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15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
16 **FOR THE COUNTY OF ALAMEDA**

17 CINDY KIEL, J.D., an Executive Associate  
18 Vice Chancellor at UC Davis, MCKENNA  
19 HENDRICKS, a UC Santa Barbara student,  
20 EDGAR DE GRACIA, a UCLA student, and  
21 LELAND VANDERPOEL, an employee at the  
22 Fresno satellite extension of the UCSF Medical  
23 Education Program, and FRANCES OLSEN,  
24 Professor of Law at UCLA,

25 Plaintiffs,

26 vs.

27 THE REGENTS OF THE UNIVERSITY OF  
28 CALIFORNIA, a Corporation, and MICHAEL  
V. DRAKE, in his official capacity as President  
of the UNIVERSITY OF CALIFORNIA,

Defendants.

**CASE NO. HG 20072843**

**PLAINTIFFS' NOTICE OF MOTION AND  
MOTION FOR PRELIMINARY  
INJUNCTION; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

**By Fax**

**UNLIMITED CIVIL JURISDICTION**

**DEPARTMENT 511**

**Date: October 14, 2020**

**Time: 1:30 PM**

**Reservation ID- 2206283**

**Action Filed: August 27, 2020**

**Trial Date: None Set**

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**TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE THAT** on October 14, 2020 at 1:30 PM or as soon thereafter as counsel may be heard in Dept. 511 of the above-captioned Court located at Hayward Hall of Justice, 24405 Amador Street, Hayward, CA 94544, Plaintiffs will and hereby do move for a preliminary injunction ordering Defendants Regents of the University of California and Michael V. Drake (in his official capacity as President of the University of California) to cease enforcement of the Executive Order issued by former University of California President Janet Napolitano dated July 31, 2020 mandating the flu vaccine for all faculty, staff, other employees, and all students (the “EO”) until such time as there is a final determination of Plaintiffs’ request for a permanent injunction.

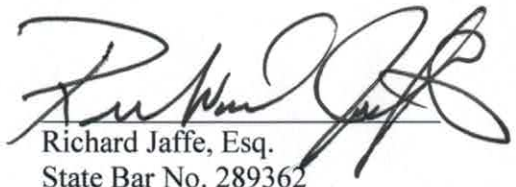
This motion is made pursuant to the provisions of California Code of Civil Procedure sections 526-27, and Cal. Rule of Court 3.1150.

Good cause exists for the requested Preliminary Injunction. As demonstrated in detail in the accompanying Memorandum of Points and Authorities, and the supporting expert declarations of Peter Gotzsche, MD, UCLA Medical School Professor Laszlo Boros, MD, UCI Associate Professor in the Population Health and Disease Prevention Program, Andrew Noymer, PhD, University of Maryland Associate Professor in the Pharmaceutical Health Services Research Department Peter Doshi, and Oxford University Senior Clinical Tutor Tom Jefferson, MD and the Supporting Plaintiffs from Executive Associate Vice Chancellor of Academic Research Cindy Kiel, UCLA law professor Frances Olsen, UCSF Medical Education Program, Leland Vanderpoel, UC Santa Barbara student McKenna Hendricks and UCLA Student Edgar de Gracia, and the papers and pleadings on file and any other such evidence as may be presented at the time of the hearing, the EO is *ultra vires* as it was made without the bylaw-required formal consultative process with the Faculty Senate. Moreover, the EO unconstitutionally interferes with the Plaintiffs’ and all UC students’ and employees’ rights to privacy and bodily integrity under the federal and state constitutions because the purported justification of mandating the flu vaccine to free up hospital beds if there is a large flu outbreak and if there is a large second wave of the pandemic and if there is a shortage of hospital beds, is collateral at best, and against the overwhelming best available evidence that the flu vaccine does not reduce hospitalization, and no court in this country has ever approved such a widespread

1 adult vaccine mandate for a reason not directly related to the cause of the public health crises.  
2 Finally, the EO violates the student Plaintiffs' equal protection rights because it interferes with their  
3 fundamental religious rights insofar as they are not offered the religious exemption offered to UC  
4 employees and their fundamental rights to equal protection of the laws because remote teaching and  
5 remote work may be subject to an exception to the EO's mandate, but remote learning by students is  
6 not.

