

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA**

CINDY KIEL, J.D., an Executive
Associate Vice Chancellor at UC Davis, et
al.,

Plaintiffs,

v.

**THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA**, a Corporation, et al.,

Defendants.

) No. HG20-072843

) **FORMAL ORDER DENYING**
) **REQUEST FOR PRELIMINARY**
) **INJUNCTION**

The motion of plaintiffs Cindy Kiel, McKenna Hendricks, Edgar de Gracia, Leland Vander Poel and Frances Olsen for preliminary injunction was heard on November 5, 2020 in Department 521, the Honorable Richard Seabolt presiding. Plaintiffs appeared through their counsel, Richard Jaffe. Defendants The Regents of the University of California and its President Michael V. Drake appeared through their counsel, A. Marisa Chun. The court issued a tentative ruling orally at the hearing and issued its order denying plaintiffs' request for a preliminary injunction at the conclusion of the hearing. While the court provided a lengthy statement of the reasons why it believed Plaintiffs were not entitled to a preliminary injunction at the hearing, the court committed to provide a written order, which follows.

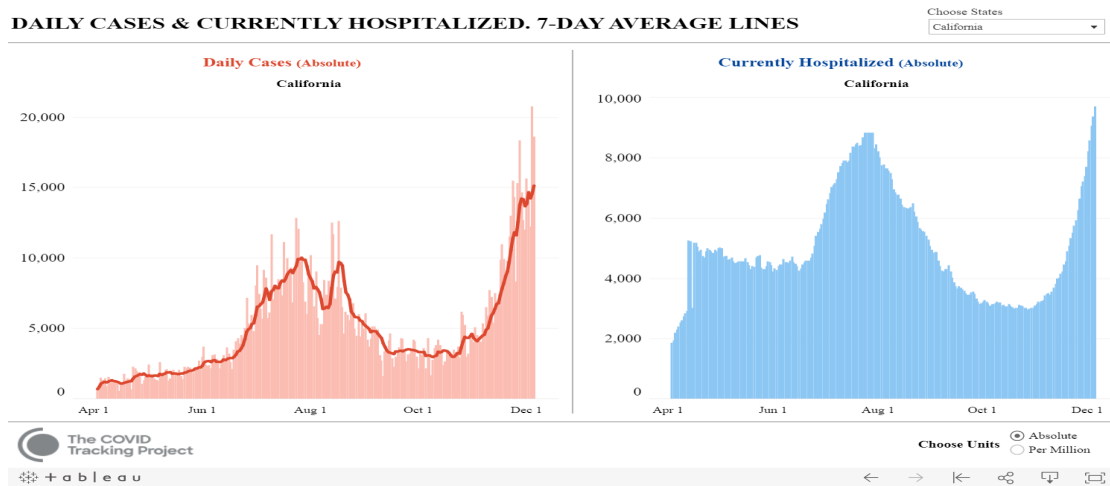
I. BACKGROUND

Plaintiffs bring this action to challenge an Executive Order issued by the President of the University of California requiring that all students, faculty and staff receive a flu vaccine as a condition to access University property during the 2020-2021 flu season. Plaintiffs claim that University's vaccine requirement, which is subject to medical exemptions and religious and disability accommodations, is ultra vires and void. Plaintiffs also claim the vaccine requirement violates their Due Process, Free Exercise of Religion and Equal Protection rights.

The court denied the motion for a preliminary injunction to enjoin enforcement of the EO because the plaintiffs did not meet their burden to show that the vaccine requirement is likely to fall outside the University President's valid exercise of authority, plaintiffs' failed to show a probability of prevailing on the merits of their constitutional claims, and the balance of harms favors denial of an injunction.

As of the date of this order, the novel coronavirus and the disease it causes, COVID-19, has sickened at least 63,192,543 people worldwide and 13,536,216 in the United States, and has killed 1,467,174 people globally and 286,016 nationally. (Center for Systems Science and Engineering at Johns Hopkins Univ., COVID-19 Dashboard, <https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6> [November 30, 2020].)

