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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN JOSE DIVISION**

12 **UNIFYSCC**, an unincorporated California
association on behalf of employees in Santa Clara
13 County; **TOM DAVIS**, an individual; and **MARIA**
RAMIREZ, an individual;

14 Plaintiffs,

15 vs.

16 **SARA H. CODY**, in her official capacity as the Santa
17 Clara County Public Health Officer; **JAMES**
WILLIAMS, in his official capacity as the County
18 Counsel of Santa Clara County; **JEFFREY SMITH**,
in his official capacity as the County Executive of
19 Santa Clara County; and **SANTA CLARA**
COUNTY;

20 Defendants.
21
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Case No. 5:22-cv-01019-SVK

[Honorable Beth L. Freeman]

**NOTICE OF MOTION AND MOTION
FOR TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW CAUSE;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: June 23, 2022
Time: 9:00 a.m.
Courtroom: 3

1 **TO THE COURT, ALL PARTIES, AND THEIR RESPECTIVE ATTORNEYS OF**
2 **RECORD:**

3 **PLEASE TAKE NOTICE** that on June 23, 2022, at 9:00 a.m., or as soon thereafter as
4 counsel may be heard in Courtroom 3, 5th Floor, United States District Court, Northern District of
5 California, San Jose Courthouse located at 280 South 1st Street, San Jose, California 95113, Plaintiffs
6 Unify Santa Clara County (“UnifySCC”), Tom Davis, and Maria Ramirez (collectively, “Plaintiffs”) will and hereby do move for a temporary restraining order and preliminary injunction against
7 Defendants Sara H. Cody, James Williams, Jeffrey Smith, and Santa Clara County (collectively,
8 “Defendants”) as follow:
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10 1. Defendants, as well as their agents, employees, and successors in office, shall be
11 restrained from enforcing, attempting to enforce, or threatening to enforce a vaccine/booster mandate
12 against Plaintiffs or otherwise requiring Plaintiffs to receive the COVID-19 vaccine or booster as a
13 condition of employment.

14 2. Defendants, as well as their agents, employees, and successors in office, shall be
15 restrained from taking any adverse action against Plaintiffs based on their refusal to take the COVID-
16 19 vaccine, including relegating Plaintiffs to unpaid leave, and stripping Plaintiffs of their
17 employment benefits.

18 Plaintiffs make this Application pursuant to the Federal Rules of Civil Procedure Rule 65(b)
19 and Civil Local Rule 65-1. Plaintiffs will likely succeed on the merits of their First Amendment and
20 Fourteenth Amendment claims, they will suffer irreparable harm absent immediate injunctive relief,
21 the balance of equities tips sharply in their favor, and the relief sought is in the public interest.

22 Good cause exists to issue the requested order to preserve Plaintiffs’ constitutional rights
23 under the United States Constitution and to avoid irreparable harm to those rights. This Application is
24 supported by the accompanying Memorandum of Points and Authorities and supporting declaration
25 attached thereto, the Complaint and exhibits attached thereto, and by such other argument and
26 evidence that may be adduced at any hearing on this matter.
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1 As reflected in the accompanying declaration of Mariah Gondeiro, Plaintiffs have notified
2 Defendants' counsel of their intention to file this Application. *See* Gondeiro Decl. ¶¶ 4-5.

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4 Respectfully submitted,

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6 ADVOCATES FOR FAITH & FREEDOM

7 Dated: March 3, 2022

/s/ Mariah Gondeiro, Esq.

8 Mariah Gondeiro

9 Attorney for Plaintiffs
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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR**
2 **TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE**

3 **I. INTRODUCTION**

4 Since March 2020, Santa Clara County (the “County”) has issued draconian and
5 unconstitutional “health orders” in the name of COVID-19. These orders determined what people
6 could do, when they could leave their homes, and whether their job was essential. These orders
7 changed frequently, but one constant remained the same: religious people were treated as second-class
8 citizens. Indeed, the Supreme Court admonished the County for its ban on religious services because
9 it treated churches harsher than secular activities and entities. *See Gateway City Church v. Newsom*,
10 141 S. Ct. 1460 (2021).

