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[Fee exempt Pursuant to Govt. Code § 6103]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO - CENTRAL JUSTICE CENTER

LET THEM CHOOSE, an initiative of LET THEM BREATHE, a California nonprofit public benefit corporation;

Plaintiffs,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT; and DOES 1-50,

Defendant.

Case No. 37-2021-00043172-CU-WM-CTL
Case No. 37-2021-00049949-CU-MC-CTL

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS FOR WRIT OF MANDATE

Judge: Hon. John Meyer
Dept.: C-64
Date: December 20, 2021
Time: 9:00 a.m.

Complaint Filed: October 12, 2021
Trial Date: Not Set

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I. INTRODUCTION AND STATEMENT OF FACTS

These consolidated cases challenge a requirement of Defendant San Diego Unified School District ("District") that students be vaccinated against the COVID-19 virus, after full approval by the Food and Drug Administration ("FDA") for their age group ("the Mandate"). Students subject to the requirement must be vaccinated in order to attend classes in person and participate in extracurricular activities. This is not a condition for *admission* to school — as with vaccines mandated statewide by the Health and Safety Code ("HSC"), and the state's current mask mandate, students may choose to enroll in a home-based private school or the District's independent study program instead.[1]

The Mandate was approved by the District Board of Education ("Board") on September 28, 2021, as recommended by the Superintendent, student health and wellness staff (registered nurse), the District's medical consultant (pediatrician), a group of infectious disease, epidemiological, pediatric, and public health experts from UC San Diego ("UCSD Expert Panel"), and State Senator and pediatrician Dr. Richard Pan. After hearing from staff and these experts, the Board deliberated, discussed but decided not to apply the Mandate to younger students, and approved a plan which resulted in the Mandate.[2] The District is one of a number of school districts in California that have adopted student vaccine mandates for in-person instruction; the Governor and public health experts applauded these actions and encouraged others to do the same.[3]

Plaintiffs Let Them Choose ("LTC") and S.V. ("SV") ("Plaintiffs") ask this Court to conclude that all of the 1,000 school districts in California lack the authority to adopt a local

[1] Other than in passing Plaintiffs do not address the issue of extracurricular activities, implicitly acknowledging that California courts have firmly established that participation in extracurricular activities is a privilege, not a right. (*Ryan v. CIF* (2001) 94 Cal.App.4th 1048, 1061; *Steffes v. CIF* (1986) 176 Cal.App.3d 739.) Plaintiffs also offer no evidence that independent study, either generally or in the District, is inferior to in-person instruction.

[2] The District incorporates by this reference the following portions of the record in this case, laying out facts regarding the intent, consideration, deliberation, and adoption of the Mandate, which need not be repeated here: 1) Defendant's Points and Authorities in Opposition to TRO Application, pp. 4-8 [ROA #30]; 2) Declaration of Dr. Howard Taras ("Taras Decl."), ¶¶ 1-12 and Exs. A-S [ROA #31]; 3) Declaration of Susan Barndollar ("Barndollar Decl.") [ROA#32]; and 4) Declaration of Mark Bresee ("Bresee Decl."), all except ¶ 2 and Ex. A [ROA #33].

[3] Senator Pan sponsored SB 277, legislation which is a substantial component of Plaintiffs argument that local school districts are legally-forbidden from adopting a local vaccine requirement for in-person instruction. Senator Pan was present (virtually) at the September 26, 2021 meeting, recommended adoption, and called the staff recommendation to the Board a "very prudent policy." (Bresee Decl. Ex. B, pp 10-13.) Similar to the Governor praising local district action two days later, one wonders why the legislative sponsor of recent student vaccination legislation in Sacramento would praise local action if his legislation was designed to reinforce the absence of local discretion.

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student vaccine mandate in response to the COVID-19 pandemic and, without saying so directly, to conclude that the current statewide vaccine and mask mandates are contrary to law because they leave students who choose not to be vaccinated with no in-person instructional option.

