No. 21A217

In the Supreme Court of the United States

JOHN DOE, an individual; JANE DOE, individually and as parent and next friend of JILL DOE, a minor child; and JILL DOE, a minor child, by and through her next friend, JANE DOE,

Applicants,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT; RICHARD BARRERA, in his official capacity as Board President; SHARON WHITEHURST-PAYNE, in her official capacity as Board Vice President; MICHAEL MCQUARY, in his official capacity as Board Member; KEVIN BEISER, in his official capacity as Board Member; SABRINA BAZZO, in her official capacity as Board Member; and LAMONT JACKSON, in his official capacity as Interim Superintendent,

Respondents.

OPPOSITION OF RESPONDENTS TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI AND STAY PENDING RESOLUTION

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INTRODUCTION

The Board of Education ("Board") of the San Diego Unified School District ("District") followed the recommendation of its staff and a group of scientific experts in pediatrics, infectious diseases, epidemiology, atmospheric chemistry, and public health from the University of California, San Diego ("UCSD Expert Panel"), who have been advising the District and Board throughout the COVID-19 pandemic, and adopted a requirement that students be vaccinated against the COVID-19 virus as a condition of in-person instruction and participation in extracurricular activities. The requirement applies to all students in the District, phased in based on full approval of the COVID-19 vaccination for an age group by the Food and Drug Administration ("FDA"). Students choosing not to be vaccinated will not be deprived of an education, but consistent with state law regarding other required vaccines will have the option of private home school instruction, the District's independent study program (iHigh Virtual Academy), or enrollment in a charter school.[1]

Like the ten (10) vaccines students are already mandated to receive as a condition of school admission in California, the District's requirement includes a single, narrowly-defined and objectively-applied medical exemption for students

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[1] *See* https://ihigh.sandiegounified.org/ (information regarding iHigh Virtual Academy). In California, charter schools are independent and operate separate from their authorizing entity, which can be a school district, a county office of education, or the state board of education. *See* Ca. Educ. Code §§ 47600 *et seq*. The District has a number of Board-approved charter schools, and there is an even larger list of charter schools in San Diego County. *See* https://sandiegounified.org/schools/charter_schools (District charter schools); https://www.cde.ca.gov/ds/si/cs/ap1/countyresults.aspx?id=37 (Charter schools in San Diego County.) Under state law, charter schools have no attendance boundaries, so enrollment is not limited to students who reside within the school district where the charter school is located. The governing bodies of District charter schools that are not co-located with District non-charter schools make their own decision regarding vaccination requirements.

whose health and safety is threatened by COVID-19 vaccine administration. This is based on and consistent with the District's stated interest of protecting the health and safety of individual students by requiring vaccination only of those who can be safely vaccinated. Also like the state-mandated vaccines, the District's requirement has no religious exemption, and no personal beliefs exemption.

Plaintiffs claim the vaccination requirement violates the Free Exercise Clause of the First Amendment, contending it is neither neutral nor generally applicable under this Court's precedent, and for the first time in their Application to this Court argue that it interferes with the parent Plaintiffs' right to control the upbringing of their child by requiring them to consent to vaccination of their child.[2]

Plaintiffs are wrong on the law and the facts. A careful review of the evidence in the record to date reveals four significant and clear conclusions. First, the *only* students exempted from the vaccination requirement are students with objectively-documented medical contraindications identified by the vaccine manufacturers and the Centers for Disease Control ("CDC"), which render it unsafe for the student to be vaccinated. Second, this sole exemption is substantively different than the "sole

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[2] In addition to raising the issue for the first time here, it is obvious that no District parent is being forced to consent to vaccination, which under the District's program and the state vaccination law is a choice, regardless of the reason for objecting to vaccination, between in-person instruction and "home-based private school or … an independent study program." Cal. Health & Safety Code § 120335(f). Plaintiffs note in their Complaint that over 1,600 individuals signed up to speak in opposition to the vaccination requirement the Board was considering. App.271. Unless Plaintiffs make the rather incredible claim that every one of those objections was a religious one, they are forced to concede two points: 1) that their claim that the vaccination requirement is a "uniquely punitive approach to religious students" is hollow (Emergency Application ["Emer.Appl."] at 3); and 2) that Plaintiffs and these 1,600+ other individuals, many or most of whom are undoubtedly parents of District students, are simply being presented with the same choice they made when deciding whether to consent to the ten (10) vaccinations required by state law.

discretion" exemption systems invalidated in cases like *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) and *Dahl v. Bd. of Trustees of W. Michigan Univ.,* 15 F.4th 728 (6th Cir. 2021). It is not "an open-ended, purely discretionary standard like 'without good cause' [which] easily could allow discrimination against religious practices or beliefs." *Foothill Church v. Watanabe*, 3 F.4th 1201, 1209 (9th Cir. 2021) (Bress, Circuit Judge, dissenting). Third, the exemption, combined with the decision to impose the vaccination requirement only after full FDA approval for a specific age group, is consistent with the stated governmental interest of protecting the health of students, an interest that would not be furthered through other exemptions including religious and/or personal belief exemptions. See, e.g. *Fulton*, 141 S.Ct. at 1877, citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531 (1993) ("A law … lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way"). Fourth, Plaintiffs' assertion that the vaccination requirement discriminates against religious exercise, simply by notifying the public that there is no religious/personal beliefs exemptions, and one post-adoption statement solely about personal beliefs exemptions, is without factual or legal support.[3] Additionally, Plaintiffs' attempt to attach legal significance to the

[3] Other school districts that have adopted student vaccine mandates have similarly notified the public of this fact, along with other information about their mandates. See, e.g. https://achieve.lausd.net/covidfaq (Los Angeles Unified School District frequently asked questions about its mandate — Question: "Are there religious exemptions for students?" Answer: "As with other immunizations for students, state law does not recognize religious or personal belief exemptions."

