JOHN W. HOWARD (SBN 80200)
ALYSSA P. MALCHIODI (SBN 282774)
MICHELLE D. VOLK (SBN 217151)
JW Howard/ Attorneys, Ltd.
701 B Street Suite 1725
San Diego, CA 92101
Tel (619) 234-2842; Fax (619) 234-1716
Johnh@jwhowardattorneys.com
alyssa@jwhowardattorneys.com

SCOTT J. STREET (SBN 258962)
JW Howard/ Attorneys, Ltd.
777 S. Figueroa Street, Suite 3800
Los Angeles, CA 90017
Tel. (213) 205-2800
sstreet@jwhowardattorneys.com

Attorneys for Plaintiffs Vincent Tsai *et al.*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

VINCENT TSAI, an individual; OSCAR RODRIGUEZ, an individual; ENRIQUE IRIBE, an individual; MOHAMED BINA, an individual; SHAYNE LAMONT, an individual; and PROTECTION FOR THE EDUCATIONAL RIGHTS OF KIDS, a California non-profit corporation,

Plaintiffs,

vs.

THE COUNTY OF LOS ANGELES, a municipal entity,

Defendant.

Case No. 21STCV36298

Assigned for all purposes to the Hon. Richard Burdge

OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

[Filed concurrently with Declaration of Scott J. Street, Declaration of Shayne Lamont and Opposition to County's Request for Judicial Notice]

Reservation No. 669385624049
Date: February 9, 2022
Time: 8:30 a.m.
Dept.: 37

Complaint filed: October 1, 2021

Plaintiffs Vincent Tsai et al. ("Plaintiffs") hereby oppose the County of Los Angeles' Motion for Judgment on the Pleadings.

I. INTRODUCTION

The COVID-19 state of emergency is nearly two years old, but the County of Los Angeles is using it to try to dismiss this case, to prevent the Court from exercising meaningful judicial review and to block Plaintiffs from getting a fair chance to litigate.

The County's motion for judgment on the pleadings should be denied. This is a declaratory relief case and the County's motion is equivalent to a general demurrer. "A general demurrer to a cause of action for declaratory relief must be overruled as long as an actual controversy is alleged …." Demurrers, Cal. Prac. Guide Civ. Pro. Before Trial Ch. 7(I)-A. A controversy clearly exists here. Plaintiffs contends that the County's COVID-19 vaccine mandate violates state law, including the state constitutional right to privacy, and it contends that the County has threatened to violate (and now actually violated) the Due Process Clause and the California Supreme Court's *Skelly* decision by suspending and firing unvaccinated County employees without a prior hearing. The County disagrees. It says it did not, and will not, violate *Skelly* (though its actions heretofore do that very thing). Given these disputes, it would be prejudicial error to grant the motion.

There is no merit to the County's argument that Plaintiffs' claims fail as a matter of law based on judicially noticeable facts. The "facts" the County discusses in the demurrer—primarily findings from other cases and studies regarding the COVID-19 vaccines—cannot be judicially noticed for their truth because they are not indisputably true. They are not binding in this case and cannot be used at the pleading stage, when the Court must accept all well-pleaded allegations in the complaint as true and liberally construe it to decide if it states a claim under any conceivable legal theory.

In fact, the motion ignores the rules that govern pleading motions. It does not challenge deficiencies on the face of Plaintiffs' First Amended Complaint ("FAC"). It does not accept the FAC's allegations as true. It is an evidentiary motion that seeks a decision on the merits based on a one-sided presentation of evidence that Plaintiffs have had no opportunity to question.

JW HOWARD/ ATTORNEYS, LTD.
701 B STREET, SUITE 1725
SAN DIEGO, CALIFORNIA 92101

The County may eventually be able to prove that it had the power to issue the COVID-19 vaccine mandate and that it acted reasonably in doing so. It may be able to prove that the mandate does not violate the California Constitution's right to privacy and that it has not violated *Skelly*. But those are mixed questions of law and fact that are heavily disputed and which Plaintiffs, having pleaded claims that are plausible on their face, deserve a fair chance to litigate. Anything less than that would raise serious constitutional concerns as it would effectively immunize the County's actions from judicial review.

Therefore, the Court should deny the motion and set the case for a bench trial.