For a variety of reasons, Plaintiffs' attempt fails and their Motions should be denied. As is explained below, four important considerations in this case were largely unaddressed by Plaintiffs, if at all: 1) the standard for the extraordinary remedy of mandamus; 2) the heightening of that standard when a party asks the judiciary to invalidate the decision of a school district, entities the Constitution and Legislature have given broad authority to address local needs beyond those afforded to other entities; 3) the scope of a school district's authority and responsibility regarding student health and wellness; and 4) the strong judicial presumption against a finding of state preemption. Against this backdrop, Plaintiffs attempt to morph a minimum state standard for admission to school into a mandate for access to in-person instruction, even during a pandemic and notwithstanding language in the Education Code ("EC"). They base this on legislation that says no such thing and that was adopted in a pre-COVID world. Even without the high bars of mandamus, district discretion and responsibilities, and the presumption against preemption, Plaintiffs' assertion that the Mandate is preempted by law is unsupported by the facts and the law. They have failed to meet their substantial burden and their Motions should be denied.

II. ARGUMENT

A. THE LEGAL LANDSCAPE RELEVANT TO THIS COURT'S CONSIDERATION OF THE MOTIONS

1. The Legal Standard for the Extraordinary Remedy of Mandamus

Neither Plaintiff addresses, other than in passing, the specifics of the factual and legal standard they face. Under the Code of Civil Procedure ("CCP") a court may "compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled." (CCP § 1085(a).) A writ of mandate is an extraordinary remedy. (*Henneberque v. City of Culver City*, (1985) 172 Cal.App.3d 837, 843 ["the California Constitution itself defines mandamus as one of the forms of 'extraordinary relief,'" see Cal. Const. Art. 6, § 10 ["… superior courts, and their judges … have original jurisdiction in proceedings for

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extraordinary relief in the nature of mandamus"].) Although "classed as a legal remedy" this extraordinary remedy is "largely controlled by equitable principles," awarded not as a matter of right but "in the exercise of sound judicial discretion." (*Wallace v. Board of Ed. of City of Los Angeles* (1944) 63 Cal.App.2d 611, 617 [applying "equitable principles" in refusing to compel a governing board to reinstate the plaintiff]; *Henneberque, supra,* 172 Cal.App.3d at p. 843.)

Mandamus is available "to compel the performance of a duty that is purely ministerial in character." (*Morris v. Harper* (2001) 94 Cal.App.4th 52, 62.) Plaintiffs bear the burden of proof regarding the existence of a ministerial duty. (*Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, 934.) To be entitled to relief, Plaintiffs must demonstrate that: 1) the governmental agency has a clear, present and ministerial duty to perform an act in obedience to the mandate; and 2) they have a clear, present, and beneficial right to performance of that duty. (*Kavanaugh v. West Sonoma County Union High Sch. Dist*. (2003) 29 Cal.4th 911, 916.) Regarding the first of the two prongs, a "ministerial act" is one that does not allow the exercise of judgment and discretion, but exists only when an employee is "required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his [or her] own judgment or opinion …." (*Jenkins v. Knight* (1956) 46 Cal.2d 220, 223-224; *Rodriquez v. Solis* (1991) 1 Cal.App.4th 495, 501.) Mandamus does not lie to control discretion conferred upon a public agency (*People* ex rel. *Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491), and "[m]andate will not issue if the duty is not plain or is mixed with discretionary power or the exercise of judgment." (*Los Angeles County Prof. Peace Officers' Assn. v. County of Los Angeles* (2004) 115 Cal.App.4th 866, 869.) Importantly, the mandatory nature of a ministerial duty "must be phrased in explicit and forceful language." (*Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 891) ["'It is not enough that some statute contains mandatory language. In order to recover plaintiffs have to show that there is some specific statutory mandate that was violated by the [public entity]'," citing *In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 689; *Tuthill v. City of San Buenaventura* (2014) 223 Cal.App.4th 1081, 1090 ["A 'general statement of public policy' cannot serve as the basis for a mandatory duty. … The Supreme Court has rejected attempts by plaintiffs to find a mandatory duty based on an 'implied duty' read into a statute'"].)