In California alone, 1,229,513 have been infected and 19,213 have died. (Tracking Coronavirus in California, Los Angeles Times <https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak> [November 30, 2020].) Current Covid Tracking charts (<https://covidtracking.com/data/charts/daily-cases-and-currently-hospitalized>) highlight the problem:



In response to this unprecedented challenge, in July 2020, UC’s then-President Janet Napolitano exercised their authority to fashion effective emergency measures by issuing an Executive Order requiring that all students, faculty and staff receive an influenza vaccination, subject to medical and religious exemptions, if they will be present on UC campuses or facilities. On September 29, 2020, UC’s current President Michael Drake, M.D., amended the Executive Order, to extend medical and religious exemptions for accommodations to UC Students. The September 29, 2020 Revised Executive Order (hereafter the “EO”) provides as follows:

“Background and Findings

“As of this date, the world is facing a severe health crisis in which COVID-19, a new respiratory illness caused by a novel coronavirus, places millions of people at work of serious illness or death. The World Health Organization has declared that the disease is a pandemic. Declarations of Emergency have been issued by the President of the United States, the Governor of California, and California Counties and other significant operations.

“In California alone, notwithstanding concerted statewide efforts to mitigate the spread of the disease, by late July, nearly 400,000 people had been diagnosed with COVID-19 and more than 7,500 had perished. Statewide positivity rates and hospitalizations were trending upward; on any given day, over 8,000 were hospitalized and more than 2,000 were so sick that they were being treated in intensive care units. As of this writing, the numbers of cases and deaths have doubled: over 800,000 cases have been reported, and with over 15,000 fatalities. While hospitalization rates and ICU rates are currently down, statewide positivity and transmission rate are starting to climb again, and state officials have predicted a significant increase in hospitalizations over the next month.

“On March 19 of this year, the State Public Health Officer issued an order directing all individuals living in the State to stay at home except as needed to facilitate authorized, necessary activities or to maintain the continuity of operations of critical infrastructure sectors. This order caused virtually every government agency and private organization in the State to transition to remote operations to the greatest extent possible. Since then, the State has developed and refined a Pandemic Roadmap to guide prudent resumption of on-site or in-person operations and the University is developing and implementing plans to transition remote activities back to its campuses consistent with applicable public health orders and directives.

“According to the Centers for Disease Control & Prevention, flu vaccination has long been accepted as a safe and effective way to prevent millions of illnesses and thousands of related doctor and hospital visits every year. In recent year, flu vaccines have reduced the risk of flu-associated hospitalizations among older adults by about 40. A 2018 study showed that from 2012 to 2015, flu vaccination among adults reduced the risk of being admitted to an intensive care unit (ICU) with flu by 82 percent. Flu vaccination has been associated with lower rates of some cardiac events among people with heart disease, especially among those who had a cardiac event in the past year. It can reduce worsening and hospitalization for flu-related chronic lung disease. It has been shown in separate studies to be associated with reduced hospitalizations among people with diabetes and chronic lung disease. A 2018 study that included influenza seasons from 2010-2016 showed that getting a flu shot reduced a pregnant woman’s risk of being hospitalized with the flu by an average of 40 percent. Flu vaccination has been shown in several studies to reduce severity of illness in people who get vaccinated but still get sick. For example, a 2017 study showed that the flu vaccination reduced deaths, intensive care unit (ICU) admissions, ICU length of stay, and overall duration of hospitalizations among hospitalized flu patients. A 2018 study showed that among adults hospitalized with flu, vaccinated patients were 59 percent less likely to be admitted to the ICU than those who had not been vaccinated. Among adults in the ICU with the flu, vaccinated patients on average spent 4 fewer days in the hospital than those who were not vaccinated. Finally, by getting vaccinated, a person can protect those around them, including those who are more vulnerable to more serious flu illness.

“During the SARS-CoV-2 pandemic, Where COVID-19, like influenza results in respiratory symptoms, it is even more critical than usual to assure widespread vaccination. As California progresses through its roadmap, the possibility of an outbreak or surge that overwhelms the health care system and causes hospital to adopt crisis standards of care necessarily increases—as of July 20, 2020, thousands of new cases are being reported every day and hospitals are experiencing shortages of testing supplies and medications necessary to treat COVID-19.

Population-level interventions that decrease the likelihood of disease transmission, hospitalization and ICU utilization must therefore be considered and adopted where feasible.

“As President of the University, I have concluded that critical steps must be taken to reduce the likelihood of severe disease among students, faculty and staff, particular those on campus, and in turn to reduce the likelihood that our health system will be overwhelmed.

“Executive Order.