District following through with and implementing the Ninth Circuit's interim order regarding a pregnancy deferral request is similarly misplaced.

The standards for the extraordinary relief Plaintiffs seek are clearly not met here, and this case is not certworthy. The Emergency Application ("Emer.App") should be denied.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Vaccination Requirement

On September 28, 2021, the Board approved a Vaccination Roadmap document ("Roadmap"). It was brought to the Board by District staff and medical experts, and referenced the recommendations of the UCSD Expert Panel. App.283-299. The Roadmap included a vaccination requirement for staff and students, tied to full FDA approval for students. *Ibid.* At the meeting, after a review of the science prompting the recommendation, the Roadmap generally described a plan and several "Next Steps" including developing a "full implementation plan." App.285-298. A Board vote was preceded by a staff and medical expert presentation, including from a State Senator and pediatrician, a public comment period, and a thorough discussion among Board members. App.55-104. Throughout, there were multiple references to student safety. See, e.g. App.55-56, 59-60, 66, 70, 77-78, 108-109. After discussion, the Board voted unanimously to approve the recommendation, phased with FDA approval. App.103-104. During the entire meeting, the word "religion" or "religious" was uttered once, when a presenter

stated: “State law does not recognize religious or personal belief exemptions for student immunizations.” App.75.

The student vaccination requirement was the recommendation of Susan Barndollar (“Barndollar”), the District’s Executive Director, Nursing & Wellness and District employee since 2001. App.108. Barndollar, a registered nurse, recommended the requirement, along with an objectively-defined medical exemption “where documented as necessary for the health and safety of an individual student,” “an important consideration consistent with the goal of promoting the health and safety of students.” App.109. Barndollar’s recommendation for the vaccination requirement and the medical exemption were the product of her work and consultation throughout the COVID-19 pandemic with a Board-certified pediatrician, Dr. Howard Taras (“Taras”), and the UCSD Expert Panel. App.108, 120-121. Her interaction with Taras and the UCSD Expert Panel, and her other professional training and experience, led her to conclude that adopting the vaccine requirement would enhance the health and safety of District students, staff, and families. App.109. For the same reason, she also recommended a medical exemption where objective documentation renders it necessary to exempt a child for the health and safety of that individual student. App.110.

B. The Medical Exemption

The medical exemption is available if certain objective criteria are met. App.109-111. Specifically, consistent with the requirements of California law for ten (10) state-mandated vaccines, see Cal. Health & Safety Code § 120335(b), the

exemption form requires a significant amount of information including but not limited to: the name and medical license number of the physician who issued the medical exemption and the primary care physician of the child and, if different, an explanation why the primary care physician is not involved; certification by the physician that the student has one or more of specifically-identified contraindications or precautions recognized by the CDC or vaccine manufacturer; a description of the medical basis for the contraindication that is identified; and whether the medical exemption is permanent or temporary. App.109-111, 145-147. The certified contraindications are specifically- and narrowly-defined: 1) "Severe allergic reaction," as defined, "after receiving first dose of COVID-19 vaccine;" or 2) "Immediate allergic reaction," as defined, "even if it was not severe, after receiving the first dose of COVID-19 vaccine or to any ingredient in the COVID-19 vaccine." App.146. Once submitted, "a registered nurse in the District's Immunization Program, and Dr. Taras, will review the Request to determine whether it provides the information required for approval. If a Request does not contain the necessary information to qualify for a medical exemption, … the Request will be denied and the student will be enrolled in independent study unless they are vaccinated. If the Request is complete, and the reason provided meets applicable CDC, ACIP, and AAP criteria or the standard of medical care, it will be approved." App.110-111; App.148 (form).

C. The Phased Approach of Implementation and Conditional Enrollments

Plaintiffs represent to the Court that there are a number of exemptions from the vaccination requirement, but the courts below correctly recognized that there is only one exemption from the requirement, the narrowly-defined medical exemption.

The vaccination requirement does not apply to all students immediately. It is, rather, phased to align with full approval by the FDA for student age groups. This approach is also consistent with the District's stated interest of protecting the health and safety of individual students. Once FDA approval is obtained for children ages 5 and up, all District students will be subject to the vaccination requirement unless medically-exempted as described above. The timing of the imposition of the requirement for a small number of students is also consistent with state law, specifically students who are migrant youth, homeless youth, foster youth, or from military families. State law gives these students who are newly enrolling, not those currently enrolled, a 30-day period to obtain their vaccination records and/or be vaccinated. App.81 (Barndollar confirming the 30-day period at Board-adoption meeting), *see also* Cal. Educ. Code § 48853.5 (f)(8)(B)); Cal. Health & Safety Code § 120341(a) [foster youth]; Cal. Educ. Code § 48852.7(c); 42 USC § 11432(g)(3)(C) [homeless youth]; Cal. Educ. Code §§ 54440 and 48204.7(c)(3) [migrant youth]; Cal. Educ. Code §§ 49700 and 49701 [children from military families]; and Cal. Educ. Code § 56300 *et seq*. Cal. Health & Safety Code § 120335(h), and 20 U.S.C. §§ 1415(b)(1), (2) [students with disabilities].

Although not referenced in the Roadmap or any action by the Board, District staff initially offered pregnant students the opportunity to request a deferral of the vaccination requirement during pregnancy. App.114.

II. PROCEDURAL HISTORY

A. District Court

On October 22, 2021, Plaintiffs initiated this lawsuit against the District and several individuals,[4] claiming the vaccination requirement violates their rights under the Free Exercise Clause of the First Amendment to the U.S. Constitution. Their complaint requests declaratory relief, and preliminary and permanent injunctions to prevent the District from granting any exemptions to the vaccination requirement "unless they give the exact same exemption to individuals who cannot get vaccinated for religious reasons." App.279.