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When no ministerial duty exists, the legal standard is abuse of discretion: "We … review the … decision to … determine whether [it] was 'arbitrary, capricious, or entirely lacking evidentiary support.'" (*Scott B. v. Board of Trustees of Orange County High School of the Arts* (2013) 217 Cal.App.4th 117, 124, quoting *State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963, 977.) When applying this standard, "[t]he trial court is to presume the decisions of the agency or public official which are subject to traditional mandamus review are correct" (*California Teachers Assn. v. Ingwerson* (1996) 46 Cal.App.4th 860, 865), a court "may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld." (*Helena F. v. West Contra Costa Unified School Dist.* (1996) 49 Cal.App.4th 1793, 1799.) The party seeking mandamus "must make some showing that the body invested with discretion has acted arbitrarily, capriciously, fraudulently, or without due regard for his rights and that the action was prejudicial to him." (*Fair v. Fountain Valley School Dist.* (1979) 90 Cal.App.3d 180, 187.)

2. <u>The Broad Discretion of Local School Districts Under California Law</u>

Needless to say, school districts do not have unlimited authority, but any analysis of mandatory duties for purposes of mandamus, and whether a school district has acted outside the bounds of its discretionary authority, must necessarily also include the existence and significance of EC sections 35160 and 35160.1 and the case law recognizing the scope of those provisions. Plaintiffs do not address this important issue, let alone apply it.[4]

A review of local California school district authority and discretion starts with Article IX, section 14 of the California Constitution: "The Legislature may authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established." This provision was added to the Constitution by a vote of the people of this State, and our Supreme Court confirmed it was specifically intended to authorize the Legislature to give significant local discretion to local school districts:

[4] As is noted below, SV asserts the discretion of school districts is equivalent to that of cities and counties. This is not accurate — school districts have decidedly more discretionary authority.

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> In 1972, California voters approved a constitutional amendment authorizing the Legislature to permit school districts "to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established." (Cal. Const., art. IX, § 14.) In the voters' pamphlet which accompanied the initiative, the Legislative Counsel explained that the provision would enable the Legislature to relieve itself of the necessity of granting specific authorization for every activity carried out by local school districts. (Ballot Pamp., Proposed Amend. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) p. 14.)

(*Hartzell v. Connell* (1984) 35 Cal.3d 899, 916.) The Legislature responded in 1976, enacting section 35160, which states "the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established." (EC § 35160.) In 1987, three years after the Supreme Court emphasized the impact of the vote of the people leading to the enactment of section 35160, the Legislature went further and enacted section 35160.1 with specific and expansive statements evidencing especially broad authority: 1) "school districts … have diverse needs unique to their individual communities and programs;" 2) "in addressing their needs, common as well as unique, school districts … should have the flexibility to create their own unique solutions;" 3) "it is the intent of the Legislature to give school districts … broad authority to carry on activities and programs, including the expenditure of funds for programs and activities which, in the determination of the governing board of the school district, … are necessary or desirable in meeting their needs and are not inconsistent with the purposes for which the funds were appropriated; and 4) "[i]t is the intent of the Legislature that Section 35160 be liberally construed to effect this objective." (EC § 35160.1., see also EC § 14000 ["The system of public school support should be designed to strengthen and encourage local responsibility for control of public education"].) As *Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1017–1019 noted, through these enactments the Legislature and the people have vested significant local control and discretion to school districts: "By the terms of the mandate itself, primary authority over public education is vested in the Legislature [citations], but the Constitution, and the Legislature itself, have ceded substantial discretionary control to local school districts. [¶¶] There is a correlative limitation upon the authority of courts to control the actions of local school

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districts. [Citation.] … [¶] It follows that courts should give substantial deference to the decisions of local school districts and boards within the scope of their broad discretion, and should intervene only in clear cases of abuse of discretion."

This broad local district authority is an important consideration in these cases, overlooked by Plaintiffs. LTC cites only section 35160, not the more specific and relevant section 35160.1, and only for the erroneous proposition that section 35160 treats school districts the same as any other state or local entity. (LTC 14.)[5] SV does not cite or address section 35160 or 35160.1 *at all*, and makes the significant error of reciting and describing a "standard of preemption of local ordinances" that relies exclusively on Article XI of the California Constitution, which applies to cities and counties and not school districts. (SV 11-12 [citing only decisions related to cities].) It is well-established that California law gives more local authority to school districts than to counties, cities, and other governmental entities. (See, e.g. *Costa Mesa City Employees Assn. v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 314, n. 7 ["unlike cities, school districts are governed by the (EC), which is designed to give school districts very broad authority in carrying out their responsibilities …"]; *Choice in Education League v. Los Angeles Unified School District* (1993) 17 Cal.App.4th 415, 429 [noting the decision in *Stanson v. Mott* (1976) 17 Cal.3d 206 "involved a state administrative agency, and not a local school board granted broad powers and fiscal authority by the Legislature in (EC) sections 35160 and 35160.1"].)

