NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

FIREFIGHTERS4FREEDOM, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B320569 (Los Angeles County Super. Ct. No. 21STCV34490)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael P. Linfield, Judge. Dismissed in part and reversed with directions in part.

JW Howard/Attorneys, John W. Howard and Scott J. Street for Plaintiff and Appellant.

Michael Feuer and Hydee Feldstein Soto, City Attorneys, Vivienne A. Swanigan, Assistant City Attorney, Jennifer Gregg, and Deputy City Attorney, for Defendant and Respondent.

INTRODUCTION

Neil deGrasse Tyson once said in an interview, "The good thing about science is that it's true whether or not you believe in it."[1] Under California's pleading rules, however, truth, scientific or otherwise, usually cannot be determined on demurrer. As we wrote in *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co.* (2022) 81 Cal.App.5th 96, "the plausibility of the [plaintiff's] allegations has no role in deciding a demurrer under governing state law standards, which . . . require us to deem as true, 'however improbable,' facts alleged in a pleading . . . ." (*Id.* at p. 110.)

Firefighters4Freedom, a nonprofit corporation "whose mission is to support the constitutional rights of firefighters in the City of Los Angeles during the COVID-19 pandemic," sued the City of Los Angeles over the City's 2021 COVID-19 vaccine mandate for City employees. Firefighters4Freedom sought declaratory and injunctive relief based on allegations the vaccine mandate exceeded the City's authority under its police powers, violated the firefighters' right to privacy under the California Constitution, and violated the firefighters' due process rights. The trial court sustained the City's demurrer to all three causes of action without leave to amend, primarily by taking judicial notice of facts contained in various documents submitted by the City, including that "COVID-19 vaccinations are safe and effective in protecting the health and safety of the public" and that "[t]here is consensus in the medical and scientific community

---

[1] Quoted in J. Sax, *The Problems with Decision-Making* (2020) 56 Tulsa L. Rev. 39, 75.

that COVID-19 vaccines are a reasonable method to lessen the spread of COVID-19 during the present global pandemic."

Firefighters4Freedom argues the trial court erred in taking judicial notice of facts about the safety and effectiveness of COVID-19 vaccines, especially in light of the Omicron variant. Firefighters4Freedom also argues the trial court erred in sustaining the City's demurrer because, assuming Firefighters4Freedom's allegations are true and not contradicted by matters subject to judicial notice, it alleged facts sufficient to state causes of action for declaratory relief.

We agree the trial court erred in taking judicial notice of the truth of the statements in the documents the City asked the court to judicially notice. Because the facts in the documents submitted by the City were not subject to judicial notice, Firefighters4Freedom's causes of action cannot be resolved on demurrer. A trial court, of course, may take judicial notice of certain aspects of the COVID-19 pandemic, the disease caused by the virus, and the existence of certain government actions and publications concerning COVID-19. But the trial court here took judicial notice of the truth of disputed factual matters. And that was error. Therefore, we reverse the order sustaining the demurrer to Firefighters4Freedom's first two causes of action for declaratory relief and, pursuant to the parties' agreement, dismiss the appeal regarding the third.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The City Adopts a COVID-19 Vaccine Mandate for City Employees*

The City Council of Los Angeles passed Ordinance No. 187134 effective August 25, 2021 requiring all City employees to be fully vaccinated for COVID-19 no later than October 19, 2021 (the vaccine mandate). (L.A. Admin. Code, § 4.701, subd. (a).) The vaccine mandate defined "fully vaccinated" to mean 14 or more days after an employee receives the second dose of a "two-dose COVID-19 vaccine series (Moderna or Pfizer-BioNTech) or a single dose of a one-dose COVID-19 vaccine (Johnson & Johnson/Janssen)." (*Id.*, § 4.700, subd. (d).) The vaccine mandate stated the City could expand this definition to include booster shots for the COVID-19 vaccines as required by federal, state, or City health and safety agencies. (*Ibid.*) The vaccine mandate allowed City employees to apply by September 7, 2021 for an exemption for medical conditions or "sincerely held religious beliefs." (*Id.*, §§ 4.701, subd. (c)(3), 4.702, subd. (a).) The City's stated goal in passing the mandate was "to have a vaccinated workforce." (*Id.*, § 4.702.) "As such," the vaccine mandate provided, "employees will not have the option to 'opt out' of getting vaccinated and become subject to weekly testing. Only those with a medical or religious exemption and who are required to regularly report to a work location are eligible for weekly testing." (*Ibid.*)

In passing the vaccine mandate, the City Council stated the measure was "required for the immediate protection of the public peace, health, and safety for the following reasons: According to the Center[s] for Disease Control, and the Los Angeles County

Department of Public Health, COVID-19 continues to pose a significant public health risk, especially as cases surge with the highly infectious spread of the Delta variant. Vaccination is the most effective way to prevent transmission and limit COVID-19 hospitalizations and deaths. The City must provide a safe and healthy workplace, consistent with COVID-19 public health guidance and legal requirements, to protect its employees, contractors and the public as it reopens services and more employees return to the workplace. Unvaccinated employees are at a greater risk of contracting and spreading COVID-19 within the workplace, and risk transmission to the public that depends on City services." (L.A. Ord. No. 187134, § 2.)

On October 26, 2021 the City Council adopted a resolution instructing the mayor to implement the City's last, best, and final offer to labor organizations regarding the consequences of failing to comply with the vaccine mandate.[2] This resolution extended the deadline to comply with the vaccine mandate to December 18, 2021 and provided that City employees who did not provide proof of compliance by that date (or who did not comply with the

---

[2] We recite the facts alleged in the operative second amended complaint, which we accept as true for purposes of reviewing the trial court's order sustaining the City's demurrer. (*Mathews v. Becerra* (2019) 8 Cal.5th 756, 786.) We also consider matters subject to judicial notice (*ibid.*), which in this case includes the City's Resolution Implementing Consequences for Non-Compliance with the Requirements of Ordinance No. 187134. The trial court took judicial notice of that document, and Firefighters4Freedom does not challenge that aspect of the trial court's ruling.

vaccine mandate after denial of a request for an exemption) were "subject to corrective action."

B. *Firefighters4Freedom Sues the City over the Vaccine Mandate*

Firefighters4Freedom filed this action on September 17, 2021, alleging in its operative second amended complaint three causes of action for "declaratory and injunctive relief." Firefighters4Freedom sought declarations (1) the City did not have authority to adopt the vaccine mandate,[3] (2) the vaccine mandate violated the California Constitution's right to privacy, and (3) the vaccine mandate violated the firefighters' rights to due process by "cutting off pay, without a hearing, to firefighters who have not complied with the mandate." Firefighters4Freedom also sought to enjoin the City from enforcing the vaccine mandate.

In seeking this declaratory and injunctive relief, Firefighters4Freedom challenged the vaccine mandate's justification that "[v]accination is the most effective way to

---

[3] Firefighters4Freedom also alleged that the City was acting in its capacity as an employer in enacting the vaccine mandate, and that, as an employer, the City did not have authority "to unilaterally change the conditions of employment" for City firefighters who were represented by a labor union. In support of its demurrer the City argued Firefighters4Freedom lacked standing to make this argument because Firefighters4Freedom does not represent City firefighters in employment matters and is not a party to the memorandum of understanding between the City and the union representing City firefighters. The trial court acknowledged these arguments but did not rule on them, and Firefighters4Freedom does not pursue them on appeal.

prevent transmission and limit COVID-19 hospitalizations and death." Firefighters4Freedom cited a statement in an interim final rule from the United States Department of Health and Human Services Centers for Medicare and Medicaid Services concerning COVID-19 vaccination requirements for staff at certain Medicare- and Medicaid-certified providers and suppliers 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.'" (See 86 Fed.Reg. 61555-01, 61615 (Nov. 5, 2021).) Firefighters4Freedom further alleged that, as of January 4, 2021, 201 City firefighters were off-duty with COVID-19 (170 of whom were vaccinated) and that there was no evidence showing COVID-19 vaccines made an individual "less likely to contract and transmit the novel coronavirus."

In its first cause of action, for declaratory relief based on the claim the City did not have the authority to adopt the vaccine mandate, Firefighters4Freedom alleged that the mandate was "not reasonably related to promoting public health and that the means used is not reasonably appropriate under the circumstances." In its second cause of action, for declaratory relief based on the claim the vaccine mandate violated City firefighters' privacy rights, Firefighters4Freedom alleged that City firefighters have a protected privacy interest in their bodily integrity and that "[c]ompulsory vaccination constitutes a serious invasion" of that right. Firefighters4Freedom further alleged the City "has never required that city employees get a shot to keep their jobs before now" and "has never disciplined, much less fired, a firefighter for declining an injection." Firefighters4Freedom

alleged that following the 2018 flu season—"one of [the] worst flu seasons in recent memory"—no City employees were "fired for declining the flu shot" and that in the last century only schoolchildren have been subject to compulsory vaccination laws in California. Thus, Firefighters4Freedom alleged, the firefighters' expectation of privacy was reasonable. Firefighters4Freedom further alleged that, in issuing the vaccine mandate, the City "did not consider alternative measures that have a lesser impact on the firefighters' privacy rights," even though "[m]any such measures exist," and that the mandate does not serve its stated purpose.

Regarding its third cause of action, for declaratory relief based on the claim the vaccine mandate violated City firefighters' due process rights, Firefighters4Freedom alleged the City did "not have the power to put [C]ity firefighters who do not follow the City vaccine mandate on unpaid leave pending termination proceedings." Firefighters4Freedom alleged the City had to "provide the firefighters with notice and an opportunity to challenge the action before it stops paying them."

C. *The City Files a Demurrer and a Request for Judicial Notice of 11 Documents*

The City demurred to all three causes of action. The City argued the vaccine mandate was a valid exercise of the City's police powers because the mandate was "reasonable given the overwhelming evidence that vaccination remains the single most effective strategy for preventing severe disease, hospitalization and death from COVID-19." The City argued the vaccine mandate did not violate the firefighters' right to privacy because "the overwhelming evidence of the efficacy and safety of the

available COVID-19 vaccines establishes that the vaccine mandate is rationally related to the City's legitimate interests." And the City argued Firefighters4Freedom failed to plead facts sufficient to show a violation of the firefighters' due process rights.

The City's arguments on the first two causes of action (unauthorized use of the City's police power and invasion of the firefighters' privacy rights) relied on assertions in documents the City submitted in its request for judicial notice. That request included the following 11 exhibits:

1. "Safety of COVID-19 Vaccines," Centers for Disease Control and Prevention, available at https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html (last updated December 6, 2021).

2. "COVID-19: Vaccines to prevent SARS-CoV-2 Infection," UpToDate, by Kathryn M. Edwards, MD, et al., available at https://www.uptodate.com/contents/covid-19-vaccines-to-prevent-sars-cov-2-infection (last updated December 1, 2021).

3. "CDC Expands Eligibility for COVID-19 Booster Shots to All Adults," Centers for Disease Control and Prevention, available at https://www.cdc.gov/media/releases/2021/s1119-booster-shots.html (last updated November 19, 2021).

4. "Interim Public Health Recommendations for Fully Vaccinated People," Centers for Disease Control and Prevention, available at https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html (updated November 19, 2021).

5. "Variant Proportions," Centers for Disease Control and Prevention, available at https://covid.cdc.gov/covid-data-tracker/#variant-proportions (last updated December 4, 2021).

6. "New CDC Study: Vaccination Offers Higher Protection than Previous COVID-19 Infection," Centers for Disease Control and Prevention, available at https://www.cdc.gov/media/releases/2021/s0806-vaccination-protection.html (August 6, 2021).

7. "Antibody Testing Is Not Currently Recommended to Assess Immunity After COVID-19 Vaccination: FDA Safety Communication," U.S. Food and Drug Administration, available at https://www.fda.gov/medical-devices/safety-communications/antibody-testing-not-currently-recommended-assess-immunity-after-covid-19-vaccination-fda-safety (May 19, 2021).

8. "Morbidity and Mortality Weekly Report (MMWR): Laboratory-Confirmed COVID-19 Among Adults Hospitalized with COVID-19-Like Illness with Infection-Induced or mRNA Vaccine-Induced SARS-CoV-2 Immunity – Nine States, January-September 2021," Centers for Disease Control and Prevention, available at https://www.cdc.gov/mmwr/volumes/70/wr/mm7044e1.html (November 5, 2021).

9. State Public Health Officer Order of July 26, 2021: "Health Care Worker Protections in High-Risk Settings," available at https://www.cdph.ca.gov/Programs/CID DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Unvaccinated-Workers-In-High-Risk-Settings.aspx (July 26, 2021).

10. Resolution Implementing Consequences for Non-Compliance with the Requirements of Ordinance No. 187134, adopted October 26, 2021 by the Los Angeles City Council.

11. "Omicron Variant: What You Need to Know," Centers for Disease Control and Prevention, available at https://www.cdc.gov/coronavirus/2019-ncov/variants/omicronvariant.html (updated December 20, 2021).[4]

The City asked the trial court to take judicial notice of exhibits 1-9 and 11, which the City said were published "primarily" by the Centers for Disease Control and Prevention (CDC) and the United States Food and Drug Administration (FDA) and which discussed "the safety and efficacy of vaccines as well as general statistics about the vaccines and the ongoing COVID-19 pandemic." The City argued judicial notice of these articles was proper because they discussed "the safety and effectiveness of vaccinations, as well as general facts relating to the vaccinations that are widely accepted as established by experts and scientists in the field of infectious diseases." The City cited *Brown v. Smith* (2018) 24 Cal.App.5th 1135 (*Brown*), where the court took judicial notice of documents published by the CDC and of "'the safety and effectiveness of vaccinations in preventing the spread of dangerous communicable diseases, a fact that is commonly known and accepted in the scientific community and the general public.'" (*Id.* at pp. 1142-1143.) The City asked the court to take judicial notice of exhibit 10, the City Council resolution, as a legislative enactment.

Firefighters4Freedom opposed the City's request for judicial notice to the extent the City was asking the court to take

---

[4] These documents were available online at the time the City filed its request for judicial notice and submitted the documents with these citations. Many of these documents have since been updated or replaced with more recent notices or publications.

judicial notice of the truth of the contents of the CDC and FDA publications and other documents. Referring to exhibit 11, a December 2021 CDC document that stated "'anyone with Omicron infection can spread the virus to others, even if they are vaccinated or don't have symptoms,'" Firefighters4Freedom argued no consensus had emerged on, among other issues, the origin and treatment of COVID-19.

