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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

13 UNITED KP FREEDOM ALLIANCE, an
14 unincorporated association; LE-LAN JORGENSEN,
15 an individual; LAURA YVANOVICH, an
16 individual; ROBIN DRUMMOND, an individual,
17 TRACEY FORD, an individual; NATALIE OGLE,
18 an individual; and NATHAN LEAVITT, an
19 individual;

20 Plaintiffs,

21 v.

22 KAISER PERMANENTE (Kaiser Foundation
23 Hospitals, Kaiser Foundation Health Plan, Inc., the
24 Permanente Medical Group, Inc.) and DOES I-X;

25 Defendants.

Case No. 4:21-cv-07894-AGT

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

ORAL ARGUMENT REQUESTED

[Filed concurrently with Declarations]

Date: December 9, 2021

Time: 10:00 a.m.

Judge: Hon. Vince Chhabria

Dept: Courtroom 4

Complaint Filed: 10/07/2021

Trial Date: None set

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Throughout the country there have been a flurry of cases alleging that various vaccine mandates are unconstitutional. There are three reasons this case is different.

First, this case is different because it illuminates a disturbing new trend in our society. American corporations now have the power to control the rules under which they function and to direct the allocation of public resources” but have not yet been asked to “assum[e] any of the responsibilities of dominion.”¹ Since that warning a decade ago, the power of American corporations has only increased, it is time our jurisprudence caught up. Defendant may argue that, in enforcing its vaccine mandate against Plaintiffs, it is doing nothing more than what the government has asked of it. This obscures the fact that the government imposed its vaccine mandate (the “Mandate”) at Kaiser’s behest in order to allow Kaiser to circumvent its collective bargaining and other obligations to Plaintiffs. This makes Kaiser the proper target of this action.

Second this suit is, to undersigned counsel’s knowledge, the only case where this degree of testimony by qualified and credentialed experts has been marshalled to explain the risks and harms caused by a program of compulsory COVID-19 vaccination. We urge the Court to begin its analysis with a thorough review of their attached declarations.

Finally, Courts have often adopted deferential standards of review when it comes to vaccine mandates, reasoning that such mandates are sometimes necessary to protect not just the recipient but the public at large. However, as the CDC has acknowledged, and as Plaintiffs’ experts further explain, COVID-19 vaccines are not actually vaccines at all, but rather treatments. (hereinafter “Treatment(s)” or “vaccine(s)”). While they might lessen recipients chances of developing serious symptoms of COVID, they do not prevent recipients from either contracting COVID-19 or spreading COVID-19 to

¹ Robert Monks, *The Corporate Capture of the United States*, Harvard Law School Forum on Corporate Governance (January 5, 2012), <https://corpgov.law.harvard.edu/2012/01/05/the-corporate-capture-of-the-united-states/> (last visited on October 27, 2021).

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1 others. In such circumstances, overriding the preferences of a non-consenting individual is much
 2 harder to justify, making the application of any standard of review other than strict scrutiny
 3 inappropriate.

4 Therefore, UNITED KP FREEDOM ALLIANCE, *et al.* (collectively the “Plaintiffs”), by and
 5 through their attorneys, respectfully move for an order preliminarily enjoining KAISER
 6 PERMANENTE’s (“Defendant’s”) Treatment mandate

7 **II. FACTUAL BACKGROUND**

8 **A. Kaiser Permanente is a State Actor**

9
 10 FRCP 65(d)(2)(C) provides that an injunction may bind “other persons who are in active
 11 concert or participation” with a defendant. “[A]ctive concert or participation in no respect implies any
 12 conspiratorial, devious, or insidious intent or design but instead means a purposeful acting of two or
 13 more persons together or toward the same end, a purposeful acting of one in accord with the ends of
 14 the other, or the purposeful act or omission of one in a manner or by a means that furthers or advances
 15 the other.” *Lado v. Wolf*, 497 F Supp 3d 914, 929 (SD Cal 2020) (cleaned up). It is particularly relevant
 16 to such an analysis whether the party and non-party are essential parts of the same enforcement
 17 mechanism. *Id.* at 930-31 (“the statutory and regulatory scheme make clear that DHS and EOIR are
 18 essential parts of the same enforcement mechanism. Thus, the Court finds that EOIR is, for purposes
 19 of general immigration enforcement, ‘in active concert or participation’ with Defendants and is
 20 therefore bound by the Preliminary Injunction”). As set forth below, Kaiser and the government have
 21 worked hand in hand towards the same end. Ponesse Decl., ¶II.8, pg. 15. They are both an essential
 22 part of one another’s enforcement mechanism². Accordingly, the government need not be a party to
 23 this action to be bound to respect any injunction entered against Kaiser. Similarly, no FRCP 19 joinder
 24 is required for an injunction to issue.

25 _____
 26 ² Indeed, because Kaiser is a state actor, the government should be “legally identified” with it, and
 27 thus bound by any injunction. *See CFPB v. Howard Law, P.C.*, 671 F. App’x 954, 955 (9th Cir.
 28 2016) (citing *United States v. Baker*, 641 F.2d 1311, 1313 (9th Cir. 1981) (“An injunction binds a
 non-party . . . [that is] ‘legally identified’ with the enjoined party.”)).

1. Kaiser and the Government Have Imposed their Respective Mandates in Coordination With One Another and in Furtherance of a Mutual Goal

a. Kaiser and the State of California Have Recognized, and Agreed to Work Towards, a Mutual Goal of Vaccination of All Eligible Californians

In January of 2021, California Governor Gavin Newsom chose Blue Cross Blue Shield and Kaiser to lead the state’s vaccination push³ due to Kaiser’s “expertise” in the field.⁴ On January 23, 2021, Kaiser and the State of California signed a memorandum of understanding (“MOU”) which required Blue Cross Blue Shield to “cooperate and coordinate with Kaiser[.]”⁵ The MOU expressly recognized that the vaccination efforts and the MOU were being undertaken to advance Kaiser and the State of California’s “shared goal” to vaccinate the residents of California.⁶ Though this objective may have been shared, it appears that it was Kaiser that insisted on the state recognizing the goal in exchange for entering into the MOU: “Agency also recognizes that Kaiser Permanente provides care and coverage to twenty-five (25) percent of Californians, and that a successful Vaccination Effort will include vaccination of all eligible individuals across the state.”⁷

b. Kaiser and the Federal Government Have Also Worked Hand-in-Hand Toward the Same Goal

i. The CDC’s Vaccine Safety Datalink, Which Tells Policymakers Whether Vaccines are Safe Enough to Mandate, is Controlled by Kaiser

The CDC’s Vaccine Safety Datalink (VSD) “started in 1990 and continues today in order to monitor the safety of vaccines and conduct studies about rare and serious adverse events following immunization.”⁸ The VSD, which is “a vital resource informing policy makers and the public about

³ Wolfson B., *Confusion over Newsom’s choice of Blue Shield, Kaiser to lead vaccination push*, MODERN HEALTHCARE, <https://www.modernhealthcare.com/insurance/confusion-over-newsoms-choice-blue-shield-kaiser-lead-vaccination-push> (last visited October 28, 2021).