After briefing on a stipulated schedule, on November 18, 2021 the district court denied Plaintiffs' application for a temporary restraining order. App.42-52. The court concluded Plaintiffs lacked standing, because Plaintiff Jill Doe's injury was unlikely to be redressed by a favorable decision — the District could implement the remedy sought (eliminate the medical exemption, for instance) and Jill Doe would still not get the relief she seeks. App.44-46. The court also concluded that Plaintiffs were unlikely to succeed on the merits of their claim, that the vaccination requirement is subject to and survives rational basis review, and that Plaintiffs did not establish irreparable harm. App.46-52.

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[4] The defendants collectively are referred to in this Opposition as "the District."

B. Ninth Circuit

The same day the district court denied Plaintiffs application for a temporary restraining order, Plaintiffs appealed, and they filed an emergency motion for a preliminary injunction pending appeal the next day.

On November 28, 2021, the Court of Appeals for the Ninth Circuit issued an initial order "in an abundance of caution," granting Plaintiffs' emergency motion in part. App.38-39. Under this initial order, the injunction was "in effect only while a 'per se' deferral of vaccination is available to pregnant students under [the vaccination requirement]," and the court stated the injunction would "terminate upon removal of the 'per se' deferral option for pregnant students." App.38. Accordingly, on November 29, 2021, the District Superintendent removed the deferral option (no students had requested a deferral), and reported that the deferral option was outside the scope of the vaccination program the Board had adopted. App.141-147.

The Ninth Circuit issued its full written opinion on December 4, 2021, wherein majority Judges Berzon and Bennett confirmed that the injunction had terminated under its own terms, and denied Plaintiffs' request for an injunction pending appeal. App.5-20. The court applied *Lukumi* and its progeny, confirming that a law that is neutral and of general applicability need not be justified by a compelling governmental interest, and concluded Plaintiffs failed to demonstrate that the district court erred in applying rational basis review. The court held Plaintiffs "have not raised a serious question" as to whether the vaccination

requirement is neutral and "have not shown a likelihood" that the vaccination requirement was implemented with the aim of suppressing religious belief. App.10.[5] Citing to *Tandon v. Newsom*, 141 S.Ct. 1294, 1296 (2021), *Fulton, Employment Division v. Smith (1990)* 494 U.S. 872, and *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 285 (2nd Cir. 2021), the court also concluded Plaintiffs "have not raised a serious question" as to whether the vaccination requirement is "generally applicable" because only students with a medical exemption are fully exempt and the exemption "serves the primary interest for imposing the mandate — protecting student 'health and safety '— and so does not undermine the District's interests as a religious exemption would." App.10-13. The court also concluded that the medical exemption is not "comparable" to the religious exemption because fewer students are likely to seek a medical exemption, which is already limited in duration, than a permanent religious exemption, and that "conditionally enrolled students … simply given a grace period" are not treated more favorably and do not undermine the District's health and safety interest in the way that a permanent religious exemption would. App.12-15. Additionally, the court reasoned that the "temporary procedural protections to students with IEPs" are not comparable "to the risk posed by a religious exemption provision." App.15-16.[6] In a portion of the decision

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[5] Dissenting Judge Ikuta did not disagree with this conclusion. Her dissent focused on the issue of general applicability.

[6] Judge Ikuta, in dissent, also did not agree with Plaintiffs' assertions, repeated again to this Court, that compliance with state and federal law regarding students with disabilities, were "exemptions." She also did not disagree with the majority's reference to federal law regarding employees, wherein the majority noted that best practices include notifying employees of their rights under Title VII. App.17.

regarding the medical exemption, which Plaintiffs do not challenge here, the Ninth Circuit concluded that given the "rigidity" of the District's medical exemption "there is no 'mechanism for 'individualized exemptions" in this case" as prohibited by the Court in *Fulton*. App.16.

On the issue of irreparable harm — although not required to reach this factor given Plaintiffs' failure to establish serious questions going to the merits of their claim — the court concluded there were "several reasons" why Appellants failed to demonstrate it, including but not limited to the issue of educational quality. App.18-20.[7] And overall, given Plaintiffs choice to proceed pseudonymously, the court noted that "[c]ritical facts going to the 'irreparable injury' inquiry are … unknowable in this case." App.19. Finally, the court noted "that the public interest weighs strongly in favor of denying Plaintiffs' motion." App.19-20.

ARGUMENT

I. THE STANDARD FOR EXTRAORDINARY RELIEF

"When this Court is asked to grant extraordinary relief, it considers, among other things, whether the applicant 'is likely to succeed on the merits,'" and that "encompass[es] not only an assessment of the underlying merits but also a

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[7] A California Assembly Health Committee Report regarding 2015 legislation that would (and did, when passed) eliminate the personal beliefs exemption to state-mandated vaccines and bolstered the independent study option for parents who choose not to vaccinate, confirmed that "[i]ndependent study is an alternative to classroom instruction consistent with a school district's regular course of study and is expected to be equal or superior in quality to classroom instruction." The State Superintendent of Public Instruction stated in the same report that the "bill provides education choices for families opting not to vaccinate their children." (See link to the Assembly Health Committee Report on Senate Bill 277 at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB277 ("6/11/15 – Assembly Health" link).

discretionary judgment about whether the Court should grant review in the case." *Does 1-3 v. Mills*, 142 S.Ct. 17, 18 (2021) (J. Barrett, concurring), *quoting Nken v. Holder*, 556 U.S. 418, 434 (2009), and *citing Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) and Supreme Court Rule 10. "Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take — and to do so on a short fuse without benefit of full briefing and oral argument." (*Ibid.*)

Plaintiffs ask for "extraordinary relief" that "'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010). Thus, a request for injunctive relief in the first instance "'demands a significantly higher justification' than a request for a stay. *Ibid.* Such drastic relief is issued "sparingly and only in the most critical and exigent circumstances," such as when "the legal rights at issue are indisputably clear." *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers).