II. ALLEGATIONS IN THE FAC AND PROCEDURAL BACKGROUND

Plaintiffs filed this case last October, shortly after the County Board of Supervisors ratified Hilda Solis' order mandating the COVID-19 vaccines for all current and future County employees. (Declaration of Scott J. Street, dated Jan. 27, 2022 ("Street Decl."), ¶ 2.)[1]

The parties' meet-and-confer process started in November, when the County's lawyers contacted Plaintiffs' counsel about their plan to demur to the original complaint. (*Id.*, ¶ 3.) Counsel spent several hours discussing these issues, including the scope of the California Emergency Services Act and the standard for adjudicating a state law privacy claim. (*Id.*) As a result of this process, the County decided not to demur to the original complaint. It answered the complaint on November 22, 2021. (*Id.*, ¶ 4.) Around the same time, Plaintiffs served their first set of written discovery, including special interrogatories and a notice to depose the County on several key issues. (*Id.*) This discovery sought to determine the evidence the County relied on when it decided to issue the vaccine mandate, among other things.

Despite answering the original complaint, the County's lawyers told Plaintiffs' counsel they intended to move for judgment on the pleadings and to raise the same arguments the parties had been discussing for weeks. (*Id.*, ¶ 5.) In response, with the County's agreement, Plaintiffs filed the First Amended Complaint ("FAC"). It was filed to take account of new evidence that shows, contrary to

[1] Plaintiffs are submitting this declaration for the limited purpose of providing procedural information about the case, and it should not be construed as litigating Plaintiffs' claims on the merits.

JW HOWARD/ ATTORNEYS, LTD.
701 B Street, Suite 1725
San Diego, California 92101

the County's findings last summer, that both the vaccinated and the unvaccinated can contract and transmit COVID-19, including the Omicron variant that has swept through America this winter. (*Id.*)

Plaintiffs filed the FAC on December 17, 2021. It alleges four state law claims. The first claim seeks a judicial declaration, and related injunctive relief, that the County does not have the power under the CESA or any other law to require that County employees get a vaccine as a condition of employment. (FAC, ¶¶ 44-54.) The FAC also alleges that the County acted arbitrarily and capriciously in adopting the mandate and that the mandate is irrational, given the evidence that both the vaccinated and the unvaccinated can contract and transmit COVID-19. (FAC, ¶ 48; see also FAC, ¶¶ 27-29 [discussing federal government's acknowledgement that benefits of vaccination "are not currently known" and that vaccinated people can contract and spread the new Omicron variant].)

The second claim seeks a judicial declaration that the County has a duty under the CESA to terminate the COVID-19 related state of emergency and that, whether it is discretionary or ministerial, the County has violated that duty by not terminating the state of emergency since last summer, when Governor Newsom declared that California had "flattened the curve" and saved the health care system from collapse. (FAC, ¶¶ 55-67.)

The third claim seeks declaratory and injunctive relief under California's constitutional right to privacy, which the vaccine mandate clearly invades. (FAC, ¶¶ 68-78.) The fourth claim seeks declaratory and injunctive relief prohibiting the County from taking any adverse employment action against permanent County employees for not complying with the vaccine mandate without giving them a prior *Skelly* hearing. (FAC, ¶¶ 79-87.)

The FAC does not seek any compensatory damages but does seek to recover costs and legal fees under Code of Civil Procedure section 1021.5. Meanwhile, the County responded to Plaintiffs' first set of special interrogatories on January 4, 2022. (Street Decl., ¶ 6, Exh. A.) It simply objected to all the requests and refused to provide substantive responses. (*Id.*)

III. LEGAL STANDARD

"A motion for judgment on the pleadings performs the same function as a general demurrer, and hence attacks only defects disclosed on the face of the pleadings or by matters that can be

JW HOWARD/ ATTORNEYS, LTD.
701 B STREET, SUITE 1725
SAN DIEGO, CALIFORNIA 92101

judicially noticed." *Cloud v. Northrop Grumman Corp.*, 67 Cal. App. 4th 995, 999 (1998). The trial court "accepts as true the factual allegations that the plaintiff makes" and "gives them a liberal construction." *Gerawan Farming, Inc. v. Lyons*, 24 Cal.4th 468, 515-16 (2000). This is especially important when, as here, the defendant argues that the complaint fails to state facts sufficient to constitute a cause of action. A case can be dismissed on this ground "only if the complaint fails to state a cause of action under any possible legal theory." *Sheehan v. San Francisco 49ers, Ltd.*, 45 Cal.4th 992, 998 (2009).

IV. ARGUMENT

The County's motion should be denied because, accepting its allegations as true, the FAC states claims for declaratory and injunctive relief under state law.

