review to Henning Jacobson's challenge . . . ."). Because the state legislature and the Cambridge Board of Health could have reasonably concluded that requiring adults to get the smallpox vaccine would protect the public's health and safety, the Court held that it survived rational basis review. *Jacobson*, 197 U.S. at 30–31 (explaining that the legislature could have found that the vaccine requirement "was likely to be the most effective for the protection of the public against disease," *id.* at 30); *id.* at 38 ("[The Court] do[es] not perceive that this [regulation] has invaded any right secured by the Federal Constitution.").

Jacobson holds that the constitutionality of a vaccine mandate, like the Policy here, turns on what reasonable legislative and executive decisionmakers *could* have rationally concluded about whether a vaccine protects the public's health and safety, not whether a vaccine actually provides immunity to or prevents transmission of a disease. Whether a vaccine protects the public's health and safety is committed to policymakers, not a court or a jury. Further, alleged scientific uncertainty over a vaccine's efficacy is irrelevant under *Jacobson*. *Jacobson* simply does not allow debate *in the courts* over whether a mandated vaccine prevents the spread of disease. *Jacobson* makes clear that it is up to the political branches, within the parameters of rational basis review, to decide whether a vaccine effectively protects public health and safety.

Jacobson is materially indistinguishable from this case. Here, as in *Jacobson*, we are presented with a bodily integrity substantive due process challenge to a

vaccine mandate imposed to protect the public's health and safety in response to a health emergency. Thus, under *Jacobson*, we must apply rational basis review.

The Policy easily survives such review because (even assuming the truth of Plaintiffs' allegations) it was more than reasonable for the LAUSD to conclude that COVID-19 vaccines would protect the health and safety of its employees and students. The SAC concedes that COVID-19 vaccines "lessen the severity of symptoms for individuals who receive them." From this, the LAUSD could have reasonably determined that the vaccines would protect the health of its employees. And as discussed above, the LAUSD could have reasonably concluded, based on information in the documents incorporated by reference into the SAC, that COVID-19 vaccines would protect the health and safety of its students and employees. In fact, the CDC reported that COVID-19 vaccines "are highly effective at protecting vaccinated people against symptomatic and severe COVID19," and "[f]ully vaccinated people are less likely to become infected" and "less likely to get and spread SARS-CoV-2." *Interim Public Health Recommendations for Fully Vaccinated People*, CDC (July 28, 2021), https://stacks.cdc.gov/view/cdc/108355 [https://perma.cc/AMW8-KH3Z]. The CDC also recommended that "everyone 5 years and older protect themselves from COVID-19 by getting fully vaccinated." *Omicron Variant: What You Need to Know*, CDC (Dec. 9, 2021), https://stacks.cdc.gov/view/cdc/112430 [https://perma.cc/B4EG-5QMR].

B.

We reject Plaintiffs' attempt to limit *Jacobson* to only those vaccines that prevent the spread of a disease and provide immunity. *Jacobson* required no such findings. The Court dealt with arguments very

similar to Plaintiffs' about the nature of vaccines, including through offers of proof made by Jacobson on which he sought to introduce expert testimony:

> Looking at the propositions embodied in the defendant's rejected offers of proof, it is clear that they are more formidable by their number than by their inherent value. Those offers in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority. We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the

> best-known, way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.
>
> Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, can anyone confidently assert that the means prescribed by the state to that end has no real or substantial relation to the protection of the public health and the public safety.

197 U.S. at 30–31 (citations omitted).

As this discussion demonstrates, the Court determined that Jacobson's claims about the smallpox vaccine—very similar to Plaintiffs' claims—were immaterial, given the other evidence from which the legislature could have reasonably concluded that the vaccine would likely protect the health and safety of the

public.[11] *Jacobson* thus applies to vaccination requirements regardless of whether such vaccines actually provide immunity and prevent the spread of disease or whether they provide no immunity and merely render COVID-19 less dangerous to those who contract it, so long as policymakers could reasonably conclude that the vaccines would protect the public's health and safety.[12]

We also reject Plaintiffs' argument that a heightened standard of review applies based on a more recent line of cases that, according to Plaintiffs, recognize a fundamental right to refuse unwanted medical treatment. Plaintiffs primarily rely on *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) (stating that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment," *id.* at 278), and *Washington v. Glucksberg*, 521 U.S. 702 (1997)

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[11] For this reason, we respectfully disagree with Judge Lee's attempt to limit *Jacobson* "to apply only if a vaccine prevents transmission and contraction of a disease." Lee Partial Dissent at 35. By rejecting Jacobson's argument—supported by offers of proof—that the smallpox vaccine did not prevent the spread of the disease, the Court necessarily held that whether the vaccine actually prevented the spread of smallpox did not matter, given the contrary evidence from which policymakers could reasonably conclude that the vaccine would protect the public's health and safety. *See Jacobson*, 197 U.S. at 30–31; *see also Child.'s Health Def.*, 93 F.4th at 79 ("*Jacobson* did not turn on the longevity of the vaccine or consensus regarding its efficacy."). *Jacobson* cannot be cabined to circumstances that the Court found immaterial.

[12] Even if the SAC plausibly alleged that COVID-19 vaccines do not effectively provide immunity or prevent the spread of COVID-19 and that they only reduce symptoms for the recipient, that would be irrelevant. What matters is whether policymakers could reasonably conclude that vaccination requirements are necessary to protect public health and safety. *Jacobson*, 197 U.S. at 30–31.

(noting that the Court "ha[s] also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment," *id*. at 720 (citing *Cruzan*, 497 U.S. at 278–79)).

Whatever the reach of these cases, they did not overrule *Jacobson*.[13] *See We The Patriots USA*, 17 F.4th at 293 n.35 ("*Jacobson* remains binding precedent."); *Norris*, 73 F.4th at 436 ("[A]bsent any indication from the [Supreme] Court that *Jacobson* is to be overruled or limited, [the court is] bound to apply that decision to reject plaintiffs' arguments here."). Indeed, even Plaintiffs do not go so far as to claim that *Jacobson* is no longer good law. As *Jacobson* remains binding and squarely governs this case, we must apply it.

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[13] Moreover, these cases do not address the circumstances addressed in *Jacobson*: a due process challenge to a vaccine policy imposed to protect the public's health and safety. So we do not read these cases as undermining *Jacobson*. But even if we did, we would still need to apply *Jacobson*. *See In re Twelve Grand Jury Subpoenas*, 908 F.3d 525, 529 (9th Cir. 2018) (per curiam) ("Where Supreme Court precedent 'has direct application in a case,' the Supreme Court has instructed 'the Court of Appeals [to] follow the case which directly controls,' even if it 'appears to rest on reasons rejected in some other line of decisions,' and thereby to 'leav[e] to th[e] Court the prerogative of overruling its own decisions.'" (alterations in original) (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997))). We thus agree with our sister circuits that, despite *Cruzan* and its progeny, *Jacobson* continues to control in cases challenging COVID-19 vaccination policies. *See We The Patriots USA*, 17 F.4th at 293–94 (rejecting plaintiffs' argument that *Jacobson* did not apply because *Cruzan* and its progeny recognized a fundamental right to refuse medical treatment); *Child.'s Health Def.*, 93 F.4th at 79–80 (same); *Norris*, 73 F.4th at 437 (same).

III.

Plaintiffs concede, and we agree, that their equal protection claim is subject to rational basis review. *See Hooks v. Clark Cnty. Sch. Dist.*, 228 F.3d 1036, 1041 (9th Cir. 2000) ("To withstand [a due process or equal protection challenge under the] Fourteenth Amendment . . . , a regulation must bear only a rational relation to a legitimate governmental purpose, unless the regulation implicates a fundamental right or an inherently suspect classification."). Because we hold above that the Policy is rationally related to the LAUSD's legitimate interest in protecting the health and safety of its employees and students, Plaintiffs' equal protection claim fails.

CONCLUSION

Although the LAUSD has rescinded the Policy, this case is not moot. Given the SAC's broad request for any proper injunctive relief along with its allegations that individual Plaintiffs were terminated under the Policy, the SAC fairly encompasses a request for reinstatement of the individual Plaintiffs who have not been restored to their prior positions.

On the merits, *Jacobson* is binding and controls, and thus rational basis review applies to Plaintiffs' substantive due process claim. Even construing Plaintiffs' allegations in their favor, the Policy survives such review, as the LAUSD could have reasonably concluded that COVID-19 vaccines would protect the health and safety of its employees and students. For this same reason, Plaintiffs' equal protection claim fails under rational basis review. We therefore affirm the district court's order granting the LAUSD's motion for judgment on the pleadings.

AFFIRMED.

OWENS, Circuit Judge, dissenting.

Plaintiffs brought this suit to obtain "injunctive relief restraining Defendants from enforcing" their vaccine policy. As Judge Hawkins correctly concluded in his dissent from the panel decision, this case is moot, as "there is no longer any policy for the court to enjoin or declare unlawful." *Health Freedom Def. Fund, Inc. v. Carvalho*, 104 F.4th 715, 732 (9th Cir. 2024) (Hawkins, J., dissenting), *vacated and reh'g en banc granted*, 127 F.4th 750 (9th Cir. 2025). Nothing in the record (or the world) even hints at the possibility that the Los Angeles Unified School District would resurrect its COVID-19 vaccine mandate, which has been dead for nearly two years. The majority does not dispute this reality. We lack Article III jurisdiction and must dismiss this case. *See Brach v. Newsom*, 38 F.4th 6, 12 (9th Cir. 2022) (en banc) (dismissing a challenge to a pandemic-related restriction as moot in line with "the numerous other circuit courts across the country" that have done the same).

The majority first attempts to skirt the mootness problem by asserting that the complaint "fairly encompasses a request for reinstatement," leaning on a boilerplate catchall request for "other and further relief as the Court may deem just and proper." Maj. Op. at 14. Yet when unanimously reversing our court on mootness grounds, the Supreme Court warned that new forms of relief, "extracted late in the day from [a] general prayer for relief and asserted solely to avoid otherwise certain mootness, bore close inspection." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71 (1997) (rejecting this court's theory that a live controversy existed where the "complaint did not expressly request nominal damages" but "it did request 'all other relief that the Court deems just and proper'" (citation

omitted)). Indeed, the Court has distinguished cases where a plaintiff "has presented a claim" for the type of relief that "ensure[s] a live controversy," *Mission Prod. Holdings v. Tempnology, LLC*, 587 U.S. 370, 377 (2019), from those where a plaintiff "ha[s] not prayed for" such relief and thus "no longer ha[s] a legally cognizable interest in the result of th[e] case," *Murphy v. Hunt*, 455 U.S. 478, 491 (1982); *cf. United States v. Sineneng-Smith*, 590 U.S. 371, 380 (2020) (unanimously reversing this court and applying the party presentation principle to require that cases be "shaped by the parties," not the court).

Not surprisingly, our sister circuits routinely reject attempts to grow a magic Article III jurisdiction beanstalk from boilerplate language. For example, the First Circuit, in a nearly identical rescinded COVID-19 mandate case, cited *Arizonans for Official English* to hold that "the students' request for 'any other relief [the] Court deems proper' cannot operate to save their otherwise moot action." *Harris v. Univ. of Mass.*, 43 F.4th 187, 193 (1st Cir. 2022).[1] The majority attempts

[1] *See, e.g.*, *Thomas R.W. v. Mass. Dep't of Educ.*, 130 F.3d 477, 480 (1st Cir. 1997) (holding that a "general prayer for relief" cannot preserve a request for damages to avoid mootness, citing *Arizonans for Official English*); *Fox v. Bd. of Trs. of State Univ. of N.Y.*, 42 F.3d 135, 141 (2d Cir. 1994) (declining to "read a damages claim into the Complaint's boilerplate prayer" for relief when there was "absolutely no specific mention in [the Complaint] of nominal damages" (citation omitted)); *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d 77, 90 (2d Cir. 2005) (applying *Arizonans for Official English* to reject that a "general claim for 'other such relief as the Court deems appropriate' is sufficiently expansive to include" the only relief that would render the case not moot); *WildEarth Guardians v. Pub. Serv. Co.*, 690 F.3d 1174, 1191 (10th Cir. 2012) (holding that "[a] broad request for 'other' relief cannot save [a] complaint" from mootness); *Harris v. City of Houston*, 151 F.3d 186, 191 (5th Cir. 1998) (declining to "conjure

to distinguish the many contrary precedents from other circuits by asserting that, unlike in those cases, relief consistent with the "gravamen" of Plaintiffs' requested injunction—even if not expressly sought—can still be granted. Maj. Op. at 18 n.10. But the mootness inquiry hinges on the relief "specific[ally] mention[ed]" by the parties, not on the court's post hoc characterization of the case's supposed essence. *Fox v. Bd. of Trs. of State Univ. of N.Y.*, 42 F.3d 135, 141 (2d Cir. 1994). Blindly embracing a never briefed or argued theory that the Supreme Court and our sister circuits have explicitly rejected is more Inspector Clouseau than "close inspection."