3. <u>California School District Authority and Responsibility Regarding Student Health and Safety</u>

The California Constitution lists as an inalienable right of students and staff to attend campuses which are safe, secure and peaceful. (Ca. Const. Art. I, §§ 28(a)(7) and (f)(1).) Consistent with this principle, "[t]he governing board of any school district shall give diligent care to the health and physical development of pupils, and may employ properly certified persons for the work." (EC § 49400.) Also consistent with this principle, and particularly relevant here, is that EC section 49403 provides that "[n]otwithstanding any other law" school districts shall cooperate with local health officers in measures necessary for the prevention and control of communicable

[5] "LTC 14" refers to page 14 of the points and authorities, a citation method used for both briefs.

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diseases, and "[f]or that purpose" may "use any funds, property, and personnel of the district" "to administer an immunizing agent to a pupil whose parent or guardian has consented in writing to the administration of the immunizing agent." (EC § 49403(a).)[6] These "immunizing agents" for "school-based immunization programs" include seasonal influenza and "diseases that represent a current or potential outbreak as declared by a federal, state, or local public health officer." (EC § 49403(b)(2)(C)(i)-(iii) and (e).)[7] The same article of the EC states that "the control of smallpox is under the direction of the State Department of Health Services, and no rule or regulation on the subject of vaccination shall be adopted by school or local health authorities." (EC § 49405.) Plaintiffs point to no other affirmative prohibition regarding vaccination, and we find none.[8]

More generally, the relationship between school staff and students is analogous to that between parent and child. "'School officials are said to stand in loco parentis, in the place of parents, …, with similar powers and responsibilities.'" (*Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 935.) Thus, school districts may take such action as "reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning." (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 874.) This role and obligation has been reinforced, including regarding required vaccinations, throughout the judiciary including the U.S. Supreme Court. (See, e.g. *Vernonia Sch. Dist. 47J v. Acton* (1995) 515 U.S. 646, 656 [judicial inquiry "cannot disregard the schools' custodial and tutelary responsibility for children," and "[f]or their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases"].)

4. General Preemption Standards

A final preliminary consideration is that even for local agencies vested with less discretion

[6] Consent is not an issue here; Plaintiffs concede parent consent is required. (See Tucker Decl. Ex. C [Vaccination Roadmap "Information for Students" slide].)

[7] There is no question that potential COVID-19 outbreaks are a current fact of life. (See Supp. Bresee Decl., Exs. A (county), B (county), and C (state).

[8] And here, despite Plaintiffs' occasional suggestions otherwise, no student is being denied admission — the question here is whether, during a pandemic, school districts are precluded from imposing a restriction on in-person instruction in furtherance of their duty to "give diligent care to the health and physical development of pupils."

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than school districts, courts disfavor a finding of preemption; there is a presumption *against* preemption. Courts "will not find that general laws preempt local ordinances" unless there is "a clear showing that the Legislature intended to preempt the field." (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149.) The party claiming preemption has the burden of overcoming the presumption against preemption. (*T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1116.) And, the Supreme Court has "been particularly 'reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another,'" in which case "'the presumption favors the validity of the local ordinance against an attack of state preemption.'" (*Big Creek Lumber Co., supra*, 38 Cal.4th at 1149.)[9]

B. THE HEALTH AND SAFETY CODE DOES NOT IMPOSE ON SCHOOL DISTRICTS A CLEAR, PRESENT AND MINISTERIAL DUTY REGARDING STUDENT ACCESS TO IN-PERSON INSTRUCTION

1. The Plain Language of the California Health and Safety Code Does Not Preclude a Local Vaccination Requirements for In-Person Instruction

