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December 23, 2021

The Honorable Scott S. Harris
Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: *Doe v. San Diego Unified School District*, No. 21A217

Dear Mr. Harris,

We write to inform the Court of developments in a parallel proceeding against Respondents in state court. Our understanding is that on Monday, December 20, at the conclusion of its hearing, the Superior Court of California for the County of San Diego issued a writ of mandate from the bench against Respondents' vaccine mandate in *Let Them Choose v. San Diego Unified School District*, No. 37-2021-43172 (Cal. Super Ct., hearing held Dec. 20, 2021). We have enclosed the Superior Court's tentative ruling issued at the beginning of the hearing. As far as we are aware, the final written ruling pursuant to rules 3.1312 and 3.1590 of the California Rules of Court, has not yet been issued. In addition, Respondents' counsel has informed us that (1) the judgment had not yet issued as of yesterday afternoon, (2) the Board has instructed him to appeal the judgment once it is entered, and (3) the Board may also seek a stay of enforcement pending appeal.

In order to determine whether Applicants still need emergency relief from this Court, we asked Respondents' counsel for their position as to whether, in light of these developments, Jill Doe still faces a January 4 deadline to provide proof of

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vaccination, and whether she still faces exclusion from school on January 24 if she does not provide that proof. We also asked Respondents' counsel for an assurance that Respondents would not enforce a vaccine mandate against Jill Doe for at least two weeks after any protection offered by the *Let Them Choose* ruling is lifted, so that this Court would have sufficient time to consider the application. Counsel for Respondents stated that he could not agree to such an arrangement, and that he cannot state anything definitive regarding the next two to four weeks, *i.e.*, until January 19.

Applicants will endeavor to update the Court as more information becomes available. If Respondents would exempt Ms. Doe from the pending deadlines, allow her to attend school in-person, and allow a short window to seek protection, then Applicants would be in a position to ask the Court to hold the application in abeyance while the case proceeds. But given Respondents' position, Applicants continue to need urgent relief from this Court.

We respectfully request that you distribute this letter to the Justices.

Sincerely,

LiMANDRI & JONNA LLP



PAUL M. JONNA

Counsel of Record for Applicants

cc: Mark Robert Bresee

Counsel of Record for Respondents

ATTACHMENT

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

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

Plaintiffs,

vs

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

Defendants.

Case Number: 37-2021-43172-CU-WM-CTL
(consolidated with 37-2021-49949 S.V. v. SDUSD)

Hearing Date: December 20 2021

TENTATIVE RULING

In September 2021, Respondent San Diego Unified School District’s (SDUSD) Board of Education voted to approve a “Vaccination Roadmap” (the Roadmap). The Roadmap requires all students eligible for a fully FDA approved COVID-19 vaccine to receive the vaccine in order to attend school in-person and participate in extra-curricular activities. Currently, only those students aged 16 and older fall within the mandate and must receive both doses of the vaccine by December 20, 2021. Students who do not comply will be placed into an independent study program beginning with the new semester. Petitioners Let Them Choose, an initiative of Let Them Breathe, and S.V., individually and on behalf of J.D. (collectively, Petitioners) seek a writ of mandate restraining SDUSD from implementing the Roadmap.

SDUSD “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.” (Educ. Code, § 35160, emphasis added; see *Hartzell v. Connell* (1984) 35 Cal.3d 899, 915–916.) Petitioners contend that the Roadmap field is preempted by Education Code section 120325 et seq. and directly conflicts

1 with both California Code of Regulations, title 17, section 6025 and provisions of Education Code
2 section 51745 et seq.

3 “Under the normal rules of preemption, a local ordinance that conflicts with state law is preempted
4 by the state law and void. . . Pursuant to preemption law, a conflict exists if the local legislation
5 duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by
6 legislative implication.” (*Haytasingh v. City of San Diego* (2021) 286 Cal.Rptr.3d 364, 392; see
7 generally *O’Connell v. City of Stockton* (2007) 41 Cal.4th 1061; *American Financial Services Assn.*
8 *v. City of Oakland* (2005) 34 Cal.4th 1239.)