7 //  
8 //

9 DATED: September 17, 2020

10 

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

This Preliminary Injunction Motion seeks to preserve the status quo by preventing the enforcement of a recent University of California Executive Order requiring all 510,000 students, faculty and staff to obtain the flu vaccine by November 1, 2020 as a condition of continued employment and continued school enrollment for students.<sup>1</sup>

The EO was issued in violation of the University’s bylaws and other governance documents requiring a formal Faculty Senate consultative process, which did not take place, and it is therefore *ultra vires* and subject to a permanent and preliminary injunction.

The stated rationale of the Executive Order is that if all members of the UC community receive a flu shot, it might free up some hospital beds, (and on the implied future/conditional possibilities), if there is a bad flu season, and if there is a bad second wave of the COVID-19 pandemic, and if California were to experience a shortage of beds, and further based on the tacit but unlikely and unsubstantiated assumption that giving the flu vaccine to the 510,000 members of the UC community will have a meaningful effect on the hospital bed needs for 40 million Californians.

Furthermore, the EO’s rationale is based on a scientifically disproven notion that mass flu vaccination decreases hospital bed utilization. A recently published analysis of 52 flu *randomized* clinical studies involving 80,000 patients has demonstrated that the flu shot has no significant effect of flu hospitalization.<sup>2</sup> Further, California Department of Public Health (“CDPH”) data about hospital bed usage during high flu seasons, along with data on COVID-19 first wave hospitalizations suggest that the likelihood of California running out of hospital beds is remote, at best. Therefore, the stated rationale of the EO is both disproven and not rationally connected to any realistic prediction of future hospital bed needs.

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<sup>1</sup> A copy of the Executive Order which is the basis of this lawsuit is attached to the Complaint and the First Amended Complaint as Exhibit “A” and is hereby sometimes referred to as the “EO.”

<sup>2</sup> See section II.C *infra* and the accompanying declaration of Peter Gøtzsche MD.

1 Core constitutional principles in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) establish  
2 that unless a vaccine mandate (or any government mandate that infringes personal liberty and bodily  
3 integrity) has a *real and substantial* connection to the public health crises, it will be struck down.  
4 The ‘free up hospital beds’ rationale was recently used by Alabama to justify restricting another  
5 fundamental right. However, two levels of federal courts rejected it and preliminarily enjoined a  
6 government order restricting a privacy right (the right to access to an abortion) in part based on  
7 *Jacobson*, because like here, it was completely speculative and factually unsupported.<sup>3</sup> And just  
8 three days ago, a Pennsylvania District Court struck down the Governor’s stay at home order,  
9 finding the order unprecedented and unconstitutional. (Copy attached to the Memorandum). This  
10 decision offers strong support for the Court’s granting a preliminary injunction in this case and  
11 shows that courts do and must protect sacred liberty and privacy rights.

12 Further, only UC employees were offered an “accommodation” from the mandate based on  
13 religious beliefs (and disability status). On its face, the EO denies the student Plaintiffs (and all UC  
14 students) their First Amendment fundamental right to religious free exercise. It fails strict scrutiny  
15 since requiring a flu shot is obviously not the least restrictive means available to further the  
16 University’s public health goals since a religious accommodation is available to employees. The  
17 equal protection violation and the fundamental unfairness of the EO to students is dramatically  
18 increased by the recent change waiving the mandate for remote teaching and working, but not for  
19 remote learning. Finally, the EO also places an unfair and disproportionate burden on the students  
20 compared to the UC employees, and compared to the 49 million plus other Californians who do not  
21 share in this sacrifice of privacy and bodily integrity for the sake of the collateral and speculative  
22 ‘free up the hospital beds’ rationale.<sup>4</sup>

23 Based on the legal analysis and as a matter of fundamental fairness, the Court should enter a  
24 preliminary injunction order to preserve the status quo pending a trial of the permanent injunction.

25 \_\_\_\_\_  
26 <sup>3</sup> *Robinson v Marshall*, Civ: Action No 2:19cv365, April 12, 2020 (District Court); *Robinson v.*  
27 *Attorney Gen.* No 20-11401-B, April 23, 2020) (Eleventh Circuit) discussed in section III.B.2 *infra*.  
(copies attached to this Memorandum).

28 <sup>4</sup> This Preliminary Injunction is based on the First Amended Complaint which is being filed and served  
on the Defendants with these motion papers.

