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Attorneys for Defendants

12
13 The Regents of the University of California and
Michael V. Drake

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA

15 COUNTY OF ALAMEDA

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

21 Plaintiffs,

22 v.

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

25 Defendants.

Case No. HG20072843

Unlimited Civil Jurisdiction

ASSIGNED FOR ALL PURPOSES TO:
Hon. Richard Seabolt
Department 521

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' *EX PARTE*
APPLICATION TO RESET THE
PRELIMINARY INJUNCTION
HEARING DATE FROM NOVEMBER
12, 2020 BACK TO MID OCTOBER**

Date:
Time:
Dept.: 521
Reservation No.: N/A

Complaint filed: August 27, 2020
Trial: None set

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In an effort to protect the health and safety of its students, faculty, and staff during the
4 COVID-19 pandemic, the University of California (“UC”) is requiring, by Executive Order
5 (“EO”), that students, faculty, and staff living, learning, or working on premises at UC locations
6 receive an influenza vaccine by November 1. This public health requirement is subject to
7 medical exemptions and religious or disability accommodations that any student, employee or
8 faculty member may request. Plaintiffs seek to enjoin Defendants The Regents of the University
9 of California and President Michael V. Drake (collectively, “The Regents”) from continuing to
10 implement the EO based on a fundamental misapprehension of the flu vaccine mandate’s basis,
11 purpose, and scope. These issues are addressed in the parties’ briefing on Plaintiffs’ motion for
12 preliminary injunction, including The Regents’ Opposition and supporting papers filed on
13 September 30, 2020, and is set to be heard at the November 12, 2020 hearing, as set by this Court.

14 Plaintiffs now seek, by way of *ex parte* application, to shorten the time for the hearing on
15 Plaintiffs’ preliminary injunction motion from the Court’s scheduled date of November 12 to a
16 date during the weeks of October 13 or 19, 2020. There is no need for this matter to be heard
17 before the Court’s selected hearing date of November 12. Contrary to Plaintiffs’ statement that
18 “the entire 510,000 members of the UC community” must get their flu shots by November 1, the
19 EO only requires those students, faculty, and staff who will be present on a UC campus or other
20 UC location to receive a flu vaccine. Students, faculty, and staff who are currently working,
21 learning, and living remotely—as most are, due to the COVID-19 pandemic and associated
22 governmental shelter-in-place orders—are not required to get a flu vaccine. And for the subset of
23 students, faculty, and staff who must come to campus, the EO provides for medical exemptions,
24 and religious and disability accommodations.

25 Further, contrary to Plaintiffs’ assertions, UC has not threatened to “fire” or “expel” any
26 employee or student who comes to campus who has not had a flu shot by November 1, as
27 Plaintiffs suggest. UC is working with students, faculty, and staff who must come on campus and
28

1 who request a medical exemption or a religious or disability accommodation to find mutually
2 agreeable solutions. UC’s intent is not to “fire” or “expel” any employee or student for not
3 receiving a flu shot between now and when this Court hears this matter on November 12.
4 Because Plaintiffs face no imminent harm, there is no need to shorten the time for the hearing.
5 Ultimately, given the Court’s limited staffing and operations for civil matters in light of the
6 pandemic, The Regents respectfully defers to this Court’s scheduling needs. For all the above
7 reasons, Plaintiffs’ *ex parte* application should be denied.

8 **II. ARGUMENT**

9 **A. Plaintiffs Face No Imminent Harm Because the Executive Order Only**
10 **Requires UC Students, Faculty, and Staff Who Must Be on UC Premises to**
11 **Receive a Flu Vaccine, Subject to Medical Exemptions and Various**
12 **Accommodations, Yet the First Amended Complaint Does Not Allege that**
13 **Any Plaintiff Is Subject to the EO**

14 Plaintiffs face no imminent harm requiring a hearing date before November 12 because
15 the EO only requires that students, faculty, and staff receive a flu vaccine if they must be
16 physically present at a UC location. (Pltfs.’ Ex Parte App., Ex. B, at pp. 2 [Revised EO, dated
17 Sept. 29, 2020] (reflecting that “Universal Vaccine [is] Encouraged” and only requiring that
18 “students, faculty, and staff living, learning, or working on premises at any UC location must
19 receive a flu vaccine, unless they receive an approved medical exemption or disability or religious
20 accommodation”).)