11 By the spring of 2021, the County lifted its health orders as several experimental vaccines
12 were circulated throughout the community. The vaccines were developed quickly to protect those who
13 are at highest risk of getting seriously ill from COVID-19, especially the elderly and those with
14 multiple co-morbidities. In response to the spread of Omicron and other variants, Defendants ordered
15 that all workers in “high-risk” settings in the County get the shots plus the most recent boosters.
16 Defendants have the sole authority to enforce the COVID-19 mandates and retain the discretion to
17 exempt anyone from their mandates at any time.

18 Plaintiffs are “high-risk” employees whose religious beliefs prevent them from taking the
19 COVID-19 vaccine or booster. Like the previous “health orders”, Defendants have disregarded
20 religion when applying their vaccine orders and policies. For instance, Defendant never engaged in
21 good faith negotiations to determine whether a reasonable accommodation was available to Plaintiffs
22 and instead deprived them of their livelihood. Meanwhile, Defendants provide accommodations to
23 similarly situated employees for medical reasons.

24 Defendants’ conduct unequivocally contravenes the Free Exercise Clause and Equal
25 Protection Clause as Defendants have no compelling reason to treat similarly situated individuals
26 differently based solely on religion. Further, a temporary restraining order and preliminary injunction
27 are warranted because, in addition to the likelihood of success on the merits, Plaintiffs will suffer
28 irreparable harm absent immediate relief. The violation of Plaintiffs’ First Amendment rights

1 constitutes irreparable harm. The balance of hardship also weighs strongly in favor of Plaintiffs. Any
2 harm to Defendants is belied by the fact that they grant reasonable accommodations to similarly
3 situated employees with medical objections. Thus, this Court should immediately enjoin Defendants
4 from taking any adverse action against Plaintiffs until it adjudicates this Action.

5 II. FACTS

6 Plaintiffs are employees who work in the County and are subject to its vaccine policies and
7 orders. Compl., ¶ 8, ECF No. 1. They have sincerely held religious beliefs that prevent them from
8 taking the COVID-19 vaccine. *Id.* Defendants have relegated them to unpaid leave and stripped them
9 of their employment benefits because they will not take the COVID-19 vaccine or booster, as required
10 under their policies and orders. *Id.*

11 On August 5, 2021, Defendants issued a policy requiring all employees take the COVID-19
12 vaccine or request a medical and/or religious exemption. *Id.*, ¶ 21, Ex. A. Following this policy,
13 Defendants created a risk tier system that classified employees as low risk, intermediate risk, or high
14 risk (“Risk Tier System”). *Id.*, ¶ 22. Employees in low risk and intermediate risk with religious
15 objections can continue to work if they wear a mask and take specific COVID-19 tests. *Id.*, ¶¶ 23-24.
16 Employees in high risk, like Plaintiffs, include social workers, registration clerks, nurses, firefighters,
17 doctors, electricians, plumbers, and probation counselors. *Id.*, ¶ 25. These employees cannot continue
18 to work if they remain unvaccinated. *Id.*

19 On December 28, 2021, the County issued a health order (“Vaccine Order”) “requiring up-to-
20 date vaccination for all workers in specific high-risk setting in [the County] (i.e., both fully vaccinated
21 and boosted against COVID-19 if eligible for a booster) by January 24, 2022.” *Id.*, ¶ 25, Ex. C. On
22 January 22, 2022, the County issued a directive establishing a waiver process (“Waiver Order”). *Id.*, ¶
23 28, Ex. D. “The waiver is available to entities facing critical staffing shortages and applies to
24 personnel who receive a bona fide medical and/or religious exemption and who follow specific safety
25 protocols.” *Id.* Defendants have the authority to revoke any waiver. *Id.*, ¶ 29.