To interpret both constitutional and statutory provisions, we first look to their plain language. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798; *Penner v. County of Santa Barbara* (1995) 37 Cal.App.4th 1672, 1677; CCP § 1858.) "Words used in a statute or constitutional provision should be given the meaning they bear in ordinary use," and "[i]f the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature …." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) In asserting the existence of a mandatory duty here, Plaintiffs primarily rely on HSC section 120335(b). The statute does indeed invoke a mandatory duty, but not what Plaintiffs suggest. The statute says "[t]he governing authority *shall not unconditionally admit* any person as a pupil of any

[9] The transcript of the September 28, 2021 Board meeting and the cited portions of the Declarations of Dr. Howard Taras and Susan Barndollar demonstrate that the recommendation here, and the action to accept it, was a product of a recommendation by District staff and San Diego-based scientists assessing local conditions, who had all been working with and advising the District since the onset of the pandemic. On the question whether to require vaccinations for in-person instruction, it simply cannot be said that the local conditions and interests in San Diego County are the same as the local conditions and interests in every other school district in the 58 counties of this state all the way up to and including the far reaches of Modoc, Siskiyou, and Del Norte Counties.

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private or public elementary or secondary school … unless, prior to his or her first admission to that institution, he or she has been fully immunized." (HSC § 120335(b) [emphasis added].) Thus, every school district in the state is *precluded* from unconditionally admitting students who have chosen not to be vaccinated against one or more of the state-mandated vaccines, absent a medical exemption. (*Id.* at § 120325(c); see also EC § 48216(a) [school districts "shall *exclude* any pupil who has not been immunized properly" pursuant to [the Health and Safety Code]" (emphasis added)].)[10] The option for those who opt to not vaccinate is "a home-based private school or … an independent study program…." (HSC § 120335(f).) The statute authorizes the California Department of Public Health ("CDPH") to add an additional statewide mandate, on all 1,000+ school districts over the 163,000 square miles of the state, which if done would impose the same unconditional admission prohibition with different exemption options (*Id.* at § 120335(b)(11).)[11]

Plaintiffs do not clearly articulate the mandatory duty they assert, let alone point to statutory provisions "phrased in explicit and forceful language." (*Guzman v. County of Monterey*, *supra*.) In effect they attempt to convert one minimum requirement for unconditional admission (which does not even address the method of instruction),[12] into a mandatory duty to provide in-person instruction to any child who has the ten (10) vaccinations required statewide regardless of any other admission criteria statutory or otherwise. (See, e.g. EC §§ 48000, 48010 (age requirements), 48204 (residency).) The plain language of the statute negates this claim; "there is [therefore] no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature …." (*Lungren v. Deukmejian*, *supra*, 45 Cal.3d at 735.)

[10] For example, if a school district governing board decided that, in the view of its majority, measles vaccines are potentially harmful and unnecessary, and began unconditionally admitting students unvaccinated against measles, that board would be deviating from its clearly-stated mandatory duty to "not unconditionally admit any person as a pupil" who is unvaccinated against measles.

[11] Indeed, the chaptered legislation emphasized by Plaintiffs (SB 277) starts, in the Legislative Counsel's Digest, with the same unambiguous language: "Existing law prohibits the governing authority of a school or other institution from unconditionally admitting any person as a pupil … unless prior to his or her admission to that institution he or she has been fully-immunized against various diseases …." (Stats.2015, Ch. 35 (SB 277).) It goes on to state that "[t]his bill would exempt pupils in a home-based private school and students enrolled in an independent study program … pursuant to specified law *from the prohibition described above*." (*Ibid.*, emphasis added.) Again, the prohibition on school district in the plain language of the law is not what Plaintiffs claim.

[12] "Unconditional admission" is defined separate and apart from the method of instruction a student will receive. (Title 17, Ca. Code of Regs. § 6000(a)(1).)

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2. Other Statutes, Regulations and Legislative History Do Not Negate the Plain Language of the Statute

In the face of the plain language of the most applicable statute undermining their claim of duty, Plaintiffs turn to regulations and legislative history, implicitly arguing they negate the plain language of HSC section 120335(b) and EC section 49403. Even if this Court proceeds past the plain language to this part of the analysis, Plaintiffs' arguments are unavailing.