“WHEREFORE AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA I DECLARE:

“On the authority vested in me by Bylaw 30, Bylaw 22.1, Regents Policy 1500 and Standing Order 100.4(ee), and based on the foregoing circumstances, I hereby issue the following order, to be effective through the 2020-2021 flu season, and direct the following:

- “1. Universal Vaccine Encouraged. Each campus shall strongly encourage universal vaccination for all students, faculty, staff, and their families by October 21, 2020.
- “2. Mandate for those on Campus. Effective November 1, 2020, all students, faculty and staff living, learning or working on premises at any UC location must receive a flu vaccine unless they receive an approved medical exemption or disability or religious accommodation....
- “3. Disability or Religious Accommodations. Requests for disability or religious accommodations may be made in person subject to this order and will be adjudicated through interactive process consistent with existing location policies and procedures.
* * *”

II. THE PARTIES AND THEIR CLAIMS

Plaintiff Cindy Kiel, J.D., is an Executive Associate Vice Chancellor at UC Davis. Plaintiff McKenna Hendricks and Edgar de Gracia are students studying at UC Santa Barbara and UCLA, respectively. Plaintiff Leland Vander Poel is an employee at the Fresno satellite extension of the UCSF’s Medical Education Program. Plaintiff Frances Olsen is a Professor of Law at UCLA. The operative complaint is the First Amended Complaint (“FAC”). In their first cause of action, plaintiffs seek a declaration as against The Regents of the University of California and University President Michael V. Drake that the EO was an ultra vires act, beyond the authority then-President Napolitano, because she failed to consult with UC’s Academic Senate prior to issuance of the EO, and therefore void. On their second and third causes of action, plaintiffs seek a declaration that the EO violates their right to due process under the Federal and California Constitutions. On the fourth cause of action, plaintiffs Hendricks and de Gracia (the “student-plaintiffs”) seek a declaration that the EO violates their right to equal

protection and impermissibly burdens their right to free exercise of religion under state and federal constitutions.

III. PROCEDURAL POSTURE AND APPLICABLE LEGAL STANDARD

This matter is not before the court for trial and the court is not making a final determination of the merits of Plaintiffs' claims. Rather, the matter is before the court on a preliminary injunction. "The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or... should not be restrained from exercising the right claimed by him [or her]." (*Law School Admission Council, Inc. v. State of California* (2014) 222 Cal.App.4th 1265, 1280 [internal quotations and citation omitted].)

The standards governing a preliminary injunction are well known. "Trial courts traditionally consider and weigh two factors in determining whether to issue a preliminary injunction. They are (1) how likely it is that the moving party will prevail on the merits, and (2) the relative harm the parties will suffer in the interim due to the issuance or nonissuance of the injunction." (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1420.) "[T]he greater the ... showing on one, the less must be shown on the other to support an injunction." (ibid, [quoting *Butt v. State of California* (1992) 4 Cal.4th 668, 678].) "The more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue." (*Right Site Coalition v. Los Angeles Unified School District* (2008) 160 Cal.App.4th 336, 338-339.)

The burden of proof is on the plaintiff as the moving party "to show all elements necessary to support issuance of a preliminary injunction." (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481.) Preliminary injunctive relief requires the use of competent evidence to create a sufficient factual showing on the grounds for relief. (See e.g., *Ancora-Citronelle Corp. v. Green* (1974) 41 Cal.App.3d 146, 150.) A plaintiff seeking injunctive relief must also show the absence of adequate damages remedy at law. (Code Civ. Proc. § 526, subd. (a)(4).)

III. DISCUSSION

A. Likelihood of Success on the Merits

1. Ultra Vires Claim in the First Cause of Action

The EO states that President Napolitano issued the EO “On the authority vested in me by Bylaw 30, Bylaw 22.1, Regents Policy 1500 and Standing Order 100.4(ee).” Bylaw 30, which relates to the President’s role as the “academic leader” of the University—as distinguished from her other roles—states that the President is “expected to consult with the Academic Senate, consistent with the principles of shared governance, on issues of significance to the general welfare and conduct of the faculty.”

Plaintiffs claim that because UC President Napolitano did not formally consult with the Academic Senate prior to issuing the EO, the EO is void. The court disagrees. The EO is not a matter bearing on an academic or professional issue. Even then, the bylaw discusses only an “expectation” of consultation with the Academic Senate, not a requirement. Standing Order 100.4(a) supports President Napolitano’s authority to issue a vaccine directive, and provides that the President “shall have full authority and responsibility over the administration of all affairs and operations of the University,” subject to exclusions not relevant here. (Chun Decl., Exh. W [Standing Order 100.4(a)].). President Napolitano confirms this in her declaration: “As the President of the University, I was its executive head with authority over the administration of all affairs and operations of the University not delegated or reserved by the Regents. My responsibilities included taking such steps as necessary to protect the health and safety of the members of the UC community during an unprecedented COVID-19 pandemic As President, I was the decision-maker on this matter and was not required to formally consult with the Academic Senate. (Napolitano Decl., ¶ 8.)