1           **II.     STATEMENT OF FACTS**

2           On July 31, 2020, the last official day of her tenure, now former president Janet Napolitano  
3 signed an executive order requiring all 280,000 UC students and all 230,000 faculty and staff to  
4 receive a flu vaccine by November 1, 2020 (with certain accommodations discussed *infra.*).<sup>5</sup>

5           The Plaintiffs in this case are employees and students at various UC campuses directly  
6 impacted by the EO as they will be required to get a flu shot. As set forth in their accompanying  
7 declarations, all of them are opposed to taking a flu shot.

8           **A.     The Stated Justification for The Executive Order**

9           The justification for mandating the flu vaccine is stated in the EO “Background and  
10 Findings” is that 1. there are a few described studies which suggest that the flu vaccine reduces flu  
11 hospitalizations and the level of flu sickness in some groups like seniors and pregnant women, and 2.  
12 mandating a flu vaccine on the entire UC community might free up hospital beds if there were to be  
13 a hospital bed shortage during a second wave of the coronavirus pandemic.

14           **B.     Changes Released to the EO**

15           Since the EO was released on August 7, 2020, the UC administration announced that faculty  
16 and staff who can teach and work entirely remotely do not have to take the flu shot. However, all  
17 students even those attending class remotely still have to comply with the mandate and get the flu  
18 shot. (Declaration of McKenna Hendrick).<sup>6</sup> Whether a faculty member or staff member is allowed to  
19 work remotely may be granted or withdrawn in the discretion of their superior, which discretion is  
20 subject to change at any moment.

21           **C.     Best Evidence Indicates that the Flu Shot Does Not Reduce Flu Hospitalizations**

22           As set forth in the Declaration of Peter Gøtzsche, a 2018 review of 52 randomized clinical  
23 studies involving 80,000 patients demonstrated that the flu vaccine did not reduce hospital bed  
24

25 \_\_\_\_\_  
26 <sup>5</sup> For reasons unknown to the Plaintiffs, the EO was not released to the UC community or the public  
until August 7, 2020.

27 <sup>6</sup> The change makes the equal protection violation even more glaring and exacerbates the  
28 fundamental unfairness of the EO to UC students.



1 usage. (Gøtzsche Dec. page 4, para. 9 to page 5 ln 15).<sup>7</sup> Dr. Gøtzsche states that the “case-control  
2 studies” used to justify the EO are notoriously unreliable and are inconsistent with the large number  
3 of fully controlled studies which showed no reduction in flu hospitalization from the flu vaccine. He  
4 concludes that their use in the EO as a justification for the vaccine mandate amounts to “scientific  
5 misconduct” according the definition established by the US Office of Research Integrity (*Id.* at page  
6 4 para. 12).

7 **D. The Feared Hospital Bed Shortage is Speculative and Contrary to the Best**  
8 **Available Data.**

9 According to the most recent CDPH data on hospital beds usage, the flu hospitalization rates  
10 during the 2016–2017 and 2017–2018 influenza seasons were 12.2 and 20.4 influenza  
11 hospitalizations per 100,000, respectively), which did not overburden hospitals. Assuming worst  
12 case COVID-19 numbers (using data to date), California has not exceeded more than 10  
13 Hospitalizations per 100,000/week, since March 7<sup>th</sup> through August 22<sup>nd</sup>.<sup>8</sup>

14 According to Kaiser Permanente, there are about 180 hospital beds per 100,000 California  
15 residents.<sup>9</sup> Therefore, even at a peak flu rate, plus the average COVID-19 hospital rate means that  
16 hospital bed utilization is much less than the 180-hospital bed availability per 100,000. Therefore,  
17 the EO’s stated rationale of the need to free up hospital beds in case there is a hospital bed shortage  
18 is extremely unlikely based on CDPH published hospital bed utilization rates.

19 \_\_\_\_\_  
20 <sup>7</sup> Included in this motion are the Declarations of Thomas Jefferson, MD who was a lead investigator  
21 of this study., and the Declaration of Peter Doshi, PhD, also a Cochrane Collaborator, who, like every  
22 expert proffered, strongly disagrees with an influenza vaccine mandate and explains how it is not  
23 effective and could cause more harm than good during this pandemic.