26 Plaintiffs’ sincerely held religious beliefs have been approved, “but they have not been granted
27 a reasonable accommodation because they are in a ‘high risk’ job setting.” *Id.*, ¶ 8. Defendants did not
28 offer reasonable accommodations to Plaintiffs such as weekly testing, teleworking, reassignment,

1 working a modified shift, or requiring employees to wear an N95 mask. *Id.*, ¶ 34. Defendants do offer
 2 reasonable accommodations to employees with medical exemptions. *Id.*, ¶ 35. Indeed, an employee
 3 with the Equal Opportunity Division within the Office of the County Counsel sent the following email
 4 confirming medical exemptions receive priority over religious exemptions: “Religious exemption is
 5 not part of the reasonable accommodation process, we are not placing you, just helping you through
 6 the recruitment process. Only medical is part of Reasonable Accommodation and you would work
 7 directly with the EOD.” *Id.*, ¶ 37, Ex. E.

8 III. ARGUMENT

9 In determining whether to issue a TRO or a preliminary injunction, this Court must consider
 10 the following four factors: (1) whether the movant has shown a likelihood of success on the merits,
 11 (2) whether there is a likelihood the movant will suffer irreparable harm in the absence of a TRO, (3)
 12 whether the balance of the equities tips in the movant’s favor, and (4) the TRO is in the public’s
 13 interest. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009); *Winter v. Natural Res. Def.*
 14 *Council, Inc.*, 555 U.S. 7, 20 (2008); *McCarthy v. Servis One, Inc.*, 2017 U.S. Dist. LEXIS 32622, at
 15 *9–10 (N.D. Cal. Mar. 7, 2017). Plaintiffs easily satisfy all four factors here.

16 A. Plaintiffs Are Likely To Succeed On The Merits

17 Plaintiffs will likely succeed on the merits in their underlying suit because Defendants’
 18 vaccine orders and policies violate the Free Exercise Clause and Equal Protection Clause.
 19 Specifically, Defendants’ policies and orders violate the Free Exercise Clause because they grant
 20 Defendants sole discretion to determine who is exempt from their policies. Defendants also violated
 21 the Free Exercise Clause and Equal Protection Clause because they discriminated against religion by
 22 prioritizing medical exemptions over religious exemptions.

23 1. Defendants’ Vaccine Policies and Orders Violate the Free Exercise Clause Because 24 They Create a Formal Mechanism for Granting and Denying Exemptions

25 A policy that forces a person to choose between observing her religious beliefs and receiving a
 26 generally available government benefit for which she is otherwise qualified burdens her free exercise
 27 rights. *See Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021). The reason is simple: denying a
 28 person “an equal share of the rights, benefits, and privileges enjoyed by other citizens” because of her

1 faith discourages religious activity. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449
2 (1988). Of course, not every burden on the free exercise of religion is unconstitutional. A policy that
3 provides a “mechanism for individualized exemptions”, as is the case here, is not generally applicable.
4 *Fulton*, 141 S. Ct. at 1877 (citation omitted).

5 Under *Fulton*, it is irrelevant whether any additional exemptions have been given or if
6 Defendants plans to issue any further exemptions. *Id.* at 1879. The issue is whether Defendants have
7 the sole discretion to create any exemptions it deems worthy and whether it “invite[s] the government
8 to decide which reasons for not complying with the policy are worthy of solicitude.” *Id.* For instance,
9 the Sixth Circuit Court of Appeals affirmed a preliminary injunction in favor of student athletes who
10 refused to take the COVID-19 vaccine and were thereafter denied a reasonable accommodation for
11 their religious beliefs. *See Dahl v. Bd. of Trustees of W. Mich. Univ.*, 15 F.4th 728 (6th Cir. 2021). In
12 reaching this decision, the Sixth Circuit held the university’s policy was not neutral and generally
13 applicable because it evaluates whether to grant religious exemptions on an individualized basis. *Id.* at
14 733; *See also Thoms v. Maricopa Cnty. Cmty. Coll. Dist.*, 2021 WL 5162538, at *9 (D. Ariz. Nov. 5,
15 2021) (“Defendant’s process for reviewing religious accommodation requests appears to be the type
16 of individualized mechanism that triggers strict scrutiny under *Fulton*”).