Further, The California Supreme Court has recognized the grant of “full powers of organization and governance” in Article IX, section 9 of the California Constitution confers on the Regents “unique constitutional status,” enabling the University to function “in some ways like an independent sovereign.” (*Miklosy v. Regents of the University of California* (2008) 44 Cal.4th 876, 889-90.) The Regents is fully empowered with respect to the organization and the government of the University (*Regents of University of California v. Superior Court* (1970) 3 Cal.3d 529, 540), and the power of the Board of Regents to operate, control and administer the University is “virtually exclusive.” (*San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 788).

Thus, even accepting the argument that consultation with the Academic Senate was required, the EO would not be void per se. The court finds that the Regents had the power to

ratify President Napolitano's actions and impliedly has ratified the EO by appearing in this action to defend the EO. Plaintiffs have not demonstrated a reasonable probability that they will prevail on the merits of their claim that the EO is ultra vires and void.

2. Plaintiffs' Equal Protection and Free Exercise Claims are Moot

The student-plaintiffs allege that the July 2020 Executive Order violates their right to equal protection and unconstitutionally burdens their free exercise of religion. (See FAC ¶¶ 87-90.) The student-plaintiffs lack standing to challenge June 2020 Executive Order since their declarations do not state that their objections to the flu vaccine are religious in nature. In any event, because the student-plaintiffs are able to apply for a religious exemption under the later-issued EO, their request for injunctive relief is moot and the court does not consider it further. (See *Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 133 [In general, "injunctive relief may not be granted when events have rendered the relief unnecessary or ineffectual."]; *Scripps Health v. Marin* (1992) 72 Cal.App.4th 324, 332-33 [injunction properly denied where changed circumstances render the relief moot].)

3. Plaintiffs Are Unlikely to Prevail on the Federal and State Privacy Claims Asserted in the Second and Third Causes of Action

Plaintiffs contend that the UC vaccine requirement violates their rights under the Federal and California Constitutions because it infringes on their bodily integrity and autonomy. Plaintiffs are unlikely to prevail on the merits of these claims.

In *Jacobson v. Commonwealth of Massachusetts* (1905) 197 U.S. 11, 32 (hereafter *Jacobson*),¹ the U.S. Supreme Court held that a state's mandatory vaccination statute was a lawful exercise of the state's police power to protect the public health and safety. In recognizing that "the principle of vaccination as a means to prevent the spread of smallpox has been enforced in many States by statutes making the vaccination of children a condition of their right to enter or remain in public schools," *Jacobson* relied in part on the California Supreme Court's decision in *Abeel v. Clark* (1890) 84 Cal. 226 (See *Jacobson, supra*, 197 U.S., at pp. 32-33.) In *Abeel*, the court upheld the State's school vaccination requirements, stating that "it was for the legislature to determine whether the scholars of the public schools should be subjected to [vaccination]." (*Abeel*, at p. 230.)

¹ Plaintiffs cite to *Jacobson* as the authority applicable to their claims asserted in the Second Cause of Action and to the EO. (See FAC, ¶¶ 71-73.)

Since *Jacobson*, courts have repeatedly cited *Jacobson* and upheld mandatory vaccination laws over challenges predicated on the First Amendment, the Equal Protection Clause, the Due Process Clause, the Fourth Amendment, education rights, parental rights, and privacy rights. (See, e.g., *Zucht v. King* (1922) 260 U.S. 174, 175-177 [“it is within the police power of a state to provide for compulsory vaccination”]; *Prince v. Massachusetts* (1944) 321 U.S. 158 [a parent “cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds”]; *Phillips v. City of New York* (2nd Cir. 2015) 775 F.3d 538, 543 [holding that “mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause”]; *Workman v. Mingo County Sch.* (S.D. W. Va. 2009) 667 F.Supp.2d 679, 690-691 [“a requirement that a child must be vaccinated and immunized before it can attend the local public schools violates neither due process nor... the equal protection clause of the Constitution”], *affd. Workman v. Mingo County Bd. of Educ.* (4th Cir. 2011) 419 F.App’x 348, 353-354.)