⁴ *Memorandum of Understanding COVID-19 Vaccination*, CALIFORNIA GOVERNMENT OPERATIONS AGENCY, <https://files.covid19.ca.gov/pdf/Kaiser-foundation-GovOps-MOU.pdf> (last visited October 28, 2021).

⁵ *Id.*

⁶ *Id.* at 3.

⁷ *Id.* at 2.

⁸ *Vaccine Safety Datalink (VSD)*, CENTERS FOR DISEASE CONTROL, ,

1 the safety of vaccines used in the United States[,]”⁹ consists of the following nine health
2 organizations:¹⁰

- 3 a. Kaiser Permanente Washington
- 4 b. Kaiser Permanente Northwest, Oregon
- 5 c. Kaiser Permanente Northern California
- 6 d. Kaiser Permanente Southern California
- 7 e. Kaiser Permanente Colorado
- 8 f. Marshfield Clinic Research Institute
- 9 g. Health Partners
- 10 h. Harvard Pilgrim, Massachusetts
- 11 i. CDC Atlanta, Georgia

12 It is clear from this list that five of the nine organizations are Kaiser. However, Kaiser also controls or
13 has substantial cooperative relationships with three of the non-Kaiser organizations: Marshfield
14 Clinical Research Institute, Health Partners, and Harvard Pilgrim.

15 Health Partners and Harvard Pilgrim are both partnered with Kaiser in a program called
16 Sentinel, which is a national data network set up in 2009 to monitor the performance of FDA-regulated
17 medical products.¹¹ Dr. Steven Jacobson, who serves as the Interim Executive Director of Marshfield
18 Clinic Research Institute,¹² also serves as the senior director of research for Kaiser Permanente of

19 _____
20 <https://www.cdc.gov/vaccinesafety/ensuringsafety/monitoring/vsd/index.html> (last visited October
21 28, 2021).

22 ⁹ McNeil, M. M., Gee, J., Weintraub, E. S., Belongia, E. A., Lee, G. M., Glanz, J. M., Nordin, J. D.,
23 Klein, N. P., Baxter, R., Naleway, A. L., Jackson, L. A., Omer, S. B., Jacobsen, S. J., & DeStefano,
24 F. (2014). *The Vaccine Safety Datalink: successes and challenges monitoring vaccine safety*.
25 *VACCINE*, 32(42), 5390–5398. <https://doi.org/10.1016/j.vaccine.2014.07.073>

26 ¹⁰ Nelson J.C., *Vaccine Safety Datalink (VSD) update on post-licensure safety monitoring of*
27 *recombinant zoster vaccine (RZV, Shingrix)*, KAISER PERMANENTE WASHINGTON HEALTH RESEARCH
28 INSTITUTE, [https://www.cdc.gov/vaccines/acip/meetings/downloads/slides-2020-10/ZosterVaccine-
03-Nelson-508.pdf](https://www.cdc.gov/vaccines/acip/meetings/downloads/slides-2020-10/ZosterVaccine-03-Nelson-508.pdf) (last visited October 28, 2021).

¹¹ *Who Is Involved*, SENTINEL INITIATIVE, <https://www.sentinelinitiative.org/about/who-involved>
(last visited October 28, 2021).

¹² *Research Institute Leadership*, Mansfield Clinic Research Institute, ,
<https://marshfieldresearch.org/research-institute-leadership> (last visited October 28, 2021).

1 Southern California.¹³

2 **ii. Kaiser Has Been Instrumental in Setting the**
 3 **Administration’s Agenda with Respect to the Anticipated**
 4 **Federal Vaccine Mandate**

5 Kaiser senior executive Michelle Gaskill-Hames was clear that the company imposed its
 6 vaccine mandate because “**we believe we’ve got to lead** this across the country.”¹⁴ That is a sentiment
 7 that Kaiser takes quite literally. In January of 2021, Kaiser’s Chief Health Officer, Bechara Choucair,
 8 was selected by the Biden Administration “to be the nation’s Covid-19 vaccine coordinator.”¹⁵ As of
 9 October 28, 2021, he is still listed as an executive on Kaiser’s website.¹⁶

10 In his dual capacity as both Kaiser’s Chief Health Officer and the nation’s vaccine czar, Dr.
 11 Choucair has perfectly mirrored the company line, calling on private employers to mandate vaccines
 12 and saying: “We truly believe that employers, whether it’s state government, local government, private
 13 businesses, universities, colleges, community colleges, we all have a role to play when it comes to
 14 vaccinations. **We are leading by example** from the federal government.” The next day he stated: “We
 15 have to look at all the tools and try to get as many people vaccinated as possible[.]”¹⁷

16 On August 11, 2021, President Biden met with Kaiser’s CEO, “expressed his optimism that
 17 additional employers would follow suit” and “noted that the federal government will continue to
 18 support employers as they require COVID-19 vaccinations.”¹⁸ On September 9, 2021, President

19 ¹³ *Dr. Steven Jacobsen of Kaiser Permanente elected president-elect of the American College of*
 20 *Epidemiology*, DEPARTMENT OF RESEARCH & EVALUATION SOUTHERN CALIFORNIA KAISER
 21 PERMANENTE, [https://www.kp-scalresearch.org/dr-steven-jacobsen-of-kaiser-permanente-elected-](https://www.kp-scalresearch.org/dr-steven-jacobsen-of-kaiser-permanente-elected-president-elect-of-the-american-college-of-epidemiology/)
 22 [president-elect-of-the-american-college-of-epidemiology/](https://www.kp-scalresearch.org/dr-steven-jacobsen-of-kaiser-permanente-elected-president-elect-of-the-american-college-of-epidemiology/) (last visited October 28, 2021).

23 ¹⁴ Del Castillo A., *‘More assertive’: Kaiser Permanente, others announce COVID-19 vaccine*
 24 *requirements*, ABC 7 NEWS, August 2, 2021 [https://abc7news.com/kaiser-permanente-vaccine-](https://abc7news.com/kaiser-permanente-vaccine-requirements/10926410/)
 25 [requirements/10926410/](https://abc7news.com/kaiser-permanente-vaccine-requirements/10926410/) (last visited October 28, 2021) (emphasis supplied).