24 <sup>8</sup> CDPH (2020). Influenza Surveillance Program. *Flu Reports*.  
25 <https://www.cdph.ca.gov/Programs/CID/DCDC/pages/immunization/flu-reports.aspx>;  
26 CDC (2020). Laboratory-Confirmed COVID-19-Associated Hospitalizations, Preliminary  
27 cumulative rates as of Aug 15, 2020. *Covid-Net*.  
28 [https://gis.cdc.gov/grasp/COVIDNet/COVID19\\_3.html](https://gis.cdc.gov/grasp/COVIDNet/COVID19_3.html)

<sup>9</sup> Kaiser Family Foundation (2020). Hospital Beds per 1,000 Population by Ownership Type. *State  
Health Facts*. <https://www.kff.org/other/state-indicator/beds-by-ownership/?currentTimeframe=0&selectedRows=%7B%22states%22:%7B%22california%22:%7B%7D%7D%7D&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>

1           **E. There is Suggestive Evidence that the Flu Vaccine Could Cause More Harm**  
2           **during this Pandemic.**

3           A Department of Defense observational study published in early January 2020, is the only  
4 actual scientific evidence currently available about the relationship between the flu vaccine and  
5 coronavirus susceptibility. Here are the first words of the abstract: “Purpose: Receiving the  
6 influenza vaccine may increase the risk of other respiratory viruses, a phenomenon known as virus  
7 interference.”<sup>10</sup>

8           The study compared respiratory virus status among DOD personnel based on their influenza  
9 vaccination status. Here is the author’s conclusion: “Receipt of influenza vaccination was not  
10 associated with virus interference among our population. Examining virus interference by specific  
11 respiratory viruses showed mixed results. **Vaccine derived virus interference was significantly**  
12 **associated with coronavirus and human metapneumovirus;** however, significant protection with  
13 vaccination as associated not only with most influenza viruses, but also parainfluenza, RSV, and  
14 non-influenza virus coinfections.” [emphasis added] *Id.*<sup>11</sup>

15           The accompanying Declarations of (a) Peter Gøtzsche MD, (b) UCLA Professor of Pediatrics  
16 Laszlo Boros, (c) University of Maryland Associate Professor (and Associate editor of the BMJ)  
17 Peter Doshi PhD, and (d) UC Irvine epidemiologist Andrew Noymer all agree that forcing the UC  
18 community to take the flu shot is a bad idea, poor public policy, and could cause increased harm due  
19 to viral interference. All agree that the influenza vaccine can negatively interfere with the immune  
20 system (*see e.g.*, Gøtzsche Dec. page 5 para 13), has serious potential for harm (*Id.* at page 5 para. 13  
21 to page 8, ln. 4), the flu vaccine has little practical benefit for individuals (and has to be administered  
22 to 71 adults to prevent 1 case of the flu, *Id.* page 4 para 9), and that the package insert of the flu

23 \_\_\_\_\_  
24 <sup>10</sup> Wolff, G. (2020). Influenza vaccination and respiratory virus interference among Department of  
25 Defense personnel during the 2017-2018 influenza season. *Vaccine*;38(2):350-354. [doi:  
10.1016/j.vaccine.2019.10.005](https://doi.org/10.1016/j.vaccine.2019.10.005)

26 <sup>11</sup> This study was published in early January 2020, Recently, the author wrote that the positive virus  
27 interference results (36% increased risk/association between the flu vaccine and coronavirus) might  
28 not apply to the “novel” pandemic coronavirus.” Wolff, G (2020). Letter to the Editor.  
*Vaccine*;38(30):4651. [doi.org/10.1016/j.vaccine.2020.04.016](https://doi.org/10.1016/j.vaccine.2020.04.016).

1 vaccine shows that although adverse events might be relatively rare, they are and can cause serious  
2 adverse events (*Id.* at page 6 para 14). Dr. Gøtzsche also opines that the EO is “deeply unethical,  
3 violates basic human rights, and is based on no reliable evidence whatsoever. In fact, the best  
4 evidence we have tells us that her [the former UC President’s] forced vaccination scheme is highly  
5 likely to be harmful.” *Id.* at page 7 para. 18).

6 Dr. Doshi makes the important point that the CDC is knowingly overselling the effectiveness  
7 and benefits of the influenza vaccine (Doshi Dec at paras. 8-9). Dr. Noymer points that that the  
8 influenza vaccine is not particularly effective in general, but will likely be less so due to the  
9 pandemic (Noymer Dec. page paras 5-6).