Plaintiffs, therefore, must demonstrate not only that they satisfy these ordinary but heightened criteria for injunctive relief, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), but also that the Court is likely to grant certiorari and reverse. S*ee* Shapiro *et al.*, Supreme Court Practice § 17.13(b), p. 17-38 (11th ed. 2019). Plaintiffs do not come close to satisfying these stringent standards.

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS

A. The Vaccination Requirement is not Subject to Categorical Exemptions

Plaintiffs contend the vaccination requirement is underinclusive because it has "a series of categorical exemptions" from the requirement. Emer.Appl. 15-17. As is noted above, with the exception of the medical exemption these "categorical exemptions" are not exemptions at all — they address the *timing* of the requirement. Their assertion is without merit.

Plaintiffs note that general applicability is lacking if a law or regulation "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." Emer.Appl. 16, *quoting Fulton,* 141 S. Ct. at 1877 (2021). Then, Plaintiffs proceed to *ignore* an asserted interest that is clear from the record, that was recognized and acknowledged by the courts below, and that Plaintiffs have not contested other than to either pretend it does not exist or imply that it is not worthy of consideration — the interest in protecting the health and safety of individual students by: 1) imposing the vaccination requirement only after full FDA approval for an age group; and 2) exempting from that group students with documented confirmation of one of the contraindications of the COVID-19 vaccine identified by the CDC or the vaccine manufacturer, which would render it unsafe for the student to be fully-vaccinated. Vaccination with increased risk to health and safety undermines the District's interests; vaccination without risk to health and safety does not.

Plaintiffs imply that the principle of underinclusivity limits a governmental actor from defining the scope of a law, regulation, or rule. Not so. The District, consistent with its interests and obligations regarding student health and safety, defined the class of individuals to whom the requirement would apply — to all students, phased by age group upon full FDA approval. Plaintiffs suggest the District is not entitled to craft such a rule. There is no support for this proposition. For example, in *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3rd Cir. 1999), the prohibition on facial hair was not underinclusive because it applied only to non-under cover law enforcement officers and not to all employees of the City of Newark. In *Does 1-3 v. Mills*, 16 F.4th 20 (1st Cir. 2021), the requirement was not underinclusive because it applied to some but not all state healthcare workers, and not all state employees. In these and other cases the focus, as it should be, was on the governmental interest or interests the law, regulation or rule was designed to address. In this case, only by ignoring the stated interest in the health and safety of individual students, which includes being vaccinated *safely*, can one formulate an argument that the vaccination requirement is underinclusive.

B. The Vaccination Requirement does not Provide for a "System of Entirely Discretionary Exemptions"

Plaintiffs next assert that "the mandate triggers strict scrutiny because it creates a system of individual exemptions and a formal system of discretionary exemptions." Emer.Appl. 18-20. They contend the record establishes that "[t]he District is … willing to create and modify exemptions for a variety of other reasons,

just not religion." Emer.Appl. 19. This attempt is also unavailing and relies almost exclusively on a misrepresentation of the record.

Initially, and significantly, Plaintiffs do not contest the conclusions reached below that the medical exemption is substantively different than the "sole discretion" exemption systems invalidated in cases like *Fulton* and *Dahl*, and that it is not "an open-ended, purely discretionary standard like 'without good cause' [which] easily could allow discrimination against religious practices or beliefs." *Foothill Church v. Watanabe*, 3 F.4th 1201, 1209 (9th Cir. 2021) (Bress, Circuit Judge, dissenting). In addressing the "system of individualized exemptions," Plaintiffs have recognized that the District's medical exemption is consistent with this Court's Free Exercise jurisprudence.

Instead, Plaintiffs again point to the timing issues, discuss the District's decision to take action in response to the Ninth Circuit's first order, asking this Court to assume the action extends beyond that scope even though the record clearly indicates otherwise, and misrepresent the record in the process.

Regarding timing issues, Plaintiffs point to a slide in the Board presentation stating that students "[m]ay be conditionally enrolled via in-person learning if they are in one of these groups: foster youth, homeless, migrant, military family, or have an IEP," App.297, and suggest the absence of a reference to the 30 days renders the time period flexible or nonexistent. But, Plaintiffs ignore parts of the record, including a specific part of the same meeting, where Barndollar answered a specific question from a Board member, stating "we give them a conditional entrance, and

we give them an extra 30 days to get those records, to get what they need so that they can start to get caught up on their immunizations if they need to, or be able to get their records. App.80-81 (emphasis added). Plaintiffs also fail to address Barndollar's declaration, which states "'conditional enrollment' is not an exemption from vaccine mandates," and that "it provides a period of thirty (30) days for the student to get vaccine shots or obtain their records evidencing that mandatory vaccines have been administered." App.111.

Plaintiffs next turn their sights on students with disabilities, stating "the 30-day limit does not always apply to conditionally enrolled students with IEPs," with citations to the record including the paragraph in Barndollar's declaration immediately after the one recited above. Emer.Appl. 19. Barndollar stated, among other things: "Once an IEP is in place, the District is mandated by federal law to implement that IEP, and cannot unilaterally change it without following due process protections afforded to students. During that process a 'stay put' mandate dictates that the student's current IEP remain in place." App.111-112. Barndollar addressed this during the Board meeting as well, in response to a question, stating that "for all other state-mandated vaccines, there is a process by which students with IEPs go through that's more extensive than students who don't have IEPs," and "we would continue to go through that process with any other mandated vaccine, even though … it was mandated from the district." App.80. Judge Ikuta, in dissent below, reinforced these federal requirements. App.26. Thus, if the legal

compliance process takes more than 30 days it is because state and federal law do not allow immediate imposition of the vaccination requirement.