26 ¹⁵ Diamond D., *Biden picks 3 coordinators for Covid-19 response*, POLITICO, December 29, 2020,
 27 <https://www.politico.com/news/2020/12/29/biden-coronavirus-response-coordinators-451996> (last
 28 visited October 28, 2021).

¹⁶ *Bechara Choucair*, KAISER PERMANENTE INSTITUTE FOR HEALTH POLICY,
<https://www.kpihp.org/bio/bechara-choucair/> (last visited October 28, 2021).

¹⁷ *J&J Says COVID Booster Shot Shows ‘Rapid and Robust’ Antibody Increase*, NBC 6 SOUTH
 FLORIDA, August 25, 2021 [https://www.nbcmiami.com/news/jj-says-covid-booster-shot-shows-](https://www.nbcmiami.com/news/jj-says-covid-booster-shot-shows-rapid-and-robust-antibody-increase/2537293/)
[rapid-and-robust-antibody-increase/2537293/](https://www.nbcmiami.com/news/jj-says-covid-booster-shot-shows-rapid-and-robust-antibody-increase/2537293/) (last visited October 28, 2021).

¹⁸ *Readout of President Biden’s Meeting with Business, University and Health Care Leaders on*

1 Biden announced that the Department of Labor was developing an emergency plan requiring every
 2 hospital, healthcare facility, and large employer in the country to mandate the COVID-19 vaccine for
 3 its employees. He also issued an executive order requiring all federal contractors mandate vaccines
 4 for their employees.¹⁹ The same day, Bechara Choucair stated in an interview that “vaccine
 5 requirements [are] one tool in our tool box” to ensure that all Americans receive a vaccine.²⁰
 6 Thereafter, Kaiser’s CEO expressed Kaiser’s “support” for the federal government’s employer vaccine
 7 mandate stating: “The president’s action demonstrates that government alone cannot solve this
 8 challenge. We support the engagement of the private sector to play more of a role in helping close the
 9 vaccination gap in our communities.”²¹

10 **2. Kaiser and the Government are an Essential Part of One-Another’s**
 11 **Enforcement Mechanisms**

12 **a. The Government is an Essential Part of Kaiser’s Enforcement**
 13 **Mechanism**

14 So far, our story describes a wonderful kumbaya moment wherein enlightened corporate
 15 executives take government by the hand to advance what they see as the common good of compulsory
 16 “vaccination.” Indeed, in a moment of crisis, the impulse to delegate the responsibility of setting the
 17 nation’s healthcare agenda to corporate executives who have spent their careers in the field of public
 18 health is forgivable. It is also dangerous. For in entwining itself with Kaiser, the government was also
 19 fashioned into a tool that the company used to clear roadblocks standing in the way of its corporate

20 _____
 21 *COVID-19 Vaccination Requirements*, THE WHITE HOUSE, August 11, 2021

22 <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/11/readout-of-president-bidens-meeting-with-business-university-and-health-care-leaders-on-covid-19-vaccination-requirements/> (last visited October 28, 2021).

23 ¹⁹ President Joseph Biden, *Remarks by President Biden on Fighting the COVID-19 Pandemic*, THE
 24 WHITE HOUSE, September 9, 2021, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/> (last visited
 25 October 28, 2021).

26 ²⁰ Roznowski B., *How does Biden’s new vaccine mandate impact Colorado employees?*, ABC
 27 DENVER 7 NEWS, September 9, 2021, <https://www.thedenverchannel.com/news/local-news/how-does-bidens-new-vaccine-mandate-impact-colorado-employees> (last visited October 28, 2021).

28 ²¹ Adams G.A., *Our support for federal vaccine requirements*, KAISER PERMANENTE, September 10,
 2021, <https://about.kaiserpermanente.org/our-story/news/our-perspective/our-support-for-federal-vaccine-requirements> (last visited October 28, 2021).

1 vision. Roadblocks like collective bargaining and market pressures.

2 Kaiser has a highly unionized workforce and has for months recognized that its collective
3 bargaining agreements might require it “to negotiate with employee unions before imposing a vaccine
4 mandate as a condition of employment.”²² The timing of the “vaccine” mandate California imposed
5 on healthcare providers was therefore so convenient as to defy all coincidence, coming as it did **the**
6 **day after** the Coalition of Kaiser Permanente Unions angrily sent Kaiser a “Demand to Bargain” over
7 the company’s own mandate.²³

8 Similarly, Kaiser has acknowledged that the “lack of a vaccine mandate” is a “competitive
9 advantage in the hospital staffing wars[.]”²⁴ Given the acute shortage of trained healthcare workers
10 nationwide, it could hardly have imposed its mandate without suffering severe operational difficulties
11 from loss of staff – unless its competitors were somehow prevented from offering the alternative of
12 mandate-free employment options.

13 Without the government’s assistance in removing these obstacles, Kaiser’s own mandate
14 would have been unenforceable. Hence Kaiser’s express corporate “[t]actic” of “[s]eek[ing] regulatory
15 relief that will allow providers to have more flexibility in achieving shared [vaccination] objectives[.]”

18 ²² Musumeci M., Kates J., *Key Questions About COVID-19 Vaccine Mandates*, KAISER FAMILY
19 FOUNDATION, April 7, 2021, [https://www.kff.org/coronavirus-covid-19/issue-brief/key-questions-
20 about-covid-19-vaccine-mandates/](https://www.kff.org/coronavirus-covid-19/issue-brief/key-questions-about-covid-19-vaccine-mandates/) (last visited October 28, 2021).

21 ²³ Demand to Bargain from Steven Ward to Steve Shields, Kaiser Permante Health Plan & Hospitals,
22 COALITION OF KAISER PERMANENTE UNIONS, AFL-CIO, August 4, 2021,
23 [https://www.unioncoalition.org/wp-content/uploads/2021/08/KP-Vaccine-Mandate-CKPU-Demand-
24 to-Bargain-8.4.21-FINAL.pdf](https://www.unioncoalition.org/wp-content/uploads/2021/08/KP-Vaccine-Mandate-CKPU-Demand-to-Bargain-8.4.21-FINAL.pdf) (last visited October 28, 2021). Tomás J. Aragón, *State Public Health
25 Officer Order of August 5, 2021*, CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, August 5, 2021,
26 [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-
27 Officer-Health-Care-Worker-Vaccine-Requirement.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Health-Care-Worker-Vaccine-Requirement.aspx) (last visited October 28, 2021); Williams
28 A., *Hospitals concerned about losing employees after vaccine mandate announcement*, ABC 7
KRCR, August 11, 2021, [https://krctrv.com/newsletter-daily/hospitals-concerned-about-losing-
employees-after-vaccine-mandate-announcement](https://krctrv.com/newsletter-daily/hospitals-concerned-about-losing-employees-after-vaccine-mandate-announcement) (last visited October 28, 2021).

