

1 SIRI & GLIMSTAD LLP  
2 Aaron Siri (Pro Hac Vice filed)  
3 Email: aaron@sirillp.com  
4 Elizabeth A. Brehm (Pro Hac Vice granted)  
5 Email: ebrehm@sirillp.com  
6 200 Park Avenue  
7 Seventeenth Floor  
8 New York, NY 10166  
9 Telephone: 212-532-1091  
10 Facsimile: 646-417-5967

11 Caroline Tucker (SBN 261377)  
12 Email: ctucker@sirillp.com  
13 700 S. Flower Street, Suite 1000  
14 Los Angeles, CA 90017  
15 Telephone 213-376-3739  
16 Facsimile 646-417-5967

17 CHRIS WIEST ATTORNEY AT LAW, PLLC  
18 Chris Wiest (Pro Hac Vice granted)  
19 Email: chris@cwiestlaw.com  
20 25 Town Center Blvd, STE 104  
21 Crestview Hills, KY 41017  
22 Telephone: 513-257-1895  
23 Facsimile: 859-495-0803

24 Attorneys for Plaintiff  
25 AARON KHERIATY, M.D.

26 **UNITED STATES DISTRICT COURT**  
27 **CENTRAL DISTRICT OF CALIFORNIA**  
28 **SOUTHERN DIVISION**

AARON KHERIATY, M.D.,  
Plaintiff,  
v.

Case No. 8:21-cv-01367 JVS (KESx)

**PLAINTIFF’S REPLY**  
**MEMORANDUM IN SUPPORT OF**  
**MOTION FOR PRELIMINARY**  
**INJUNCTION**

1 THE REGENTS OF THE UNIVERSITY  
2 OF CALIFORNIA, a corporation, *et al.*,  
3 Defendants.  
4

Date: September 27, 2021  
Time: 1:30 pm  
Place: Courtroom 10C  
Judge: Hon. James V. Selna

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6  
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*Washington v. Harper*, 494 U.S. 210 (1990).....5

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497 U.S. at 278.....5

1 **PRELIMINARY STATEMENT**

2 Defendants’ opposition tries to establish their right to require vaccinations  
3 generally, but it almost totally ignores Plaintiff’s actual claim, which is for a  
4 violation of the equal protection clause. Plaintiff is not challenging whether  
5 Defendants can require vaccinations, rather he is challenging whether Defendants  
6 could constitutionally permit individuals with vaccine-induced immunity back on  
7 campus while, at the same time, refusing to permit individuals with natural immunity  
8 on campus.

9 Defendants’ admitted goal in establishing the Mandate<sup>1</sup> was to prevent the  
10 transmission of the SARS-CoV-2 virus on campus. However, the fatal flaw in  
11 Defendants’ argument is that they have shown no evidence that an individual with  
12 natural immunity from a prior infection can become reinfected and transmit the virus  
13 to others. Plaintiff established in his moving papers that there is not one documented  
14 example of such transmission, and Defendants failed to show otherwise in their  
15 opposition. On the other hand, even the CDC has admitted that vaccinated  
16 individuals can experience so-called breakthrough infections, and those infections  
17 can transmit the virus to others. Thus, Defendants’ Mandate excludes from campus  
18 the individuals who are *incapable* of spreading the virus but permits on campus  
19 individuals who *can* spread the virus. Given their stated goal, this distinction made  
20 by Defendants cannot survive rational basis review, let alone the required strict  
21 scrutiny appropriate in this case.

22 For these reasons, as explained below, the Court should grant the requested  
23 injunction.

24  
25  
26 <sup>1</sup> Capitalized terms not defined herein have the meaning given to them in Plaintiff’s  
27 moving papers.