10 Dr. Boros explains viral interference in more biological perspective as the flu vaccine  
11 causing as a loss of balance resulting in acute inflammation (sympathetic-parasympathetic,  
12 anabolic/catabolic, wear and tear), that is the protective mechanism for maintenance of health. Dr.  
13 Boros gives the cellular mechanism of action about how viral interference will likely cause an  
14 increase in pandemic coronavirus cases, and the increased risk of autoimmune disease from the  
15 vaccine (Boros Dec., especially paras. 5, 22-23).

16 In short, all five experts, including two UC medical and health professors, and three of the  
17 world’s leading experts on the medical literature on vaccines conclude this mandate is bad health  
18 policy and in a time of a pandemic may cause more or much more harm than good, and that the  
19 stated justification of ‘free up hospital beds’ is inconsistent with the best available evidence, which  
20 consist of 52 randomized clinical trials.

### 21 **III. ARGUMENT**

#### 22 **A. The Legal Standard**

23 Injunctions against public officials for their official actions are available (1) where the  
24 statute is unconstitutional and there is a showing of irreparable injury, (2) where the statute is valid  
25 but is enforced in an unconstitutional manner, (3) where the statute is valid but, as construed, does  
26 not apply to the plaintiff; and (4) where the public official's action exceeds his or her authority.”  
27 *Alfaro v. Terhune*, 98 Cal.App.4th 492, 501 (2002). This Preliminary Injunction is based upon the  
28 first and fourth exceptions.

1 Plaintiffs are entitled to a preliminary injunction if they show that (1) they are “likely to  
2 prevail on the merits at trial” and (2) the interim harm they will suffer “if an injunction is denied is  
3 greater than the interim harm the opposing party is likely to suffer if the injunction is issued.”  
4 *Integrated Dynamic Sols., Inc. v. VitaVet Labs, Inc.*, 6 Cal. App. 5th 1178, 1183 (2016) (citation and  
5 alterations omitted). Courts apply a sliding scale approach to these factors: “the greater the plaintiff’s  
6 showing on one, the less must be shown on the other.” *Butt v. State of California*, 4 Cal. 4th 668, 678  
7 (1992).

8 **B. Likelihood of Success on the Merits**

9 **1. The EO is an *Ultra Vires* act as Alleged in the First Cause of Action.**

10 State schools are required to act within their bylaws and charters, or else their activities are  
11 voidable as *ultra vires*. See e.g., *Compton Coll. Fed'n of Teachers v. Compton Cmty. Coll. Dist.*, 132  
12 Cal. App. 3d 704, 714 (1982); *Waugh v. Bd. of Trs.*, 237 U.S. 589, 594 (1915); and the just released  
13 *Univ. of Tex. v. Univ. of Tex.* (Court of Appeals of Texas, Third District, Austin Sep 04, 2020, 2020  
14 Tex. App. LEXIS 725) (upholding student’s *ultra vires* challenge to public university’s attempt to  
15 discipline the student outside the proper procedures outlined by its authority).

16 The stated authority for issuing the EO is set out as “the authority vested in me by Bylaw,  
17 30, Bylaw 22.1, Regents Policy 1500 and Standing Order 100.4(ee) . . . .” (EO at page 2, Exhibit  
18 “A” attached to the Complaint and First Amended Complaint). However, none of these documents  
19 justify the unilateral action taken by the former president.

20 To the contrary, the bylaws specifically provide that *inter alia*, the president is “expected to  
21 consult with the Academic Senate, consistent with the principles of shared governance, on **issues of**  
22 **significance to the general welfare and conduct of the faculty.**” (Bylaw 30, emphasis added).

23 There is nothing in the text of the EO which states or implies that the former president  
24 consulted with or received any formal input from the University’s faculty Senate, and the  
25 Declaration of Cindy Kiel establishes that there was no such formal consultative process (See Kiel  
26 Declaration at page 5, para. 17).

1 The other cited governance documents either refer back to bylaw 30<sup>12</sup> or do not expressly  
2 grant the President to make such a momentous unprecedented decision on her own.<sup>13</sup>

3 Based on the expert declarations (Götzsche, Doshi, Jefferson, Noymer, and Boros) the risks  
4 and dangers of the flu vaccine during a non-flu pandemic, the Court must conclude that mandating  
5 the flu vaccine for the entire 510,000 members of the UC community is an issue of “significance to  
6 the general welfare and conduct of the faculty”, especially since the flu shot is not directly related to  
7 the pandemic, (2) has resulted in the payment of almost \$1 billion in federal compensation,<sup>14</sup> (3) and  
8 has been shown in the Declarations to increase the risk of harm from some coronaviruses, (4) has  
9 been demonstrated to be ineffective in over half of its recipients, and (5) can actually spread the flu.