²⁴ Weber L., *Lack of a Vaccine Mandate Becomes Competitive Advantage in Hospital Staffing Wars*,
KAISER HEALTH NEWS (A PUBLICATION OF THE KAISER FAMILY FOUNDATION), August 31, 2021,
[https://khn.org/news/article/covid-hospital-staff-shortage-lack-of-mandate-competitive-advantage-
worker-recruitment-retention/](https://khn.org/news/article/covid-hospital-staff-shortage-lack-of-mandate-competitive-advantage-worker-recruitment-retention/) (last visited October 28, 2021).

1 which they are to be credited for forthrightly acknowledging.²⁵

2 **b. Kaiser is an Essential Part of the Government’s Enforcement**
3 **Mechanism**

4 California has made health care facilities the enforcers and administrators of its vaccine
5 mandate. The state’s mandate vests health care facilities with the power to decide whether employees
6 are exempt from the Mandate.²⁶ It also makes clear that the mandate is to be enforced only against
7 healthcare facilities and, consequently, that it is the healthcare facilities themselves that are responsible
8 for enforcing the mandate against workers.²⁷

9 **B. COVID Treatments Expose Recipients to Substantial Risk of Harm and May**
10 **Actually Make the Pandemic Worse**

11 **1. COVID “Vaccines” are Treatments and Not Vaccines**

12 **a. COVID Treatments do not Prevent Recipients from Getting or**
13 **Spreading COVID.**

14 While COVID Treatments may be somewhat effective at mitigating symptoms and
15 hospitalizations as all treatments and prophylactics do, they do not prevent individuals from either
16 getting or transmitting COVID. According to the CDC, “[c]urrently, Delta is the only [COVID] variant
17 classified as a Variant of Concern (VOC) in the United States.”²⁸ The Director of the CDC has made
18 clear that the currently available “vaccines” do not prevent infection with, or transmission of, the Delta
19 variant, saying: “[W]hat [the vaccines] can’t do anymore is prevent transmission.”²⁹ The fact that the
20 COVID Treatments are ineffective in preventing transmission of COVID was also recently confirmed

21 ²⁵ *COVID-19 Vaccine Confidence Toolkit*, KAISER PERMANENTE,
22 [https://about.kaiserpermanente.org/content/dam/kp/mykp/documents/instructions/covid19-vaccine-
confidence-toolkit.pdf](https://about.kaiserpermanente.org/content/dam/kp/mykp/documents/instructions/covid19-vaccine-confidence-toolkit.pdf) p. 32 (emphasis supplied) (last visited October 28, 2021).

23 ²⁶ Tomás J. Aragón, *Order of August 5, 2021* (If an operator of a facility listed above under section
(1) deems a worker to have met the requirements of an exemption . . .)

24 ²⁷ *Id.*

25 ²⁸ *Covid Tracker Weekly Review Interpretative Summary for October 22, 2021*, CENTERS FOR
DISEASE CONTROL AND PREVENTION, [https://www.cdc.gov/coronavirus/2019-ncov/covid-
data/covidview/index.html](https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html) (last visited October, 28, 2021)

26 ²⁹ Madeline Holcomb, *Fully Vaccinated People Who Get a CoVID-19 Breakthrough Infection*
Transmit the Virus, CDC Chief Says, CNN HEALTH, August 6, 2021
27 <https://www.cnn.com/2021/08/05/health/us-coronavirus-thursday/index.html> (last visited October
28, 2021)

1 by the British Government. On October 23, 2021, in a televised interview the Honorable Boris
 2 Johnson, Prime minister of Great Britain, admitted and confirmed in no uncertain terms that the
 3 “vaccines” do **not prevent infection by or transmission of** the SARS-Cov-2 virus.³⁰

4 Plaintiffs’ experts agree. For example, Dr. McCullough states in his declaration that “None of
 5 the vaccines stop the transmission of Delta” and further notes that the Delta variant has been “readily
 6 contracted and spread among vaccinated healthcare workers at the University of San Diego Health[.]”
 7 McCullough Decl., ¶15, *see also* McCullough Decl., ¶¶ 34-35, Tyson Decl., ¶14, Bhattacharya Decl.,
 8 ¶¶20-23. Indeed, fully “vaccinated” healthcare workers readily spread the Delta variant to one another
 9 at 251 times the viral loads as in the past, and may, in fact, more readily spread the disease to their
 10 patients. McCullough Decl., ¶¶16, 17. The CDC found that the vaccinated carried a higher viral load
 11 than the unvaccinated. McCullough Decl., ¶ 40. At minimum, vaccinated individuals are “at least as
 12 likely as unvaccinated individuals to be shedding live virus.” Bhattacharya Decl., ¶ 23.

13 **b. Natural Immunity Does Prevent Recipients from Getting and** 14 **Spreading Covid**

15 In contrast to the COVID Treatments, it is well established that natural immunity, or immunity
 16 after infection, does prevent infection and transmission. As Dr. Yeadon, who holds a PhD in
 17 respiratory pharmacology, explains: “Immunity from conquering the virus leaves the individual with
 18 *complete* immunity.” Yeadon Decl., ¶23. It is “memorized” immunity to all components/proteins of
 19 the virus and not just the infamous spike proteins exclusively targeted by the COVID Treatments.
 20 Yeadon Decl., ¶23; Bhattacharya Decl., ¶¶12, 17-18. Hence, natural immunity is a complete, or sterile
 21 immunity, as opposed to the temporary and partial mitigation provided by the Treatments.

22 **2. Mandatory Treatment Poses Serious Risks to Recipients**

23 Healthy young and middle-aged people are at no measurable risk of death if they are infected
 24

25 ³⁰ Embedded video found at: Amy Coles, *COVID-19: Boris Johnson Urges Those Eligible to Get*
 26 *Coronavirus Booster Jabs This Winter*, SKY NEWS, October 23, 2021,
 27 [https://news.sky.com/story/covid-19-boris-johnson-urges-those-eligible-to-get-coronavirus-booster-](https://news.sky.com/story/covid-19-boris-johnson-urges-those-eligible-to-get-coronavirus-booster-jabs-this-winter-12442495)
 28 [jabs-this-winter-12442495](https://news.sky.com/story/covid-19-boris-johnson-urges-those-eligible-to-get-coronavirus-booster-jabs-this-winter-12442495) (last visited October 25, 2021); *see also*, Tyson Decl., ¶¶14-19(COVID
 vaccines do not work).