17 Here, Defendants have the sole authority and discretion to determine their policies and
18 exemptions. Compl., ¶ 5. For instance, on August 5, 2021, Defendants issued a policy requiring all
19 employees to get the COVID-19 vaccine or apply for a religious or medical accommodation. *Id.*, ¶ 21.
20 Defendants created the Risk Tier System that helps them determine what accommodation, if any, an
21 employee will receive. *Id.*, ¶¶ 22-25. On December 28, 2021, Defendants issued the Vaccine Order
22 which prevented employees in high-risk setting from requesting an accommodation. *Id.*, ¶ 26, Ex. C.
23 Then, on January 10, 2022, Defendants issued the Waiver Order that allows them to exempt anyone
24 from the Vaccine Order if they determine the employment setting is experiencing a staffing shortage
25 that necessitates more employees on staff. *Id.*, ¶ 28, Ex. D. Defendants also reserve the right to revoke
26 a waiver. *Id.*, ¶ 29.

27 In sum, Defendants have the authority to decide who is affected by their policy, who must
28 comply with their policy, and who is exempted from their policy. Defendants’ policies and orders,

1 combined with their ability to exercise sole discretion to exempt anyone at any time, triggers strict
2 scrutiny.

3 2. Defendants’ Vaccine Policies and Orders Also Violate the Free Exercise Clause Because
4 They Discriminate Against Religion

5 Defendants’ policies and orders are also not neutral because they discriminate against religion.
6 A regulation is not a neutral burden on religion if it discriminates against a religious practice on its
7 face, or if in its real operation it targets a religious practice. *Church of the Lukumi Babalu Aye, Inc. v.*
8 *City of Hialeah*, 508 U.S. 520, 534 (1993). Additionally, a regulation is not generally applicable
9 where it “treat[s] any comparable secular activity more favorably than religious exercise.” *Tandon v.*
10 *Newsom*, 141 S. Ct. 1294, 1296 (April 9, 2021) (emphasis in original). And “whether two activities
11 are comparable for purposes of the Free Exercise Clause must be judged against the asserted
12 government interest that justifies the regulation at issue,” including activities that “could . . . present []
13 similar risks” of “spread[ing] COVID-19.” *Id.* (emphasis added) (internal quotations omitted).

14 Here, Defendants’ vaccine policies and orders purportedly provide for both medical and
15 religious exemptions. Compl., ¶ 21. However, in application, Defendants discriminate against religion
16 by prioritizing medical accommodations over religious accommodations. Defendants never
17 accommodated Plaintiffs but instead relegated them to unpaid leave. *Id.*, ¶ 33. Defendants do
18 accommodate employees with medical exemptions. *Id.*, ¶¶ 35-37.

19 Because Defendants’ vaccine policies and orders are not neutral and generally applicable, they
20 trigger strict scrutiny under the First Amendment. *See Lukumi*, 508 U.S. at 531–32; *Fulton*, 141 S. Ct.
21 at 1877. Defendants can offer “no compelling reason why it has a particular interest in denying an
22 exception [to these particular Plaintiffs] while making them available to others.” *Id.* at 1882. There is
23 no compelling interest in denying Plaintiffs’ religious accommodations while granting similarly
24 situated individuals’ accommodations for medical reasons notwithstanding the government’s
25 supposed interest in stopping the spread of COVID-19.

26 For related reasons, Defendants also falter on the narrow tailoring prong. As the Supreme
27 Court recently put it with respect to the government’s “interest in reducing the spread of COVID,”
28 “[w]here the government permits other activities to proceed with precautions, it must show that the

1 religious exercise at issue is more dangerous than those activities even when the same precautions are
 2 applied.” *Tandon*, 141 S. Ct. at 1297. That is exactly what the government cannot do here. Defendants
 3 cannot show that an unvaccinated religious adherent undermines their asserted interests any more than
 4 an unvaccinated employee with medical contraindications to vaccination. *See Dahl*, 15 F.4th at 735
 5 (“One need not be a public health expert to recognize that the likelihood that a student-athlete
 6 contracts COVID-19 from an unvaccinated non-athlete with whom she lives, studies, works,
 7 exercises, socializes, or dines may well meet or exceed that of the athlete contracting the virus from a
 8 plaintiff who obtains a religious exemption to participate in team activities.”); *Thoms*, 2021 WL
 9 5162538, at *10 (“Plaintiffs are equally likely to spread COVID-19 as those students whose clinical
 10 sites do not require vaccination, who are nonetheless excluded from the Policy”).