A. The County Exceeded Its Powers When It Adopted the COVID Vaccine Mandate.

The first cause of action contends that the County exceeded its powers and acted arbitrarily when it adopted the COVID-19 vaccine mandate. Like the others alleged in the FAC, this is a declaratory relief claim. Pleading challenges to such claims are disfavored. In a declaratory relief case, "the complaint is sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties ... and requests that the rights and duties be adjudged." *Jefferson, Inc. v. City of Torrance*, 266 Cal. App. 2d 300, 302 (1968) (quotations omitted).

The FAC does that. It alleges that the County vaccine mandate "exceeds the County's authority under state law" and is not necessary or the "least restrictive means of response" to the spread of COVID-19. (FAC, ¶ 47.) It also alleges that the mandate "fails to accomplish the County's purpose in adopting it, as people who receive the Covid-19 shot can still contract and transmit the virus." (*Id.*) And it challenges the process by which the County adopted the mandate as arbitrary and capricious because "the County failed to consider evidence of the Covid-19 shots' effectiveness and necessity." (FAC, ¶ 48.) The County disagrees with these contentions. But that just shows the parties disagree, as the FAC alleges in paragraph 49.

This is a quintessential claim for declaratory relief. Thus, it is not clear why the County

JW HOWARD/ ATTORNEYS, LTD.
701 B STREET, SUITE 1725
SAN DIEGO, CALIFORNIA 92101

thinks it should be dismissed. For example, the County argues that the vaccine mandate does not violate the state Constitution's right to privacy. (Motion, at 17-18.) As explained below, that is a mixed question of law and fact that cannot be decided at the pleading stage. (Section IV.C, pp. 9-14, below.) The County also talks about strict scrutiny versus intermediate scrutiny but those are federal standards that do not apply in this case.

In that sense, the motion misconstrues the first cause of action. The County issued the vaccine mandate pursuant to the California Emergency Services Act ("CESA"), which, during a local state of emergency, gives local officials the power to "orders and regulations necessary to provide for the protection of life and property, including orders or regulations imposing a curfew within designated boundaries where necessary to preserve the public order and safety." Cal. Gov't Code § 8634. What does "necessary" mean? The CESA does not say but, in its only case involving the law, the California Supreme Court said that "in situations of 'extreme peril' to the public welfare the State may exercise its sovereign authority to the fullest extent possible *consistent with individual rights and liberties*." *Macias v. State*, 10 Cal.4th 844, 854 (1995) (emphasis added). This language indicates that there are limits on what the government can do during a state of emergency. The government's action must be narrowly tailored.

That is why the FAC alleges that the vaccine mandate exceeds the County's powers under the CESA. It is not necessary. It is not narrowly tailored. It is not tailored at all. And it fails to accomplish its purpose since vaccinated people can still contract and spread the COVID virus. (FAC, ¶¶ 47-48.) Those allegations must be accepted as true in this motion, and they state a plausible claim that the vaccine mandate exceeds the County's powers under the CESA.

Of course, a party can use a demurrer or a motion for judgment on the pleadings to attack allegations of a legal nature that misstate California law. *Stearn v. County of San Bernardino*, 170 Cal. App. 4th 434, 439-40 (2009). For example, imagine that the CESA said the County "has the power to issue any vaccine mandate it wants." If the CESA said that, then a court could disregard a contrary allegation. Indeed, that is why no such argument was made in *In re Juan C.*, 28 Cal. App. 4th 1093 (1994), which arose in response to a curfew the City of Long Beach adopted during the

JW HOWARD/ ATTORNEYS, LTD.
701 B STREET, SUITE 1725
SAN DIEGO, CALIFORNIA 92101

Rodney King riots. The CESA explicitly gives cities the power to "impos[e] a curfew within designated boundaries where necessary to preserve the public order and safety." Cal. Gov't Code § 8634.[2] It does not explicitly give them the power to mandate vaccines for public employees.

The County also accuses Plaintiffs of challenging the constitutionality of the CESA. The FAC does not allege such a claim. It merely seeks judicial review of an emergency government order that affects tens of thousands of people. No court has interpreted the CESA to preclude judicial review of emergency government orders. To the contrary, judicial review under the CESA is available and focuses on whether the government "has exceeded its authority or indulged in arbitrary action." *Malibu W. Swimming Club v. Flournoy,* 60 Cal. App. 3d 161, 166 (1976). That is exactly what the FAC alleges.