To side shuffle this constitutional black hole, the majority departs from the many analogous challenges to rescinded COVID-19 policies that have been dismissed as moot, *see Brach*, 38 F.4th at 12 n.3 (collecting cases), and instead relies on *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059 (9th Cir. 2002), which concerned alleged violations of the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA). Maj. Op. at 15-16.[2] In that case, plaintiffs sought to enjoin a timber sale on national forest land or any other relief that "may be necessary and appropriate to avoid further irreparable harm" from the sale. *Id*. at 1066. Even after logging of the timber concluded, we held

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up relief" by "'read[ing] into' [the] complaint additional requests" that would manufacture a live controversy).

[2] The majority also cites *Norris v. Stanley*, 73 F.4th 431 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 1353 (2024)—another pandemic-related case that it claims involves "similar circumstances" and was not moot. Maj. Op. at 15. Unlike here, however, the plaintiffs in *Norris* specifically "sought nominal damages for the alleged violations of their constitutional rights." *Id*. at 433 n.1.

over a dissent that the case was not moot because further environmental harm from the sale "may yet be remedied by any number of mitigation strategies," which were fairly encompassed in the requested relief. *Id*.

The parties never cited *Neighbors of Cuddy Mountain* nor its underlying theory in their many briefs submitted to this court, nor did the original panel or dissent. And despite the majority's claim that *Neighbors of Cuddy Mountain* derived from longstanding mootness principles, Maj. Op. at 16 n.9, no published decision in this circuit—or any other—has ever relied on *Neighbors of Cuddy Mountain*'s mootness rationale outside the narrow context of NFMA and NEPA violations. That collective silence speaks for itself: There is simply no basis to extend *Neighbors of Cuddy Mountain*'s mootness holding beyond its specific environmental context to the claims presented here. *Compare Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008) (citing *Neighbors of Cuddy Mountain* and similar cases to illustrate this court's recognition of "'live' controversies *in environmental cases* even after the contested government projects were complete" (emphasis added)), *with Brach*, 38 F.4th at 11 (holding that, where plaintiffs sue to enjoin a pandemic policy but the policy no longer remains, the plaintiffs "have gotten everything they asked for" and the "actual controversy has evaporated," presenting a "classic case" of mootness).[3]

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[3] The majority's tepid reliance on *Z Channel Limited Partnership v. Home Box Office, Inc.*, 931 F.2d 1338 (9th Cir. 1991)—a nearly thirtyfive-year-old case that was also never cited by the parties nor the original panel—is even less persuasive. Maj. Op. at 16 n.9. No published decision from this circuit in nearly three decades has relied on *Z Channel* to overcome a mootness challenge based on hypothetical relief that no party

Because neither of the majority's last-minute mootness rationales survive "close inspection," *Arizonans for Off. Eng.*, 520 U.S. at 71, I respectfully dissent for the reasons stated by Judge Hawkins.

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specifically sought. And for good reason: *Z Channel* is a textbook example of overreach, with the majority "[d]efying a clear rule of procedure, creating an inter-circuit conflict and resurrecting a legal theory long ago abandoned by the parties" to bring the case "back from the dead." 931 F.2d at 1346, 1349 (Kozinski, J., dissenting); *see also Sineneng-Smith*, 590 U.S. at 380 (cautioning against appellate courts "interject[ing]" themselves into cases); *NAACP v. U.S. Sugar Corp.*, 84 F.3d 1432, 1438 (D.C. Cir. 1996) (citing the *Z Channel* dissent); *Seven Words LLC v. Network Sols.*, 260 F.3d 1089, 1095–97 (9th Cir. 2001) (declining to apply *Z Channel* to overcome a mootness challenge); *Bain v. Cal. Tchrs. Ass'n*, 891 F.3d 1206, 1212 (9th Cir. 2018) (declining to "transform" the requested relief "at the eleventh hour" to avoid mootness, citing *Seven Words* and *Arizonans for Official English*).

LEE, Circuit Judge, joined by COLLINS, Circuit Judge, dissenting in part.

The majority's opinion comes perilously close to giving the government carte blanche to require a vaccine or even medical treatment against people's will so long as it asserts—even if incorrectly—that it would promote "public health and safety." But the many mistakes and missteps by our government and the scientific establishment over the past five years counsel caution: Their errors underscore the importance of carefully evaluating the sort of sweeping claims of public-health authority asserted by the Los Angeles Unified School District ("LAUSD") here. Faithful adherence to Supreme Court precedent confirms that we should not blindly accept the mere say-so of the government. We thus should not affirm the dismissal of this lawsuit challenging LAUSD's COVID-19 vaccine mandate—without permitting the plaintiffs to offer evidence to rebut the government officials' far-reaching claims.[1]

Contrary to the majority, I read the Supreme Court's decision in *Jacobson v. Massachusetts*—which upheld a smallpox vaccine mandate—to apply only if a vaccine prevents transmission and contraction of a disease. 197 U.S. 11 (1905). The plaintiffs here have plausibly claimed—at least at the pleading stage where we must accept the truth of the allegations—that the COVID-19 vaccine mitigates serious symptoms but does not "prevent transmission or contraction of COVID-19." And if that is true, then *Jacobson*'s rational basis review does not apply, and we must examine the vaccine mandate under a more stringent standard. Ultimately, the plaintiffs may be wrong about the

[1] I agree with the majority that this appeal is not moot.

COVID-19 vaccine, but they should be given a chance to challenge the government's assertions about it.

I respectfully dissent in part.

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When the mRNA-based COVID-19 vaccines were first announced in late 2020, pharmaceutical companies touted clinical trials that they claimed showed an efficacy rate of over 90 percent.[2] As scientists contended then, these vaccines would "protect individuals from infection and transmission."[3]

Based in part on these trial results, federal, state and local governments acted swiftly to impose vaccine mandates. The United States government required federal employees, government contractors, and millions of private sector employees to be vaccinated.[4] Over 8,000 men and women in uniform were discharged and

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[2] *Pfizer and BioNTech Announce Vaccine Candidate Against COVID-19 Achieved Success in First Interim Analysis from Phase 3 Study*, Pfizer, https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-biontech-announce-vaccine-candidate-against (Nov. 9, 2020); *Moderna's COVID-19 Vaccine Candidate Meets its Primary Efficacy Endpoint in the First Interim Analysis of the Phase 3 COVE Study*, Moderna, https://investors.modernatx.com/news/news-details/2020/Modernas-COVID-19-Vaccine-Candidate-Meets-its-Primary-Efficacy-Endpoint-in-the-First-Interim-Analysis-of-the-Phase-3-COVE-Study/default.aspx (Nov. 16, 2020).

[33] Ali Pormohammad et al., *Efficacy and Safety of COVID-19 Vaccines: A Systematic Review and Meta-Analysis of Randomized Clinical Trials*, 9 Vaccines 1, 15 (2021), https://pmc.ncbi.nlm.nih.gov/articles/PMC8148145/.

[4] *See, e.g.*, Kathryn Watson et al., *Biden announces COVID-19 vaccine mandates that will affect 100 million Americans*, CBS News (Sept. 10, 2021), https://www.cbsnews.com/live-updates/biden-covid-19-vaccine-mandates-announcement/.

severed from service for their refusal to be vaccinated.[5] States also imposed their own mandates. Even 18 months into the pandemic, California Governor Gavin Newsom announced that he planned to require schoolchildren to be vaccinated, despite scientific evidence that showed young children face extremely low health risks from COVID-19.[6] That proposed mandate would have banned unvaccinated children from the classroom and relegated them to online learning. And relevant here, LAUSD issued a memorandum requiring all employees to get vaccinated—or lose their jobs.

But it turned out that the government—and the scientific establishment—were wrong about a lot of things. The COVID-19 vaccines did not end up having an efficacy rate of over 90 percent in real-life. People repeatedly caught COVID-19, despite being vaccinated and "boosted." Indeed, repeat infections among the vaccinated became so common that the phrase "breakthrough infection" entered common parlance. Given this reality, the government shifted its emphasis on why people should get vaccinated: It was less about preventing transmission and contraction of COVID-19

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[5] *Fact Sheet: President Donald J. Trump Reinstates Service Members Discharged for Refusing the COVID Vaccine*, The White House, https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-reinstates-service-members-discharged-for-refusing-the-covid-vaccine/ (Jan. 27, 2025).

[6] California Becomes First State in Nation to Announce COVID-19 Vaccine Requirements for Schools, *Governor Gavin Newsom*, https://www.gov.ca.gov/2021/10/01/california-becomes-first-state-in-nation-to-announce-covid-19-vaccine-requirements-for-schools/ (last visited May 28, 2025). California ultimately walked away from this announced policy.

and more about mitigating serious symptoms.[7] Even LAUSD in its brief before the three-judge panel focused largely on the vaccine's effect in lessening symptoms, stating that "[t]he overwhelming consensus amongst the nation's leading health experts is that COVID-19 vaccines are safe and effective in preventing serious illness and death from this highly contagious virus."

The plaintiffs here go further and contend that the COVID-19 vaccine is not even a "traditional" vaccine that prevents transmission or provides immunity. Rather, the COVID-19 vaccines merely mitigate symptoms in a manner more akin to a medical treatment than a vaccine. Thus, according to the plaintiffs, the Supreme Court's *Jacobson v. Massachusetts* decision does not apply here. The district court, for its part, held that the plaintiffs' "distinction" between "lessen[ing] the severity of the disease" and "prevent[ing] contraction or transmission" was "misplaced" and that *Jacobson* applies even if requiring the COVID-19 vaccines constitutes forced medical treatment. *Health Freedom Def. Fund v. Reilly*, 2022 WL 5442479, at *5 (C.D. Cal. Sept. 2, 2022).

The majority reads *Jacobson* broadly to empower the government to impose any vaccine mandate so long as it believes the mandate would "protect public health and safety." Maj. Op. 23. Under the majority's reading, "alleged scientific uncertainty over a vaccine's

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[7] *See Benefits of Getting Vaccinated*, CDC, https://www.cdc.gov/covid/vaccines/benefits.html#:~:text=Vaccination%20is%20more%20reliable%20way,associated%20with%20COVID%2D19%20infection., (Jan 13, 2025) (emphasizing that "Getting vaccinated against COVID-19 has many benefits that are supported by scientific studies. The COVID-19 vaccine helps protect you from severe illness, hospitalization, and death.").

efficacy is irrelevant under *Jacobson*." *Id.* In other words, if the government believes a vaccine will protect "public health and safety," that is the end of the story. The majority adopts a sweeping definition of "public health and safety" such that the government can mandate a vaccine—and potentially any medical treatment—if the required measure just "lessen[s] the severity of symptoms," whether or not it prevents transmission and contraction of the disease. *Id.*

I disagree with the majority's overly broad reading of *Jacobson*. The Supreme Court upheld Massachusetts' vaccine requirement against smallpox precisely because the vaccine prevented the transmission and contraction of smallpox. It emphasized this point repeatedly:

- The "principle of vaccination as a means to *prevent the spread* of smallpox has been enforced in many [S]tates." 197 U.S. at 31–32 (emphasis added).
- "[V]accination strongly tends to *prevent the transmission or spread* of this disease." *Id.* at 34 (quoting *Viemeister v. White,* 179 N.Y. 235, 72 N.E. 97, 98–99 (1904) (emphasis added)).
- It is "common belief" that a vaccine has a "decided tendency to *prevent the spread* of this fearful disease." *Id.* at 34 (emphasis added).
- Quarantine requirements were justified because of "the danger of the *spread of the disease*." *Id.* at 29 (emphasis added).