First, "[q]uasi-legislative regulations are construed using the same principles as for the interpretation of statutes," those being, that words of the authorizing statute "provide the most reliable indicator of legislative intent." (*Lafferty v. Wells Fargo Bank, N.A.* (2018) 25 Cal.App.5th 398, 410.) Plaintiffs ask the Court to discard the plain language of a statute and subordinate the statute to a regulation. (Cal. Code of Regs., tit. 17, § 6025(a).) An interpretation that contradicts the plain language of a statute cannot reverse the meaning of the statute. Second, legislative purpose of the law is not focused on enrollment but "that all children covered by section 3381 [now H&S Code, § 120335] are required by state law to be immunized." (*Salasguevara v. Frye* (1995) 31 Cal.App.4th 330, 340.) The purpose is not, as Plaintiffs would have it, to require that school districts exclude a student "only when he has not received vaccination for the statutorily enumerated diseases." (LTC 11). Their urged construction would lead to absurd results — districts would run afoul of the duty to admit a student each time they were to not enroll (or exclude) a student who although fully vaccinated lacks other admission criteria statutory or otherwise, as noted above. "In construing a statute, a court may consider the consequences that would follow from a particular construction and will not readily imply an unreasonable legislative purpose. Therefore a practical construction is preferred." (*Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147.) While regulations may "fill up the details" (see *GMRI, Inc. v. California Dept. of Tax & Fee Administration* (2018) 21 Cal.App.5th 111, 125), "even under the broadest of statutory mandates" regulations "may not … alter, enlarge, subvert or impair" the authorizing statute. (*County of Santa Cruz v. State Bd. of Forestry* (1998) 64 Cal.App.4th 826, 837.)

Plaintiffs also rely on two legislative reports related to SB 277, from the Assembly Health

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Committee ("Health") and the Senate Judiciary Committee ("Judiciary") (See Spangler Decl. Exs. M [Health] and N [Judiciary]), but neither stand for the proposition that the legislature has stripped local districts of the authority to implement their own vaccination programs above and beyond the state-mandated minimum. First, both reports include the same statement of the prohibition found in the statute and the Legislative Counsel's Digest — "Existing Law … prohibits the governing authority … from unconditionally admitting…." (Health 1; Judiciary 4.) The "Purpose of the Bill" was to raise vaccination rates by eliminating the personal beliefs exemption ("PBE") (Health 2; Judiciary 1); the legislation simply did not address local school district authority generally or regarding vaccines specifically. Also, and needless to say, SB 277 was not enacted during or in response to a pandemic. Furthermore, a statement that "states" enact vaccination laws in no way establishes that *only* a state can do so, and in California the Legislature has explicitly indicated otherwise. (See EC §§ 48903, 49405, addressed above). Plaintiffs also point to a statement in a Judiciary Committee report regarding a "statewide standard" allowing for a "consistent policy." (SV 13; Judiciary 18.) Not only does the passage not evidence a foreclosure of local immunization programs (and by implication a repeal of EC § 48903), Plaintiffs fail to note that the only issue in the legislation — and the *only* focus for opponents and supporters alike — was whether to remove the PBE. Thus, the passage was addressing a request that, for an added statewide vaccine, individual school districts be able to choose whether to offer a PBE.[13]

3. <u>Local School Districts Vaccination Requirements are Neither in Conflict With Nor Preempted by State Law</u>

Plaintiffs also contend that the Board's action was outside the scope of its broad discretion and contrary to a mandatory duty because, they assert, it is contradictory/ inconsistent with state law (LTC 14-15; SV 12-14, 16-18) and it is field preempted by state law (LTC 15-18; SV 14-16). This approach fails as well.

If local legislation "conflicts with state law, it is preempted by such law and is void." There are three types of preemption whereby "[a] conflict exists if the local legislation 'duplicates,

[13] The California School Boards Association, the Association of California School Administrators, and several school districts supported SB 277. (Health 15-16; Judiciary 22-23.) Would these organizations and districts support this legislation if its intent was to undermine local school district authority and discretion?