21 None of the five Plaintiffs has even alleged that he or she cannot work or learn remotely
22 and, to the contrary, some, such as Plaintiff Professor Frances Olsen, admit that they are working
23 remotely. (Olsen Decl. iso Pltfs.’ Mot. for Prelim. Inj., ¶ 3.) Accordingly, The Regents’
24 Opposition to the Motion for Preliminary Injunction (“Opposition”) raised standing arguments,
25 because it is not even clear that any Plaintiff is subject to the requirement to take a flu vaccine
26 prior to being on campus, pursuant to the revised EO. And even if any Plaintiff is required to be
27 present at a UC location after November 1, each of them may request a medical exemption or a
28 religious or disability accommodation. Again, the First Amended Complaint does not allege that
any Plaintiff has done so.

1 The primary purpose of the EO is to protect the health and safety of the UC community.
2 The purpose of the EO is not to terminate or expel UC staff, faculty, or students. To that end, the
3 University and its counsel are working with Plaintiffs' counsel to address concerns that Plaintiffs
4 may have with respect to the EO's implementation. For example, when the University learned
5 from Plaintiffs' counsel that a non-party, a UC Davis employee, had concerns about how her
6 request for a religious accommodation was being processed, the University looked into the
7 concern raised immediately. Within hours, UC was able to determine that her request for religious
8 accommodation had been approved on October 7 and would be communicated to the UC Davis
9 employee the following day, on October 8. (Chun Decl. iso The Regents' Opp. to Ex Parte App.,
10 ["Chun Decl.,"] ¶ 5) (concurrently filed herewith).

11 Plaintiffs complain that "at least some campuses" are continuing to advise employees that
12 they have to get a flu shot unless they have a medical exemption or an accommodation, attaching
13 a screen shot from a UC Riverside reminder to get the flu vaccine. (Pltfs.' Ex Parte App., Ex. C.)
14 However, again, none of the Plaintiffs are students or employees of UC Riverside, so this screen
15 shot is irrelevant. More importantly, because Plaintiffs' counsel advised The Regents' counsel on
16 October 7 about the unclear communication to UC Riverside employees, again, The Regents'
17 counsel notified UC Riverside stakeholders the same day, in order to clarify any inadvertently
18 unclear or confusing communication. (Chun Decl. ¶ 6.)

19 **B. The Regents Will Defer to the Court's Scheduling Preference for a November**
20 **12 Hearing Date or Any Other Date with Respect to the Preliminary**
21 **Injunction Motion**

22 The Regents are acutely aware of this Court's heavy docket and the additional logistical
23 burdens which the COVID-19 pandemic has imposed on our Alameda County Superior Court, its
24 judicial officers, and its staff. When Plaintiffs' counsel advised The Regents' counsel that he
25 intended to file an ex parte application to accelerate the Court's November 12 hearing date for
26 Plaintiffs' motion for preliminary injunction ("PI Motion"), the undersigned explained to
27 Plaintiffs' counsel (who is currently located in Connecticut) that such an application was probably
28 futile, because the Court is severely short-staffed with respect to civil matters and that it would

1 take some time for the Court to even process the voluminous papers filed by both sides on the PI
2 Motion. In any event, as explained to Plaintiffs' counsel, the University's intention is to work
3 with its community members to accommodate individuals who wish to decline taking the flu shot,
4 whether for medical, religious, or disability-related reasons, not to terminate or to expel anyone
5 prior to the November 12 hearing date. There is no imminent harm to any Plaintiff and, therefore,
6 there is no good cause to accelerate the hearing date from the Court's chosen date of November
7 12. At the end of the day, The Regents will defer to the Court's scheduling preferences with
8 respect to the hearing date for the motion for preliminary injunction filed by Plaintiffs.

9 **III. CONCLUSION**

10 For the foregoing reasons, Defendants respectfully request that the Court DENY
11 Plaintiffs' *ex parte* motion to reset the preliminary injunction hearing date from November 12,
12 2020 back to mid-October 2020.

13 Dated: October 8, 2020

Respectfully submitted,

CROWELL & MORING LLP

By: 

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The Regents of the University of
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