The Court of Appeal confirmed this in *Newsom v. Superior Court (Gallagher)*, 63 Cal. App. 5th 1099 (2021), when it analyzed the CESA following a bench trial. It could not find any particularized standards to guide the government's exercise of emergency power, raising concerns under the separation of powers doctrine. *Id.* at 1115-16. But it held that, "of greater significance than 'standards' is the requirement that legislation provide 'safeguards' against the arbitrary exercise of quasi-legislative authority." *Id.* at 1116. The "availability of judicial review is ... commonly cited as one of the most important and effective safeguards" in that analysis. Jennifer Holman, *Re-Regulation at the CPUC and California's Non-Delegation Doctrine: Did the CPUC Impermissibly Convey Its Power to Interested Parties?* 20 Environs 58, 61 (June 1997).

The County's position violates this principle and would effectively preclude judicial review of a mandate that affects tens of thousands of people. That is not proper.

The County may also argue that it could issue the vaccine mandate pursuant to its police powers, as opposed to the CESA. It did not say that before, though, and did not make that argument in its motion. In any event, a police power regulation will "be upheld if it is reasonably related to

[2] The curfew passed muster in *Juan C.* because it applied "only so long as an emergency exists, and there [was] no dispute that a *bona fide* emergency existed in the city in late April and early May of 1992." 28 Cal. App. 4th at 1101. By contrast, the County's vaccine mandate applies indefinitely and Plaintiffs dispute that COVID-19 is still a *bona fide* emergency. Indeed, the FAC alleges that the County has a duty to terminate the COVID-19 state of emergency. (FAC, ¶¶ 55-67.)

JW HOWARD/ ATTORNEYS, LTD.
701 B Street, Suite 1725
San Diego, California 92101

promoting the public health, safety, comfort, and welfare, and if the means adopted to accomplish that promotion are reasonably appropriate to the purpose." *Sunset Amusement Co. v. Bd. of Police Commissioners*, 7 Cal.3d 64, 72 (1972) (cleaned up). This means analysis cannot be conducted at the pleading stage. *See Community Memorial Hospital v. County of Ventura*, 50 Cal. App. 4th 199, 203-04 (1996), as modified (Sept. 18, 1996) (explaining that trial court overruled demurrer to claims that accused government of exceeding its powers and acting unreasonably in its operation of county hospital); *Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 135 (1976) (trial court declared city's rent control ordinance void after "a lengthy trial showed that the city was not faced with a serious public emergency of the sort the court deemed constitutionally prerequisite to imposition of rent controls under the police power").

The motion for judgment on the pleadings of the first cause of action should be denied.

B. County Officials Have a Duty to Terminate the COVID-19 State of Emergency.

The Court should also deny the County's motion to dismiss the second cause of action, which seeks declaratory and injunctive relief compelling the County to terminate the COVID-19 state of emergency.

There has been little litigation under the CESA, in part because nobody has ever asserted the wide-ranging power claimed by the government in response to COVID-19. But one thing is clear: an emergency cannot be indefinite. "The governing body shall proclaim the termination of the local emergency at the earliest possible date that conditions warrant." Cal. Gov't Code § 8630(d). A similar rule applies to the Governor. *Id.* § 8629.

Judicial review is a critical tool in enforcing this duty. That is why, in a previous case involving CESA, the Court of Appeal held that a trial court erred when it sustained a demurrer to a petition that sought to compel Governor Gray Davis to terminate the state of emergency related to the state's energy crisis. *Nat'l Tax-Limitation Committee v. Schwarzenegger*, 8 Cal. Rptr. 3d 4, 8 (Cal. Ct. App. 2003). It saw "no reason why plaintiffs should not be allowed to present evidence that there is no longer an energy shortage and that the conditions of disaster or extreme peril which previously existed as a result of the earlier shortage have ceased to exist." *Id.* at 19. And "if the

JW HOWARD/ ATTORNEYS, LTD.
701 B STREET, SUITE 1725
SAN DIEGO, CALIFORNIA 92101

evidence shows only one reasonable conclusion—a conclusion contrary to the Governor's determination—then the court" does not have to accept the Governor's determination and "allow him to continue to exercise emergency powers when the basis for the state of emergency has disappeared." *Id.* at 19 (quotations omitted).