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contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'" (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.) "The 'contradictory and inimical' form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands." (*City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 743.) As to the third type (field preemption), "local legislation enters an area that is 'fully occupied' by general law when the Legislature has expressly manifested its intent" to do so, "or when it has impliedly done so in light of [three] indicia of intent: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern'"; (2) the state law "partially" covers the subject matter but "clearly" indicates "that a paramount state concern will not tolerate further or additional local action;" or (3) the state law "partially" covers the subject matter which "is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality." (*City of Riverside*, at p. 743; *Sherwin-Williams*, 4 Cal.4th at p. 898.)

"[N]o inimical conflict will be found where it is reasonably possible to comply with both the state and local laws." (*City of Riverside, supra*, at p. 743.) For example, California's medical marijuana use statutes did not expressly or impliedly preempt the City of Riverside's zoning provisions that prohibited land use for a medical marijuana dispensary because there was "no duplication between the state laws, on the one hand, and Riverside's ordinance, on the other, in that the two schemes are coextensive." (*City of Riverside*, 56 Cal.4th 729, 752-54.) "Persons who refrain from operating medical marijuana facilities in Riverside are in compliance with both the local and state enactments." (*Id*. at pp. 754–55; see also *T-Mobile West LLC v. City and County of San Francisco* (2019) 245 Cal.Rptr.3d 412, 421, 6 Cal.5th 1107, 1122 [a state statute providing that telephone corporations may construct lines and erect equipment along public roads did not preempt local regulation allowing city to condition permit approval for telephone line construction on aesthetic considerations]; c/f *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1071-72 [state law that provided for "vehicle forfeiture … only upon proof beyond a reasonable doubt" preempted a local city law that the same "merely by a preponderance of evidence."])

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Here, the District's Mandate is not preempted by the state's student immunization laws as the District can simultaneously comply with both. The purpose of state law is to preclude school districts from unconditionally admitting students who do not have certain immunizations absent a medical exemption. (See *Salasguevara v. Frye* (1995) 31 Cal.App.4th 330, 340 ["no doubt that the Legislature, at all times since the 1971 adoption of the child immunization statutes, viewed the law as providing that all children covered by section 3381 [now HSC, § 120335] are required by state law to be immunized."]) The District can implement its requirement for in-person instruction and still comply with its duty to not unconditionally enroll students who lack the state's required vaccines. SV's reliance on *Haytasingh v. City of San Diego* (2021) 66 Cal.App.5th 429 is misplaced and actually reinforces the District's position — similar to *O'Connell, supra,* in *Haytasingh* a local ordinance specifically allowed government employees to violate an explicit state law prohibiting watercraft speeds over a specified limit. The District can comply (and is) with the HSC by not unconditionally admitting students who do not have the statewide mandated vaccines, and nothing in the Board's action changes that.

There is no express preemption here. The state vaccination law does not specify that the CDPH's power to add a statewide mandate is exclusive, or that individual boards in their broad discretion cannot impose local requirements for in-person instruction (particularly, here, as a unique solution to the pandemic). There are also no indicia of implied preemption. That school districts have statutory and constitutional duties and authorities regarding student health and safety generally and vaccines specifically (as noted above), forecloses an argument that immunization is "exclusively a matter of state concern." (*City of Riverside, supra*; *Sherwin-Williams, supra*.) There is also no paramount "concern" evident that "will not tolerate further or additional local action" (*Ibid*), when in fact, the District's Mandate furthers the CDPH's "Guidance for K-12 Schools in California, 2021-22 School Year":

> In California, the surest path to safe and full in-person instruction at the outset of the school year, as well as minimizing missed school days on an ongoing basis, is a strong emphasis on the following: vaccination for all eligible individuals to get COVID-19 rates down throughout the community; ... COVID-19 vaccination is strongly recommended for all eligible people in California, including … students.