1 by SARS-CoV-19. Yeadon Decl., ¶¶16; Zelenko Decl., ¶¶12-13. In contrast, if a Treatment is
 2 administered to these populations, statistically, there will be more injuries and deaths. “The COVID-
 3 19 mass vaccination is associated with at least a 101-fold increase in annualized vaccine deaths
 4 reported to VAERS.” McCullough Decl., ¶45; *see also* Yeadon Decl., ¶¶25-27; McCullough Decl.,
 5 ¶¶47-64; Bhattacharya Decl., ¶¶26-33, Cole Decl., ¶¶10-18.

6 Dr. Bhattacharya is an infectious disease expert who holds both an MD and PHD from Stanford
 7 University, where he also previously served as a professor of medicine. The COVID Treatments have
 8 less common, but severe, side effects including “severe and non-severe (anaphylactic) reactions. *Id.*
 9 The Treatments also have “rare but deadly side effects” in young people including a clotting,
 10 myocarditis, pericarditis, and Guillain-Barre Syndrome. *Id.* Dr. Bhattacharya also notes that “[t]here
 11 is still the possibility of severe side effects that have yet to be identified as the vaccines have been in
 12 use in human populations for less than a year [and] [a]ctive investigation to check for safety problems
 13 is still ongoing.” *Id.*

14 As importantly, the Vaccine Adverse Event Reporting System (VAERS) reports 6,136 deaths
 15 caused by the COVID treatments and 21,806 hospitalizations as of June 2021. Cole Decl., ¶9. In
 16 comparison, for the previous **20 years**, there were only 3,167 adult deaths (158 per year) for all
 17 vaccines combined, a sudden 39 times increase. *Id.*

18 **II. THE STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF**

19 To obtain a preliminary injunction, plaintiffs must establish: (1) likelihood of success on the
 20 merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of
 21 equities tips in their favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def.*
 22 *Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Alternatively, under the sliding
 23 scale approach, a “plaintiff can meet the burden of obtaining a preliminary injunction even when there
 24 are serious questions going to the merits—a lesser showing than a likelihood of success on the merits—
 25 if the balance of hardships strongly favors the plaintiff.” *Cascadia Wildlands v. Scott Timber Co.*, 715
 26 F App’x 621, 623-24 (9th Cir 2017) (cleaned up). Under the sliding scale approach, a plaintiff must
 27 still demonstrate the “likelihood of irreparable harm and that the injunction is in the public interest[.]”
 28

1 *Id.*

2 **III. ARGUMENT**

3 **A. Plaintiffs are Likely to Succeed on their Constitutional Claims. Alternatively,**
 4 **Plaintiffs' Claims Raise Serious Constitutional Questions.**

5 **1. Plaintiffs are Likely to Succeed on Their Claim that Kaiser is a State**
 6 **Actor. At the Very Least, Plaintiffs Have Raised Serious Questions About**
 7 **Whether Kaiser is a State Actor.**

8 A private entity can be held liable for constitutional violations where one of four factors are
 9 present: “(1) [P]ublic function, (2) joint action, (3) governmental compulsion or coercion, and (4)
 10 governmental nexus.” *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835-36 (9th Cir. 1999).
 11 In addition to these factors, state action will be found in any other situation where a plaintiff can “show
 12 that there is a sufficiently close nexus between the State and the challenged action of the regulated
 13 entity so that the action of the latter may be fairly treated as that of the State itself.” *Id.* at 836 (internal
 14 cites omitted). There is ultimately “no rigid formula for measuring state action for purposes of section
 15 1983 liability.” *Ibid.* (quoting *Ouzts v. Maryland Nat'l Ins. Co.*, 505 F.2d 547, 550 (9th Cir. 1974)).
 16 Rather, “the inquiry into whether private conduct is fairly attributable to the state must be determined
 17 based on the circumstances of each case.” *Ibid.* (citing *Bass v. Parkwood Hosp.*, 180 F.3d 234, 242
 18 (5th Cir. 1999) and *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 6 L. Ed. 2d 45, 81 S. Ct.
 19 856 (1961)).

20 Kaiser's Vaccine Mandate Fulfills a Traditional Public Function:³¹ Implementing and
 21 enforcing a vaccination mandate in response to a pandemic is traditionally a public function. *See S.*
 22 *Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613, 207 L.Ed.2d 154, 155 (2020), 141
 23 S. Ct. 10, 12, 208 L.Ed.2d 155, 156 (2020) (“Our Constitution principally entrusts the safety and the
 24 health of the people to the politically accountable officials of the States to guard and protect.”)
 25 (quotations omitted); *Jacobson v. Massachusetts*, 197 U.S. 11, 29, 25 S. Ct. 358, 362, 49 L.Ed. 643
 26 (1905) (“[I]t is equally true that in every well-ordered society charged with the duty of conserving the
 27 safety of its members the rights of the individual in respect of his liberty may at times, under the

28 ³¹ *See*, Ponesse Declaration, ¶ 1.1, page 2.

1 pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, **as**
 2 **the safety of the general public may demand.**”) (emphasis supplied). At the very least, Kaiser’s
 3 vaccine mandate constitutes performance of a public function with the government’s acquiescence.
 4 *See Marsh v. Alabama*, 326 U.S. 501, 507, 66 S. Ct. 276, 279, 90 L.Ed. 265, 269 (1946) (“And even
 5 had there been no express franchise but mere acquiescence by the State in the corporation’s use of its
 6 property as a segment of the four-lane highway, operation of all the highway, including the segment
 7 owned by the corporation, would still have been performance of a public function and discrimination
 8 would certainly have been illegal.”).

9 Alternatively, Kaiser’s Vaccine Mandate is a Product of Joint Action and has a Governmental
 10 Nexus: For the reasons previously set forth, Plaintiff is likely to succeed in demonstrating that Kaiser
 11 and the government worked hand-in-hand to implement the vaccine mandate and now work hand-in-
 12 hand as partners in enforcement.