D. *The Trial Court Sustains the Demurrer Without Leave To Amend*

The trial court sustained the demurrer to all three causes of action without leave to amend. In ruling on the City's request for judicial notice, the court stated the safety and effectiveness of vaccines was "a well-known 'medical and scientific' fact." The court took judicial notice of all 11 documents submitted by the City and that "COVID-19 vaccinations are safe and effective in protecting the health and safety of the public." The court appears to have taken judicial notice of the existence of the documents and of the truth of the statements in them, which the court cited throughout its order. In rejecting Firefighters4Freedom's argument the court could not "'decide a question that may depend on disputed facts by means of judicial notice,'" the court ruled that the case cited by Firefighters4Freedom for that proposition, *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, did not preclude the court from taking "judicial notice of U.S. government agency documents which cite facts around which the world scientific community has reached consensus." The court also rejected Firefighters4Freedom's argument it was not appropriate to take judicial notice of the COVID-19 vaccinations' safety and efficacy because those facts

were not "'indisputably true.'" The court stated "the fact that some people may believe a falsehood" did not prevent the court from taking judicial notice of a scientific fact based on the consensus of scientific, historical, or professional opinion.

Relying on the judicially noticed facts in the documents submitted by the City, the trial court sustained the demurrer to Firefighters4Freedom's causes of action for declaratory relief based on the claims that the City lacked authority to implement the mandate and that the mandate invaded the firefighters' privacy rights. On the former cause of action, the trial court ruled "[c]ompulsory vaccination is a valid exercise of state police power" because "[t]here is consensus in the medical and scientific community that COVID-19 vaccines are a reasonable method to lessen the spread of COVID-19 during the present global pandemic." On the latter cause of action, the trial court stated that, under *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 (*Hill*), a plaintiff asserting a violation of the state constitutional right to privacy must allege (1) a legally protected privacy interest, (2) a reasonable expectation of privacy in the circumstances, and (3) conduct by the defendant constituting a serious invasion of privacy. (*Id.* at pp. 39-40.) The court ruled Firefighters4Freedom failed to allege facts to satisfy the first element because "the challenged action clearly implicates public health and safety and does not affect a fundamental right to privacy." Regarding the second element, the court ruled "the ongoing global COVID-19 public health emergency poses a countervailing state interest sufficient to render the firefighters' privacy expectations unreasonable." The court stated that "the scientific consensus on data accumulated on available COVID-19 vaccines clearly supports their use to combat the spread of

[COVID-19] among the general population" and that this "overwhelming scientific evidence in favor of COVID-19 vaccine use" made the firefighters' privacy concerns "not reasonable." On the third element, the court ruled Firefighters4Freedom failed to allege a serious invasion of privacy because the vaccine mandate did not "require[ ] everyone to be vaccinated." The court found that firefighters could "remain unvaccinated and seek other employment with an employer that does not require its employees to be vaccinated." Finally, on Firefighters4Freedom's cause of action for declaratory relief based on the claim the vaccine mandate violated City firefighters' due process rights, the trial court ruled as a matter of law that "the firefighters were not entitled to a hearing before an adverse employment action during an emergency situation" and that Firefighters4Freedom failed to allege facts showing how "the events that led to adverse employment actions illustrate a due process violation."

E. *The Trial Court Enters Judgment, Firefighters4Freedom Appeals, and the Parties Stipulate To Dismiss the Appeal Regarding the Third Cause of Action*

On March 14, 2022 the trial court entered a judgment of dismissal. Firefighters4Freedom timely appealed.

On January 10, 2023 the Los Angeles City Council adopted a resolution ending the state of local emergency effective February 1, 2023.[5] Following the briefing on the appeal,

---

[5] We take judicial notice of the Special 3 Resolution / Declaration of Local Emergency / Coronavirus (COVID-19) adopted January 10, 2023 by the Los Angeles City Council. (See Evid. Code, §§ 452, subd. (b), 459.)

Firefighters4Freedom and the City stipulated that, "given the City's efforts following the City's Executive Employee Relations Committee [meeting held January 27, 2023] regarding the vaccine mandate and the City Council's decision to end the local COVID-19 emergency declaration, the third cause of action for declaratory and injunctive relief . . . should be removed from the appeal." We therefore dismiss the appeal from the judgment to the extent it is based on the order sustaining the demurrer to the third cause of action.

DISCUSSION

A. *Applicable Law and Standard of Review*

"'In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory.'" (*Mathews v. Becerra* (2019) 8 Cal.5th 756, 768 (*Mathews*); see *Silva v. Langford* (2022) 79 Cal.App.5th 710, 715.) We treat the demurrer as admitting all properly pleaded material facts, but not contentions, deductions, or conclusions of fact or law. (*Mathews*, at p. 768.) "'[W]e accept as true even improbable alleged facts, and we do not concern ourselves with the plaintiff's ability to prove [the] factual allegations." (*Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Insurance Co.*, *supra*, 81 Cal.App.5th at pp. 104-105; see *Shusha, Inc. v. Century-National Ins. Co.* (2022) 87 Cal.App.5th 250, 261 [courts must assume the truth of the plaintiff's allegations "even if improbable"], review granted April 19, 2023, S278614)

We also consider matters a court may judicially notice (*Mathews*, *supra*, 8 Cal.5th at p. 768), but a demurrer is not the

appropriate procedure for determining the truth of disputed facts (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 365). """The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable. [Citation.] . . . "'[J]udicial 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.'"""" (*Ibid.*; see *New Livable California v. Association of Bay Area Governments* (2020) 59 Cal.App.5th 709, 716 ["'a court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show'"]; *Fremont Indemnity Co. v. Fremont General Corp.*, *supra*, 148 Cal.App.4th at pp. 114-115 [same].)

B. *The Trial Court Abused Its Discretion in Taking Judicial Notice of 10 of the 11 Documents*

1. *Applicable Law and Standard of Review*

"""Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.)[6] Matters that are subject to judicial notice are listed in sections 451 and 452. A matter ordinarily is subject to judicial notice only if the matter is reasonably beyond dispute.'" (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 835; see *Fremont Indemnity Co. v. Fremont General Corp.*,

---

6 Statutory references are to the Evidence Code.

supra, 148 Cal.App.4th at p. 113.) As the Supreme Court explained in the early leading case of *Varcoe v. Lee* (1919) 180 Cal. 338: "Judicial notice is a judicial short cut, a doing away, in the case of evidence, with the formal necessity for evidence, because there is no real necessity for it. So far as matters of common knowledge are concerned, it is saying there is no need of formally offering evidence of those things, because practically everyone knows them in advance, and there can be no question about them." (*Id.* at p. 344; see *ibid.* [taking judicial notice of the character of a well-known street as a "business district"].) "'Courts take judicial notice of those things which are common knowledge to the majority of mankind, or to those persons familiar with the particular matter in question. But matters of which courts have judicial knowledge are uniform and fixed, and do not depend upon uncertain testimony; as soon as a circumstance becomes disputable, it ceases to fall under the head of common knowledge, and so will not be judicially recognized.'" (*Id*. at p. 345.)

Section 451, subdivision (f), provides that "[j]udicial notice shall be taken of . . . [f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute." Section 452, subdivision (g), authorizes the court to take judicial notice of "[f]acts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute," and section 452, subdivision (h), allows the court to take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." As one treatise

explains, section 451, subdivision (f), "requires notice of matters 'universally known'—the highest category," whereas section 452, subdivisions (g) and (h), provide for "optional notice of matters that are not universally known and also of matters that are not known but are easily ascertainable." (1 Witkin, Cal. Evidence (5th ed. 2022) Judicial Notice § 32; see *Preserve Shorecliff Homeowners v. City of San Clemente* (2008) 158 Cal.App.4th 1427, 1434-1435 [comparing section 451, subdivision (f), and section 452, subdivisions (g) and (h)].)

Under section 451, subdivision (f), a court must take judicial notice "only of facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute. [Citation.] If there is any doubt whatever either as to the fact itself or as to its being a matter of common knowledge, evidence should be required." (*Barreiro v. State Bar* (1970) 2 Cal.3d 912, 925; accord, *Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 787; see *Communist Party of U.S. of America v. Peek* (1942) 20 Cal.2d 536, 546 ["'if there were any possibility of dispute' the fact cannot be judicially noticed"].)[7] Examples of facts falling within the scope of section 451, subdivision (f), are the occurrence of the 1994 Northridge earthquake (*Wolfe v. State Farm Fire & Casualty Ins. Co.* (1996) 46 Cal.App.4th 554, 560), population data (*Devidian v. Automotive Service Dealers Assn.* (1973) 35 Cal.App.3d 978, 982), and comparative population data (*Preserve Shorecliff*

---

[7] The Legislature enacted sections 451 and 452 in 1965 to codify common law governing matters subject to judicial notice. (See *Paramount Television Productions, Inc. v. Bill Derman Productions* (1968) 258 Cal.App.2d 1, 10; 1 Witkin, Cal. Evidence, *supra*, Judicial Notice § 32].)

Homeowners v. City of San Clemente, *supra*, 158 Cal.App.4th at pp. 1434-1435). A court also has taken judicial notice under section 451, subdivision (f), of "the principle of radar as an electronic device which scientifically and accurately measures speed of a moving object," but not of "the accuracy and operating efficiency of [a] particular radar device." (*People v. MacLaird* (1968) 264 Cal.App.2d 972, 973, 975.)

Section 452, subdivisions (g) and (h), allow a court to take judicial notice of matters commonly known or readily ascertainable. Readily ascertainable facts include those "facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter." (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145.) Regarding scientific facts, the comment by the Assembly Committee on the Judiciary accompanying section 452 states: "Subdivisions (g) and (h) include, for example, facts which are accepted as established by experts and specialists in the natural, physical, and social sciences, if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings." Under section 452, subdivisions (g) and (h), courts have taken judicial notice of the reliability of urine testing for determining blood alcohol content (*People v. Municipal Court (Sansone)* (1986) 184 Cal.App.3d 199, 202) and the fact that visible smoke contains incompletely oxidized materials (*McAllister v. Workmen's Compensation Appeals Bd.* (1968) 69 Cal.2d 408, 414-415; see *id.* at p. 414 ["[m]atters of scientific certainty are subject to judicial notice"]). Under the earlier common law rules, courts took judicial notice of the location of

parts of the human body and other "commonly known" medical facts. (See *People v. Sanders* (1969) 268 Cal.App.2d 802, 805, fn. 1 [taking judicial notice that limiting blood flow to the brain "is attended by serious danger"]; *Thomsen v. Burgeson* (1938) 26 Cal.App.2d 235, 239 ["The location of the tonsils is a matter which is easily observable to anyone, and the location and function of the uvula and soft palate are matters of common knowledge, and of which the court can take judicial notice."]; see generally 1 Witkin, Cal. Evidence, *supra*, Judicial Notice § 35.) In general, courts may take judicial notice of the existence of government publications or of specific facts contained in official documents where appropriate under sections 451 or 452, but not of the truth of the contents of the documents. (See *Dominguez v. Bonta* (2022) 87 Cal.App.5th 389, 400 ["'Courts can take judicial notice of the existence, content and authenticity of public records and other specified documents, *but do not take judicial notice of the truth of the factual matters asserted in those documents*.'"]; *Unruh-Haxton v. Regents of University of California*, *supra*, 162 Cal.App.4th 343 at pp. 364-365 [""'Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning.'"'"].)

Finally, "'the power of judicial notice is to be exercised with caution.'" (*Varcoe v. Lee*, *supra*, 180 Cal. at p. 344; accord, *Weitzenkorn v. Lesser*, *supra*, 40 Cal.2d at p. 787; *Communist Party of U.S. of America v. Peek*, *supra*, 20 Cal.2d at p. 547; *People v. Brotherton* (1966) 239 Cal.App.2d 195, 204; see *People v. Davis* (2013) 57 Cal.4th 353, 360 ["'[i]f there is any reasonable question whatever'" about whether a matter is "'certain and indisputable,'" then "'proof should be required'"].) We review a trial court's decision to take judicial notice for abuse of

discretion. (*Physicians Committee for Responsible Medicine v. Los Angeles Unified School Dist.* (2019) 43 Cal.App.5th 175, 182; *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 536, disapproved on another ground in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939, fn. 13; see *Center for Biological Diversity v. California Department of Conservation, etc.* (2019) 36 Cal.App.5th 210, 227 ["We apply the abuse of discretion standard of review to any ruling by the trial court on admissibility of evidence, including requests for judicial notice."].)

2. *Sources Cited by Firefighters4Freedom Suggest the COVID-19 Vaccines' Safety and Efficacy Are Subjects of Reasonable Dispute*

In granting the City's request for judicial notice, the trial court cited section 451, subdivision (f), and section 452, subdivisions (g) and (h), but did not specifically find that the facts and documents the court took judicial notice of satisfied the requirements of any of those provisions. The trial court also took judicial notice that the "COVID-19 vaccinations are safe and effective in protecting the health and safety of the public," although the court did not explain what it meant by "safe" or "effective." And the court took judicial notice the medical and scientific community had reached a consensus COVID-19 vaccination is a reasonable method to reduce the spread of the disease during the pandemic, as well as of similar statements. But because the sources cited by Firefighters4Freedom, and even some of the documents the City asked the court to judicially notice, reflected reasonable disputes about these factual statements, the trial court erred in taking judicial notice of them.

Firefighters4Freedom identified several sources that disputed the efficacy of the COVID-19 vaccines in preventing the spread of COVID-19, particularly in light of the Omicron variant. In its complaint Firefighters4Freedom cited a federal agency document published in November 2021 stating 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.'" (See 86 Fed.Reg. 61555-01, 61615 (Nov. 5, 2021).) Firefighters4Freedom also alleged both vaccinated and unvaccinated individuals have tested positive for COVID-19, including over 100 City firefighters and a Los Angeles County supervisor. As discussed, in opposing the City's request for judicial notice, Firefighters4Freedom also cited the City's exhibit 11, a CDC document from December 2021, which stated that "'anyone with Omicron infection can spread the virus to others, even if they are vaccinated or don't have symptoms.'" That document also stated: "We don't yet know how easily [the Omicron variant] spreads, the severity of illness it causes, or how well available vaccines and medications work against it. . . . More data are needed to know if Omicron infections, and especially reinfections and breakthrough infections in people who are fully vaccinated, cause more severe illness or death than infection with other variants. . . . [B]reakthrough infections in people who are fully vaccinated are likely to occur." And the City's exhibit 2, "COVID-19: Vaccines to prevent SARS-CoV-2 Infection," also questioned the ability of the COVID-19 vaccines to limit the spread of disease following the emergence of the Delta and Omicron variants.