10 If the flu mandate is an issue of “significance to the general welfare and conduct of the  
11 faculty” then the EO was issued in violation of the bylaws and it is *ipso facto ultra vires*<sup>15</sup> and  
12 should be declared null and void by this Court under established California law. *Alfaro v. Terhune*,  
13 *supra*, 98 Cal.App.4th at 501.<sup>16</sup>

## 14 **2. The EO Violates the Fifth and Fourteenth Amendments (Second Cause of** 15 **Action).**

16 Every person has an undeniable right of privacy, which includes the right to control his or her  
17 own body and be free of forced medical interventions. *See e.g., Cruzan v. Director, Missouri Dept*

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18 <sup>12</sup> *e.g.* bylaw 22.1, and Regents Policy Statement 1500 “The President is expected to direct the  
19 management and administration of the University of California System consistent with the Bylaws...”

20 <sup>13</sup> Standing Order 100.4 (ee) sets out several dozen specific things the President is permitted to do,  
21 like to award degrees, hire and fire staff and set compensation, modify budget estimates and many  
22 very specific tasks. This Standing Order does not appear to permit a president to mandate a flu  
vaccine during a coronavirus pandemic.

23 <sup>14</sup> United States Health & Human Services (2020). Vaccine Injury Compensation Data. *HRSA*.  
<https://www.hrsa.gov/vaccine-compensation/data/index.html>

24 <sup>15</sup> The former President’s failure to comply with the Bylaws, to consult the faculty before issuing the  
25 EO, and to so note such consultation in the EO is also a breach of the shared governance norms  
deeply embedded in the UC community.

26 <sup>16</sup> Even if the EO is not *ultra vires*, it should still be overturned under *Scharf v. Regents of The*  
27 *University of California*, 234 Cal.App.3d 1393, 1402-1404 (1991) because it is a matter of statewide  
28 concern which requires a statewide resolution.

1 of *Health*, 497 US 261, 279 (1990). But like all rights, privacy is not absolute and must be balanced  
2 against other important rights.

3 In the area of mandatory vaccination, the balancing test of these competing rights was first  
4 set out in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which set out a clear red line on when a  
5 vaccine mandate *must* be struck down, warning the government that "if a statute purporting to have  
6 been enacted to protect the public health, the public morals, or the public safety, has no real or  
7 substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights  
8 secured by the fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the  
9 Constitution."

10 On its face, the proffered justification of the mandate of freeing up hospital beds has no  
11 "real... relation" to the pandemic because it is based on at least three speculations about what will  
12 happen in the future. The mandate has no *substantial* relation to the pandemic since there is no basis  
13 in fact to conclude or even predict that there will be a hospital bed shortage, and more importantly,  
14 *the best available scientific evidence has disproven that alleged rationale, that the flu shot will*  
15 *reduce hospital bed usage.*

16 As indicated, the UC's 'free up the hospital beds' justification was recently rejected by two  
17 levels of Alabama federal courts when it was used by the state to justify the denial of another  
18 fundamental right (abortion). The district court rejected the hospital bed rationale because there was  
19 no proof, and preliminarily enjoined the state from enforcing the restrictive order. *Robinson v*  
20 *Marshall*, Civ: Action No 2:19cv365, April 12, 2020 order). The State moved for a stay, but in a  
21 lengthy opinion, the Eleventh Circuit denied the request citing (as did the District Court) *Jacobson's*  
22 requirement of a real and substantial relation. *Robinson v. Attorney Gen.* No 20-11401-B, April 23,  
23 2020). (Copies of both cases are attached to this Memorandum). These opinions are four-square on  
24 point.

25 Beyond the real and substantial relation test, *Jacobson* may also stand for the proposition that  
26 public health regulations require five elements to be constitutional: (1) public health necessity, (2)  
27  
28

1 reasonable means, (3) proportionality, (4) harm avoidance, and (5) non-discrimination. The  
2 executive order issued by the former President meets none of these required elements.<sup>17</sup>

3 On September 14, 2020, a Pennsylvania District court just struck down the Governor’s stay  
4 at home order, discussing the *Jacobson* rationale (Copy attached to this Memorandum). While the  
5 analysis is different, that decision offers strong support for voiding this UC action which so  
6 obviously tramples on the rights of Plaintiffs and all UC community members and is so potentially  
7 dangerous given lack of evidence showing the safety of the influenza vaccine during a novel  
8 coronavirus pandemic. The Court should conclude that Plaintiffs have met their burden of proving a  
9 likelihood of success on the Second Cause of Action.