More recently, both federal and state courts have rejected state and federal constitutional challenges California Senate Bill No. 277, which repealed the personal belief exemption to California's immunization requirements for children attending public and private schools and childcare facilities from the state’s mandatory vaccine requirement. (See, e.g., *Whitlow v. California* (S.D. Cal. 2016); 203 F.Supp.3d 1079, 1085-1087; *Brown v. Smith* (2018) 24 Cal. App. 5th 1135, 1144-1145; *Love v. State Dept of Educ.* (2018) 29 Cal. App. 5th 980 (Love).)

In *Whitlow*, the U.S. District Court for the Southern District of California denied a motion for preliminary injunction against enforcement of SB 277. The plaintiffs argued that SB 277 violated their right to education and to due process. The court found that all of the plaintiffs' due process arguments were foreclosed by *Zucht, supra*, 260 U.S. at 176, which rejected a due process challenge to the permanent exclusion of a child from school because the child refused to submit to vaccination. (*Whitlow, supra*, 203 F. Supp.3d at 1089.) The court determined the plaintiffs were unlikely to succeed on the merits of their claim that SB177 violated their right to education, stating “[t]he right of education, fundamental as it may be, is no more sacred than any of the other fundamental rights that have readily given way to a State's interest in protecting the health and safety of its citizens....” (*Whitlow, supra*, 203 F.Supp.3d at 1091.) In so holding, the *Whitlow* court observed that “[C]onditioning school enrollment on vaccination has long been

accepted by the courts as a permissible way for States to inoculate large numbers of young people and prevent the spread of contagious diseases.” (Id.)

In *Love*, the most recent of the state court SB 277 decisions, the plaintiffs claimed that SB277 violated their rights under the California Constitution because it infringed on their rights to bodily autonomy and to refuse medical treatments, conditioned the right to attend school on giving up the right to bodily autonomy, and negated their parental right to make decisions in the upbringing of their children. The court noted that where the state infringes on a fundamental constitutional right, strict scrutiny applies; otherwise, the rational basis test applies. After enunciating the standards for each test, the court determined that the plaintiffs’ substantive due process claims failed under either level of scrutiny. (Id.) The court agreed with the analysis in *Whitlow*, stating: “Unquestionably, imposing a mandatory vaccine requirement on school children as a condition of enrollment does not violate substantive due process.” (*Love, supra*, 29 Cal. App. 5th at 989-90 citing *Whitlow, supra*, 203 F.Supp.3d at p. 1089.) Further,

It is well established that laws mandating vaccination of school-aged children promote a compelling governmental interest of ensuring health and safety by preventing the spread of contagious diseases. (Brown v. Smith, *supra*, 24 Cal.App.5th at p. 1146, 235 Cal.Rptr.3d 218, citing *Whitlow v. California Dept. of Education, supra*, 203 F.Supp.3d at pp. 1089-1090; *Abeel v. Clark, supra*, 84 Cal. at pp. 230-231, 24 P. 383 [“Vaccination, then, being the most effective method known of preventing the spread of the disease referred to, it was for the legislature to determine whether the scholars of the public schools should be subjected to it, and we think it was justified in deeming it a necessary and salutary burden to impose upon that general class. ... ‘What is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is invested with a large discretion, which cannot be controlled by the courts, except, perhaps, when its action is clearly evasive, and where, under pretense of lawful authority, it has assumed to exercise one that is unlawful.’ ”]; *Jacobson v. Massachusetts, supra*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 [upheld state mandatory vaccination law under the Fourteenth Amendment]; *Zucht v. King* (1922) 260 U.S. 174, 176, 43 S.Ct. 24, 25, 67 L.Ed. 194, 198 [ordinances mandating certificate of vaccination prior to allowing school attendance did not violate substantive due process rights because it was “settled that it is within the police power of a state to provide for compulsory vaccination”].) That interest exists “regardless of the circumstances of the day, and is equally compelling whether it is being used to prevent outbreaks or eradicate diseases.” (Brown, at p. 1146, 235 Cal.Rptr.3d 218.)

(Id. at 990.)