11 3. Defendants’ Vaccine Policies and Orders Violate the Equal Protection Clause

12 Plaintiffs also allege a claim for relief under the Equal Protection Clause. The Equal Protection
 13 Clause provides that “[n]o State shall...deny to any person within its jurisdiction the equal protection
 14 of the laws.” U.S. Const. amend. XIV. Equal protection requires the state to govern impartially – not
 15 draw distinctions between individuals based solely on differences that are irrelevant to a legitimate
 16 governmental objection. *City of Cleburne, Tex. V. Cleburne Living Ctr.*, 473 U.S. 432, 466 (1985).
 17 For the reasons explained above, Defendants’ policies and orders discriminate against religion by
 18 creating a system of classifications that improperly accommodate exemptions for employees
 19 concerned with bodily health while denying accommodations to employees seeking to exercise their
 20 sincerely held religious beliefs. Compl., ¶ 64. There is no rational, legitimate, or compelling interest in
 21 applying different standards to similarly situated groups. *See Romer v. Evans*, 517 U.S. 620, 633
 22 (1996) (“A law declaring that in general it shall be more difficult for one group of citizens than for all
 23 others to seek [protection] from the government is itself a denial of equal protection of the laws in the
 24 most literal sense.”)

25 **B. Plaintiffs Satisfy The Remaining Factors For A TRO And Preliminary Injunction**

26 Plaintiffs easily satisfy the remaining three factors for an emergency TRO and preliminary
 27 injunction: (1) irreparable harm; (2) balance of hardships; and (3) public interest.

1 Plaintiffs can demonstrate irreparable harm because the loss of a constitutional right, “for even
 2 [a] minimal period [] of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S.
 3 347, 373 (1976). Here, Plaintiffs must either receive the vaccine in direct violation of their religious
 4 beliefs or refuse the vaccine and face imminent loss of employment. Because a constitutional right is
 5 being threatened or impaired, a finding of irreparable harm is mandated.

6 Furthermore, where the government is the opposing party, the balance of harm and the public
 7 interest merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Defendants’ vaccine orders and
 8 policies violate the First Amendment, and “it is always in the public interest to prevent the violation
 9 of a party’s constitutional rights.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting
 10 *Elrod*, 427 U.S. at 373). As the U.S. Supreme Court recently affirmed, “even in a pandemic, the
 11 Constitution cannot be put away and forgotten.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S.
 12 Ct. 63, 68 (2020).

13 Further, any argument of irreparable harm is belied by the fact that Defendants grant
 14 reasonable accommodations to similarly situated employees for medical reasons. Plaintiffs pose no
 15 greater threat of spreading COVID-19 than individuals concerned with bodily health. However,
 16 Plaintiffs are being deprived of their constitutional rights and their livelihood is at stake. The public
 17 undoubtedly has considerable interest in maintaining the service of healthcare workers, social
 18 workers, and other public servants who have provided critical care to COVID-19 patients and
 19 individuals suffering from mental health issues during the pandemic. *See* Battacharya Decl., ¶ 44.
 20 Thus, injunctive relief is in the public interest.

21 IV. CONCLUSION

22 For the foregoing reasons, this Court should grant Plaintiffs’ motion to temporarily restrain
 23 and preliminary enjoin Defendants’ vaccine policies and orders.

24 Respectfully submitted,

25 ADVOCATES FOR FAITH & FREEDOM

26 Dated: March 3, 2022

27 /s/ Mariah Gondeiro, Esq.

28 Mariah Gondeiro

Attorney for Plaintiffs