9 More than a century ago, the Legislature began regulating the field of school vaccination
10 requirements. In 1890, the California Supreme Court upheld a “Vaccination Act” that required
11 schools to exclude children who had not been vaccinated against smallpox. (*Abeel v. Clark* (1890)
12 84 Cal. 226, 227–228, 230.) The Court stated that vaccination, “being the most effective method
13 known of preventing the spread of the disease referred to, it was for the legislature to determine
14 whether the scholars of the public schools should be subjected to it.” (*Id.* at p. 230, emphasis
15 added.) The Legislature subsequently put control of smallpox under the direction of the State
16 Department of Public Health (DPH) and provided that “no rule or regulation on the subject of
17 vaccination shall be adopted by school or local health authorities.” (Educ. Code, § 49405, emphasis
18 added; see also Health & Saf. Code § 131052, subd. (3).)

19 Between 1961 and 2010, the Legislature imposed a total of 10 vaccine requirements for school
20 children—diphtheria, hepatitis B, haemophilus influenza type b, measles, mumps, pertussis,
21 poliomyelitis, rubella, tetanus, and varicella. (Health & Saf. Code, §§ 120325, subd. (a)(1)–(10),
22 120335, subd. (b)(1)–(10); see Assem. Com. on Health, Analysis of Sen. Bill No. 277 (2015–2016
23 Reg. Sess.) as amended May 7, 2015, p. 4.) “Each of the 10 diseases was added to the California
24 code through legislative action, after careful consideration of the public health risks of these
25 diseases, cost to the state and health system, communicability, and rates of transmission.” (*Love v.*
26 *State Department of Education* (2018) 29 Cal.App.5th 980, 987, emphasis added.) A detailed
27 statutory and regulatory scheme has been established to implement the school vaccine mandates.
28 (See Health & Saf. Code, § 120325 et seq.; Cal. Code Regs., tit. 17, § 6000 et seq.) The scheme
included exemptions for both medical reasons and personal beliefs. (See Health & Saf. Code, §
120370; former Health & Saf. Code, § 120365.)

In 2015, in response to decreasing vaccination rates and a rise in measles, the Legislature removed
the “personal beliefs” exemption to these 10 school vaccination requirements. (Sen. Bill No. 277
(2015–2016) §§ 1, 4; see generally *Love, supra*, 29 Cal.App.5th 980; *Brown v. Smith* (2018) 24
Cal.App.5th 1135.) In doing so, the Legislature considered whether “the issue of public health
could be addressed by mandating vaccines on a community by community or school district [by]
school district basis,” but concluded that “a statewide approach is the correct approach.” (Sen.
Com. on Judiciary, Analysis of Sen. Bill No. 277 (2015–2016) as amended Apr. 22, 2015, p. 18.)
“To provide a statewide standard, allows for a consistent policy that can be publicized in a uniform
manner, so districts and educational efforts may be enacted with best practices for each district. . . .
Further in consultation with various health officers, they believe a statewide policy provides them
the tools to protect all children equally from an outbreak.” (*Ibid.*)

Recognizing the need for additional vaccine mandates that may arise in the future, the Legislature
added a “number 11” mandating that school children be vaccinated against “[a]ny other disease

1 deemed appropriate by the [State Department of Public Health], taking into consideration the
2 recommendations of the Advisory Committee on Immunization Practices of the United States
3 Department of Health and Human Services, the American Academy of Pediatrics, and the
4 American Academy of Family Physicians.” (Health & Saf. Code, §§ 120325, subd. (a)(11),
5 120335, subd. (b)(11); see also *id.* at § 131051, subd. (a)(3)(J).) However, because the addition of a
6 new mandate via this “catch all” provision “disrupts the careful balancing of the various rights
7 involved” in the legislative process, the Legislature decided to maintain the “personal beliefs”
8 exemption for new vaccination requirements added by the DPH. (*Id.* at § 120338; Sen. Com. on
9 Judiciary, Analysis of Sen. Bill No. 277 (2015–2016) as amended Apr. 22, 2015, pp. 17–18.)