In addition, the documents the trial court judicially noticed referred to at least two types of vaccine efficacy: the vaccines' ability to reduce the spread of infection and their ability to reduce the severity of disease. For example, exhibit 4, a publication on the CDC website from November 2021, "Interim Public Health Recommendations for Fully Vaccinated People," stated that "COVID-19 vaccines are safe and effective at preventing infection, hospitalization, and death." And as stated, exhibit 11, the CDC document from December 2021, "Omicron Variant: What You Need To Know," acknowledged the vaccines were less effective in preventing the spread of disease caused by the Omicron variant, but stated that "[c]urrent vaccines are expected to protect against severe illness, hospitalizations, and deaths."

On the issue of the COVID-19 vaccines' safety, the documents the trial court judicially noticed repeatedly stated the vaccines were "safe," but they also acknowledged "common side effects" and "rare" but "serious safety problems." And exhibit 1, the CDC publication "Safety of COVID-19 Vaccines," stated the "CDC continues to closely monitor the safety of COVID-19 vaccines." While the trial court could have taken judicial notice of the fact the COVID-19 vaccines satisfied the FDA's safety standards for approval (see *Eidson v. Medtronic, Inc.* (N.D.Cal. 2013) 981 F.Supp.2d 868, 879 ["courts have specifically held that the FDA's approval letters for medical devices are subject to judicial notice"]), it is unclear what the trial court's use of the term "safe" meant in the context of evaluating whether Firefighters4Freedom alleged sufficient facts to constitute causes of action. For example, that COVID-19 vaccines are "safe" could mean they are safe for most people who receive them (see *Brox v. Hole* (D.Mass. 2022) 590 F.Supp.3d 359, 363 ["'[f]ull FDA

approval takes place when enough data demonstrate that the vaccines are safe and effective for most people who receive them, and when the FDA has had an opportunity to review and approve the whole vaccine manufacturing process and facilities'"]), for all people, or for some group of people.

More generally, the documents the trial court judicially noticed acknowledged that the virus that causes COVID-19 continues to evolve. Exhibit 5, a CDC publication titled "Variant Proportions," stated that "SARS-CoV-2, the virus that causes COVID-19, is constantly changing and accumulating mutations in its genetic code over time" and that "new variants [were] expected to emerge." Exhibit 4 recommended a certain testing regimen for vaccinated people "[b]ased on evolving evidence." Exhibit 11, the December 2021 CDC publication, stated: "Scientists are working to determine how well existing treatments for COVID-19 work. Based on the changed genetic make-up of Omicron, some treatments are likely to remain effective while others may be less effective." This CDC publication also stated: "Scientists are currently investigating Omicron, including how protected fully vaccinated people will be against infection, hospitalization, and death."

Given the conflicting information and claims submitted by the parties about the COVID-19 vaccines' safety and efficacy, including conflicts created by the documents the trial court judicially noticed; the continuing evolution of the virus that causes COVID-19; and the ambiguity of the terms "safe" and "effective"; the trial court abused its discretion in granting the City's request for judicial notice. The facts the City submitted were not subject to judicial notice because the safety and efficacy of the COVID-19 vaccines are subjects of reasonable dispute and

are not universally known, commonly known, or readily ascertainable and require the presentation of evidence, either on summary judgment or at trial. (See *People v. Davis*, *supra*, 57 Cal.4th at p. 361 [judicial notice was not appropriate where "none of [the requested assertions] is so certain, indisputable, and commonly known that the appellate court could dispense with the requirement that evidence be presented to prove them"]; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1178, fn. 37 [contents of a document were "not properly subject to judicial notice" where "the question of the availability and effectiveness of treatment for mentally disordered sex offenders is a matter subject to professional debate"]; *People v. Ireland* (1995) 33 Cal.App.4th 680, 685 [declining to take judicial notice of assertions that "are currently the subject of controversy"].) The scientific evidence may weigh, even heavily, in favor of one side or the other, but these issues cannot be decided on the pleadings, whose allegations we must accept as true, or a request for judicial notice, whose exhibits create factual conflicts that require evidence to resolve.

In arguing the trial court properly took judicial notice of the COVID-19 vaccines' safety and effectiveness, the City relies on *Brown*, *supra*, 24 Cal.App.5th 1135, which the trial court quoted at length. In *Brown* the court took judicial notice of "'the safety and effectiveness of vaccinations in preventing the spread of dangerous communicable diseases, a fact that is commonly known and accepted in the scientific community and the general public,'" as well as several documents published by the CDC and other government agencies. (*Id.* at p. 1142.) The vaccines at issue in *Brown* were mandated by state law for school children against diphtheria, hepatitis B, haemophilus influenzae type b,

measles, mumps, pertussis (whooping cough), poliomyelitis, rubella, tetanus, and varicella (chickenpox), which an Assembly Committee report deemed "preventable diseases." (*Id.* at pp. 1139, fn. 1, 1140.) The plaintiffs in *Brown* opposed the defendants' request for judicial notice, but offered no evidence or authority supporting their opposition. (*Id.* at p. 1142.)

Citing a 1925 Court of Appeal decision, *Southern California Edison Co. v. Industrial Accident Com.* (1925) 75 Cal.App. 709, the court in *Brown* stated: "'Where the issue pertains to medical or surgical treatment, the nature, effect, and result of which are the subjects of common knowledge, such matters are within the rule of judicial knowledge. As for instance, the court will take judicial notice of the nature, purpose, and effects of vaccination.'" (*Brown*, *supra*, 24 Cal.App.5th at p. 1142; see *Southern California Edison Co.*, at p. 715.) *Southern California Edison*, however, did not involve vaccines. The case concerned a medical procedure known as the "'Hibbs' or 'Albee' treatment," and the court in *Southern California Edison* declined to take judicial notice of the effects of that surgery because they were "not matters of common knowledge." (*Southern California Edison Co.*, at p. 716.)[8] Moreover, the reference to the effects of vaccination

---

[8] The court stated: "The record nowhere discloses the nature or character of this proposed treatment, nor whether it could be classified as a major or a minor operation; nor is there any evidence to show what if any inconvenience or pain would be suffered by the patient, or to what extent, if at all, he would be confined to his bed as a result of the operation." (*Southern California Edison Co. v. Industrial Accident Com.*, *supra*, 75 Cal.App. at pp. 714-715.) Dr. Russell Hibbs was a pioneer of orthopedic surgery who in the early 20th century developed a

in *Southern California Edison* concerned the smallpox vaccine, which a case cited by the court in *Southern California Edison* acknowledged had been required in some parts of the world since 1807, was "required in nearly all the armies and navies of the world," and was compulsory for school children in all but a few states and cities in the United States. (*Id.* at p. 715; see *Viemeister v. White* (1904) 179 N.Y. 235, 239-242.) No such history supports judicial notice of the safety and efficacy of the COVID-19 vaccines.[9]

The court in *Brown* also cited *McAllister v. Workmen's Compensation Appeals Bd.*, *supra*, 69 Cal.2d 408 and *Gould v. Maryland Sound Industries, Inc.*, *supra*, 31 Cal.App.4th 1137 for the proposition that a court may take judicial notice of scientific facts. (See *Brown*, *supra*, 24 Cal.App.5th at p. 1142.) *McAllister* and *Gould* are distinguishable as well. The court in *McAllister* took judicial notice of the fact that "smoke is visible, and that, as a matter beyond scientific dispute, smoke is visible precisely because it contains incompletely oxidized materials." (*McAllister*, at p. 414.) The court found this fact was "common knowledge" and readily ascertainable by reference to a dictionary or an

---

spinal fusion surgical technique for treating scoliosis. (See https://www.srs.org/professionals/meetings/the-hibbs-society [as of Mar. 8, 2023], archived at < https://perma.cc/XLD5-PWTQ >.)

[9] The court in *Viemeister v. White*, *supra*, 179 N.Y. 235 did not take judicial notice of the safety and efficacy of the smallpox vaccine. The court stated it would take judicial notice only of "the common belief of the people of the state" that "vaccination is a preventive of smallpox." (*Id.* at p. 241.)

encyclopedia.[10] (*Id.* at pp. 414-415.) *Gould* did not concern any scientific facts (it addressed whether a court could take judicial notice of an employment contract), and the court in that case merely stated that section 452, subdivision (h), gives a court authority to take judicial notice of "facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter." (*Gould*, at p. 1145.) In stark contrast, the documents and facts the trial court judicially noticed here did not create or reflect a consensus among experts and specialists regarding the safety and efficacy of the COVID-19 vaccines, and those facts are not "readily ascertainable" by reference to "treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter." (*Ibid.*) Thus, neither *Brown* nor the cases it cited support taking judicial notice of the safety and efficacy of vaccines in general or of the COVID-19 vaccines in particular. (See *People v. Brotherton*, *supra*, 239 Cal.App.2d at p. 205 ["A distinction may well be drawn between generally recognized scientific principles and their application to a particular set of facts."].)

Moreover, the City never identified the "statistics about the vaccines and the ongoing COVID-19 pandemic" it wanted the court to take judicial notice of, and the court never identified which parts of the documents contained facts the court believed were subject to judicial notice. (See *Building Industry Assn. of Bay Area v. City of San Ramon* (2016) 4 Cal.App.5th 62, 73, fn. 11

---

[10] An encyclopedia is a set of books containing information on a variety of subjects. (See *Estate of Ockerlander* (1961) 195 Cal.App.2d 185, 185.)

[declining to take judicial notice of a government report where the plaintiff failed to identify "specific facts and propositions within the report for judicial notice"].) As discussed, a court may take judicial notice of the existence of government publications, but generally may not take judicial notice of the truth of matters asserted in such documents. (See *Dominguez v. Bonta*, *supra*, 87 Cal.App.5th at p. 400; *Wood v. Superior Court of San Diego County* (2020) 46 Cal.App.5th 562, 580, fn. 2; see, e.g., *Burcham v. City of Los Angeles* (C.D.Cal. 2022) 562 F.Supp.3d 694, 700-701 [taking judicial notice of only the fact that government guidelines regarding COVID-19 "exist and not for the truth of the scientific facts contained within (which Plaintiffs dispute)"].) There undoubtedly are facts concerning COVID-19 and the actions by federal, state, and local government agencies regarding the pandemic that are subject to judicial notice. For example, the court likely could have taken judicial notice of the existence of federal agency documents stating the vaccines are safe and effective for certain applications. But neither the City's request for judicial notice nor the scope of the trial court's order granting that request was limited to such facts.

C. *The Trial Court Erred in Sustaining the Demurrer to the Cause of Action for Declaratory Relief Based on Lack of Authority To Issue the Vaccine Mandate*

"Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. (Cal. Const., art. XI, § 7.) Apart from this limitation, the 'police power [of a county or city] under this provision . . . is as broad as the police

power exercisable by the Legislature itself.'" (*Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885; see *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1118.) A county or city "may use its police powers to do '"whatever will promote the peace, comfort, convenience, and prosperity" of [its] citizens . . . , [and these powers] should "not be lightly limited."'" (*San Diego County Veterinary Medical Assn. v. County of San Diego* (2004) 116 Cal.App.4th 1129, 1135.) When a county's or city's action "'is challenged as not being a valid exercise of police power, all presumptions favor its validity, and it will be upheld unless its unconstitutionality clearly and unmistakably appears.'" (*Ibid.*)

Courts will ordinarily uphold an ordinance enacted under a city's police powers if the ordinance satisfies two requirements: (1) "'it is reasonably related to promoting the public health, safety, comfort, and welfare'" and (2) "'the means adopted to accomplish that promotion are reasonably appropriate to the purpose.'" (*Sunset Amusement Co. v. Board of Police Commissioners* (1972) 7 Cal.3d 64, 72 (*Sunset Amusement*); accord, *Duarte Nursery, Inc. v. California Grape Rootstock Improvement Com.* (2015) 239 Cal.App.4th 1000, 1009.) Thus, "[i]n determining the validity of a legislative measure under the police power our sole concern is with whether the measure reasonably relates to a legitimate governmental purpose," and legislation "is within the police power if its operative provisions are reasonably related to the accomplishment of" that purpose. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 158, 160 (*Birkenfeld*).)

The vaccine mandate states its objective is "to protect the City's workforce and the public that it serves" by reducing the

risk of unvaccinated employees "contracting and spreading COVID-19 within the workplace" and "to the public that depends on City services." (L.A. Admin. Code, §§ 4.701, subd. (a), L.A. Ord. No. 187134 § (2).) The mandate thus states the conditions showing it is "reasonably related to promotion of the public health and welfare" (*Birkenfeld*, *supra*, 17 Cal.3d at p. 160) and therefore meets the first part of the test for upholding a measure under the police power (see *Sunset Amusement Co. v. Board of Police Commissioners*, *supra*, 7 Cal.3d at p. 72). The propriety of the vaccine mandate therefore turns on the second part of the test: whether the mandate is "a rational curative measure" to accomplish its objectives. (*Birkenfeld*, *supra*, 17 Cal.3d at p. 160; see *ibid.* ["the constitutionality of residential rent controls under the police power depends upon the actual existence of a housing shortage and its concomitant ill effects of sufficient seriousness to make rent control a rational curative measure"]; *Duarte Nursery, Inc. v. California Grape Rootstock Improvement Com.*, *supra*, 239 Cal.App.4th at p. 1009 ["'[T]he mere declaration by a Legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified.'"].)

The trial court ruled the vaccine mandate was a "reasonable method to lessen the spread of COVID-19 during the present global pandemic" based on facts the court judicially noticed that "there is no reasonable dispute over the effectiveness of vaccines in combating COVID-19" and that "[t]he overwhelming consensus of scientific opinion supports the conclusion that COVID-19 vaccines are safe and effective at both combating the spread of, and the severity of illness from, COVID-19." Because the trial erred in taking judicial notice of those

facts, the court erred in sustaining the City's demurrer to Firefighters4Freedom's causes of action for declaratory relief based on those facts.