The FAC alleges such facts with respect to the local COVID-19 state of emergency. (FAC, ¶¶ 55-67.) Yes, the California Supreme Court ordered that the *Schwarzenegger* opinion be unpublished because, by the time the Court of Appeal issued it, Arnold Schwarzenegger had replaced Governor Davis and terminated the emergency, mooting the case. But the principles discussed in it apply equally here. Moreover, as explained above, *Newsom* said the government's obligation to terminate a state of emergency at the earliest possible date that conditions warrant is a safeguard that saves the CESA from violating the non-delegation doctrine and being declared unconstitutional. 63 Cal. App. 5th at 1116-17. That safeguard is meaningless if a court cannot exercise judicial review of the government's refusal to terminate a state of emergency if the plaintiff can allege facts that show the emergency is over.

The FAC does that. Its allegations are not frivolous or conclusory, either. To the contrary, the FAC alleges that, while "Covid-19 was a novel virus that some predicted would overwhelm the health care system and kill millions" in March 2020, it "has now been around for two years" and "can be treated." (FAC, ¶ 59.) It also alleges that "Governor Newsom said in June 2021 that Californians had flattened the curve and could return to normalcy." (FAC, ¶ 60.) The County did not dispute these allegations, nor could it at this stage. Thus, the second cause of action should also proceed.

C. Under *Mathews*, A State Law Privacy Claim Cannot Be Decided on the Pleadings.

There is no merit to the County's argument that the FAC fails to state a claim for declaratory and injunctive relief under the state Constitution's express right to privacy.

"[A] plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious

JW HOWARD/ ATTORNEYS, LTD.
701 B STREET, SUITE 1725
SAN DIEGO, CALIFORNIA 92101

invasion of privacy." *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal.4th 1, 39-40 (1994). Then the burden shifts. "A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests." *Id.* at 40.

Autonomy privacy. The FAC clearly alleges the three elements needed to plead a state law claim that the County vaccine mandate invades County employees' right to bodily integrity. (FAC, ¶¶ 70-72.) The County does not argue otherwise. Instead, it contends that, "while 'forced medical treatment' sometimes implicates autonomy privacy interests, it does not constitute a serious invasion of privacy in the context of mandatory vaccination." (Motion, at 14:22-24.)

That is wrong. "Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact." *Hill*, 7 Cal.4th at 40. "If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." *Id.* But these questions cannot be decided at the pleading stage. The Supreme Court made that clear in *Mathews v. Becerra*, 8 Cal.5th 756 (2019), a recent state law privacy case that the government tried to get dismissed.

Like here, the government in *Mathews* argued that requiring therapists to report their patients for viewing child porn did not involve a serious invasion of a reasonable privacy interest. The Supreme Court rejected the government's arguments because "we have no such facts before us at this stage of the litigation." *Id.* at 776. The Court emphasized the need to develop evidence through discovery and to have a full and fair hearing on the merits. *Id.* at 776-77. It correctly observed that other state law privacy cases "were decided on the basis of fully litigated records" and not on the pleadings. *Id.* at 784.

The County tried to distinguish *Mathews* by saying the law involved in that case "was

JW HOWARD/ ATTORNEYS, LTD.
701 B Street, Suite 1725
San Diego, California 92101

unrelated to public health" and that no fundamental rights exist when the government regulates public health. (Motion, at 16 n.2.) That is wrong. There is "no dispute the right to bodily integrity is a fundamental right which limits the traditional police powers of the state in the context of public health measures under the federal and state Constitutions." *Coshow v. City of Escondido*, 132 Cal. App. 4th 687, 709 (2005); *see also American Academy of Pediatrics v. Lungren*, 16 Cal.4th 307, 340-41 (1997) (recognizing privacy rights of minors in abortion case).

This issue should be easy to decide. The COVID-19 vaccines are medical treatments and "a competent adult has the right to refuse medical treatment, even treatment necessary to sustain life." *Conservatorship of Wendland*, 26 Cal.4th 519, 530 (2001) (citing cases). Indeed, the California Supreme Court has described the right to refuse medical treatment as "basic and fundamental" and said it cannot be "overridden by medical opinion." *Id.* at 532 (quotations omitted). It has recognized, unequivocally, that this state's "constitutional right of privacy guarantees to the individual the freedom to choose to reject, or refuse to consent to, intrusions of his bodily integrity." *Id.* at 531-32 (cleaned up). That is the right Plaintiffs seek to vindicate in this case.