1 **ARGUMENT**

2 **I. Plaintiff Has Standing Because an Injunction Will Redress a Discreet**  
3 **Injury**

4 Defendants argue Plaintiff lacks standing in that Plaintiff’s injury is not  
5 redressable because a California Department of Public Health (“CDPH”) Order,  
6 which covers medical workers in certain settings, also requires vaccination.<sup>2</sup> In  
7 essence, Defendants argue that the Court cannot prohibit them from depriving  
8 Plaintiff of his constitutional rights because another government entity is doing the  
9 same thing. However, “[a] plaintiff satisfies the redressability requirement when  
10 he shows that a favorable decision will relieve a discrete injury to himself. He need  
11 not show that a favorable decision will relieve his *every* injury.” *Arizona Attorneys*  
12 *for Criminal Justice v. Brnovich*, No. 20-16293, 2021 WL 3743888, at \*2 (9th Cir.  
13 Aug. 24, 2021) (quoting *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982))  
14 (granting standing to challenge a criminal code section despite a similar  
15 unchallenged procedural rule).

16 Here, Plaintiff seeks to enjoin Defendants from prohibiting him, and other  
17 naturally immune individuals, from re-entering campus. A favorable decision will  
18 permit Plaintiff to return to campus, thereby redressing a distinct injury caused by  
19 Defendants. If he then needs to challenge the CDPH Order so he can also return to  
20 the hospital, that will be a fight for another day.

21 **II. Plaintiff is Likely to Succeed on the Merits**

22 **A. Strict Scrutiny Applies to Plaintiff’s Equal Protection Claim**

23 Defendants try in their opposition to frame this case as a question about  
24 whether the government can generally mandate a vaccine, and in doing so, they rely  
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26 <sup>2</sup> [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Health-Care-Worker-Vaccine-Requirement.aspx)  
27 [State-Public-Health-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).

1 on the Supreme Court’s 116-year-old holding in *Jacobson v. Commonwealth of*  
2 *Massachusetts*, 197 U.S. 11 (1905). This argument, however, is a strawman.  
3 Plaintiff is not challenging whether Defendants can require vaccinations generally.  
4 Instead, Plaintiff is asserting a violation of equal protection because Defendants are  
5 treating differently two groups, both of which are immune to SARS-CoV-2. This  
6 basic misdirection by Plaintiffs means that nearly all of the cases they cite in favor  
7 of vaccination mandates are easily distinguishable. *E.g.*, *Jacobson*, 197 U.S. at 27  
8 (evaluating whether a town could mandate vaccinations); *Phillips v. City of New*  
9 *York*, 775 F.3d 538, 542 (2d Cir. 2015) (challenging New York’s mandatory school  
10 vaccination law); *Harris v. Univ. of Mass.*, No. 21-cv-11244-DJC, 2021 WL  
11 3848012 (D. Mass. Aug. 27, 2021) (challenging general university vaccine  
12 requirement); *Klaassen v. Trustees of Indiana Univ.*, No. 1:21-CV-238 DRL, 2021  
13 WL 3073926, at \*1 (N.D. Ind. July 18, 2021) (challenging university vaccine  
14 mandate for all students).

15 Defendants submitted the decision in *Frontline Doctors v. Wilcox*, No. 5:21-  
16 cv-01243 (C.D. Cal.), which touches on the Mandate’s requirement that naturally  
17 immune individuals receive a vaccine. (Dkt. No. 21-9.) Nevertheless, its analysis is  
18 akin to those in the above cases because it examines whether requiring vaccines for  
19 such individuals substantively violated their due process rights, and whether it  
20 created a danger because vaccination could be harmful to Plaintiffs. (*Id.* pp. 5, 8.)  
21 That decision did not touch on the question of whether there was an equal protection  
22 violation when Defendants chose to treat naturally immune individuals differently  
23 from those who are vaccinated, as is the issue here. Thus, *Wilcox* is not analogous  
24 to the instant case.

25 Defendants would prefer a general challenge to mandating vaccinations  
26 because they claim *Jacobson* requires the Court to apply rational basis review any  
27

1 time a government mandates vaccinations during a pandemic. However, Defendants  
2 ignore the Supreme Court’s holding last year in *R.C. Diocese of Brooklyn v. Cuomo*,  
3 141 S. Ct. 63 (2020) (“*Cuomo*”) where it found that “even in a pandemic, the  
4 Constitution cannot be put away and forgotten.” *Id.* at 68. As the Second circuit  
5 stated, when applying *Cuomo*:

6           ... we grant no special deference to the executive when the  
7           exercise of emergency powers infringes on constitutional  
8           rights. That is precisely what the three-tiered framework for  
9           analyzing constitutional violations is for, and courts may not  
10          defer to the Governor simply because he is addressing a  
11          matter involving science or public health.