To be sure, the Court in *Jacobson* noted that the defendant had challenged the effectiveness of the smallpox vaccine in limiting the spread of the disease. *Id.* at 23–24. The majority opinion latches onto that language to argue that it does not matter whether a

vaccine limits transmission and contraction of a disease; we must just defer to a state's belief that a vaccine will protect "public health and safety." Maj. Op. 23. But the Court did not hold that vaccines can be required even if they do not prevent the transmission and contraction of the disease.

Admittedly, it is somewhat difficult to parse this 120-year-old case because it predates our tiers-of-scrutiny analysis. But I read the Court's opinion much more narrowly than the majority does: If "everybody knows . . . and therefore the [trial] court judicially knew, as th[e] [C]ourt knows, that an opposite theory [about the public-health efficacy of the smallpox vaccine] accords with the common belief, and is maintained by high medical authority," Jacobson's argument that this overwhelming consensus was not unanimous does not amount to a viable constitutional claim. *Jacobson*, 197 U.S. at 30. While it acknowledged that some people shared Jacobson's distinctly unorthodox belief, the Court noted that it is "common belief" that is "accepted by the mass of the people, as well as by most members of the medical profession" that the smallpox vaccine has the "decided tendency to prevent the spread" of disease. *Id.* at 34 (quoting *Viemeister*'s upholding of a smallpox vaccine mandate in New York); *see also id.* at 35 ("vaccination, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries"); *id*. at 37 (suggesting that there is "deep and universal" belief in the "community" and "medical advisers" about the vaccine's efficacy). *Jacobson* then recited the number of states—and countries ranging from Britain to Denmark to Germany to Sweden—that have adopted compulsory smallpox vaccination, underscoring the common and almost universal belief

that smallpox vaccines prevent the spread of that disease. *Id.* at 31 n.1.

Our case is factually different from *Jacobson*. At the pleading stage, we must accept as true the plaintiffs' well-pleaded allegation that the newly developed mRNA COVID-19 vaccines do not effectively prevent the transmission and contraction of COVID-19 and thus more resemble medical treatments than the sort of robustly validated smallpox vaccine at issue in *Jacobson*. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). That allegation may ultimately not bear out once the parties offer evidence, but the plaintiffs' theory appears plausible at this stage, especially given the federal government's focus on mitigation of symptoms over prevention of transmission and LAUSD's failure in its brief to try to factually rebut that claim. This means that *Jacobson* does not bar this suit—at least for now.

The majority opinion suggests that *Jacobson*'s reference to "public health and public safety" is so capacious that merely "lessen[ing] the severity of symptoms" is enough to justify a vaccine mandate. Maj. Op. 23. But nothing in *Jacobson* hints that just mitigating symptoms alone can count as "public health and public safety." The entire thrust of *Jacobson* is that "*public* health and *public* safety" means protecting the mass public from the spread of smallpox. Aside from the repeated references to "preventing the spread" of smallpox, the opinion makes many allusions to the dangers of widespread transmission of the disease among the public. *See, e.g.*, 197 U.S. at 26 (mentioning the "injury that may be done to others" if a person has the liberty to refuse vaccines); *id*. at 27 ("a community has the right to protect itself against an epidemic of disease which threatens the safety of its members");

id. at 28 (noting smallpox was "prevalent and increasing at Cambridge"); *id*. at 30–31 (vaccination is the "best known[] way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population"); *id.* at 31 (discussing the need to "stamp out the disease of smallpox" for the "protection of the public health and the public safety").

If we accept the majority's holding that a state can impose a vaccine mandate just to "lessen the severity of symptoms" of sick persons—without considering whether it lessens transmission and contraction of this disease—then we are opening the door for compulsory medical treatment against people's wishes. Vaccines, by definition, build immunity and prevent transmission and contraction of an infectious disease, but we risk blurring the line between vaccines and medical treatment if vaccines are defined as anything that lessens symptoms.

None of this is to deny that the COVID-19 vaccines may well have saved millions of lives of the elderly, people with comorbidities, and others with weakened immune systems. But we have held that the government cannot compel people to involuntarily receive even life-saving medical treatment. If lessening the severity of symptoms alone justifies vaccine mandates, then it may well implicate the fundamental right to "refus[e] unwanted medical treatment," as explained by Judge Collins in his panel concurrence. *Health Freedom Def. Fund v. Carvalho*, 104 F.4th 715, 728 (9th Cir. 2024) (Collins, J., concurring), *vacated*, 127 F.4th 750 (9th Cir. 2025); *see also Cruzan ex rel. Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278–79 (1990); *Washington v. Glucksberg*, 521 U.S. 702, 724–25 (1997) (holding that the "right of a competent individual to refuse medical treatment" is "entirely

consistent with this Nation's history and constitutional traditions" (citation omitted)). Indeed, under the majority's reasoning, we are only a step or two from allowing the government to require COVID-19 patients to take, say, Ivermectin if the government in its judgment believes that it would "lessen the severity of symptoms."

As a practical matter, I fear we are giving the government a blank check to foist health treatment mandates on the people—despite its checkered track record—when we should be imposing a check against the government's incursion into our liberties.

I respectfully dissent in part.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-55908
D.C. No. 2:21-cv-08688-DSF-PVC

HEALTH FREEDOM DEFENSE FUND, INC., a Wyoming Not-for-Profit Corporation; JEFFREY FUENTES; SANDRA GARCIA; HOVHANNES SAPONGHIAN; NORMA BRAMBILA; CALIFORNIA EDUCATORS FOR MEDICAL FREEDOM,

Plaintiffs-Appellants,

v.

ALBERTO CARVALHO, in his official capacity as Superintendent of the Los Angeles United School District; ILEANA DAVALOS, in her official capacity as Chief Human Resources Officer for the Los Angeles School District; GEORGE MCKENNA; MONICA GARCIA; SCOTT SCHMERELSON; NICK MELVOIN; JACKIE GOLDBERG; KELLY GONEZ; TANYA ORTIZ FRANKLIN, in their official capacities as members of the Los Angeles Unified School District governing board,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted September 14, 2023
Seattle, Washington

Filed June 7, 2024

Before: Michael Daly Hawkins, Ryan D. Nelson, and Daniel P. Collins, Circuit Judges.

Opinion by Judge R. Nelson;
Concurrence by Judge R. Nelson;
Concurrence by Judge Collins;
Dissent by Judge Hawkins

OPINION

SUMMARY*

COVID-19/Mootness

The panel vacated the district court's order dismissing plaintiffs' action alleging that the COVID-19 vaccination policy of the Los Angeles Unified School District ("LAUSD")—which, until twelve days after oral argument, required employees to get the COVID-19 vaccination or lose their jobs—interfered with their fundamental right to refuse medical treatment.

The panel held that the voluntary cessation exception to mootness applied. LAUSD's pattern of withdrawing and then reinstating its vaccination policies was enough to keep this case alive. The record supported a strong inference that LAUSD waited to see how the oral argument in this court proceeded before determining whether to maintain the Policy or to go

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

forward with a pre-prepared repeal option. LAUSD expressly reserved the option to again consider imposing a vaccine mandate. Accordingly, LAUSD has not carried its heavy burden to show that there is no reasonable possibility that it will again revert to imposing a similar policy.

Addressing the merits, the panel held that the district court misapplied the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), in concluding that the Policy survived rational basis review. *Jacobson* held that mandatory vaccinations were rationally related to preventing the spread of smallpox. Here, however, plaintiffs allege that the vaccine does not effectively prevent spread but only mitigates symptoms for the recipient and therefore is akin to a medical treatment, not a "traditional" vaccine. Taking plaintiffs' allegations as true at this stage of litigation, plaintiffs plausibly alleged that the COVID-19 vaccine does not effectively "prevent the spread" of COVID-19. Thus, *Jacobson* does not apply.

Concurring, Judge R. Nelson wrote separately to point out that this Circuit's intervening case *Kohn v. State Bar of California*, 87 F.4th 1021 (9th Cir. 2023) (en banc), raises the question of whether the district court's holding that the Los Angeles Unified School District is entitled to sovereign immunity should be revisited on remand.

Concurring, Judge Collins wrote separately to address a crucial point that the district court overlooked. Pursuant to more recent Supreme Court authority, compulsory treatment for the health benefit of the person treated—as opposed to compulsory treatment for the health benefit of others— implicates the fundamental right to refuse medical treatment. Plaintiffs' allegations here are sufficient to invoke that

fundamental right. Defendants note that the vaccination mandate was imposed merely as a "condition of employment," but that does not suffice to justify the district court's application of rational-basis scrutiny.

Dissenting, Judge Hawkins wrote that because there is no longer any policy for this court to enjoin, he would, as this court has done consistently in actions challenging rescinded early pandemic policies, hold that this action is moot, vacate the district court's decision, and remand with instructions to dismiss the action without prejudice.

COUNSEL

John W. Howard (argued) and Scott J. Street, JW Howard Attorneys LTD., San Diego, California; George R. Wentz, Jr., The Davillier Law Group LLC, New Orleans, Louisiana; for Plaintiffs-Appellants.

Connie L. Michaels (argued), Littler Mendelson PC, Los Angeles, California; Carrie A. Stringham, Littler Mendelson PC, San Diego, California; for Defendants-Appellees.

OPINION

R. NELSON, Circuit Judge:

For over two years—until twelve days after argument—Los Angeles Unified School District (LAUSD) required employees to get the COVID-19 vaccination or lose their jobs. LAUSD has not carried its "formidable burden" to show that it did not abandon this policy because of litigation, and thus that "no reasonable expectation remains that it will return to its old ways." *Cf. FBI v. Fikre*, 601 U.S. 234, 241 (2024) (cleaned up). So this case is not moot. *See id.* On the merits, the district court misapplied the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11

(1905), stretching it beyond its public health rationale. We vacate the district court's order dismissing this claim and remand for further proceedings under the correct legal standard.

I

This case is about LAUSD's COVID-19 vaccination policy. LAUSD has reversed course several times. Because of its importance to the mootness issue, we recount that history in detail.[1]

LAUSD issued its first policy on March 4, 2021. That policy was challenged two weeks later in a lawsuit filed by Plaintiff California Educators for Medical Freedom (CEMF) and several individual plaintiffs. According to CEMF's complaint, LAUSD's policy required employees to get the COVID-19 vaccine, no exceptions. The March 4 memorandum announcing this policy was attached to the complaint. This memorandum stated that employees would "be notified to make an appointment through the District's vaccination program when it is their turn to get vaccinated." *See CEMF v. LAUSD*, No. 21-cv-02388, 2021 WL 1034618, Dkt. 1, Ex. F at 1 (C.D. Cal. Mar. 17, 2021). It added that "District employees may either participate in the District's COVID-19 vaccination program or provide vaccination documentation in the form of an official Vaccination Record certified by a medical professional." *Id.* For those who chose the latter option, the memorandum provided instructions

[1] We may properly take judicial notice that various statements were made in filings in related litigation. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). But we do not take those statements themselves as true. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018).

on how to "submit proof of vaccination from an external medical provider through the LAUSD Daily Pass" website. *Id.* It specified that "[c]urrent District employees will submit documentation of COVID-19 vaccination through the Daily Pass web portal at http://DailyPass.lausd.net as indicated in their vaccination notification." *Id.* at 2. The memorandum said nothing about an option to submit to COVID testing rather than submitting vaccine verification.

The very next day after CEMF filed suit, LAUSD reversed course and issued a "clarifying memorandum" that gave employees an option to test for COVID-19 if they did not want to get the vaccine. Relying on this clarifying memorandum, which LAUSD claimed did not impose "mandatory vaccinations," LAUSD moved to dismiss CEMF's suit because, among other things, it was "moot and/or premature." LAUSD disputed whether CEMF had adequately pleaded that exemptions would not be allowed.