Finally, Plaintiffs contend there is "a formal mechanism for granting individualized exemptions" because the District Superintendent eliminated the pregnancy deferral request option pursuant to the court's order the, demonstrating the Superintendent is allowed to make discretionary modifications to the medical exemption, to conditional enrollment time periods, and/or to create new deferrals or exemptions. Emer.Appl. 19-20. Not only is this erroneous, the Superintendent's action following the November 28, 2021 order demonstrates that the *opposite* is true. Specifically, the Superintendent reported to the court that his "duties … include ensuring that District policies and practices approved by action of the Board of Education *be modified or terminated only by subsequent action of the Board*." App.143 (emphasis added). It was for this reason that he was authorized to remove the pregnancy deferral request provision from the medical exemption form — *because it was not approved by the Board*. The vaccination requirement, the scope of it (full FDA approval only), the medical exemption, the 30-day conditional enrollment allowance for newly enrolling students from vulnerable populations, and direction to implement the vaccine requirement in accordance with law were approved by the Board on September 28, 2021, and the Superintendent has confirmed that these actions can "be modified or terminated only by subsequent action of the Board." Plaintiffs' assertion is flatly contradicted by the unambiguous words in the Superintendent's declaration — he was authorized to remove the

pregnancy deferral because, not being authorized by the Board, it never should have been there in the first place.

C. Until this Application Plaintiffs did not Raise the "Rule of *Yoder*," and Vaccination Requirements do not Violate it

1. Plaintiffs Should Not Be Permitted to Raise this Issue for the First Time Here

In determining whether the Court will review a case and reverse, the Court will consider the proper raising of the issues sought to be presented in the courts below. See *Bloeth v. New York*, 82 S. Ct. 661 (1962). Thus, generally parties waive the right to argue an issue on appeal if they did not raise the issue before a lower court. *N.L.R.B. v. Sears, Roebuck & Co.*, 95 S.Ct. 1504, 1523-24 (1975). This Court is generally a court of review, and not of first view and does not address arguments that were not addressed by the Court of Appeals. *See Cutter v. Wilkinson*, 125 S.Ct. 2113, 2120, fn. 7 (2005); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 124 S.Ct. 2359, 2371 (2004). The Court has found that it is generally unwise to consider arguments in their first instance. *Byrd v. U.S.*, 138 S.Ct. 1518, 1526-27 (2018) ("[Byrd] did not raise this argument before the District Court or Court of Appeals, and those courts did not have occasion to address [them] …. Because this is 'a court of review, not of first view,' *Cutter v. Wilkinson,* 544 U.S. 709, 718, n. 7, … it is generally unwise to consider arguments in the first instance ….") The Court should do the same here.

2. The Claim is Unlikely to Succeed

Even if the Court considers this newly raised argument, it should be rejected.[8] Plaintiffs rely on *Smith* for the proposition that heightened scrutiny should apply to this case. Emer.Appl. at 20-21. Applicants omit, however, that in *Smith* the Court expressly noted that strict scrutiny should not apply to compulsory vaccination laws. The Court observed that to subject every Free Exercise case to strict scrutiny and require a compelling governmental interest "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind[,]" including compulsory military service and "compulsory vaccination laws[,]" and "[t]he First Amendment's protection of religious liberty does not require this." *Smith,* 494 U.S. at 888-889. The *Smith* Court cautioned that making compliance with a local rule or law "contingent on the law's coincidence with [an individual's] religious beliefs, except where the State's interest is 'compelling'" would allow that individual "to become a law unto himself[.]" *Id.* at 885, *citing Reynolds v. United States*, 98 US 145 (1879).

This Court has upheld parents' rights to direct the upbringing of their child(ren) when the relief sought would not jeopardize the health or safety of the child, or burden society or public safety. In *Wisconsin v. Yoder* (1972) 406 U.S. 205, 230, the Court noted, "This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare

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[8] Again, among other things, the District is not forcing consent to vaccination, for the COVID-19 requirement or for the state-mandated vaccines. Plaintiffs and every other parent have the option to choose not to be vaccinated and access other educational options, regardless of the reason they decline vaccination.

has been demonstrated or may be properly inferred." The *Yoder* Court emphasized that exempting Amish children from compulsory secondary school attendance would not interfere with anyone else's rights. *Id.* at 223-224. The Court explained:

> It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. *Id.* at 220.

In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court upheld child labor laws that prohibited aspects of Jehovah's Witness religious practice. The Court observed:

> [T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty. [Citations.] And neither rights of religion nor rights of parenthood are beyond limitation. ... [The State's] authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." (*Prince*, at pp. 166-167.)

In *Phillips v. City of New York* (2d Cir. 2015) 775 F.3d 538, *cert. denied* 577 U.S. 822 (2015), the court relied on the above "persuasive dictum" in *Prince* in reaching its holding that "mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause." *Phillips* at 543. Thus, this Court has consistently declined to uphold parents' rights to direct the religious upbringing of their child when the act or omission sought may arguably impact safety, as is the case here.

D. The Vaccination Requirement is Neutral

Finally, Plaintiffs briefly and generally contend strict scrutiny applies because the District has "'proceed[ed] in a manner intolerant of religious beliefs …

because of their religious nature," and has "'single[d] out' religion 'for especially harsh treatment.'" Emer.Appl. 21-22, quoting from *Fulton*, 141 S. Ct. at 1877 and *Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). None of the judges who have considered this assertion below have given it credence, nor should this Court because there is nothing in the record to support it.