As noted by the court in *Love*, a compelling interest test would also ask whether the EO is narrowly tailored to achieve the interest at stake. Here, the EO is far less restrictive than in cases such as *Love*, which involved a blanket prohibition on refusing immunization, and more easily satisfies the narrow-tailoring standard. The EO is subject to medical exemptions and disability and religious accommodations, the vaccine requirement is limited to the 2020-2021 flu season, and the EO only applies to persons who are required to access University property to work or study.² Plaintiffs suggested at the hearing that the EO is not narrowly tailored because there are less restrictive alternatives such as wearing a mask. But a law is narrowly tailored if “proposed alternatives will not be as effective” to achieve the government's goal. (*See Ashcroft v. ACLU* (2004) 542 U.S. 656, 665.) The evidence in this case amply supports that requiring flu vaccination is more likely to reduce transmission of the flu on UC property than proceeding under looser rules. (See, e.g., Byington Decl. ¶¶ 21, 23, 36-37; Declaration of Bernadette M. Boden-Albana, ¶¶ 6-7.)³

In the FAC and throughout their brief, Plaintiffs mischaracterize the EO as simply a measure to conserve hospital beds.⁴ Plaintiffs then cite to evidence they claim shows there will

² In this regard, the EO can be distinguished from the restrictions challenged in *County of Butler v. Wolf*, 2020 WL 5510690 (W.D. Pa. Sept. 14, 2020) where the challenged order had “no mechanism for expiration” and “applied to any gathering of individuals on public or private property for any purpose.” (*Id.*, *22.)

³ The court also notes that SB 227, required school aged children to be vaccinated as a condition of attending school in a non-crisis situation. The court nevertheless rejected the constitutional challenges to SB 277 presented in that case. By contrast, in this case, the flu is a contagious disease, we are in the middle of a pandemic, and the court is presented with substantial, compelling evidence that a mandatory flu vaccine is the best way to achieve the University’s stated goals. (See Declaration of Carrie Byington, M.D., ¶¶ 24-37; Declaration of Bernadette M. Boden-Albana, Ph.D, ¶¶ 6-8; Declaration of Brad Buchman, M.D., ¶¶ 4-7.)

⁴ Plaintiffs have also alleged that the EO is unconstitutional because it will “force the 510,000-member [UC] community” to vaccinate and “sacrifice their rights to personal liberty, privacy and bodily integrity.” (FAC, ¶ 4; and Prayer, ¶ A.) This is an incorrect statement of what the EO does. While the EO “strongly encourage[s] universal vaccination” for all students, faculty and staff, it only requires vaccination of those “living, learning, or working at any UC location.” The flu vaccine is a condition of access to University property. It does not affect the entire UC community as Plaintiffs allege. That is an important distinction given that it appears the vast majority of the UC community during the pandemic is studying and working remotely.

be no shortage of hospital beds⁵ and the flu vaccine will not reduce hospitalizations, in any event. Based on this narrowing of the EO's purpose, Plaintiffs assert that the EO has no real or substantial relationship to the University's goals. That the EO's broader goal to "reduce the likelihood of severe disease among students, faculty and staff, particularly those on campus, and in turn to reduce the likelihood that our health system will be overwhelmed (in more in than just hospital bed capacity)" is clear on the face of the EO and supported by the declarations of the University's numerous experts. Plaintiffs attempt to narrow the purpose of the EO is unavailing.

Plaintiffs next argue that the flu vaccine is ineffective⁶ and medically unnecessary⁷. Presumably, this evidence is offered to show that the EO is not narrowly tailored because it will not achieve University's goals or that there are less restrictive alternatives. Plaintiffs' evidence is insufficient to credibly undermine the widely-held belief that the flu vaccine is safe and effective or the conclusions of recognized scientific, medical, and public health authorities that getting a flu vaccination could reduce flu cases and their severity, thereby protecting health and conserving critical healthcare resources during the pandemic.⁸

⁵ Plaintiffs' evidence may no longer be accurate as California hospitals brace for a surge in COVID cases. (See M. La Ganga, at al., Hospitals brace for holiday COVID surge, fearing staff shortages and burnout, L.A. Times, Nov. 22, 2020., which can be found at <https://www.latimes.com/california/story/2020-11-22/hospitals-brace-for-holiday-covid-surge-fearing-staff-shortages-and-burnout>.) See also <https://covidtracking.com/data/charts/daily-cases-and-currently-hospitalized> for real-time case and hospitalization counts in California.

⁶ See, e.g., Declaration of Peter Götzsche, M.D., ¶¶ 7-10; Declaration of Thomas Jefferson, M.D., ¶ 7; Declaration of Andrew Noymer, ¶ 5.)

⁷ See, Noymer Decl., ¶¶ 6-9.