But LAUSD did not dispute CEMF's contention that the March 4 memorandum was properly construed "as requiring District employees to be vaccinated." Instead, LAUSD argued that, considering the March 18 "clarifying memorandum" allowing a testing alternative—issued after the lawsuit was filed—the case was moot or unripe. CEMF argued that the complaint properly alleged that a mandatory policy was in place when the suit was filed, and that the post-filing clarifying memorandum could not establish mootness under the voluntary cessation doctrine. CEMF's position was bolstered by its citation in the complaint to a letter from the LAUSD employees' union, which stated that "[a]ll District employees will be required to be vaccinated," and "[n]o exceptions have been made." *See CEMF*, No. 21-cv-2388, 2021 WL

1034618, Dkt. 1, Ex. G at 2. In its reply brief LAUSD shifted its position and explicitly denied that the March 4 memorandum "reflects a mandatory vaccination policy." LAUSD argued that the March 18 memorandum was "merely a clarification" of the "original March 4, 2021 memorandum."

On July 27, 2021, the district court dismissed the complaint, holding that CEMF's claims were not ripe. Noting that CEMF's amended complaint had cited the March 18 memorandum, the district court held that, considering the then-existing testing option, "there is no threat of future injury because LAUSD explicitly stated it is not requiring vaccines." The court held that it was "completely speculative" whether "LAUSD will begin to require vaccination of all employees at some point in the future and will not offer exemptions" for the plaintiffs. The court acknowledged CEMF's allegations about the March 4 policy memorandum. Still, the court held that, because that policy was changed before it was ever enforced, the dispute remained unripe. "That Defendants were contemplating requiring the vaccine, and then later reversed course and explicitly said they would not be, does not create a ripe case or controversy."

Having obtained dismissal of CEMF's suit on these grounds, LAUSD reversed course again two weeks later. Its new policy (the Policy), adopted on August 13, 2021, expressly eliminated the testing option on which the district court's July 27 dismissal had been based. The Policy required that all LAUSD employees be fully vaccinated against COVID-19 by October 15, 2021. Like the earlier March 4 memorandum, the Policy required those who are vaccinated outside of LAUSD's own program to submit proof of vaccination through the "Daily Pass" web portal. The Policy ostensibly

provided for religious and medical exemptions. But each of the individual plaintiffs here were allegedly denied accommodations, thus rendering any exemptions "illusory."

CEMF sued again, this time joined by Health Freedom Defense Fund, Inc. and new individual plaintiffs (collectively, Plaintiffs). They named as defendants LAUSD employees and Board members in their official capacities. Plaintiffs challenged the Policy as violating the Fourteenth Amendment, among other claims. Only the substantive due process and equal protection claims brought under 42 U.S.C. § 1983 are on appeal. Plaintiffs ask for future relief, including declaring the Policy unconstitutional and enjoining LAUSD from requiring it.

Plaintiffs claim that the Policy interferes with their fundamental right to refuse medical treatment. Their complaint's crux is that the COVID-19 "vaccine" is not a vaccine. "Traditional" vaccines, Plaintiffs claim, should prevent transmission or provide immunity to those who get them. But the COVID-19 vaccine does neither. At best, Plaintiffs suggest, it mitigates symptoms for someone who has gotten it and then gets COVID-19. But this makes it a medical *treatment*, not a vaccine.

Plaintiffs' complaint supports these assertions with data and statements from the Centers for Disease Control and Prevention (CDC). For example, Plaintiffs claim that the CDC changed the definition of "vaccine" in September 2021, striking the word "immunity." Thus, they argue, the CDC conceded that the COVID-19 vaccine is not a "traditional vaccine." They also cite CDC statements that say the vaccine does not prevent transmission, and that natural immunity is superior to the vaccine.

LAUSD moved for judgment on the pleadings, requesting judicial notice of the attached CDC information. This included information about the COVID-19 death count and number of cases, as well as the vaccine's safety and effectiveness. For example, the CDC says that "COVID-19 vaccines are safe and effective."

The district court granted LAUSD's motion. *Health Freedom Def. Fund v. Reilly*, No. CV-21-8688, 2022 WL 5442479, at *7 (C.D. Cal. 2022). The district court took judicial notice of LAUSD's attached documents. *Id.* at *2–3. Then, applying a rational basis review, the district court held that the Policy does not implicate any fundamental right, *id.* at *5, and that LAUSD had a legitimate government purpose in requiring the COVID-19 vaccination, *id.* at *6. The district court held that the COVID-19 vaccine's reduction in symptoms and prevention of severe disease and death in recipients survived rational basis review, even if it did not prevent transmission or contraction. *Id.*

The district court largely relied on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), in concluding that the Policy survived rational basis review. *Reilly*, 2022 WL 5442479, at *5–6. Plaintiffs argued that the COVID-19 vaccine is a "medical treatment" and not a traditional vaccine. *Id.* at *5. The district court disagreed, holding that "*Jacobson* does not require that a vaccine have the specific purpose of *preventing* disease." *Id.* (emphasis in original).

Plaintiffs appealed the district court's order. In April 2023, LAUSD filed its answering brief. It vigorously defended its vaccine mandate and did not raise any suggestion that it might be revoked. We held oral argument on the morning of September 14, 2023. The case was calendared together with two similar appeals

involving the rejection of challenges to vaccine mandates that had been imposed on state employees by Oregon and Washington. But Oregon and Washington revoked their mandates before the answering briefs were filed in those cases. They therefore sought dismissal of the claims for prospective relief in those cases as moot.

LAUSD's counsel was asked at oral argument about the contrast with those cases and whether LAUSD could maintain the Policy indefinitely. LAUSD's counsel responded that the Policy was properly still in place because "there are Covid spikes right now." Counsel stated that LAUSD was "very concerned about maintaining the health of [its] staff" and believed that COVID vaccines should continue to be required "until it is absolutely established that the vaccines have no effect." When again pressed about the contrast with the two other argued cases about vaccine mandates, counsel stated that "with respect to what the district is going to do now, what they're considering doing now, there is only so much I can tell you, because it's not in the record." Counsel then reaffirmed LAUSD's view that "with respect to the vaccination requirement, they have felt that until it is established that the vaccine is not of use in any way that it is important to go ahead and maintain it." LAUSD's counsel also repeatedly defended the constitutionality of its vaccine mandate.

According to a declaration submitted by Plaintiffs' counsel, LAUSD's attorney turned to him as they were leaving the courtroom and said, "What are you going to do when we rescind the mandate?" That same day, LAUSD's Superintendent (the Superintendent) submitted to the LAUSD Board (the Board) of

Education a proposal to repeal the mandate.[2] Twelve days later, (the Board) voted to rescind the Policy by a six to one vote, with one abstention. This lawsuit was mentioned by members of the public at the meeting of the Board. Indeed, one commenter played excerpts from the publicly available audio recording of the oral argument in this court.[3] The Superintendent submitted materials in support of repeal that stated that, because the virus was no longer "spreading at a rapid enough pace to overwhelm hospital systems," LAUSD "no longer need[ed] a COVID-19 vaccine requirement to keep schools open for in-person learning." They explained that "[t]he science [on vaccines] has not changed" and they are still "safe and effective." And they also cautioned that LAUSD would continue to monitor COVID-19, and if "health conditions necessitate a revisiting of the COVID-19 vaccine requirement," LAUSD would reconsider the Policy.

Comments made by LAUSD officials and Board members at the meeting generally followed these statements. The one Board member who voted against the repeal, Dr. McKenna, said he was "not afraid of litigation" or the "zealousness that will come out with

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[2] Plaintiffs' Motion for Judicial Notice is GRANTED in part and DENIED in part. We take judicial notice that LAUSD voted to withdraw the Policy on September 26, 2023, and that various documents were submitted, and statements made, in connection with that repeal. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689–90 (9th Cir. 2001). But we do not take judicial notice of the truth of the claims made in such written or oral statements. *Id.*; *see also Owino v. Holder*, 771 F.3d 527, 534 n.4 (9th Cir. 2014) (denying request for judicial notice of article where "[t]he government does not concede that the facts [included] are beyond dispute.").

[3] LAUSD, *September 26th, 2023 – 1pm Regular Board Meeting*, YOUTUBE (Sept. 26, 2023), https://www.youtube.com/watch?v=qQf_y77unZw (25:37–28:00) (*Meeting*).

lawsuits" brought by employees who lost their jobs. *Meeting* (59:20 – 1:00:48). Likewise, Board President Goldberg said that she had a "foot in [the] camp with Dr. McKenna." *Id.* (1:13:12 – 1:15:12). While she acknowledged that the virus was now "endemic," she also said she did not regret imposing the mandate for "one moment, not 30 seconds, not one tiny bit." *Id.* (1:13:15–22). When the vote on the repeal was called, she voted, "Reluctantly, yes." *Id.* (1:18:23–26).

LAUSD then asked us to dismiss the appeal, claiming that the case is now moot. Plaintiffs objected, arguing that LAUSD withdrew the Policy because they feared an adverse ruling.

II

"Judgments on the pleadings are reviewed de novo." *George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1229 (9th Cir. 1996). We review under the same standards as a motion to dismiss. *Gregg v. Haw., Dep't of Pub. Safety*, 870 F.3d 883, 887 (9th Cir. 2017). So we must accept the plaintiffs' alleged facts as true, whether "actual proof" of them is "improbable." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). If the parties provide competing but plausible explanations, the plaintiffs' complaint survives. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Thus, we can affirm for the moving party only if there are no material and unresolved facts, and the plaintiffs' claims fail as a matter of law. *George*, 91 F.3d at 1229.

III

We begin by analyzing whether this appeal is now moot because of LAUSD's recent policy reversal. Because LAUSD acted after this litigation was filed, we must decide whether the voluntary cessation exception to mootness applies. *See, e.g.*, *Trinity*

Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 457 n.1 (2017).

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). But generally, a party's decision to stop the challenged conduct does not take away our "power to hear and determine the case." *Id.* (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

Sometimes, however, voluntary cessation can moot a case. First, it must be reasonably clear that the challenged practice will not happen again. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Second, any effects of the alleged violation must be permanently reversed. *Davis*, 440 U.S. at 631. This is a "formidable burden" and "holds for governmental defendants no less than for private ones." *Fikre*, 601 U.S. at 241.

LAUSD's pattern of withdrawing and then reinstating its vaccination policies is enough to keep this case alive. *See Fikre v. FBI*, 904 F.3d 1033, 1039 (9th Cir. 2018) ("[A] claim is not moot if the government remains practically and legally free to return to [its] old ways despite abandoning them in the ongoing litigation." (citing *W.T. Grant*, 345 U.S. at 632) (internal quotation marks omitted)). Twice LAUSD has withdrawn its policy only after facing some litigation risk. LAUSD immediately rescinded its prior policy after some plaintiffs first sued, and LAUSD then asked the district court to dismiss for mootness or ripeness. But then just two weeks after securing a dismissal on those grounds, LAUSD implemented the Policy, which has remained in effect for over two years.

We held oral argument on the morning of September 14, 2023, where LAUSD's counsel was vigorously questioned. That same day LAUSD submitted a report recommending rescission of the Policy. Twelve days later, LAUSD withdrew the Policy.

Litigants who have already demonstrated their willingness to tactically manipulate the federal courts in this way should *not* be given any benefit of the doubt. LAUSD's about-face occurred only after vigorous questioning at argument in this court, which suggests that it was motivated, at least in part, by litigation tactics. *See R.W. v. Columbia Basin Coll.*, 77 F.4th 1214, 1226 (9th Cir. 2023). For example, in *Columbia Basin College*, we upheld a finding that the voluntary-cessation-mootness burden had not been met. *Id.* We were persuaded by the district court, which noted the defendants' strategic timing of sending a letter purporting to moot the case more than three years after litigation but only one month before moving on mootness. *Id.* Here too, LAUSD's timing is suspect.

Rather than hold LAUSD to its "formidable burden," *see Fikre*, 601 U.S. at 241, the dissent consistently draws highly debatable inferences for LAUSD in evaluating LAUSD's actions in the two vaccine-related lawsuits filed against it. But federal judges "are 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Com. v. New York*, 588 U.S. 752, 139 S. Ct. 2551, 2575 (2019) (citation omitted). Given the detailed procedural history summarized earlier, the record at least supports a strong inference that LAUSD waited to see how the oral argument in this court proceeded before determining whether to maintain the Policy or to go forward with a pre-prepared repeal option. LAUSD appears to have twice

sought to manipulate the federal courts to avoid an adverse ruling on this issue. Moreover, the Board expressly reserved the option to again consider imposing a vaccine mandate. This confirms that LAUSD has not carried its heavy burden to show that there is no reasonable possibility that it will again revert to imposing a similar policy.