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(Supp. Bresee Decl., Ex. C p. 038.) Further, it would be untenable to say that the subject of student immunization "is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality." (*Ibid*.) Again, the CDPH has expressed a "strong emphasis" on counties in this state getting COVID-19 rates down in their community, and the District (2nd largest in California) is a significant portion of the county. As such, examination of the "whole purpose and scope" of this state law (*O'Connell, supra*) militates against a finding that the Mandate is preempted, especially since "California courts will presume, absent a clear indication of preemptive intent from the Legislature, that [a local] regulation is *not* preempted by state statute." (*City of Riverside*, at p. 743.)[14]

4. <u>The Legislature has Dictated that Independent Study is a Choice for Students Who Choose not to be Vaccinated</u>

Finally, as is noted above, long before the COVID-19 pandemic the Legislature provided an option to students who choose not to be vaccinated when required — independent study or some other form of non-in-person instruction. (HSC § 120335(f).) Thus, Plaintiffs' argument is either: 1) the state-mandated vaccine requirements are unlawful; or 2) when a student chooses not to be vaccinated against one or more of the vaccines mandated statewide, that student is choosing independent study, but a District student who chooses not to be vaccinated against COVID-19 is forced into independent study. The latter is obviously illogical; it cannot be voluntary in 10 circumstances and forced in one other. As to the former, the Legislature has clearly made a determination, through adopted statutes, that the requirement that independent study be voluntary is *consistent* with choosing not to be vaccinated. Similarly, regarding the State's indoor mask mandate in schools, the CDPH has advised that schools should offer independent study to students who are excluded from campus because they will not wear a face covering. (Supp. Bresee Decl., Ex. C.)[15] All of this is consistent with various statutory provisions permitting exclusion from in-

[14] LTC asserts that the school districts in California that have adopted COVID-19 vaccine requirements are cultivating chaos because students moving from one district to another are "suddenly ineligible to enroll" in another district. (LTC 18.) This, of course, is false — *any* student residing in the District, including those who move to the District in the future, are eligible to enroll and will be allowed to enroll, including those who have not been administered one or more required vaccines. Choosing an educational option during the enrollment process is obviously does not make one "ineligible to enroll."

[15] It is entirely likely that many of the Let Them Breathe advocates, the principal of LTC, have done exactly that.

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person instruction for public health reasons. (See e.g. EC §§ 48213, 49451; HSC §§ 120230, 120335.) The Assembly Health Committee report relied on by Plaintiffs also undercuts their argument, stating "[i]ndependent study is an alternative to classroom instruction consistent with the school district's regular course of study and is expected to be equal or superior in quality to classroom instruction." (Health 8.) The report describes California law on the subject (8-10), and a support statement from the State Superintendent of Public Instruction includes "that education is a fundamental right in California, and this bill provides education choices for families opting not to vaccinate their children." (*Id.* at 10.) The same is true in the Judiciary report. (See, e.g. Judiciary 6 ["the bill does not prevent children from getting an education: the bill 'exempts a variety of homeschooling options, …. If parents are unwilling to protect children from disease, they have choices — even if those would not be their first choice"].) State law is clear — those choosing not to be vaccinated are opting into independent study or home study *voluntarily*.[16]

C. THE DISTRICT HAS NOT ABUSED ITS DISCRETION

Applying the abuse of discretion standard described above, there can be no conclusion other than the District and its Board did not abuse discretion. Plaintiffs do not contend otherwise. The recommendation was the product of extensive long-term collaboration between District staff, its medical consultant, and the UCSD Expert Panel. From the Superintendent introducing the issue, to the presentation laying out the rationale and the science, the recommendation, extensive public comment, deliberation and discussion by the Board, through the unanimous determination that the vaccine requirement should be implemented, this was an exercise of careful thought and consideration. It is consistent with the principles espoused and recommendations made by local and state public health agencies. (Supp. Bresee Decl. Exs. A, B and C.)

Of course, people acting in good faith can and do disagree with vaccine mandates, whether it is on scientific, sociological, political, personal, religious, or any number of other criteria or perspectives, but the standard for overturning the discretionary decision of the democratically-elected members of the Board is not based on these considerations, or how numerous and/or vocal

[16] SV claims the Board's action deviated from its policies. (SV 19.) In addition to the fact that a governing board can amend its policies by board action, SV also cites to and submits a policy of the San Diego County Office of Education, not the District. (*Ibid.*)

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those opposing the decision are. Plaintiffs establish no mandatory duty, and under the appropriate legal standard this Court has no grounds to reverse the Board's decision.

III. CONCLUSION

For the foregoing reasons, the District respectfully requests that the Motions of Plaintiffs Let Them Choose and S.V. be DENIED.

Dated: December 13, 2021

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