Plaintiffs point to two statements directly, to another statement tangentially, to the removal of the pregnancy deferral option, and to the repeated but specious contention that the Board approved the vaccination requirement "knowing that it would burden religious believers while exempting thousands of students for secular reasons." Emer.Appl. 22.

Regarding the latter, there are two clear evidentiary problems. The first is addressed above, and was addressed and rejected by the courts below — *all* District students will be subject to the vaccination requirement as full FDA approval is phased in for their age group, with the only exemption being the limited medical exemption Plaintiffs no longer challenge. Second, what the District "knew" on September 28, 2021 is speculative. We know that more than 1,600 people expressed their opposition to the requirement, App.271, but the record does not reflect the extent to which the absence of a religious exemption was the reason, as opposed to philosophical, scientific, legal, sociological, political or other non-religious objections.

Regarding the two statements directly referring to religious exemptions, they are Barndollar stating during the approval meeting that "State law does not recognize religious or personal belief exemptions for student immunizations," and a

District document stating "[a]s with other immunizations for students, state law does not recognize religious or personal belief exemptions." App.75, 297, 322. Both are true and correct statements, and neither of them establishes intolerance or disfavor of religion. The tangential reference reveals another misstatement of the record — Plaintiffs' reference to the "Board President's assertion that religious exemptions are a 'loophole' that results in 'large numbers' of people not getting vaccinated." Emer.Appl. 7-8. This is knowingly misleading and Plaintiffs have been reminded multiple times — the statement was explicitly about *personal belief exemptions*, and it was made after the Board adopted the vaccination requirement. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found*, 538 U.S. 188, 196-97 (2003) (the relevant inquiry is statements during deliberations, prior to taking action). The newspaper article cited, entitled "What you need to know about San Diego Unified's vaccine mandate," was in question and answer format, and one question was "Can I get a 'personal belief' exemption from the vaccine mandate?" App.259. The Board President was then quoted as saying "we know from states that allow these sort of personal belief (exemptions), that creates kind of a loophole that means large number people don't, in the end, get vaccinated." App.259. Not only is this statement *not* referencing religious exemptions, an obvious subset of a much larger "personal beliefs" category that is essentially limitless, it is based on fact.[9] The

[9] The article notes that "[a] 2015 state law banned personal belief exemptions from school vaccines that were required by the state at the time." App.259. In the same California Assembly Health Committee Report cited above, the State Superintendent of Public Instruction stated that "California has seen a dramatic increase in the PBE [personal belief exemption] rate for students entering kindergarten over the past fifteen years, placing other children, and the overall public health of our citizens, at risk of illness or death from

effort to fabricate religious bigotry into the record of this case should not be credited.

Finally, regarding the removal of the pregnancy deferral request option, Plaintiffs contend this decision was motivated not by the Ninth Circuit's order but, rather, occurred only because it was unrelated to religion and "just so [the District] could keep excluding religious students." Emer.Appl.22. This disparagement without evidence, direct or circumstantial, is specious and unwarranted.

E. Rational Basis Applies, and the Vaccination Requirement is Rationally-Related to a Legitimate Interest

When a law is neutral and of general applicability, the law need only survive rational basis review — even if it "has the incidental effect of burdening a particular religious practice." *Lukumi,* 508 U.S. at 520. Under this test, a law must be upheld if it is rationally related to a legitimate government purpose, and Plaintiffs "have the burden to negat[e] every conceivable basis which might support [the requirement]." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). They do not even attempt to do so, nor could they if they tried.

The vaccination requirement contains one, narrow exemption, directly and objectively related to an interest the requirement is designed to protect; it applies only after full FDA approval, consistent with the health and safety concerns of some parents regarding emergency use authorization; it offers "conditional enrollment"

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preventable diseases." *See* link to the Assembly Health Committee Report on SB277 at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB277 ("6/11/15 – Assembly Health" link).

only as required by law; the exemption is narrowly structured, akin to state law for mandatory vaccinations; it is based on objective and extensive advice from local public health experts. The vaccination requirement easily survives rational basis review.

III. BALANCE OF HARDSHIPS AND PUBLIC INTEREST

Although the Court need not address the balance of hardships and the public interest, based on Plaintiffs' failure to meet the standard regarding the merits of their Free Exercise claims, the District contends the Ninth Circuit was correct in concluding that Plaintiffs have not carried their burden regarding irreparable harm and the balancing of interests. App.17-20. Regarding the former, this case *is* "meaningfully distinct" from recent decisions like *Tandon*, in that Plaintiffs are not prevented from exercising their religion, and their claims regarding the deficiencies of other educational options and college scholarship opportunities are speculative and not established in the record. And, Plaintiffs' desire to proceed anonymously has, even during the brief span of this lawsuit and the correspondingly thin record as a result, hampered the District's ability to address many factual contentions.[10]

[10] Plaintiffs acknowledge that Free Exercise Clause claims require proof of sincerity and religiosity, and that Plaintiffs bear the burden of proof. Emer.Appl. 14, *citing Wisconin v. Yoder*, 406 U.S. 205, 215-216, 235, *see also Frazee v. Illinois Dept. of Employment Sec.* (1989) 489 U.S. 829, 833 ("There is no doubt that '[o]nly beliefs rooted in religion are protected by the Free Exercise Clause,' ... Purely secular views do not suffice. Nor do we underestimate the difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held. States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause." (Internal citations omitted).) The District recognizes that Plaintiff Jill Doe has submitted declarations regarding the sincerity of her beliefs, but to be clear, the overriding concern regarding Plaintiffs' anonymity is that it has precluded the District from having any opportunity to present evidence testing Plaintiffs' contentions about education and

Regarding the latter, the Ninth Circuit summed it up nicely, and the website the court cited 12 days ago reveals a worsening trend:

> The COVID-19 pandemic has claimed the lives of over three quarters of a million Americans. *Covid Data Tracker*, Ctrs. For Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last visited Dec. 1, 2021). The record indicates that vaccines are safe and effective at preventing the spread of COVID-19, and that SDUSD's vaccination mandate is therefore likely to promote the health and safety of SDUSD's students and staff, as well as the broader community. And as the Supreme Court has long recognized, "the right to practice religion freely" is not "beyond regulation in the public interest," including regulation aimed at reducing the risk of "expos[ing] the community or the child to communicable disease or the latter to ill health or death." *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944); *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995) (noting that First Amendment rights "are different in public schools than elsewhere," including because, "[f]or their own good and that of their classmates, public school children are routinely required . . . to be vaccinated against various diseases"). The public interest therefore favors SDUSD's mandate.