We must view any strategic moves designed to keep us from reviewing challenged conduct with a "critical eye." *See Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012). Comments made by Board members confirm that its policy rescission aimed to avoid litigation. For example, Dr. McKenna—the sole Board member to vote against withdrawal of the Policy—justified his vote because he was "not afraid of litigation" or the "zealousness that will come out with lawsuits" brought by employees who lost their jobs. Likewise, Board President Goldberg said that she had a "foot in [the] camp" with Dr. McKenna, and so "reluctantly" voted to rescind. These comments show that the Board was aware of, and responding to, the pending litigation. LAUSD therefore is no longer entitled to any presumption of regularity.

The dissent disagrees, citing distinguishable cases involving challenges to COVID-19 policies. We found in each case that the government entity did not intentionally abandon its policy because of litigation risk but for other intervening reasons. *See, e.g.*, *Brach v. Newsom*, 38 F.4th 6, 12 (9th Cir. 2022) ("The State did not rescind its school closure orders in response to the litigation—the orders 'expired by their own terms' . . ."); *McDonald v. Lawson*, 94 F.4th 864, 869 (9th Cir. 2024) ("[N]othing in the record . . . indicates that [the State's assertion that it would not enforce the challenged rule] was made in bad faith." (citation

omitted)); *Seaplane Adventures, LLC v. County of Marin*, 71 F.4th 724, 732 (9th Cir. 2023) (given that California's state of emergency ended, "there is no indication that the County can or will reimpose restrictions similar to those in effect at the very beginning of the pandemic."); *Donovan v. Vance*, 70 F.4th 1167, 1172 (9th Cir. 2023) (explaining that because the vaccine mandate exemption was based on executive orders that no longer exist, no relief is available). Indeed, this panel unanimously reached the same conclusion about the withdrawal of the vaccine mandates imposed by Oregon and Washington. *See Johnson v. Kotek*, 2024 WL 747022, at *1 (9th Cir. 2024) (dismissing the claims for prospective relief as moot); *Pilz v. Inslee*, 2023 WL 8866565, at *1 (9th Cir. 2023) (same). As explained above, LAUSD's actions do not suggest the same intent as existed in these other cases. Here, unlike in *Lawson*, the evidence shows that LAUSD acted at least partially in bad faith to avoid litigation risk in again changing the Policy. And unlike in *Seaplane Adventures*, LAUSD has shown that they "can or will reimpose" similar restrictions.

Thus, the voluntary cessation exception to mootness applies. *See id.*; *see also Pub. Utils. Comm'n of State of Cal. v. FERC*, 100 F.3d 1451, 1460 (9th Cir. 1996) ("in order for [the voluntary cessation] exception to apply, the defendant's [changed action] must have arisen *because of* the litigation." (emphasis in original)). This case is not moot.[4]

IV

We now turn to the merits. The district court held, applying rational basis review under *Jacobson*, that the Policy satisfied a legitimate government purpose.

[4] For these reasons, LAUSD's Motion to Dismiss is DENIED.

But the district court's analysis diverges from *Jacobson*. We thus vacate the district court's opinion and remand.

The district court relied on *Jacobson* to hold that the Policy was rooted in a legitimate government interest. *Reilly*, 2022 WL 5442479, at *5–6. But *Jacobson* does not directly control based on Plaintiffs' allegations. In *Jacobson*, the Supreme Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease. 197 U.S. at 38. The Court explained that the "principle of vaccination" is "to prevent the spread of smallpox." *Id.* at 31–32. Because of this, the Court concluded that the State's interest superseded Jacobson's liberty interest, and the vaccine requirement was constitutional. *Id.*

Plaintiffs argue that a "traditional vaccine" must provide immunity and prevent transmission, meaning that it must "prevent the spread" of COVID-19. Plaintiffs allege that the vaccine does not effectively prevent spread, but only mitigates symptoms for the recipient. And Plaintiffs claim that something that only does the latter, but not the former, is like a medical treatment, not a "traditional" vaccine. This interpretation distinguishes *Jacobson*, thus presenting a different government interest.

Putting that aside, the district court held that, even if it is true that the vaccine does not "prevent the spread," *Jacobson* still dictates that the vaccine mandate challenged here is subject to, and survives, the rational basis test. The district court reasoned that "*Jacobson* does not require that a vaccine have the specific purpose of *preventing* disease." *Reilly*, 2022 WL 5442479, at *5 (emphasis in original). It acknowledged Plaintiffs' allegations that the vaccine did not "prevent

transmission or contraction of COVID-19." *Id.* at *6. But it declared that "these features of the vaccine further the purpose of protecting LAUSD students and employees from COVID-19," and thus "the Policy survives rational basis review." *Id.*

This misapplies *Jacobson*. *Jacobson* held that mandatory vaccinations were rationally related to "preventing the spread" of smallpox. 197 U.S. at 30; *see also Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 23 (2020) (Gorsuch, J., concurring) ("Although *Jacobson* pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review to Henning Jacobson's challenge . . ."). *Jacobson*, however, did not involve a claim in which the compelled vaccine was "designed to reduce symptoms in the infected vaccine recipient rather than to prevent transmission and infection." *Reilly*, 2022 WL 5442479, at *5. The district court thus erred in holding that *Jacobson* extends beyond its public health rationale—government's power to mandate prophylactic measures aimed at preventing the recipient from spreading disease to others—to also govern "forced medical treatment" for the recipient's benefit. *Id.* at *5.

At this stage, we must accept Plaintiffs' allegations that the vaccine does not prevent the spread of COVID-19 as true. *Twombly*, 550 U.S. at 556. And, because of this, *Jacobson* does not apply. LAUSD cannot get around this standard by stating that Plaintiffs' allegations are wrong. Nor can LAUSD do so by providing facts that do not contradict Plaintiffs' allegations. It is true that we "need not [] accept as true allegations that contradict matters properly subject to judicial notice." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). But even if the materials offered by LAUSD are subject to judicial notice, they

do not support rejecting Plaintiffs' allegations. LAUSD only provides a CDC publication that says "COVID-19 vaccines are safe and effective." But "safe and effective" for what? LAUSD implies that it is for preventing transmission of COVID-19 but does not adduce judicially noticeable facts that prove this.

We note the preliminary nature of our holding. We do not prejudge whether, on a more developed factual record, Plaintiffs' allegations will prove true. But "[w]hether an action 'can be dismissed on the pleadings depends on what the pleadings say.'" *Marshall Naify Revocable Tr. v. United States*, 672 F.3d 620, 625 (9th Cir. 2012) (quoting *Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997)). Because we thus must accept them as true, Plaintiffs have plausibly alleged that the COVID-19 vaccine does not effectively "prevent the spread" of COVID-19. Thus, *Jacobson* does not apply, and so we vacate the district court's order of dismissal and remand.

V

This case is not moot. And the district court wrongly applied *Jacobson* to the substantive due process claim. Thus, we vacate the district court's order and remand.

VACATED AND REMANDED.

R. NELSON, J., concurring:

I write separately to address another issue not at issue in this appeal, but perhaps relevant as this case progresses on remand. Our intervening case, *Kohn v. State Bar of California*, 87 F.4th 1021 (9th Cir. 2023) (en banc), raises the question whether the district court's holding below that the Los Angeles Unified School District (LAUSD) is entitled to sovereign immunity should be revisited.

"[A] federal court generally may not hear a suit brought by any person against a nonconsenting State." *Munoz v. Super. Ct. of L.A. Cnty.*, 91 F.4th 977, 980 (9th Cir. 2024) (internal quotation marks omitted). "This prohibition applies when the state or the arm of a state is a defendant." *Id.* (cleaned up). We recently clarified when a government agency is an "arm of the state." *See Kohn*, 87 F.4th at 1026–32. We examined the current test—the *Mitchell* factors—against Supreme Court precedent and overruled it. *Id.* at 1027–30 (reassessing *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201–02 (9th Cir. 1988)). We instead adopted a new, entity-based test. *Id.* at 1030. *Kohn*'s reasoning may impact claims that can be brought against LAUSD.

The Supreme Court has never established a standard test for determining whether an entity is an "arm of the state." *See id.* at 1026–27. We developed the *Mitchell* factors out of a "grab bag" of Supreme Court and Ninth Circuit precedent. *Id.* at 1027. One of the cases the *Mitchell* factors relied on was the Supreme Court's decision in *Edelman v. Jordan*, 415 U.S. 651 (1974). *Id. Edelman* suggested that if the judgment would be paid by the State, the suit is barred. *See id.* at 1027 (citing *Edelman*, 415 U.S. at 663 ("Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be

paid from public funds in the state treasury is barred by the Eleventh Amendment.")). Since *Edelman*, however, the Court has held that solvency *and* state dignity are equally important, and what matters is how the state and defendant relate to one another. *See id.* at 1027–28; *see also id.* ("But, since *Edelman* and *Mitchell*, the Supreme Court has clarified that '[t]he Eleventh Amendment does not exist solely in order to preven[t] federal-court judgments that must be paid out of a [s]tate's treasury.'" (quotations omitted) (itself quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996)).

The *Mitchell* test was applied inconsistently, and thus was not predictable. The factors were weighted differently, and while this balancing afforded judicial discretion, "it allows lower courts in our Circuit to 'twist' the arms of the state doctrine depending on the defendant." *Id.* at 1029. For example, "[u]nder *Mitchell*, we [] placed the greatest weight on" who was financially responsible in assessing sovereign immunity. *Id.* at 1027 (citing *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 (9th Cir. 1991)). This made little sense. *See id.* at 1027–30.

The second *Mitchell* factor—"whether the entity performs central government functions"—was also applied inconsistently. *Id.* at 1029. At times, we have evaluated this at the entity-level, and other times at the activity-level. *Id.* But if the *Mitchell* test were entity-based, an entity either should be immune or not—it should not depend on what the entity is doing. *Id.*

Recognizing this tension, *Kohn* overruled *Mitchell*. *Id.* at 1028 ("The *Mitchell* factors are . . . inconsistent with Supreme Court arm of the state doctrine."). In its place, we adopted an "entity-based" test. *Id.* at 1030.

This three-factor test evaluates "(1) the state's intent as to the status, including the functions performed by the entity; (2) the state's control over the entity; and (3) the entity's overall effects on the state treasury." *Id.* (citing *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 873 (D.C. Cir. 2008) (cleaned up)). Under it, "an entity either is or is not an arm of the [s]tate"—it is not context specific. *Id.* at 1031 (citing *P.R. Ports Auth.*, 531 F.3d at 873).

We have held that California school districts have sovereign immunity, relying on *Mitchell*. *See, e.g.*, *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir. 1992); *Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d 923, 934 (9th Cir. 2017). That said, we have held that school districts in other states are not.[1] The reasons for this differing result are now suspect under *Kohn*. Given this, it must be reassessed whether California school districts are an "arm of the state."

We first held that California school districts were an "arm of the state" in *Belanger*. We noted that some factors cut against this but reasoned that "Belanger [could not] prevail on the first and most important factor because a judgment against the school district would be satisfied out of state funds." *Belanger*, 963 F.2d at 251. We also stated that "under California law, the school district is a state agency that performs central government functions." *Id.* This analysis thus hinged on the first and second, now defunct, *Mitchell* factors. *See id. Belanger*'s analysis of the second factor also examined the *activity* that California school

[1] *See, e.g.*, *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1184 (9th Cir. 2003) (Alaska); *Savage v. Glendale Union High Sch., Dist. No. 205*, 343 F.3d 1036, 1044 (9th Cir. 2003) (Arizona); *Eason v. Clark Cnty. Sch. Dist.*, 303 F.3d 1137, 1143 (9th Cir. 2002) (Nevada).

districts performed—public schooling—and reasoned that because that was a "central governmental function," they were "arms of the state." *Id.* The *Belanger* court was unconcerned that California school districts "enjoy wide discretion and considerable autonomy" under this second factor. *See id.* This analysis is thus suspect under *Kohn*.