12 *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020) (preliminarily  
13 enjoining certain covid restrictions). As Justice Gorsuch stated in his influential  
14 concurrence in *Cuomo*: “*Jacobson* didn’t seek to depart from normal legal rules  
15 during a pandemic, and it supplies no precedent for doing so.” *Cuomo*, 141 S. Ct. at  
16 70; *Culinary Studios, Inc. v. Newsom*, 517 F. Supp. 3d 1042, 1063 (E.D. Cal. 2021)  
17 (“A public health emergency does not give rise to an alternative standard of  
18 review.”). As such, an equal protection clause concerning the deprivation of a  
19 fundamental right during a pandemic is still subject to strict scrutiny analysis under  
20 the current understanding of *Jacobson*.

21           Defendants next claim that requiring an unnecessary vaccination does not  
22 concern the fundamental right to bodily integrity. This goes against decades of  
23 judicial decisions. A “forcible injection ... into a nonconsenting person’s body  
24 represents a substantial interference with that person’s liberty[.]” *Washington v.*  
25 *Harper*, 494 U.S. 210, 229 (1990). The common law baseline from which this right  
26 developed was that “even the touching of one person by another without consent and  
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1 without legal justification was a battery.” 497 U.S. at 278. Furthermore, “[t]he  
2 Ninth Circuit has reaffirmed the Court’s recognition of **fundamental rights to**  
3 **determine one’s own medical treatment**, to refuse unwanted medical treatment,  
4 and a fundamental liberty interest in medical autonomy.” *Magney v. County of*  
5 *Humboldt*, No. 17-CV-02389-HSG, 2018 WL 6460506, at \*4 (N.D. Cal. Dec. 10,  
6 2018) (internal quotations omitted, emphasis added).

7 *Jacobson*, and other decisions relied on by Defendants such as *Klaassen v.*  
8 *Trustees of Indiana Univ.*, balanced this fundamental right to bodily integrity against  
9 society’s need to prevent transmission of diseases to justify a lower standard of  
10 review when examining substantive due process challenges to compulsory  
11 vaccination requirements. *E.g.*, *Jacobson*, 197 U.S. at 34 (relying repeatedly on the  
12 logic that “vaccination strongly tends to prevent the transmission or spread of this  
13 disease”); *Klaassen*, 2021 WL 3073926 at \*24 (acknowledging the individual right  
14 to bodily integrity applied in *Cruzan*, but distinguishing it because in preventing  
15 transmission “[v]accines address a collective enemy, not just an individual one”).  
16 This same balancing of rights, however, cannot apply to the instant equal protection  
17 claim where, as discussed below, the science establishes that individuals with natural  
18 immunity cannot transmit the virus, but those with vaccine-induced immunity can  
19 transmit it. Thus, mandating that a person be injected with a vaccine when it is not  
20 necessary to combat the spread of a disease implicates only an individual’s well-  
21 established fundamental rights to bodily integrity and medical choice, which are  
22 protected under the due process clause, and requires a strict scrutiny analysis.

23 Defendants also try to argue that their policy is “not forcing vaccination” and  
24 as such cannot implicate any constitutional rights. However, Defendants never  
25 dispute Plaintiff’s argument that the state does not need to physically force an  
26 activity in order to sufficiently impinge on a person’s liberty rights; it is enough that  
27

1 the state coerces a person by conditioning a benefit on an unconstitutional  
2 requirement. (Dkt. No. 15-1 at p. 19.)

3 **B. Defendants’ Mandate Cannot Survive Strict Scrutiny**

4 Strict scrutiny requires that the regulation “must be ‘narrowly tailored’ to  
5 serve a ‘compelling’ state interest.” *Cuomo*, 141 S. Ct. at 67. As Defendants  
6 concede here, their compelling interest in mandating vaccination is in controlling the  
7 spread of SARS-CoV-2. (Dkt. No. 21 p. 2.) However, Defendants’ opposition brief  
8 fails to show how treating naturally immune individuals differently from those who  
9 are vaccinated serves that interest.