10 **3. The EO violates State Constitutional Privacy Protections (The Third Cause**  
11 **of Action).**

12 Plaintiffs are likely to succeed on the third cause of action which parallel’s the federal  
13 constitutional second cause of action. The California test is:

14 “The evaluation of privacy claims under our state Constitution requires (1) the  
15 identification of a specific, legally protected privacy interest, (2) a determination whether  
16 there is a reasonable expectation of privacy in the circumstances, (3) an assessment of the  
17 extent and gravity of the alleged invasion of privacy, and (4) a balancing of the invasion  
18 against legitimate and competing interests. (*Hill v. National Collegiate Athletic Assn.*  
19 *(1994) 7 Cal.4th 1, 35-39, 26 Cal.Rptr .2d 834, 865 P.2d 633.*) **The key element in this**  
20 **process is the weighing and balancing of the justification for the conduct in question**  
21 **against the intrusion on privacy resulting from the conduct whenever a genuine,**  
22 **nontrivial invasion of privacy is shown.** (*Loder v. City of Glendale (1997) 14 Cal.4th*  
23 *846, 893, 59 Cal.Rptr.2d 696, 927 P.2d 1200.*)

24 *Alfaro v. Terhune, supra*, 98 Cal.App.4th at 509 (2002) (emphasis added)

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25 <sup>17</sup> There is no public health necessity for a flu vaccine during this COVID-19 pandemic as  
26 previously demonstrated. The means are not reasonable. There is no proportionality in singling out  
27 and denying the privacy and bodily integrity rights of 510,000 UC affiliated people from the 39  
28 million other Californians who do not have to take the shot. There is not harm avoidance, and in fact  
there is suggestive evidence that the flu shot will increase novel coronavirus infections. Finally, the  
EO discriminates against the UC students by not offering a religious accommodation and  
discriminates against the 510,000-member community because the overwhelming majority of the  
rest of the State’s residents do not have to take the shot.

1 In 1974, an amendment to the California Constitution elevated the right of privacy to an  
2 "inalienable right." Cal. Const. Article I, §1, *Lantz v. Superior Court* (1994) 28 Cal. App. 4th 1839,  
3 1848. See also, California Constitution, Article I, §7, especially "A person may not be deprived of  
4 life, liberty, or property without due process of law or denied equal protection of the laws" and  
5 "maximizing the educational opportunities and protecting the health and safety of all public-school  
6 pupils".

7 The California courts recognize the "relatively certain principle that a competent adult has  
8 the right to refuse medical treatment, even treatment necessary to sustain life." *Conservatorship of*  
9 *Wendland* (2001) 26 Cal.4th 519, 530 and the California Constitution, Article I, §1 "guarantee[ing]  
10 to the individual the freedom to choose to reject, or refuse to consent to, intrusions of his bodily  
11 integrity." *Id.* at pp. 531-532; see also *Riese v. St. Mary's Hospital & Medical Center* (1987) 209  
12 Cal.App.3d 1303, 1317. This right is grounded in both state constitutional and common law,  
13 together with the right of privacy guaranteed.

14 In balancing privacy rights against competing public health rights, the Court must come  
15 down in favor of privacy because 1. There is no proven direct benefit the flu shot has on COVID-19  
16 2. There is evidence it may increase the risk of contracting the pandemic coronavirus and cause harm  
17 to many in the UC community 3. The best available evidence demonstrates that the flu shot does not  
18 reduce hospital bed usage, which is the stated justification for the mandate, and 4. the best available  
19 public health data indicates that it is extremely unlikely there will be a hospital bed shortage this flu  
20 season during a second wave, if it occurs. Thus, the non-existent purported benefit of forcing  
21 510,000 to get a flu shot is collateral, based on multiple layers of speculation, and the factual basis is  
22 contradicted by the best available information from the CDPH and the randomized clinical trials  
23 evaluating the influenza vaccine.

24 In this country, adults have a reasonable expectancy of privacy that they will not have to  
25 submit to forcible vaccination as a condition of employment or to attend university, and certainly not  
26 for a vaccine that is unrelated to the pandemic. Therefore, based on a state constitutional analysis, it  
27 is likely that Court will ultimately rule that the EO violates Plaintiffs' privacy rights and rights of  
28 bodily integrity conferred by the California Constitution.