The County also contends that the long history of compulsory vaccination in America undermines the reasonableness of County employees' expectation of privacy. But "we have never held that the existence of a long-standing practice or requirement of disclosure can, by itself, defeat a reasonable expectation of privacy in the circumstances." *Mathews*, 8 Cal.5th at 778. Furthermore, "[i]n cases where we have relied on a long-standing practice of disclosure to find no reasonable expectation of privacy or a diminished expectation, the long-standing practice was clear and served to put individuals on notice." *Id.* at 777. The County did not cite such authority here. It did not, for example, show that there is a long history of requiring that County employees get a vaccine as a condition of employment. To our knowledge, the County has never had a vaccine mandate of *any* kind before now.

Indeed, the only California vaccine case the County cited, *Love v. State Board of Education*, 29 Cal. App. 5th 980 (2018), involved immunization requirements for schoolchildren, the most recent of which were enacted during the 1960s. These requirements could not have put County

JW HOWARD/ ATTORNEYS, LTD.
701 B STREET, SUITE 1725
SAN DIEGO, CALIFORNIA 92101

employees on notice that they would be required to get a shot they do not want as a condition of employment.

The County also makes much of the Court of Appeal's statement, in *Love*, that "[w]e are aware of no case holding mandatory vaccination statutes violate a person's right to bodily autonomy." 29 Cal. App. 5th at 989. That is because, until recently, no California government tried to force competent adults to get a vaccine they did not want. *Love* also overlooked *Coshow*, which cited "mandatory smallpox vaccination" as the type of "invasive and highly personalized medical treatments used in cases where the state sought to override a person's freedom to choose and where the Supreme Court has recognized a liberty interest in freedom from such unwanted medical treatment." 132 Cal. App. 4th at 710.

The County's reliance on *Jacobson v. Massachusetts* is also misplaced. In fact, *Coshow* cited *Jacobson* as a case that *recognized* a liberty interest in refusing unwanted medical treatment. *Id.* That echoes Justice Neil Gorsuch's statement that people have misread *Jacobson* during the pandemic. "Nothing in *Jacobso*n purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights. In fact, *Jacobson* explained that the challenged law survived only because it did not 'contravene the Constitution of the United States' or 'infringe any right granted or secured by that instrument.'" *Roman Cath. Diocese of Brooklyn v. Cuomo*, __ U.S. __, 141 S. Ct. 63, 70-71 (2020) (Gorsuch, J., concurring) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905)). To be clear, *Jacobson* is irrelevant in this state law privacy case; in light of *Coshow*, it cannot be construed to defeat County employees' expectation of privacy in their bodily integrity.

Of course, this does not preclude the County from arguing that its vaccine mandate is justified. But state and federal law differ. "Where the case involves an obvious invasion of an interest fundamental to personal autonomy … a 'compelling interest' must be present to overcome the vital privacy interest." *Mathews*, 8 Cal.5th at 780-81; see also *Am. Acad. of Pediatrics*, 16 Cal.4th at 341 (holding that "a statutory intrusion upon an autonomy privacy interest of such a fundamental nature [in that case, reproductive rights] may not be justified simply by showing that

JW HOWARD/ ATTORNEYS, LTD.
701 B STREET, SUITE 1725
SAN DIEGO, CALIFORNIA 92101

the statute serves legitimate 'competing interests' sufficient to justify an impingement on a 'less central' privacy interest"). Thus, a higher standard than the federal "rational basis" test applies here.

This is a critical distinction. State action fails rational basis review under the federal Constitution "only when it rests on grounds wholly irrelevant to the achievement of the State's objective." *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 996 (N.D. Cal. 2012) (cleaned up). This standard is so difficult to meet that courts "hardly ever strike[ ] down a policy as illegitimate under rational basis scrutiny" and have only done so when "the laws at issue lack any purpose other than a bare ... desire to harm a politically unpopular group." *Trump v. Hawaii*, – U.S. – , 138 S. Ct. 2392, 2420 (2018) (quotations omitted). By contrast, "when a statute intrudes on a privacy interest protected by the state Constitution, it is our duty to independently examine the relationship between the statute's means and ends." *Mathews*, 8 Cal.5th at 786-87; *see also Am. Acad. of Pediatrics*, 16 Cal.4th at 348-49 (same).