As stated, Firefighters4Freedom alleged that the vaccine mandate "is not reasonably related to promoting public health and that the means used is not reasonably appropriate" in part because "the spread of the Omicron variant shows the COVID-19 vaccines do not prevent people from contracting or transmitting COVID-19." Assuming, as we must, the truth of those allegations, the "'constitutional facts'" (*Birkenfeld*, *supra*, 17 Cal.3d at p. 160) on which the validity of the vaccine mandate depends are in dispute. (See *id.* at p. 136 [city charter amendment transgressed "the constitutional limits of the police power not because of its objectives but because certain procedures it provides would impose heavy burdens upon landlords not reasonably related to the accomplishment of those objectives"].) Thus, the trial court erred in ruling as a matter of law that Firefighters4Freedom failed to allege sufficient facts to constitute a cause of action for declaratory relief on this theory. (See *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 996 (*Sheehan*) [a cause of action is not susceptible to demurrer where "the record does not contain enough information to establish as a matter of law that the complaint fails to state a cause of action"]; *D'Amico v. Board of Medical Examiners* (1970) 6 Cal.App.3d 716, 727-728 ["the question of whether there are facts which would justify" a statute under a state's police powers "should not be determined on demurrer"].) As the Supreme Court stated in *Mathews*, *supra*, 8 Cal.5th 756, "surviving demurrer is no assurance of success on the merits once evidence is developed and

considered," but there is not yet any factual basis on which "to prejudge what the evidence will show." (*Id.* at p. 762.)

The City argues that "[c]ompulsory vaccination falls squarely within the police power of a State and its local authorities" and that "[c]ourts consistently have held that vaccination mandates are a permissible use of state power to combat public health emergencies." That may be true, at least for the first part of the test to uphold a measure under police powers. But the cases the City cites, which concern mandates for different vaccines upheld in different circumstances, do not show as a matter of law the vaccine mandate in this case is reasonably appropriate to accomplish its objectives. Four of the cases the City cites, *Abeel v. Clark* (1890) 84 Cal. 226, *French v. Davidson* (1904) 143 Cal. 658 (*French*), *Jacobson v. Commonwealth of Massachusetts* (1905) 197 U.S. 11 (*Jacobson*), and *Zucht v. King* (1922) 260 U.S. 174 (*Zucht*), concerned compulsory smallpox vaccinations, and the Supreme Courts in *Abeel* and *Jacobson* discussed the smallpox vaccine's lengthy history of success in preventing disease. For example, in *Abeel* the California Supreme Court stated that experience with the smallpox vaccine since 1796 has "proved it to be the best method known to medical science to lessen the liability to infection with the disease." (*Abeel*, at p. 230.) And the United States Supreme Court in *Jacobson* stated no one could doubt that compulsory smallpox vaccination was substantially related to the protection of public health and safety, given long-standing, government-sponsored vaccination programs (including one in England that began in 1808) and state court decisions throughout the country upholding smallpox vaccine mandates (including *Abeel*). (*Jacobson*, at pp. 31-33 & fn. 1.) The California Supreme Court in *French* and

the United States Supreme Court in *Zucht* followed *Abeel* and *Jacobson*, respectively, for their holdings that ordinances requiring smallpox vaccinations were valid exercises of police power. (See *French*, at p. 661; *Zucht*, at p. 176.)[11]

Of course, after the parties have had an opportunity to take discovery and submit evidence, these cases (and others, including some of the cases cited by the concurring and dissenting opinion) may support the conclusion the City had the authority to issue the vaccine mandate. (See, e.g., *Brox v. Hole*, *supra*, 590 F.Supp.3d at p. 370 [denying a preliminary injunction against the enforcement of a COVID-19 vaccine mandate following the consideration of evidence concerning the vaccines' safety and efficacy]; *id.* at p. 369 [finding that the vaccine mandate at issue "has a 'real and substantial relation' to public health and safety" and "unquestionably bears a substantial relation" to a compelling interest in stemming the spread of COVID-19]; *Bauer v. Summey* (D.S.C. 2021) 568 F.Supp.3d 573, 581 [denying a preliminary injunction against the enforcement of a COVID-19 vaccine mandate after considering evidence of the vaccines' safety and efficacy]; *id.* at p. 595 [finding that "preventing the spread of COVID-19 provides a rational justification for vaccine mandates"]; *America's Frontline Doctors v. Wilcox* (C.D.Cal., July 30, 2021, No. EDCV 21-1243 JGB (KKx))

---

[11] The City also cites *Brown*, which, as discussed, involved vaccines for 10 childhood diseases and took judicial notice of the safety and efficacy of vaccinations in general based on cases concerning the smallpox vaccine. (See *Brown*, *supra*, 24 Cal.App.5th at pp. 1135, 1142 [citing *Southern California Edison Co. v. Industrial Accident Commission of State of California*, *supra*, 75 Cal.App. at p. 715], 1143 [citing *Jacobson*, *Zucht*, and *French*].)

2021 WL 4546923, at p. 4 [denying a temporary restraining order].) But, again, that is not an issue to be decided on these pleadings.

The City argues in supplemental briefing, submitted at our request, we can affirm the trial court's order sustaining the demurrer to Firefighters4Freedom's first cause of action by taking judicial notice of the existence of CDC publications stating the COVID-19 vaccines are safe and effective, and then finding the City's reliance on the CDC's guidance justifies the vaccine mandate. Even if we were to grant the City's belated and defective request for judicial notice,[12] factual disputes still would prevent us from affirming the trial court's ruling that Firefighters4Freedom failed to allege facts sufficient to state a cause of action.

For example, it is unclear whether the CDC's proclamation COVID-19 vaccines are "safe and effective," without more, would be sufficient to show the mandate was a reasonable way to accomplish the City's objectives. If the mandate's purpose is to protect City workers from severe disease, hospitalizations and death, statements by the government that the vaccines are "safe and effective" in preventing those outcomes arguably support the mandate. As discussed, however, the CDC also stated scientists were still investigating the Omicron variant, "including how protected fully vaccinated people will be against infection,

---

[12] The City did not comply with California Rules of Court, rule 8.252(a), which provides that "in order to obtain judicial notice by a reviewing court under Evidence Code section 459, 'a party must serve and file a separate motion with a proposed order.'" (*Ming-Hsiang Kao v. Holiday* (2020) 58 Cal.App.5th 199, 204, fn. 3.)

hospitalization, and death." Moreover, if, as Firefighters4Freedom argues, the mandate's purpose is to prevent the spread of disease among City employees and the public they serve, the CDC statements that the vaccines are safe and effective for something other than preventing transmission (i.e., preventing severe disease, hospitalization, and death) do not establish "a complete absence of even a debatable rational basis for the legislative determination" the mandate "is a reasonable means of counteracting harms and dangers to the public health and welfare." (*Birkenfeld*, *supra*, 17 Cal.3d at p. 161; see *id.* at pp. 136, 173 [charter amendment exceeded City's police powers because its provisions were "not reasonably related to the amendment's stated purpose"].) The better course is for the trial court to determine the City's purpose in imposing the vaccine mandate, consider evidence regarding the mandate's means of accomplishing that purpose (which could include facts subject to judicial notice), and make findings whether those means are reasonably appropriate.

The concurring and dissenting opinion would affirm the trial court's order sustaining the City's demurrer to Firefighters4Freedom's cause of action challenging the vaccine mandate under the police powers clause of the California Constitution. To do that, the concurring and dissenting opinion takes judicial notice of the publication of 15 statements from the documents submitted by the City and a document from the United States Department of Health and Human Services cited in the operative complaint. (Conc. & dis. opn. *post*, pp. 3-9.) Then, citing decisions pre-dating *Sunset Amusement* and *Birkenfeld*, the concurring and dissenting opinion assumes the City had those statements in mind when it enacted the vaccine

mandate. (*Id.*, pp. 10-11, 17-18.) Finally, the concurring and dissenting opinion assumes Firefighters4Freedom's first cause of action is "essentially a substantive due process challenge" under the United States Constitution, applies federal standards for evaluating substantive due process claims, and relies on numerous federal court cases to conclude Firefighters4Freedom cannot, as a matter of law, allege the vaccine mandate is not rationally related to a legitimate government interest. (*Id*. at pp. 14-23.)

There are several flaws in this analysis. Procedurally, the City did not ask the trial court or this court to take judicial notice of most of the statements identified in the concurring and dissenting opinion (for their truth or their existence), nor did the City argue in the trial court or in this court that we should evaluate whether Firefighters4Freedom stated sufficient facts to constitute a cause of action under the standard for federal substantive due process claims. The concurring and dissenting opinion comes up with this theory on its own.

Substantively, there are good reasons for not relying on federal substantive due process cases. First, the federal court cases cited by the concurring and dissenting opinion dismissing challenges to various vaccine and mask mandates were decided under federal pleading standards, which are "significantly different" and more stringent than California pleading standards. (See *Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Insurance Company*, *supra*, 81 Cal.App.5th at pp. 109-110 [in contrast to federal law, California law requires a court "to deem as true, 'however improbable,' facts alleged in a pleading"]; *Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279, 305, fn. 14 ["[i]t should not be assumed that the standards

governing motions to dismiss in federal court and demurrers in state court are the same"; in particular, "federal district judges have more latitude to dismiss claims at the pleading stage under *Bell Atlantic Corp. v. Twombly* [(2007) 550 U.S. 544, 127 S.Ct. 1955] than California trial judges have under our traditional notice pleading standards"]; see also *Teva Pharmaceuticals USA, Inc. v. Superior Court* (2013) 217 Cal.App.4th 96, 110 ["[g]iven the differences between federal and California pleading standards," federal pleading cases "are of limited use"].)

Second, while the federal rational basis test for substantive due process challenges under the United States Constitution and the state law test for police powers challenges under the California Constitution are similar, they are not the same. For example, in its most recent application of the rational basis test, the United States Supreme Court stated a legislative act "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." (*Dobbs v. Jackson Women's Health Organization* (2022) ___ U.S. ___, ___ [142 S.Ct. 2228, 2284].) The court in *Burcham v. City of Los Angeles*, *supra*, 562 F.Supp.3d 694, a case cited by the concurring and dissenting opinion, quoted a Ninth Circuit case that stated that, for due process claims under the Fifth Amendment to the United States Constitution, "[r]ational basis review allows for decisions based on rational speculation unsupported by evidence or empirical data." (*Id.* at p. 707, quoting *United States v. Navarro* (9th Cir. 2015) 800 F.3d 1104, 1114; see also *Heller v. Doe by Doe* (1993) 509 U.S. 312, 320-321 [113 S.Ct. 2637, 2643] ["'[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation

unsupported by evidence or empirical data.'"].)[13] These statements are inconsistent with the California Supreme Court's analysis in *Birkenfeld*, *supra*, 17 Cal.3d 129, which, as stated, required evidence of "the actual existence of a housing shortage and its concomitant ill effects" to justify a residential rent control ordinance under the police power. (*Id.* at p. 160.) Because Firefighters4Freedom alleged a cause of action under the police powers clause of the California Constitution, not under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, California cases (including binding California Supreme Court cases) govern the evaluation of whether Firefighters4Freedom stated a cause of action under California's pleading standards.

Finally, contrary to the suggestion in the concurring and dissenting opinion, we do not take any position on the merits of Firefighters4Freedom's cause of action or on the government's ability to protect public health and welfare in the face of the uncertainties of a "new and evolving virus." (Conc. & dis. opn. *post*, pp. 26-27.) We conclude only that Firefighters4Freedom's allegations, "even if improbable [and] absent judicially noticed facts irrefutably contradicting them," stated a cause of action under the police powers clause of the California Constitution. (*Marina Pacific Hotel and Suites, LLC v. Fireman's Fund*

---

[13] One scholar has described the federal rational basis test as "no test at all" because "the modern rational basis test 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." (Jackson, *Classical Rational Basis and the Right To Be Free of Arbitrary Legislation* (2016) 14 Geo. J.L. & Pub. Pol'y 493, 494.)

Insurance Company, *supra*, 81 Cal.App.5th at p. 109; see *Starlight Cinemas, Inc. v. Massachusetts Bay Ins. Co.* (2023) 91 Cal.App.5th 24, 34-35; *Shusha, Inc. v. Century-National Insurance Company*, *supra*, 87 Cal.App.5th at p. 261, review granted.)

D. *The Trial Court Erred in Sustaining the Demurrer to the Cause of Action for Declaratory Relief Based on Invasion of Privacy*

1. *Applicable Law*

"Unlike the federal Constitution, the California Constitution expressly recognizes a right to privacy: 'All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.'" (*Mathews*, *supra*, 8 Cal.5th at p. 768; see Cal. Const., art. I, § 1.) "The inclusion of privacy among the inalienable rights recognized by our state Constitution "'creates a legal and enforceable right of privacy for every Californian.'"" (*Mathews*, at p. 769, italics omitted.)

In *Hill* the Supreme Court articulated a two-part inquiry to determine whether the plaintiff's right to privacy under article I, section 1 has been violated. (See *Hill*, *supra*, 7 Cal.4th at p. 26.) First, the plaintiff must demonstrate three "threshold elements" to "permit courts to weed out claims that involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant." (*Sheehan*, *supra*, 45 Cal.4th at p. 999; see *Lewis v. Superior Court* (2017) 3 Cal.5th 561, 571.) The three threshold

elements are "'(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.'" (*Lewis*, at p. 571; see *Hill*, at pp. 39-40.) "Second, if a claimant satisfies the threshold inquiry, '[a] defendant may prevail in a state constitutional privacy case by negating any of the three elements . . . 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.' [Citation.] '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.'" (*Lewis*, at p. 572; see *Hill*, at p. 40.)

"Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court. [Citations.] 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. 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." (*Hill*, *supra*, 7 Cal.4th at p. 40.) "The existence of a sufficient countervailing interest or an alternative course of conduct present threshold questions of law for the court. The relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact." (*Ibid*.)

2. *Firefighters4Freedom Alleged a Legally Protected Privacy Interest*

Firefighters4Freedom alleged City firefighters have a legally protected privacy interest in their bodily integrity. The trial court ruled Firefighters4Freedom failed to allege a legally protected privacy interest because "the challenged action clearly implicates public health and safety and does not affect a fundamental right to privacy." To be protected, however, a privacy interest need not be fundamental. (See *Lewis v. Superior Court, supra*, 3 Cal.5th at p. 572 [distinguishing between cases where a "'fundamental'" right of personal autonomy is involved and those where a fundamental privacy right is not]; *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 288 [same].) Moreover, the case cited by the trial court, *Wilson v. California Health Facilities Com.* (1980) 110 Cal.App.3d 317 (*Wilson*), was decided before *Hill* and did not apply the analytical framework prescribed by the Supreme Court in *Hill*.