13 Alternatively, it is Fair to Treat Kaiser’s Vaccine Mandate as State Action:

14 Ultimately the reason that the Constitution does not generally apply to private employers is
 15 that employees are free to leave if they are unhappy with the conditions of their employment. *See*
 16 *Belgau v. Inslee*, 975 F.3d 940, 952 (9th Cir. 2020) (“We note that there is an easy remedy for
 17 Washington public employees who do not want to be part of the union: they can decide not to join the
 18 union in the first place, or they can resign their union membership after joining. Employees
 19 demonstrated the freedom to do so, subject to a limited payment commitment period. In the face of
 20 their voluntary agreement to pay union dues and in the absence of any legitimate claim of compulsion,
 21 the district court appropriately dismissed the First Amendment claim against Washington.”). Indeed,
 22 in dismissing a recent suit against the Houston Methodist Hospital’s employee vaccine mandate, the
 23 United States District Court for the Southern District of Texas held: “This is not coercion . . . Bridges
 24 can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply
 25 need to work somewhere else.”³² *See also Belgau v. Inslee*, 975 F.3d 940, 952 (9th Cir. 2020).

26 _____
 27 ³² *Bridges v. Hous. Methodist Hosp.*, No. H-21-1774, 2021 U.S. Dist. LEXIS 110382 (S.D. Tex.
 28 June 12, 2021), accessible at <https://www.documentcloud.org/documents/20860669-houston->

1 However, here Defendant and the government have worked together to ensure that this is the situation
 2 no longer. Plaintiffs are not free to leave Kaiser and ply their trade elsewhere. There is nowhere else
 3 they can go by design.

4 **2. Because Defendant is Mandating a Treatment, and not a Vaccine, Strict**
 5 **Scrutiny is the Appropriate Standard**

6 “[E]ven in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Cath.*
 7 *Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). “Every violation of a person’s bodily
 8 integrity is an invasion of his or her liberty” and “any such action is degrading if it overrides a
 9 competent person’s choice to reject a specific form of medical treatment.” *Washington v. Harper*,
 10 494 U.S. 210, 237 (1990) (Stevens, J., concurring in part). Nonetheless, some courts have opined
 11 that “the right to refuse vaccination is not deeply rooted in this nation's history” and that, therefore,
 12 the right to refuse **vaccination** is not a fundamental right and rational basis review is appropriate.
 13 *Williams v. Brown*, No. 6:21-cv-01332-AA, 2021 US Dist LEXIS 201423, at *22 (D Or Oct. 19,
 14 2021) (emphasis supplied).

15 In contrast, however, the “rights to determine one’s own medical **treatment**, and to
 16 refuse unwanted medical treatment,” **are** “fundamental[,]” and individuals also have “a fundamental
 17 liberty interest in medical autonomy.” *Coons v. Lew*, 762 F.3d 891, 899 (9th Cir. 2014) (as amended)
 18 (internal cites omitted, emphasis supplied), *cert. denied* in *Coons v. Lew*, 575 US 935, 135 S Ct
 19 1699, 191 LEd2d 675 (2015). Therefore, “a competent person has a constitutionally protected liberty
 20 interest in refusing unwanted medical treatment.” *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S.
 21 261, 278 (1990). This right is rooted in “the common-law rule that forced medication was a battery,
 22 and the long legal tradition protecting the decision to refuse unwanted medical treatment.”
 23 *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997). “Governmental actions that infringe upon a
 24 fundamental right receive strict scrutiny.” *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th
 25 Cir. 2005), as amended by 447 F.3d 1187 (9th Cir. 2006); *See also Washington v. Harper*, 494 US

26 _____
 27 [methodist-lawsuit-order-of-dismissal](#) (no constitutional causes of action were alleged).
 28

1 210, 223, 110 S Ct 1028, 1037, 108 LEd2d 178, 199 (1990) (acknowledging in dicta that, outside of
 2 the prison context, the right to refuse treatment would be a “fundamental right” subject to a “more
 3 rigorous standard of review”).

4 Various definitions of the word “vaccine” exist. For example, prior to August of this
 5 year, the CDC defined “vaccine” as a product that “produce[s] immunity to a specific disease” and
 6 vaccination as “[t]he act of introducing a vaccine into the body to produce immunity to a specific
 7 disease.”³³ More recently, the CDC has updated these definitions to take into account the fact that
 8 COVID vaccines do not produce immunity.³⁴ However, this question of semantics need not concern
 9 the Court. *See Letter v. Unumprovident Corp.*, No. 02-2694, 2004 US Dist LEXIS 17680, at *8 (ED
 10 La Aug. 31, 2004) (“quibbling over these semantics does not change the essential facts of this case
 11 or the level of scrutiny applied by the Court[.]”). What matters for the purposes of ascertaining which
 12 tier of scrutiny is appropriate is not whether the COVID Treatments fall, or do not fall, into some
 13 dictionary definition of the term. Rather, the question is this: **Why** have Courts historically been
 14 deferential to decisions to mandate vaccines, but not treatments? Framed this way, the answer is
 15 clear. A personal decision to refuse vaccination does not mitigate risks to other people to whom
 16 disease might be spread. In contrast, declining treatment impacts only the health of the individual
 17 making the decision.

18 The presumption of some courts that vaccine mandates are subject to a deferential
 19 standard of review traces its roots to *Jacobson. Roman Catholic Diocese v. Cuomo*, ___US___, 141
 20 S Ct 63, 70-71, 208 LEd2d 206, 212-13 (2020) (Gorsuch and Kavanaugh concurrences. While it is
 21 arguable whether *Jacobson* really established a deferential standard, *id.*,³⁵ it is clear that, to the extent
 22

23
 24 ³³ *Immunization: The Basics*, CENTERS FOR DISEASE CONTROL, July 27, 2021, archived at
 25 [https://web.archive.org/web/20210727183505/https://www.cdc.gov/vaccines/vac-gen/imz-](https://web.archive.org/web/20210727183505/https://www.cdc.gov/vaccines/vac-gen/imz-basics.htm)
[basics.htm](https://www.cdc.gov/vaccines/vac-gen/imz-basics.htm) (last visited October 28, 2021).

26 ³⁴ <https://www.cdc.gov/vaccines/vac-gen/imz-basics.htm>

27 ³⁵ “In *Jacobson*, individuals could accept the vaccine, pay the fine, or identify a basis for exemption.
 28 The imposition on Mr. Jacobson’s claimed right to bodily integrity, thus, was avoidable and
 relatively modest. It easily survived rational basis review, and might even have survived strict
 scrutiny, given the opt-outs available to certain objectors.”

1 that *Jacobson* commands such deference, the vaccines to which that standard applies are those
 2 “adapted to prevent the spread of contagious diseases[.]” *Jacobson, supra*, 197 US at 35.
 3 Accordingly, courts that have found that COVID “vaccine” mandates are subject to more lenient
 4 scrutiny have done so with the assumption that the “vaccines” being mandated “prevent the spread
 5 of COVID-19[.]” *See e.g., Norris v. Stanley*, No. 1:21-cv-756, 2021 US Dist LEXIS 198388, at *10
 6 (WD Mich Oct. 8, 2021), *see also Valdez v. Grisham*, No. 21-cv-783 MV/JHR, 2021 US Dist LEXIS
 7 173680, at *6 (DNM Sep. 13, 2021) (“the refusal to receive the COVID-19 vaccine not only
 8 endangers the individual but the entire community[.]”).