We then doubled down on this holding in *Sato*. Between *Belanger* and *Sato*, California enacted AB 97, which "reformed education funding and governance in California." *Sato*, 861 F.3d at 929. As a result, public education in California became more locally funded and educational achievement more locally controlled—thus reducing the State's involvement in both. *See id.* That said, we still held that because state and local education funds were "still 'hopelessly intertwined,'" the first, now disfavored, *Mitchell* factor still favored immunity. *Id.* at 932. For the second *Mitchell* factor, while we recognized that "AB 97 granted districts [] some measure of autonomy and discretion in goal-setting," "it did not delegate primary responsibility for providing public education." *Id.* at 933. This determination thus looked at the activity—providing public education—rather than the entity. That reasoning and this conclusion is now suspect under *Kohn*.

Our new entity-based test in *Kohn* seems to conflict with (and likely overrule) our reasoning in *Belanger* and *Sato*. Because of this, the district court's holding that LAUSD is an "arm of the state" (as well as our prior holdings in *Belanger* and *Sato*) may need to be revisited. *Cf. Reilly*, 2022 WL 5442479, at *3 (relying

on *Mitchell* to determine that LAUSD has Eleventh Amendment immunity).[2]

[2] If LAUSD does not have sovereign immunity, Plaintiffs may be able to amend to raise a monetary claim, which would be another reason this case is not moot. *Cf. Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *see also Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 425–26 (9th Cir. 2008) ("[A] 'live claim for [even] nominal damages will prevent dismissal for mootness.'" (quoting *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002))).

COLLINS, Circuit Judge, concurring:

I agree that this case is not moot and that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), is not controlling under the well-pleaded allegations of Plaintiffs' complaint. I therefore concur in the majority opinion. I write separately to emphasize a crucial point the district court overlooked.

The district court in this case explicitly held that *Jacobson* governs Plaintiffs' substantive due process claim even if one assumes the truthfulness of the complaint's allegations that the Covid vaccines are not very effective at preventing infection and transmission and that their value is primarily in *reducing disease severity* for those recipients of the vaccine who thereafter contract Covid. As the majority explains, *Jacobson* did not involve a comparable claim and is not controlling authority with respect to it.

In my view, the district court further erred by failing to realize that these allegations directly implicate a distinct and more recent line of Supreme Court authority, in which the Court has stated that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from [the Court's] prior decisions." *Cruzan ex rel. Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278–79 (1990) (citing, not only *Jacobson*, but a series of later "cases support[ing] the recognition of a general liberty interest in refusing medical treatment"). In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court explained that *Cruzan*'s posited "'right of a competent individual to refuse medical treatment'" was "entirely consistent with this Nation's history and constitutional traditions," in light of "the common-law rule that forced medication was a battery, and the long legal tradition protecting the

decision to refuse unwanted medical treatment." *Id*. at 724–25 (citation omitted). Given these statements in *Glucksberg*, the right described there satisfies the history-based standards that the Court applies for recognizing "fundamental rights that are not mentioned anywhere in the Constitution." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237–38 (2022). The Supreme Court's caselaw thus clarifies that compulsory treatment for the health benefit of *the person treated*—as opposed to compulsory treatment for the health benefit of *others*—implicates the fundamental right to refuse medical treatment.

Plaintiffs' allegations here are sufficient to invoke that fundamental right. Defendants note that the vaccination mandate was imposed merely as a "condition of employment," but that does not suffice to justify the district court's application of rational-basis scrutiny. *See Lane v. Franks*, 573 U.S. 228, 236 (2014) ("[The] Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights.").

With these additional observations, I concur in the majority opinion.

HAWKINS, Circuit Judge, dissenting.

This case is over. We cannot grant the sole relief sought by the Plaintiffs, an injunction against enforcement of the school district's now rescinded COVID-19 vaccination policy (the "Policy"). Despite the absence of any ongoing policy, my friends in the Majority would hold that this action remains justiciable under the voluntary cessation exception to mootness. *See FBI v. Fikre*, 601 U.S. 234, 241 (2024). In doing so, they ignore the practical realities surrounding LAUSD's adoption and rescission of the Policy, which demonstrate that there is no reasonable expectation LAUSD will reimpose the Policy in the future. Because there is no longer any policy for our court to enjoin, I would, as our court has done consistently in actions challenging rescinded early pandemic policies, hold that this action is moot, vacate the district court's decision, and remand with instructions to dismiss the action without prejudice. *See, e.g.*, *Brach v. Newsom*, 38 F.4th 6 (9th Cir. 2022) (en banc).

I begin with a brief overview of the pertinent events to illustrate the context in which LAUSD adopted and then rescinded the Policy. In early March 2020, the World Health Organization declared a global pandemic in response to COVID-19, leading to the issuance of local, state, and federal emergency declarations and orders. "Governor Gavin Newsom declared a state of emergency within California, and issued Executive Order N-33-20, requiring Californians to 'heed the current State public health directives' including the requirement 'to stay home or at their place of residence.'" *Id.* at 9. Around March 16, 2020, LAUSD closed its facilities for in-person operations and implemented a distance learning and remote work

program that lasted through most of the 2020–2021 school year.

In advance of the reopening of schools for in-person instruction, California Educators for Medical Freedom—one of the Plaintiffs in this action—and several other individuals filed a complaint on March 17, 2021, seeking to enjoin LAUSD from implementing a policy that required employees, without exception, to be vaccinated against COVID-19. *Cal. Educators for Med. Freedom v. Los Angeles Unified Sch. Dist.*, No. 21-cv-02388, 2021 WL 1034618, Dkt. 1 (C.D. Cal. Mar. 17, 2021) (*CEMF*).[1] The *CEMF* complaint alleged, on information and belief, that LAUSD had adopted such a policy, *id.* ¶ 1, and attached several documents in support, including a March 4, 2021 memorandum to employees. *See id.* Ex. F. The memorandum informed LAUSD employees that they were eligible to receive COVID-19 vaccinations and provided information about registering for vaccinations through the District's vaccination program or submitting documentation of their vaccination if received through an outside program. *Id.* The memorandum did not state explicitly that employees were required to receive vaccinations or that employment consequences would follow if employees were not vaccinated.[2] *Id.* The day after the

[1] We may take judicial notice of filings and decisions in related court actions. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006).

[2] CEMF also supported its complaint with a letter from the LAUSD employees' union. *CEMF*, No. 21-cv-02388, 2021 WL 1034618, Dkt. 1, Ex. G. The letter indicated that the District's plans to implement a mandatory vaccination policy were in progress; the information regarding those plans "may very well change;" discussions with the District were "nowhere near done;" and no deadlines had been set given a variety of unknown variables, including the availability of vaccinations. *Id.*

CEMF plaintiffs filed their complaint, LAUSD sent an updated interoffice memorandum that clarified "vaccinations are not mandatory at this time." The *CEMF* plaintiffs acknowledged in an amended complaint that LAUSD was giving staff the option to test or be vaccinated.

LAUSD moved to dismiss the case on ripeness grounds because it had not yet implemented a vaccination policy, and the district court granted the motion. The district court found that the case did not raise any voluntary cessation concerns because, "according to Plaintiffs' allegations, Defendants never began the objectionable conduct in the first place." The district court dismissed the action without prejudice on July 27, 2021.

The 2021–2022 LAUSD school year was set to begin just a few weeks later on August 16, 2021.[3] The 2021–2022 school year also marked the unrestricted reopening of LAUSD schools for in-person instruction.[4] On August 13, 2021—the first "pupil free day" of the school year[5] and three days before students would be returning to the classrooms—LAUSD circulated a memorandum to staff announcing the Policy and explaining that all non-exempt employees must be vaccinated against COVID-19. The LAUSD Board of

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[3] LAUSD, Single-Track Instructional School Calendar 2021–2022, https://achieve.lausd.net/cms/lib/CA01000043/Centricity/Domain/4/REV1.4.2022BoardAppvd_2021-2022InstructionalCal.pdf ["LAUSD 2021–2022 Calendar"].

[4] The emergency legislation allowing the California public school system to move online expired on June 30, 2021, and on July 12, 2021, the State of California lifted "all restrictions on school reopening." *Brach*, 38 F.4th at 11, 13.

[5] *See* LAUSD 2021–2022 Calendar.

Education (the "Board") approved the policy at a subsequent meeting in November 2021.

Plaintiffs filed the underlying complaint and sought an injunction barring enforcement of the Policy. LAUSD eventually moved for judgment on the pleadings. The district court granted the motion and entered judgment in favor of the Defendants. Plaintiffs then appealed.

We held oral argument on September 14, 2023, approximately four weeks after the start of LAUSD's 2023–2024 school year.[6] At oral argument, counsel for Plaintiffs informed the court that, although the Policy remained in effect as of that date, there were rumors LAUSD would be rescinding the Policy. Consistent with those rumors, a detailed report proposing rescission of the Policy was submitted to the Board on the same day as oral argument. The proposal identified the many changes that had occurred since LAUSD adopted the Policy in the fall of 2021 and expressed the view that vaccines were no longer needed to keep schools open for in-person learning. At its next meeting, held on September 26, 2023, the Board heard comments from interested parties and voted to rescind the Policy.

The Majority characterizes LAUSD's conduct as an intentional manipulation of federal courts. But we generally afford the government a presumption of good faith, *Brach*, 38 F.4th at 13, and when viewed in context, there are obvious, non-litigation-related

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[6] LAUSD, Instructional School Calendar 2023–2024, https://www.lausd.org/site/default.aspx?PageType=3&ModuleInstanceID=67213&ViewID=C9E0416E-F0E7-4626-AA7BC14D59F72F85&RenderLoc=0&FlexDataID=112212&PageID=17824&Comments=true.

explanations for LAUSD's actions surrounding the adoption and rescission of the Policy. Far from the "about-face" described by the Majority, the *CEMF* pleadings and attached documents reflect that LAUSD simply had not formalized or implemented a vaccination policy at the time the plaintiffs filed their complaint in that litigation. Although implementation of the Policy came on the heels of the *CEMF* lawsuit's dismissal, it also coincided with the start of the new school year and LAUSD's full return to in-person learning after the unprecedented school closures seventeen months earlier. Thus, I would not be so quick to deem the timing of LAUSD's development and adoption of the Policy as litigation gamesmanship, and I would not rely on it to infer the motive behind LAUSD's rescission of the Policy. Instead, I believe there is sufficient evidence in the record that LAUSD rescinded the Policy in response to developments regarding COVID-19 and "not [as] a temporary move to sidestep litigation." *Brach*, 38 F.3d at 13.

Next, and more importantly, the record shows that LAUSD is not reasonably expected to reenact the Policy. *See Fikre*, 601 U.S. at 241. The burden to show that challenged conduct is not reasonably expected to recur is a "formidable" one indeed. *Id.* And governmental defendants must bear that burden just as any other private party would. *Id.* Here, LAUSD has carried that burden.

Again, context matters. LAUSD adopted the Policy in response to the COVID-19 pandemic and the return to full in-person instruction after the extended school closures occasioned by the onset of the pandemic. Those are not "routine occurrence[s] that we can assume [are] reasonably likely to reoccur." *McDonald v. Lawson*, 94 F.4th 864, 869 (9th Cir. 2024). It then

rescinded the Policy after several key developments in 2023, including the end of local, state, and federal emergency COVID-19 orders; the World Health Organization's determination that COVID-19 no longer constitutes a public health emergency of international concerns; and the determination that COVID-19 had entered an endemic phase. These legal and scientific developments and LAUSD's reliance on them suggest that LAUSD's recission of the Policy is "entrenched" and not "easily abandoned." *Brach*, 38 F.4th at 13. LAUSD also has averred that, absent a very unlikely return to the onset of the COVID-19 pandemic, it will not reinstate the Policy.

As we have said before, "circumstances change, and when circumstances change, it is not reasonable to expect simple repetition of past actions." *Wallingford v. Bonta*, 82 F.4th 797, 804 (9th Cir. 2023). The bottom line, here, is that the circumstances have changed. And neither the speculative possibility of a future pandemic nor LAUSD's power to adopt another vaccination policy save this case.[7] *See Brach*, 38 F.4th at 9.