This does not mean that the vaccine mandate must pass strict scrutiny. That is a federal law standard. More importantly, under state law, this analysis cannot be done at the pleading stage. The government must plead and prove justification as an affirmative defense. *Hill*, 7 Cal.4th at 40. Again, *Mathews* emphasized that point. Nobody disputed the importance of the Legislature's goal in protecting children from sexual predators but the "parties disagree[d]" about "whether the reporting requirement actually serves its intended purpose." *Id.* at 782. The Supreme Court said that determination could not be made at the pleading stage, without the development of evidence and a full hearing on the merits. *Id.* at 782-86; *see also Sheehan v. San Francisco 49ers, Ltd.*, 45 Cal.4th 992, 1003 (2009) (reversing demurrer ruling in state law privacy case because, "given the absence of a factual record … further inquiry is necessary to determine whether the challenged policy is reasonable").

Mathews is good law and at least one appellate court has applied it to reverse a trial court's ruling on a state law privacy claim. *All of US or None-Riverside Chapter v. Hamrick*, 64 Cal. App. 5th 751, 798-802 (2021) (reversing grant of summary judgment). It requires denying the County's motion on the privacy claim.

JW HOWARD/ ATTORNEYS, LTD.
701 B STREET, SUITE 1725
SAN DIEGO, CALIFORNIA 92101

The fact that the Board of Supervisors adopted the vaccine mandate does not change that, as "the ordinary deference a court owes to any legislative action vanishes when constitutionally protected rights are threatened." *Spiritual Psychic Science Church v. City of Azusa*, 39 Cal.3d 501, 514 (1985). Moreover, the Court cannot take judicial notice that the COVID-19 vaccines are safe and effective because "judicial notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed." *Freemont Indemnity Co. v. Fremont General Corp.*, 148 Cal. App. 4th 97, 114 (2007). Unlike the school vaccines in *Love*, which had been on the books for decades, the effectiveness of vaccines in preventing the spread of COVID-19 is reasonably disputable. Even the federal government has acknowledged that, saying that "the duration of vaccine effectiveness in preventing COVID-19, reducing disease severity, reducing the risk of death, and the effectiveness of the vaccine to prevent disease transmission by those vaccinated are not currently known …." 86 Fed. Reg. at 61,615 (Nov. 5, 2021).

Informational privacy. The FAC also seeks declaratory and injunctive relief regarding the County's requirement that employees upload their confidential medical information through the Fulgent app, an app that has been rumored to have ties to the Chinese government. The state Constitution protects the "'dissemination or misuse of sensitive and confidential information.'" *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1041 (N.D. Cal. 2014) (quoting *Hill*, 7 Cal. 4th at 35). This includes medical records. *Grafilo v. Wolfsohn*, 33 Cal. App. 5th 1024, 1034 (2019). And while the County contends that compelled use of the Fulgent app does not constitute an "egregious breach of the social norms," that is a factual issue that Plaintiffs must have a chance to gather discovery about and litigate on a full record. *Hill*, 7 Cal.4th at 37; *see also In re Google Location Hist. Litig.*, 514 F. Supp. 3d 1147, 1157-58 (N.D. Cal. 2021) (same)

A fair chance to litigate—that is all Plaintiffs seek at this early stage. Under *Mathews*, it would be reversible error for the Court to dismiss the privacy claim.

D. Some County Employees Have Already Been Fired Without Prior *Skelly* Hearings.

The FAC also states a claim for declaratory and injunctive relief under the Due Process

JW HOWARD/ ATTORNEYS, LTD.
701 B STREET, SUITE 1725
SAN DIEGO, CALIFORNIA 92101

Clause and *Skelly*.

The "California statutory scheme regulating civil service employment confers upon an individual who achieves the status of 'permanent employee' a property interest in the continuation of his employment which is protected by due process." *Skelly v. State Pers. Bd.*, 15 Cal.3d 194, 206 (1975). Although the type of *Skelly* hearing that must be provided varies based on the exigency and severity of the proposed discipline, "[t]he potential deprivation of a person's means of livelihood demands a high level of due process." *Bostean v. Los Angeles Unified Sch. Dist.*, 63 Cal. App. 4th 95, 110 (1998) (quotations omitted).

The FAC alleges that the County cannot take any adverse employment action against County employees without first providing them with a *Skelly* hearing, and, in the case of sworn officers, the additional procedural protections provided by the state law Firefighter and Police Officer Bill of Rights. (FAC, ¶¶ 80-81.) The FAC also alleges that the "County contends that it does not have to comply with *Skelly* or the Police Officer or Firefighter Bill of Rights before taking adverse employment action against County employees who choose not to get the Covid-19 shots or who object to turning their confidential medical information over to the County as a condition of employment." (FAC, ¶ 82.) Those allegations clearly articulate a dispute about these issues and thus state a claim for declaratory relief.