10 Despite submitting 72 pages of written expert testimony and citing to 84  
11 sources, Defendants do not present evidence to contest the following facts Plaintiff  
12 established in his moving papers:

- 13 1. That the CDC admits that vaccinated individuals can become infected with  
14 and spread the SARS-CoV-2 virus<sup>3</sup> (“non-sterilizing immunity”), but  
15 naturally immune individuals’ do not spread this virus (“sterilizing  
16 immunity”). *Compare* UC Faculty Dec. ¶¶ 11-21 and McCullough Dec.  
17 ¶¶ 13-17, 19-20 *with* Defendants’ Expert Declarations. *See also* University  
18 of California Faculty Reply Declaration, dated September 13, 2021, “UC  
19 Faculty Reply Dec.” ¶¶ 10-15, 17-26.
- 20 2. That when symptomatic cases occur, the rate among vaccinated  
21 individuals (“breakthrough cases”) is multiple fold higher than the rate  
22 among naturally immune individuals (“reinfections”). *Id.*
- 23 3. That there has never been a single documented case of a reinfection  
24 resulting in further transmission of the virus, but there have been many  
25 documented cases of breakthrough infections resulting in subsequent  
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27 <sup>3</sup> <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>.

1 transmission. *Id.*

2 These uncontested facts alone reflect that treating vaccinated and naturally  
3 immune individuals differently is irrational and does not serve the goal of protecting  
4 the UC community. The very fact that naturally immune individuals like Plaintiff  
5 have sterilizing immunity, while vaccinated individuals can still silently transmit  
6 SARS-CoV-2 should end the inquiry. UC Faculty Reply Dec. ¶¶ 9-15, 17-26. This  
7 is clear from the uncontested fact that there has never been a documented case of  
8 reinfection resulting in further transmission. UC Faculty Reply Dec. ¶¶ 21-26. Not  
9 one. Even though reinfection does rarely occur as indicated by the study from Brazil  
10 cited by Defendants, nothing in that study, or any other study, documents a  
11 reinfected individual transmitting the virus to others. *Id.*

12 Defendant’s expert, Dr. Crotty, at most claims that transmission by naturally  
13 immune individuals is “plausible,” but he does not point to a single confirmed  
14 example of it. (Dkt. No. 21 p. 6.) To satisfy strict scrutiny, “Defendants ‘must do  
15 more than simply posit the existence of the disease sought to be cured. It must  
16 demonstrate that the recited harms are real, not merely conjectural, and that the  
17 [Resolution] will in fact alleviate these harms in a direct and material  
18 way.’” *Tepeyac v. Montgomery County*, 5 F. Supp. 3d 745, 764 (D. Md. 2014)  
19 (quoting *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994))  
20 (holding that speculation that some individuals may confuse a health clinic  
21 practitioner for a doctor were not sufficient to satisfy strict scrutiny).

22 On the other hand, as the Director of the CDC stated on August 5, 2021: “what  
23 [the Covid-19 vaccines] can’t do anymore is prevent transmission,” which is why  
24 the CDC recommends vaccinated individuals wear masks. UC Faculty Reply Dec.  
25 ¶ 10. Furthermore, as the Director of the Oxford Vaccine Group explained: “Herd  
26 immunity [from vaccination alone] is not a possibility because [the Delta variant]  
27  
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1 still infects vaccinated individuals.” *Id.* Obviously, the vaccines still have value in  
2 providing personal protection and reducing symptoms, but what is clear is that the  
3 vaccines do not prevent all transmission. UC Faculty Reply Dec. ¶¶ 9-15, 17, 20.  
4 In practice, this means that if the goal is to reduce transmission, it is irrational to  
5 permit vaccinated individuals on campus who can spread the virus, while preventing  
6 naturally immune individuals like Plaintiff from returning.