The District's vaccination requirement is incremental to promote and ensure *safe* vaccinations based on full FDA approval, but moving toward vaccination of all District students clearly promotes the public interest.

IV. THIS CASE IS NOT CERTWORTHY

Plaintiffs contend that in the absence of emergency relief the Court should treat the Application as a petition for writ of certiorari, and grant certiorari on an expedited schedule. Emer.Appl. 30. "A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that

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athletics. The District does not know, to state just a few examples, Jill Doe's coach(es) position on the likelihood of a scholarship; it does not know whether she plays one or more sports on club team(s), and whether the college recruiting focus is at club tournaments and not the short high school seasons; it does not know whether there are courses she is taking that are not available through the iHigh Virtual Academy. Plaintiffs are asking the Court to accept as true certain assertions the District has had no opportunity to address.

court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Rule 12. Plaintiffs base their request on a handful of assertions, none of which are convincing let alone provide a compelling reason to grant certiorari. Applying the reasons the Court typically considers on the question, this case is not appropriate for certiorari and the request should be denied.

A. This Case is Not the Appropriate Vehicle to Address Current Nationwide Issues

Plaintiffs assert "vaccination mandate litigation is of obvious nationwide importance," point to "a host of challenges to various government vaccination mandates pending in the lower courts and in this Court, some of which include religious liberty claims," and state "cases like this one and the state healthcare worker mandates are more likely to turn on Free Exercise questions." Emer.Appl. 30-31, referring to *We The Patriots* and *Mills*. They contend this case, above all the others, "presents an ideal vehicle for the Court to address the … class of … challenges" turning on Free Exercise issues. Emer.Appl. 32. For a number of reasons beyond the correctness of the decisions below, the contention is erroneous.

First, a key and substantive fact not mentioned by Plaintiffs is that of all the more than 10 pending cases they cite, this is the only one involving a vaccination requirement in a public elementary and secondary school setting. This Court has long held that while public school students retain First Amendment rights in a

public school setting, "the First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988). Consistent with these principles, the Supreme Court has been clear:

> Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children. For 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.

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995), *see also Bd. of Educ. v. Earls*, 536 U.S. 822, 830–32 (2002) (Students "are routinely required to submit to physical examinations and vaccinations against disease," as "[s]ecuring order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.")[11] This Court's recognition of the uniqueness of the public elementary and secondary school setting, and the scope and application of enumerated constitutional rights in that setting, undercuts Plaintiffs assumption that a decision in this case would apply to and resolve the issues in cases involving employment, university enrollment and intercollegiate sports, federal contracting, and the military. This case is decidedly not "an excellent vehicle for addressing litigation of nationwide importance." Emer.Appl. 32.

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[11] California law recognizes this special relationship and *in loco parentis* principles. See, e.g. Cal. Educ. Code §§ 49400 and 49403 ("[t]he governing board of any school district shall give diligent care to the health and physical development of pupils," and may initiate inoculation programs); Cal. Educ. Code § 44807 (establishing duty of care and supervision).

Second, and similarly, Plaintiffs' contention that this case in particular "is of obvious nationwide importance" is undercut by their chastising of the District for being among a handful of school districts nationally that has, to date, adopted a vaccination requirement for in-person attendance. Emer.Appl. 8-9. By their own assertions, Plaintiffs admit that vaccine requirements in public elementary and secondary schools generally, whether they are pre-existing and ongoing vaccine requirements under state law (many with medical exemptions and no religious and/or personal beliefs exemptions), or COVID-19 pandemic-specific requirements specifically, is not a national hot-button issue.

Finally, Plaintiffs state this case "is factually clear, with a deep enough record on which to base a decision." Emer.Appl. 32. The District disagrees. In addition to the factual disputes described above, this suit was filed October 22, 2021, Plaintiffs application for a temporary restraining order was filed November 1, 2021, the District's opposition was filed November 8, 2021, and the district court's decision came on November 18, 2021. Thus, the record developed over essentially one week, from Plaintiffs' first filing on November 1 to the District's response on November 8. As is noted above, none of the three plaintiffs are known to the District, and there has been no decision on their application to proceed pseudonymously, with the District and the district court expressing doubt that the standard requiring an "unusual case" where plaintiffs "reasonably fear severe harm" is met here. App.19, 51, *citing Doe v. Kamehameha Schools*, 596 F.3d 1036 (9th Cir. 2010). The Board's action on September 28, 2021 initiated the development

of an implementation plan, but student medical exemption requests did not start coming in until after the record was established so "the record does not disclose the number of students who have sought or are likely to seek a medical exemption." App.12, 29. Indeed, among the factual disagreements underlying the majority and dissenting opinions below were, according to Judge Ikuta, a "rationale [she found] entirely speculative" due to the lack of a clear record. App.29. These are a few examples undercutting Plaintiffs' contention that we have a sufficiently-developed record for review.