9 As set forth in the “Factual Background” section, Plaintiffs are likely to succeed in
 10 showing that the COVID “vaccine” does not prevent the spread of COVID or, at least, have raised
 11 serious questions as to whether this is the case. Therefore, the strict scrutiny due to forced treatment,
 12 as opposed to vaccination, is appropriate.

13 Since Kaiser is a state actor, and because the right to refuse treatment is a fundamental
 14 right subject to strict scrutiny, Kaiser’s vaccine mandate must be struck down unless it is narrowly
 15 tailored to serve a compelling state interest, *Gateway City Church v. Newsom*, 516 F Supp 3d 1004,
 16 1017 (ND Cal 2021), and “advance[s] [that] compelling state interest by the least restrictive means
 17 available.” *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

18 In addition, though states may not take away fundamental rights, they are free to recognize
 19 additional rights as fundamental. *Zaatari v. City of Austin*, 615 SW3d 172, 192 (Tex. App 2019).
 20 California has chosen to expand upon the 14th Amendment in article I, section 1 of its Constitution,
 21 which, unlike the US Constitution, expressly guarantees a right to privacy. *See People v. Baldwin*
 22 (1972) 62 Cal App 3d 727, 735 (describing this constitutional provision as “adding privacy as a
 23 fundamental right[.]”). As California’s Court of Appeal has said: “The right of patient autonomy has
 24 been described as the ultimate exercise of one’s right to privacy.” *Donaldson v. Lungren* (1992) 2
 25 Cal App 4th 1614, 1620 (cleaned up). Thus, under the California Constitution, there is a “the right
 26 to refuse treatment or life- sustaining measures [that] is not limited to those who are terminally ill.”
 27 *Id.* at 1620.

1 Ultimately the analysis of whether there is a fundamental right to refuse treatment is similar,
2 in one sense, under either the US or California Constitutions because, “[w]hether asserting rights
3 resting upon the United States or California Constitution or the decisional law of informed consent,
4 a patient may refuse treatment even though withholding of treatment creates a life-threatening
5 situation.” *Donaldson* at 1620. **However, unlike the Fourteenth Amendment, which applies only**
6 **to the government and state actors, California employers are bound to recognize employees’**
7 **privacy rights under the California Constitution whether or not they are state actors.** This is
8 because “article I, section 1 [of the California Constitution] was intended to reach both governmental
9 and nongovernmental conduct.” *Luck v. S. Pac. Transp. Co.*(1990) 218 Cal App 3d 1, 18 . Therefore,
10 “[p]rivacy is protected not merely against state action; it is considered an inalienable right which
11 may not be violated by anyone[.]” *Porten v. Univ. of S.F.*, 64 Cal App 3d 825, 829, 134 Cal Rptr
12 839, 842 (1976), and the “constitutional right to privacy” under the California Constitution “forms
13 a sufficient touchstone of public policy to support [a] wrongful termination claim.” *See Feminist*
14 *Women's Health Ctr. v. Superior Court*, 52 Cal App 4th 1234, 1245, 61 Cal Rptr 2d 187, 193 (1997).

15 **3. Defendant’s Mandate is not Narrowly Tailored both because Less**
16 **Restrictive Alternatives are Available and because it Applies to**
17 **Individuals who Have Natural Immunity and Individuals who Work**
Remotely

18 The Supreme Court has explained that any restriction implicating a fundamental right “must
19 be narrowly tailored to promote a compelling Government interest.” *U.S. v. Playboy Entm’t Grp.*, 529
20 U.S. 803 (2000)). “If a less restrictive alternative would serve the Government’s purpose, the
21 legislature must use that alternative” *Id.*; *see also, Sable Commc’ns of Cal. v. FCC*, 492 U.S. 115, 126
22 (1989). Defendants’ Mandate is not narrowly tailored both because less restrictive means of
23 accomplishing the same goal are available and because the Mandate applies to both individuals who
24 have natural immunity and individuals who work remotely.

25 Dr. Bhattacharya is an infectious disease expert who holds both an MD and PHD from Stanford
26 University, where he also previously served as a professor of medicine. He answers the question of
27 whether less restrictive alternatives to compulsory vaccination are available plainly: “Can employers
28

1 keep [their] employees and customers safe if [they] do[] not mandate that all [their] employees be
 2 vaccinated? The answer is a definitive yes.” Bhattacharya Decl., ¶ 42. Dr. Bhattacharya outlines an
 3 alternative, and less restrictive, method that would accomplish the goal of protecting employees and
 4 patients from COVID: A robust and “inexpensive” system of testing. Bhattacharya Decl., ¶¶ 43-46.
 5 This system would be “at least as safe” as a “universal vaccine mandate with no meaningful
 6 exemptions.” *Id.* ¶ 45.

7 Dr. Bhattacharya also explains that mandating employees with natural immunity take the
 8 vaccine makes no sense. Defendant “could simply exempt from its vaccine requirement all employees
 9 who legitimately claim an exemption and have recovered from COVID . . . such employees pose at
 10 least as little-and likely less-risk of spreading [COVID] than fully vaccinated workers” who do not
 11 have natural immunity. Bhattacharya Decl., ¶ 46.

12 Finally, of course, mandating that employees who work 100% remotely take the COVID
 13 vaccine cannot possibly serve the purpose of protecting either patients or other members of Kaiser’s
 14 staff.

15 **4. Because the COVID Treatments do not Confer Immunity, Defendant’s**
 16 **Mandate Does Not Serve a Compelling Government Interest**

17 While “[s]temming the spread of COVID-19 is unquestionably a compelling interest” as noted
 18 in *Roman Catholic Diocese v. Cuomo*, ___US___, 141 S Ct 63, 67, 208 LE2d 206, 209 (2020),
 19 Defendants’ vaccine mandate will have no impact on the spread of COVID and may, in fact, help it to
 20 spread more easily. Whether or not the **symptoms** of the virus may be mitigated by the treatments is
 21 a personal interest and not a public interest any more than treatment mitigating the symptoms of a
 22 person’s heart disease or diabetes. Harvard School of Public Health analysis of 68 countries and 2,947
 23 counties across USA found “no discernable association between COVID-19 cases and levels of fully
 24 vaccinated . . . In fact the trend line suggest a marginally positive association such that countries with
 25 higher percentage of population fully vaccinated have higher COVID-19 cases.” Cole Decl., ¶ 21.
 26 Because the treatments have demonstrated to only be effective in sometimes reducing the **symptoms**
 27 of Covid and not the **transmission** of Covid, the mandate serves no compelling public interest.
 28

1 **5. Defendant’s Mandate Would Fail Even Under the Test Outlined in**
 2 **Jacobson**

3 *Jacobson* provides that a public health mandate “enacted to protect the public health” will be
 4 struck down as unconstitutional if it “has no real or substantial relation to those objects, or is, beyond
 5 all question, a plain, palpable invasion of rights secured by the fundamental law[.]” *Jacobson*, 197
 6 U.S. at 31. While the mandate in *Jacobson* was upheld, this case is distinguishable from *Jacobson* in
 7 several ways.