7 Unable to contest the foregoing facts, Defendants argue that “[t]he extent to  
8 which infection-induced immunity provides protection against new [undiscovered]  
9 variants is also unknown.” Dkt. No. 21 pp. 6-7. First, natural immunity protects  
10 against all currently circulating variants. UC Faculty Reply Dec. ¶¶ 17-18. Second,  
11 no one can know for certain whether vaccines will protect against these unknown  
12 future variants either, the future is always uncertain. UC Faculty Reply Dec. ¶¶ 6-  
13 8, 10, 15.

14 Defendants also do not address the numerous studies in the Plaintiff’s expert  
15 affidavits that repeatedly show that natural immunity is far superior. For example,  
16 Defendants did not address the real-world data from the Cleveland Clinic study of  
17 52,238 hospital employees, which found that **none of the 1,359 unvaccinated**  
18 **previously infected individuals contracted SARS-CoV-2 despite a high**  
19 **background infection rate in the hospital.** UC Faculty Reply Dec. ¶ 18.  
20 Defendants also ignore nearly a dozen other studies with similar results. UC Faculty  
21 Reply Dec. ¶¶ 17-26. Instead, they point to a single study out of England saying,  
22 “mRNA COVID-19 vaccine immunity was somewhat better than natural immunity”  
23 (Dkt. No. 21-3 ¶ 49) but that is unreliable because this study was meant to assess the  
24 effectiveness of the Pfizer, Moderna, and AstraZeneca vaccines against new SARS-  
25 CoV-2 PCR-positive tests (not against natural infection) and states that  
26 “[e]ffectiveness of two doses remains at least as great as protection afforded by prior  
27

1 natural infection.” UC Faculty Reply Dec. ¶ 25. At the same time, Defendants  
2 ignore the official UK health authority data which found that, as of September 3,  
3 2021, among all UK residents there is a probable reinfection rate of 0.025% but a  
4 vaccine breakthrough rate of 23%. UC Faculty Reply Dec. ¶ 26.

5 Defendants try to avoid these issues by claiming that because antibody tests  
6 are supposedly unreliable, it is not feasible to exclude individuals with natural  
7 immunity. However, there are other tests to show immunity, such as T-cell tests.  
8 Aaron Kheriaty Reply Dec. ¶ 30. Nevertheless, that is not even the issue here  
9 because when Plaintiff contracted SARS-CoV-2, like many other infected  
10 individuals, a PCR test confirmed his infection and he experienced many of the  
11 common symptoms of COVID-19, including loss of taste and smell. Dkt. No 15-2  
12 at ¶ 2. Thus, there is no question Plaintiff was infected and recovered, and there are  
13 far more narrow ways that Defendants could choose to determine who has natural  
14 immunity. Therefore, simply excluding everyone without a vaccine is overly  
15 inclusive and as such cannot satisfy strict scrutiny.

### 16 **C. The Mandate Cannot Satisfy a Rational Basis Review**

17 Even though the Court should apply strict scrutiny, given the foregoing  
18 uncontested facts, the Mandate cannot survive rational basis review either. In the  
19 equal protection context, a “Defendants’ ‘rel[iance] on a classification...whose  
20 relationship to an asserted goal...is so attenuated as to render the distinction arbitrary  
21 or irrational’ is not likely to withstand rational basis review.” *Arizona Dream Act*  
22 *Coalition v. Brewer*, 757 F.3d 1053, 1066 (9th Cir. 2014) (quoting *City of Cleburne,*  
23 *Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985)).

24 Here, Defendants classified two similarly situated groups differently and  
25 permitted individuals with vaccine-induced immunity to reenter campus but  
26 prevented those with natural immunity from reentering. The goal in enforcing this  
27

1 distinction was supposedly to prevent the spread of SARS-CoV-2 on campus. (Dkt.  
2 No. 21 p. 2.) However, as shown, even Defendants’ five experts cannot provide a  
3 single documented example of a naturally immune person who has transmitted the  
4 virus to others. UC Faculty Reply Dec. ¶¶ 21-26. Likewise, the science shows that  
5 natural immunity is at least as good, and in fact better, than vaccine-induced  
6 immunity.<sup>4</sup> UC Faculty Reply Dec. ¶¶ 16-26. Thus, there is no relationship between  
7 Defendants’ chosen classification and their legitimate goal, rendering the  
8 classification irrational.