B. There are no Conflicts Between the Ninth Circuit's Decision in this Case and this Court's Free Exercise Precedents

Plaintiffs next contend that Judge Ikuta, in dissent, identified "multiple grave conflicts" between the decision of Judges Berzon and Bennett and this Court's Free Exercise decisions. However, and assuming for the sake of argument that this case raises "an important federal question" under Rule 10(c), on the issues about which the majority and dissent disagreed a review of the two opinions reveals their disagreement was factual.

Plaintiffs note that Judge Ikuta said the majority erred on the general applicability framework "by focusing on the School District's reasons for offering an exemption, rather than the interest that the School District actually asserts to justify the mandate." Emer.Appl. 11-12. This invokes a disagreement not on the legal standard for general applicability, but a dispute over the facts that apply to

that legal standard. This is best revealed in two footnotes, starting with footnote 5 of the majority opinion:

> The dissent insists on a narrower formulation of SDUSD's asserted interest, characterizing that interest as "ensur[ing] 'the safest environment possible for all students and employees' by preventing the transmission and spread of COVID-19." See, e.g., Dissent at 8. Although promoting a safe school environment is undoubtedly one of SDUSD's interests in promulgating both a student and employee vaccination mandate, the interest the District emphasizes most frequently in the record with respect to the student vaccination mandate is protecting the "health and safety" of students.

App.11. Judge Ikuta addressed this footnote in her own footnote, also number 5:

> The majority argues that the School District's interest is not an interest in "ensuring the safest environment possible for all students and employees" but rather the interest in "protecting the 'health and safety' of students." Maj. at 7 n.5. The majority's quibble over wording is irrelevant in this context. The School District has made clear that its justification for the vaccine mandate is to prevent the transmission and spread of COVID-19 from infected students to other individuals at the school. Any medical exemption undercuts this goal, even if there are good reasons for the exemption.

App.28-29. The District certainly disagrees that this was a "quibble over wording," and the majority's footnote number 5 explicitly contradicts Judge Ikuta's assertion that the majority did not recognize the District interest she reiterated,[12] but it is clear the dispute was over what governmental interests the record established — the majority concluded (correctly in the District's view) that "the goal of promoting the health and safety of students" is one of the governmental interests for the vaccination requirement, and Judge Ikuta concluded it was merely a rationale for

[12] The majority's footnote 5 states "promoting a safe school environment is undoubtedly one of SDUSD's interests in promulgating both a student and employee vaccination mandate." They simply concluded it was not the *only* interest driving the vaccine requirement.

the medical exemption but not a governmental interest motivating the vaccine requirement itself.

The split among the Ninth Circuit judges was based on facts, in an undeveloped record. Judges Berzon and Bennett did not "decide[] an important federal question in a way that conflicts with relevant decisions of this Court."

C. There is no Circuit Split on Vaccination Requirements, and Especially not on Elementary and Secondary Student Vaccination Requirements

Finally, Plaintiffs contend there is "a circuit split over the application of the Free Exercise Clause," warranting review Rule 10(a). Emer.Appl. 32-33. Under the Rule the Court may exercise its discretion to grant certiorari when a Court of Appeals has entered a decision in conflict with the decision of another Court of Appeals on the same important matter, but a petition "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, 10(a).

Plaintiffs contend there is a "split over the application of the Free Exercise Clause" arising from decisions from the Third and Sixth Circuits on the one hand (*Dahl* and *Fraternal Order of Police*), and from the Ninth, First, and Second Circuits on the other (the decision below in this case, *Mills*, and *We The Patriots*). They provide no explanation regarding *what* the split in "application of the Free Exercise Clause" is, other than to point to the outcome of the cases — a medical exemption with no religious exemption triggering strict scrutiny in *Dahl* and *Fraternal Order*

of Police, and a medical exemption with no religious exemption not triggering strict scrutiny in this case, *Mills*, and *We The Patriots*. But a review of these decisions reveals the different outcomes were based on different factual records, and the application of those records to this Court's Free Exercise decisions. In *Mills*, for example, the court distinguished *Fraternal Order of Police* and *Dahl* not by applying a different or conflicting rules or standards of Free Exercise, but on the facts. 16 F.4th at 33-34, *see also We The Patriots* (noting that *Dahl* was decided "under different factual circumstances"). The District contends these decisions are not "in conflict" with one another within the meaning of Rule 10, and do not misapply properly stated rules of law.

Also, as is addressed above, other than the decision below none of these decisions involved a vaccination requirement in an elementary and secondary public education setting, and there is no conflict among federal courts of appeals or other courts in this nation, including states' highest courts, regarding the authority to require vaccination for school attendance without a religious exemption, and this Court has repeatedly declined to grant certiorari. *See Phillips v. City of New York*, 775 F.3d 538, 543-44 (2d Cir. 2015), *cert. denied*, 577 U.S. 822 (2015); *Workman v. Mingo County Bd. of Ed.*, 419 Fed.Appx. 348 (4th Cir. 2011), *cert. denied*, 565 U.S. 1036 (2011); *Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017); *Brown v. Stone*, 378 So. 2d 218, 222 (Miss. 1979), *cert. denied*, 449 U.S. 887 (1980); *Davis v. Maryland*, 451 A.2d 107, 111-112 (Md. 1982); *Wright v. DeWitt School Dist.*, 385 S.W.2d 644, 647-48 (Ark. 1965); *Sadlock v. Bd. of Ed.*, 58 A.2d 218, 220-22 (N.J.

1948); *Mosier v. Barren Cnty. Bd. of Health*, 215 S.W.2d 967, 969 (Ky. 1948); *Brown v. Smith*, 235 Cal.Rptr.3d 218 (2018); *Love v. State Dept. of Education*, 240 Cal.Rptr.3d 861 (2018).

There is no basis under Rule 10 or any other recognized standard for granting certiorari in this case.

CONCLUSION

For the foregoing reasons, the District respectfully requests that the Application be DENIED.

Date: December 16, 2021

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