The County says that the FAC fails to state a claim because no County employees have been fired or suspended yet. It is wrong. One of the individual plaintiffs in this case, Shayne Lamont, was fired from his job in the Department of Environmental Health last December, without ever receiving a *Skelly* hearing. (Declaration of Shayne Lamont, dated Jan. 26, 2022 ("Lamont Decl."), ¶¶ 3-7.) Similar stories of suspensions and harassment have been reported. (*Id.*, ¶ 8; Street Decl., ¶ 7.)

Thus, there is no merit to the County's argument that it is following *Skelly* and ensuring that permanent County employees get their full due process rights. That issue certainly cannot be adjudicated at the pleading stage. That is true even if the County merely threatens to suspend or fire employees without a prior *Skelly* hearing. "Declaratory relief is appropriate to obtain judicial clarification of the parties' rights and obligations under applicable law." *Californians for Native*

JW HOWARD/ ATTORNEYS, LTD.
701 B Street, Suite 1725
San Diego, California 92101

Salmon etc. Assn. v. Dep't of Forestry, 221 Cal. App. 3d 1419, 1427 (1990). Furthermore, as an equitable remedy, a claim for declaratory relief "'may be brought to determine and declare rights *before* any actual invasion of those rights has occurred.'" *Id.* at 1426 (emphasis added) (quoting 5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 800(c), p. 244). That is the case here.

Courts have also used declaratory relief cases to adjudicate important constitutional questions and to avoid a multiplicity of actions. *Id.* at 1430. That reasoning also applies here. Several thousand County employees joined Plaintiff PERK to prosecute this case. It is far more efficient to litigate the due process issues created by the County's vaccine mandate in one case than in hundreds of individual actions.

E. The County's Arguments Would Effectively Eliminate Meaningful Judicial Review.

Plaintiffs can amend their complaint if necessary. But it shouldn't be. Accepting its allegations as true, the FAC states claims for declaratory and injunctive relief under state law. A contrary finding would effectively immunize the County's actions from judicial review. That is not proper. Pandemics happen, but "interpreting the law is a judicial function." *McClung v. Employment Dev. Dep't*, 34 Cal. 4th 467, 470 (2004) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). This duty includes deciding whether a statute is constitutional and whether, under the CESA, the government "has exceeded its authority or indulged in arbitrary action." *Flournoy*, 60 Cal. App. 3d at 166.

V. CONCLUSION

A fair chance to litigate—that is all Plaintiffs seek. Therefore, Plaintiffs respectfully request that the Court deny the County's motion and set the case for an expedited bench trial.

Dated: February 3, 2022

JW HOWARD/ ATTORNEYS, LTD.

By: _____

Scott J. Street
Attorneys for Plaintiffs Vincent Tsai et al.

JW HOWARD/ ATTORNEYS, LTD.
701 B Street, Suite 1725
San Diego, California 92101

PROOF OF SERVICE

I, the undersigned, do declare that I am employed in the county aforesaid, that I am over the age of [18] years and not a party to the within entitled action; and that I am executing this proof at the direction of the member of the bar of the above entitled Court. The business address is:

JW Howard Attorneys LTD
701 B Street, Ste. 1725
San Diego, California 92101

■ MAIL. I am readily familiar with the business' practice for collection and processing of correspondence for mailing via the United States Postal Service and that the correspondence would be deposited with the United States Postal Service for collections that same day.

■ ELECTRONIC. I am readily familiar with the business' practice for collection and processing of documents via electronic system and said documents were successfully transmitted via Email that same day.

☐ PERSONAL. The below described documents were personally served on date below via Knox Services.

On the date indicated below, I served the within as indicated:

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

TO:

SheppardMullin
1901 Avenue of the Stars, Suite 1600
Los Angeles, CA 90067-6017
Kent Raygor
KRaygor@sheppardmullin.com
Valerie Alter
VAlter@sheppardmullin.com

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was ***EXECUTED*** on November 22, 2021, at San Diego, CA.

/s/ Dayna Dang
Dayna Dang, Paralegal
dayna@jwhowardattorneys.com

JW HOWARD/ ATTORNEYS, LTD.
701 B STREET, SUITE 1725
SAN DIEGO, CALIFORNIA 92101