1                                   **4. The EO Violates The Federal Equal Protection Rights of The Students Based**  
2                                   **on Not Being Provided with A Religious Accommodation in The Mandatory**  
3                                   **Flu Shot Exemption (The Fourth Cause of Action).**

4                   The University of California is a state-created, state-financed and state-run public trust  
5                   education system, and as such, it is subject to the Fifth Amendment right to equal protection of the  
6                   law through the Fourteenth Amendment. The EO provides that university employees may seek a  
7                   “religious accommodation” to the flu vaccine to be “adjudicated through the interactive process  
8                   consistent with existing location policies and procedures (EO at page 2 paragraph 1c to page 3).

9                   There is no similar religious accommodation for the university students, which violates  
10                  Plaintiff students’ rights to the equal protection of the law and First Amendment protected religious  
11                  rights, which must be governed by strict scrutiny because they are fundamental rights. *See e.g.,*  
12                  *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.*, 32 Cal. 3d 779, 798-99 (1982) (reversing  
13                  a judgement in favor of a school district, the California Supreme Court stated, “ . . . in cases  
14                  involving ‘suspect classifications’ or touching on ‘fundamental interest,’ . . . the court has adopted  
15                  an attitude of active and critical analysis, subjecting the classification to strict scrutiny.”); *W. Va.*  
16                  *State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637-38 (1943); *Dunn v. Blumstein*, 405 U.S. 330, 341  
17                  (1972); *Harman v. Forssenius*, 380 U.S. 528, 540 (1965); *Skinner v. Oklahoma*, 316 U.S. 535, 543  
18                  (1942) (utilizing the equal protection clause to reverse an Oklahoma Supreme Court order that  
19                  attempted to perform the medical procedure of sterilization upon a convicted felon).

20                  There are less restrictive means of achieving whatever goal the UC wants to achieve in terms  
21                  of hospital bed usage (even on the counterfactual assumption that the flu vaccine reduced flu related  
22                  hospital beds) by granting the two students the same religious accommodation as it granted to  
23                  employees. Further, there is no compelling state interest in reducing hospital bed usage because there  
24                  is no evidence that there will be a shortage of hospital beds and the data indicated that there will be  
25                  no such need even if the seasonal flu is as bad as it ever has been. And as indicated the best evidence  
26                  is that the flu shot does not decrease flu hospitalizations. For these reasons, it is likely that the Court  
27                  will rule in Plaintiffs’ favor at the trial of this action.

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**C. The Harm to the Plaintiffs (and others similarly opposed to being forced to take the flu shot is Much greater than the harm in delaying the mandate. This is Harm in the Absence of Relief.**

A violation of a federal constitutional right inflicts *per se* irreparable injury. See e.g., *Northeastern Florida Chapter of Ass'n of General Contractors of America v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990); *citing Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir.1983); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir.1981).

However, as set forth in detail in Section II *supra* and accompanying expert declarations, the injury which will be inflicted by the EO is obvious and potentially grave, based on the risk of Adverse Events in the Flu Vaccine’s package inserts, vaccine or viral interference potential from the flu vaccine to coronaviruses, and the proven harm to UC’s community’s elderly and pregnant women.

The risk from a delay in the implementation of the EO is minimal to nonexistent. The best clinical trials evidence demonstrates that the flu vaccine does not reduce hospitalizations. The California hospitalization bed utilization numbers strongly suggests that there will not be a hospital bed shortage even if there is a high seasonal flu combined with a large second wave. There is no convincing evidence that the flu vaccine will prevent COVID-19 infections, but there is some specific evidence that viral interference might well increase COVID-19 infections.

Regardless of how the science ends up, the notion that 510,000 Californians can be compelled to take a vaccine which has not been proven to be safe for administration during a coronavirus pandemic, turns all these people into human guinea pigs and is repugnant to established scientific and ethical norms, and of course, it is completely unconstitutional under the bright red line set up by the Supreme Court in *Jacobson*, and recently reaffirmed on the exact same proffered rationale.

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**IV. CONCLUSION**

For the foregoing reasons, the Plaintiffs, speaking for hundreds of thousands of members of the UC community, respectfully request that the Court enter a preliminary injunction order barring the EO pending the trial of this action.

DATED: September 17, 2020



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