9 Defendants assert that because this classification concerns medical and  
10 scientific issues, the Court should abstain from questioning them during a pandemic.  
11 However, following *Cuomo*, “courts may not defer to the [state] simply because [it]  
12 is addressing a matter involving science or public health,” even during a pandemic.  
13 *Agudath Israel of Am.*, 983 F.3d at 635. Doing so would render the courts toothless  
14 any time there was a health emergency, and that is exactly what the decision in  
15 *Cuomo* cautioned against. *Id.*

### 16 **III. Plaintiff will Suffer Irreparable Harm in Absence of an Injunction**

17 Defendants misrepresent Plaintiff’s claims of irreparable harm by stating that  
18 he claims, “he alone will be irreparably harmed” by the Mandate. Plaintiff brought  
19 this case on behalf of himself and all others similarly situated. Dkt. No. 1 at p. 28.  
20 Thus, the irreparable harm is not just to himself, but to all those other individuals  
21 who have natural immunity but are excluded from the UC campuses.

22 Defendants try to simply swat away the fact that a loss of constitutional  
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24 <sup>4</sup> Defendants posit that vaccinating naturally immune individuals grants them a form  
25 of “hybrid” immunity. However, they fail to explain how this “hybrid” immunity is  
26 necessary to achieve the goal of preventing the spread of the virus, when they cannot  
27 even show a single example of a non-hybrid naturally immune person who has  
28 transmitted the virus to others.

1 freedoms constitutes irreparable harm by claiming that no constitutional protection  
2 is at issue here. (Dkt. 15-1 pp. 23-24.) However, even in *Klaassen*, one of the  
3 primary cases Defendants rely on, the court acknowledged that if there is “a  
4 constitutional harm, the law presumes irreparable harm” and that mandating a  
5 vaccination creates just such a constitutional harm to the right of bodily integrity.  
6 2021 WL 3073926 at \*41.

7 **IV. The Balance of the Equities Tips in Favor of Plaintiff**

8 The balance of the equities tips in favor of Plaintiff and all others with natural  
9 immunity. As noted, naturally immune individuals are less likely to transmit the  
10 virus than are those with vaccine-induced immunity. On the other hand, the harm to  
11 Plaintiff and those like him is inevitable if the injunction is denied, which outweighs  
12 the non-existent risk Defendants fear. Defendants raise the issue of patient well-  
13 being to argue that the injunction should not be granted. However, Patient well-  
14 being is foremost in Plaintiff’s mind as a medical ethicist. Kheriaty Dec. ¶¶ 7-9,  
15 Kheriaty Reply Dec. ¶¶ 5-8. Plaintiff treats psychiatric patients where relationships  
16 are important and another care provider could not easily step in to take his place  
17 without disrupting patient care. Kheriaty Dec. ¶¶5-7, Kheriaty Dec. ¶¶7, 9.  
18 Moreover, as noted, the requested relief goes beyond just Plaintiff, and in fact applies  
19 to “any individual who has been infected with SARS-CoV-2 and recovered.” Dkt.  
20 No 15-5 at 2. Thus, in evaluating the harm, the court must also look to the  
21 disruptions in those peoples’ lives, and in the lives of the other patients or individuals  
22 that those people interact with on campus.

1 **V. CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully requests the Court issue a  
3 preliminary injunction enjoining and prohibiting Defendants from enforcing the  
4 Mandate against naturally immune individuals.

5  
6 Dated: September 13, 2021

SIRI & GLIMSTAD LLP

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8 By: /s/ Elizabeth A. Brehm  
9 Aaron Siri (Pro Hac Vice filed)  
10 Elizabeth Brehm (Pro Hac Vice granted)  
11 Caroline Tucker

12 CHRIS WIEST ATTORNEY AT LAW, PLLC  
13 Chris Wiest (Pro Hac Vice granted)

14 Attorneys for Plaintiff  
15 AARON KHERIATY, M.D.  
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