Unsurprisingly, our court has found that other challenges to early COVID-19 policies became moot

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[7] I also disagree with the approach to avoiding mootness suggested in the concurrence. Although we may consider subsequent events when evaluating mootness, we typically do not allow plaintiffs to change the nature of the remedies sought in their complaint when mootness concerns arise. *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1097–98 (9th Cir. 2001). If our court would not allow the Plaintiffs to save this case with a "late-in-the-day" request for damages, *Bain v. Cal. Teachers Ass'n*, 891 F.3d 1206, 1212 (9th Cir. 2018), the court certainly should refrain from sua sponte suggesting a novel legal theory in support of a remedy not sought in the complaint as a means to reach the merits of an otherwise moot case.

upon the rescission or expiration of those policies, and in doing so, we rejected arguments that the voluntary cessation exception to mootness applied, particularly in light of the unique circumstances that gave rise to the policies in the first place. *See, e.g.*, *id.* at 12–14; *McDonald*, 94 F.4th at 869; *Seaplane Adventures, LLC v. County of Marin*, 71 F.4th 724, 732–33 (9th Cir. 2023); *Donovan v. Vance*, 70 F.4th 1167, 1172 & n.5 (9th Cir. 2023).

In a recent trio of cases, the Supreme Court vacated as moot lower court judgments concerning COVID-19 vaccination mandates following the rescission of those mandates. *Payne v. Biden*, 144 S. Ct. 480 (2023); *Biden v. Feds for Ded. Freedom*, 144 S. Ct. 480, 480–81 (2023); *Kendall v. Doster*, 144 S. Ct. 481 (2023). Relying on *Payne*, *Feds for Medical Freedom*, and *Doster*, we determined that a challenge to the executive order mandating COVID-19 vaccinations for federal contractors became moot upon rescission of that executive order; we vacated our court's earlier opinion, dismissed the appeal as moot, and remanded for the district court to vacate portions of its order regarding the moot claims. *Mayes v. Biden*, 89 F.4th 1186, 1188 (9th Cir. 2023). The case before us now warrants the same result.

"Sometimes, events in the world overtake those in the courtroom, and a complaining party manages to secure outside of litigation all the relief he might have won in it." *Fikre*, 601 U.S. at 240. That is the case here. Because there is no longer any policy for the court to enjoin or declare unlawful, I would hold that the case is moot, vacate the district court's decision, and remand for the district court to dismiss the case as moot. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). I dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 21-8688 DSF (PVCx)

HEALTH FREEDOM DEFENSE FUND, *et al.*,

Plaintiffs,

v.

MEGAN K. REILLY, *et al.*,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS (DKT. 74)

Defendants Megan Reilly, Ileana Davolos, George McKenna, Monica Garcia, Scott Schmerelson, Nick Melvoin, Jackie Goldberg, Kelly Gonez, and Tanya Ortiz Franklin move for judgment on the pleadings. Dkt. 47-1 (Mot.). Plaintiffs Health Freedom Defense Fund, Inc., California Educators for Medical Freedom, Miguel Sotelo[1], Jeffrey Fuentes, Sandra Garcia, Hovhannes Saponghian, and Norma Bramila oppose. Dkt. 79 (Opp'n). The Court deems this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7-15. The hearing scheduled for September 12, 2022 is removed from the Court's calendar. The motion is GRANTED.

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[1] Sotelo stipulates to dismissal of his claims. Opp'n at 7 n.2.

I. BACKGROUND

On August 13, 2021, Defendants enacted a mandatory COVID-19 vaccination requirement (the Policy) for employees and other adults working at the Los Angeles Unified School District (LAUSD). Dkt. 65 (SAC) ¶ 4.[2] The Policy required that employees must receive their first dose of the COVID-19 vaccine by October 15, 2021 or be terminated effective November 1, 2021. *Id.* ¶¶ 4-5; *id.* Ex. A at 1 (the Policy). The Policy provides for various exemptions from the vaccination requirement, including accommodations based on a sincerely held religious belief or a disability or serious medical condition. Policy at 4.

Plaintiff Health Freedom Defense Fund is a Wyoming corporation with its headquarters in Idaho. SAC ¶ 9. Plaintiff California Educators for Medical Freedom is a voluntary, unincorporated association of California state education employees. *Id.* ¶ 10. Plaintiffs Miguel Sotelo, Jeffrey Fuentes, Sandra Garcia, Hovhannes Saponghian, and Norma Bramila are citizens of Los Angeles County and are employed by LAUSD in various positions. *Id.* ¶¶ 11-5. Plaintiffs have all either been terminated, placed on unpaid leave, or allegedly face imminent termination due to their refusal to be vaccinated against COVID-19. *Id.* ¶¶ 73-77.

Defendant Alberto Carvalho is the superintendent of LAUSD, and Ileana Davalos is the Chief Human Resources Officer for LAUSD. *Id.* ¶¶ 17-18. Defendants George McKenna, Monica Garcia, Scott Schmerelson, Nick Melvoin, Jackie Goldberg, Kelly Gonez, and Tanya Ortiz Franklin are LAUSD's governing board

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[2] The SAC violates the Local Rules because it is not a searchable PDF. *See* L.R. 5-4.3.1.

members. *Id.* ¶ 19. All Defendants are named in their official capacities. *Id.* ¶¶ 17-19.

Plaintiffs assert claims under 42 U.S.C. § 1983 for violation of substantive due process and equal protection under the Fourteenth Amendment, for declaratory and injunctive relief under the Americans with Disabilities Act (ADA), and for violations of California law. *Id.* ¶¶ 79-144.

II. LEGAL STANDARD

Rule 12(c) of the Federal Rules of Civil Procedure permits a party to move to dismiss a suit "[a]fter the pleadings are closed – but early enough not to delay trial." Fed. R. Civ. P. 12(c). "Judgment on the pleadings is proper when, taking all allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." *Stanley v. Trustees of Cal. State Univ.,* 433 F.3d 1129, 1133 (9th Cir. 2006). It must appear beyond doubt that the plaintiffs can prove no set of facts that would entitle them to relief. *Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co.,* 132 F.3d 526, 529 (9th Cir. 1997).

When deciding a Rule 12(c) motion, courts may consider facts set forth in the pleadings as well as facts contained in materials of which the court may take judicial notice. *Heliotrope Gen., Inc. v. Ford Motor Co.,* 189 F.3d 971, 981 n.18 (9th Cir. 1999); *see also Hebert Abstract Co. v. Touchstone Props., Ltd.,* 914 F.2d 74, 76 (5th Cir. 1990) (a Rule 12(c) motion "is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts"). Allegations by the non-moving party must be accepted as true, and allegations of the moving party that have been denied must

be deemed false for the purpose of the motion. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.,* 896 F.2d 1542, 1550 (9th Cir. 1990). However, a court is not required to accept the veracity of "legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged," or "merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Cholla Ready Mix, Inc. v. Civish,* 382 F.3d 969, 973 (9th Cir. 2004) (internal quotation marks and citations omitted) (reviewing ruling under Rule 12(b)(6)).

III. DISCUSSION

Defendants move for judgment on the pleadings as to each of Plaintiffs' causes of action on the grounds that all claims are barred by Eleventh Amendment immunity and that Plaintiffs fail to state a claim against Defendants. Mot. at 1-2.

A. Evidentiary Objections

Defendants object to each of the 31 exhibits attached to Plaintiffs' Opposition. Dkt. 80-2 at 3. Among other objections, Defendants point out that Plaintiffs' reference to those exhibits is improper on a motion for judgment on the pleadings. *Id.* The Court agrees with Defendants. "Judgment on the pleadings is limited to material included in the pleadings. Otherwise, the proceeding is converted to summary judgment." *Yakima Valley Mem'l Hosp. v. Washington State Dep't of Health,* 654 F.3d 919, 925 n.6 (9th Cir. 2011) (finding district court did not abuse discretion in declining to convert motion for judgment on the pleadings into one for summary judgment). The Court declines to convert this motion into one for summary judgment by considering the exhibits to Plaintiffs' Opposition.

B. Judicial Notice

Defendants request judicial notice of four exhibits filed in support of their Reply. Dkt. 80-1 (RJN). Exhibits A and B are statistics published by the World Health Organization and the County of Los Angeles Department of Public Health showing the total number of reported COVID-19 cases as of August 2022 in the United States and Los Angeles County, respectively. *Id.* Exs. A-B. Exhibit C is an information sheet published by the Centers for Disease Control and Prevention (CDC) relating to COVID-19 vaccines. *Id.* Ex. C. All exhibits are public.

Federal Rule of Evidence 201(b) provides that a court "may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." A court "may take judicial notice of 'matters of public record.'" *Lee v. City of Los Angeles,* 250 F.3d 668, 688-89 (9th Cir. 2001) (quoting *Mack v. South Bay Beer Distrib.,* 789 F.2d 1279, 1282 (9th Cir. 1986)). A court "cannot take judicial notice of disputed facts contained in such public records." *Khoja v. Orexigen Therapeutics, Inc.,* 899 F.3d 988, 999 (9th Cir. 2018) (quoting *Lee,* 250 F.3d at 689 (simplified)).

Plaintiffs object to Defendants' request for judicial notice on the grounds that (1) Defendants did not cite Exhibits A-C in their motion or reply briefs; (2) the exhibits do not relate to the "central contested issues in this case" of whether COVID-19 vaccines are effective in creating immunity and whether LAUSD failed to recognize the efficacy of natural immunity; and (3) the sources cited in the exhibits are unreliable.

First, Defendants cite Exhibits A-C on page seven of their Reply. Dkt. 80 (Reply) at 7. Second, that the exhibits do not pertain to what Plaintiffs consider to be the core issues in this case does not in itself prevent the Court from taking judicial notice of them. Finally, as for the accuracy of the information in Exhibits A-C, the Court takes judicial notice of the *existence* of the documents, not the truth of the allegations or the merits of the arguments asserted in those documents, or the parties' characterization of those documents.

Exhibits A-C are matters of public record because they are government publications. *See Corrie v. Caterpillar, Inc.,* 503 F.3d 974, 978 n.2 (9th Cir. 2007) (a court may take judicial notice of a government publication).

The Court GRANTS Defendants' request for judicial notice.

C. Eleventh Amendment Immunity

Defendants argue that the Court should dismiss the SAC because while Plaintiffs do not expressly seek damages, their "end goal" is a damages award prohibited by the Eleventh Amendment. Mot. at 5.

"The Eleventh Amendment creates an important limitation on federal court jurisdiction, generally prohibiting federal courts from hearing suits brought by private citizens against state governments without the state's consent." *Sofamor Danek Grp., Inc. v. Brown,* 124 F.3d 1179, 1183 (9th Cir. 1997). Under the Eleventh Amendment, agencies of the state are immune from private damages or suits for injunctive relief brought in federal court. *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 100 (1984). To determine whether a governmental agency is an arm of the state, courts examine the following factors:

whether a money judgment would be satisfied out of state funds, whether the entity performs essential government functions, whether the entity may sue or be sued, whether the entity has the power to take property in its own name or only the name of the state, and the corporate status of the entity. *Jackson v. Hayakawa,* 682 F.2d 1344, 1350 (9th Cir. 1982); *Mitchell v. Los Angeles Cmty. Coll. Dist.,* 861 F.2d 198, 201 (9th Cir. 1988), *cert. denied,* 490 U.S. 1081 (1989) (applying test to community college district).

The Ninth Circuit has repeatedly found that public school districts in California are arms of the state and are immune to suit under the Eleventh Amendment. *Sato v. Orange Cnty. Dep't of Educ.,* 861 F.3d 923, 926 (9th Cir. 2017) (holding that "[s]chool districts . . . in California remain arms of the state and cannot face suit"); *C.W. v. Capistrano Unified Sch. Dist.,* 784 F.3d 1237, 1247 (9th Cir. 2015) ("It is well-established that a school district cannot be sued for damages under § 1983."); *Corales v. Bennett,* 567 F.3d 554, 573 (9th Cir. 2009) (citing *Belanger v. Madera Unified Sch. Dist.,* 963 F.2d 248, 254 (9th Cir. 1992)) (holding school districts in California are immune from § 1983 claims by virtue of the Eleventh Amendment).

State immunity from suit extends also to its agencies and officers with one exception. *Ex parte Young,* 209 U.S. 123 (1908) (barring suits against state officials in their official capacity except for claims for prospective declaratory and injunctive relief)). To be liable under *Ex parte Young,* the state official "must have some connection with the enforcement of the [allegedly unconstitutional] act." *Los Angeles Cnty. Bar Ass'n v. Eu,* 979 F.2d 697, 704 (9th Cir. 1992). "This connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over

the persons responsible for enforcing the challenged provision will not subject an official to suit." *Id.* It cannot be for retrospective relief. *Green v. Mansour,* 474 U.S. 64, 68 (1985) ("We have refused to extend the reasoning of *Young,* however, to claims for retrospective relief.").