Under *Hill* courts must first examine "the basic nature of the [alleged] privacy interest at a general level." (*Mathews*, *supra*, 8 Cal.5th at p. 770.) The right to bodily integrity (also called personal autonomy) is protected under article I, section 1 of the California Constitution. (See *In re Qawi* (2004) 32 Cal.4th 1, 14 ["The right of privacy guaranteed by the California Constitution, article I, section 1 'guarantees to the individual the freedom to choose to reject, or refuse to consent to, intrusions of his bodily integrity.'"]; *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 530-531, 533; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 340; *In re Terrazas* (2022) 73 Cal.App.5th 960, 966-967; *Love v. State Dept. of Education* (2018) 29 Cal.App.5th 980, 993 (*Love*).) Firefighters4Freedom

alleged a legally protected privacy interest and satisfied the first element of *Hill*.

The City suggests the vaccine mandate did not implicate a legally protected privacy interest because "the City is not forcing any City employee to get a COVID-19 vaccine against their will." Instead, the City argues, the vaccine mandate allows City employees to "get the vaccine or apply for an exemption or deferral, or seek employment elsewhere." The City cites four federal court decisions, three of which address liberty interests under federal due process law, and one of which asserts a privacy claim under the Fourteenth Amendment of the United States Constitution. (See *We The Patriots USA, Inc. v. Hochul* (2d Cir. 2021) 17 F.4th 266, 293 & fn. 34 [evaluating the plaintiffs' privacy claim under the Fourteenth Amendment]; *Klaassen v. Trustees of Indiana University* (7th Cir. 2021) 7 F.4th 592, 592 [alleging a COVID-19 vaccine requirement violated due process]; *Johnson v. Brown* (D.Or. 2021) 567 F.Supp.3d 1230, 1252 [same]; *Bridges v. Houston Methodist Hospital* (S.D.Tex. 2021) 543 F.Supp.3d 525, 526-528 [challenging a COVID-19 vaccine requirement under federal and Texas law].) None of those cases supports the City's contention Firefighters4Freedom's cause of action does not allege a legally protected privacy interest under the California Constitution, which is "broader and more protective of privacy than the federal constitutional right . . . ." (*American Academy of Pediatrics v. Lungren*, *supra*, 16 Cal.4th at p. 326; see *Love*, *supra*, 29 Cal.App.5th at p. 993 ["The California Constitution provides that all individuals have a right to privacy, which 'protects a larger zone in the area of financial and personal affairs than the federal right.'"].)

Moreover, the California Supreme Court has recognized legally protected privacy interests in cases where the plaintiffs were not "forced" to succumb to an alleged invasion of privacy. For example, *Hill* involved a drug testing requirement for college athletes, and *Sheehan* involved a policy requiring football fans to submit to a pat search before entering a stadium. (See *Sheehan*, *supra*, 45 Cal.4th at p. 996; *Hill*, *supra*, 7 Cal.4th at p. 8.) That the athletes in *Hill* could have quit playing sports, and the fans in *Sheehan* could have stopped going to games, did not negate the privacy interests in those cases. Similarly, that City firefighters could quit their jobs instead of getting a COVID-19 vaccine does not eliminate the firefighters' privacy interest in their bodily integrity.

3. *Whether the Alleged Expectation of Privacy Is Reasonable Cannot Be Determined on Demurrer*

"A 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms." (*Hill*, *supra*, 7 Cal.4th at p. 37.) Thus, a "plaintiff's expectation of privacy in a specific context must be objectively reasonable under the circumstances, especially in light of the competing social interests involved." (*Id.* at pp. 26-27; accord, *Sheehan*, *supra*, 45 Cal.4th at p. 1000.) "Even when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy. For example, advance notice of an impending action may serve to '"limit [an] intrusion upon personal dignity and security"' that would otherwise be regarded as serious. . . . In addition, customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy." (*Hill*,

at pp. 36-37; see *Sheehan*, at p. 1000.) "Finally, the presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant." (*Hill*, at p. 37.)

Firefighters4Freedom alleged the City firefighters' expectation to be free from compulsory COVID-19 vaccination was reasonable because "the City has never had a vaccination requirement for public employment before now and the City has never disciplined, much less fired, a firefighter for declining an injection. The only compulsory vaccination laws adopted in California during the past century concerned certain vaccines that children need to attend school. Those laws do not undermine city firefighters' expectation of privacy in their bodily integrity." The trial court ruled "the ongoing global COVID-19 public health emergency poses a countervailing state interest sufficient to render the firefighters' privacy expectations unreasonable." The court relied on (improperly) judicially noticed facts to find that a scientific consensus on COVID-19 data supported using the vaccines to fight the spread of the virus and that the firefighters' privacy concerns were unreasonable because the scientific evidence was "overwhelming."

As discussed, the trial court erred in taking judicial notice of these facts. The court also failed to consider other relevant factors, such as competing social interests and relevant customs and practices. (See *Sheehan*, *supra*, 45 Cal.4th at p. 1000; *Hill*, *supra*, 7 Cal.4th at pp. 26-27.) Because there was no evidence regarding these factors (indeed, there was no evidence at all), the trial court could not determine whether the firefighters' expectation of privacy was reasonable as a matter of law. (See *Mathews*, *supra*, 8 Cal.5th at p. 776 [court could not determine on

demurrer whether the alleged privacy expectation was reasonable]; *Sheehan*, at p. 1000 [court could not determine the reasonableness of the plaintiffs' expectation of privacy on demurrer because the record did not establish the competing social interests of a stadium pat search policy or explain why the league believed it was appropriate].)

4. *Whether the Alleged Invasion of Privacy Is Sufficiently Serious Cannot Be Determined on Demurrer*

"Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy." (*Hill*, *supra*, 7 Cal.4th at p. 37.) This third threshold element under *Hill* "'is intended simply to screen out intrusions on privacy that are de minimis or insignificant.'" (*American Academy of Pediatrics v. Lungren*, *supra*, 16 Cal.4th at p. 339; see *Lewis v. Superior Court*, *supra*, 3 Cal.5th at p. 571.)

Firefighters4Freedom alleged that enforcing the vaccine mandate would lead to a "serious" invasion of the firefighters' right to privacy. The trial court did not directly address this element of the *Hill* framework. In any event, whether the alleged invasion of privacy was sufficiently serious to qualify under *Hill* cannot be determined on demurrer because there is no evidence in the record (or, again, any evidence at all) concerning the factors a court must consider in making that determination. (See *Sheehan*, *supra*, 45 Cal.4th at p. 1000; *Strawn v. Morris, Polich & Purdy, LLP* (2019) 30 Cal.App.5th 1087, 1100 ["Whether

appellants can *prove* an invasion of privacy 'sufficiently serious in . . . nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right' [citation] remains to be seen when the parties' evidence is produced on a motion for summary judgment or at trial."].)

5. *Whether the City Can Prove a Countervailing Interest Justifies an Invasion of Privacy Cannot Be Determined on Demurrer*

As stated, the existence of a countervailing interest is a question of law. (*Hill*, *supra*, 7 Cal.4th at p. 40.) The trial court found that the government generally has "an important interest in safeguarding its residents' health" and that the City has an interest in "the health and welfare of the City's workforce and the general public." We acknowledge, and Firefighters4Freedom does not seriously dispute, the City's interests in protecting the general public from contagious diseases and providing a safe and healthy workplace are compelling. (See *Love*, *supra*, 29 Cal.App.5th at p. 990 [the government has a compelling interest in ensuring the public's health and safety by preventing the spread of contagious diseases]; *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 446 ["employers have a legitimate—indeed compelling—interest in maintaining a safe working environment for their employees"].)

But the existence of countervailing interests does not end the inquiry. The relative strength of the countervailing interests and whether the vaccine mandate "substantively furthers" them are mixed questions of law and fact that the court cannot analyze in the absence of an evidentiary record. (*Hill*, *supra*, 7 Cal.4th at p. 40; see *Mathews*, *supra*, 8 Cal.5th at pp. 782-783.) In *Mathews*

the Supreme Court held a cause of action for invasion of privacy was not subject to demurrer because the parties had not introduced evidence on disputed issues, including whether countervailing interests justified the alleged invasion of privacy. (*Mathews*, at pp. 762, 769.) The plaintiffs in *Mathews* were therapists and counselors who alleged that a provision of the Child Abuse and Neglect Reporting Act (Pen. Code, § 11164 et seq.) violated their patients' right to privacy by requiring the therapists to inform law enforcement or child protection agencies whenever their patients voluntarily disclosed they had accessed child pornography. (*Id.* at p. 760.) The legislation was intended "to protect children from abuse and neglect." (*Ibid.*) The Supreme Court stated: "No one disputes that the principal purpose of the reporting requirement—preventing the sexual exploitation and abuse of children—is a weighty one. [Citation.] The main issue on which the parties disagree is whether the reporting requirement actually serves its intended purpose." (*Id.* at p. 782.) "With no facts developed at this stage of the litigation, we are unable to evaluate these competing claims as to whether the reporting requirement serves its intended purpose." (*Id.* at p. 783.)[14]

---

[14] The Supreme Court in *Mathews* also declined to decide on demurrer "whether the proper standard of justification . . . is the compelling interest test or a general balancing test" because there was no evidence about the justification for the alleged invasion and there was general agreement the interest promoted was "weighty." (*Mathews*, *supra*, 8 Cal.5th at p. 782.) Because, as even Firefighters4Freedom does not appear to dispute, the City's interest here is compelling, we too need not decide that issue.

Similarly, Firefighters4Freedom does not dispute the City's stated purpose for adopting the vaccine mandate. But it does dispute whether the vaccine mandate is designed to achieve its goals. (See *Mathews*, *supra*, 8 Cal.5th at p. 769; *Hill*, *supra*, 7 Cal.4th at p. 34.) The trial court ruled the vaccine mandate was constitutionally valid based on the fact (of which the court took judicial notice) the mandate serves the purpose of "combat[ting] the spread of SARS-CoV-2 among the general population." Because the trial court erred in taking judicial notice of that fact, there is no way to determine whether the vaccine mandate justified the alleged invasion of privacy. (See *Mathews*, at p. 784 ["[w]e have recognized the value of such factual development" on the issue whether the challenged action furthers its intended purpose "in other cases involving the state constitutional right to privacy, which were decided on the basis of fully litigated records"]; *Sheehan*, *supra*, 45 Cal.4th at p. 1000 [court cannot determine whether an alleged invasion of privacy is justified by countervailing interests without an evidentiary record].) Moreover, even if the City ultimately is able to justify the vaccine mandate, Firefighters4Freedom "may undertake the burden of demonstrating the availability and use of protective measures, safeguards, and alternatives to defendant's conduct that would minimize the intrusion on privacy interests. [Citations.] For example, . . . if defendant's legitimate objectives can be readily accomplished by alternative means having little or no impact on privacy interests, the prospect of actionable invasion of privacy is enhanced." (*Hill*, at p. 38.) This issue too involves highly factual questions that cannot be decided on demurrer. (See *Lewis v. Superior Court*, *supra*, 3 Cal.5th at p. 574 ["evidence of less intrusive alternatives is relevant in

balancing the government's interests against the privacy intrusion at issue"].)

The City asserts that, because the vaccine mandate "directly relates to health care," we should apply a "'presumption of constitutional validity'" that, the City says, Firefighters4Freedom cannot overcome. The trial court, citing *Love*, *supra*, 29 Cal.App.5th at page 993, agreed with this assertion. Contrary to *Love*, California law does not defer to the Legislature (or, here a city council) "when a statute intrudes on a privacy interest protected by the state Constitution." (*Mathews*, *supra*, 8 Cal.5th at p. 786; see *American Academy of Pediatrics v. Lungren*, *supra*, 16 Cal.4th at pp. 349-350 ["when a statute impinges upon a constitutional right, legislative findings with regard to the need for, or probable effect of, the statutory provision cannot be considered determinative for constitutional purposes"].) Instead, "it is our duty to independently examine the relationship between the statute's means and ends." (*Mathews*, at pp. 786-787; see *Lungren*, at p. 350 ["we must go beyond the legislative findings accompanying the statute to determine whether the provisions of [a law] can be sustained, as defendants maintain, on the basis of the state's interests in protecting the health of minors and in preserving and promoting the parent-child relationship"].) This duty exists regardless of the legislation's subject matter.[15]

---

[15] The duty to independently review legislation that implicates a legally protected privacy interest also exists regardless of whether a court applies the compelling interest or general balancing test. (See *Mathews*, *supra*, 8 Cal.5th at pp. 786-787 [court must examine whether the challenged statute furthers the state's objective to protect children under a "general

The court in *Love* cited *Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687 at page 712 for the proposition that, "'[i]n the area of health and health care legislation, there is a presumption both of constitutional validity and that no violation of privacy has occurred.'" (*Love*, *supra*, 29 Cal.App.5th at p. 993.) Neither part of this proposition, however, is correct. The court in *Coshow* held there was no privacy interest at stake in the case because a city's water fluoridation program did not implicate the plaintiff's right to bodily integrity or to refuse medical treatment. (See *Coshow*, at pp. 709-710 ["Although [the plaintiff] alleged he had a fundamental right to bodily integrity, there simply is no such right in the context of public drinking water."].) Moreover, the court in *Coshow* did not apply *Hill* and instead cited two pre-*Hill* decisions—*People v. Privitera* (1979) 23 Cal.3d 697 (*Privitera*) and *Wilson*, *supra*, 110 Cal.App.3d 317—for the proposition quoted in *Love*. (See *Coshow*, at pp. 711-712.) *Wilson*, in turn, relied primarily on *Privitera*. (See *Wilson*, at p. 324.)[16]

---

balancing test" or a "compelling interest test"]; *Lewis v. Superior Court*, *supra*, 3 Cal.5th at p. 574 [general balancing test applies to a statute intended to protect the public from a dangerous class of prescription drugs]; *Medical Bd. of California v. Chiarottino* (2014) 225 Cal.App.4th 623, 636 [balancing test applies to a statute intended to protect the public from a dangerous class of prescription drugs].)

[16] In a footnote the court in *Wilson* also stated unremarkably that "[h]ealth care legislation is a proper exercise of police power." (*Wilson*, *supra*, 110 Cal.App.3d at p. 324, fn. 8.)