⁸ Consistent with the opinions of UC's experts and as recited in the EO, the Centers for Disease Control's guidance during the pandemic states: "Ensuring that routine vaccination is maintained or reinitiated during the COVID-19 pandemic is essential for protecting individuals and communities from vaccine-preventable diseases and outbreaks. Routine vaccination prevents illnesses that lead to unnecessary medical visits, hospitalizations and further strain the healthcare system. For the 2020-2021 influenza season, influenza vaccination will be paramount to reduce the impact of respiratory illnesses attributed to influenza in the population and resulting burdens on the healthcare system during the COVID-19 pandemic." <https://www.cdc.gov/vaccines/pandemic-guidance/index.html> [last accessed November 30, 2020].)

Similarly, the California Department of Public Health opines that flu shots are "more important than ever" and advises: "In an effort to prevent a 'twindemic' of COVID-19 and

The court has carefully considered Plaintiffs’ evidence offered to show that the flu vaccine is unsafe⁹. In particular, the court has reviewed the declaration of Laszlo G. Boros, M.D. offered to support their contention that the flu vaccine could predispose a person to infection by COVID-19, or result in miscarriage, or negatively impact immune function.

To support his opinion that the flu vaccine has the potential to predispose a person to infection by COVID-19, Dr. Boros relies on a 2020 study by Gregg Wolff of the U.S. Armed Forces Health Surveillance Branch. the Wolff study found an association between the flu vaccine and the coronaviruses that cause the common cold. UC’s experts persuasively argue that the study cannot extrapolated to SARS-CoV-2, the coronavirus resulting in COVID-19. (See Declarations of Lee W. Riley, M.D., Ph.D. at ¶¶ 13-15 and Arthur L. Reingold, M.D. at ¶ 24.) Significantly, Wolff himself later cautioned against interpreting his study as indicating any association between the flu vaccine and COVID-19 or as suggesting that anyone should not obtain the flu vaccine. (See Declaration of Harvey v. Fineberg, M.D. [Fineberg Decl.], ¶¶ 26-27 and Exh. B; Declaration of Carrie L. Byington, M.D. ¶¶ 45 and Exh. D.) Finally, the Wolff Study’s finding related to seasonal coronaviruses was apparently later found to be incorrect. (See *id.*, ¶46 and Exh. E; See also, Riley Decl., ¶13.)

Dr. Boros next states that a study by the CDC suggested the possibility that women who received H1N1-containing flu vaccine two years in a row had an increased risk of miscarriage. First, this was not a CDC study as pointed out by UC. (See Declaration of Lee W. Riley, ¶14.) Second, the same group of researchers found two years later—using a larger data set—that there was no significant association between the flu vaccine and miscarriage. (*Id.*; Byington Decl.

seasonal influenza, we are urging all Californians, 6 months of age and older, to get vaccinated against the flu now. Influenza (flu) is a contagious respiratory illness that can cause mild to severe illness. A bad case of the flu can result in hospitalization or even death. Older adults and those with certain health conditions, are at high risk of serious flu complications. The best way to prevent the flu is by getting vaccinated.”

(<https://www.cdph.ca.gov/Programs/CID/DCDC/pages/immunization/influenza.aspx> [last accessed November 30, 2020].)

This court is not in the position, and is not inclined to, second-guess this public health guidance or the opinions of recognized medical and public health experts.

⁹ See Declaration of Laszlo G. Boros, M.D. See also the Declaration of Dr. Peter Göttsche, for more generalized opinions.

¶49.) In fact, the Advisory Committee on Immunization Practices, the American College of Obstetricians and Gynecologists and the CDC continue to recommend that pregnant women get the flu vaccine because flu poses a danger to pregnant women and a flu vaccine can prevent serious illness, including hospitalization, in pregnant woman. (Id., ¶¶ 49-50; Riley Decl., ¶ 14.) The CDC also recommends the flu vaccine for pregnant women to protect against their babies during the first six months of life when they are not eligible for vaccination. (Byington Decl. ¶49.)¹⁰

The court has reviewed paragraphs 13-29 of Dr. Boros's declaration where he provides the opinion that the flu vaccine has the potential to negatively impact human immune response. The court agrees that insufficient foundation is provided for this opinion. (See Riley Decl., ¶15.) In evaluating this motion, the court accords no weight on Dr. Boros's opinion to the effect that this year's flu vaccine has the potential to be harmful for the reasons stated in his declaration. The court also notes that Plaintiffs' asserted opinions regarding the safety and efficacy of the flu vaccine disregard the standard applied to mandatory vaccination requirements in *Jacobson* on which they rely. (*Jacobson*, supra, 197 U.S. at p. 35; see also, *Phillips*, supra, 775 F.3d at 542-43 [rejecting substantive due process challenge: "Plaintiffs argue that a growing body of scientific evidence demonstrates that vaccines cause more harm to society than good, but as *Jacobson* made clear, that is a determination for the legislature, not the individual objectors."] In this case, the court finds that the right to take steps to prevent the spread of contagious diseases on UC property has been delegated to the UC Regents and to the President of the University.