Defendants argue that while Plaintiffs only expressly request injunctive relief in the SAC, they are effectively suing for damages. Mot. at 8. In support of this statement, Defendants point to paragraph 22, which states:

> But for Defendants' qualified immunity this suit would include a demand that Plaintiffs be compensated for these damages. Upon information and belief, discovery will reveal grounds for claiming one or more exceptions to the doctrine of qualified immunity. If that occurs, Plaintiffs will seek leave to amend this Complaint to assert claims for money damages against Defendants in their individual capacities.

SAC ¶ 22. In opposition, Plaintiffs argue this paragraph merely states that if Plaintiffs determine that an exception to qualified immunity applies, they will seek damages against Defendants, but do not do so in the SAC. Opp'n at 5. The Court agrees. The Court declines to dismiss the SAC on the basis of Eleventh Amendment immunity.

D. Failure to State a Claim

1. State Law Claims (Third, Fifth, Sixth, and Seventh Causes of Action)

Defendants argue that the Court lacks jurisdiction to consider Plaintiffs' state law claim for declaratory

and injunctive relief under the California Constitution, due process under California law, public disclosure of private facts, and breach of security for computerized personal information. "A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law" and "conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *See Pennhurst,* 465 U.S. at 106, 121 (1984) ("a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment" and "this principle applies as well to state-law claims brought into federal court under pendent jurisdiction.").

Plaintiffs agree to dismiss their state law claims without prejudice. Opp'n at 9. The Court therefore GRANTS Defendants' motion as to the state law claims without leave to amend.

2. Substantive Due Process (First Cause of Action)

Defendants argue Plaintiffs' substantive due process claim under 42 U.S.C. § 1983 fails because the SAC does not implicate a fundamental right. Mot. at 9.

The Due Process Clause prohibits government officials from arbitrarily depriving a person of constitutionally protected liberty or property interests. *See Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.,* 509 F.3d 1020, 1025-26 (9th Cir. 2007). "Unless a classification trammels fundamental personal rights or implicates a suspect classification, to meet constitutional challenge the law in question needs only some rational relation to a legitimate state interest." *Lockary v. Kayfetz,* 917 F.2d 1150, 1155 (9th

Cir. 1990) (citing *City of New Orleans v. Dukes,* 427 U.S. 297, 303-04 (1976)). "Governmental action is rationally related to a legitimate goal unless the action is clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals, or general welfare." *Sylvia Landfield Trust v. City of Los Angeles,* 729 F.3d 1189, 1193 (9th Cir. 2013) (internal quotations omitted).

The two-tiered rational basis inquiry first asks whether the challenged law has a legitimate purpose, then whether the challenged law promotes that purpose. *Erotic Serv. Provider Legal Educ. and Research Project v. Gascon,* 880 F.3d 450, 457 (9th Cir. 2018). "Given the standard of review, it should come as no surprise [courts] hardly ever strike[ ] down a policy as illegitimate under rational basis scrutiny." *Trump v. Hawaii,* 138 S. Ct. 2392, 2420 (2018).

a. *Existence of Fundamental Right*

First, Defendants argue the Policy does not violate any fundamental right. Defendants cite numerous cases in which federal courts have upheld mandatory vaccination laws, and cite *Jacobson v. Massachusetts,* 197 U.S. 11, 25 (1905) in which the Supreme Court upheld a state's mandatory vaccination policy. Plaintiffs concede that mandatory vaccination laws are generally constitutional under *Jacobson* and its progeny, but argue that LAUSD's Policy implicates a different, fundamental constitutional right: the right to refuse unwanted medical treatment. Opp'n at 9. Specifically, Plaintiffs argue that the COVID-19 vaccine is not actually a vaccine, but rather should be viewed as a medical treatment. *Id.* at 10. Plaintiffs do not cite any cases adopting this approach with respect to the COVID-19 vaccine or any other vaccine. Instead, Plaintiffs cite dicta from *Jacobson* stating it was

"common belief" that the smallpox vaccine at issue in that case had a "decided tendency to prevent the spread of this fearful disease, and to render it less dangerous to those who contract it." *Id.* (citing *Jacobson,* 197 U.S. at 34) (citing *Viemeister v. White,* 179 N.Y. 235 (1904)). Plaintiffs argue this language indicates a vaccine must prevent infection and transmission in order to be considered a vaccine for scrutiny under *Jacobson. Id.*

Plaintiffs argue that the COVID-19 vaccine should instead be viewed as a "medical treatment" and be subject to strict scrutiny because "it is designed to reduce symptoms in the infected vaccine recipient rather than to prevent transmission and infection." *Id.* at 12. In support of this statement, Plaintiffs cite various sources stating the purpose of the COVID-19 vaccine is to lessen the severity of the disease, not prevent contraction or transmission. Opp'n at 12-17. But Plaintiffs' reliance on this distinction is misplaced. The language from *Jacobson* on which Plaintiffs rely is a quote from a New York Supreme Court decision that the Supreme Court in *Jacobson* cited as support for the point that "vaccination, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries . . . ." *Jacobson,* 197 U.S. at 35. Moreover, in *Jacobson,* the Supreme Court articulated the more general finding that the plaintiff had not demonstrated that "the means prescribed by the state" to "stamp out the disease of smallpox" had "no real or substantial relation to the protection of the public health and the public safety." *Id.* at 31. *Jacobson* does not require that a vaccine have the specific purpose of *preventing* disease.

Further, the Seventh Circuit recently considered and rejected many of the arguments Plaintiffs make here. *See Lukaszczyk v. Cook Cnty.,* --- F.4th ---, No. 21-3200, 2022 WL 3714639 (7th Cir. Aug. 29, 2022). In particular, the plaintiffs argued that the vaccine mandates infringed fundamental liberty and bodily autonomy interests and that the policies at issue should therefore be subject to strict scrutiny rather than rational review. *Id.* at *7. The Seventh Circuit rejected this argument on the grounds that following the Supreme Court's guidance, the circuit court "has been hesitant to expand the scope of fundamental rights under substantive due process." *Id.* at *8. The circuit therefore declined to apply strict scrutiny and applied rational basis review instead, finding under that standard that while the plaintiffs had "shown the efficacy of natural immunity as well as pointed out some uncertainties associated with the COVID-19 vaccines," they "have not shown the governments lack a 'reasonably conceivable state of facts' to support their policies." *Id.* at *8-9. The Ninth Circuit has also been reluctant to add new fundamental rights under substantive due process. *See Stormans, Inc. v. Wiesman,* 794 F.3d 1064, 1087 (9th Cir. 2015) (courts "must be 'reluctant to expand the concept of substantive due process' and must 'exercise the utmost care whenever we are asked to break new ground in this field.'" (citing *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997)). Without further guidance from the Ninth Circuit, the Court declines to adopt case law applying strict scrutiny in cases of forced medical treatment to the COVID-19 vaccine context.

b. *Rational Basis Review*

Defendants argue that there is a rational basis for the Policy: "a legitimate and constitutionally

mandated state interest in promotion and providing the safest environment possible to all employees and students against the COVID-19 virus." Mot. at 16 (citing Cal. Const. art. I, Sec 28(c)(1) and Education Code Sec. 44807). Plaintiffs argue that the vaccine does not further the Policy's stated purpose of "provid[ing] the safest possible environment in which to learn and work," Policy at 1; Opp'n at 19; they point out various uncertainties about the precise mechanics of the COVID-19 vaccine, including numerous authorities explaining that the COVID-19 vaccine is believed to reduce symptoms in infected vaccine recipients and prevent severe disease and death, rather than prevent transmission or contraction of COVID-19. Opp'n at 12-16. However, these features of the vaccine further the purpose of protecting LAUSD students and employees from COVID-19, and the Court finds the Policy survives rational basis review.

The Court GRANTS Defendants' motion as to the substantive due process claim.

3. Equal Protection (Second Cause of Action)

Defendants argue that Plaintiffs' equal protection claim fails because Plaintiffs are not members of a suspect class, no fundamental rights are implicated, and the Policy survives rational basis review. Mot. at 14.

The Equal Protection Clause mandates that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Cent.,* 473 U.S. 432, 439 (1985). To prevail on an equal protection claim, a plaintiff must "show that a class that is similarly situated has been treated disparately." *Boardman v. Inslee,* 978 F.3d 1092, 1117 (9th Cir. 2020). If the identifiable group is recognized as a suspect or quasi-

suspect class, courts examine the classification under a heightened level of scrutiny. *Cleburne,* 473 U.S. at 440; *see Regents v. Bakke,* 438 U.S. 265, 290-91 (1978) (Powell, J.) (treating race as a suspect classification); *Craig v. Boren,* 429 U.S. 190, 197 (1976) (treating gender as a quasi-suspect classification). Outside of the limited number of traits that have been recognized as suspect or quasi-suspect classes, courts apply rational basis review. *See, e.g., Mass. Bd. of Ret. v. Murgia,* 427 U.S. 307, 312 (1976) (applying rational basis review to an equal protection claim alleging discrimination based on age). If there is no suspect class at issue, differential treatment is presumed to be valid so long as it is "rationally related to a legitimate state interest." *Cleburne,* 473 U.S. at 440. To determine the appropriate standard of review of an Equal Protection Clause claim, the first step is to determine the type of classification at issue.

The rational basis review test is functionally the same under substantive due process and the Equal Protection Clause. *Gamble v. City of Escondido,* 104 F.3d 300, 307 (9th Cir. 1997). The Equal Protection Clause is satisfied so long as there is a "plausible policy reason for the classification," the government decisionmaker relied on facts that "may have been considered to be true," and "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn,* 505 US 1, 11 (1992).

Plaintiffs identify the two classes that the Policy treats disparately as unvaccinated persons and vaccinated persons. Opp'n at 22. Plaintiffs cite no authority indicating courts have found such classifications to be suspect. *See id.; see also Kheriaty v. Regents of Univ. of California,* No. SACV 21-01367 JVS (KESx),

2021 WL 4714664 (C.D. Cal. Sept. 29, 2021) (finding university vaccine policy did not create a suspect or quasi-suspect class in treating individuals disparately who had vaccine-induced versus infection-induced immunity to COVID-19).

Further, as discussed above, the Policy does not implicate any fundamental rights, and the Policy is rationally related to a legitimate state interest. Therefore, the Court GRANTS Defendants' motion as to the equal protection claim with leave to amend.

4. ADA Claim (Fourth Cause of Action)

Plaintiffs state in their Opposition that they agree to dismiss their ADA claim without prejudice. Even if Plaintiffs had not agreed to voluntarily dismiss their claim, Defendants correctly point out that Plaintiffs have failed to allege they have a "physical or mental impairment," which is required to state a claim under the ADA. *See* 42 U.S.C. § 12102(1) (defining "disability" as (1) "a physical or mental impairment that substantially limits one or more major life activities of such individual;" (2) "a record of such an impairment;" or (3) being regarded as having such an impairment.").

The Court therefore GRANTS the motion as to the ADA claim without prejudice.[3]

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[3] Defendants argue Plaintiffs may not bring ADA claims against individual employees. Mot. at 19 (citing *Walsh v. Nevada Dep't of Hum. Res.,* 471 F.3d 1033, 1037 (9th Cir. 2006). *Walsh* addresses liability for individual employees in their *individual* capacities; here, Defendants are named in their official capacities and Plaintiffs seek prospective injunctive relief under the ADA, not damages.

IV. CONCLUSION

Defendants' motion for judgment on the pleadings is GRANTED. Should Plaintiffs choose to file an amended complaint, it must be filed and served no later than September 26, 2022. Failure to file by that date will waive the right to do so. The Court does not grant leave to add new defendants or new claims. Leave to add defendants or new claims must be sought by a separate, properly noticed motion. A red-lined copy of any amended complaint must be submitted to the Court's generic email inbox.

IT IS SO ORDERED.

Date: September 2, 2022

/s/ Dale S. Fischer
Dale S. Fischer
United States District Judge