The *Coshow* court's citations to *Privitera* were, in a word, puzzling. The Supreme Court in *Privitera* did not apply a presumption of constitutional validity to a legally protected privacy interest or presume there was no violation of privacy because the challenged legislation concerned healthcare. Instead, the Supreme Court first held the defendants (who were convicted by a jury of conspiracy to prescribe and sell unapproved drugs) failed to assert a legally protected privacy interest in accessing drugs "of unproven efficacy." (*Privitera*, *supra*, 23 Cal.3d at pp. 701-702, 709.) The Supreme Court then applied a straightforward rational basis test to determine the validity of the relevant Health & Safety Code provision, stating the issue was whether "the challenged legislation bear[s] a reasonable relationship to the achievement of the legitimate state interest in the health and safety of its citizens." (*Id.* at pp. 707, 708-709.) The Supreme Court held it did, basing its conclusion on evidence supporting the state's position that approval of the drug in question for certain patients "'would lead to needless deaths and suffering.'" (*Id.* at pp. 707, 708-709.) It is unclear how the courts in *Coshow* and *Wilson* derived a presumption of any kind from the Supreme Court's decision in *Privitera*.[17]

---

[17] It might be possible to derive from *Privitera* a presumption that "statutes restricting [the] exercise of a right found by the United States Supreme Court to be a fundamental privacy right are reviewed under the rational basis standard when the danger to health is significant" (*Privitera*, *supra*, 23 Cal.3d at p. 702, fn. 2), but that presumption would not be good law under *Hill* and its progeny. Following *Hill*, the court determines the level of scrutiny to apply to government action that implicates a legally protected privacy interest not by the subject matter of the

In any event, such presumptions are contrary to Supreme Court authority addressing legislation related to healthcare, such as *Mathews* and *American Academy of Pediatrics v. Lungren*, which do not acknowledge or apply any such presumptions.

DISPOSITION

The appeal from the judgment based on the trial court's order sustaining the demurrer to the third cause of action is dismissed. The remaining portion of the judgment is reversed, and the trial court is directed to vacate its order sustaining the demurrer without leave to amend to the first and second causes of action and to enter a new order overruling the demurrer to those two causes of action. Firefighters4Freedom is to recover its costs on appeal.

SEGAL, J.

I concur:

PERLUSS, P. J.

---

government act but by the nature of the asserted privacy right, the extent and seriousness of the alleged invasion, any countervailing interests, and the overall context. (See *Mathews*, *supra*, 8 Cal.5th at p. 781; *Williams v. Superior Court* (2017) 3 Cal.5th 531, 557.)

ESCALANTE, J., concurring and dissenting.

I concur in the majority's conclusion that the second cause of action for declaratory relief based on invasion of privacy presents mixed questions of law and fact that cannot be determined on demurrer. I thus join in part D of the Discussion section of the majority's opinion.

I respectfully dissent from the majority's opinion as to the first cause of action for declaratory relief based on lack of authority to issue the vaccine mandate. In my view, the trial court could determine, based on judicially noticeable facts, that the City acted within its police powers in enacting the ordinance. I would thus affirm the trial court's ruling sustaining the demurrer without leave to amend as to the first cause of action.

DISCUSSION

A. The Trial Court Could Properly Take Judicial Notice of Statements by Public Health Authorities Regarding the Safety and Effectiveness of COVID-19 Vaccines

I agree with the majority that the trial court erred in taking judicial notice of the ultimate facts that COVID-19 vaccines are safe and effective. However, in my view, the court could properly take judicial notice that the United States Centers for Disease Control and Prevention (CDC) and the California Department of Public Health made certain statements regarding the safety and effectiveness of the vaccines. The fact that the CDC and the Department of Public Health made the statements is not subject to reasonable dispute and is thus a proper subject for judicial notice under Evidence Code section 452, subdivision (h). (*In re A.V.* (2021) 73 Cal.App.5th 949, 957

[taking judicial notice of guidelines published by the CDC under Evid. Code, §§ 452, subds. (c), (h) and 459, subd. (a)]; *Love v. Superior Court* (1990) 226 Cal.App.3d 736, 743, fn. 5 [taking judicial notice of guidelines regarding Acquired Immune Deficiency Syndrome published by the Public Health Service, which, like the CDC, is a branch of the United States Department of Health and Human Services]; see also *Kane v. de Blasio* (S.D.N.Y. 2022) 623 F.Supp.3d 339, 347, fn. 8, appeal pending [under standards equivalent to those under California law, taking judicial notice of CDC and Food and Drug Administration (FDA) statements regarding COVID-19 vaccines]; *Health Freedom Defense Fund v. Reilly* (C.D.Cal. Sept. 2, 2022, No. CV-21-8688 DSF) 2022 WL 5442479, *2, appeal pending [taking judicial notice of CDC and FDA statements regarding vaccines]; *America's Frontline Doctors v. Wilcox* (C.D.Cal. May 5, 2022, No. EDCV-21-1243 JGB) 2022 WL1514038, *8-9 [same]; *Guilfoyle v. Beutner* (C.D.Cal. Sept. 14, 2021, No. 2:21-CV-05009-VAP) 2021 WL 4594780, *24 [taking judicial notice of CDC and California Department of Public Health guidelines and recommendations regarding COVID-19 mitigation measures in public schools, but not the truth of the scientific bases for the guidelines]; cf. *Wood v. Superior Court* (2020) 46 Cal.App.5th 562, 580, fn. 2 [taking judicial notice that the Department of Fair Employment and Housing made statements published on its website, but not taking judicial notice of the truth of the statements].)

Among other things, the court could take judicial notice that the CDC made the following statements contained within Exhibits 1, 3, 4, 6, and 8 of the City's request for judicial notice:

"COVID-19 vaccines are **safe and effective**. [¶] Millions of people in the United States have received COVID-19 vaccines under the most intense safety monitoring in U.S. history. [¶] CDC recommends you get a COVID-19 vaccine as soon as possible." (Safety of COVID-19 Vaccines, Centers for Disease Control and Prevention, available at https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-ofvaccines.html [last updated December 6, 2021][1] (Exhibit 1).)

"COVID-19 vaccines are **safe and effective**. COVID-19 vaccines were evaluated in tens of thousands of participants in clinical trials. The vaccines met the Food and Drug Administration's (FDA) rigorous scientific standards for safety, effectiveness, and manufacturing quality needed to support approval or authorization of a vaccine. [¶] Millions of people in the United States have received COVID-19 vaccines since they were authorized for emergency use by the FDA. These vaccines have undergone and will continue to undergo the most intensive safety monitoring in U.S. history. This monitoring includes using both established and new safety monitoring systems to make sure that COVID-19 vaccines are safe." (Exhibit 1.)

"CDC continues to encourage the 47 million adults who are not yet vaccinated to get vaccinated as soon as possible to protect themselves, their families, loved ones and communities." (CDC Expands Eligibility for COVID-19 Booster Shots to All Adults, Centers for Disease Control and Prevention, available at https://www.cdc.gov/media/releases/2021/s1119-booster-shots.html [last updated November 19, 2021] (Exhibit 3).)

---

[1] The citations are to the versions of these documents attached to the City's request for judicial notice, not to any updated version on the CDC's website.

"COVID-19 vaccines are safe and effective at preventing infection, hospitalization, and death. Most people who get COVID-19 are unvaccinated. However, since vaccines are not 100% effective at preventing infection, some people who are fully vaccinated will still get COVID-19. An infection of a fully vaccinated person is referred to as a 'breakthrough infection.' People who get vaccine breakthrough infections can be contagious but are less likely than unvaccinated people to be hospitalized or die." (Interim Public Health Recommendations for Fully Vaccinated People, Centers for Disease Control and Prevention, available at https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html [updated November 19, 2021] (Exhibit 4).)

"Vaccines continue to reduce a person's risk of contracting the virus that cause[s] COVID-19, including [the Delta] variant. Vaccines are highly effective against severe illness, but the Delta variant causes more infections and spreads faster than earlier forms of the virus that causes COVID-19." (Exhibit 4.)

"Currently approved or authorized COVID-19 vaccines protect people from getting infected and severely ill, and significantly reduce the likelihood of hospitalization and death. Fully vaccinated people are less likely to become infected and, if infected, to develop symptoms of COVID-19 compared with unvaccinated people. Even when fully vaccinated people develop symptoms, they tend to be less severe symptoms than in unvaccinated people. This means they are less likely to be hospitalized or die than people who are not vaccinated. However, people who get vaccine breakthrough infections can be contagious and spread the virus to others." (Exhibit 4.)

"Risk of SARS-CoV-2 infection, severe disease, and death is reduced for fully vaccinated people. However, since vaccines are not 100% effective at preventing infection, some people who are fully vaccinated will still get a COVID-19 infection. Fully vaccinated people who do become infected can transmit it to others." (Exhibit 4.)

"In today's [Morbidity and Mortality Weekly Report], a study of COVID-19 infections in Kentucky among people who were previously infected with SARS-CoV-2 shows that unvaccinated individuals are more than twice as likely to be reinfected with COVID-19 than those who were fully vaccinated after initially contracting the virus. These data further indicate that COVID-19 vaccines offer better protection than natural immunity alone and that vaccines, even after prior infection, help prevent reinfections. [¶] . . . CDC Director Dr. Rochelle Walensky [said:] 'This study shows you are twice as likely to get infected again if you are unvaccinated. Getting the vaccine is the best way to protect yourself and others around you, especially as the more contagious delta variant spreads around the country.'" (New CDC Study: Vaccination Offers Higher Protection than Previous COVID-19 Infection, Centers for Disease Control and Prevention, available at https://www.cdc.gov/media/releases/2021/s0806-vaccination-protection.html [August 6, 2021] (Exhibit 6).)

"[A] second publication from [Morbidity and Mortality Weekly Report] shows vaccines prevented COVID-19 related hospitalizations among the highest risk age groups. As cases, hospitalizations, and deaths rise, the data in today's [Morbidity and Mortality Weekly Report] reinforce that COVID-19 vaccines are the best way to prevent COVID-19." (Exhibit 6).

"COVID-19 vaccines remain safe and effective. They prevent severe illness, hospitalization, and death. Additionally, even among the uncommon cases of COVID-19 among the fully or partially vaccinated, vaccines make people more likely to have a milder and shorter illness compared to those who are unvaccinated. CDC continues to recommend everyone 12 and older get vaccinated against COVID-19." (Exhibit 6).

"All eligible persons should be vaccinated against COVID-19 as soon as possible, including unvaccinated persons previously infected with SARS-CoV-2." ("Morbidity and Mortality Weekly Report (MMWR): Laboratory-Confirmed COVID-19 Among Adults Hospitalized with COVID-19-Like Illness with Infection-Induced or mRNA Vaccine-Induced SARS-CoV-2 Immunity – Nine States, January-September 2021," Centers for Disease Control and Prevention, available at https://www.cdc.gov/mmwr/volumes/70/wr/mm7044e1.htm [November 5, 2021] (Exhibit 8).)

The court could also take judicial notice of the following statements by the Department of Public Health in the State Public Health Officer Order of July 26, 2021 on the subject of "Health Care Worker Protections in High-Risk Settings." (Evid. Code, § 452, subd. (c) [court may take judicial notice of the official acts of the executive departments of any state]; *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518 [official acts include orders of an administrative agency].)

"Unvaccinated persons are more likely to get infected and spread the virus, which is transmitted through the air. Most current hospitalizations and deaths are among unvaccinated persons. Thanks to vaccinations and to measures taken since March 2020, California's health care system is currently able to

address the increase in cases and hospitalizations." (Dept. of Public Health, State Public Health Officer Order of July 26, 2021: "Health Care Worker Protections in High-Risk Settings," available at https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Unvaccinated-Workers-In-High-Risk-Settings.aspx [July 26, 2021] (Exhibit 9).)

"Vaccination against COVID-19 is the most effective means of preventing infection with the COVID-19 virus, and subsequent transmission and outbreaks." (Exhibit 9.)

The court could also take judicial notice of statements and findings by the Secretary of the United States Department of Health and Human Services (Health and Human Services) in the federal agency's interim final rule that Firefighters4Freedom cites in its second amended complaint and in its appellate briefs. (Evid. Code, § 452, subd. (c) [court may take judicial notice of the document as an official act of an administrative agency].)

The document is entitled "Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination." In the document, the Secretary of Health and Human Services announced an interim final rule providing that, "in order to receive Medicare and Medicaid funding, participating facilities must ensure their staff—unless exempt for medical or religious reasons—are vaccinated against COVID-19." (*Biden v. Missouri* (2022) 142 S.Ct. 647, 650 [summarizing the interim final rule].) The Secretary set forth findings in support of the rule, which the United States Supreme Court summarized as follows: "The Secretary of Health and Human Services determined that a COVID-19 vaccine mandate will substantially reduce the

likelihood that healthcare workers will contract the virus and transmit it to their patients." (*Id.* at p. 652.)

The Secretary explained the basis for the findings at length. For example, the Secretary stated: "In addition to preventing morbidity and mortality associated with COVID-19, currently approved or authorized vaccines also demonstrate effectiveness against asymptomatic SARS-CoV-2 infection. A recent study of health care workers in 8 states found that, between December 14, 2020 through August 14, 2021, full vaccination with COVID-19 vaccines was 80 percent effective in preventing RT-PCR-confirmed SARS-CoV-2 infection among frontline workers. (Fn. omitted.) Emerging evidence also suggests that vaccinated people who become infected with the SARS-CoV-2 Delta variant have potential to be less infectious than infected unvaccinated people, thus decreasing transmission risk. (Fn. omitted.) For example, in a study of breakthrough infections among health care workers in the Netherlands, SARS-CoV-2 infectious virus shedding was lower among vaccinated individuals with breakthrough infections than among unvaccinated individuals with primary infections. (Fn. omitted.) Fewer infected staff and lower transmissibility equates to fewer opportunities for transmission to patients, and emerging evidence indicates this is the case. The best data come from long term care facilities, as early implementation of national reporting requirements have resulted in a comprehensive, longitudinal, high quality data set. Data from CDC's National Healthcare Safety Network (NHSN) have shown that case rates among [long term care] facility residents are higher in facilities with lower vaccination coverage among staff; specifically, residents of [long term care] facilities in which vaccination coverage of staff is

75 percent or lower experience higher rates of preventable COVID-19. (Fn. omitted.) Several articles published in CDC's Morbidity and Mortality Weekly Reports (MMWRs) regarding nursing home outbreaks have also linked the spread of COVID-19 infection to unvaccinated health care workers and stressed that maintaining a high vaccination rate is important for reducing transmission." (Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, interim final rule with comment period, 86 Fed.Reg. 61555-01, 61558 (Nov. 5, 2021) (Omnibus COVID-19 Health Care Staff Vaccination).)

The Secretary also stated: "It is essential to reduce the transmission and spread of COVID-19, and vaccination is central to any multi-pronged approach for reducing health system burden, safeguarding health care workers and the people they serve, and ending the COVID-19 pandemic. Currently FDA-approved and FDA-authorized vaccines in use in the U.S. are both safe and highly effective at protecting vaccinated people against symptomatic and severe COVID-19. (Fn. omitted.) Higher rates of vaccination, especially in health care settings, will contribute to a reduction in the transmission of SARS-CoV-2 and associated morbidity and mortality across providers and communities, contributing to maintaining and increasing the amount of healthy and productive health care staff, and reducing risks to patients, resident, clients, and PACE program participants." (Omnibus COVID-19 Health Care Staff Vaccination, *supra,* 86 Fed.Reg. 61555-01 at p. 61560.)