8 Firstly, mandating COVID vaccination “has no real or substantial relation” to protecting public
 9 health because according to all credible scientific experts the COVID vaccine neither prevents
 10 individuals from getting, nor spreading, COVID. Secondly, at issue in *Jacobson* was the 1901-1902
 11 smallpox outbreak. Ponesse Decl., ¶¶II.1, pg. 10. In Massachusetts at that time, smallpox killed
 12 approximately 30% of individuals who caught it. In contrast, the risk of death from COVID is
 13 extremely low (less than 0.5% for those of age 69 and less). Tyson Decl., ¶13. Thirdly, the vaccine
 14 that Plaintiff had been mandated to take in *Jacobson* generally conferred sterile immunity upon
 15 individuals who received it. This means that vaccinated individuals could neither catch smallpox nor
 16 transmit it to others. In contrast, the available Treatments for COVID generally do not confer sterile
 17 immunity. *Id.* at ¶14. Rather, the Treatments simply lessen the severity of symptoms for individuals
 18 who receive them. They are actually a prophylactic treatment for COVID and not a vaccine at all.
 19 Fourthly, the Treatments cripple the immune systems of some of those to whom they are administered
 20 and also create vaccine-based dependencies owing to the ongoing need for booster shots.³⁶ Cole Decl.,
 21 ¶¶10-18.

22 Finally, the plaintiff in *Jacobson* was given the option to pay a relatively modest fine rather
 23 than taking the vaccine. Plaintiffs here have no option to pay such a fine, nor even now to quit and
 24 find another job in their chosen field anywhere in the country due to Defendant’s actions. *See Roman*
 25

26 ³⁶ Fatemeh Farshadpour, *Antibody-Dependent Enhancement and the Critical Pattern of Covid-19:*
 27 *Possibilities and Considerations*, Medical Principles and Practices (April 21, 2021),
 28 DOI:10.1159/000516693.

1 *Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 71, 208 L.Ed.2d 206, 213 (2020) (“In *Jacobson*, individuals
 2 could accept the vaccine, pay the fine, or identify a basis for exemption. The imposition on Mr.
 3 *Jacobson*’s claimed right to bodily integrity, thus, was avoidable and relatively modest. It easily
 4 survived rational basis review, and might even have survived strict scrutiny, given the opt-outs
 5 available to certain objectors.”) (Justices Gorsuch and Kavanaugh concurring, internal quotations
 6 omitted).

7 **B. Plaintiffs Face Irreparable Harm if the Mandate is Not Enjoined**

8 “Generally, irreparable harm is presumed if a violation of the constitution is shown.” *Kaiser v.*
 9 *Cty. of Sacramento*, 780 F Supp 1309, 1311 (ED Cal 1991). Therefore, “[w]hen a plaintiff seeks
 10 injunctive relief based on an alleged constitutional deprivation, the two prongs of the preliminary
 11 injunction threshold merge into one [and] in order to show irreparable injury, plaintiff must show a
 12 likelihood of success on the merits.” *Page v. Cuomo*, 478 F Supp 3d 355, 364 (NDNY 2020).
 13 Accordingly, Plaintiffs’ likelihood of success on their constitutional claims also satisfies this
 14 requirement.

15 **C. The Balance of the Equities Strongly Favors Plaintiffs**

16 As set forth above, any health benefits of “vaccination” accrue only to Plaintiffs. Likewise, the
 17 risks of vaccination are borne only by Plaintiffs. Therefore, the equities strongly favor, or at least favor,
 18 Plaintiffs being able to make the decision as to whether to take the vaccine for themselves as they are
 19 the only ones directly impacted by the decision. *Ponessa Decl.*, ¶¶ I.1-I-4.

20 Given the nearly 100% chance of full recovery, some individuals might rationally choose to
 21 risk contracting COVID, thereby obtaining natural immunity rather than play Vaccine Roulette and
 22 risk suffering severe known, or yet unrepresented, side effects. *Ponessa Decl.*, ¶II.2 pg. 11, *Urso Decl.*,
 23 ¶8-10. With natural immunity, when a mutation arrives in the future, there is a much higher likelihood
 24 that a person’s “complete” immunity will protect them. Therefore, at the very least, the balance of
 25 equities favors Plaintiffs.

26 **D. The Public Interest is Best Served by the Entry of an Injunction**

27 “[A]ll injunctions vindicating constitutional rights serve the public interest[.]” *Altman v. Cty.*
 28

1 of Santa Clara, 464 F Supp 3d 1106, 1133 (ND Cal 2020), see also *Mhc Fin. v. City of San Rafael*,
2 No. C 00-3785 VRW, 2009 US Dist LEXIS 149085, at *30 (ND Cal Apr. 17, 2009). For the reasons
3 set forth above, Plaintiffs are likely to succeed on their claim that Kaiser’s Vaccine Mandate is
4 unconstitutional. Therefore, this factor cuts in Plaintiffs’ favor.

5 Even aside from this constitutional ground, the public interest is best served by entering an
6 injunction because, as set forth above, COVID vaccination makes an individual no less likely to spread
7 COVID and may make an individual more likely to spread it. Tyson Decl., ¶ 14; McCullough Decl., ¶
8 16.

9 **IV. CONCLUSION**

10 The COVID “vaccines” neither prevent “vaccinated” individuals from acquiring or
11 transmitting the virus. Therefore, they are treatments which provide health benefits and health risks to
12 the recipients. The right to refuse treatment is a fundamental right under both the US and California
13 Constitutions. Kaiser is bound to respect this fundamental right, as pertains to the US Constitution,
14 because it is a state actor. It is bound to respect this fundamental right, under the California
15 Constitution, whether or not it is a state actor. It has nonetheless mandated that all employees be
16 “vaccinated.” This mandate must be enjoined.

17
18 Dated: October 29, 2021

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19
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