10 The DPH is charged with adopting and enforcing regulations to carry out the vaccination
11 requirements. (Health & Saf. Code, § 120330; see Cal. Code Regs., tit. 17, § 6000 et seq.) The
12 DPH has not added COVID-19 as a required vaccine under the “catch all” provision, which would
13 need to include a personal belief exemption. (Cal. Code Regs., tit. 17, § 6025; see Health & Saf.
14 Code, § 120338.) Rather, DPH regulations state that a school “shall unconditionally admit or allow
15 continued attendance” to any student who has either received each of 10 enumerated vaccines or
16 obtained an exemption. (*Ibid.*, emphasis added; see also *Puerta v. Torres* (2011) 195 Cal.App.4th
17 1267, 1272 [“The term ‘shall’ is mandatory”].)

18 Vaccination requirements do not apply to students who are enrolled in an independent study
19 program and not receiving classroom-based instruction. (Health & Saf. Code, § 120335, subd. (f).)
20 However, the decision to participate in independent study must be voluntary. (See Educ. Code, §§
21 51747, subds. (f), (g)(8), 51749.5, subd. (a)(9), (12), 51749.6, subd. (a)(6); Cal. Code Regs., tit. 5, §
22 11700, subd. (d).) Thus, if students have received all 10 vaccinations, a school district cannot force
23 or coerce them into non-classroom-based independent study.

24 In light of the above, it is clear that SDUSD’s Roadmap attempts to impose an additional
25 requirement in a field that the Legislature fully occupies through Health and Safety Code section
26 120325 et seq. The Legislature intended a statewide standard for school vaccination requirements
27 and established a detailed scheme. The Legislature expressly contemplated the addition of new
28 vaccine mandates without further legislative action, but assigned that responsibility to the DPH,
taking into account recommendations from other relevant agencies and organizations and
mandating that those new mandates include a personal belief exemption. The statutory scheme
leaves no room for each of the over 1,000 individual school districts to impose a patchwork of
additional vaccine mandates, including those like the Roadmap that lack a personal belief
exemption and therefore are even stricter than what the DPH could itself impose upon learned
consideration.

SDUSD is correct that certain statutes contemplate school districts administering vaccines in
cooperation with local health officers to help prevent and control communicable diseases in school
age children, including “diseases that represent a current or potential outbreak as declared by a
federal, state, or local public health officer,” provided the district has received parental consent.
(See Educ. Code, § 49403; see also Health & Saf. Code, §§ 120375, subd. (d), 120380.) However,
the Roadmap was not enacted to cooperate with the local health officer, and more to the point, those
statutes do not detract from the Legislature’s intent to occupy the field of mandating a specific
vaccine for school age children.

1 SDUSD's Roadmap also attempts to impose an additional requirement that directly conflicts with
2 California Code of Regulations, title 17, section 6025 and the above referenced provisions of
3 Education Code section 51745 et seq. SDUSD is required to admit students and allow their
4 continued in-person attendance as long as they have received the 10 enumerated vaccines.
5 SDUSD's attempt to impose an additional vaccine mandate and force students (both new and
6 current) who defy it into non-classroom-based independent study directly conflicts with state law.

7 The sole function of this Court is to determine whether the Roadmap is preempted by state law.
8 SDUSD's Roadmap appears to be necessary and rational, and the district's desire to protect its
9 students from COVID-19 is commendable. Unfortunately, the field of school vaccine mandates has
10 been fully occupied by the State, and the Roadmap directly conflicts with state law. The addition of
11 a COVID-19 vaccine mandate without a personal belief exemption must be imposed by the
12 Legislature. Accordingly, this Court is compelled to **GRANT** the petitions for writ of mandate.
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