B. The Ordinance Was a Valid Exercise of the City's Police Powers

As the majority explains, a court must uphold an ordinance enacted under a city's police powers if the ordinance is "'reasonably related to promoting the public health, safety, comfort, and welfare'" and "'the means adopted to accomplish that promotion are reasonably appropriate to the purpose.'" (*Sunset Amusement Co. v. Board of Police Commissioners* (1972) 7 Cal.3d 64, 72.) "In determining the validity of a legislative measure under the police power [a court's] sole concern is with whether the measure reasonably relates to a legitimate governmental purpose." (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 159.)

Legislation passes muster under this test unless there is "a complete absence of even a debatable rational basis" for the legislative enactment. (*Birkenfeld v. City of Berkeley, supra,* 17 Cal.3d at p. 161; see also *Massingill v. Department of Food & Agriculture* (2002) 102 Cal.App.4th 498, 504 ["[a] law is a valid exercise of the police power unless the law is manifestly unreasonable, arbitrary or capricious, and has no real or substantial relation to the public health, safety, morals or general welfare"].) "'The courts may differ with the legislature as to the wisdom and propriety of a particular enactment as a means of accomplishing a particular end, but as long as there are considerations of public health, safety, morals, or general welfare which the legislative body *may have* had in mind, which have justified the regulation, *it must be assumed* by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation.'" (*Consolidated Rock Products Co. v. City of Los Angeles* (1962) 57 Cal.2d 515, 522,

italics added; see also *Dittus v. Cranston* (1959) 53 Cal.2d 284, 287 [in determining the validity of a statute, court considered what the Legislature "could have concluded" without evidence of what the Legislature actually concluded or relied on in enacting the statute].) Statutes are "presumed to be constitutional; and [they] must be deemed to have been enacted on the basis of any state of facts supporting it that reasonably can be conceived." (*Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24, 30 (*Higgins*); see also *Doyle v. Board of Barber Examiners* (1963) 219 Cal.App.2d 504, 515 [in determining whether there is a reasonable relationship, the question is whether there are "any facts in the record or of which we may take judicial notice which might justify" the enactment; "[i]n the pursuit of acceptable legislative hypotheses, judges have not hesitated to draw upon their own experience and upon abstract studies in the particular regulatory field"].)

The California Supreme Court has referred to this as a "rational basis test." (*People v. Privitera* (1979) 23 Cal.3d 697, 702 (*Privitera*); accord, *Higgins, supra,* 62 Cal.2d at p. 31 [party challenging statute must show "there is no rational basis whatever for the statute"].) California courts rely on federal authorities in describing the contours of the test. (See, e.g., *Privitera,* at pp. 702-709; *Miller v. Board of Public Works of the City of Los Angeles* (1925) 195 Cal. 477, 484-485 [relying on federal authority in describing the scope of police powers]; *County of Los Angeles Department of Public Health v. Superior Court* (2021) 61 Cal.App.5th 478, 489 [analyzing both federal and California case law in determining the parameters of rational basis review as it applies to COVID-19 restrictions]; *Doyle v. Board of Barber Examiners*, *supra,* 219 Cal.App.2d at p. 514

["federal and California doctrines appear to [be] parallel" in determining whether there is a rational basis for legislation].)

Vaccine mandates are generally within the government's police powers. (*Brown v. Smith* (2018) 24 Cal.App.5th 1135, 1143 ["it has been settled since 1905 . . . 'that it is within the police power of a State to provide for compulsory vaccination'"]; see *Jacobson v. Massachusetts* (1905) 197 U.S. 11 (*Jacobson*); *Zucht v. King* (1922) 260 U.S. 174, 176 [it is "settled that it is within the police power of a State to provide for compulsory vaccination"]; *French v. Davidson* (1904) 143 Cal. 658 [upholding vaccine mandate as being within the scope of the police power; decision did not turn on strength of evidence in support of vaccination]; *Abeel v. Clark* (1890) 84 Cal. 226, 230-231 [vaccine mandate fell within the scope of the government's police powers; "'[w]hat is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is invested with a large discretion, which cannot be controlled by the courts, except, perhaps, when its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful"]; *Love v. State Dept. of Education* (2018) 29 Cal.App.5th 980, 989-992 [affirming order sustaining demurrer to claim that compulsory vaccine law violated substantive due process]; cf. *In re Matthew M.* (2023) 88 Cal.App.5th 1186, 1197 [in a different context, citing *Brown v. Smith, supra,* 24 Cal.App.5th at p. 1143, for the proposition that "'it has been settled since 1905 . . . "that it is within the police power of a State to provide for compulsory vaccination"'"].)

In *Jacobson*, *supra,* 197 U.S. 11, the United States Supreme Court applied an early version of the rational basis test and upheld the constitutionality of a compulsory vaccination law enacted to combat a smallpox outbreak. (*Id.* at pp. 12-14, 39.) Jacobson was criminally charged after he refused to be vaccinated. In his defense, he argued the law was unconstitutional because it exceeded the police powers of the state. He sought to introduce expert testimony to show the vaccine was neither safe nor effective. (*Id.* at p. 30 [explaining that Jacobson sought to introduce opinions 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"].)

The United States Supreme Court held the trial court properly excluded the evidence. The Supreme Court took judicial notice of the fact that "an opposite theory [i.e., that the vaccine was safe and effective] accords with the common belief and is maintained by high medical authority." (*Jacobson, supra,* 197 U.S. at p. 30.) "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." (*Ibid.*) The Supreme Court further stated: "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." (*Id.* at p. 31.)

The standard applied in *Jacobson, supra,* 197 U.S. 11, comports with modern rational basis review under California law. (*County of Los Angeles Department of Public Health v. Superior Court* (2021) 61 Cal.App.5th 478, 489.) Courts in other jurisdictions have relied on *Jacobson* in dismissing actions challenging compulsory vaccine laws and policies enacted during the COVID-19 crisis, applying a rational basis test that is indistinguishable from the California test.[2] (See, e.g., *Burcham v. City of Los Angeles* (C.D.Cal. 2022) 562 F.Supp.3d 694, 707 [granting a motion to dismiss a lawsuit challenging the same ordinance at issue here]; *Health Freedom Defense Fund v. Reilly, supra,* 2022 WL 5442479, *1 [granting motion to dismiss a challenge to a vaccine mandate on substantive due process grounds; rational basis test is met as a matter of law]; *Kane v. de Blasio, supra,* 623 F.Supp.3d at pp. 359-360 [same]; *Legaretta v. Macias* (D.N.M. 2022) 603 F.Supp.3d 1050, 1067 [granting motion to dismiss complaint; collecting cases for the proposition that "[i]n the context of the current pandemic, courts consistently have applied *Jacobson* to find that mandatory vaccine policies meet the rational basis test"]; *Children's Health*

---

[2] The courts have applied this test in evaluating, among other things, substantive due process challenges to vaccine mandates. I view Firefighters4Freedom's first cause of action as essentially a substantive due process challenge to the ordinance.

Defense, Inc. v. Rutgers, The State University of New Jersey (D.N.J. Sept. 22, 2022, No. 21-15333 (ZNQ)) 2022 WL 4377515, *1, appeal pending [granting motion to dismiss; vaccine mandate passes rational basis test]; *Massachusetts Correction Officers Federated Union v. Baker* (D.Mass. Sept. 19, 2022, No. 21-11599-TSH) 2022 WL 439680 [granting motion to dismiss challenge to vaccine mandate that applied to all state executive department employees]; *Antunes v. Rector & Visitors of the University of Va.* (W.D.Va. Sept. 12, 2022, No. 3:21-CV-00042) __ F.Supp.3d __ [2022 WL 4213031, *6-7] [granting motion to dismiss; vaccine mandate for health care workers met rational basis test]; *Pavlock v. Perman* (D.Md. Sept. 1, 2022, Civ. A. No. RDB-21-2376) 2022 WL 3975177, *4-5 [granting motion to dismiss; vaccine mandate was proper exercise of the government's police powers]; *Commey v. Adams* (S.D.N.Y. Aug. 11, 2022, No. 22-CV-0018 (RA)) 2022 WL 3286548 [granting motion to dismiss; workplace vaccine mandate passes rational basis test]; *America's Frontline Doctors v. Wilcox, supra,* 2022 WL1514038, *8-9 [granting motion to dismiss complaint challenging vaccine mandate imposed by the University of California]; *Wise v. Inslee* (E.D.Wash. Apr. 27, 2022, No. 2:21-CV-0288 TOR) 2022 WL 1243662, *1 [granting motion for judgment on pleadings in case challenging governor's proclamation imposing vaccination requirements on certain state employees]; *Marciano v. de Blasio* (S.D.N.Y. 2022) 589 F.Supp.3d 423, 434-435 [granting motion to dismiss challenge to vaccine policy; policy was enacted to protect public health and has a real or substantial relation to public health]; *Kheriaty v. Regents of the University of California* (C.D.Cal. Dec. 8, 2021, No. SACV-21-1367 JVS) 2021 WL 6298332, *8 (*Kheriaty*) [granting judgment on the pleadings;

vaccine policy is rationally related to legitimate government purpose]; see also *Ryder v. Cook County Department of Public Health* (N.D.Ill. Mar. 31, 2023, No. 22 CV 626) 2023 WL 2745679, *4 [dismissing complaint challenging ordinance requiring proof of vaccination to dine indoors]; *Collins v. City University of New York* (S.D.N.Y. Feb. 8, 2023, No. 21-CIV-9544 (NRB)) 2023 WL 1818547 [granting motion to dismiss challenge to vaccine mandate; applying rational basis test in the context of a free exercise challenge]; *We the Patriots USA, Inc. v. Connecticut Office of Early Childhood Development* (D.Conn. 2022) 579 F.Supp.3d 290 [non-COVID-19 case; granting motion to dismiss challenge to law requiring vaccination of school children for diseases other than COVID-19; rational basis test met].) Many more cases have denied motions for preliminary injunctions or other similar motions on the same ground. (See, e.g., *Klaassen v. Trustees of Indiana University* (7th Cir. 2021) 7 F.4th 592, 593 [denying motion for stay pending appeal; "[g]iven *Jacobson v. Massachusetts* [citation omitted], which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2"]; *We The Patriots USA, Inc. v. Hochul* (2d Cir. 2021) 17 F.4th 266, 290 [law mandating vaccines for all health care workers in the state was a reasonable exercise of the State's power to enact rules to protect the public].)[3]

---

[3] The cases Firefighters4Freedom cites in footnote 1 of its opening brief are not on point. In *National Federation of Independent Business v. Department of Labor* (2022) 142 S.Ct. 661, the United States Supreme Court stayed implementation of

Here, the City could reasonably rely on statements by the CDC, the FDA, and the California Department of Public Health regarding the safety and effectiveness of vaccines. (*Burcham v. City of Los Angeles, supra,* 562 F.Supp.3d at p. 707 ["[b]ecause the Ordinance follows guidelines from governmental organizations such as the CDC, the [FDA], and the California Department of Public Health, the Court finds that the City's decisionmakers could conclude that the Ordinance was at least rationally related to controlling the spread of COVID-19"]; see also *Doe v. Franklin Square Union Free School District* (E.D.N.Y. 2021) 568 F.Supp.3d 270, 276 ["the CDC has consistently been cited as an acceptable rationale for government officials during the pandemic"]; *Beahn v. Gayles* (D.Md. 2021) 550 F.Supp.3d 259,

---

a nationwide vaccine mandate imposed by the Occupational Safety and Health Administration (OSHA) on the grounds it was outside OSHA's authority because OSHA did not have the power to regulate public health. (*Id.* at p. 666; see also *id.* at p. 667 (conc. opn. of Gorsuch, J.) [OSHA's rule invades the province of state and local governments].) Other cases concerned whether the President had authority to issue a vaccine mandate on federal contractors under the Federal Procurement Policy Act (FPPA), an issue on which courts have come to varying conclusions. (Compare *Mayes v. Biden* (9th Cir. 2023) 67 F.4th 921, 926 [reversing grant of preliminary injunction; President had authority under the FPPA to issue vaccine mandate] with *Georgia v. President of the United States* (11th Cir. Aug. 26, 2022) 46 F.4th 1283, 1308 [finding that "plaintiffs are entitled to a preliminary injunction against the enforcement of the contractor vaccine mandate" but vacating nationwide injunction].) The cases concerned the scope of authority under the statute, not whether the mandate had a reasonable relationship to a legitimate government purpose.

277 ["[p]laintiffs also do not allege facts suggesting that the policy lacked a rational basis; indeed, as the Directives were issued in response to rising COVID-19 infection rates and based on CDC guidance regarding reopening schools [citation omitted], the Court finds that the school closure policy was rationally related to the County's interest in combatting the spread of COVID-19"]; *Megeso-William-Alan v. Ige* (D.Haw. 2021) 538 F.Supp.3d 1063, 1078-1079 [mask mandate case; "[i]n the midst of a pandemic, it is clearly reasonable for state and local officials to follow the CDC's guidance" given that the CDC is the "federal agency responsible for controlling the spread of COVID-19"]; *Henry v. DeSantis* (S.D.Fla. 2020) 461 F.Supp.3d 1244, 1255 ["[t]he Executive Orders explain the Governor used scientifically-based-research policies from the U.S. Centers for Disease Control. There is nothing arbitrary about the Governor's actions. Using science, medicine, and data, the Governor took reasonable steps clearly related to the legitimate interest in protecting the public health"].)

During a public health emergency, government entities must act swiftly to protect public health. They must be able to rely on the guidance and expertise of public health officials in responding to such a crisis. Further, in determining whether the ordinance fell within the scope of the police power, the court can assume the City relied on the statements of the CDC and other public health officials. (*Higgins, supra,* 62 Cal.2d at p. 30; *Consolidated Rock Products Co. v. City of Los Angeles*, *supra,* 57 Cal.2d at p. 522; *Dittus v. Cranston*, *supra,* 53 Cal.2d at p. 287*; Doyle v. Board of Barber Examiners, supra,* 219 Cal.App.2d at p. 515.) The statements of the CDC and the California Department of Public Health establish there is a reasonable

relationship between the ordinance and the legitimate purpose of protecting the public during a public emergency.