The court is unaware of any case in which a court has struck down a mandatory immunization imposed as a condition of attending school or college, as a condition of access to property for the purpose of employment, or as violating bodily autonomy. The vaccine mandate in *Love* required school aged children to be vaccinated, without exception, as a condition of attending grades (pre) K-12 in a non-crisis situation. The court nevertheless rejected the

¹⁰ A Cochrane review, co-authored by Plaintiffs' expert Dr. Thomas Jefferson, and cited by their expert, Dr. Gøtzsche, concludes "The administration of both seasonal and 2009 pandemic vaccines during pregnancy had no significant effect on abortion or neonatal death." (See Riley Decl., ¶ 14 and citation to study.) Dr. Boros's declaration statements appear to contradict studies provided by Plaintiffs' other witnesses.

constitutional challenges presented in that case. The result in *Love* supports that plaintiffs are not likely to prevail on the merits of the claims asserted here.

At the hearing, plaintiffs argued that the school vaccine mandate cases can be distinguished because the plaintiffs in those cases challenged vaccine requirements that applied to school-aged children whereas the EO applies to adults. Plaintiffs did not cite to any authority that a different analysis should apply to adult vaccine mandates. Accordingly, the court treats this point as waived for the purposes of the court's ruling on this motion.

B. The Balance of the Harms Favors Denial of the Injunction

The second part of the preliminary injunction analysis requires the court to evaluate the harm the plaintiffs are likely to sustain if the preliminary injunction is denied compared to the harm the defendant is likely to suffer if the injunction is issued. (*IT Corp, v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.) The court must "examine the relative actual harms to the parties." (*Id.* at 72.)

At this stage, the court finds that the relative interim harms favor denial of an injunction. Plaintiffs' have not made not made the required strong showing of irreparable harm. Plaintiffs allege that a presumption of irreparable harm flows from the mere assertion of a constitutional violation but this presumption arises only after a plaintiff has shown a likelihood of success on the merits of the constitutional claim, which plaintiffs have not done.

Additionally, plaintiffs have not shown that they are subjected to the EO's vaccine requirement because they are required to access University property. Plaintiff Olsen acknowledges that she is able to work from home during UC's work-from-home guidance (which remains in effect until June 2021). The declarations of Plaintiffs Kiel, Hendricks, McKenna and Vander Poel are silent on these parties' ability to work and study from home. Plaintiff de Gracia states in his declaration that he is compliant with the UC vaccine mandate.

If the court declined to stay the EO, plaintiffs other than de Gracia could not access University property without a vaccine, an exemption or accommodation. On the other hand, the flu season is underway, so if the University is prevented from implementing the vaccine mandate the window will close on the opportunity protect the individual and collective health of the UC community by requiring a flu vaccine. Based on the evidence, the court views the flu vaccine mandate as critically important in reducing burdens on an already overburdened health care system. As between the harm that flows from heightened risk of contracting and transmitting the

flu during the COVID-19 pandemic on campus and surrounding communities without a mandatory vaccine, and the harm that flows to these plaintiffs from having to work or study remotely, the balance of harms favors denial of the requested injunction.

C. Evidentiary Issues

Defendants' unopposed request for judicial notice of the Code of Massachusetts Regulations, Department of Public Health, Title 105, Chapter 220, et seq., is denied. While the court could take judicial notice of these regulations, they are not relevant to the court's analysis of this motion. The court also has not considered new evidence submitted for the first time on reply.

III. ORDER

The motion for preliminary injunction is DENIED. The court emphasizes that this is not a final determination of the merits of the complaint. The court is aware of Plaintiffs' desire not to submit to mandatory vaccination as a condition of accessing UC property. However, in light of the long line of cases upholding vaccine mandates against similar challenges, the court is not persuaded at this stage that Plaintiffs will succeed on the merits of their claims, or that the balance of the relative harms favors an injunction. The court is therefore constrained to deny Plaintiffs' request for a preliminary injunction.

Dated: December 4, 2020

Richard Seabolt

Hon. Richard Seabolt
Judge of the Superior Court