Privitera, *supra,* 23 Cal.3d 697, is instructive as to the role of the court in applying the rational basis test. There, the defendants were convicted of violating Health and Safety Code section 1707.1 by distributing the unapproved drug laetrile to cancer patients. Laetrile is a non-toxic substance that the defendants contended could be effectively used to treat cancer but that had not been approved for such use. Section 1707.1 prohibited the sale, delivery, prescription, or administration of "any drug or device to be used in the diagnosis, treatment, alleviation or cure of cancer which has not been approved by the designated federal agency . . . or by the state board." (*Privitera,* at p. 700.)

The defendants appealed their convictions on the ground the statute was unconstitutional as applied to laetrile. The Court of Appeal overturned the convictions, concluding "the limitation upon the right to prescribe, to treat, [on] the doctor [in] [Health and Safety Code] section 1707.1 bears no logical relationship to the expressed legislative purpose." (*Privitera, supra,* 23 Cal.3d at p. 737 (dis. opn. of Bird, C.J., quoting full text of Court of Appeal's decision).)[4]

---

[4] The Court of Appeal concluded that restricting the use of laetrile implicated the right of privacy of cancer patients and their doctors and that a compelling interest test applied. After concluding the ban bore no logical relationship to the expressed legislative purpose, the Court of Appeal stated: "A fortiori, if there is a lack of reasonable relationship between the end sought and the means used, then certainly no compelling state purpose is present." (*Privitera, supra,* 23 Cal.3d at p. 737 (dis. opn. of

The Supreme Court reversed. The court held the appropriate standard of review was the "rational basis test," under which the court had to determine whether the statute bore a "reasonable relationship to the achievement of the legitimate state interest in the health and safety of its citizens." (*Privitera, supra,* 23 Cal.3d at pp. 708-709.) The court concluded the state had legitimate interests in ensuring cancer patients received effective treatment and in ensuring patients would not be misled by doctors and others providing misinformation. The court further concluded the ban on laetrile was reasonably related to those interests. In reaching that conclusion, the court relied on published findings by the commissioner of the FDA in a rulemaking proceeding. The FDA commissioner had found that "[l]aetrile is not generally recognized by qualified experts as a safe and effective cancer drug" and that "[i]ncreasingly, doctors dealing with cancer patients are finding that patients are coming to legitimate therapy too late, having delayed while trying [l]aetrile." (*Id.* at p. 706.) The commissioner had further found: "'[A]pproval of [l]aetrile restricted to "terminal" patients would lead to needless deaths and suffering'" among certain patients. (*Id.* at p. 707.)

The Supreme Court stated: "[W]e are not prepared to reject as unreasonable the explanation given by the commissioner for the Food and Drug Administration's refusal to approve laetrile for use by 'terminal' cancer patients.'" (*Privitera, supra,* 23 Cal.3d at p. 708.)

Bird, C.J., quoting full text of Court of Appeal's decision).) Here, the first cause of action is not based on the right of privacy.

The court emphasized it was "not taking sides on the fiercely contested medical questions regarding laetrile's safety or efficacy as a cancer drug. . . . Nor are we endorsing the decision the Legislature has made on the basis of existing scientific evidence. Whether cancer patients—especially advanced cancer patients who have unsuccessfully sought relief from conventional therapy and who are fully informed as to the consensus of scientific opinion concerning the drug—should have access to laetrile is clearly a question about which reasonable persons may differ. It is not our function to render scientific or legislative judgments. Rather, we must resolve a narrow question: Does the challenged legislation bear a reasonable relationship to the achievement of the legitimate state interest in the health and safety of its citizens? We conclude [Health and Safety Code] section 1707.1 does satisfy this standard." (*Privitera, supra*, 23 Cal.3d at pp. 708-709; see also *People v. Aguiar* (1968) 257 Cal.App.2d 597, 603 [in determining that marijuana possession laws were reasonably related to a legitimate government purpose, the court took judicial notice of the fact that some medical authorities opined that marijuana caused psychological dependence and encouraged experimentation with other drugs; although other medical authorities reached the opposite conclusion, it was not the court's role to weigh the competing fact-finding studies].)

Here, the statements by the CDC, the Secretary of Health and Human Services, and the California Department of Public Health regarding the safety and effectiveness of the COVID-19 vaccines are analogous to the statements by the FDA commissioner that the Supreme Court relied on in *Privitera*. The

statements supply a reasonable basis for the City's vaccine mandate, even if there is room for scientific debate on the issue.

The majority expresses doubt as to whether the statements of the CDC and the California Department of Public Health are sufficient to show there is a reasonable relationship to the state's interest, if the state's interest is in reducing *transmission* of COVID-19, as opposed to preventing severe disease, hospitalization, and death. I do not read the CDC's statements so narrowly. The CDC stated the vaccines reduce (but do not eliminate) the risk of *infection*, not only the risk of hospitalization or death. (See Exhibit 4 ["[v]accines continue to reduce a person's risk of contracting the virus that cause[s] COVID-19"]; *ibid.* ["[c]urrently approved or authorized COVID-19 vaccines protect people from getting infected," though breakthrough infections may still occur]; *ibid.* ["[f]ully vaccinated people are less likely to become infected"]; Exhibit 6 ["unvaccinated individuals are more than twice as likely to be reinfected with COVID-19 than those who were fully vaccinated"].) The California Department of Public Health similarly stated that "[u]nvaccinated persons are more likely to get infected and spread the virus" and that "[v]accination against COVID-19 is the most effective means of preventing infection with the COVID-19 virus, and subsequent transmission and outbreaks." (Exhibit 9.) It is reasonable to conclude that people who are not infected with the virus will not transmit it, and that a lower incidence of infection will correspond to a lower incidence of transmission.

Further, the very document that Firefighters4Freedom cites in its second amended complaint and appellate briefs shows there was a reasonable relationship between the government's interest in reducing transmission of the disease and the vaccine

mandate. As discussed, the Secretary of Health and Human Services found that a vaccine mandate in the health care setting would reduce the rate of infection and transmission of the disease. For example, the Secretary stated, "Higher rates of vaccination, especially in health care settings, will contribute to a reduction in the transmission of SARS-CoV-2 and associated morbidity and mortality across providers and communities, contributing to maintaining and increasing the amount of healthy and productive health care staff, and reducing risks to patients, resident, clients, and PACE program participants." (Omnibus COVID-19 Health Care Staff Vaccination, *supra,* 86 Fed.Reg. 61555-01 at p. 61560.)

Further, even if the statements by the public health authorities were insufficient to show there was a rational relationship between the vaccine mandate and the City's legitimate purpose in reducing *transmission* of the virus, the vaccine mandate would still be rationally related to the City's interest reducing the *severity* of the disease and in limiting COVID-19 hospitalizations and deaths in its employees. The City could rationally conclude that the risk of more severe illness in unvaccinated staff could contribute to absenteeism due to COVID-related illness, which in turn could affect the ability of the City to provide needed services. (Cf. Omnibus COVID-19 Health Care Staff Vaccination, *supra,* 86 Fed.Reg. 61555-01 at p. 61559 [discussing need for vaccination in the health care setting to reduce risk of absenteeism (among other things)].) That is enough to support the conclusion that the ordinance was reasonably related to a legitimate government purpose. (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 970 ["[t]here is simply no authority for the proposition that a piece of

legislation that advances legitimate goals, but not precisely those goals specified in its preamble, may be struck down by a court as unconstitutional"].)

The majority suggests that sources cited by Firefighters4Freedom may call into question the statements by the CDC and California Department of Public Health regarding the safety and effectiveness of the COVID-19 vaccines, and that the court must consider Firefighters4Freedom's evidence before deciding the issue. In determining whether the vaccine mandate is within the scope of the police powers, the court does not weigh the strength of the evidence on each side. (See *Privitera, supra,* 23 Cal.3d at pp. 708-709; *County of Los Angeles Department of Public Health v. Superior Court*, *supra,* 61 Cal.App.5th at p. 495 [concluding there was a rational basis for the institution of an outdoor dining ban; court "decline[d] the Restaurateurs' invitation to second-guess public health officials' actions in an "'area[ ] fraught with medical and scientific uncertainties'"]; *People v. Aguiar, supra,* 257 Cal.App.2d at pp. 602-603 [taking judicial notice of conflicting views regarding safety of marijuana; "[u]nder this state of affairs it is not for this court to weigh fact-finding studies against each other[;] [t]his is a legislative function and we leave it to the Legislature to determine whether in its wisdom a change in or repeal of existing laws is warranted"]; see *Phillips v. City of New York* (2d Cir. 2015) 775 F.3d 538, 542 [refusing to consider that a "growing body of scientific evidence demonstrates that vaccines cause more harm to society than good" in upholding a vaccine mandate; the strength of the scientific evidence is for the legislature to determine].)

In any event, I disagree with the majority's characterization of the documents cited by Firefighters4Freedom.

As discussed, the *primary* messages in the Secretary of Health and Human Service's interim final rule that Firefighters4Freedom relies on is that vaccines are safe and effective in reducing transmission of the virus and that a vaccine mandate is necessary in the health care setting to protect the health of patients and workers. (See *Biden v. Missouri*, *supra,* 142 S.Ct. at p. 652 [discussing Omnibus COVID-19 Health Care Staff Vaccination, *supra,* 86 Fed.Reg. 61555-01].)

In arguing the Secretary of Health and Human Service's interim final rule undercuts the conclusion that vaccines are effective, Firefighters4Freedom quotes from a portion of the document concerning an "[a]ccounting [t]able" summarizing the "quantified impact of [the interim] rule." The Secretary explained the accounting table "covers only 1 year because there will likely be many developments regarding treatments and vaccinations and their effects in future years and we have no way of knowing which will most likely occur. A longer period would be even more speculative than the current estimates." The Secretary further explained: "As explained in various places within this RIA and the preamble as a whole, *there are major uncertainties as to the effects of current variants of SARS-CoV-2 on future infection rates, medical costs, and prevention of major illness or mortality. For example, 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*. These uncertainties also impinge on benefits estimates. For those reasons we have not quantified into annual totals either the life-extending or medical cost-reducing benefits of this rule and have used only a 1-year projection for the cost estimates

in our Accounting Statement (our first-year estimates are for the last two months of 2021 and the first ten months of 2022). We also show a large range for the upper and lower bounds of potential costs to emphasize the uncertainty as to several major variables, such as changes in voluntary vaccination levels, longer term effects, and others previously discussed." (Omnibus COVID-19 Health Care Staff Vaccination, *supra,* 86 Fed.Reg. 61555-01 at p. 61615, italics added.)

The italicized sentences do not undermine the primary conclusion set forth in the document, which, again, is that a vaccine mandate for health care workers is necessary to reduce both severity of disease and transmission of COVID-19. Even if those sentences were enough to call the Secretary's conclusions into question, it again is not the role of the court to weigh evidence.

I also disagree that the uncertainty about the Omicron variant expressed in the City's Exhibit 11 undercuts the City's position. Firefighters4Freedom mounts a facial challenge to the City's ordinance, claiming the enactment was beyond the City's police powers and violated city employees' right to privacy at the time the ordinance was passed. The ordinance was passed in August 2021, and the resolution instructing the mayor to implement the ordinance was passed in October 2021. As reflected in the CDC documents, the Omicron variant did not emerge until late November 2021. The United States identified Omicron as a "variant of concern" on November 30, 2021, and the first Omicron case in the United States was identified on December 1, 2021. (Omicron Variant: What You Need to Know, Centers for Disease Control and Prevention, previously available at https://www.cdc.gov/coronavirus/2019-

ncov/variants/omicronvariant.html [updated December 20, 2021] (Exhibit 11).)

Nineteen days later, the CDC issued Exhibit 11. In that document, the CDC reported: "We don't yet know how easily [the Omicron variant] spreads, the severity of illness it causes, or how well available vaccines and medications work against it." (Exhibit 11.) The fact there was uncertainty in the weeks immediately following the identification of the new variant does not undermine the conclusion that there was a rational basis for the vaccine mandate at the time it was passed, months before the variant was identified.

Moreover, given the nature of a pandemic caused by a new and evolving virus, government entities necessarily had to take action to protect the public despite uncertainty. At the time the ordinance was passed in August 2021, the Delta variant was surging. Over 630,000 people had died from COVID-19 in the United States.[5] That number grew to 750,000 just two months later, when the implementing resolution was passed. Under

---

[5] The death statistics are drawn from the tracker maintained by the CDC. (CDC, COVID Data Tracker, at <https://covid.cdc.gov/covid-data-tracker/#trends_totaldeaths_select_00> [as of June 13, 2023].) Numerous courts have taken judicial notice of the truth of the data supplied by this tracker. (See, e.g., *Slidewaters LLC v. Washington State Department of Labor and Industries* (9th Cir. 2021) 4 F.4th 747, 753 [relying on death statistics from the CDC's tracker]; *Calm Ventures LLC v. Newsom* (C.D.Cal. 2021) 548 F.Supp.3d 966; *Kheriaty, supra*, 2021 WL 6298332, *1.) As of August 14, 2021, the CDC had received reports of 630,698 deaths from COVID-19 in the United States. That number had risen to 751,409 by October 16, 2021.

those conditions, the City was forced to act with imperfect information. The reasonableness of the government entity's action is appropriately measured with reference to the statements of public health officials with the expertise to provide such guidance. (See *Mays v. Dart* (7th Cir. 2020) 974 F.3d 810, 823 [in case involving safety standards in a jail and not involving vaccines, court stated "CDC Guidelines provide the authoritative source of guidance on prevention and safety mechanisms for a novel coronavirus in a historic global pandemic where the public health standards are emerging and changing"].)

In any event, the CDC *reaffirmed* the importance of vaccines in Exhibit 11, stating: "Current vaccines are expected to protect against severe illness, hospitalizations, and deaths due to infection with the Omicron variant. However, breakthrough infections in people who are fully vaccinated are likely to occur. With other variants, like Delta, vaccines have remained effective at preventing severe illness, hospitalizations, and death. The recent emergence of Omicron further emphasizes the importance of vaccination and boosters." (Exhibit 11.) The CDC further stated: "Vaccines remain the best public health measure to protect people from COVID-19, slow transmission, and reduce the likelihood of new variants emerging." (*Ibid.*) Given those statements, the uncertainty expressed in other portions of the document does not suggest a "complete absence of even a debatable rational basis" for the measure.

For those reasons, I conclude the trial court properly sustained the demurrer without leave to amend as to the first cause of action. I would affirm the trial court's order as to that claim.

ESCALANTE, J.*

---

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.